

11-7-2021

Like and Subscribe: The Fight for Student Athletes' NIL Rights

Jovanny Nava

Follow this and additional works at: <https://scholarship.law.slu.edu/lawjournalonline>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Like and Subscribe: The Fight for Student Athletes' NIL Rights

Jovanny Nava*

On June 21, 2021, the Supreme Court decided *NCAA v. Alston*.¹ At its center, the case concerned a putative class action brought by current and former student athletes alleging the National Collegiate Athletic Association (NCAA) violated federal antitrust laws by limiting the compensation they could receive in exchange for their athletic services² The Northern District of California permanently enjoined the NCAA from limiting education related benefits that member conferences or schools could provide.³ The Ninth Circuit affirmed.⁴

In a unanimous decision, the Court, through an opinion written by Justice Neil Gorsuch, held the district court's injunction as consistent with established antitrust principles.⁵ In his concurrence, Justice Brett Kavanaugh laid out the implications of the Court's decision. While the Court decided the case at bar on narrow grounds concerning the *education* related benefits which conferences and schools could provide their student athletes, that these restrictions were unable to survive rule of reason scrutiny does not bode well for the remaining rules restricting student athletes from receiving compensation or benefits from their colleges for playing sports.⁶ *Alston* opens up one route through which student athletes can challenge the remaining NCAA restrictions through the courts. But during the runup to the Court deciding *Alston*, the battle challenging the NCAA's policy prohibiting athletes from profiting off their name, image, and likeness provides another way through which athletes can bring about such change.

* J.D. Candidate, May 2023, Saint Louis University School of Law

¹ *NCAA v. Alston*, 141 S. Ct. 2141, 2141 (2021).

² *Id.*

³ *Id.* at 2147.

⁴ *Id.* at 2154.

⁵ *Id.* at 2166.

⁶ *Alston*, 141 S. Ct. at 2167.

Name, image, and likeness (NIL) refers to a student athlete's ability to earn income from licensing deals for their personal brand and association with his or her university's athletics team.⁷ After vehemently opposing the ability of athletes to enter into these potentially lucrative collaborations, on June 30, 2021, the NCAA reversed course when it amended its policy to allow such opportunities.⁸ The NCAA's decision to alter their regulation also followed several states' enactment of legislation aimed at allowing athletes to profit off their name, image, and likeness. Many state legislators were driven to enact such statutes following courts' hesitancy to challenge the prior NCAA regulations forbidding student athletes from profiting off their personal brand.⁹

The first state to enact such a law was California through its 2019 Fair Pay to Play Act.¹⁰ The law, meant to go into effect January 1, 2023, prohibited colleges from upholding any limitation preventing a student athlete from profiting off their name, image, and likeness.¹¹ Further, the law prohibited the NCAA from disqualifying California member schools complying with the law.¹²

The second such measure, enacted in Colorado, took a tamer approach. Senate Bill 20-123 was passed in March 2020 and is set to also take effect

⁷ Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Sept. 01, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

⁸ Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NATIONAL COLLEGIATE ATHLETIC ASS'N (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>.

⁹ Joe Schick, *Name, Image, Likeness: It's Do or Die for the NCAA*, CIN. L. REV. (Dec. 22, 2020), <https://uclawreview.org/2020/12/22/name-image-likeness-its-do-or-die-for-the-ncaa/>.

¹⁰ Alaa Abdeldaiem, *California Governor Signs Fair Pay to Play Act*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/california-governor-signs-fair-pay-to-play-act-lebron-james>.

¹¹ *Id.*

¹² *Id.*

on January 1, 2023.¹³ While the law states that an athletic association shall not prevent a student from profiting off their name, image, and likeness, it also created an exception where a Colorado institution was a member of an association which required the enforcement of such a prohibition.¹⁴ Such convoluted language created much confusion around the new law.

Florida was the third state to adopt such a measure through the enactment of the Intercollegiate Athlete Compensation and Rights Bill on June 12, 2020.¹⁵ With an effective date of July 1, 2021, it significantly ratcheted up the pressure on the NCAA to reconsider its existing policy.¹⁶ But the Florida law created several restrictions on the types of contracts athletes can enter into. The most significant of these restrictions is disallowing conflicts with an athlete's school, the reporting of all deals, that compensation come from third parties not affiliated with the school, and that such compensation be commensurate with the "fair market value of the authorized use."¹⁷

It was in the context of such new laws that the NCAA approached Congress in December 2019 to lobby for federal legislation that would supersede the developing mosaic of state laws.¹⁸ And in April 2020, following federal inaction and with Congress preoccupied with responding to the beginning of the coronavirus pandemic, the NCAA's Board of Governors adopted a plan to move forward with reforming the

¹³ Steve Berkowitz, *Colorado Governor Signs College Athlete Name, Image and Likeness Bill*, USA TODAY (Mar. 20, 2020), <https://www.usatoday.com/story/sports/college/2020/03/20/colorado-governor-signs-college-athlete-name-image-likeness-bill/2887481001/>.

¹⁴ *Id.*

¹⁵ Matt Baker, *Governor Ron DeSantis Signs Florida Name, Image and Likeness Bill Into Law*, TAMPA BAY TIMES (June 12, 2020), <https://www.tampabay.com/sports/gators/2020/06/12/gov-ron-desantis-signs-florida-name-image-and-likeness-bill-into-law/>.

¹⁶ *Id.*

¹⁷ Schick, *supra* note 9.

¹⁸ *Id.*

association's NIL policies.¹⁹

The concept of athletes lending their NIL to brands via advertisements, endorsements, and sponsorships is not a novel concept within our society and economy. Rather, professional athletes have been doing it for decades. By allowing student athletes to profit from their brand during their time in college, the change in regulation simply moved up the timeframe during which athletes can begin building their brand. The rise of social media and its potential to drive consumer decisions and spending is another factor that led to the ability for athletes to monetize their brand. Social media serves as a powerful tool for student athletes because it affords them the opportunity to profit from their followers.²⁰ For example, Instagram influencers are paid based on their number of followers. The more followers an influencer has, the more potential for profit.

But student athletes' newfound ability to begin profiting off their brand poses several new considerations and issues which these athletes must now deal with, often with minimal legal knowledge. One such consideration which athletes should bear in mind at the inception of their careers concerns protecting the brand they have and will work so hard to build. An athlete would do well to seek and obtain trademark protection through the United States Patent and Trademark Office for their brand before they begin to monetize it.²¹ Such protection will allow an athlete to license the brand as well as protect it during any future disputes. An athlete should also consider retaining an attorney and/or agent to preserve and grow the brand.²² An attorney or agent would represent an athlete in trademark disputes, contract negotiations, and potential collaborations.

¹⁹ *Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, NAT'L COLLEGIATE ATHLETIC ASS'N (Apr. 29, 2020), <http://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions>.

²⁰ Schick, *supra* note 9.

²¹ Jeremy M. Evans, *Age of Name, Image, and Likeness*, AMERICAN BAR ASS'N (Dec. 1, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/november-december/student-athlete-brands-age-name-image-likeness/.

²² *Id.*

But of course, not every student athlete will be able to afford such services. This has spurred debate around what role universities and their athletic departments should play in helping an athlete navigate this new and complex realm. Such institutions are already well-positioned and experienced at negotiating brand deals.²³ But allowing universities to play such a role runs the risk of putting them in a position of conflict of interest and not properly prepare athletes to handle their business matters after graduation.²⁴ Further, by involving themselves in an athlete's deals, schools risk exposing themselves to potential liability should a deal turn sour.²⁵ Rather, the best approach would be one wherein schools provide their athletes with an education on best practices, what a standard exemplary deal would entail for them, and how athletes can protect their rights.²⁶ By providing a baseline education, schools will better prepare their athletes while also limiting their own exposure.

Currently, 28 states have some type of NIL law on the books.²⁷ In the 22 states that lack such laws, the NCAA has advised its member schools to craft their own policies.²⁸ Such variety currently allows schools located within states that have more favorable NIL laws and conditions to use that advantage to attract top talent.²⁹ The most prominent example occurred during the Southeastern Conference's annual media days, where Alabama head football coach, Nick Saban, hinted that sophomore quarterback Bryce Young was approaching the one million dollar mark in NIL deals –

²³ *Id.*

²⁴ *Id.*

²⁵ Courtney Majocha, *The New World of College Athletics*, HARVARD LAW TODAY (Aug. 3, 2021), <https://today.law.harvard.edu/the-new-world-of-college-athletics/>.

²⁶ *Id.*

²⁷ Dan Murphy, *NIL Laws Add New Variable to Recruiting Decisions*, ESPN (Oct. 21, 2021), https://www.espn.com/college-sports/story/_/id/32445468/nil-laws-add-new-variable-recruiting-decisions.

²⁸ *Id.*

²⁹ *Id.*

all before playing his first game.³⁰ Federal legislation is therefore needed if the intention is to create a more uniform playing field for both student athletes and colleges around the country.

The ability to profit off one's hard work is a core value in this country, built on time-tested principles of free market capitalism and individual freedom. Having to juggle educational, athletic, and personal responsibilities, college athletes must exhibit a level of drive and tenacity if they wish to succeed both on and off the field. By allowing them to profit from the brand they work so hard to build and cultivate, NIL policies set such students up with a skillset which they can draw from when they begin their professional careers. And since many student athletes do not get the opportunity to go pro, this experience allows them to go out and succeed in the next chapter of their lives – whatever that may be. The economic benefits of encouraging such entrepreneurship will be felt well beyond the athletics industry. The success of the movement to allow student athletes to profit off their NIL exhibits how athletes and their allies can exert pressure on the NCAA to reconsider their current policies governing this space. Coupled with the Court's recent decision in *Alston*, which played a significant role in applying pressure on the NCAA, it provides a framework on how activists can go after the remaining restrictions.

Edited by Alex Beezley

³⁰ Mike Rodak, *Bryce Young: Alabama's Culture Prevents NIL Earnings from Being Issue*, AL.COM (Aug. 19, 2021), <https://www.al.com/alabamafootball/2021/08/bryce-young-alabamas-culture-prevents-nil-earnings-from-being-issue.html>.