DO COLLEGE ATHLETES GET NIL? UNREASONABLE RESTRAINTS ON PLAYER ACCESS TO SPORTS BRANDING MARKETS

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Name, image, and likeness ("NIL") laws for college athletes have replaced the NCAA's amateurism model. While they improve athletes' economic rights, the twenty-five state NIL laws in my study show that pay restrictions vary widely. New Mexico has four pay restrictions compared to forty-five in Illinois. Common restrictions protect a school's intellectual property rights, authorize schools to approve NIL deals, and prohibit certain athlete activities and sponsorships.

Many restrictions advance a reasonable institutional interest, but Illinois and Mississippi over-regulate NIL rights. Their laws authorize schools to be paid market value as a condition for approving an athlete's use of school marks and logos. Illinois and Mississippi also bar athletes and NIL sponsors from suing schools for unfair competition and business torts.

Division I universities in Illinois are the most vulnerable schools for an antitrust test case. Using athletic department revenue data from seven public schools (2016–2019), I show that they had sluggish revenue growth for corporate sponsorships, advertising, and licensed products.

This constitutes a relevant market in which athletes compete directly against schools for NIL deals. Furthermore, these schools behaved like a market-restricting conspiracy by holding private meetings to draft the nation's most restrictive NIL law. Former NCAA athletes at Illinois and Northwestern who are now state lawmakers advanced this school conspiracy by amending a K-12 school truancy bill to introduce the Student-Athlete Endorsement Rights Act. The law unreasonably protects these schools' licensing and sponsorship markets—a conclusion supported by comparisons to other states and demonstrated by applying an antitrust analysis to Illinois's most severe restraints on athlete pay.

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My analysis relates to player antitrust litigation that began in the 1970s. The NCAA and schools prevailed in these lawsuits for decades. But, O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), and* NCAA v. Alston*, 141 S. Ct. 2141 (2021), turned this tide in favor of athletes. Illinois's Student-Athlete Endorsement Rights Act ignores this seismic shift in litigation while legislating NIL rights that provide nil access to courts to enforce them.*

Overall, my study shows that most state NIL laws advance economic rights for college athletes. But half the states have no NIL laws. I recommend that lawmakers in states with NIL laws scale back the most onerous restrictions for pay. Unless a federal NIL law is enacted, this state-law hodgepodge means that schools will compete for athletes on uneven terms, further destabilizing athletic competition between NCAA Division I schools.

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I. INTRODUCTION

Name, image, and likeness compensation is an overdue reform that allows college athletes to earn money without losing eligibility to compete.[1] NIL rights are dismantling the National Collegiate Athletic Association's long-criticized amateur athlete model.[2] The NCAA's former executive director panned his association as "a nationwide money-laundering scheme."[3] More recently, Justice Brett Kavanaugh condemned the NCAA's business model as a "price-fixing labor" conspiracy.[4] Economists provide evidence that NCAA sports exploit Black and Brown athletes while enriching White coaches and administrators.[5] Other disciplines reveal how the NCAA's amateur model exploits athletes.[6]

In 2021, however, the NCAA conceded reluctantly that college athletes should have NIL rights.[7] Politicians,[8] coaches,[9] and sports commentators[10]

1. *See, e.g.*, Marc Edelman, *Women's Athletes Are Big Winners in Sports' 2021 NIL Reform*, FORBES (Jan. 1, 2022, 12:00 AM), https://www.forbes.com/sites/marcedelman/2022/01/01/womens-college-athletes-are-big-winners-in-2021-nil-reform/?sh=45409bc1de55 [https://perma.cc/5FK9-LP82] (describing how LSU gymnast, Olivia Dunne, and University of Connecticut women's basketball star, Paige Bueckers, have signed endorsement deals that could earn them $1 million or more per year).

2. *See generally id.*

3. *See* WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 73 (1995).

4. NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

5. *See, e.g.*, Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo & Nicole F. Ozminkowski, *Who Profits from Amateurism? Rent Sharing in Modern College Sports* 28 (Nat'l Bureau of Econ. Rsch. Working Paper, Paper No. 27734, Nov. 2020), http://www.nber.org/papers/w27734 [https://perma.cc/2WEY-HNER].

6. *See* Harry Edwards, *The Black 'Dumb Jock': An American Sports Tragedy*, 131 COLL. BD. REV. 8 (1984) ("But Black student-athletes are burdened also with the insidiously racist implications of the myth of 'innate Black athletic superiority,' and the more blatantly racist stereotype of the 'dumb Negro' condemned by racial heritage to intellectual inferiority."); BILLY HAWKINS, THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINANTLY WHITE NCAA INSTITUTIONS 13 (2010); *see also* Derek Van Rheenen, *Exploitation in College Sports: Race, Revenue, and Educational Reward*, 48 INT'L REV. SOCIO. SPORT 550, 550 (2012); *see also* Krystal K. Beamon, *"Used Goods": Former African American College Student-Athletes' Perception of Exploitation by Division I Universities*, 77 J. NEGRO EDUC. 352, 362 (2008); *see also* Krystal Beamon & Patricia A. Bell, *Academics Versus Athletics: An Examination of the Effects of Background and Socialization on African American Male Student Athletes*, 43 SOC. SCI. J. 393, 402 (2006); *see also* Kirsten F. Benson, *Constructing Academic Inadequacy: African American Athletes' Stories of Schooling*, 71 J. HIGHER EDUC. 223, 242 (2000).

7. Dan Murphy, *NCAA Clears Way for Athletes to Profit from Names, Images and Likenesses*, ESPN (Oct. 29, 2019), https://www.espn.com/college-sports/story/_/id/27957981/ncaa-clears-way-athletes-profit-names-images-likenesses [https://perma.cc/6MEF-NU53] (NCAA's Board of Governors voted unanimously to start the process for creating rules that allow college athletes to profit from their names, images, and likenesses.).

8. *See infra* Section III.B.

9. Dan Bernstein, *NCAA NIL Roundtable: How People Inside College Sports Would Change Name, Image and Likeness Rules*, SPORTING NEWS (Aug. 30, 2021), https://www.sportingnews.com/us/ncaa-football/news/ncaa-nil-college-sports-name-image-likeness/n4xzndlnun61hzx8w2ygiyh3 [https://perma.cc/5TJ3-MH7J] (Jay Wright, Villanova's men's basketball coach, said: "[t]his is something that we should have addressed probably 10 years ago, gradually. But I think that the landscape has forced us, and state legislation has forced us, to have to make a quick decision now." David Shaw, Stanford's football coach, commented: "I'll go all the way back to when I heard about the Ed O'Bannon (case). The first time I was introduced to something like this. I thought about it a while, I said, 'You know what, this just makes sense. It just makes too much sense. . . . So, I'm pleased that we're here.'").

10. For the view of a prominent sports commentator, ESPN's Jay Bilas was interviewed by Ailsa Chang, *ESPN's Jay Bilas Weighs in On Student-Athlete Compensation Via NIL Vote*, NPR (June 29, 2021, 4:11 PM),

agree. Amid this growing consensus, my empirical study takes a skeptical approach to NIL legislation: why wouldn't some NCAA schools, after decades of monopolizing billions of dollars of revenue produced by the labor of their athletes,[11] promote anticompetitive NIL laws?

In the brief time since I surveyed the first 25 NIL laws, NIL deals have spun out of control.[12] Laws to permit NCAA athletes to earn money as influencers and sponsors have evidently been ignored in some states as players sign lucrative pay-to-play deals.[13] Exacerbating this situation, half of states had not enacted any NIL laws by July 1, 2021[14]—and while they seemed to trail other states in granting college athletes economic rights, their inaction may have fueled compensation agreements for athletes that bore little resemblance to the deals allowed in states with NIL laws.[15] Even in NIL states, pay-for-play deals have been transacted.[16] The agency to pay for these deals have been thinly-disguised booster groups called "collectives."[17] None of the NIL laws in my study approved this

https://www.npr.org/2021/06/29/1011415075/espns-jay-bilas-weighs-in-on-student-athlete-compensation-via-nil-vote [https://perma.cc/8S68-VN4P] ("Everyone in America except for a college athlete already owns their name, image and likeness and their right to publicity. And they can do endorsement deals, sell their name, image, and likeness, you know, do commercials, whatever they like, except for a college athlete.").

11. Garthwaite et al., *supra* note 5, at 1 Football Bowl Subdivision ("FBS") schools earned $4.4 billion in revenue in 2006, and their revenues grew to $8.5 billion the next decade.).

12. *See* Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting [https://perma.cc/9659-3QL8] ("'We are exactly where we didn't want to go,' MAC commissioner Jon Steinbrecher says. 'We've talked long and hard about how institutions are not supposed to be in the business of setting up things, and we are seeing that institutions are now setting up these collectives. That's not name, image and likeness—that's pay for play.'").

13. Josh Planos, *The NCAA Doesn't Know How to Stop Boosters from Playing the NIL Game*, FIVETHIRTYEIGHT (May 16, 2022, 6:00 AM), https://fivethirtyeight.com/features/the-ncaa-doesnt-know-how-to-stop-boosters-from-playing-the-nil-game/ [https://perma.cc/DSW3-H6PC] (Texas's Clark Field Collective provides $50,000 to every Longhorn offensive lineman on scholarship. The Texas NIL law in this study is modeled along the traditional format of player endorsement deals.); s*ee infra* Table 1 and Subsection III.B.3 (showing that Texas prohibits employment as part of its NIL law).

14. *See infra* Table 1; Subsection III.B.1.

15. *See Tracker: Name, Image and Likeness Legislation by State*, BUS. COLL. SPORTS (May 3, 2022), https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/ (June 17, 2022) [https://perma.cc/59JE-DKNW] (including Utah among the states with no NIL laws by July 1, 2021). *But see* Jackson Payne, *Built Brands Enters Name, Image and Likeness Partnership with BYU Football to Pay Walk-on Tuition*, UNIVERSE SPORTS (Aug. 12, 2021), https://universe.byu.edu/2021/08/12/built-brands-enters-nil-partnership-with-byu-football-to-pay-walk-on-tuition/ [https://perma.cc/PB52-SPCJ] (reporting that BYU's football program announced an NIL agreement with a Utah company, Built Brands, that would pay tuition for all walk-on players on the roster).

16. *See infra* Section III.B, *infra* note 117; *see also* Madison Williams, *Miami's Isaiah Wong Says He Won't Transfer After Threat Over NIL*, SPORTS ILLUSTRATED (Apr. 30, 2022), https://www.si.com/college/2022/04/30/miami-isaiah-wong-transfer-portal-statement-threat-nil-deal-lifewallet-nba-draft [https://perma.cc/C6FX-GWCU] (reporting that Lifewallet also paid Isaiah Wong in a $100,000 NIL deal after the Miami guard threatened to enter the NCAA transfer portal).

17. Liz Clarke, *Miami's Billionaire Booster Defends His Big-Dollar NIL Deals*, WASH. POST (May 17, 2022, 5:30 AM), https://www.washingtonpost.com/sports/2022/05/17/john-ruiz-miami-booster-nil-ncaa/ [https://perma.cc/PAH6-P6JG] ("In the first year of NIL agreements, a steroid-fed version . . . has emerged in which several boosters pool money to create school-specific collectives that bankroll deals specifically to land recruits. That, in effect, is thinly veiled 'pay for play,' which the NCAA prohibits.").

use of booster support for NIL deals. Indeed, three states specifically prohibited them—Arkansas, South Carolina, and Illinois.[18]

Thus, my study could be retitled, "College Athletes Are Nillionaires: Now What?" I am sticking, however, with "Do College Athletes Get NIL? Unreasonable Restraints on Player Access to Sports Branding Markets," because my research makes an even stronger case in 2022, compared to late 2021, that states with restrictive NIL laws have imposed market restraints on players that appear to violate the Sherman Act.[19]

With that background in mind, I provide a brief overview of my empirical study. To test my theory that some NIL laws provide grounds for an antitrust lawsuit by college athletes, my study quantifies pay restrictions for college athletes in NIL laws.[20] This methodology identifies the most anticompetitive laws.[21] Some states lightly regulate NIL deals.[22] But a few appear to over-regulate athlete NIL rights.[23] I focus primarily on the most restrictive NIL law: Illinois's Student-Athlete Endorsement Rights Act.[24] Using the basic outline of a Sherman Act antitrust lawsuit, I show how the Illinois NIL law applies to a relevant market for college athlete,[25] how NCAA Division I Illinois schools conspired to formulate these market restrictions,[26] how former athletes from Northwestern University and the University of Illinois at Urbana-Champaign aided this conspiracy by sponsoring the bill and scheduling hearings and votes for this law,[27] and how parts of the law unreasonably restrain economic rights of college athletes.[28] I also show how the public schools in the conspiracy do not qualify for an exemption under the Sherman Act.[29]

My analysis begins with the history of antitrust litigation involving college athletes who sued the NCAA. Part II explains how they consistently lost these lawsuits from the 1970s until recently.[30] Section II.A shows how courts deferred for decades to the NCAA's rules for athletes.[31] In Section II.B, courts gradually recognized that college athletes have economic rights.[32] Courts have begun to

18. *See infra* Section III.B.
19. *See infra* Table 1 and Section III.B.
20. *See infra* Table 1 and Section III.B.
21. *See infra* Table 3 and Section III.B.
22. *See infra* Table 1 and Section III.B.
23. *See infra* Table 1 and Section III.B.
24. *See infra* notes 238–42.
25. *See infra* Section IV.B and Table 4.
26. *See* James Krause, *Let's Make a Deal: Explaining Name, Image and Likeness in the NCAA*, N. STAR (July 20, 2021), https://northernstar.info/86038/sports/lets-make-a-deal-explaining-name-image-and-likeness-in-the-ncaa/ [https://perma.cc/PCR3-XXLA] ("'We've had a lot of conversations about the athletes and them profiting off their name, image and likeness.' Frazier said he and all other Athletic Directors in the state have been assembled on several occasions by University of Illinois Athletic Director Josh Whitman on issues relative to college athletics, including recently on NIL.").
27. *See infra* Section IV.C.
28. *See infra* Section IV.D.
29. *See infra* notes 161–74.
30. *See infra* Part II.
31. *See infra* Section II.A.
32. *See infra* Section II.B.

consider whether athletes compete in an athletic labor market but have not been convinced by plaintiff depictions of this market.[33] Nonetheless, courts ruled on athlete complaints that the NCAA and conferences unreasonably restrained athlete NIL rights.[34] Recently, athletes successfully alleged that schools unreasonably limit athlete compensation for educational benefits in *Alston v. NCAA*.[35] The arc of this history is important because it shows that the NCAA was accustomed to imposing financial restraints on college athletes. This history also supports my skeptical belief that some NCAA schools would conspire in the emerging legislative sphere for NIL rights to protect their licensing and marketing revenues by unreasonably restraining financial opportunities for athletes.

Part III surveys state NIL laws.[36] Section III.A explains how I scored pay restrictions for these laws.[37] Section III.B presents data.[38] Table 1 is a chart of 25 state NIL restrictions on athlete compensation.[39] Fact Finding 1 shows that state NIL pay-restrictions vary widely from four points in New Mexico to forty-five points in Illinois.[40] Fact Finding 2 finds that the most common pay restrictions protect the intellectual property rights of schools, authorize schools to approve or reject NIL deals—without a right to a portion of the athlete's pay—and enumerate activities that cannot be in an NIL deal.[41] Fact Finding 3 shows uncommon pay restrictions, including laws that allow schools to take money from athlete deals and bar NIL lawsuits against schools.[42]

Illinois has the most restrictive NIL law.[43] Part IV shows that NCAA schools in Illinois conspired to restrain athlete NIL rights.[44] Section IV.A shows that the Illinois schools are not exempt from the Sherman Act because they behaved as market participants while advocating for an NIL bill.[45] Section IV.B uses revenue data from seven schools' corporate sponsorships, advertising, and licensed products as a relevant market related to NIL regulations.[46] Section IV.C shows how these schools stealthily colluded to amend a K-12 school truancy bill to avoid public comment on their NIL proposal.[47] Former athletes for Illinois and Northwestern sponsored the bill,[48] scheduled hearings in the waning days of the legislative session,[49] and called the bill for a vote in the closing hours.[50] Section

33. *See infra* notes 71–73, 93.
34. *See infra* notes 71, 74–75.
35. *See generally* NCAA v. Alston, 141 S. Ct. 2141 (2021).
36. *See infra* Part III.
37. *See infra* Section III.A.
38. *See infra* Section III.B.
39. *See infra* Section III.B.
40. *See infra* Section III.B.
41. *See infra* Section III.B.
42. *See infra* Section III.B.
43. *See* Student-Athlete Endorsement Rights Act, 110 ILL. COMP. STAT. ANN. 190 (West 2021).
44. *See infra* Part IV.
45. *See infra* Section IV.A.
46. *See infra* Section IV.B.
47. *See infra* Section IV.C.
48. *See infra* notes 246–48.
49. *See infra* note 244.
50. *See infra* note 248.

IV.D explains why a potent antitrust defense called the *Noerr-Pennington* doctrine—which immunizes legislative efforts to restrict or eliminate market competition—does not apply to the Illinois schools.[51] I demonstrate how the "sham" exception to *Noerr-Pennington* applies to misrepresentations made by the schools in the days leadings up to its passage,[52] and how the NIL law creates an imbalance-of-power sham for athletes while entirely barring all NIL lawsuits against the schools.[53] Section IV.E identifies unreasonable restraints of trade in the NIL law—authorizing a school to be compensated for the market value of its logos and marks as a condition for approving an NIL deal, and barring all antitrust and business torts lawsuits against a school.[54]

Part V states my conclusions.[55] The long arc of athlete antitrust litigation that began in the 1970s now bends in favor of college athletes.[56] But Illinois's Student-Athlete Endorsement Rights Act unreasonably restrains college athletes who are enrolled in Illinois universities and colleges.

Part VI is an Appendix of the text of two NIL bills: legislation that was enacted in 2021 with many pay restrictions and a version in 2019 with fewer restrictions that died in committee.[57]

II. THE SHERMAN ACT AND NCAA: HOW THE TIDE TURNED

The Sherman Act promotes economic competition.[58] State entities may restrain competition, however, to advance a public policy.[59] As a private association with more than 1,100 colleges and universities, the NCAA is outside this zone of antitrust immunity.[60] Suppose, however, state universities agree among themselves to promote a legislative plan to restrain NIL rights for athletes. This presents a closer state immunity question. Section IV.A takes up that question in

51. *See infra* Section IV.D.

52. *See infra* notes 283–89.

53. *See infra* notes 293–95.

54. *See infra* Section IV.E.

55. *See infra* Part V.

56. *See infra* Section II.B.

57. *See infra* Part VI.

58. Sherman Act, 26 Stat. 209 (1890) (codified as amended 15 U.S.C. §§ 1–38); *see also* NCAA v. Alston, 141 S. Ct. 2141, 2147 (2021) ("In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces 'yield the best allocation' of the Nation's resources.") (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.27 (1984)).

59. *See* Patrick v. Burget, 486 U.S. 94, 100–01 (1988), where a doctor alleged that other physicians in the state's peer review system injured competition by denying him hospital privileges after he opened a clinic that competed with the hospital. The Court said:

> The active supervision requirement stems from the recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." . . . The mere presence of some state involvement or monitoring does not suffice. . . . The active supervision prong . . . requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. (citations omitted)

60. *Overview*, NCAA, https://www.ncaa.org/sports/2021/2/16/overview.aspx (last visited Oct. 7, 2022) [https://perma.cc/MXG2-3Q7N] (describing itself as a "member-led organization" for "about 1,100 member schools in all 50 states, the District of Columbia, Puerto Rico and even Canada").

more detail.[61] For now, when state schools are market participants—in this analysis, the market of athletic-related royalties, sponsorships, advertisements, and licensing—they may lose antitrust immunity.[62] They are potentially liable for antitrust violations.

Before analyzing this possibility, I present a brief history of antitrust cases involving athletes as plaintiffs. Over time, antitrust courts have changed their views of the NCAA.[63] From the 1970s through early 2000s, they took a hands-off approach.[64] The Supreme Court's 9-0 vote in *NCAA v. Alston* ended this deference,[65] punctuated by Justice Brett Kavanaugh's withering attack of the NCAA.[66]

A. Sherman Act Antitrust Litigation Involving College Athletes

Because sports leagues try to equalize each team's chance to compete for a championship, their teams enforce anticompetitive rules that deprive athletes of a free labor market.[67] Pro sports teams negotiate with player unions for salary caps to limit compensation and prevent teams from stockpiling talent.[68] Likewise, the NCAA imposes scholarship limits to spread talent across schools.[69]

Antitrust courts from the 1970s until recently ignored these economic realities in college athletics.[70] The NCAA successfully argued that college athletes must be amateurs as a condition to be eligible.[71] In a related approach, the NCAA

61. *See infra* Section IV.A.

62. *See infra* notes 161–78 and accompanying text.

63. *See infra* Section II.B.

64. *See infra* notes 67–73 and accompanying text.

65. *See* NCAA v. Alston, 141 S. Ct. 2141, 2144 (2021).

66. *Id.* at 2166–69 (Kavanaugh, J., concurring).

67. *See* Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 874 (S.D.N.Y. 1975)

> The College Draft is allegedly designed to prevent competition among member NBA clubs for what it [sic] virtually the exclusive source of basketball talent in the country. The system operates so that each NBA club is given the exclusive right to choose specific college players with whom it desires to negotiate. If the college player does not wish to negotiate or play for the NBA club which 'owns' his rights, the player may not negotiate with or for any other NBA club.

Id. See also ROBERT BORK, THE ANTITRUST PARADOX 278 (1978) (remarking that "some activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.").

68. Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 686 (2d Cir. 1995) (describing league restraints on team competition for players, including the college draft, salary cap, and a team's right of first refusal in matching another team's offer to a player).

69. NCAA, 2020–21 NCAA DIVISION I MANUAL 226 (2020) ("There shall be a limit of 13 on the total number of counters in men's basketball at each institution."); *see also id*. at 208 ("Sport-by-Sport Financial Aid Limitations. Division I may establish limitations on the number of financial aid awards a member institution may provide to countable student-athletes (counters).").

70. Rock v. NCAA, 928 F. Supp. 2d 1010, 1026 (S.D. Ind. 2013); Bloom v. NCAA, 93 P.3d 621, 627 (Colo. 2004); Gaines v. NCAA, 746 F. Supp. 738, 747 (M.D. Tenn. 1990).

71. *Alston*, 141 S. Ct. at 2152 ("Nor did the district court find much evidence to support the NCAA's contention that its compensation restrictions play a role in consumer demand. As the court put it, the evidence failed 'to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand.'") (citations omitted).

contended that its educational mission was not sullied by the commercialism in pro sports.[72]

For decades, this approach succeeded in antitrust cases.[73] Initially, athletes tried to persuade courts that NCAA's regulations were market transactions.[74] But, courts accepted the NCAA's education and amateur justifications.[75] In other litigation, the NCAA shifted its rationale for avoiding the reach of the Sherman Act, claiming that college sports are an "avocation," not a business.[76]

Eventually, antitrust challenges aimed at the NCAA's mobility restrictions on athlete transfers to other schools: still, courts dismissed these lawsuits.[77] They failed to see college football as a minor league for professional football athletes.[78] This judicial blind-spot would make sense if a plaintiff had no realistic chance of playing professional sports. That was not the case in *Banks v. NCAA*, where a Notre Dame football player remained undrafted after declaring for the NFL following his junior year.[79] NCAA eligibility rules blocked Banks from returning to school for a senior year of competition.[80] A federal appeals court rejected his antitrust claim, dismissing his contention that NCAA rules restrained

72. *See* Banks v. NCAA, 746 F. Supp. 850, 852 (N.D. Ind. 1990) (stating that the NCAA organizes amateur intercollegiate athletics "as an integral part of the educational program and . . . retain[s] a clear line of demarcation between intercollegiate athletics and professional sports").

73. Smith v. NCAA, 139 F.3d 180, 185–86 (3d Cir. 1998) (upholding the NCAA's mobility restrictions and penalties in relation to a rule preventing participation by graduate student who had been an undergraduate at a different institution); *see also Banks*, 977 F.2d at 1089–90 (upholding a rule that revoked athlete's eligibility to participate in an intercollegiate sport in the event that the athlete chose to enter a professional draft or engage an agent to help secure a position with a professional team); *Gaines*, 746 F. Supp. at 744 (upholding a rule revoking an athlete's eligibility to participate in an intercollegiate sport in the event that the athlete chose to enter a professional draft or engage an agent to help secure a position with a professional team); Justice v. NCAA, 577 F. Supp. 356, 382 (D. Ariz. 1983) (upholding a rule that denied athlete eligibility to participate in an intercollegiate sport if the athlete accepted pay for participation in the sport).

74. The district court in *Jones v. NCAA* held that the Sherman Act does not apply to NCAA eligibility standards. 392 F. Supp. 295, 303 (D. Mass. 1975). The Fifth Circuit assumed without deciding that the Sherman Act applies to the NCAA's student eligibility rules in *McCormack v. NCAA*, 845 F.2d 1338, 1343–44 (5th Cir. 1988).

75. In *Gaines*, the district court distinguished between the NCAA's commercial rules and noncommercial rules, ruling that eligibility standards were not commercial. 746 F. Supp. at 743–44. The court in *Smith* ruled that the NCAA's eligibility rules are not related to the NCAA's commercial interests, and therefore, the Sherman Act did not apply to these student regulations. 139 F.3d at 182.

76. *See* Bloom v. NCAA, 93 P.3d 621, 626 (Colo. 2004) ("*Student participation in intercollegiate athletics is an avocation*, and student-athletes should be protected from exploitation by professional and commercial enterprises.") (emphasis added); Shelton v. NCAA, 539 F.2d 1197, 1198 (9th Cir. 1976) (holding that a student crosses the amateur boundary by signing a contract to play a professional sport).

77. *See* NCAA v. Yeo, 171 S.W.3d 863, 869 (Tex. 2005); Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1065 (9th Cir. 2001).

78. *See, e.g.*, *Justice*, 577 F. Supp. at 373 ("[C]ase law flatly rejects the notion that student-athletes' expectations of future athletic careers are constitutionally protected."); *Yeo*, 171 S.W.3d at 870 (stating that student-athletes remain amateurs).

79. In *Banks v. NCAA*, a Notre Dame football player was undrafted after declaring for the NFL draft following his junior year but was blocked by NCAA eligibility rules from returning to school for a senior year of competition. 977 F.2d 1081, 1082 (7th Cir. 1992). The Seventh Circuit rejected the player's Sherman Act claim because the player failed "to explain how the no-draft rule restrains trade in the college football labor market." *Id*. at 1089.

80. *Id*. at 1082.

a labor market.[81] Accepting the NCAA's amateurism mantra at face value, the majority said that elimination of the NCAA's restrictions on entering the draft and signing with an agent would change college football from "educating the student-athlete to creating a 'minor-league' farm system . . . for professional football in the NFL."[82]

Courts slowly warmed to the idea that NCAA rules regulate some type of market activity. In *Tanaka v. University of Southern California*, the Ninth Circuit said that NCAA rules relate to a cognizable market in college football.[83] The Seventh Circuit, in *Agnew v. NCAA*, acknowledged that that NCAA football is a "competitive market to attract student-athletes whose athletic labor can result in many benefits for a college, including economic gain."[84]

These athletes did not sue for pay as employees: they simply characterized scholarships as compensation in this labor market.[85] But college athletes still experienced futility when they contended to courts that NCAA rules unreasonably restrained their freedom to transfer in pursuit of a college education.[86]

B. The Evolution of College Athlete NIL Rights and Antitrust Law

The first antitrust lawsuit involving a college athlete's NIL rights changed this trajectory of NCAA litigation. In the following analysis, I elaborate on this inflection point.

In June 2021, the Supreme Court brought decades of judicial fealty to the NCAA's amateurism model to a swift end in *NCAA v. Alston*.[87] This decision evolved from a complex web of court cases. In *O'Bannon v. NCAA*,[88] a former

81. *Id*. at 1084.

82. *Id.* at 1091. This ignored Notre Dame's reputation for developing football players for the NFL. Statistics for the year that Banks entered the draft could not be found, however, Notre Dame was tied for ninth among schools that had active players in the NFL in 2020. Spencer Parlier, *NFL Players by College on 2020 Rosters*, NCAA (Sept. 8, 2020), https://www.ncaa.com/news/football/article/2020-09-07/nfl-players-college-2020-rosters [https://perma.cc/9CSU-BX8R].

83. Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1064–65 (9th Cir. 2001) (citing Mackey v. Nat'l Football League, 543 F.2d 606, 622 (8th Cir. 1976)). Still, the court did not find a close connection between the athletic conference's transfer rules and the free agency restrictions in *Mackey*, because the PAC-10 imposed a one-year penalty, while the NFL's "Rozelle Rule" was unlimited in duration. *See id.*

84. Agnew v. NCAA, 683 F.3d 328, 347 (7th Cir. 2012). Agnew lost his scholarship when Rice University did not renew it following his injury, and as a result, he had to pay to complete his degree. *Id.* at 332. Although the court was receptive to the concept of "athletic labor," it upheld the district court's dismissal of Agnew's complaint because he failed to state a conspiracy or combination to restrain a labor market. *Id.* at 347–48.

85. Tanaka, a soccer player for USC, sought to transfer to nearby UCLA without incurring a one-year penalty that required her to sit out during the next season. *Tanaka*, 252 F.3d at 1061. She claimed that she participated in an investigation into academic fraud and that USC retaliated against her by invoking the PAC-10's ineligibility rule that would deter transferring. *Id.* at 1061–62. Tanaka alleged that this conference rule had anticompetitive effects under the Sherman Act, but the appeals court rejected this argument, noting that the PAC-10's restrictions would not apply to her if she transferred outside the conference. *Id.* at 1062.

86. *See* Rock v. NCAA, No. 1:12-cv-01019-TWP-DKL, 2016 WL 1270087, at *18 (S.D. Ind. Mar. 31, 2016) (denying motion for class certification in a case that challenged the NCAA's rules prohibiting granting athletes multi-year, Division I football scholarships from 1973 to 2012, thereby eliminating competition among schools for their labor).

87. NCAA v. Alston, 141 S. Ct. 2141, 2144 (2021).

88. *See generally* O'Bannon v. NCAA (*O'Bannon III*), 802 F.3d 1049 (9th Cir. 2015).

star basketball player at UCLA led a landmark antitrust lawsuit involving the NCAA's exclusive exploitation of his name, image, and likeness while prohibiting athlete compensation from these licensing revenues.[89] Ed O'Bannon's trial showed that college basketball is a full-time job,[90] causes athletes to miss many classes,[91] and exploits athletes' NIL rights without allowing them to benefit in any way.[92] District Court Judge Claudia Wilken ruled in favor of O'Bannon, concluding that the NCAA's blanket rules against compensation unlawfully restrained trade.[93] She also rejected the NCAA's argument that schools embrace amateurism out of philosophical commitment.[94] The Ninth Circuit Court affirmed this antitrust analysis but vacated Judge Wilkin's remedy that schools set aside $5,000 per year in deferred NIL compensation for athletes, which they could access after exhausting their eligibility.[95]

O'Bannon's NIL story did not end there, however. Nancy Skinner, a state senator in California, had followed his quest for economic rights and wondered

89. O'Bannon v. NCAA (*O'Bannon II*), 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

90. Testimony of Plaintiff Edward J. O'Bannon, Jr., O'Bannon v. NCAA (*O'Bannon I*), No. c-09-3329, 2014 WL 6907623, at *9 (N.D. Cal. June 9, 2014) ("Q. And during the season, approximately how much time a week did you spend on basketball and basketball related activities? A. A week, I'm thinking anywhere from 40 to 45 hours.").

91. *Id.* at 13 ("Q. And you said when you were travelling you missed classes? A. Correct. Q. Approximately how many classes in a season would you miss because of travel commitments for basketball? A. I believe anywhere from 30, 35, I mean just kind of off the top of my head.").

92. *Id.* at 16–18.

> Q. When did you first learn that your image was used in a college game for—for video?
> A. Of, the time. '08? 2008.
> Q. How did it come about that you learned your image was used?
> A. I was at a friend's house . . . and his son, who was also out there in the garage, reminded his dad about the video game that he had been playing the night before. So, my friend asked if I wanted to come into the house and see, you know . . . So, we went in— . . . His son pulled up the video game, and – and logged it in, and there I was . . .
> Q. Did anyone ask for your permission to feature you in a video game?
> A. No.
> Q. Were you ever paid for appearing in a video game?
> A. No.
> Q. Sitting here today, Ed, would you be willing to sell your image to someone who wanted to put it in a college video game with your team?
> A. Yes.

93. *O'Bannon II*, 7 F. Supp. 3d at 1008. The court enjoined the NCAA from prohibiting schools from giving scholarships that equaled the full cost of an athlete's attendance at their schools. *Id*. The court also allowed schools to put away up to $5,000 per year in deferred compensation, to be held in trust for athletes until they exhaust their eligibility. *Id*.

94. The district court's ruling was the first to undermine the NCAA's amateurism rules:

> What's more, there is no evidence to suggest that any schools joined Division I originally because of its amateurism rules. These schools had numerous other options to participate in collegiate sports associations that restrict compensation for student-athletes, including the NCAA's lower divisions and the NAIA. Indeed, schools in FCS, Division II, and Division III are bound by the same amateurism provisions of the NCAA's constitution as the schools in Division I. The real difference between schools in Division I and schools in other divisions and athletics associations, as explained above, is the amount of resources that Division I schools commit to athletics. Thus, while there may be tangible differences between Division I schools and other schools that participate in intercollegiate sports, these differences are financial, not philosophical.

Id. at 981.

95. O'Bannon v. NCAA (*O'Bannon III*), 802 F.3d 1049, 1079 (9th Cir. 2015).

if state legislation could enact an NIL law.[96] In 2019, she successfully sponsored an NIL law that revolutionized college sports by prohibiting any athletic association or conference from penalizing a student athlete for earning money on their own name, image, or likeness.[97]

During this post-*O'Bannon* time, athletes challenged aspects of the NCAA's restrictions on their educational benefits, apart from NIL restrictions.[98] Following the *O'Bannon* lawsuit, the NCAA was enjoined "from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball."[99] But in *Alston*, athletes sued for *additional* education-related compensation that their non-athlete student peers were eligible to receive from schools.[100] The term "education related benefits" referred to college expenses above and beyond cost-of-attendance, such as musical instruments, computers, internships, classroom equipment, and similar.[101]

Although the *Alston* class action was separate from *O'Bannon*, it was consolidated with *O'Bannon* under the name of *In re NCAA Grant-in-Aid Cap Antitrust Litigation*.[102] Judge Wilken ruled that the NCAA's cap on education-related expenses violated the Sherman Act because schools could not justify limits related to "computers, science equipment, musical instruments and other items not currently included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies."[103] In a subsequent decision, the court said that restrictions on "post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; expenses for pre- and post-eligibility tutoring; expenses related to studying abroad that are not covered by the cost of attendance; and paid post-eligibility internships" were unreasonable restraints of trade.[104]

96. Chuck Culpepper, *This State Senator Once Caused McDonald's to Change. No Wonder She Took on the NCAA*, WASH. POST (June 30, 2021, 5:39 PM), https://www.washingtonpost.com/sports/2021/06/30/first-name-image-likeness-law-california-nancy-skinner/ [https://perma.cc/UM7B-CFWK].

97. *Id*.

98. NCAA v. Alston, 141 S. Ct. 2141, 2164 (2021).

99. *Id.* at 2153.

100. *In re* NCAA Grant-in-Aid Cap Antitrust Litig. (*Alston I*), Nos. 14-md-02541-CW, 14-cv-02758-CW, 2018 WL 1524005, at *6 (N.D. Cal. 2018).

101. *Id*.

102. *In re* NCAA Grant-in-Aid Cap Antitrust Litig. (*Alston II*), 375 F. Supp. 3d 1058, 1065 (N.D. Cal. 2019). Later, the Ninth Circuit summarized how the *Alston* lawsuit became part of the *O'Bannon* case:

> In March 2014, while the NCAA was litigating *O'Bannon I*, FBS football and D-I men's and women's basketball players filed several antitrust actions against the NCAA and eleven D-I conferences that were transferred to and, with one exception, consolidated before the same district court presiding over *O'Bannon I*. Rather than confining their challenge to rules prohibiting NIL compensation, Student-Athletes sought to dismantle the NCAA's entire compensation framework.

In December 2015, the district court certified three injunctive relief classes comprised of (i) FBS football players, (ii) D-I men's basketball players, and (iii) D-I women's basketball players. Each subclass consists of student-athletes who have received or will receive a full grant-in-aid during the pendency of this litigation.

In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig. (*Alston III*), 958 F.3d 1239, 1247 (9th Cir. 2020).

103. *Alston II*, 375 F. Supp. 3d at 1088.

104. *Alston III*, 958 F.3d at 1260 n.17.

On appeal before the Supreme Court, the Justices skeptically questioned the NCAA's amateurism model during oral argument.[105] By a 9-0 vote, the Court ruled that the NCAA's education-benefits restrictions violated the Sherman Act.[106] Justice Brett Kavanaugh's concurring opinion went far beyond the issue of non-monetary educational benefits.[107] His stinging indictment of NCAA athletics laid bare decades of sanctimonious facades that universities and colleges used in defense of amateurism:

> The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood. Price-fixing labor is price-fixing labor.[108]

Although *Alston* was a decisive and watershed ruling, it was not the last chapter in athlete antitrust challenges. In a current lawsuit, *Grant House v. NCAA*,[109] athletes are challenging NCAA rules that required them to forego NIL compensation while being compelled to assign their NIL rights to schools and conferences.[110] This differed from Ed O'Bannon's lawsuit by specifying injuries related to NCAA and Power Five conference exploitation of athletes' NIL for their exclusive benefit.[111] In other words, the lawsuit was not aimed at video game revenues where athletes were portrayed as recognizable icons,[112] but at NCAA rules that barred conferences and schools from sharing their network revenues, as well as money from marketing contracts for sports apparel, and other revenue sources that involve athletes' NIL. The athletes also alleged that while NCAA rules fixed athlete NIL compensation at zero, schools used these revenues to build extravagant facilities and pay coaching salaries.[113] Days after the

105. Transcript of Oral Argument at *33, NCAA v. Alston, Nos. 20-512, 20-520, 2021 WL 1212749 (U.S. Mar. 31, 2021). Justice Thomas referred to "players," not student athletes, when he marveled at the "ballooning" pay for coaches in this amateur arena. *Id.* at *10. Justice Kavanaugh referred to NCAA athletes as "workers who are making the schools billions of dollars on the theory that consumers want the schools to pay their workers nothing." *Id.* at *33. Justice Barrett openly doubted "that consumers love watching unpaid—unpaid people play sports"—again, phrasing that avoided the NCAA's religious incantation of "student-athletes." *Id.* at *37.

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

107. *Id.* at 2166–69.

108. *Id*. at 2167 (Kavanaugh, J., concurring).

109. *See generally* Grant House v. NCAA, 545 F. Supp. 3d 804 (N.D. Cal. 2021).

110. *See id*. at 808.

111. *Compare* O'Bannon v. NCAA (*O'Bannon II*), 7 F. Supp. 3d 955, 966 (N.D. Cal. 2014), *with Grant House*, 545 F. Supp. 3d at 808–09.

112. *See Grant House*, 545 F. Supp. 3d at 809 ("Plaintiffs aver that, absent the challenged rules, the NCAA and its member conferences and schools would allow student-athletes to take advantage of opportunities to profit from their NIL, and NCAA member conferences and schools would share with student-athletes the revenue they receive from third parties for the commercial use of student-athletes' NIL.").

113. *Id*.

Supreme Court decided *Alston*, Judge Wilken rejected the NCAA's motion to dismiss the case, allowing it to proceed.[114]

Coinciding with the ongoing NIL antitrust litigation in *House*, twenty-five states recently enacted laws to allow NIL compensation for NCAA athletes.[115] Part III sheds new light on these laws by offering the first statistical picture of pay restrictions for athletes.

III. SURVEY OF STATE NIL LAWS: STATISTICS AND FACT FINDINGS

California enacted the nation's first NIL law in 2019.[116] To date, several studies compare pay restrictions in these laws.[117] My study adds to these efforts by quantifying all types of pay restrictions in NIL laws. In addition, my study reports qualitative features of these pay limits. One basic example is variations in how laws define an athlete's name, image, and likeness agreement—for instance, one state expansively includes a person's voice.[118]

More generally, there is no reason to assume lawmakers enacted NIL laws with the same motivations. Senator Skinner in California intended to legislate new economic rights for athletes.[119] But, some laws allow schools to benefit financially from an athlete's NIL deal.[120] By providing statistical and qualitative comparisons of these economic laws, my study suggests that some states have more attractive NIL laws than others to attract college athletes. Conversely, this

114. *See id*. at 820 (dismissing the NCAA's motion to dismiss except for a former player's claim for injunctive relief).

115. *See infra* note 127.

116. Alan Blinder, *N.C.A.A. Athletes Could Be Paid Under New California Law*, N.Y. TIMES, https://www.nytimes.com/2019/09/30/sports/college-athletes-paid-california.html (June 21, 2021) [https://perma.cc/BJW2-KCZQ] (quoting Sen. Nancy Skinner, lead sponsor of the bill: "People are just so aware of the fact that you've got a multibillion-dollar industry that . . . basically denies compensation to the very talent, the very work that produces that revenue. Students who love their sport and are committed to continuing their sport in college are handicapped in so many ways, and it's all due to N.C.A.A. rules.").

117. Several studies, like mine, try to measure differences in college player NIL rights. The National College Players Association ("NCPA") study ranked state laws on 21 criteria relating to a player's ability to monetize his or her NIL and ranked New Mexico first at 90% of possible points. *See* Liz Clarke, *State-by-State Rating System Gives College Recruits Road Map to Evaluate NIL Laws*, WASH. POST (Oct. 21, 2021, 12:34 PM), https://www.washingtonpost.com/sports/2021/10/21/name-image-likeness-laws-state-rankings/ [https://perma.cc/7Y2L-85NJ]. This is similar to my finding for New Mexico. *See infra* Table 1 and Fact Finding 1, Bullet Point 2. The three states the NCPA study tied for lowest, at 43%: Alabama, Illinois, and Mississippi. Clarke, *supra*. This also compared to my findings. *See infra* Table 1 and Fact Finding 1, Bullet Points 2 and 3. Like my study, the NCPA study concluded that any infringement of a player's NIL rights is an improper restraint of trade. Clarke, *supra*. For other comparable studies, *see* Jonathan L. Israel & Gregory A. Marino, *Nationwide College Sports "NIL" Law Tracker*, FOLEY & LARDNER LLP (Aug. 24, 2021), https://www.foley.com/en/insights/publications/2021/08/nationwide-nil-tracker [https://perma.cc/J9ED-MKK5]. This study offers detailed references to specific provisions of state NIL laws, however, it does not quantify and compare these elements. *See generally* Note, Brian P. Bunner, *NIL Bills: An Examination of the Implications of Compensating College Athletes under Name, Image, and Likeness Legislation*, 18 PITT. TAX REV. 355 (2021).

118. *See infra* Section III.B; Part VI.

119. Blinder, *supra* note 116.

120. *Infra* Section III.B.

study identifies the most restrictive laws.[121] This information can lead to legislative reforms or legal redress to improve NIL earnings for college athletes.

A. State NIL Laws: Methods for This Survey

I researched several online NIL trackers to identify states that passed NIL laws.[122] Next, I explored each state's website for legislative services that reported on NIL laws. In three states where executive orders produced NIL laws, I visited the relevant websites for governors.[123] My research focused on state laws enacted through July 1, 2021. I chose this cut-off date for several reasons. This date coincided with the NCAA's adoption of an interim NIL policy.[124] Also, this date occurred just eleven days after the Supreme Court issued its *Alston* decision. I wanted to capture a snapshot of state regulation from California's adoption of the first collegiate NIL law to this landmark antitrust case because I anticipated that the NIL regulatory scene would shift soon after this date.

I read all the laws to develop a data survey. To explain, the survey was organized around topical categories such as types of compensation and licensing restrictions under NIL laws. I found that the laws enumerated up to seven restriction categories: (1) athlete compensation, (2) license and trademark, (3) time-related restrictions on pay, (4) morals and lifestyle, (5) third party NIL platform, (6) agents, and (7) school immunity from lawsuits.[125]

The categories had different amounts of restrictions: athlete compensation (20 points); license and trademark (11 points); time that restrictions apply (4 points); morals and lifestyle (10 points); NIL platform (1 point); agents (3 points); and (7) school immunity from lawsuits (3 points).[126] Thus, pay restrictions in a state law could range from zero to fifty-two. I assigned one point to each matching item. While some pay restrictions are probably more consequential for athletes than others, I had no objective basis for assigning different weights to these points.

Once this survey was developed, I re-read each law and entered checks for each pay restriction in my survey. I read each law at least three times to ensure accuracy and consistency in my scoring. When my scoring was completed, I entered the data into an SPSS data analysis program. The following results were the product of running a frequencies distribution analysis.

121. *Infra* Section III.B.

122. I primarily relied on the Business of College Sports Tracker. Kristi Dosh, *Tracker: Name, Image and Likeness Legislation by State*, BUS. COLL. SPORTS, https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/ (June 17, 2022) [https://perma.cc/LUH5-G9AG]; Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE, https://opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/ (June 27, 2022) [https://perma.cc/2KXT-4B2D].

123. *See infra* note 127 (Kentucky, North Carolina, and Ohio).

124. *See* Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/9RRA-BXDP].

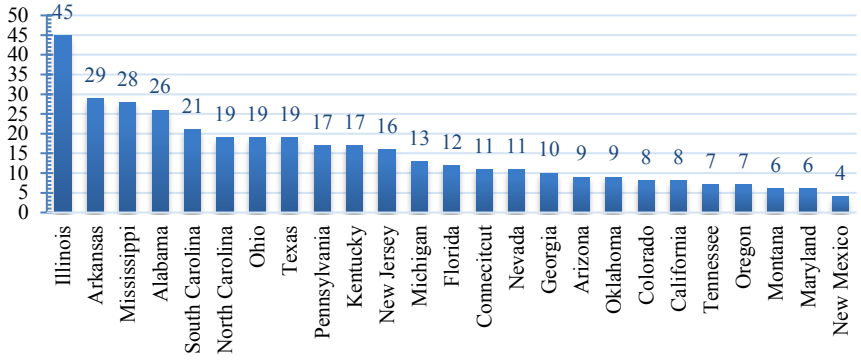
125. *See infra* note 127.

126. *See infra* note 127; Table 1.

B. State NIL Laws: Data and Fact Findings

Table 1 compiles scores for each state's NIL law. The data are then organized around these fact findings: (1) the range of state NIL scores, with enumeration of high-, medium-, and low-restriction laws; (2) common restrictions, enumerating their types by each state; and (3) uncommon restrictions, listing their types by each state.

Table 1
Scorecard of State NIL Restrictions on College Athlete Pay



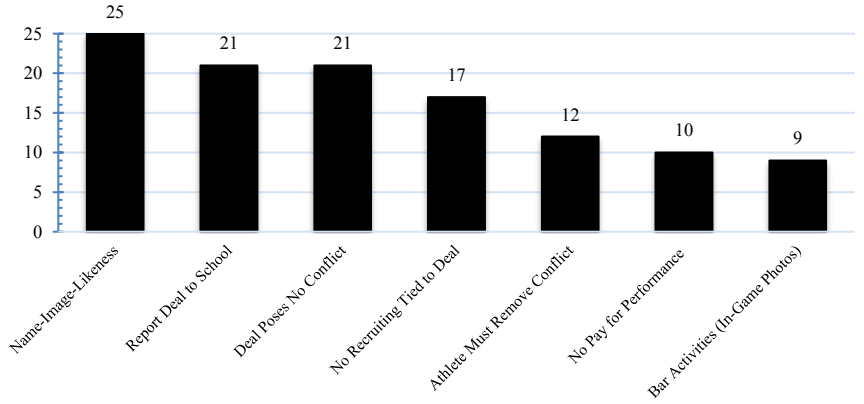
Fact Finding 1: State law restrictions on pay for college athletes vary from four points to forty-five points.

- Twenty-five states passed NIL laws by July 2021. All the laws had pay restrictions for NCAA athletes.[127]

127. Alabama (Act effective July 1, 2021, No. 227, 2021 Ala. Acts); Arizona (Act of Mar. 26, 2021, ch. 141, 2021 Ariz. Sess. Laws (amending ARIZ. REV. STAT. § 15-14 by adding Article 9.1)); Arkansas (An Act to Establish the Arkansas Student-Athlete Publicity Rights Act; and for Other Purposes, No. 810, 2021 Ark. Acts (amending ARK. CODE § 4-75 to add subchapter 13, the Student-Athlete Publicity Rights Act)); California (Act of September 30, 2019, Ch. 383, 2019 Cal. Stat. (adding Section 67456 and adding and repealing Section 67457 to the Education Code, relating to collegiate athletics)); Colorado (Compensation and Representation of Student Athletes, ch. 35, 2020 Colo. Sess. Laws 114); Connecticut (Act Effective July 1, 2021, No. 21-132, 2021 Conn. Acts (Reg. Sess.) (substituting Subsection (b) of section 10a-149d of CONN. GEN. STAT.)); Florida (Intercollegiate Athlete Compensation and Rights, ch. No. 2020-28, 2020 Fla. Laws (creating Section 1106.74 of FLA. STAT.)); Georgia (Act of May 6, 2021, No. 228, 2021 Ga. Laws (amending Title 20 ch. 3 of the GA. CODE)); Illinois (Student-Athlete Endorsement Rights Act, No. 102-0042, 2021 Ill. Laws); Kentucky (Exec. Order 2021-418 (June 24, 2021)); Maryland (Jordan McNair Safe and Fair Play Act, ch. 138, 2021 Md. Laws. (adding to Section 15-128 and 15-129 of MD. CODE)); Michigan (Act of Jan. 4, 2021, No. 366, 2020 Mich. Pub. Acts); Mississippi (Mississippi Intercollegiate Athletics Compensation Rights Act, ch. 444, 2021 Ms. Laws); Montana (Act effective July 1, 2023, ch. 396, 2021 Mont. Laws); Nevada (Act of May 29, 2021, ch. 202, 2021 Nev. Stat. (amending Chapter 389 of NEV. REV. STAT.)); New Jersey (New Jersey Fair Play Act, ch. 83 No. 971, 2020 N.J. Laws); New Mexico (Student Athlete Endorsement Act, ch. 124, 2021 N.M. Laws); North Carolina (Exec. Order No. 223 (July 2, 2021)); Ohio (Exec. Order 2021-10D (June 28, 2021)); Oklahoma (Act of May 28, 2021, 2021 Okla. Sess. Laws (creating Revised Uniform Athlete Agents Act, codified as Section 820.2 in OKLA. STAT.)); Oregon (Act effective June 29, 2021, ch. 422, 2021 Or. Laws (amending OR. REV. STAT. 702.005, 702.027, and

- Illinois had the most pay restrictions (45 points), while New Mexico had the fewest (4 points).[128]
- Arkansas (29 points), Mississippi (28 points), Alabama (26 points), and South Carolina (21 points) had comparatively high pay restriction scores.[129]
- Nine states had comparatively few pay restrictions: New Mexico (4 points); Maryland (6 points), Montana (6 points), Oregon (7 points), Tennessee (7 points), California (8 points), Colorado (8 points), Arizona (9 points), and Oklahoma (9 points).[130]
- Michigan (13 points) and Florida (12 points) were in the middle of states for pay restrictions.[131]

Table 2
Common Pay Restrictions in State NIL Laws for College Athletes



Finding 2: There are common restrictions in NIL laws, including protection of schools' intellectual property rights, authorization of schools to approve or reject NIL deals, definitions for NIL, and prohibition of activities related to NIL deals.

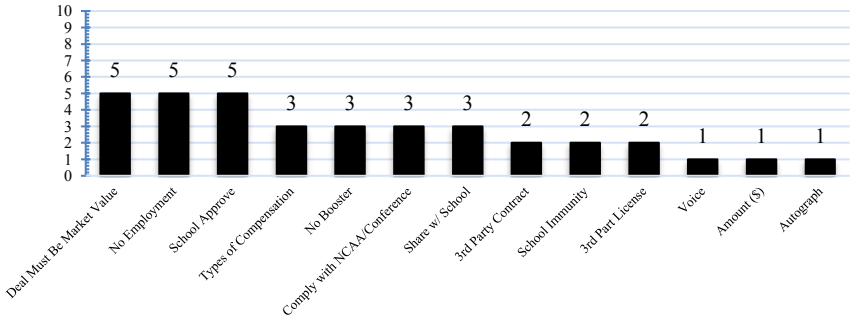
- All 25 state laws allow pay for an athlete's name-image-likeness, as defined by law.[132]

702.047)); Pennsylvania (Act of June 30, 2021, No. 26, 2021 Pa. Laws); South Carolina (Act of May 6, 2021, No. 35, 2021 S.C. Acts (amending S.C. CODE by adding ch. 158 to Title 59)); Tennessee (Act of May 18, 2021, ch. 400, 2021 Tenn. Pub. Acts (amending TENN. CODE Title 49, Chapter 7)); and Texas (Act of June 14, 2021, 2021 Tex. Gen. Laws (formerly S.B. 1385, amending Subchapter Z, Chapter 51 of the Education Code)).

128. *See supra* Table 1.
129. *See supra* Table 1.
130. *See supra* Table 1.
131. *See supra* Table 1.
132. *See supra* Table 2.

- In 21 laws, athletes are required to disclose or report NIL deals to schools before these transactions are finalized.[133]
- In 21 laws, NIL deals that conflict with a school's rights or policies are prohibited. These laws require athletes to disclose terms of a deal and provide grounds for schools to reject NIL deals that pose a conflict of interest. NIL deals are presumed to be valid unless a school rejects a deal for a specifically stated reason.[134]
- Following on this point, 12 state laws require schools to communicate to the athlete, and where applicable, to the athlete's agent, the specific conflict in the pending NIL deal. Overall, this law encouraged athletes and schools to resolve a conflict to allow NIL deals to proceed without violating school policies and property rights.[135]
- NIL deals cannot be used to recruit athletes (17 states), nor can NIL deals pay for athletic performance or ability (10 states).[136]
- In 9 states, laws expressly prohibit NIL deals that would pay athletes in activities such as games and related athletic contests, use of playing field or practice facility, and similar.[137]

Table 3
Uncommon Pay Restrictions in State Laws for College Athletes



Finding 3: Uncommon pay restrictions include prohibition of deals with boosters and lawsuits against schools; and allowing schools to take money from NIL deals.

- Five states require NIL deals to be transacted for market value (Illinois, Tennessee, North Carolina, New Jersey, and Georgia).[138]

133. *See supra* Table 2.
134. *See supra* Table 2.
135. *See supra* Table 2.
136. *See supra* Table 2.
137. *See supra* Table 2.
138. *See supra* Table 3.

- Five states prohibit employment of athletes as part of NIL deals (Illinois, Ohio, Texas, Mississippi, and Arkansas).[139]
- Five states provide schools authority to approve NIL deals without requiring them to identify and inform the athlete or agent of a specific conflict—in other words, the law allows a school to disapprove a deal without an explanation or opportunity to amend it (Illinois, Michigan, Ohio, Pennsylvania, and New Mexico).[140]
- Three states authorize a school to be compensated at market rates for an athlete's use of the school's logos, marks, mascot, and similar property as a condition to approve an NIL deal (Alabama, Illinois, and Mississippi).[141]
- Three states regulate the type of compensation that athletes receive (Illinois, Arkansas, and South Carolina). Illinois defines compensation broadly to include any "form of payment or remuneration."[142]
- Three states expressly prohibit boosters from being a party to an NIL agreement (Illinois, South Carolina, and Arkansas).[143]
- Two states have unique NIL provisions, such as defining name, image, and likeness to include an athlete's voice (Illinois) and autographs (Texas), while Texas prohibits gun endorsement deals.[144]
- Two states immunize schools from tort or unfair competition lawsuits in NIL deals (Illinois[145] and Mississippi [146]).

Overall, the most striking conclusion is that these state NIL laws—all of which provide college athletes new economic rights—influenced the NCAA to implement an interim, loosely-worded policy for NIL deals.[147] The irony is that athletes and schools in states with restrictive conditions for NIL deals are more limited than schools and athletes in states with no NIL law.

The survey reveals a consensus of NIL principles that have taken hold in many states: athletes should have the right to pay for NIL deals while being required to disclose terms for review by schools; and schools should approve deals unless they promptly identify a term in a deal that conflicts with their institutional policies or the state law.[148] NIL laws allow schools to protect their logos, marks, symbols, colors, and similar by rejecting or approving use of this institutional

139. *See supra* Table 3.
140. *See supra* Table 3.
141. *See supra* Table 3.
142. *See supra* Table 3.
143. *See supra* Table 3.
144. *See supra* Table 3.
145. *See infra* Section IV.D ("No postsecondary educational institution shall be subject to a claim for damages of any kind under this Act, including, but not limited to, a claim for unfair trade or competition or tortious interference.").
146. S.B. 2313, 136th Leg. Sess. (Miss. 2021), Mississippi Intercollegiate Athletics Compensation Rights Act, at Section 7, stating: "[n]o postsecondary educational institution shall be subject to a claim for damages of any kind under this act, including, without limitation, a claim for unfair trade or competition or tortious interference."
147. *See* Hosick, *supra* note 124.
148. *See supra* Table 2 and accompanying text.

property; however, only three states allow schools to use their approval powers as a possible lever to gain compensation from the student's NIL deal.[149]

As of July 1, 2021, this consensus of state policies looked like progress for college athletes. But, given that half the states had no NIL laws, states with NIL legislation should consider revising their most onerous restrictions. One state, Alabama, repealed its NIL law in 2022.[150] Unless a federal NIL is enacted, or the NCAA issues detailed and comprehensive NIL regulations, this hodgepodge of states with NIL laws, and those without such laws, combined with the wide range of state restrictions that are shown in Section III.B, means that schools will likely compete for athletes on uneven terms.[151] This new landscape undermines a premise that applies to all sports leagues: rules of competition should promote equality of opportunity to win championships.

IV. HOW THE SHERMAN ACT APPLIES TO THE ILLINOIS SCHOOLS' CONSPIRACY TO RESTRAIN COLLEGE ATHLETE NIL DEALS

My analysis in Part IV divides into the basic components of antitrust lawsuits.[152] To begin with, Section IV.A shows that public universities in Illinois are not immune from the Sherman Act because they acted as market participants, not government regulators.[153] To challenge the Illinois NIL law in a Sherman Act lawsuit, athletes would allege that NCAA schools conspired to bar them from competing against their schools in markets for athletic royalties, sponsorships, advertisements, and licensing. Section IV.B provides details of this relevant market.[154] Section IV.C shows that athletes in Division I ("D-I") Illinois schools would have grounds to allege that their schools secretly conspired to write the state NIL law to protect the schools' markets from competition.[155] Section IV.D identifies the restraints of trade from the Illinois school conspiracy.[156]

It is important to note, however, the Sherman Act does not apply when individuals conspire to pass laws that impose anti-competitive market restrictions. Two Supreme Court decisions generated this principle, called the *Noerr-Pennington* doctrine.[157] *Noerr-Pennington* presents a challenge to my theory of a school conspiracy to legislate market restraints in violation of the Sherman Act. But the Supreme Court has also created exceptions to this doctrine, most notably

149. *See supra* Table 3; note 127.

150. H.B. 76, 2022 Reg. Sess. (Ala. 2022) (repealing Act 2021-227 of the 2021 Regular Session, relating to student athletes and compensation for use of a student athlete's name, image, or likeness, passed February 3, 2022).

151. *See supra* Table 1.

152. *See* FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 5–25 (2000). For a specific example to organize my analysis, I consulted Complaint at 11–28, 79–82, House v. NCAA, 545 F. Supp. 3d 804 (N.D. Cal. 2021) (Nos. 4:20-cv-03919 CW, 4:20-cv-04527 CW).

153. *See infra* Section IV.A.

154. *See infra* Section IV.B.

155. *See infra* Section IV.C.

156. *See infra* Section IV.D.

157. *See infra* notes 270–76.

the "sham" exception in *California Motor Transport v. Trucking Unlimited*.[158] Section IV.E applies this exception to the Illinois law that bars all lawsuits to enforce NIL deals.[159]

A. Illinois Universities Are Not Exempt from the Sherman Act

Public entities are generally immune from antitrust liability.[160] This principle appears to apply to public universities who conspire to regulate the economic rights of athletes. But the Supreme Court's landmark antitrust case, *Parker v. Brown*, concluded that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[161] To avail itself of the immunity, a state actor must show that its "conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation."[162]

This background sets the context for demonstrating that NCAA schools in Illinois do not qualify for an antitrust immunity. *North Carolina State Board of Dental Examiners v. Federal Trade Commission*[163] shows why this is so. In that case, a state authorized a board of dentists to set professional standards.[164] In this capacity, the board took actions against non-dentist providers of teeth whitening who competed with dentists for this service.[165] The Federal Trade Commission ("FTC") ordered the state board to stop restraining this competition.[166]

The Supreme Court upheld the FTC's action.[167] The Court viewed the dental board as a non-sovereign entity controlled by active market participants.[168] As a group of market actors, the state dental board did not qualify for immunity from federal antitrust law.[169] To reach this conclusion, the Court applied two

158. *See infra* notes 276–82.

159. *See infra* Section IV.E.

160. *See* Parker v. Brown, 317 U.S. 341, 351–52 (1943) (finding that state actors are immune from Sherman Act liability).

161. *Id.* at 351.

162. Hoover v. Ronwin, 466 U.S. 558, 569 (1984) (quoting Cmty. Commc'ns Co. v. Boulder, 455 U.S. 40, 54 (1982)).

163. 574 U.S. 494 (2015).

164. *Id.* at 500.

165. *Id.* After dentists began to offer teeth whitening services in the 1990s, non-dentists offered similar services for less money to consumers, starting in 2003. *Id.* The state dental board investigated the non-dentists, issued at least 47 cease-and-desist letters, and suggested that these providers would be referred for criminal charges for practicing dentistry without a license. *Id.* at 501. At the time of these administrative actions in 2006, eight of the dental board's ten members offered these services. *Id.*

166. *Id.* at 502.

167. *Id.* at 515 (affirming the Fourth Circuit's ruling upholding the FTC's cease-and-desist authority: "[i]f a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked").

168. *Id.* at 503–04.

169. *Id*. at 513 ("[I]f agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision.").

tests.[170] First, the Court suggested without holding that the dental board acted pursuant to a clearly articulated state policy.[171] Applying the second test, however, the Court determined that the dental board did not implement a policy that was actively supervised by the state.[172] Thus, the FTC had authority to prohibit the dental board from ordering non-dentist teeth whiteners to cease and desist.[173]

How does the balance struck in *North Carolina State Board of Dental Examiners* between state regulation and the Sherman Act apply to Illinois universities who met among themselves to plan for NIL legislation? My analysis is guided by this roadmap:

> The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.[174]

This guidance frames my analysis. To begin with, I show that D-I state universities in Illinois are market participants. They brand and license sportswear and other merchandise in commercial outlets.[175] This is also a relevant market for athletes who exploit their NIL rights.[176] Also, I show that schools booked weak revenue gains or losses from 2016–2019 for their athletic merchandise,[177] giving rise to an inference that they were motivated to protect their markets.

B. The Relevant NIL Market

In recent antitrust lawsuits by student athletes against the NCAA and athletic conferences, courts considered without ruling that athletic labor defines the relevant market.[178] In these cases, college athletes alleged that NCAA rules required them to relinquish all NIL rights as a condition to participate,[179] and to

170. *Id.* at 506 ("[A] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear . . . policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." (internal citation omitted)).

171. *Id*. at 507 ("The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated."); *see also id*. at 504 ("The parties have assumed that the clear articulation requirement is satisfied, and we do the same.").

172. *Id*. ("Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.").

173. *See id.* at 512 ("The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so—and, for reasons to be noted, it need not be so—there would be some cause for concern.").

174. *Id.* at 515.

175. *See infra* notes 186–92.

176. *See infra* notes 186–92, 198–207.

177. *See infra* Table 4.

178. *See, e.g.*, Rock v. NCAA, 928 F. Supp. 2d 1010, 1022 (S.D. Ind. 2013).

179. *See, e.g.*, Grant House v. NCAA, 545 F. Supp. 3d 804, 808 (N.D. Cal. 2021).

consent to the use of their personal name, image, and likeness by schools and conferences.[180]

Much has changed with the recent advent of NIL rights. Athletes now compete to some degree with their school's brand.[181] Recalling the results in Section III.B, legislated pay restrictions on athlete compensation vary widely.[182] Table 3 pinpoints uncommon state restrictions on NIL pay, with some appearing to be heavy-handed.[183] In this Section, I will show that Illinois schools controlled the legislative process to implement unreasonable restraints in NIL deals.[184]

The Alleged Relevant Market: I begin this analysis with data that defines the Illinois NCAA Schools Branding Market. I present data for school revenues in 2016–2019 from corporate sponsorships, advertising, and licensed products at seven public universities in Illinois.[185] This market is relevant for NIL deals because it appears to overlap with athlete sponsorships and endorsements.[186]

To define this market, I draw from data in NCAA financial reports that are published by the Knight Commission on Intercollegiate Athletics in conjunction with *USA Today*.[187] Universities and colleges file NCAA financial reports to the U.S. Department of Education.[188] Data are also reported to the Integrated Postsecondary Education Data System.[189]

The Knight Commission's database has gaps for private schools. In Illinois, data are unavailable for D-I athletic programs at Northwestern, DePaul, and Loyola.[190] My analysis uses data from seven Illinois public schools: Eastern Illinois University, Illinois State University, Northern Illinois University, University of Illinois at Chicago, University of Illinois at Urbana-Champaign, Southern Illinois University-Carbondale, and Western Illinois University.[191]

My analysis centers on revenue data 2016–2019.[192] I used 2019 as a cutoff date because the COVID-19 pandemic, which took hold in the U.S. in early 2020, significantly disrupted all sports, including NCAA games, thereby

180. O'Bannon v. NCAA (*O'Bannon II*), 7 F. Supp. 3d 955, 966 (N.D. Cal. 2014).

181. *See generally* Dan Murphy, *NIL Turns One: After a Year of Radical Change, What Happens Next?*, ESPN (July 1, 2022), https://www.espn.com/college-sports/story/_/id/34173052/year-radical-change-happens-next [https://perma.cc/D4HA-HFRK].

182. *See supra* notes 127–31.

183. *See supra* Section III.B, Fact Finding 3.

184. *See infra* notes 186–212.

185. *See infra notes* 198–207.

186. *See infra* note 264.

187. *Custom Reporting*, KNIGHT-NEWHOUSE COLL. ATHLETICS DATABASE, http://cafidatabase.knightcommission.org/reports (last visited Oct. 7, 2022) [https://perma.cc/XDC8-A585] (see bottom of page, "About the Data").

188. *What Is the Equity in Athletics Data Analysis Cutting Tool?*, U.S. DEP'T OF EDUC., https://ope.ed.gov/athletics/#/ (last visited Oct. 7, 2022) [https://perma.cc/5YLX-HEVF].

189. *Custom Reporting*, *supra* note 187.

190. *Id.*

191. *See infra* Table 4.

192. *See infra* Table 4.

skewing marketing activities after 2019.[193] "Corporate Sponsorships, Advertising, Licensing" is defined as:

> Definition: Revenue generated by the institution from royalties, licensing, advertisements and sponsorships.
>
> Explanation: The category of corporate sponsorship, advertising, and licensing revenue includes funds received by the institution directly from: sponsorships, licensing agreements, advertisement, royalties, and in-kind products and services as part of sponsorship agreement. (Line 15). (From NCAA Financial Reports).[194]

As I explain in more detail, this market was stagnant, with almost no growth—about 3.2% per year, before adjusting for consumer price inflation.[195] Discounting for annual inflation during 2016–2019, the Illinois NCAA School Branding Market was essentially flat.[196] Table 4 offers graphical support for this conclusion.

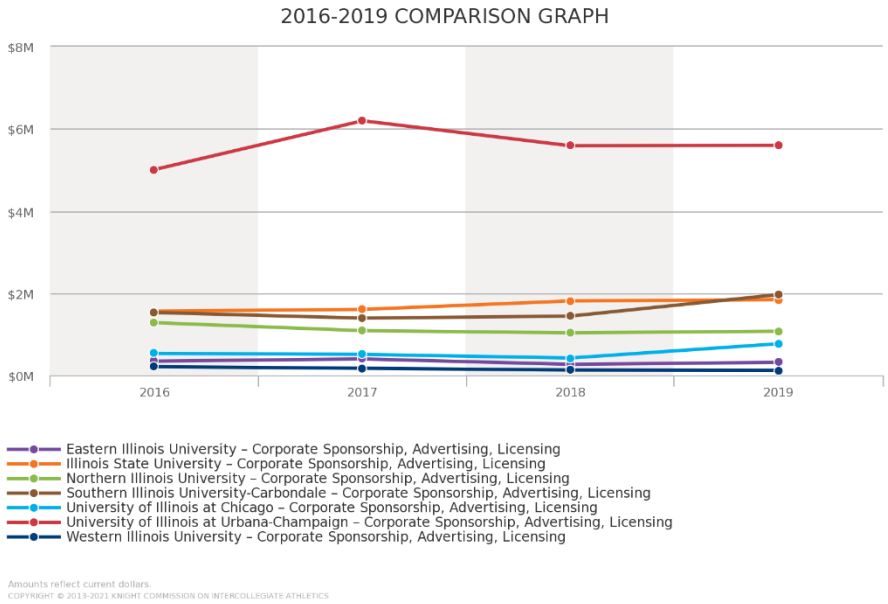
193. Matthew J. Williams & Devin M. Mathis, *The COVID-19 Pandemic and the Stress It Put on College Athletics*, SPORT J. (Aug. 13, 2021), https://thesportjournal.org/article/the-covid-19-pandemic-and-the-stress-it-put-on-college-athletics/ [https://perma.cc/E2DA-W3XB].

194. *About the Data*, KNIGHT-NEWHOUSE COLL. ATHLETICS DATABASE, https://knightnewhousedata.org/about-the-data (last visited Oct. 7, 2022) [https://perma.cc/VB69-USET].

195. *See infra* Table 4.

196. *See infra* Table 4.

TABLE 4: REVENUE FROM CORPORATE SPONSORSHIPS, ADVERTISING, AND LICENSING FOR D-I PUBLIC UNIVERSITIES IN ILLINOIS (2016–2019)



To portray the market in more detail, I break out four schools that reported sports branding revenues within a plus-or-minus 20% range over four years. The two schools with revenue growth were Illinois State University (+17.85%)[197] and the University of Illinois at Urbana-Champaign (+11.79%).[198] Two schools experienced declines: Eastern Illinois University (-8.31%)[199] and Northern Illinois University (-16.25%).[200]

Three schools reported higher revenue variance. Two schools showed strong gains: University of Illinois at Chicago (+43.91%)[201] and Southern Illinois University-Carbondale, (+28.52%).[202] One school had a sharp decline: Western Illinois University (-42.00%).[203] To add an important caveat: schools with the

197. *Custom Reporting Results*, KNIGHT-NEWHOUSE COLL. ATHLETICS DATABASE, http://cafidatabase.knightcommission.org/reports/ac928529 (last visited Oct. 7, 2022) [https://perma.cc/5RWC-3NXM] (customized analysis reporting $1,562,151 in 2016; $1,603,750 in 2017; $1,810,315 in 2018; and $1,840,985 in 2019).

198. *Id.* (customized analysis reporting $5,007,415 in 2016; $6,193,635 in 2017; $5,584,183 in 2018; and $5,597,786 in 2019).

199. *Id.* (customized analysis reporting $345,304 in 2016; $398,302 in 2017; $267,435 in 2018; and $316,599 in 2019)

200. *Id.* (customized analysis reporting $1,281,020 in 2016; $1,086,419 in 2017; $1,033,925 in 2018; and $1,072,824 in 2019).

201. *Id.* (customized analysis reporting $533,811 in 2016; $509,439 in 2017; $421,734 in 2018; and $768,202 in 2019).

202. *Id.* (customized analysis reporting $1,528,692 in 2016; $1,390,792 in 2017; $1,441,494 in 2018; and $1,964,681 in 2019).

203. *Id.* (customized analysis reporting $209,083 in 2016; $171,307 in 2017; $128,819 in 2018; and $121,266 in 2019).

most variance had lower revenues than the four schools with less variance and therefore were less susceptible to larger percentage swings.[204]

Summing across schools, total revenues for the Illinois NCAA School Branding Market varied from $10,467,476 (2016), $11,353,644 (2017), $10,687,905 (2018), and $11,682,343 (2019).[205] Revenues from 2016 to 2019 gained $1,328,699 (10.5%). Over this period, inflation was measured at about 2% per year.[206] In 2016, the "All Total" Consumer Price Index ("CPI") was 2.1%;[207] in 2017, 2.1%;[208] in 2018, 1.9%;[209] and in 2019, 2.3%.[210] Subtracting the sum of the inflation index (8.4%) from the aggregate gain in revenues (10.5%), the Illinois NCAA School Branding Market registered growth of 2.1% in inflation adjusted dollars—or, about half a percent per year.

In sum, the sports branding market for seven public schools in Illinois was stagnant.[211] The data support the inference that athletic programs in the Illinois NCAA School Branding Market were motivated to restrain how their athletes competed against them.

C. The Alleged Conspiracy

In Subsection IV.C.1, I demonstrate that a group of Illinois schools actively coordinated a legislative strategy for NIL legislation while bypassing conference and NCAA bodies. Apart from a student newspaper article that disclosed that these schools met and planned their NIL strategy,[212] the schools coordinated their effort in total secrecy. This provides evidence of a conspiracy to restrain competition in the Illinois NIL athlete market. Subsection IV.C.2 shows how the conspiring schools used a stealthy legislative process to enact passage of a midnight-hour NIL bill that avoided public comment. Taken together, Subsections 1 and 2 show how the conspirators planned and executed their legislative restraints.

204. *Id*.

205. *Id.*

206. *Consumer Price Index, 1913-*, FED. RSRV. BANK OF MINNEAPOLIS, https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1913- (last visited Oct. 7, 2022) [https://perma.cc/UZ8N-Y66J].

207. *Consumer Price Index News Release*, U.S. BUREAU OF LAB. STAT. (Jan. 18, 2017, 8:30 AM), https://www.bls.gov/news.release/archives/cpi_01182017.htm [https://perma.cc/KTU5-MLTE].

208. *Consumer Price Index News Release*, U.S. BUREAU OF LAB. STAT. (Jan. 12, 2018, 8:30 AM), https://www.bls.gov/news.release/archives/cpi_01122018.htm [https://perma.cc/ENN9-T4SN].

209. *Consumer Price Index News Release*, U.S. BUREAU OF LAB. STAT. (Jan. 11, 2019, 8:30 AM), https://www.bls.gov/news.release/archives/cpi_01112019.htm [https://perma.cc/D2X6-JL79].

210. *Consumer Price Index News Release*, U.S. BUREAU OF LAB. STAT. (Jan. 14, 2020, 8:30 AM), https://www.bls.gov/news.release/archives/cpi_01142020.htm [https://perma.cc/D42A-SEPB].

211. *See supra* Table 4 (showing that Illinois D-I Public Universities' annual revenues for corporate sponsorships, advertising, and licensing remained nearly consistent from 2016 to 2019).

212. *See generally* Krause, *supra* note 26 (reporting on Northern Illinois University Athletic Director Sean Frazier's account of NIL planning by athletic directors in Illinois: "'We've had a lot of conversations about the athletes and them profiting off their name, image and likeness.' Frazier said he and all other Athletic Directors in the state have been assembled on several occasions by University of Illinois Athletic Director Josh Whitman on issues relative to college athletics, including recently on NIL.").

1. D-I Illinois Schools: How NCAA and Conference Rules Affect Athletic Competition

For the most part, the seven public universities in the Illinois NCAA School Branding Market do not compete against each other in the same conference. The University of Illinois at Urbana-Champaign is in the Big Ten.[213] Northern Illinois University in the MAC Conference.[214] Currently, the University of Illinois at Chicago ("UIC") is in the Horizon League, though it announced plans to join the Missouri Valley Conference.[215] Illinois State University and Southern Illinois University are in the Missouri Valley Conference.[216] Eastern Illinois University is in the Ohio Valley Conference.[217] Western Illinois University is in the Summit League for basketball.[218] The schools directly compete against each other to a limited degree. In non-conference play, Loyola and UIC have played each other 25 times in men's basketball from 2006 through 2021.[219] Illinois State and Eastern Illinois have played each other 108 times in football from 1901 through 2021.[220] Southern Illinois has played Western Illinois 41 times in football from 1960 through 2021.[221] The point is that these schools have had little history of interacting with each other before they formed a conspiracy to legislate the Illinois NIL law.

Adding to this point, NCAA rules prohibit these schools from engaging in certain types of unfair competition. The rules emphasize the importance of competitive fairness. Rule 2.10 states that member schools "shall promote opportunity for equity in competition to ensure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in

213. *See generally About the Conference*, BIG TEN CONF., https://bigten.org/sports/2018/6/6/school-bio-big10-school-bio-html.aspx (last visited Oct. 7, 2022) [https://perma.cc/UBW6-PVP4].

214. *2021 Rocket Mortgage MAC Football Championship*, MID-AM. CONF. (Dec. 4, 2021), https://getsomemaction.com/tournaments/?id=159&path=football [https://perma.cc/R5MC-ERUB].

215. *UIC to Join the Missouri Valley Conference*, MO. VALLEY CONF. (Jan. 26, 2022, 11:15 AM), https://mvc-sports.com/news/2022/1/26/general-uic-to-join-the-missouri-valley-conference.aspx [https://perma.cc/Q6U5-UKKF].

216. *See generally The Valley, Missouri Valley Conference,* MVC-SPORTS, https://mvc-sports.com/ (last visited Oct. 7 , 2022) [https://perma.cc/5CXC-Y3YM].

217. *OVC Member Institutions*, OHIO VALLEY CONF., http://ovcsports.com/sports/2012/6/14/GEN_061412 1029.aspx (last visited Oct. 7, 2022) [https://perma.cc/C5ZV-NJ83].

218. *Summit League Quick Facts*, SUMMIT LEAGUE, https://thesummitleague.org/sports/2020/5/26/Quick%20Facts.aspx (last visited Oct. 7, 2022) [https://perma.cc/X2HD-PE76].

219. *Men's Basketball History vs UIC from Jan 15, 2006–Nov 20, 2021*, LOY. UNIV. CHI., https://loyola-ramblers.com/sports/mens-basketball/opponent-history/university-of-illinois-chicago/27 (last visited Oct. 7, 2022) [https://perma.cc/ZP4Y-Z2ZL].

220. *Football History vs Eastern Illinois University from Nov 16, 1901–Sep 17, 2022*, ILL. STATE UNIV., https://goredbirds.com/sports/football/opponent-history/eastern-illinois-university/41 (last visited Oct. 7, 2022) [https://perma.cc/EUP2-SE3G].

221. *Football History vs Western Illinois University from Oct 8, 1960–Oct 2, 2021*, S. ILL. UNIV. ATHLETICS, https://siusalukis.com/sports/football/opponent-history/western-illinois-university/150 (last visited Oct. 7, 2022) [https://perma.cc/TE52-LTXN].

participation in intercollegiate athletics."[222] Published in 2020, before Illinois enacted the Student-Athlete Endorsement Rights Act, the rule's import for NIL rights is not clear.[223] It could mean that schools should not use NIL deals as disguised employment for athletic performance. But, given that the rule protects individual athletes from being "prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics,"[224] Rule 2.10 could also mean that schools should not collude to unreasonably limit athletes from monetizing NIL rights.

A second NCAA rule bears more directly on athlete NIL rights. Rule 5.3.2.1 gives Power 5 schools legislative autonomy.[225] Its use of "legislative process" refers to how conferences govern themselves.[226] The rule's context does not extend to the American political arena.[227] Within these "areas of autonomy,"[228] conferences can make their own rules, including those for "the role of agents and advisors in assisting student-athletes with career planning and decision making."[229] This provision is implicated in the new NIL environment, given that many state laws regulate sports agency for athletes who sign NIL deals.[230] Another autonomy rule allows conferences to pass "[l]egislation related to promotional activities for careers and pursuits unrelated athletics participation."[231]

222. *See* NCAA, *supra* note 69, at art. 2.10 ("The structure and programs of the Association and the activities of its members shall promote opportunity for equity in competition to ensure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics.").

223. Madeline Myers, *Illinois Amends NIL Legislation, Only a Year After Initial Bill*, BUS. COLL. SPORTS (June 7, 2022), https://businessofcollegesports.com/name-image-likeness/illinois-amends-nil-legislation-only-a-year-after-initial-bill/ [https://perma.cc/W5PE-563Y].

224. *See* NCAA, *supra* note 69, at art. 2.10.

225. *See* NCAA, *supra* note 69, at art. 5.3.2 Division I Legislative Process and art. 5.3.2.1 Process for Areas of Autonomy. More specifically, *see* art. 5.3.2.1.1 Authority to Adopt or Amend Legislation ("The Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pac-12 Conference and Southeastern Conference and their member institutions shall have the authority to adopt or amend legislation that is identified as an area of autonomy.").

226. *See* NCAA, *supra* note 69, at art. 5.3.2.1.2. This article, Areas of Autonomy, notes:

> The Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pac-12 Conference and Southeastern Conference and their member institutions are granted autonomy in the following areas to permit the use of resources to advance the legitimate educational or athletics-related needs of student-athletes and for legislative changes that will otherwise enhance student-athlete well-being.

Id.

227. *See* NCAA, *supra* note 69, at art. 5.3.2.1.2.

228. *See* NCAA, *supra* note 69, at art. 5.3.2.1.2.c (providing Power 5 conferences authority to adopt legislation that relates to a number of areas of autonomy, including: "Promotional Activities Unrelated to Athletics Participation. Legislation related to promotional activities for careers and pursuits unrelated athletics participation").

229. *See* NCAA, *supra* note 69, at art. 5.3.2.1.2.b (providing Power 5 conferences authority to adopt legislation that relates to a number of areas of autonomy, including: "Insurance and Career Transition. Legislation related to . . . the role of agents and advisors in assisting student-athletes with career planning and decision making").

230. C.R.S. § 23-16-301; Uniform College Athlete Name, Image, or Likeness Act of 2021, B24-0456, 24th Council (D.C. 2021); 20-2-201, MCA.

231. *See* NCAA, *supra* note 69, at art. 5.3.2.1.2.c (providing Power 5 conferences authority to adopt legislation that relates to a number of areas of autonomy, including: "Promotional Activities Unrelated to Athletics

Two central points can be deduced from this discussion. First, neither NCAA or conference rules allow schools in a specific state to collude or conspire to take advantage of their athletes through legislation. Second, during the time that Illinois lawmakers were considering an NIL bill, the Big Ten and other conferences offered no NIL guidance and were seeking a legislative solution from Congress.[232] Illinois and Northwestern worked together in this vacuum to promulgate NIL principles before Illinois enacted its NIL law.[233]

These observations bear on the Illinois NCAA School Branding Market. Evidence below shows that a group of schools in Illinois, hereafter called the Illinois NCAA School Branding Conspiracy,[234] appeared to collude to protect this market. While some of these conspirators competed in football and basketball, they had no history in behaving like a conference for the State of Illinois. Nor did these schools have any history acting as a lobbying group.

But these large and small schools spanned the Illinois political map, stretching from Chicago's liberal base to conservative rural districts.[235] By meeting to coordinate NIL activities—a point of evidence in my analysis below—the schools legislated a uniquely restrictive NIL law to protect their sports branding market to the disadvantage of their athletes.[236]

2. The Illinois School Conspiracy to Legislate an Anticompetitive NIL Law

In 2019, Illinois Representative Emanuel (Chris) Welch proposed H.B. 3904, an NIL bill.[237] Eight Illinois universities opposed it, and none supported it.[238] On October 30, 2019, the Illinois House passed the bill, 86 to 25.[239] The

Participation. Legislation related to promotional activities for careers and pursuits unrelated [to] athletics participation").

232. *Statement from the Autonomy Five Conferences on Hearing About Name, Image, and Likeness Legislation in Senate Commerce Committee*, BIG TEN CONF. (June 9, 2021, 4:30 PM), https://bigten.org/news/2021/6/9/general-the-autonomy-five-conferences-statement-on-hearing-about-name-image-and-likeness-legislation-in-senate-commerce-committee.aspx [https://perma.cc/4ULL-T9A7].

233. *See infra* notes 237–39, 247.

234. A conspiracy among two or more competitors can be found in a formal agreement. Formality of agreement is not required; however, an understanding or meeting of the minds between at least two competitors or potential competitors that unreasonably restrains trade suffices to state a claim for relief. The agreement or understanding is the offense. Overt acts to advance the conspiracy is not essential.

235. *Compare* Ben Winck, *Less Than 10 Percent of Evanston Voters Cast Ballot for Donald Trump*, DAILY NW. (Nov. 11, 2016), https://dailynorthwestern.com/2016/11/11/city/less-than-10-percent-of-evanston-voters-cast-ballot-for-donald-trump/ [https://perma.cc/QP5J-S7CZ] (stating that in Northwestern's primary community, about 7% of votes were for Donald Trump), *with Politics & Voting in Macomb, Illinois*, SPERLING'S BEST PLACES, https://www.bestplaces.net/voting/city/illinois/macomb (last visited Oct. 7, 2022) [https://perma.cc/MZN6-B7VC] (stating that in Western Illinois University's home county, 40.5% of the vote was for the Democratic candidate in the 2020 presidential election, compared to 57.0% voted for the Republican).

236. *See infra* notes 238–41.

237. Student Athlete Endorsement Act, H.B. 3904, 101st Gen. Assemb. (Ill. 2019). Once enacted, the name of the law changed slightly to the Student-Athlete Endorsement Rights Act. *See* Appendix, Section VI.A.

238. Witness Slips, H.B. 3904, 101st Gen. Assemb. (Ill. 2019).

239. *See* H.B. 3904, 101st Gen. Assemb. (Ill. 2019) (House Roll Call, House Bill 3904, Student Athlete Endorsements, Third Reading Passed).

bill never advanced from a committee assignment.[240] Important to note is that the bill was short, enumerating athlete NIL rights with few limits on pay.[241]

An NIL bill was proposed again in 2021, although it started as legislation for "chronic truants" in the Chicago Public School system.[242] The bill had nothing to do with college athletes: it proposed to amend the School Code and Juvenile Court Act of 1987 to provide school administrators flexibility in addressing truancy.[243] The truancy bill was co-sponsored[244] by Senator Napoleon Harris, a former Northwestern football player,[245] Welch, a former Northwestern baseball player,[246] and Kambium Buckner, a former Illinois football player.[247] The inconspicuous bill attracted three proponents and no opponents.[248]

On May 12, 2021, Buckner, a former University of Illinois football player, proposed House Amendment 001 to the bill,[249] a comprehensive NIL proposal called the Student-Athlete Endorsement Rights Act.[250] It is important to note that the text of the legislation was much longer compared to the pro-athlete bill introduced in 2019 and had many more limits on athlete pay.[251] This comparison provides evidence of the conspiracy's intent to enact numerous restraints for athletes in their NIL deals.

The amendment attracted only supporters of the bill in two hearings—from public and private universities in Illinois.[252] The NIL amendment deleted

240. Bill Status, H.B. 3904, 101st Gen. Assemb., Senate, (Ill. 2019) (pursuant to Senate Rule 3-9(b)/Referred to Assignments).

241. H.B. 3904, 101st Gen. Assemb. (Ill. 2019). The full text of the bill is reprinted *infra* Section VI.B.

242. S.B. 2338, 102nd Gen. Assemb. (Ill. 2021).

243. S.B. 2338, 102nd Gen. Assemb. (Ill. 2021) (introduced on Feb. 26, 2021 by Sen. Kimberly A. Lightford).

244. S.B. 2338, 102nd Gen. Assemb. (Ill. 2021).

245. *See Napoleon Harris,* SRCFB, https://www.sports-reference.com/cfb/players/napoleon-harris-1.html (last visited Oct. 7, 2022) [https://perma.cc/BJ9X-JYRE] (played for Northwestern University in 1998, 2000, and 2001); *Napoleon Harris*, BALLOTPEDIA, https://ballotpedia.org/Napoleon_Harris (last visited Oct. 7, 2022) [https://perma.cc/G7HB-XF7M] (state senator graduated from Northwestern University).

246. Brian Mackey, *College Athlete Endorsement Bill Clears Illinois House*, NPR ILL. (Oct. 30, 2019, 5:13 PM), https://www.nprillinois.org/statehouse/2019-10-30/college-athlete-endorsement-bill-clears-illinois-house [https://perma.cc/6XF7-7PHJ] (reporting that Rep. Welch played college baseball at Northwestern).

247. Claire O'Brien, *Time to Cash In: Illinois' NIL Laws Go into Effect Thursday After Years of Pressure for Legislature*, DAILY ILLINI (July 1, 2021), https://dailyillini.com/sports-stories/2021/07/01/time-to-cash-in-illinois-nil-laws-go-into-effect-thursday-after-years-of-pressure-for-legislature/ [https://perma.cc/KLT9-UL5N] (reporting that Rep. Kambium Buckner, a sponsor of the NIL bill, is a former University of Illinois football player).

248. Witness Slips, S.B. 2338, 102nd Gen. Assemb. (Ill. 2021) (3 in favor 0 opposed, including Dr. Zakieh Mohammed (Chicago Public Schools), G Tito Quinones (Chicago Public Schools), and Kyle Hillman (National Association of Social Workers Illinois Chapter, National Association of Social Workers–Illinois Chapter)).

249. *See* O'Brien, *supra* note 247.

250. *See* O'Brien, *supra* note 247 (House Committee Amend. No. 1, linking to Amendment to Senate Bill 2338, referring to the "Student-Athlete Endorsement Rights Act"). It was at this time the name of the statute changed. *Cf. supra* note 225.

251. S.B. 2338, 102nd Gen. Assemb. (Ill. 2019). The full text of the bill is reprinted *infra* Section VI.A. *Cf.* the full text of the shorter bill in 2019, Appendix, Section VI.B.

252. Witness Slips, S.B. 2338, 102nd Gen. Assemb. (Ill. 2021) (House Committee Amend. No. 1, Witness Slips For S.B. 2338, House Amendment 001, listing the following as witnesses for hearings on May 19 and May

references to three laws that dealt with truancy, scuttling the bill's original purpose.[253] Thus, the amendment used an unrelated truancy bill as a subterfuge for Illinois universities to advance NIL legislation without attracting public participation and comment. This helped to promote conditions to legislate broad NIL pay restrictions.

On May 26, 2021, athletic directors of NCAA schools in Illinois wrote a joint letter to Governor Pritzker and Members of the Illinois General Assembly to endorse Senate Bill 2338.[254] The athletic directors were "grateful to Speaker Welch and Representative Buckner for their openness *to collaboration*"[255] without explaining why a Chicago Public Schools truancy bill was used to advance a complete NIL law instead of a stand-alone bill or an amendment to a higher education law. The emphasized text—"collaboration," much like collusion— is evidence of a conspiracy by the Illinois schools and aided by their former athletes in roles as lawmakers.[256]

On June 1, 2021—less than two weeks after testimony was taken for Rep. Buckner's amendment—both chambers of the Illinois General Assembly passed Senate Bill 2338.[257] The legislative calendar showed that the last hearing for the session was held on May 31st.[258] The late scheduling of Rep. Buckner's amendment, the short time for scheduling witness hearings, the joint letter of athletic directors less than one week before the final vote on June 1st are evidence of a stealthy conspiracy among the Illinois NCAA schools to hold de facto private hearings on the Illinois NIL law.[259]

The Student Athlete Endorsement Rights Act was amended by a law passed by the General Assembly on May 20, 2022. House Bill 1175 amended Sections 5, 10, 15, 20, and 25 and added a new part, Section 22.[260] Notably, however, the

31, 2021: Jennifer Creasey and Nolan Drea (University of Illinois System), John Charles (Southern Illinois University System), Jonathan Lackland (Illinois State University), Josh Whitman (University of Illinois Champaign-Urbana), Katie Anselment (Eastern Illinois University), Katie Davison (Northern Illinois University), Laura Farr (Northwestern University), and Peter Coffey (DePaul University)).

253. Bill Status, S.B. 2338, 102nd Gen. Assemb. (Ill. 2021).

254. Email from Prof. Michael LeRoy to Nolan Drea, Asst. Director of State Relations, University of Illinois, Office of Government Relations (Oct. 25, 2021, 3:01 PM) (on file with author) (The letter was dated May 26, 2021, with the salutation: "Dear Governor Pritzker and Members of the Illinois General Assembly" with attachment of letter to Gov. J.B. Pritzker and Members of the General Assembly.).

255. *Id*. (emphasis added).

256. *Id.*

257. Bill Status, S.B. 2338, 102nd Gen. Assemb. (Ill. 2021) (reporting that the bill was designated Senate Public Act 102-0042 on June 29, 2021; passed both chambers on June 1, 2021; sent to the Governor on June 11, 2021; and was approved by the Governor on June 29, 2021).

258. *See 102nd General Assembly Calendar May 2021*, ILL. GEN. ASSEMBLY, https://www.ilga.gov/house/schedules/2021_SESSION_CALENDAR.pdf (last visited Oct. 7, 2022) [https://perma.cc/U85M-6J5E].

259. *See* Email from Michael LeRoy to Nolan Drea, *supra* note 254.

260. *See* Student-Athlete Endorsement Rights Act, Public Act 102-0892, 2022 Ill. Legis. Serv. P.A. 102-892 (H.B. 1175) (West). Its most significant change amended Section 20, as follows, to remove the prohibition on schools working directly or indirectly with collectives to enter into NIL deals with college athletes:

(110 ILCS 190/20)

Sec. 20. Agents; publicity rights; third party licensees

….

amended law leaves in place the most restrictive elements in the Illinois NIL law—namely, Section 15(c)'s language allowing schools to be compensated for approving an NIL deal, and Section 35, which completely bars college athletes from suing their schools over NIL deals.[261] In addition, the amendments are too limited to remove Illinois from its top rank as the most restrictive NIL law in the nation.[262] While these amendments improve the ability of Illinois schools to recruit athletes, other states are taking similar action.[263]

D. Noerr-Pennington *Does Not Immunize the Illinois Schools' Conspiracy*

Section IV.A explained that Illinois school conspirators are not exempt as state actors from antitrust scrutiny.[264] My analysis continued in Section IV.B by showing the relevant sports licensing and branding market that the Illinois NIL law regulates.[265] Section IV.C showed how D-I Illinois schools engaged in a conspiracy to limit competition in this market with their athletes.[266] That Section explained how the conspiracy orchestrated legislation to impose some unreasonable restraints of trade for their athletes.[267] Here in Section IV.D, I explain the *Noerr-Pennington* doctrine, a potent defense in antitrust cases. I conclude by explaining why this antitrust defense should not apply to the Illinois school conspirators.

To begin with, the *Noerr-Pennington* doctrine broadly exempts antitrust conspiracies by market actors who use a legislative process to further their goal.[268] In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* ("*Noerr*"),[269] railroad firms conspired against trucking companies—their

(g) No postsecondary educational institution shall provide ~~or directly or indirectly arrange for a third party to provide~~ compensation to a prospective or current student-athlete or enter into, ~~or directly or indirectly arrange for a third party to enter into,~~ a publicity rights agreement with a prospective or current student-athlete. Nothing in this Act shall require a postsecondary educational institution to directly or indirectly identify, create, facilitate, arrange, negotiate, or otherwise enable opportunities for a prospective or current student-athlete to enter into a publicity rights agreement with a third party.

261. *See* S.B. 2338, 102nd Gen. Assemb. (Ill. 2021) (Sections 15(c) & 35).

262. *See supra* note 260.

263. *See* Jeremy Crabtree, *Illinois Joins List of States Allowing NIL Collectives to Work with Coaches*, ON3: NIL (May 23, 2022), https://www.on3.com/nil/news/illinois-joins-list-allowing-nil-collectives-to-work-with-coaches/ [https://perma.cc/43H5-57DU] (stating that states with a Southeast recruiting footprint, including Tennessee, Mississippi, South Carolina, and Louisiana, have enacted or are progressing toward NIL laws that allow coaches to work with third parties such as collectives to compensate student-athletes for use of their NIL).

264. *See* discussion *supra* Section IV.A.

265. *See* discussion *supra* Section IV.B.

266. *See* discussion *supra* Section IV.C.

267. *See* discussion *supra* Section IV.D.

268. *See generally* United Mine Workers v. Pennington, 381 U.S. 657 (1965); E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

269. 365 U.S. 127, 129 (1961).

competitors[270]—by running a negative advertising campaign.[271] At the same time, the railroad firms sought legislation to increase regulatory costs for trucks.[272]

The Supreme Court ruled that the Sherman Act did not apply to this anti-competitive conspiracy because antitrust law cannot regulate the political process.[273] *United Mine Workers of America v. Pennington* ("*Pennington*") concluded: "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."[274]

But, the *Noerr* decision planted a seed for an exception, noting that when a "campaign, ostensibly directed toward influencing governmental action . . . *is a mere sham* to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . the application of the Sherman Act would be justified."[275] Later, in *California Motor Transport*,[276] the Court concluded that the sham exception is itself a substantive antitrust offense. A sham can take several forms, according to the *California Motor Transport* Court.[277]

Three portions of that opinion suggest grounds for challenging Section 35 of the Illinois NIL law, which bars all lawsuits under this statute. They are briefly presented in separate points, followed by an explanation of how these principles apply to the Illinois NIL law.

The Political Misrepresentation Sham: First, the Court said that no immunity applies when antitrust conspirators seek to immunize their restraint of trade by misrepresenting their actions as a legitimate exercise of their right to engage in the legislative process: [t]There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes, and which may result in antitrust violations. *Misrepresentations, condoned in the political arena*, *are not immunized when used in the adjudicatory process.*[278]

The Denial of Legal Process Sham: Second, the Court said that the immunity doctrine cannot result in "*effectively barring respondents from access to the*

270. *Id.* at 128.

271. The railroads admitted that their publicity campaign was designed to support passage of weight limit laws and higher taxes for interstate trucks. *See id.* at 131.

272. *Id.* (discussing how railroad companies admitted that their publicity campaign aimed getting truck companies to "pay their fair share of the cost of constructing, maintaining and repairing the roads, and with regard to the driving hazards they create").

273. *See id.* at 137. The Court stated:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

274. 381 U.S. 657, 670 (1965).

275. *Noerr*, 365 U.S. at 144 (emphasis added).

276. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 509–11 (1972).

277. *Id.* at 509–16.

278. *Id*. at 513 (emphasis added).

agencies and courts."[279] "Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'"[280]

The Imbalance of Power Sham: Third, the Court was mindful of the potential imbalance of political power between antitrust conspirators and weaker competitors who cannot effectively legislate for their own interests: [a] combination of entrepreneurs to . . . deter their competitors from having free and unlimited access to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another.[281]

How do these elements of the sham exception to *Noerr-Pennington* apply to the Illinois NIL law and the conspiracy that led to its passage?

First, the political misrepresentation sham doctrine can be supported by applying the empirical results of this study in Fact Finding 3 to the May 26, 2021, letter from athletic directors of Illinois schools—the agents of the school conspiracy.[282] They addressed their letter to Governor Pritzker and Members of the Illinois General Assembly five days before a vote was held on the Senate Bill 2338.[283] The letter said: "[o]ur institutions of higher education support this legislation as currently proposed and embrace its implementation, thereby allowing *a fair landscape* for our student-athletes and universities."[284] But the letter did not mention that Section 35 of the Student Athlete Endorsement Rights Act would bar all lawsuits relating to NIL deals.[285] This material omission of fact undermined the athletic directors' assertion of a "fair landscape" for Illinois

279. *Id.* (emphasis added).
280. *Id*.
281. *Id*. at 515.
282. *See* Email from Michael LeRoy to Nolan Drea, *supra* note 254.
283. *Id.*
284. *Id.* (emphasis added).
285. *See id.*; *see also* Appendix *infra* Section VI.A.

college athletes.[286] To this point, the letter failed to mention that these universities are suable by their students,[287] including their NCAA athletes.[288]

Second, under the denial of legal process sham, if Section 35 of the Illinois NIL law deters a single lawsuit, there is sufficient precedent under *California Motor Transport* to proceed with an antitrust case against the Illinois school conspirators.[289]

Strengthening this point, Section 35 of the Illinois NIL law conflicts with the Illinois Antitrust Act when it states:

> Section 35. Liability. No postsecondary educational institution shall be subject to a claim for damages of any kind under this Act, including, but not limited to, a claim for unfair trade or competition or tortious interference. No postsecondary educational institution shall be subject to a claim for damages related to its adoption, implementation, or enforcement of any

286. *See* Email from Michael LeRoy to Nolan Drea, *supra* note 254.

287. *See generally* Polley v. Nw. Univ., 560 F. Supp. 3d 1197, 1201 (N.D. Ill. 2021) (student sued for breach of contract by moving to online instruction during COVID-19 pandemic); Oyoque v. DePaul Univ., 520 F. Supp. 3d 1058, 1060 (N.D. Ill. 2021) (student sued for breach of contract related to online course instruction during COVID-19 pandemic); Doe v. Bd. of Trs. of Univ. of Ill., No. 17–CV–2180, 2018 WL 11269804, at *1 (C.D. Ill. July 24, 2018) (student alleged he was removed from the university without due process following an allegation of sexual assault by a fellow student); Leetaru v. Bd. of Trs. of Univ. of Ill., 32 N.E.3d 583, 585 (Ill. 2015) (graduate student sued over removal from the program for alleged violations of research policies); Liu v. Nw. Univ., 78 F. Supp. 3d 839, 841–42 (N.D. Ill. 2015) (law student sued for breach of contract and violation of due process related to his disabilities); Seitz-Partridge v. Loyola Univ. of Chi., 948 N.E.2d 219, 222 (Ill. App. Ct. 2011) (student sued for tortious interferences after being dismissed for plagiarism); Doe v. Bd. of Trs. of Univ. of Ill., No. 05 C 5189, 2006 WL 2792694, at *1 (N.D. Ill. Sept. 25, 2006) (complaint by former Ph.D.-M.D. student under the Americans with Disabilities Act, the Rehabilitation Act, and Equal Protection Clause); Ill. Native Am. Bar Ass'n v. Univ. of Ill. by its Bd. of Trs., 856 N.E.2d 460, 462 (Ill. App. Ct. 2006) (student group for Native Americans sued to stop the hostile atmosphere related to Chief Illiniwek controversy); Doe v. Nw. Univ., 682 N.E.2d 145, 147 (Ill. App. Ct. 1997) (dental student sued for exposure to HIV); Waller v. S. Ill. Univ., 125 F.3d 541 (7th Cir. 1997) (law student claimed constitutional violations related to removal from academic program); Kelley v. Bd. of Trs. of Univ. of Ill., 832 F. Supp. 237, 239 (C.D. Ill. 1993) (former NCAA swimmers sued the university for terminating the men's swimming program); Bilut v. Nw. Univ., 645 N.E.2d 536, 537 (Ill. App. Ct. 1994) (student sued over university's failure to award her a Ph.D.); Frederick v. Nw. Univ. Dental Sch., 617 N.E.2d 382, 385 (Ill. App. Ct. 1993) (student sued for age discrimination upon dismissal from program); Eisele v. Ayers, 381 N.E.2d 21, 24 (Ill. App. Ct. 1978) (medical students sued after their tuition was raised); Tanner v. Bd. of Trs. of Univ. of Ill., 363 N.E.2d 208, 209 (Ill. App. Ct. 1977) (university student sought a writ of mandamus to compel the University of Illinois to award him a Ph.D.); Undergraduate Student Ass'n v. Peltason, 359 F. Supp. 320, 322 (N.D. Ill. 1973) (students and student organization at University of Illinois sued over revocation of scholarship aid).

288. *See generally* Sams v. Bd. of Trs. of Ill. State Univ., 65 Ill. Ct. Cl. 127 (2013) (basketball player sued to restore his financial aid); Sellers v. Rudert, 918 N.E.2d 586, 588 (Ill. App. Ct. 2009) (injured football player sued for negligent treatment of game-related injury); Badali v. State, 54 Ill. Ct. Cl. 340 (2001) (injured baseball player sued for negligence growing out college coach's requirement that players slide head-first into a base); Wilson v. Intercollegiate (Big Ten) Conf. Athletic Ass'n, 513 F. Supp. 1062, 1063 (C.D. Ill. 1981) (football player sued to establish his eligibility to play).

289. *See* Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380, 382 (1991) (explaining that a "sham" is the use of "the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon"); *see also* Technicon Med. Info. Sys. Corp. v. Green Bay Packaging, Inc., 480 F. Supp. 124, 126, 128 (E.D. Wis. 1979); Cyborg Sys., Inc. v. Mgmt. Sci. Am., Inc., No. 77 C 2645, 1978 WL 1312, at *6 (N.D. Ill. Jan. 30, 1978) ("[A] majority of the [Supreme] Court would find that the sham litigation exception can be applied to a case involving only one lawsuit."); Associated Radio Serv. Co. v. Page Airways, Inc., 414 F. Supp. 1088, 1096 (N.D. Tex. 1976).

> contract, rule, regulation, standard, or other requirement in compliance with this Act.[290]

This part of the NIL law contradicts Section 7(2) of the Illinois Antitrust Act, which provides unlimited access to persons who seek to enforce their rights under this law:

> *Any person* who has been injured in his business or property, or is threatened with such injury, by a violation of Section 3 of this Act *may maintain an action in the Circuit Court for damages, or for an injunction, or both, against any person who has committed such violation*.[291]

Section 5 of the Illinois Antitrust Act also offers evidence of the imbalance of power sham. This section exempts activities of sixteen organizations—labor organizations, agricultural cooperatives, public utilities, telecommunication companies, insurers, religious and charitable groups, non-profits for rural electrification, securities dealers, agricultural boards of trade, motor, rail, and pipeline carriers, national banks, savings and loan associations, professional organizations, foreign nations, local governments (including school districts), and e-waste commercial groups.[292] A legislative process in which athletes were represented could have cited this provision of the state's antitrust law to show that Section 35 of the NIL bill conflicted with these exemptions by silently adding a new group to the immunity section.[293] The obvious contradiction between the state's antitrust and NIL laws with respect to the immunity of schools from lawsuits is the result of a legislative process driven by a "combination of entrepreneurs to . . . deter their competitors from having 'free and unlimited access' to the agencies and courts."[294]

No court has tested the foregoing *Noerr-Pennington* arguments.[295] These contentions are novel. But in a current Sherman Act lawsuit involving a lead co-plaintiff from the University of Illinois football team, a district court rejected the defendants' attempted use of the *Noerr-Pennington* doctrine.[296] Tymir Oliver and other NCAA athletes alleged that the NCAA and Power Five Conferences unreasonably restrained their rights to profit from their NIL.[297] In their motion to dismiss the lawsuit, the defendants argued that *Noerr-Pennington* immunized their legislative testimony in which they conceded that strict rules on amateur competition should be relaxed or eliminated.[298] The court rejected this argument,

290. *See* Appendix, *infra* Section VI.A.

291. 740 ILL. COMP. STAT. ANN. 10/7(2) (West 2010) (emphasis added).

292. *See* 740 ILL. COMP. STAT. ANN. 10/5 (West 2019).

293. *See* Appendix, *infra* Section VI.A.

294. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972).

295. *See generally* United Mine Workers v. Pennington, 381 U.S. 657 (1965); E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

296. *See* House v. NCAA, 545 F. Supp. 3d 804, 814 n.4 (N.D. Cal. 2021). Tymir Oliver, who was an Illinois football player before the lawsuit commenced, was a co-plaintiff with Grant House and Sedona Price, current student athletes, respectively competing for Arizona State University and the University of Oregon. *Id*. at 808 nn.2–3. Because Oliver's eligibility to compete has expired, the court dismissed his claims for injunctive relief though not for damages. *Id*. at 819–20. The court denied the motion to dismiss for House and Price. *Id.*

297. *See id.* at 808.

298. *Id.* at 814 n.4.

reasoning that "Defendants have not shown that the *Noerr-Pennington* doctrine precludes Plaintiffs from using the statements in question as party admissions to support their claims in this action, which arise from Defendants' alleged price-fixing by way of certain NCAA rules and not from Defendants' petitioning activities."[299]

E. The Alleged Restraints of Trade

In Subsection III.B.2, my study identifies a small group of states that enacted unusual limits on athlete NIL compensation.[300] Only one state—Illinois—enacted all uncommon restrictions. Illinois law required NIL deals to be transacted at market value;[301] prohibited employment of college athletes;[302] mandated that schools approve or reject NIL deals without communicating to an athlete or agent an objectionable term to allow them to amend the deal;[303] authorized schools to seek market compensation for approval of its logo or marks;[304] expanded compensation to include "any other form of payment or remuneration";[305] barred boosters from being a party to an NIL agreement;[306] defined an athlete's name, image, and likeness to include the individual's voice;[307] and immunized schools from all NIL lawsuits by athletes—specifically for business torts and unfair competition claims.[308]

These cumulative restrictions protect Illinois D-I school conspirators as vertically integrated purveyors of their brands who impose non-price restraints on downstream competitors—their athletes.[309] Illinois law positions college athletes as downstream purveyors insofar as schools must approve their brand and sponsorship deals in markets where the schools already sell and license merchandise, but only after the schools completely strip value from the athlete's school

299. *Id.*

300. *See* discussion *supra* Section III.B.

301. *See* Appendix *infra* Section VI.A ("A student-athlete may earn compensation, commensurate with market value, for the use of the name, image, likeness, or voice of the student-athlete . . . .").

302. *See* Appendix *infra* Section VI.A.

303. *See* Appendix *infra* Section VI.A.

304. *See* Appendix *infra* Section VI.A.

305. *See* Appendix *infra* Section VI.A.

306. *See* Appendix *infra* Section VI.A.

307. *See* Appendix *infra* Section VI.A.

308. *See* Appendix *infra* Section VI.A; *see also* discussion *supra* Section III.B.

309. *See* Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425, 1485 (2010), explaining:

> Vertical restraints are imposed by a manufacturer on someone "down" the distribution chain such as a wholesaler or distributor, or between a wholesaler/distributor and a retailer. The restraints can involve price terms, which are referred to as resale price maintenance, or *non-price terms* such as the *location, territories, or customers* that a wholesaler, distributor, or retailer can serve.

Id. (emphasis added).

The emphasized text relates to the Illinois Student-Athlete Endorsement Rights Act, which has non-price restraints on student NIL deals that prohibit transactions involving school property and customers, among other limits. *See* Appendix *infra* Section VI.A.

affiliation.[310] By restricting NIL deals to the athlete's personal brand, without any reference to a school or team, these non-price restraints create separate consumer markets for school teams—including the unreasonably restrained athlete as a team member—and the athlete as an individual.[311]

Purveyors of luxury and status products engage in similar anticompetitive practices when they impose non-price restraints on downstream retailers who sell their products along with competing brands.[312] These restrictions implement the purveyor's strategy to build a brand with consumers who will not accept substitutes.[313] These restraints can reduce both intra- and inter-brand competition, while adding to the value of the purveyor's brand—in other words, "the more effective a vertical restraint is in differentiating a brand, the greater the reduction in inter-brand competition."[314] These market restrictions are subject to a rule of reason analysis under *Continental T. V., Inc. v. GTE Sylvania, Inc*.[315]

The Illinois D-I school conspiracy for NIL is a type of non-price restraint for sales of status brands. To begin, the Illinois law restricts boosters as part of NIL deals, an uncommon law.[316] By comparison, at the University of Oregon, alumnus and mega-booster Phil Knight created an NIL firm to aid athletes at his alma mater to tap into the marketing savvy of his firm, Nike.[317] Athletes at Oregon can enter into this marketing arrangement to optimize their branding strategy.[318] In North Carolina, a state with less than half the NIL restrictions compared to Illinois,[319] Duke allows its licensing office to approve or disapprove of an athlete's use of the school's marks and colors in the context of NIL deals.[320]

310. *See* Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 GEO. L.J. 2079, 2082 (1999) (describing leverage theory, where a theater chain has many screens, often in markets with no competitor, where the company uses its market size to bargain for first-run distribution rights for movies to injure competing theaters that are left with second-run rights for the same movie).

311. Desai & Waller, *supra* note 309, at 1485:

> Vertical restraints are imposed by a manufacturer on someone "down" the distribution chain such as a wholesaler or distributor, or between a wholesaler/distributor and a retailer. The restraints can involve price terms, which are referred to as resale price maintenance, or non-price terms such as the location, territories, or customers that a wholesaler, distributor, or retailer can serve.

312. *Id*. at 1487.

313. *Id.* (citing Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83, 96, 118–19 (1995)).

314. *Id*.

315. 433 U.S. 36 (1977) (establishing a broad rule of reason analysis for all vertical non-price restraints).

316. *See supra* Fact Finding 3, Bullet Point 6; *see also infra* Appendix Section VI.A, Section 20(e).

317. Daniel Libit, *Oregon Draws NCAA Scrutiny for Third-Party NIL Program*, YAHOO! (Jan. 15, 2022), https://www.yahoo.com/entertainment/oregon-draws-ncaa-scrutiny-third-170148040.html [https://perma.cc/6KGC-W7EN] (reporting on Knight's creation of a firm called Division Street to provide branding and marketing assistance to Oregon athletes).

318. *Id*.

319. *See supra* Table 1 (comparing Illinois with 45 pay restriction points to North Carolina with 19 pay restriction points).

320. *Policy Regarding Name, Image and Likeness*, DUKE UNIV., https://goduke.com/documents/2021/7/1/7_1_21_Duke_NIL_Policy.pdf [https://perma.cc/P8N4-SDFE] (Compared to athletes who are subject to the Illinois NIL law, Duke athletes enjoy a far more permissive use of the school's branding identifiers. Duke's policy states: "a Duke student-athlete may not use the name, symbols, logos, trademarks, facilities, and images associated with Duke University unless specific approval is obtained in advance in accordance with the Duke

Unlike the NIL law in Illinois, the North Carolina executive order does not allow schools to seek market value compensation from athletes who use school colors or markings.[321] At BYU in Utah[322] and University of Miami in Florida,[323] NIL sponsors for entire teams or athletic programs paid a monthly flat fee to athletes.[324] Utah has no NIL law and therefore no NIL pay restrictions.[325] In California, a state with few NIL pay restrictions,[326] Haley and Hannah Cavinder signed NIL deals with Boost Mobile that potentially netted them more than $1 million with no legal prohibition on showing them in their basketball uniforms.[327] When the Cavinders signed a WWE endorsement deal, a promotional photo featured them with their school team, Fresno State.[328]

In these comparison states, sponsors of NIL deals set the market value of these transactions, not the schools. But in Illinois NIL deals must be transacted for market value, a legal term without any definition or financial benchmark.[329] Because the Illinois law vests Illinois schools with authority to approve NIL deals, the law gives them unilateral authority to be market arbiters for NIL deals.[330]

Also, the Illinois NIL law raises a concern about tying arrangements that could be actionable under the Sherman Act.[331] At the University of Illinois at Urbana-Champaign, the athletic director, Josh Whitman, and other leaders of the athletic department gathered close to one hundred people in the school's football

Trademark Licensing policy available here: http://www.trademarklicensing.duke.edu/."). There is no mention of the school reserving a right to be compensated for use of these markings. *See id.*

321. N.C. Exec. Order No. 223, (July 2, 2021); *see generally* Grant House v. NCAA, 545 F. Supp. 3d 804 (N.D. Cal. 2021).

322. Mitch Harper, *NCAA Looking into BYU Football's High-Profile NIL Deal with Built Bar*, KSLSPORTS.COM (Dec. 10, 2021, 5:57 PM), https://kslsports.com/474620/byu-football-ncaa-built-bar-nil-probe/ [https://perma.cc/X98K-MW4G] (reporting that Built Bar signed NIL contracts with all 123 BYU football players).

323. Sam Cooper, *American Top Team to Offer $540K Worth of NIL Deals to Miami Scholarship Football Players*, YAHOO! SPORTS (July 6, 2021), https://sports.yahoo.com/florida-company-offers-540-k-worth-of-nil-endorsement-deals-to-all-miami-scholarship-football-players-183415305.html [https://perma.cc/2FGM-ZEXZ].

324. *See id.*; Harper, *supra* note 322.

325. *Utah NIL Law for NCAA*, SPRY, https://spry.so/nil-state-guide/utah-nil-law-for-ncaa/ (Aug. 22, 2022) [https://perma.cc/LM3N-NF3W] ("There is no current legislation for Name, Image, Likeness (NIL) announced in Utah.").

326. *See supra* Table 1 (showing that California had the sixth fewest pay restriction points).

327. Craig Harris, *The Cavinder Twins, 'Queens' of College Sports Endorsements, Poised to Make $1 Million*, USA TODAY, https://www.usatoday.com/story/money/2022/01/26/haley-hanna-cavinder-sport-ncaa-athletes/6518831001/?gnt-cfr=1 (Jan. 28, 2022, 4:09 PM) [https://perma.cc/7YBV-BKM5].

328. Ryan Glasspiegel, *Cavinder Twins Highlight Inaugural WWE NIL Class*, N.Y. POST, https://nypost.com/2021/12/08/cavinder-twins-highlight-inaugural-wwe-nil-class/ (Dec. 8, 2021, 9:00 AM) [https://perma.cc/X6C8-KWVJ].

329. *See* Appendix *infra* Section VI.A.

330. *See* Appendix *infra* Section VI.A.

331. *See* JEFF MILES, PRINCIPLES OF ANTITRUST LAW 8 (2016) (explaining that the Sherman Act, amended by the Clayton Act, prohibits some tying and exclusive-dealing agreements); It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 680–81 (4th Cir. 2016); Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 267 (6th Cir. 2015) ("In a tying arrangement, a seller requires buyers of a product over which it has market power—the 'tying product'—also to purchase a product over which it seeks to gain market power—the 'tied product.'"); Brantley v. NBC Universal, Inc., 649 F.3d 1078, 1082 (9th Cir. 2011).

practice facility to explain the Illinois NIL law.[332] Jay Ramshaw, a local realtor who attended the athletic department's information session on NIL as the law took effect, remarked, "Champaign is going to benefit greatly from it."[333] This shows that the school attempted to tie its athletes to the athletic department's local NIL marketing power.[334] Certainly, this form of marketing could generate NIL deals for athletes. But, the framing of this statement shows that the athletic program attempted to be a market broker to benefit athletes *and* the businesses in the community.[335] Given the fact that the Illinois NIL law allows for athletes to have their representation,[336] the athletic department's role as a business community agent had potential to undermine an athlete's best financial interests in these local market deals.[337] This arrangement would tie part of the NIL market for Illinois athletes to the school's relationships with local businesses.[338]

Tying arrangements that encourage or persuade businesses to make deals with a monopoly do not result in antitrust liability.[339] There must be coercion,[340] and there is no evidence of such pressure in news reports of these arrangements. But, even if these brokered deals did not violate the Sherman Act, they may have

332. Scott Richey, *UI Gives Crash Course in Name/Image/Likeness Opportunities to Local Businesses*, NEWS-GAZETTE (June 30, 2021), https://www.news-gazette.com/news/local/university-illinois/ui-gives-crash-course-in-name-image-likeness-opportunities-to-local-businesses/article_27a2795e-0561-579f-b866-2ee6ed1f9de4.html [https://perma.cc/8E3F-8BUT].

333. Joey Wagner, *Area Businesses Ready to Jump into NIL Fray: 'Champaign Is Going to Benefit Greatly from It'*, 247 SPORTS (July 4, 2021), https://247sports.com/college/illinois/Article/Illinoi-student-athletes-capitalize-on-NIL-Andre-Curbelo-partners-with-U-of-I-credit-union-Josh-Whitman-167333424/ [https://perma.cc/SH4F-ZFBN].

334. *Id.*

335. *Id.*

336. *See* Appendix *infra* Section VI.A.

337. In fact, shortly after the Illinois athletic department held this market-organizing meeting with local businesses, Illinois athletes signed NIL deals where they co-marketed their personal brand in outlets where the school sells licensed merchandise—a local sportswear store, and a t-shirt printer. Ethan Simmons, *Prep-to-Print: Incoming Freshman Guard Inks First Local Endorsement*, NEWS-GAZETTE (July 15, 2021), https://www.news-gazette.com/business/prep-to-print-incoming-freshman-guard-inks-first-local-endorsement/article_a88e8013-09a2-5f75-97d8-825784dc4ba1.html [https://perma.cc/R2UH-JYFP] (explaining that shortly after the Illinois athletic department held this market-organizing meeting with local businesses, Illinois athletes signed NIL deals where they co-marketed their personal brand in outlets where the school sells licensed merchandise). A major donor inked an NIL deal with a star basketball players and lesser-known athletes in other sports to promote compressors and manufacturing jobs in Decatur, Illinois. Ethan Simmons, *Illini Athletes Drive Decatur Manufacturer's New Marketing Campaign*, NEWS-GAZETTE (Oct. 5, 2021), https://www.news-gazette.com/business/employment/illini-athletes-drive-decatur-manufacturers-new-marketing-campaign/article_444baa84-9fd0-575b-8a46-3b63cd2fed6c.html [https://perma.cc/8ED4-WHVJ] (A firm headed by two "prolific Illini athletics donors" signed an NIL deal with 20 different Illini athletes across each of the school's varsity sports teams.). The fact that this deal included one athlete from each of the school's men's and women's teams shows how the school may have shaped the NIL deal to showcase its athletic program. *Id.* In addition, the NIL deal was struck with a major donor to the Illinois athletic program, indicating more evidence of a tying relationship. *Id.*

338. *See* Wagner, *supra* note 333.

339. *See, e.g.*, Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186 (2d Cir. 1992).

340. *See, e.g.*, Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1159–60 (9th Cir. 2003) ("Essential to . . . a tying claim is proof that the seller *coerced* a buyer to purchase the tied product.").

implicated common law actions for an agent's breach of fiduciary duty because the school appeared to act in this capacity.[341]

Third, and apart from a vertical market restraint and a tying relationship, Illinois's NIL law injures athletes under the Sherman Act by prohibiting them from suing for "a claim for damages of *any* kind under this Act, including, but not limited to, a claim for unfair trade or competition or tortious interference."[342] While this law shields Illinois school conspirators from any legal liability arising from NIL deals, it operates like illegal conspiracies to force competitors into arbitration.[343] When an antitrust conspiracy imposes unlawful market restraints and also requires injured parties to waive their right to sue, this "secondary conspiracy" compounds "an initial antitrust conspiracy."[344] This tactic tends to "limit the potential exposure from and strengthen the underlying price-fixing conspiracy."[345]

My finding that Illinois is only one of two states that immunizes its NCAA schools from tort or unfair competition lawsuits in NIL deals suggests the lack of a reasonable justification for its NIL law.[346] The fact that university students in Illinois are generally able to sue their school offers more evidence that the NIL law was passed to protect the brand of the Illinois athletic programs.[347]

341. *See, e.g.*, Lawlor v. N. Am. Corp. of Ill., 983 N.E.2d 414 (Ill. 2012). The Illinois Supreme Court reaffirmed that courts should use a multi-factor test to determine if an agency relationship is established, including "(1) the question of hiring; (2) the right to discharge; (3) the manner of direction of the servant; (4) the right to terminate the relationship; and (5) the character of the supervision of the work done." *Id.* at 427. Given the university's exclusive authority to approve NIL deals, and the university's extensive control of a scholarship athlete, the existence of an agency relationship is plausible in these initial NIL deals at Illinois. The court also restated the elements for breach of fiduciary duty: "(1) that a fiduciary duty exists; (2) that the fiduciary duty was breached; and (3) that such breach proximately caused the injury of which the party complains." *Id.* at 433.

342. *See* Appendix *infra* Section VI.A.

343. *See generally* Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381 (2018) (explaining that "[a] conspiracy to arbitrate exists when the competing firms in a market illegally agree that they will all impose mandatory arbitration on their consumers. This Article explains how the Supreme Court's relatively recent arbitration opinions have converted arbitration clauses into a mechanism that firms can use to insulate themselves from liability for their illegal conduct").

344. *Id.* at 412 n.158.

345. *Id.* at 412.

346. *Id.* at 413.

347. *See* Rachel Otwell, *U of I Sued Over Handling of Sexual Misconduct Claims*, NPR ILL. (Feb. 25, 2021, 5:00 AM), https://www.nprillinois.org/education-desk/2021-02-25/u-of-i-sued-over-handling-of-sexual-misconduct-claims [https://perma.cc/UU9H-EB2D]; Ben Zigterman, *UI Settles Free-Speech Lawsuit with Students Involved in Incident at 2017 Trump Protest*, NEWS-GAZETTE (Dec. 14, 2019), https://www.news-gazette.com/news/local/university-illinois/ui-settles-free-speech-lawsuit-with-students-involved-in-incident-at-2017-trump-protest/article_2668d44e-6862-5376-9dba-c5e09ec90605.html [https://perma.cc/6Z3A-8DSQ]; Greg Piper, *University of Illinois Settles Speech Code Lawsuit Before Supreme Court Can Review Case*, COLL. FIX (Feb. 3, 2021), https://www.thecollegefix.com/university-of-illinois-settles-speech-code-lawsuit-before-supreme-court-can-review-case/ [https://perma.cc/3JWD-DHF8].

V. CONCLUSIONS

Repeat violations of the Sherman Act are not uncommon.[348] This also occurs in professional sports leagues.[349] These observations frame my conclusions: one might otherwise assume that no NIL law could pose an antitrust concern because these laws have revolutionized pay for college athletes. The arc of history traced by my study shows that college athletes have made large economic gains, primarily as an outgrowth of decades of antitrust litigation.[350] In Part II, I showed the extreme deference that courts paid to the NCAA and its member institutions by turning aside one athlete antitrust lawsuit after another.[351] Only recently, federal courts considered that college athletes compete in an athletic labor market.[352] Then came the momentous *O'Bannon* antitrust litigation in which athletes prevailed over the NCAA,[353] followed by the seismic ruling in *Alston*.[354]

Between the conclusion of the protracted litigation in *O'Bannon*, and the Supreme Court's ruling in *Alston*, twenty-five states enacted NIL laws.[355] The laws generally advance the economic rights of college athletes.[356] But by quantifying pay restrictions that are embedded in state NIL laws in Part III, my study shows wide variance in these economic regulations.[357] New Mexico has one-tenth the number of NIL restrictions in Illinois's law.[358] Thus, one key conclusion is that some state laws restrict athlete pay much more than others.[359] This

348. *See, e.g.*, *In re* Buspirone Patent Litig., 185 F. Supp. 2d 363, 378 (S.D.N.Y. 2002) ("A continuing violation is one in which the plaintiff's interests are repeatedly violated, and, in these circumstances, a new cause of action accrues each time the plaintiff is injured by an act of the defendant.").

349. Mackey v. Nat'l Football League, 543 F.2d 606, 623 (8th Cir. 1976) (affirming a ruling that the NFL violated the Sherman Act by requiring a team who signed a free agent to compensate the team who lost a player with someone of equal value); Smith v. Pro-Football, 593 F.2d 1173, 1187 (D.C. Cir. 1978) (ruling in a separate antitrust lawsuit that challenged the college draft, that the draft "was severely anticompetitive in effect"); Jackson v. Nat'l Football League, 802 F. Supp. 226, 232 (D. Minn. 1992) (After eight players challenged the NFL's restrictions on free agency as Sherman Act violations in 1990, a jury found that the NFL violated the Sherman Antitrust Act.). The NFL implemented Plan B free agency in February 1989, giving teams a right of first refusal if any designated player signed an offer sheet with another team. *Id.* at 228 n.1; Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 873 (S.D.N.Y. 1975) (issuing a restraining order after NBA players filed an antitrust lawsuit in 1970 to block the NBA's proposed merger of the NBA with its rival, the American Basketball Association ("ABA")—a merger that would eliminate labor market competition for professional basketball players); *see* Robertson v. Nat'l Basketball Ass'n, 72 F.R.D. 64, 66–67 (S.D.N.Y. 1976) (ending litigation in a settlement that eliminated the reserve clause, a legal obligation that prevented a player from negotiating with any other team).

350. Josh Schafer, *NIL: Here's How Much Athletes Earned in the First Year of New NCAA Rules*, YAHOO! FINANCE (July 1, 2022), https://finance.yahoo.com/news/nil-heres-how-much-ncaa-athletes-earned-185901941.html [https://perma.cc/S8JG-A7SW] ("College athletes earned an estimated $917 million in the first year of Name Image and Likeness (NIL) payments, which began in July 2021, according to new data from Opendorse.").

351. *See supra* Section II.A.

352. *See supra* Sections II.A–B.

353. O'Bannon v. NCAA (*O'Bannon II*), 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

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

355. *See supra* note 127.

356. *See supra* note 127.

357. *See supra* Table 1.

358. *See supra* Section III.B.

359. *See supra* Section III.B. (*Compare* Bullet Point 2 *with* Bullet Point 3).

finding implies that schools in more permissive states can use NIL legislation as a competitive advantage to recruit and retain athletes. This is the sunny side of NIL laws.

But my study pays more attention to a dark side of NIL legislation: states can over-regulate athletes' economic rights to the point of restraining trade in the sports licensing and branding market in which athletes and their schools directly compete. In the case of the Illinois NIL law, not only is there empirical evidence that NCAA athletes are burdened by economic regulations,[360] including the unusual provision that schools can seek market value compensation from athletes to approve an athlete's use of their school's broadly enumerated definition of marks and logos[361]: I also show that Illinois schools wrote these regulations in private meetings[362] and used an opaque legislative process[363] to enact their law without any evidence that lawmakers, athlete advocates, or the media could raise concerns from an athlete's vantage point. For that matter, the highly unusual Illinois law that bars all lawsuits over an NIL deal not only restrains the rights of athletes: it also applies to businesses that might wish to sue an Illinois school for unfair competition, tortious interference with their business, or in any other respect.[364]

This returns my analysis to the long arc of athletes' antitrust litigation. That arc now bends decisively in favor of college athletes and away from the NCAA, conferences, and schools.[365] Illinois schools appear to have flattened that still-bending arc of history by conspiring to protect their stagnating sports licensing and branding markets.[366] While Illinois's Student-Athlete Endorsement Rights Act provides NCAA athletes NIL rights, it also provides athletes nil access to courts. *O'Bannon* and *Alston* are antitrust cases that took aim at the NCAA amateur athlete model: following in their path, my blueprint for an antitrust lawsuit against certain Illinois NCAA schools may help athletes by judicially enjoining the Illinois law's most anticompetitive features.[367]

VI. APPENDIX

The Appendix has two versions of NIL legislation. Section VI.A contains the complete Illinois Student Athlete Endorsement Rights Act which was passed in the 102nd General Assembly in 2021. This law was written by athletic directors at major NCAA schools in Illinois and provided to former athletes who are now state lawmakers. This law is longer and has more athlete-pay restrictions than the bill in Section VI.B which Illinois universities opposed.

360. *See supra* Section III.B. (Bullet Point 1).
361. *See infra* Appendix Section VI.A.
362. Krause, *supra* note 26.
363. *See supra* notes 242–58.
364. Krause, *supra* note 26.
365. NCAA v. Alston, 141 S. Ct. 2141, 2167 (Kavanaugh, J., concurring).
366. *See supra* Section IV.C.
367. *See* Sherman Act, 26 Stat. 209 (1890) (codified as amended 15 U.S.C. §§ 1–38).

A. Full Text of the Illinois Student Athlete Endorsement Rights Act (2021)[368]

Public Act 102-0042 S.B. 2338

Enrolled AN ACT concerning education.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Short title. This Act may be cited as the Student-Athlete Endorsement Rights Act.

Section 5. Definitions.

In this Act:

"Compensation" means anything of value, monetary or otherwise, including, but not limited to, cash, gifts, in-kind items of value, social media compensation, payments for licensing or use of publicity rights, payments for other intellectual or intangible property rights under federal or State law, and any other form of payment or remuneration, except as excluded under this Act.

"Compensation" shall not include: (1) tuition, room, board, books, fees, and personal expenses that a postsecondary educational institution provides to a student-athlete in accordance with the rules of the athletic association or conference of which the postsecondary educational institution is a member; (2) Federal Pell Grants and other State and federal grants or scholarships unrelated to, and not awarded because of a student-athlete's participation intercollegiate athletics or sports competition; (3) any other financial aid, benefits, or awards that a postsecondary educational institution provides to a student-athlete in accordance with the rules of the athletic association or conference of which the postsecondary educational institution is a member; or (4) the payment of wages and benefits to a student-athlete for work actually performed (but not for athletic ability or participation in intercollegiate athletics) at a rate commensurate with the prevailing rate for similar work in the locality of the student-athlete's postsecondary educational institution.

"Image" means any visual depiction, including, but not limited to, photograph, digital image, rendering, and video.

"Intercollegiate athletics program" means an intercollegiate athletics program played at the collegiate level for which eligibility requirements for participation by a student-athlete are established by a national association for the promotion or regulation of collegiate athletics.

"Likeness" means a physical, digital, rendering, or other depiction or representation of a student-athlete, including a student-athlete's uniform number or signature, that reasonably identifies the student-athlete with particularity.

"Name" means the first or last name or the nickname of a student-athlete when used in a context that reasonably identifies the student-athlete with particularity.

368. S.B. 2338, 102nd Gen. Assemb. (Ill. 2021).

"Name, image, and likeness agreement" or "publicity rights agreement" means a contract or other written or oral arrangement between a student-athlete and a third party licensee regarding the use of the name, image, likeness, or voice of the student-athlete.

"Publicity right" means any right that (i) is licensed under a publicity rights agreement or (ii) is recognized under a federal or State law that permits an individual to control and benefit from the commercial use of the name, image, likeness, or voice of the individual.

"Postsecondary educational institution" means a public university or community college or private university or college.

"Social media compensation" means all forms of payment for engagement on social media received by a student-athlete as a result of the use of that student-athlete's name, image, likeness, or voice.

"Student-athlete" means a student currently enrolled at a postsecondary educational institution who engages in, is eligible to engage in, or may be eligible in the future to engage in, an intercollegiate athletics program at a postsecondary educational institution. If an individual is permanently ineligible to participate in a particular intercollegiate sport, the individual is not a student-athlete for purposes of that sport.

"Third party licensee" means any individual or entity that licenses publicity rights or the use of name, image, likeness, or voice from any prospective or current student-athlete or group of student-athletes.

"Third party licensee" shall not include any national association for the promotion or regulation of collegiate athletics, athletics conference, or postsecondary educational institution.

Section 10. Compensation.

Except as provided in Section 15:

(1) A student-athlete may earn compensation, commensurate with market value, for the use of the name, image, likeness, or voice of the student-athlete while enrolled at a postsecondary educational institution and obtain and retain a certified agent for any matter or activity relating to such compensation.

(2) A student-athlete may not earn compensation in exchange for the student-athlete's athletic ability or participation in intercollegiate athletics or sports competition or agreement or willingness to attend a postsecondary educational institution.

(3) Notwithstanding any other provision of law or agreement to the contrary, a student-athlete shall not be deemed an employee, agent, or independent contractor of an association, a conference, or a postsecondary educational institution based on the student-athlete's participation in an intercollegiate athletics program.

Section 15. Postsecondary educational institutions; limitations; prohibitions.

(a) Except as provided in this Act, a postsecondary educational institution shall not uphold any contract, rule, regulation, standard, or other requirement that prevents a student-athlete of that institution from earning compensation as a

result of the use of the student-athlete's name, image, likeness, or voice. Any such contract, rule, regulation, standard, or other requirement shall be void and unenforceable against the postsecondary educational institution or the student-athlete. Compensation from the use of a student-athlete's name, image, likeness, or voice may not affect the student-athlete's scholarship eligibility, grant-in-aid, or other financial aid, awards or benefits, or the student-athlete's intercollegiate athletic eligibility. Nothing in this Act is intended to alter any State or federal laws, rules, or regulations regarding the award of financial aid at postsecondary educational institutions.

(b) Except as provided in this Act, an athletic association, conference, or other group or organization with authority over intercollegiate athletic programs, including, but not limited to, the National Collegiate Athletic Association, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association, shall not prevent, or otherwise enforce a contract, rule, regulation, standard, or other requirement that prevents a student-athlete at a postsecondary educational institution from earning compensation as a result of the use of the student-athlete's name, image, likeness, or voice.

(c) To protect the integrity of its educational mission and intercollegiate athletics program, a postsecondary educational institution may impose reasonable limitations on the dates and time that a student-athlete may participate in endorsement, promotional, social media, or other activities related to the license or use of the student-athlete's name, image, likeness, or voice.

Nothing in this Act shall restrict a postsecondary educational institution from exercising its sole discretion to control the authorized use of its marks or logos or to determine a student-athlete's apparel, gear, or other wearables during an intercollegiate athletics competition or institution-sponsored event. A student-athlete may not receive or enter into a contract for compensation for the use of the student-athlete's name, image, likeness, or voice in a way that also uses any registered or licensed marks, logos, verbiage, name, or designs of a postsecondary educational institution, unless the postsecondary educational institution has provided the student-athlete with written permission to do so prior to execution of the contract or receipt of compensation. If permission is granted to the student-athlete, the postsecondary educational institution, by an agreement of all of the parties, may be compensated for the use in a manner consistent with market rates. A postsecondary educational institution may also prohibit a student-athlete from wearing any item of clothing, shoes, or other gear or wearables with the name, logo, or insignia of any entity during an intercollegiate institution-sponsored event. athletics competition or

(d) An athletic association, conference, or other group or organization with authority over intercollegiate athletics programs, including, but not limited to, the National Collegiate Athletic Association, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association, shall not enforce a contract, rule, regulation, standard, or other requirement that prevents a postsecondary educational institution from participating in an

intercollegiate athletics program as a result of the compensation of a student-athlete for the use of the student-athlete's name, image, likeness, or voice.

(e) A postsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics programs, including, but not limited to, the National Collegiate Athletic Association, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association, shall not directly or indirectly:

(1) enter into, or offer to enter into, a publicity rights agreement with a prospective or current student-athlete; or

(2) provide a prospective or current student-athlete or the student-athlete's family compensation in relation to the use of the student-athlete's name, image, likeness, or voice.

(f) A postsecondary educational institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics programs, including, but not limited to, the National Collegiate Athletic Association, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association, shall not prevent a student-athlete from obtaining professional representation for purposes of this Act in relation to name, image, likeness, or voice, or to secure a publicity rights agreement, including, but not limited to, representation provided by athlete agents or legal representation provided by attorneys. A student-athlete shall provide the postsecondary educational institution with written notice and a copy of the agreement within 7 days of entering into a representation agreement with any individual for the purpose of exploring or securing compensation for use of the student-athlete's name, image, likeness, or voice.

Section 20. Agents; publicity rights; third party licensees.

(a) An agent, legal representative, or other professional service provider offering services to a student-athlete shall, to the extent required, comply with the federal Sports Agent Responsibility and Trust Act and any other applicable laws, rules, or regulations.

(b) A grant-in-aid, including cost of attendance, and other permissible financial aid, awards, or benefits from the postsecondary educational institution in which a student-athlete is enrolled shall not be revoked, reduced, nor the terms and conditions altered, as a result of a student-athlete earning compensation or obtaining professional or legal representation pursuant to this Act.

(c) A student-athlete shall disclose to the postsecondary educational institution in which the student is enrolled, in a manner and time prescribed by the institution, the existence and substance of all publicity rights agreements. Publicity rights agreements that contemplate cash or other compensation to the student-athlete that is equal to or in excess of a value of $500 shall be formalized in a written contract, and the contract shall be provided to the postsecondary educational institution in which the student is enrolled prior to the execution of the agreement and before any compensation is provided to the student-athlete.

(d) A student-athlete may not enter into a publicity rights agreement or otherwise receive compensation for that student-athlete's name, image, likeness, or

voice for services rendered or performed while that student-athlete is participating in activities sanctioned by that student-athlete's postsecondary educational institution if such services or performance by the student-athlete would conflict with a provision in a contract, rule, regulation, standard, or other requirement of the postsecondary educational institution.

(e) No booster, third party licensee, or any other individual or entity, shall provide or directly or indirectly arrange for a third party to provide compensation to a prospective or current student-athlete or enter into, or directly or indirectly arrange for a third party to enter into, a publicity rights agreement as an inducement for the student-athlete to attend or enroll in a specific institution or group of institutions. Compensation for a student-athlete's name, image, likeness, or voice shall not be conditioned on athletic performance or attendance at a particular postsecondary educational institution.

(f) A postsecondary educational institution may fund an independent, third-party administrator to support education, monitoring, disclosures, and reporting concerning name, image, likeness, or voice activities by student-athletes authorized pursuant to this Act. A third-party administrator cannot be a registered athlete agent.

(g) No postsecondary educational institution shall provide or directly or indirectly arrange for a third-party to provide compensation to a prospective or current student-athlete or enter into, or directly or indirectly arrange for a third party to enter into, a publicity rights agreement with a prospective or current student-athlete.

(h) No student-athlete shall enter into a publicity rights agreement or receive compensation from a third-party licensee relating to the name, image, likeness, or voice of the student-athlete before the date on which the student-athlete enrolls at a postsecondary educational institution.

(i) No student-athlete shall enter into a publicity rights agreement or receive compensation from a third party licensee for the endorsement or promotion of gambling, sports betting, controlled substances, cannabis, a tobacco or alcohol company, brand, or products, alternative or electronic nicotine product or delivery system, performance-enhancing supplements, adult entertainment, or any other product or service that is reasonably considered to be inconsistent with the values or mission of a postsecondary educational institution or that negatively impacts or reflects adversely on a postsecondary educational institution or its athletic programs, including, but not limited to, bringing about public disrepute, embarrassment, scandal, ridicule, or otherwise negatively impacting the reputation or the moral or ethical standards of the postsecondary educational institution.

Section 25. Term of student-athlete contract. A contract for the use of the student-athlete's name, image, likeness, or voice that is entered into while the student-athlete is participating in an intercollegiate sport at a postsecondary educational institution may not extend beyond the student-athlete's participation in the sport at the institution.

Section 30. Construction. Nothing in this Act shall be construed to modify any requirements or obligations imposed under Title IX of the Education Amendments of 1972.

Section 35. Liability. No postsecondary educational institution shall be subject to a claim for damages of any kind under this Act, including, but not limited to, a claim for unfair trade or competition or tortious interference. No postsecondary educational institution shall be subject to a claim for damages related to its adoption, implementation, or enforcement of any contract, rule, regulation, standard, or other requirement in compliance with this Act. This Act is not intended to and shall not waive or diminish any applicable defenses and immunities, including, but not limited to, sovereign immunity applicable to postsecondary educational institutions.

Section 99. Effective date.

This Act takes effect upon becoming law or on July 1, 2021, whichever is later.

B. Full Text of the Illinois Student Athlete Endorsement Act (2019)[369]

H.B. 3904 Engrossed

AN ACT concerning education.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Short title. This Act may be cited as the Student Athlete Endorsement Act.

Section 5. Definitions. In this Act:

"Institution" means a publicly or privately operated college or university located in this State that offers baccalaureate degrees.

"Student athlete" means a student enrolled in an institution and participating in intercollegiate athletics.

Section 10. Student athlete compensation.

(a) An institution may not uphold any rule, requirement, standard, or other limitation that prevents a student athlete of that institution from earning compensation as a result of the use of the student athlete's name, image, or likeness. Earning compensation from the use of a student athlete's name, image, or likeness may not affect the student's scholarship eligibility.

(b) An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, may not prevent a student athlete of an institution from earning compensation as a result of the use of the student's name, image, or likeness.

369. H.B. 3904, 101st Gen. Assemb. (Ill. 2019).

(c) An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, may not prevent an institution from participating in intercollegiate athletics as a result of the compensation of a student athlete for the use of the student's name, image, or likeness.

Section 15. No compensation for prospective student athlete. An institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics may not provide a prospective student athlete with compensation in relation to the athlete's name, image, or likeness.

Section 20. Professional representation.

(a) An institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics may not prevent a student athlete from obtaining professional representation in relation to a contract or legal matter, including, but not limited to, representation provided by an athlete agent or legal representation provided by an attorney.

(b) Professional representation provided by an athlete agent to a student athlete shall be by a person licensed pursuant to the Illinois Athlete Agents Act. An athlete agent representing a student athlete shall comply with the federal Sports Agent Responsibility and Trust Act in his or her relationship with the student athlete.

Section 25. Scholarships. A scholarship from the institution in which a student athlete is enrolled that provides the student with the cost of attendance at that institution is not compensation for purposes of this Act, and a scholarship may not be revoked as a result of earning compensation or obtaining legal representation pursuant to this Act.

Section 30. Contracts.

(a) A student athlete may not enter into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness if a provision of the contract is in conflict with a provision of the athlete's team contract.

(b) A student athlete who enters into a contract providing compensation to the athlete for use of the athlete's name, image, or likeness shall disclose the contract to an official of the institution, to be designated by the institution.

(c) An institution asserting a conflict described in subsection (a) shall disclose to the student athlete or the athlete's legal representation the relevant contractual provision that is in conflict.

(d) A team contract of an institution's athletic program may not prevent a student athlete from using the athlete's name, image, or likeness for a commercial purpose when the athlete is not engaged in official team activities. It is the

intent of the General Assembly that this prohibition shall apply only to contracts entered into, modified, or renewed on or after the effective date of this Act.

Section 99. Effective date. This Act takes effect January 1, 2023.