A TRANSFORMATIVE STANDARD FOR TRANSFORMATIVE TIMES: PROTECTING STUDENT-ATHLETE SPEECH IN THE ERA OF NAME, IMAGE, AND LIKENESS

TABLE OF CONTENTS

INTRODUCTION

"[U]sing AI to produce work that a student then represents as one's own could result in a charge of academic misconduct," a statement from Louisiana State University warned.[1] The declaration was timely; acclaimed gymnastics student-athlete and social media influencer Olivia Dunne had just endorsed "Caktus.AI," an artificial intelligence startup with a business model centered on student shortcuts.[2] Pursuant to Louisiana state law and the university's name, image, and likeness (NIL) policy, "[a] postsecondary education institution may prohibit an intercollegiate athlete from using their NIL for compensation if such opportunity ... goes against the values of the postsecondary education institution."[3] This broad grant of discretion raises two central questions: what are institutional values, and can institutions legally regulate the expressive content of NIL deals when such content conflicts with institutional values?

Provisions of this nature are customary of existing NIL state laws, all of which have been rapidly enacted and altered within the past several years.[4] The Supreme Court's decision in *NCAA v. Alston* completely revolutionized the landscape of college athletics, holding the National Collegiate Athletic Association's (NCAA) prohibition on "educational benefits" was an unnecessarily restrictive means of attaining procompetitive goals.[5] The ruling opened the door for all NCAA restrictions on student-athlete compensation, including prohibitions on profiting from their NIL, to potentially be

1. Brett Martel, *Olivia Dunne Endorses an AI Writing Tool. Is That a Problem?*, AP NEWS (Mar. 8, 2023, 2:17 PM), https://apnews.com/article/livvy-dunne-lsu-nil-ai-c063f7f457cade99a5435c5e94fdf68a [https://perma.cc/2SZA-6WAR].

2. *See id.*

3. LSU Board of Supervisors, *Policy on Student-Athlete Name, Image and Likeness (NIL)*, LA. ST. UNIV. 1, 3 (2021), https://www.lsu.edu/bos/docs/policies/policy_name-imagelikeness-2021-june.pdf [https://perma.cc/AP87-Y4T9].

4. *See* Callan G. Stein, Brett E. Broczkowski, Christopher M. Brolley, Connor DeFilippis & Mia Marko, *State and Federal Legislation Tracker*, TROUTMAN PEPPER (Sept. 26, 2024), https://www.troutman.com/state-and-federal-nil-legislation-tracker.html [https://perma.cc/L2BE-FKXF].

5. *See* NCAA v. Alston, 594 U.S. 69, 105-07 (2021).

deemed violations of antitrust law.[6] In turn, the NCAA lifted its prohibitions on NIL compensation.[7] An influx of state legislation ensued, causing drastic change that has presented the NCAA with an array of complex legal questions to navigate.[8] NIL policymaking was initially left entirely to state legislatures, with institutions left to conform their policies to the specific laws of the state in which they operate.[9] Even as the NCAA has issued more guidance and legislation, there is a complete lack of uniformity in regulating NIL compensation. This inconsistency has dramatically transformed the nature of recruiting and competition in college athletics.[10]

Despite the confusion about how NIL should and will be regulated, and its impacts on the future of collegiate athletics, one thing is certain: it has empowered student-athletes in unprecedented ways. The NCAA is primarily built on the concept of amateurism. For decades, this concept was stringently protected by a bright-line rule that student-athletes were not permitted to receive any monetary compensation.[11] However, in a world where the NCAA generated hundreds of millions of dollars in revenue without its student-athletes seeing a penny in return, this rule proved to be unjust. *Alston* finally manufactured a way for student-athletes to capitalize on their talents and platforms without compromising the amateurism at the heart of collegiate athletics.[12] This, among other things, allows student-athletes to profit from their NIL.

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6. *See* Tymber W. Long, Comment, *Nice Try, NCAA—The Sherman Antitrust Act Applies to You, Too*, 61 WASHBURN L.J. ONLINE 71, 80 (2022), https://www.washburnlaw.edu/publications/wlj/online/volume/61/long-nice-try-ncaa.html [https://perma.cc/YCQ9-PRXU].

7. 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/9HPK-CJNN].

8. *See* Laura C. Murray, Note, *The New Frontier of NIL Legislation*, 60 HOUS. L. REV. 757, 766-67 (2023).

9. *See* Hosick, *supra* note 7.

10. *See infra* Part I.

11. NCAA v. Bd. of Regents, 468 U.S. 85, 88, 102, 120 (1984) ("The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role.").

12. *See* NCAA v. Alston, 594 U.S. 69, 107 (2021); Greg Johnson & StudentNation, *The NCAA Makes Billions and Student Athletes Get None of It*, THE NATION (Apr. 9, 2014), https://www.thenation.com/article/archive/ncaa-makes-billions-and-student-athletes-get-none-it/ [https://perma.cc/8SKU-LT9H].

Student-athletes fought for the capability to capitalize on their NIL for years, arguing their talents were being exploited without fair compensation, whether in the context of video games, advertisements, or the revenue of the NCAA in general.[13] Thus, the NCAA lifting the bright-line restriction on NIL opportunities was monumental for the rights of student-athletes, who have wasted no time seeking out this new world of opportunity.[14] Since *Alston*, every institution has rushed to try to gain an advantage, as NIL resources have now become the primary focus in recruiting efforts. Some argue that amateur competition has already been completely engulfed by commercial motivations.[15]

As a result, the NCAA continues to desperately seek help from Congress in a push for federal NIL legislation. Such legislation would theoretically provide uniformity in regulation, ensure transparency in disclosure of NIL activity, and foster the restoration of fairness in competition.[16] NIL compensation is clearly the new norm in collegiate athletics, and the NCAA is scrambling to adapt and preserve amateurism while empowering student-athletes to access the undeniable benefits of NIL.[17] Even beyond the tangible monetary benefits, NIL gives student-athletes a platform to express

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13. *See*, *e.g.*, Hart v. Elec. Arts, Inc., 717 F.3d 141, 146-47 (3d Cir. 2013); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1271, 1284 (9th Cir. 2013); O'Bannon v. NCAA, 802 F.3d 1049, 1052-53 (9th Cir. 2015).

14. *See* Bill Carter, *Seven Data Points That Will Tell the Story of NIL in 2023*, SPORTS BUS. J. (Jan. 17, 2023), https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/01/17-Carter. aspx [https://perma.cc/VV5B-5D3J]; Erica Hunzinger, *One Year of NIL: How Much Have Athletes Made?*, AP NEWS (July 6, 2022, 4:57 PM), https://apnews.com/article/college-football-sports-basketball-6a4a3270d02121c1c37869fb54888ccb [https://perma.cc/M9SM-L8SL].

15. *See, e.g.*, Natalie M. Welch, *NIL Disrupts the Power Dynamics of College Sports*, SEATTLE UNIV. (2022), https://www.seattleu.edu/business/news-events/albers-brief/albers-brief-fall-2022/nil-disrupts-the-power-dynamics-of-college-sports/ [https://perma.cc/C5F6-AQD8].

16. *See* David Cobb, *Tennessee Granted Temporary Injunction by Federal Judge as NCAA Loses Ability to Enforce NIL Policy*, CBS SPORTS (Feb. 23, 2024, 5:55 PM), https://www.cbssports.com/college-football/news/tennessee-granted-temporary-injunction-by-federal-judge-as-ncaa-loses-ability-to-enforce-nil-policy/ [https://perma.cc/F4FB-UY4M] ("The NCAA fully supports student-athletes making money from their name, image and likeness and is making changes to deliver more benefits to student-athletes, but an endless patchwork of state laws and court opinions make clear partnering with Congress is necessary to provide stability for the future of all college athletes.").

17. *See id.*

themselves and their values, as well as build their personal brands in new ways.[18]

While NIL activity may not cleanly fit into any one existing category of First Amendment activity, such as commercial or student speech, the expressive content of NIL activity necessitates First Amendment protection.[19] In *Healy v. James*, the Supreme Court expressly recognized that "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs."[20] At their core, NIL deals foster opportunities for student-athletes to associate with certain organizations, values, and belief systems. Naturally, such expression may be unavoidably tethered to institutions themselves by virtue of student-athletes' enrollment.[21] Further, as institutions become more involved in NIL activity, the student-athlete's role within the institution is becoming closer to that of an employee.[22] For these reasons, state laws and school policies that broadly enable institutions to regulate the content of NIL deals, coupled with the law trending towards student-athletes becoming public employees, raise significant threats to the First Amendment rights of these student-athletes.

On the topic of state and institutional policies, most states have passed NIL laws, and institutions have then conformed their policies to those laws.[23] These laws tend to be extremely similar in certain respects.[24] For instance, the NIL opportunities available to a student-athlete can generally be restricted based on the nature of the performance in the contract, the nature of the compensation

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18. *See* Sam C. Ehrlich & Neal C. Ternes, *Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech*, 45 COLUM. J.L. & ARTS 47, 48, 50 (2021); *see also* Jamarius Burton, *NIL Deals*, JAMARIUS BURTON, https://www.jamariusburton.com/s-projects-side-by-side [https://perma.cc/L3P7-E7PS] (statement of former University of Pittsburgh basketball star Jamarius Burton) ("For me, NIL just allows me to showcase my skills. I am not really in it for the money, but just for an opportunity.").

19. *See* Ehrlich & Ternes, *supra* note 18, at 63 ("The argument that NIL restrictions violate the First Amendment rights of athletes is a complicated one .... We feel that NIL restrictions are not exclusively an issue of commercial speech.").

20. 408 U.S. 169, 181 (1972).

21. *See* discussion *infra* Part II.A.

22. *See* discussion *infra* Part II.A.

23. *See* Stein et al., *supra* note 4.

24. *See NIL State Laws: Current Name, Image, and Likeness Legislation at the State Level*, NIL NETWORK (Aug. 27, 2022), https://www.nilnetwork.com/nil-laws-by-state/ [https://perma.cc/AWY2-LGBP].

provided, and even the motivations behind the formation of the agreement.[25] The focus of this Note, however, is the constitutionality of restrictions on the *expressive* content of NIL activity; that is, the subject matter a student-athlete endorses through NIL. These restrictions tend to take two general forms: (1) restrictions that specifically prohibit certain endorsements that conflict with existing institutional sponsorships or promote specific "vice industries";[26] and (2) restrictions that broadly prohibit endorsements that conflict with "institutional values."[27] The second of these forms gives institutions seemingly wide-ranging discretion over how student-athletes can express themselves in utilizing their platform to pursue financial gain. Both types of restrictions, however, present interesting First Amendment questions that will prove troubling for institutions.

As an entirely new and developing area of the law, NIL further complicates the existing struggles in determining how NCAA student-athletes should be viewed by the law in the employment context. Such a determination is crucial to understanding the extent of student-athletes' First Amendment protections. Even as NIL drives the law further in the direction of student-athletes becoming employees of the university, student-athletes are still undeniably enrolled students of the university, and scholastic achievement is still a primary consideration for college athletics.[28]

This unique relationship between student-athletes and their institutions necessitates an entirely new standard for First Amendment analysis. This Note will craft that standard and create a workable framework to protect student-athletes from broad, discretionary restrictions on the expressive content of their NIL activity. Part I will provide relevant background on where the NIL landscape currently stands, the trends in current and prospective legislation, and the reality that student-athletes are destined to become public employees under the law. In consideration of this

25. *See id.*

26. *See* Ehrlich & Ternes, *supra* note 18, at 50.

27. *See id.*

28. *See* NCAA v. Alston, 594 U.S. 69, 107 (2021) ("By permitting colleges and universities to offer enhanced education-related benefits, [the district court's] decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools.").

reality, Part II will synthesize existing doctrine for student speech and public employee speech to create a new "Student-Athlete Standard" for analyzing the First Amendment protections that should be afforded to NIL deals. This Standard will afford student-athletes the First Amendment protections they deserve as they inevitably approach public employee status. In turn, Part III will apply this Standard to existing NIL policies, as well as proposed federal policies, to both illustrate the constitutional concerns of NIL law as it stands and conceptualize alterations to potentially avoid these concerns.

I. BACKGROUND

The NCAA's current plea for national uniformity in NIL regulation is the product of three years of what coaches have described as the "wild, wild west."[29] The absence of transparency in the negotiation of deals and the lack of regulatory guidance as to the limits of those negotiations, have created an all-out race to the forefront of the NIL scene. Unsurprisingly, the institutions with the most resources have gained a colossal advantage.[30] One thing that was supposed to be clear about NIL from the outset was that compensation would not be provided or facilitated by the institutions themselves.[31] Unfortunately for the NCAA, the line between institutions and the commercial world has blurred. The institutions' role in facilitating NIL deals must be understood to determine the role they can play in regulating the content of such deals; this will be illustrated in Part I.A. With this role outlined, Part I.B will provide a brief overview of the current operation of NIL law and proposed federal legislation, including the rationales underlying these policies, to demonstrate the uniqueness of the relationship between institutions and student-athletes.

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29. Mark Wogenrich, *Penn State's James Franklin Calls NIL 'the Wild, Wild West'*, SPORTS ILLUSTRATED (Dec. 26, 2022, 12:37 AM), https://www.si.com/college/pennstate/football/penn-state-football-james-franklin-nil-wild-wild-west [https://perma.cc/AS3Q-5W6V].

30. *See* Welch, *supra* note 15.

31. *NCAA Division I: Institutional Involvement in a Student-Athlete's Name, Image and Likeness Activities*, NCAA (Oct. 26, 2022) [hereinafter *NCAA Guidance on Institutional Involvement*], https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf [https://perma.cc/3B6N-Z558].

A. Institutional Involvement in NIL

On June 30, 2021, the NCAA formally announced its suspension of the prohibition on NIL opportunities, and released its initial guidance as to how institutions should structure and implement NIL policy.[32] Discussing the NCAA policy guidelines, Division II Presidents Council Chair Sandra Jordan noted, "The new policy preserves the fact college sports are not pay-for-play .... It also reinforces key principles of fairness and integrity ... and maintains rules prohibiting improper recruiting inducements. It's important any new rules maintain these principles."[33] Jordan's statement accurately reflected the initial intent of NIL implementation: to provide student-athletes a fair opportunity to financially capitalize on their talents and the value they bring to their institutions, while maintaining the amateurism and competitive fairness upon which the NCAA is purportedly built.[34]

One way the NCAA tailored the policy to ensure this was by prohibiting the institutions themselves from having too much involvement in NIL activity.[35] The one model that the NCAA feared most was a "pay-for-play" model, in which institutions find ways to effectively pay student-athletes to attend under the guise of NIL.[36] Pursuant to this concern, the NCAA explicitly mentioned the need and desire for federal legislation in their original guidance.[37] The policy was viewed as foundational material to fill in the gaps for existing state laws, and a placeholder for states without an NIL statute to follow in the absence of uniform federal legislation.[38]

Unfortunately for the NCAA, as the NIL industry exploded, uniform federal legislation did not follow.[39] Variations in state laws and unanswered questions in NCAA guidance have led to a

32. *See* Hosick, *supra* note 7.

33. *See id.*

34. *See id.*

35. *See NCAA Guidance on Institutional Involvement*, *supra* note 31.

36. *See NIL Update Memo*, NCAA (June 27, 2023), https://mc97gsxn49y6wmpf4p2n764zq7z1.pub.sfmc-content.com/2ezhy1105pc [https://perma.cc/X7YX-APAW].

37. *See* Hosick, *supra* note 7.

38. *Id.*

39. *See* Ralph D. Russo, *Congressional Hearing Targets 'NIL Chaos' in College Sports*, AP NEWS (Mar. 29, 2023, 3:11 PM), https://apnews.com/article/ncaa-nil-congress-hearing-c16418 7d3e590926e1c7cae18d4d2368# [https://perma.cc/6PD5-Y3JX].

complete lack of transparency and uniformity in the world of NIL, allowing some states to create de facto pay-for-play systems for their institutions.[40] The single most important factor in this process is the emergence of NIL collective organizations.[41] These collectives are created, often by prominent boosters or alumni of the institution, to pool funds together and facilitate NIL opportunities for student-athletes.[42] Collectives are legally separate from the institutions in a formal sense.[43] In a functional sense, however, collectives are a perfect illustration of how pay-for-play models have emerged in the absence of concrete regulation by the NCAA or federal government.[44] They serve primarily to pool donor funds and allocate them to student-athletes; a pay-for-play system in its most obvious form. Collectives remain legally separate from institutions, but not free from their influence.[45]

While a lack of institutional involvement in the facilitation of NIL activity was a bedrock of the initial NCAA guidance, this has simply not been the case in practice. In June of 2023, Texas passed a law that made it permissible for institutions to openly affiliate with NIL collectives.[46] This action was alarming to the NCAA, and prompted immediate guidance that if state law conflicts with NCAA memoranda, institutions are to follow NCAA guidance rather than the text of the statutes.[47] It also contained the following mandate: "Any entity that is so closely aligned with an institution that it is viewed as an extension of the university is subject to the same NIL scrutiny as the institution and must adhere to NCAA rules and policy."[48]

Unfortunately for the NCAA, the Texas law was only the beginning of states defying NCAA guidance by enabling NIL collectives to function as "extension[s] of the university."[49] On January

40. *See id.*

41. *See* Pete Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3 (July 6, 2022), https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/ [https://perma.cc/967Y-Y66X].

42. *Id.*

43. *Id.*

44. *See id.*

45. *See id.*

46. TEX. EDUC. CODE ANN. § 51.9246(m)(1) (West 2024).

47. *See NIL Update Memo*, *supra* note 36.

48. *Id.*

49. *See id.*; *see also* Stein et al., *supra* note 4.

10, 2024, to address this inevitable trend, the NCAA adopted its first official NIL bylaws, which took effect on August 1, 2024.[50] The legislation establishes concrete disclosure requirements, prohibits NIL from being negotiated during the recruitment of a prospective student-athlete, and bolsters educational resources to support student-athletes in pursuing NIL opportunities.[51] Most notably, there are additional proposals as to the relationship between NIL entities (collectives) and institutions, which purport to enable direct communication but keep financials separate between the parties.[52] While this appears to be a progressive move in the context of institutional involvement, it still pales in comparison to what states are doing in practice.

On February 23, 2024, a United States District Court in the Eastern District of Tennessee issued a preliminary injunction to prevent the NCAA from enforcing its NIL policy as it pertains to using NIL as a component of the recruiting process.[53] The injunction allows both high school prospects and transfer student-athletes to negotiate NIL deals as part of their recruitment, and for institutions to utilize NIL resources to induce attendance.[54] While the injunction only applied to the specific regulations pertaining to recruiting, the Court's reasoning represented a culmination of the issues with the current landscape of NIL law.[55] Further, on April 17, 2024, Virginia passed an amendment that creates the most aggressive NIL law to date, which reads: "No athletic association ... shall ... [p]revent an institution from compensating a student-athlete for the use of his name, image, or likeness."[56] Despite NCAA efforts to adapt, the new Virginia law, which took effect on July 1, 2024, illustrates that a

50. Meghan Durham Wright, *Division I Council Approves NIL Disclosure and Transparency Rules*, NCAA (Jan. 10, 2024, 7:56 PM), https://www.ncaa.org/news/2024/1/10/ media-center-division-i-council-approves-nil-disclosure-and-transparency-rules.aspx [https://perma.cc/5R5T-8X74].

51. *Id.*

52. *Id.*

53. Tennessee v. NCAA, No. 3:24-CV-00033-DCLC-DCP, 2024 WL 755528, at *1, *6 (E.D. Tenn. Feb. 23, 2024).

54. *Id.*

55. *Id.*

56. *See* VA. CODE ANN. § 23.1-408.1(C)(4) (2024).

lack of uniform, national regulation has made the enforcement of NCAA policy impossible.[57]

B. Current State of Policy

As outlined above, the current system of regulation consists of both state law and NCAA policy. NCAA bylaws and accompanying guidelines provide the broad foundation of NIL regulations that institutions "must" follow.[58] In states that have NIL statutes, those statutes control, and are often significantly similar to the NCAA guidelines.[59] As evidenced in Texas, however, if a state passes a law that is directly at odds with the NCAA guidance, the NCAA policy is supposed to control.[60] States can narrow or broaden NIL regulations in areas where NCAA guidance is not clear, but state laws are not supposed to directly contradict NCAA policy.[61] This is, of course, only according to how the NCAA believes its policy should interact with state law. In practice, the NCAA does not have any actual legal authority to enforce NIL policy, as evidenced by the Tennessee injunction.[62] The tension between state law and NCAA policy is a "game of chicken"—one that the states are currently winning.[63]

At this moment in time, thirty-four states have an active NIL law.[64] While there are certainly some sharp differences reflected in newer statutes from certain states, the language and effects of many statutes are similar to each other, and in accordance with NCAA guidelines.[65] State laws are enacted mostly to legally prohibit universities from interfering with student-athletes' general ability to profit from their NIL, and establish that their eligibility will not be impacted by pursuing NIL.[66] As noted, however, some have begun

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57. *See id.*

58. *See* Wright, *supra* note 50.

59. *See* Stein et al., *supra* note 4.

60. *See NIL Update Memo*, *supra* note 36.

61. *See id.*

62. *See* Tennessee v. NCAA, No. 3:24-CV-00033-DCLC-DCP, 2024 WL 755528, at *6 (E.D. Tenn. Feb. 23, 2024).

63. *See supra* notes 45-56 and accompanying text.

64. *See* Stein et al., *supra* note 4.

65. *See id.*

66. *See, e.g.*, MICH. COMP. LAWS ANN. § 390.1731 (West 2024) ("A postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation

to completely diverge from NCAA policy and tailor their state law to allow institutions to have a greater role.[67]

Arkansas, which was the first state to go down this path, and the aforementioned Texas law are good examples of this divergence.[68] Interestingly, some states that formerly had NIL laws—Alabama, for instance—have repealed the statutes, citing an effort to keep up with other states who are purportedly gaining an advantage, either by not having a state statute to limit NIL activity or by passing state laws that enable more NIL activity.[69] The specific language of these statutes, and the implications of how NIL activity is affected by institutions in these states, will be illustrated in Part II.

As evidenced by the current landscape of NIL regulation, uniform federal legislation would go a long way in resolving current conflicts between states as well as between state law and institutional policy.[70] There are a variety of proposed NIL bills, all of which significantly differ in purpose and scope, and these differences mainly stem from whether the legislators prioritize empowering the athletes or the institutions.[71] For instance, the Protecting Athletes, Schools, and Sports Act of 2023 seeks to provide concrete structure to NIL and ensure institutions are in position to actively monitor NIL to preserve competitive fairness—an ideal policy from the NCAA's perspective.[72] The College Athletes Protection & Compensation Act of 2023, on the other hand, is aimed not to increase

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that prevents a student of that institution from fully participating in intercollegiate athletics based upon the student earning compensation as a result of the student's use of his or her name, image, or likeness rights.").

67. *See*, *e.g.*, ARK. CODE ANN. § 4-75-1303(b) (West 2024) ("An institution of higher education, its supporting foundations, or its authorized entities may identify, create, facilitate, and otherwise enable opportunities for a student-athlete to earn compensation for the commercial use of the student-athlete's publicity rights.").

68. *See id.*; TEX. EDUC. CODE ANN. § 51.9246(m)(1) (West 2024).

69. *See*, *e.g.*, Burr & Forman, *Alabama Has Repealed Its NIL Law—Can Alabama's Student-Athletes Still Get Paid?*, J.D. SUPRA (Feb. 17, 2022), https://www.jdsupra.com/legalnews/alabama-has-repealed-its-nil-law-can-7729528/ [https://perma.cc/WN39-6DPE].

70. *See* Cobb, *supra* note 16 ("The NCAA fully supports student-athletes making money from their name, image and likeness and is making changes to deliver more benefits to student-athletes, but an endless patchwork of state laws and court opinions make clear partnering with Congress is necessary to provide stability for the future of all college athletes.").

71. *See* discussion *infra* Part III.B.

72. *See generally* Protecting Athletes, Schools, and Sports Act of 2023, S. 2495, 118th Cong. (2023).

regulation as the NCAA desires, but to give student-athletes unprecedented levels of access to compensation, benefits, and legal protection.[73] The makeup of proposed federal legislation will be further discussed in Part III, but notwithstanding the many differences in legislative intent, all the bills have a common denominator: they would preempt existing state law, establish disclosure procedures to ensure compliance and transparency, and most importantly, officially codify NIL rights in federal law.[74]

Regarding the First Amendment, state and proposed federal laws have the potential to enable heavy institutional regulation of NIL. Most state laws, and some of the proposed federal laws, explicitly enable institutions to prohibit student-athletes from entering deals that concern recognized "vice" industries, such as alcohol, tobacco, and gambling.[75] First Amendment concerns are clear not only for these prohibitions but also for the more restrictive provisions imposed by the institutions themselves: those that prohibit deals which conflict with the institution's image or values.

The current structure of NIL regulation, which empowers institutional involvement in the activity of collectives and the facilitation of NIL opportunities generally, makes these provisions even more problematic.[76] It is essential to consider how this expanded role will impact institutions' capability to restrict the content of NIL agreements. Part II will illustrate how the landscape of NIL policy, along with the expanded role of institutions, have likened the relationship between institutions and student-athletes to that of an employer and employee. For First Amendment purposes, this can be addressed by creating a unique standard which synthesizes existing First Amendment doctrine pertaining to public university employees and students.

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73. *See* College Athletes Protection & Compensation Act of 2023, 118th Cong., https://www.booker.senate.gov/imo/media/doc/college_athletes_protection_and_compensation_act_of_2023.pdf [https://perma.cc/L94X-EYFL].

74. *See* discussion *infra* Part III.B.

75. *See* Protecting Athletes, Schools & Sports Act of 2023, S. 2495, § 5(c)(2)(A); *see, e.g.*, LA. STAT. ANN. § 17:3703(C)(2) (2024); *see also supra* note 25 and accompanying text (referring to certain "vice industries").

76. *See supra* Part I.A.

II. CRAFTING THE STUDENT-ATHLETE STANDARD FOR FIRST AMENDMENT ANALYSIS: STUDENTS, PUBLIC EMPLOYEES, OR BOTH?

While the First Amendment is perhaps the most prized pillar of American democracy, it is not as simple as the text of the Constitution suggests.[77] There are many circumstances in which the government can lawfully restrict speech, and a variety of legal doctrines have been tailored to specific situations in which such restriction is permissible. As the Supreme Court wrote in *Healy v. James*, a case in which the Court greatly restricted public universities from regulating student speech and association on college campuses, "First Amendment rights must always be applied 'in light of the special characteristics of the ... environment' in [each] particular case."[78] Thus, there is no need to group NIL expression within an existing category of speech that the government is or is not allowed to regulate. This would not only ignore the unique nature of NIL but also undermine the ever-evolving relationship between universities and their student-athletes.

When the NCAA stopped restricting athletes' ability to profit from their NIL, it began an ongoing trend of student-athletes taking on more and more characteristics of employees. The entire rationale behind prohibiting financial compensation for student-athletes in the first place was to keep them as just that: students before athletes.[79] With NIL compensation now permitted, the law can no longer simply categorize student-athletes as ordinary college students, nor can it strictly group them in with other employees of the university. The circumstances call for unique treatment that reconciles athletes' employee-like characteristics with their factual status as enrolled students. Thus, the extent to which student-athletes have assumed the characteristics of public employees must be examined. With this dual role established, existing doctrine pertaining to both public employees and public university students

77. *See generally* U.S. CONST. amend. I.

78. 408 U.S. 169, 180 (1972).

79. *See* NCAA v. Alston, 594 U.S. 69, 82 (2021) ("The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports.").

both lend applicable concepts that can be synthesized to tailor a new "Student-Athlete" category for First Amendment analysis.

A. Student-Athletes as Both Public Employees and Students

The NCAA's unwavering use of the term "student-athlete" is accompanied by a near century of history and litigation pertaining to the employment status of student-athletes.[80] Prior to the legalization of NIL, whether college athletes argued for worker's compensation benefits[81] or simply that the revenue they generate for the NCAA and its conferences should classify them as employees,[82] the term "student-athlete" functioned as a guise to protect the NCAA from confronting the drastic implications of classifying college athletes as employees.[83] Since the beginning of the NIL era, however, the tone has changed dramatically.

In 2021, Jennifer Abruzzo, general counsel for the National Labor Relations Board (NLRB), released a ground-breaking memorandum[84] in the wake of the ruling in *Northwestern University & College Athletes Players Association*, a case in which the NLRB refused jurisdiction over student-athletes.[85] Abruzzo argued that, even before NIL, but especially given the NCAA's lift on the NIL ban, college athletes were conclusively encompassed by both the National Labor Relations Act (NLRA) and the common law definitions of "employee."[86] Her argument is premised on the fundamental definition of employee: someone "who perform[s] services for another

80. *See* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 74 (2006).

81. *See* State Comp. Ins. Fund v. Indus. Comm'n, 314 P.2d 288, 289-90 (Colo. 1957) (dismissing a claim for workers' compensation benefits after a student-athlete died from a head injury he suffered in a college football game).

82. *See* Dawson v. NCAA, 932 F.3d 905, 913 (9th Cir. 2019) (denying that the NCAA or the PAC-12 conference were employers of student-athletes, or that student-athletes were employees of their schools to begin with).

83. *See* McCormick & McCormick, *supra* note 80.

84. *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, NLRB (Sept. 29, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of [https://perma.cc/RD6Z-JNVQ].

85. *See generally* 362 N.L.R.B. 1350, 1355-56 (2015).

86. Memorandum GC 21-08 from Jennifer A. Abruzzo, General Counsel of the NLRB (Sept. 29, 2021).

and [is] subject to the other's control," and in many cases receives consideration for those services.[87] She pointed to the fact that institutions and the NCAA dictate the requirements for eligibility and restrictions on participation and make millions from the services that athletes render through playing sports.[88] Abruzzo even seems to think that athletic scholarships constitute consideration indicative of an employee-employer relationship,[89] a premise that the NCAA and lawmakers have consistently resisted.[90] However, with the rise of NIL compensation, and athletes' ability to contract for compensation, Abruzzo's argument has become undeniable.[91] The memorandum was not merely an opinion, but a call to action.

Abruzzo consciously ignited the fight to do away with the term "student-athlete" and secure protections for college athletes as employees of their institutions.[92] In May of 2023, the NLRB filed a complaint against the University of Southern California and the PAC-12 Conference, alleging they are joint employers of college athletes.[93] The case will have massive implications on the legal employment status of college athletes. The NCAA, PAC-12, and University of Southern California are all private parties, and deeming them joint employers will effectively grant all NCAA athletes access to employee protections under the NLRA.[94]

Recently, the NLRB took the leap it refused to take in *Northwestern University*, and ruled that men's basketball student-athletes at Dartmouth University are, in fact, employees of the institution, and

87. *Id.* (alteration in original).

88. *See id.*

89. *See id.*

90. *See supra* notes 79-82 and accompanying text.

91. *See* Memorandum GC 21-08 from Jennifer A. Abruzzo, *supra* note 86 ("In addition, Players at Academic Institutions are permitted to use professional service providers to assist them in engaging in NIL activities. The freedom ... makes Players at Academic Institutions much more similar to professional athletes who are employed by a team to play a sport, while simultaneously pursuing business ventures." (footnote omitted)).

92. *See id.*

93. *See generally* Complaint, NLRB v. Univ. S. Cal. et al., No. 31-CA-290326 (N.L.R.B. May 18, 2023).

94. Steve Berkowitz, *NCAA, Pac-12, USC Trial Begins with NLRB over Athletes' Employment Status*, USA TODAY (Nov. 8, 2023, 2:43 PM), https://www.usatoday.com/story/sports/college/2023/11/07/ncaa-pac-12-usc-student-athlete-misclassification-trial/71483085007/ [https://perma.cc/X7SN-WK25].

specifically granted them the right to unionize.[95] This case is significant not only because the NLRB affirmatively ruled that student-athletes fell within the statutory definition of employee, but also because Dartmouth does not even give athletic scholarships.[96] The Board adopted an extremely liberal definition of compensation, finding that receiving an "early read" from admissions and valuable gear from the athletics department was compensation in lieu of a scholarship.[97] These benefits are nominal compared to institutions that award athletics scholarships and facilitate exorbitant payments to their student-athletes through NIL collectives. In July of 2024, the Third Circuit even declined to preclude student-athletes from bringing claims under the Fair Labor Standards Act, which opens the door even further for them to be recognized as employees.[98] As a result, the argument that student-athletes are employees of their universities continues to strengthen.

Statutory trends pertaining to institutional involvement in NIL activity also provide strong evidence for student-athletes attaining employee status. As described in Part I, state NIL lawmaking is devolving to an effective "arms race" in which each state attempts to maximize the NIL capacity of their institutions.[99] One of the most common ways in which states have attempted to gain an advantage is by tailoring the law to enable a hands-on role for institutions in the facilitation and creation of NIL opportunities.[100] When NIL regulations were first conceptualized by the NCAA, separating the institution from the compensation was of the utmost importance.[101] Now, however, states have clearly abandoned the sense of amateurism in college athletics, and state legislatures are effectively enabling pay-for-play through NIL legislation. Missouri's updated NIL

95. *See* Trustees of Dartmouth Coll., N.L.R.B. No. 01-RC-325633, at 20-22 (Feb. 5, 2024) ("Further, the Board provides that employee status will be found where there is a rudimentary economic relationship, actual or anticipated, between employee and employer. To make this determination, the Board employs a broad test that considers payments other than traditional wages. These payments need not be large or otherwise significant in amount." (footnote omitted)).

96. *Id.* at 17-18.

97. *Id.* at 19-20.

98. *See* Johnson v. NCAA, 108 F.4th 163, 167 (3d Cir. 2024).

99. *See* discussion *supra* Part I.A.

100. *See supra* notes 52-56 and accompanying text.

101. *See supra* notes 31-35 and accompanying text.

law, as amended by House Bill 417, illustrates the typical language that has emerged in state statutes that follow this trend.[102] The language broadens the role of institutions and contradicts some of the specific distinctions that the NCAA initially made about institutional involvement.[103] The role of institutions in NIL activity was originally intended to be one of education, support, and monitoring. States, however, have aggressively pushed to enable institutions to be facilitators of the deals.[104]

In making this push, states have not forgotten to shield institutions from potential liability; the Texas NIL law outlines language that is customary of NIL statutes on this matter.[105] It provides that while institutions are now enabled to directly affiliate and facilitate opportunities with NIL collectives, the acts of those collectives are still not acts of the institution.[106] States are giving institutions a vehicle to streamline NIL compensation without bearing the burden of compensating athletes directly for participation in the institution's athletic programs. On this note, the Texas bill, as well as the Missouri bill and several others, explicitly state that despite receiving compensation for their NIL, student-athletes are not to be considered employees under the law.[107]

The language attempting to expressly clarify that student-athletes are not employees, and that even acts of NIL collectives that are facilitated and endorsed by the institution are not acts of that institution itself, reveals the true intention of the states. States

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102. *See* MO. ANN. STAT. § 173.280(4)(2)(b) (West 2024) ("A postsecondary educational institution ... shall have the right to identify, create, facilitate, negotiate, support, enable, or otherwise assist with opportunities for a student athlete to earn compensation from a third party, including an institutional marketing associate.").

103. *See* Hosick, *supra* note 7.

104. *See* Stein et al., *supra* note 4.

105. *See* TEX. EDUC. CODE ANN. § 51.9246(o) (West 2024) ("An activity of a third-party entity ... may not be construed as an act on behalf of an institution ... provided that: (1) the entity is a separate legal entity from the institution; and (2) the institution does not own or control the entity.").

106. *See id.*

107. *See id.* § 51.9246(g)(3) ("A student athlete participating in an intercollegiate athletic program at an institution to which this section applies ... is not considered an employee of the institution based on the student athlete's participation in the intercollegiate athletic program."); *see also* ARK. CODE ANN. § 4-75-1307(a)(5) (West 2024) ("This subchapter does not ... [r]ender student-athletes employees of the institution of higher education based on participation in varsity intercollegiate athletic competition."); MO. ANN. STAT. § 173.280(4)(2)(c) (West 2024).

have constructed a pay-for-play system that avoids acknowledging student-athletes as employees receiving compensation for their participation. Until there is uniform federal legislation pertaining to the employment status of college athletes, the law should look past these blanket provisions in state NIL statutes. States should not be permitted to enable institutions to directly compensate athletes through NIL collectives, and then simply state that athletes are not employees under the law.

Thus, given the recent cases and compelling factual evidence that student-athletes meet both the NLRA and common-law definitions of employees, along with increased institutional involvement in NIL compensation, student-athletes are inevitably approaching employee status under the law.[108] To cement this point even further, it is important to revisit the reasons why the NCAA has always argued student-athletes will never be employees under the law.[109] Former Supreme Court Justice Byron White illustrated the basic rationale behind the pre-*Alston* ban on any form of compensation for student-athletes outside of their academic scholarships: "[E]ach of these regulations represents a[n] ... attempt 'to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives.'"[110] The NCAA sought to preserve this principle in its restrictions on institutional involvement with NIL, but states have completely undermined this principle in their legislation.[111]

As walls break down between institutions and NIL collectives, significant First Amendment implications arise. Prior to this rise of institutional involvement in NIL, scholars argued for the application of several different First Amendment doctrines to NIL activity,

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108. *See* Memorandum GC 21-08 from Jennifer A. Abruzzo, *supra* note 86.

109. *See In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1146 (N.D. Cal. 2014) ("The NCAA has identified five potential procompetitive justifications for its rules prohibiting student-athletes from receiving compensation for the use of their names, images, and likenesses[:] ... (1) the preservation of amateurism in college sports; (2) promoting competitive balance among Division I teams; (3) the integration of education and athletics; (4) increased support for women's sports and less prominent men's sports; and (5) greater output of Division I football and basketball.").

110. NCAA v. Bd. of Regents, 468 U.S. 85, 123 (1984) (White, J., dissenting) (quoting Kupec v. Atl. Coast Conf., 399 F. Supp. 1377, 1380 (M.D.N.C. 1975)).

111. *See supra* notes 55-57 and accompanying text.

namely commercial speech doctrine.[112] Courts have analyzed non-commercial student-athlete First Amendment cases through the lens of both student speech doctrine and public employee doctrine.[113] As student-athletes continue to formally and functionally assume public employee status in the current pay-for-play landscape, this Note will focus on synthesizing the public employee speech doctrine with student speech doctrine, and crafting a standard to protect the expressive content of NIL activity. The normative considerations driving the protections afforded to commercial speech will also play an important role in crafting the Student-Athlete Standard.[114]

As a point of clarification, in analyzing the general relationship between institutions and student-athletes as it pertains to overall employment status, this Note does not distinguish between public and private institutions. However, when assessing First Amendment concerns, this distinction is crucial, as the First Amendment only applies to state actors.[115] There is existing scholarship that considers the possibility that the NCAA could ultimately be considered a state actor, since it effectively uses public universities as a vehicle to enforce its policies.[116] There is also scholarship considering if the language of state laws can make private institutions state actors when those laws require, rather than merely enable, institutions to restrict the content of NIL activity.[117] However, in this Note, First Amendment analysis will be conducted in the context of the institutions that are definitively state actors at this moment in time: public institutions.[118] The First Amendment

112. *See* Shane Stout, Note, *Delay of Gain: How North Carolina's Name, Image, and Likeness Law Unconstitutionally Restricts Student-Athletes' Commercial Speech Rights*, 21 FIRST AMEND. L. REV. 264, 274-76 (2023); Luc Hardy Adeclat, Note, *Money Talks: Why the First Amendment Should Protect the Ability of Student Athletes to Profit Off Their Name, Image or Likenesses*, 32 U. FLA. J.L. & PUB. POL'Y 109, 123, 126 (2021).

113. *See* Matthew Strauser & Noah C. Chauvin, Note, *Student-~~Athlete~~ Employee Speech*, 19 VA. SPORTS & ENT. L.J. 171, 188-90 (2020); *see, e.g.*, Marcum v. Dahl, 658 F.2d 731, 734-35 (10th Cir. 1981) (applying the public employee doctrine to a First Amendment claim when a student-athlete had their scholarship revoked for statements about the coach); Richard v. Perkins, 373 F. Supp. 2d 1211, 1217 (D. Kan. 2005) (citing public employee doctrine as driving the holding that the dismissed student-athlete's speech was not on a matter of public concern).

114. *See infra* Part II.D.

115. *See* U.S. CONST. amend. I.

116. *See, e.g.*, Strauser & Chauvin, *supra* note 113, at 202-03.

117. *See, e.g.*, Stout, *supra* note 112, at 272-73.

118. *See id.* at 272-74.

protections afforded to athletes at public universities will generally not extend to those of athletes at private universities.[119] Additionally, the public employee doctrine is only relevant to public institutions.[120] In sum, irrespective of whether student-athletes receive formal legal employment status, student-athletes at public universities should be afforded a special First Amendment standard that accounts for their characteristics as public employees.

Student-athletes certainly satisfy the definition of employees of their respective institutions. However, the situation is not simply resolved by classifying them as such and affording them the same First Amendment protections that public university employees receive. College athletes are still undeniably enrolled as students, pursuing a degree while participating in athletics. Thus, the First Amendment protections that student-athletes are afforded must be tailored to this dual role. First Amendment doctrine in the context of public employee speech and student speech in public schools can be reconciled to form a Student-Athlete Standard for First Amendment analysis of NIL-related expression.

B. The Public Employee Doctrine

Before analyzing the relevant aspects of the public employee speech doctrine, it is important to clarify the specific manner in which institutions restrict NIL activity. As Professors Sam Ehrlich and Neal Ternes illustrate, there is an important distinction between whether institutions are restricting existing expression or preventing expression from occurring in the first place.[121] The latter would constitute a restriction known as "prior restraint."[122] While restrictions on NIL content appear to be prior restraints on their face, this is not the case in practice. Some institutions do currently require athletes to disclose the content of their NIL deals before

119. *See id.* at 274.

120. *See* Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968).

121. *See* Ehrlich & Ternes, *supra* note 18, at 81-84.

122. *See id.* at 66. *See generally* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (explaining the nature of prior restraints and the constitutional presumption against them).

they are finalized.[123] Ehrlich and Ternes correctly argue that such preclearance is almost certainly unconstitutional.[124]

However, disclosure requirements for NIL agreements vary greatly across states and institutions, and are even nonexistent in many cases.[125] Most significantly, on August 1, 2024, disclosure became a national NCAA requirement, but that requirement only mandates disclosure within 30 days *after* entering or signing the agreement.[126] In other words, many institutions do not have, nor are they required to have, preclearance processes that evaluate the content of deals *before* they are made. Thus, in practice, institutions generally are not in a position to restrain expression before it occurs, and their provisions restricting NIL expression do not operate as prior restraints.[127] Further, given the new NCAA legislation, institutions who do require disclosure prior to the finalization of NIL agreements could simply alter such requirements to avoid the constitutional concerns of preclearance. Thus, it is more relevant to analyze these policies as they operate in practice: they restrict the expressive content of NIL activity *after the expression occurs*.

The law governing this type of regulation on public employee speech originates from the landmark Supreme Court case *Pickering v. Board of Education of Township High School District 205*.[128] Cases such as *Connick v. Myers* and *Garcetti v. Ceballos* have expanded the doctrine to form the current standard for analysis.[129]

123. *See*, *e.g.*, University of Pittsburgh (Pittsburgh Campus) Athletics, *Name, Image and Likeness Policy & Resource Documents*, UNIV. PITT. 4 (2022), https://pittsburghpanthers.com/documents/2023/1/2/NIL_Policy_Update_1_2_22.pdf [https://perma.cc/JXS3-NCAJ].

124. *See* Ehrlich & Ternes, *supra* note 18, at 81-84.

125. *See*, *e.g.*, *Tennessee NIL Information*, UNIV. TENN. ATHLETICS (2021), https://utsports.com/sports/2021/6/30/tennessee-athletics-name-image-and-likeness-information-guidance [https://perma.cc/D45N-TXND] (making no mention of disclosure being required prior to entering a compensated NIL agreement); *GatorsNIL*, UNIV. FLA. (2021), https://floridagators.com/sports/2021/12/16/guidelines-name-image-likeness.aspx [https://perma.cc/88G6-T7NW] (encouraging, but not requiring, disclosure and clarifying that reporting is "not an approval process").

126. *See* Wright, *supra* note 50.

127. *See id.*

128. *See generally* 391 U.S. 563, 572-75 (1968).

129. *See* Connick v. Myers, 461 U.S. 138, 154 (1983) (holding that a public employee's questionnaire only minimally touched on a matter of public concern and could not outweigh the government's interest in restricting it); Garcetti v. Ceballos, 547 U.S. 410, 422-23 (2006) (holding that an attorney's memo was written pursuant to the official duties of his

The prevailing two-step test was most recently upheld and articulated in *Kennedy v. Bremerton School District*, a case in which the Court protected a high school football coach's right to engage in personal prayer on the field immediately following games.[130]

In employing this test, the Court first assesses if the public employee is speaking within the scope of their official duties.[131] If so, the inquiry ends; the employee is speaking for the government rather than for themselves as a private citizen, and the government restriction on speech is therefore permissible.[132] If the speech is outside of this scope, however, the Court moves to the second prong, and determines if the employee is speaking as a citizen on a matter of public concern.[133] However, even if the employee is speaking on a matter of public concern, their interest in speaking on such a matter is then weighed against the government's interest in promoting the efficiency of its employees fulfilling their duties.[134] Only after this balancing test is an assessment made on whether the government was justified in restricting the speech.[135] This creates a highly restrictive, but not technically insurmountable, burden for public employees to meet in order to prevail on a First Amendment claim against the government.

In *Kennedy*, the school district first argued that the coach acted pursuant to his official duties as a government employee since he only had access to the field by virtue of his employment.[136] The Court squarely rejected this argument.[137] The first prong of the test

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employment and thus he did not speak as a private citizen).

130. 597 U.S. 507, 512, 528-29 (2022).

131. *Id.* at 527.

132. *Id.* at 527-28.

133. *Id.* at 528.

134. *See id.*

135. *Id.*; *see Connick*, 461 U.S. at 154 ("Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment.").

136. *See* Kennedy, 598 U.S. at 522.

137. *See id.* at 530 ("Nor is it dispositive that Mr. Kennedy's prayers took place 'within the office' environment—here, on the field of play. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not." (citation omitted)).

looks specifically to the responsibilities of the employee in carrying out their duties; the mere fact the employee was physically located at work is not conclusive evidence that they acted within the scope of their duties.[138] This distinction will be crucial in the context of restrictions on NIL, which will be further illustrated in Part II.D. The Court then held that the government clearly lost the balancing inquiry at the second prong.[139]

In its application to student-athletes, however, this balancing inquiry would be far too restrictive. Student-athletes would be required to show the expressive content of an NIL deal pertains to "matters of public concern" to even require the institution to show a legitimate justification for restricting that content.[140] Even after satisfying this burden, their expression would have to be of such importance as to outweigh the institution's interest in restricting it for employment-related purposes.[141] Requiring NIL deals to survive this stringent, layered prong to receive First Amendment protection would greatly undermine the First Amendment rights that student-athletes hold as students engaging in off-campus speech, and hinder their ability to capitalize on their NIL in the manner they wish to. Thus, the public employee doctrine, standing alone, is not feasibly applicable to student-athlete speech in the context of NIL. Part II.C will analyze the First Amendment case law pertaining to public-school students, and identify the relevant considerations for student-athletes at public institutions.

C. The Student Doctrine

The extent to which First Amendment protections shield student speech in public schools has been extensively litigated and developed throughout history. The Court's landmark case on the issue, *Tinker v. Des Moines Independent Community School District*, established the fundamental principle that "[i]t can hardly be

138. *See id.* at 528-30.

139. *Id.* at 532.

140. *See Connick*, 461 U.S. at 154.

141. *See id.* at 146 ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[142] While not an absolute grant of First Amendment protection to students, this principle conveys a simple message: public schools have never, and can never, completely restrict the speech and expression of students as they see fit. In *Tinker*, the Court found it unconstitutional for a high school to suspend students for wearing arm bands in protest of the Vietnam War, as such expression "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others."[143] Since *Tinker*, the Court has been confronted with many circumstances in which public schools reasonably restricted student speech to protect the productivity of the learning environment, and prevent substantial disruption to class work.[144] However, there are undeniably drastic differences between the restrictions considered in these cases and the restrictions at issue in this Note.

Content-based regulations of student-athlete NIL activity are hardly similar to restrictions on speech in an elementary or secondary schoolhouse, other than the mere fact that a school administration is exerting control over its students. Fortunately, the core principles hailing from *Tinker* and related cases have been considered and applied to regulations on off-campus speech,[145] as well as restrictions on college campuses.[146] Just a few years ago, in *Mahanoy Area School District v. B.L.*, the Court considered how a

142. 393 U.S. 503, 506 (1969).

143. *Id.* at 514.

144. *See*, *e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (upholding a school principal's deletion of obscene articles in a student newspaper and establishing that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986) (upholding a student's suspension for a sexually explicit speech and holding that "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education"); Morse v. Frederick, 551 U.S. 393, 397, 408 (2007) (upholding a student's suspension for his "BONG HiTS 4 JESUS" sign on a school sponsored trip, and holding that "[t]he 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse ... allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." (citation omitted)).

145. *See* Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 192-93 (2021).

146. *See* Healy v. James, 408 U.S. 169, 180 (1972).

high school could regulate a student's off-campus speech, and identified three factors which supported a fundamental principle: when it comes to restrictions on off-campus speech, "the leeway the First Amendment grants to schools in light of their special characteristics is diminished."[147] These three factors are: (1) the school no longer standing *in loco parentis* upon the student departing campus; (2) the implications of a school effectively having control over speech for all hours of the day; and (3) the school's interest in prioritizing protection of unpopular and diverse student perspectives.[148] After weighing these factors, the Court held the school could not regulate a student's off-campus social media post that expressed disdain for the school's cheerleading team.[149]

While these three factors for off-campus speech will have relevance to NIL expression, it is even more pertinent to consider the First Amendment protections that have been afforded to students for on-campus speech at public universities. The Court established a foundational principle in *Healy*, holding that although schools have historically been afforded some discretion in regulating student speech, "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[150] In *Healy*, Central Connecticut State College, a public university, denied students' application for a chapter of a leftist political organization to be formally recognized by the university.[151] The application was rejected because "the group would be a 'disruptive influence' at CCSC and ... recognition would be 'contrary to the orderly process of change' on the campus."[152] The Court ruled for the students, and outlined the reasons why the school's rejection of formal recognition effectively deprived the organization's members of their right to association guaranteed by the First Amendment.[153]

147. 594 U.S. at 190.
148. *Id.* at 189-90.
149. *Id.* at 193-94.
150. 408 U.S. at 180.
151. *Id.* at 172-74.
152. *Id.* at 179.
153. *Id.* at 180-82.

As a result of this patchwork of cases, there is no definitive legal test to determine the First Amendment protections afforded to public-school students, let alone student-athletes.[154] However, the principles underlying the holdings in these cases provide guidance as to the extent of these protections. The Court has maintained that even in a high school context, there is a much weaker argument for schools regulating student speech when that speech occurs off campus.[155] Further, the Court has recognized the enhanced importance of students' First Amendment freedoms on college campuses, and how the justifications for regulating student speech are diminished on those campuses.[156]

D. Reconciliation to Form the Proposed Student-Athlete Doctrine

With the First Amendment protections afforded to both public employees and public-school students now outlined, it is evident that aspects of both doctrines are applicable to student-athlete expression in the context of NIL deals. As previously stated, courts have already applied both public employee speech doctrine and student speech doctrine to cases involving student-athlete speech.[157] Broadly classifying student-athletes as one or the other, however, misconstrues their position within their institutions and deprives them of protections to which they are entitled. Although student-athletes satisfy the legal definition of employees,[158] it does not follow that they should be broadly analyzed as such for First Amendment purposes. This would grant institutions far too much discretion in restricting student-athletes' NIL expression. The public employee doctrine primarily protects the interests of the government employer, and restricts employees from using their status to harm the reputation or operation of the government entity.[159]

On the other hand, existing protections given to off-campus student speech generally and college student speech in particular

154. Strauser & Chauvin, *supra* note 113, at 186-87.

155. *See* Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 191, 193-94 (2021).

156. *See Healy*, 408 U.S. at 180.

157. *See, e.g.*, Marcum v. Dahl, 658 F.2d 731, 734 (10th Cir. 1981); Richard v. Perkins, 373 F. Supp. 2d 1211, 1217 (D. Kan. 2005).

158. *See* Trustees of Dartmouth Coll., N.L.R.B. No. 01-RC-325633, at 22 (Feb. 5, 2024).

159. *See supra* notes 126-27 and accompanying text.

are intended to allow students to express themselves freely and contribute to the marketplace of ideas that educational institutions are supposed to foster.[160] Further, in the landmark case *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court addressed the particular context of commercial speech, which is "expression related solely to the economic interests of the speaker and its audience."[161] While this doctrine may not encompass all NIL activity, such as public appearances or social media affiliations that do not directly promote commercial transactions, scholars have rightfully highlighted how existing NIL regulations conflict with commercial speech protections.[162] In *Central Hudson*, the Court notably held, "the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment."[163] Much of the NIL activity student-athletes engage in is directly commercial in nature, and while their role as functional employees of their institutions would restrict their commercial speech rights, the normative considerations behind the free flow of commercial information is worth note.[164] The rationales underlying how the Court has crafted the doctrines of public employee speech, student speech, and commercial speech all play a role in analyzing student-athlete NIL speech.

Much like any other category of First Amendment analysis, the analytical framework must be tailored to specific circumstances.[165] With the overwhelming trend of institutional involvement in NIL compensation, the similarities student-athletes already have to employees notwithstanding NIL compensation, and the factual enrollment status of these athletes as students, a new "Student-Athlete Standard" for First Amendment analysis should be applied to NIL laws. This Standard would functionally remove the first prong of the public employee doctrine and operate with a rebuttable presumption that student-athletes are always speaking as private citizens. This both accounts for the strong interest in protecting the

160. *See Healy*, 408 U.S. at 180.
161. *See* 447 U.S. 557, 561 (1980).
162. *See* Stout, *supra* note 112; Ehrlich & Ternes, *supra* note 18, at 63.
163. *See* 447 U.S. at 567.
164. *See id.*
165. *See Healy*, 408 U.S. at 171.

on-campus speech of students and promotes consistency with *Kennedy*.[166]

If the traditional first prong were to be applied to student-athletes, institutions would first argue that student-athletes are speaking incident to their employment since their deals arise out of their posture as athletes. *Kennedy* discarded this argument, rejecting the school board's assertion that Kennedy's prayer was government speech merely because his access to the field arose from his employment.[167] The Court held the speech must be within the scope of his actual duties as coach, not just incident to the fact that he has access to the field.[168] Next, institutions would argue that even if student-athletes are speaking as private citizens, that speech is not on a matter of public concern. The public concern requirement should play no role in the NIL context: this would restrict the content of NIL deals in unimaginable ways.

Thus, all NIL activity will be presumed to be speech of the student-athlete as a private citizen, not of the institution itself. However, making this presumption rebuttable will still leave the door open for institutions to argue a student-athlete is engaging in government speech pursuant to their duties, if, for instance, they wear a product with an offensive message during a game. However, the mere fact that they got the deal because they are a student-athlete is not evidence of their speech being within the scope of their duties.[169]

As for the second prong, there will still be a balancing test, enabling the government to make arguments that an NIL deal inhibits them from carrying out their function, by potentially having adverse disruptive effects on the team or educational community, or tarnishing the image of the institution. However, this interest must be weighed with the student's interest in freely contributing to the marketplace of ideas within the university community, an interest clearly articulated in *Healy* and generally reinforced across student speech cases.[170] This prong is where the aforementioned public

166. *See supra* notes 133-37 and accompanying text.
167. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 530-31 (2022).
168. *Id.* at 530.
169. *See id.*
170. *See supra* Part II.C.

concern analysis would occur and serve as a contributing factor in the balancing test.

To reiterate, the Student-Athlete Standard will begin with a rebuttable presumption that a student is speaking as a private citizen rather than a university employee. Assuming the government concedes or loses this prong, the second prong will entail an adaptable test that balances the interest of the school in facilitating the efficient operation of its duties with the interest of the student-athlete in participating in public discourse. The next Part will apply this standard to current and proposed legislation, and conceptualize how policy should be structured to comply with the standard.

III. IMPLICATIONS ON CURRENT AND FUTURE POLICY

As detailed in Part I, the entire reason for the ongoing controversy and discussion pertaining to NIL is the lack of uniform regulation, and in some states, the lack of any regulation at all.[171] Most of the laws that states have adopted are similar in many ways.[172] However, the areas in which statutes differ from state-to-state are crucial, and fundamentally change the operation of NIL activity on the basis of state lines.[173] First, this Part will examine these differences as they pertain to the First Amendment rights of student-athletes and highlight the tension between existing law and the proposed protections of the Student-Athlete Standard. Then, this Part will look to prominent proposed federal bills, and similarly evaluate the First Amendment implications of legislation that members of Congress have already proposed. Given the takeaways from applying the Student-Athlete Standard to existing state laws and federal proposals, this Part will then consider how future legislation can be crafted to avoid First Amendment violations.

A. Existing State Legislation

While it has been just a few years since the NCAA enabled student-athletes to profit from their NIL, most states already

171. *See* Stein et al., *supra* note 4.
172. *See supra* Part I.B.
173. *See supra* Part I.B.

enacted legislation tailored toward NIL regulation.[174] All of these laws are very similar in many respects. For instance, all of them lay out almost identical basic prohibitions to legalize NIL activity, including sweeping bans on any institutional interference with the ability of student-athletes to profit from their NIL while preserving their eligibility.[175] They also uniformly establish that NIL deals cannot conflict with existing institutional endorsement deals and often lay out basic requirements for who qualifies as an agent to represent student-athletes.[176] However, these laws also have a wide array of differences, and recent dramatic amendments have completely altered the NIL landscape and directly impacted student-athlete speech.[177] The most significant discrepancies between states can be described as pertaining to two general categories: institutional involvement in NIL and deals that conflict with institutional values.

With the emergence of NIL collectives as the most effective way for institutions to streamline NIL compensation, some states have taken steps to give their institutions an advantage in facilitating NIL activity through these collectives.[178] Two prevailing approaches have emerged to effectuate this change. States like Texas have simply amended their laws to lift the barrier between the institutions and third-party collectives.[179] New laws allow institutions to announce preferred collectives and work with them to direct donor funds.[180] The other approach, adopted by states like Alabama, is simply to suspend the NIL law altogether.[181] In the absence of federal legislation or any enforcement by the NCAA itself, states

174. *See* Stein et al., supra note 4.

175. *See, e.g.*, LA. STAT. ANN. § 17:3703(B) (2024) ("A postsecondary education institution shall not adopt or maintain a contract, rule, regulation, standard, or other requirement that prevents or unduly restricts an intercollegiate athlete from earning compensation for the use of the athlete's name, image, or likeness.").

176. *See, e.g.*, *id.* § 17:3703(D)(2).

177. *See, e.g.*, TEX. EDUC. CODE ANN. § 51.9246(m)(1) ("An institution to which this section applies or third-party entity acting on the institution's behalf, or employee of the institution or third-party entity: (1) may identify, create, facilitate, or otherwise assist with opportunities for a currently enrolled student athlete to earn compensation from a third party for the use of the student athlete's name, image, or likeness.").

178. *See, e.g.*, *id.*

179. *See id.*

180. *See, e.g.*, *id.*

181. *See, e.g.*, Burr & Forman, *supra* note 69.

have essentially decided they will not enact self-imposed regulations that potentially disadvantage their institutions.[182] With these changes, the NCAA's initial emphasis on keeping the institutions separate from NIL activity, and preventing a pay-for-play system, has been completely discarded.

NIL laws often directly restrict the expression of student-athletes by giving institutions discretion to deny certain associations. The most problematic way in which this is done is through general bans on deals that conflict with arbitrary institutional values. Mississippi's NIL law provides an example of such a ban.[183] These provisions give institutions apparent unilateral authority to prohibit any NIL deals they feel conflict with their "values or mission."[184] Although these broad "institutional values" restrictions are certainly the most potent way in which current NIL policy restricts student-athlete speech in many states, it is not the only way. Many states, even those that do not restrict NIL pursuant to institutional values, impose restrictions on NIL deals pertaining to certain vice industries, such as alcohol, gambling, or adult entertainment.[185] These provisions also raise clear tension with the First Amendment rights of student-athletes. While more specific than the broad concept of institutional values, they still significantly prohibit student-athletes from associating with industries that may bring controversy to the institution. Universities can stretch the definitions to encompass any affiliations they find controversial.[186]

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182. *See, e.g.*, *id.*

183. MISS. CODE ANN. § 37-97-107(7) (West 2024) (banning NIL activity "reasonably considered to be inconsistent with the values or mission ... or that ... negatively impacts or reflects adversely on a postsecondary education institution ... including ... negatively impacting the reputation or the moral or ethical standards of the postsecondary educational institution.").

184. *See, e.g.*, LA. STAT. ANN. § 17:3703(C)(1) ("A postsecondary education institution may prohibit an intercollegiate athlete from using the athlete's name, image, or likeness for compensation if the proposed use ... conflicts with either of the following: (a) Existing institutional sponsorship agreements or contracts. (b) Institutional values as defined by the postsecondary education institution.").

185. *See, e.g.*, *id.* § 17:3703(C)(2) ("An intercollegiate athlete shall not earn compensation for the use of the athlete's name, image, or likeness for the endorsement of tobacco, alcohol, illegal substances or activities, banned athletic substances, or any form of gambling or gaming, including sports wagering.").

186. *See* Ehrlich & Ternes, *supra* note 18, at 49 (describing how schools have classified associating with Barstool Sports as a gambling affiliation).

Additionally, while controversial, many of these industries encompass legal activity, at least for the adult population. There is good reason to believe that outside of NIL deals pertaining to activity banned by the NCAA that would impact eligibility, such as gambling or banned substances, the institution's interest in its image will not outweigh the student-athlete's interest in communicating an association with lawful activity.[187]

Under the Student-Athlete Standard, both categories of restrictions on NIL activity would be generally impermissible. This is not to say that there is no circumstance in which institutions could prohibit deals involving controversial material, but broad bans on these deals afford institutions far too much discretion and athletes far too little protection. If student-athletes are presumed to be speaking as private citizens when promoting and associating with companies, institutional values are not necessarily implicated in any way. NIL activity would only have relevance to institutional values if the deal adversely impacted institutional operations, perhaps due to the use of university marks or interference with team activities. In these instances, institutions could potentially prevail in proving their interest in restricting the expression outweighs the student-athletes' interest in the expression itself. However, regulations must be far narrower than simply prohibiting any deals that institutions feel conflict with their values or pertain to controversial industries. Part III.C will explore just how to tailor these restrictions to conform with the Student-Athlete Standard.

B. Proposed Federal Legislation

Given the inequitable playing field that NIL law has created, many, particularly the NCAA, have called for federal NIL legislation to at least establish uniform standards and regulations for all institutions.[188] At this stage, there have been several prominent proposals on the Senate floor, and all have been quite different in

187. *See id.* at 71-72.

188. *See* Eric Prisbell, *Examining the NCAA's Aggressive Push for Federal NIL Laws*, ON3 (Sept. 25, 2023), https://www.on3.com/nil/news/ncaa-aggressively-pushes-for-federal-nil-bill-corey-booker-lindsey-graham-tommy-tuberville-joe-manchin/ [https://perma.cc/RQ8E-QWT9].

effect.[189] All of these proposed bills seem to at least share an interest in one central concept: transparency.[190] Whether by establishing a central NIL agency or increased disclosure requirements, all of the proposed federal bills seek to improve competition by at least requiring full transparency in the NIL space.[191] This can help ensure that no money is being passed under the table without a proper purpose and prevent tampering from occurring. However, when it comes to the priorities of these proposed bills, and their implications on the First Amendment rights of student-athletes, there is a lot of variation in what members of Congress believe NIL laws should look like.

One proposal, Representative Mike Carey's Student Athlete Level Playing Field Act, represents the rather extreme position of unequivocally protecting the freedom of student-athletes to engage in NIL activity.[192] The bill basically prohibits institutions from interfering with NIL opportunities in any way, while also establishing a central governing body to enable transparency in what deals are being made.[193] There is an exception for deals utilizing the insignia of the institution, as these deals may be prohibited by the institution.[194] For First Amendment purposes, this bill represents the idea that student-athletes are private citizens, free to associate with organizations of their choosing so long as they do not use university marks in doing so. The bill even firmly establishes that student-athletes are not employees, which likely functions to reinforce this notion.[195] However, as institutions continue to treat

189. *See* Ben Pope, Ben McMichael & James Fielding, *Highlights of the Federal Proposals to Regulate NIL Deals*, LITTLER (Feb. 6, 2024), https://www.littler.com/publication-press/publication/highlights-federal-proposals-regulate-nil-deals [https://perma.cc/KB4Z-SJM8].

190. *See, e.g.*, Protecting Athletes, Schools & Sports Act of 2023, S. 2495, 118th Cong. § 6 (2023).

191. *See id.* § 6(b)-(c) (establishing mandatory processes for agents and third parties to register with the Federal Trade Commission and the NCAA); *see also* Student Athlete Level Playing Field Act, H.R. 3630, 118th Cong. § 3 (2023) (establishing the "Covered Athletic Organization Commission" containing thirteen expert representatives to regulate disputes).

192. *See* H.R. 3630 § 2 (2023).

193. *See id.* §§ 2-3.

194. *See id.* § 2(c).

195. *See id.* § 8(d) ("Nothing in this Act, or the amendments made by this Act, may be construed to affect the employment status of a student athlete who enters into an endorsement contract with respect to a covered athletic organization or an institution of higher education.").

student-athletes more and more like employees, a conclusive declaration of their status as non-employees seems less and less feasible.

On the other end of the spectrum, Senators Joe Manchin and Tommy Tuberville's Protecting Athletes, Schools, and Sports Act is more tailored to protect institutions than it is to protect student-athletes.[196] This bill would explicitly restrict NIL activity in the aforementioned vice industries at the federal level.[197] NIL collectives would also be required to register with an agency and remain separate from institutions to counteract the emerging pay-for-play system that the collectives have effectuated.[198] As discussed in Part III.A, these general bans on vice industries raise First Amendment concerns, particularly if they are being imposed at the federal level.[199] Part III.C will explore the specific ways in which federal legislation could successfully regulate the content of NIL activity.

C. Crafting Policy Given This Standard

With the existing conflicts between NIL legislation and the First Amendment outlined, it is important to consider how the proposed Student-Athlete Standard would impact policy. The existing broad restrictions on NIL-related expression must be refined to comport with the protections guaranteed by the Student-Athlete Standard. To reiterate, this Standard alters the public employee doctrine by beginning with a rebuttable presumption that student-athletes are expressing themselves as private citizens. From there, the test conducts a balancing inquiry that weighs institutional interests with the value of the expression. Unlike the traditional public employee standard, this standard heavily favors student-athlete speech, and forces institutions to actually prove a significant detriment to their function in order to block NIL activity. Therefore,

196. *See generally* Protecting Athletes, Schools & Sports Act of 2023, S. 2495, 118th Cong. (2023).

197. *See id.* § 5(c)(2)(A) ("[T]he National Collegiate Athletic Association or an institution of higher education may prohibit a student athlete who is enrolled at the institution from participating in intercollegiate athletics if the student athlete has entered into a name, image, or likeness contract with any person or entity related to or associated with ... adult entertainment ... alcohol products ... tobacco, marijuana ... pharmaceuticals ... weapons, including firearms.").

198. *See id.* § 6.

199. *See supra* Part III.A.

restrictions that comport with this Standard must be quite narrow. There are two approaches, already adopted by two states, that present examples of restrictions that would likely stand under the Student-Athlete Standard.

The first approach comes from Oklahoma's NIL law, which imposes time, place, and manner restrictions on NIL activity.[200] The statute restricts NIL activity that directly interferes with team activities or institutional operations.[201] Restrictions of this nature are generally subject to a more lenient standard of scrutiny in the First Amendment context, as they merely regulate the circumstances of speech.[202] Not only that, but they also make a great deal of sense as they pertain to the Student-Athlete Standard, as such restrictions hinge on a tangible harm to the operation of the institution, as the Student-Athlete Standard requires. This regulation does not explicitly regulate content; it merely prevents NIL activity from interfering with the responsibilities of the student-athlete or the team's activities.

Another approach comes from the Missouri NIL law, which implements an "institutional values" provision, but only in the context of NIL activity involving "unique identifiers," like the insignia of the institution.[203] The provision restricts student-athletes from using these unique identifiers "in a manner that the institution in its sole discretion determines ... to be inconsistent with such institution's or third-party's values or mission."[204] It goes on to also restrict uses that affect the institution's image, moral and ethical standards, or violate the code of conduct.[205] While these restrictions

200. OKLA. STAT. ANN. tit. 70, § 820.25(D) (West 2024) ("A postsecondary institution may adopt reasonable time, place, and manner restrictions to prevent a student athlete's name, image, or likeness activities from interfering with team activities, the postsecondary institution's operations, or the use of the institution's facilities.").

201. *See id.*

202. R. George Wright, *Time, Place, and Manner Restrictions on Speech*, 40 N. ILL. U. L. REV. 265, 269 (2020).

203. MO. ANN. STAT. § 173.280(2)(5)(b) (West 2024).

204. *Id.* § 173.280(2)(5)(d).

205. *Id.* § 173.280(2)(5)(d)(b)-(e) (allowing institutions to restrict uses that "b. Adversely affect[ ] such institution's or third-party's image; c. Negatively impact[ ] or inappropriately reflect[ ] upon the reputation or religious, moral, or ethical standards of such institution or third party; d. Violate[ ] such institution's or third party's code of conduct or similar requirements; or e. Conflict[ ] with a provision of such institution's or third party's current licenses or contracts").

are far more extensive than those of most states, there is a clear limitation: these restrictions only apply to NIL activity involving licensed use of unique identifiers of the institution. If the institution permits its marks to be used in NIL activity, it naturally retains more discretion to restrict the content of that activity. These types of deals are far more likely to directly reflect upon the institution rather than the student-athlete due to the use of the institution's marks. Therefore, while these types of restrictions would not hold under the Student-Athlete Standard if they were applied generally, they are permissible if they pertain exclusively to NIL activity involving university marks.

Overall, the highlighted provisions from Oklahoma and Missouri illustrate two existing examples of restrictions on NIL-related expression that would be valid under the Student-Athlete Standard. These restrictions do not broadly confer discretion to institutions to regulate the content of NIL activity. Instead, they are tailored to protect the institutions' interest in their own image and operation. When student-athletes utilize university marks, or their NIL activity directly interferes with institutional activities, the argument that they are engaging in government speech becomes far more compelling. Thus, restrictions on the content of NIL activity should be limited to specific situations in which student-athletes involve the institution in that activity, causing a tangible harm to the institution itself. Accordingly, reasonable time, place, and manner restrictions are permissible so long as they implicate substantial institutional interests, just as they do in nearly any First Amendment context.[206]

CONCLUSION

The ever-changing landscape of college athletics demands uniformity in regulating the world of NIL. As student-athletes navigate the new world of college sports, they should be fully empowered to capitalize on their own NIL. The discrepancies between current laws regulating the NIL space from state-to-state create great disadvantages based on the state in which an athlete is located. One of these

206. *See* Wright, *supra* note 202.

disadvantages, in many states, is institutions reserving the right to arbitrarily infringe upon student-athletes' First Amendment rights. As the landscape inevitably trends towards student-athletes assuming the roles of public employees at public universities, institutions should not be able to use the current public employee doctrine to greatly restrict student-athlete expression. Student-athletes assume an undeniably unique posture within their institutions.

As is the case with any First Amendment doctrine, the specific circumstances call for a specific standard tailored to protecting student-athletes' freedom of expression and association in NIL activity. The Student-Athlete Standard tailors the public employee doctrine to be far more favorable to student-athletes, and presumes they are speaking as private citizens, as is necessary to protect the First Amendment freedoms of college students. However, it still leaves the door open for institutions to show that NIL activity impacts the institution in a way that either makes the deal itself government expression or interferes with institutional activities. The Student-Athlete Standard synthesizes the interests of all parties involved with the unique position that student-athletes hold at public institutions. It offers them wide-ranging First Amendment protection in engaging in NIL activity, while also providing the institutions with a form of redress if this activity crosses a line that makes it the institution's own activity. Regardless of how NIL continues to evolve, a new and unique standard will be necessary to protect student-athletes' ability to profit from their own NIL, free of the looming possibility that their deals will be arbitrarily rejected.

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