Marquette Sports Law Review

Volume 34
Issue 2 *Spring*

Article 2

2024

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ARTICLES

ARE COLLECTIVES JOINT EMPLOYERS OF COLLEGE ATHLETES? EMPIRICAL ANALYSIS OF NIL DEALS AND SCHOOL POLICIES

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Using data on NIL deals from an anonymized athletic program, and survey results from thirty-six universities relating to their NIL collectives, I analyze whether collectives are joint employers of athletes with these schools. I compare NIL school policies and NIL deal data to three theories of joint employment: (a) a traditional approach under the Fair Labor Standards Act (FLSA), (b) an approach suggested by the National Labor Relations Board (NLRB) for college athletics that is being tested in a case against USC, Pac-12 Conference, and National Collegiate Athletic Association (NCAA); and (c) a recent NLRB rule that considers an entity's reserved control of terms and conditions of employment of workers in a separate business.

My study also identifies four organizational models for NIL deals: (1) the original endorsement deal model, (2) collective model, (3) joint venture model between a media business and the University of Alabama's athletic program, synchronized to activities of a collective and athletes; and (4) private equity model that Florida State University is exploring.

In my dataset for the 2022-2023 school year, median NIL deal pay was $24 an hour for football and men's basketball, assuming that athletes worked 40 hours per week for six months. The compressed signings of NIL deals and base level NIL pay for football players resembled the NFL's signing of undrafted free agents. Median NIL deal pay for women's basketball was $24 an hour for

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a six-month season, compared to $9.61 an hour in median pay for softball players.

As an important caveat, the data are per NIL deal, not student athlete. Some players could have signed more than one NIL deal. Due to privacy concerns for these students, the data only disclosed payments for NIL deals and team totals.

Some men's basketball players had NIL pay deals over $100,000 (one paid $350,000) while football recorded one deal worth $75,000. Football players earned about $3.6 million; men's basketball players earned about $1.6 million; and the NIL total for all athletes was $5.4 million.

Most NIL pay deals in men's and women's sports were below minimum wages under the FLSA. Total NIL deals for most teams were small, with four teams totaling about $3,000 and one team about $11,000, resulting in NIL "haves" and "have nots." Low-value NIL deals suggest that legal rulings and policy discussions of NIL pay should focus on football and men's basketball.

The original endorsement deal model has a low probability of leading to a joint employment relationship between collectives and schools. However, the NLRB's legal theory for college athletics poses a medium risk of joint employment for a school and its collectives, while the NLRB's reserved control rule poses a high risk of joint employment for all collectives and their schools. Alabama's joint venture model and Florida State's possible private equity models also pose a high risk of joint employment for schools and their collectives.

I. INTRODUCTION

A. Background and Context

Name, image, and likeness (NIL) deals for college athletes became more prevalent after the NCAA approved them 2021.[1] Within a year, collectives were an integral part of NIL dealmaking,[2] often structured as 501(c)(3) charitable

[1] 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 ("While opening name, image and likeness opportunities to student-athletes, the policy in all three divisions preserves the commitment to avoid pay-for-play and improper inducements tied to choosing to attend a particular school. Those rules remain in effect.").

[2] OPENDORSE, NIL AT TWO (PDF file available upon request from author), at 4. ("30 of the top collectives in the country use Opendorse to make automated payments and compliance disclosures").

organizations,[3] to pay for recruiting and retaining athletes at a particular school.[4] In a short time an NCAA portal that acts like a free agent market enabled collectives to function like a third-party payroll entity for schools.[5] However, some NIL collectives were so far removed from charitable activities that the IRS threatened schools with enforcement actions.[6] In 2023, the NIL space exploded with NIL collectives.[7] Currently, some involve new business ventures for NCAA schools that create a potent synergy between a school's athletic brand, advertising, NIL recruiting, fan base, and corporate sponsors.[8]

What started in 2021 as an endorsement rights legal movement[9] — where an athlete would individually seek NIL money outside a school's athletic enterprise[10] — has rapidly morphed into complicated business models for

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[3] David A. Fahrenthold & Billy Witz, *How Rich Donors and Loose Rules Are Transforming College Sports*, N.Y. TIMES (Oct. 22, 2023), https://www.nytimes.com/2023/10/21/us/college-athletes-donor-collectives.html. Texas' collective set another pattern that more than seventy other collectives followed: It organized itself as a tax-exempt charity, meaning its donors get a tax deduction. The groups have justified their charitable status by paying athletes to visit sports camps and hospitals, or to post about nonprofits on social media.

[4] Dave Wilson, *Nebraska's Matt Rhule Prefers Developing Own Players Over Portal*, ESPN (Nov. 29, 2023, 6:09 PM), https://www.espn.com/college-football/story/_/id/39007978/nebraska-matt-rhule-prefers-developing-own-players-portal ("'[A] good quarterback in the portal costs, you know, a million to $1.5 million to $2 million right now . . . . There are some teams that have $6 [million] or $7 million players playing for them.' said Nebraska Head Football Coach, Matt Rhule").

[5] Josh Planos, *The NCAA Doesn't Know How to Stop Boosters from Playing the NIL Game*, FIVETHIRTYEIGHT (May 16, 2022, 6:00 AM), https://fivethirtyeight.com/features/the-ncaa-doesnt-know-how-to-stop-boosters-from-playing-the-nil-game/ (describes Texas's Clark Field Collective, which provides $50,000 to every Longhorn offensive lineman on scholarship.).

[6] Memorandum from the Internal Revenue Service, Office of Chief Counsel, Whether Operation of an NIL Collective Furthers an Exempt Purpose Under Section 501(c)(3) 2 (May 23, 2023), https://www.irs.gov/pub/lanoa/am-2023-004-508v.pdf.

[7] *NIL Deals Across College Athletics Continue to Spark Controversy*, SPORTS BUS. J. (May 3, 2022), https://sportsbusinessjournal.com/Daily/Issues/2022/05/03/Marketing-and-Sponsorship/NIL.aspx; *see also* Taking the Buzzer Beater to the Bank: Protecting College Athletes' NIL Dealmaking Rights: Hearing Before the Subcomm. on Innovation, Data, & Commerce of the H. Comm. on Energy and Commerce, 118th Cong. (2023) (hearing memorandum), https://d1dth6e84htgma.cloudfront.net/IDC_NIL_Hearing_Memo_d1d85ebbbf.pdf?updated_at=2023-03-27T140634.232Z, at 4: "NIL Collectives are a third-party collection of fans and boosters who pool together capital to compensate athletes who play for a given school. Over 250 collectives have been formed nationwide and nearly one-third of collectives have a nonprofit status."

[8] Mathey Gibson, *Alabama Athletics, Learfield Unveil the Advantage Center for NIL*, SPORTS ILLUSTRATED (Sept. 23, 2023, 2:42 PM), https://www.si.com/college/alabama/bamacentral/alabama-athletics-learfield-unveil-the-advantage-center-for-nil.

[9] Michael H. LeRoy, *Do College Athletes Get NIL? Unreasonable Restraints on Player Access to Sports Branding Markets*, 2023 U. Ill. L. Rev. 53, 66, 68 (2023).

[10] *See, e.g.*, Craig Harris, *The Cavinder Twins, 'Queens' of College Sports Endorsements, Poised to Make $1 Million*, USA TODAY (Jan. 28, 2022), https://www.usatoday.com/story/money/2022/01/26/haley-hanna-cavinder-sport-ncaa-athletes/6518831001/?gnt-cfr=1.

collectives that opaquely intersect with a school's athletic department.[11] Against this backdrop, the NCAA clings to its anachronistic amateurism model that prohibits athletes from earning any money for their athletic labor.[12] Thus, schools and their athletic departments adhere to principles of amateurism.[13]

My primary research question asks: Do any of the emerging NIL business models implicate schools as joint employers of college athletes under the Fair Labor Standards Act (FLSA) or National Labor Relations Act (NLRA)? If this legal conclusion is plausible, what are the implications for athletes and schools if the National Labor Relations Board (NLRB) or a federal court rule that an employment relationship exists?

These questions reflect two divergent legal trends that show signs of converging in ways that could revolutionize college athletics. In one long-running trend, courts defer to the amateur athlete model that the National Collegiate Athletic Association (NCAA) has implemented since that group's founding in 1906.[14] So far, courts have ruled that employment and labor laws do not apply to college athletes.[15]

The second trend involves the joint employer doctrine. Outside of college athletics, the joint employment doctrine has been used successfully by workers in FLSA lawsuits, helping them recover unpaid minimum wages and overtime.[16] For example, when one employer with its own employees engages another business in a way that directly controls their workers, the two entities may be joint employers.[17]

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[11] *Alabama Athletics and Learfield Open The Advantage Center*, UNIVERSITY OF ALABAMA ATHLETICS (Sept. 30, 2021, 10:50 AM), https://rolltide.com/news/2023/9/22/alabama-athletics-and-learfield-open-the-advantage-center.

[12] Johnson v. Nat'l Collegiate Athletic Ass'n, Defendants' Supplemental Brief Concerning National Collegiate Athletic Ass'n v. Alston, Docket No. 219-cv-05230-JP, Filed July 6, 2021, 2021 WL 6105962 (E.D.Pa.) (Trial Motion, Memorandum and Affidavit) ("the economic reality of student athletics is and should continue to be . . . that student athletes do not receive unlimited payments unrelated to education, akin to salaries seen in professional sports leagues [omitting quotes]"').

[13] *See, e.g.*, *UCLA NIL Policy*, at § 4, UCLA (Dec. 19, 2022), https://uclabruins.com/documents/2023/1/12/UCLA_NIL_POLICY__Updated_12192022_.pdf.

[14] PROCEEDINGS OF THE SECOND ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 78-79 (Dec. 28, 1907), https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=144&q1=shall%20represent.

[15] Berger v. NCAA, 843 F.3d 285, 288 (7th Cir. 2016); Dawson v. NCAA, 932 F.3d 905, 911 (9th Cir. 2019).

[16] Falk v. Brennan, 414 U.S. 190, 191 (1973).

[17] More recently, see Salinas v. Com. Interiors, Inc., 848 F.3d 125, 141 (4th Cir. 2017) (issue of joint employment "turns on . . . relative association or disassociation between entities with respect to establishing the essential terms and conditions of . . . employment"); Schultz v. Cap. Int'l Sec., Inc., 466 F.3d 298, 310 (4th Cir. 2006); Baystate Alt. Staffing, Inc. v. Herman, 163 F.3d 668, at 678 (1st Cir. 1998) ("an individual's operational control over significant aspects of the business . . . can cause the corporation to compensate (or not to compensate) employees in accordance with the FLSA"); Brock v. Hamad, 867 F.2d 804 (4th Cir. 1989).

Recent developments augur expansion of joint employment. The General Counsel of the National Labor Relations Board (NLRB) issued a formal memorandum in 2021 that allows this agency to test a legal theory that individual schools are joint employers with athletic conferences and the NCAA.[18]

This would potentially enable college athletes to form a labor union to negotiate terms and conditions of employment. More generally, without specific regard to college athletics, a new NLRB rule expands the joint employer doctrine.[19] The rule could apply to franchisors and franchisees.[20] This development could also have implications for college athletics insofar as a court could analogize the rule to the NCAA and conferences as franchisors and to schools as franchisees.

Using anonymized data from a collective for the 2022-2023 academic year from a Power Five Conference school,[21] I examine patterns of NIL pay that could implicate a joint employment relationship.[22] This determination depends, however, on the type of collective that interacts with a school,[23] and whether a particular joint employment approach under the FLSA or NLRA applies.[24] My analysis culminates in a risk assessment chart in Table 9, which depict legal outcomes that depend on four different types of NIL models and three different joint employment approaches.[25]

B. Organization of This Article

Part II explores the history of amateurism in college athletics.[26] Critics of college athletics emerged in the 1880s and 1890s,[27] pointing to the use of paid

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[18] Memorandum from Jennifer A. Abruzzo, Off. of the Gen. Couns. Nat. Lab. Rel. Bd., *Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act*, 1 (Sept. 29, 2021), https://apps.nlrb.gov/link/document.aspx/09031d458356ec26.

[19] N.L.R.B., *Standard for Determining Joint Employer Status*, 88 Fed. Reg. 73946 (Oct. 27, 2023), https://www.federalregister.gov/documents/2023/10/27/2023-23573/standard-for-determining-joint-employer-status.

[20] *Id.* at 73960, stating: "We similarly decline other commenters' invitation to exempt other kinds of businesses, including cooperative businesses, franchise businesses, and firms and independent contractors operating in the insurance and financial advice industry, from the joint-employer standard we adopt in this final rule."

[21] *See infra*, Part IV.B.

[22] *See infra*, Parts IV.B(2)-(4).

[23] *See infra*, Parts III.B(2)-(4).

[24] *See infra*, Part V.D.

[25] *Id.*

[26] *See infra* notes 58-90.

[27] *See infra* notes 67-69.

athletes and lamenting the erosion of academic values at major universities.[28] A national athletic association, which was later renamed the National Collegiate Athletic Association (NCAA), was established in the 1905-1906 academic year to ensure that only college students who enrolled in classes played sports for their schools.[29] By 1914,[30] and continuing through the 1920s,[31] published reports highlighted instances of financial support to college athletes. An effort by the president of the University of North Carolina to reform college athletics failed in the 1930s.[32] By the 1950s,[33] the NCAA implemented rules to crack down on schools and athletes that violated the association's amateurism principles, including regulations for scholarships.[34]

Part III examines the legal and business landscape for NIL collectives.[35] Part III.A explains the origins of NIL rights for college athletes,[36] including a Supreme Court decision in 2021 that led the NCAA to implement loosely defined NIL rules.[37] In Part III.B,[38] I analyze four NIL business models. The first was an endorsement model in which athletes were paid by third parties to promote a business.[39] NIL collectives emerged in 2022, where boosters associated with a school offered lucrative NIL deals to recruit and retain athletes.[40] Recently, another NIL collective tied a joint venture between Learfield, a large media company, and the Alabama athletic program, to the school's athletes to enhance NIL opportunities.[41] Also, Florida State University explored a private equity model for its athletic program.[42] This arrangement

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[28] *See* PROCEEDINGS OF THE THIRD ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 30 (Jan. 2, 1909), https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=96&q1=agitation.

[29] *See id.* at 1.

[30] *See infra* notes 74-78, at 43.

[31] *See infra* notes 80-81.

[32] *See infra* note 72.

[33] Robert J. Romano, *The Concept of Amateurism: How the Term Became Part of the College Sport Vernacular*, 1 U.N.H. SPORTS L. REV. 29, 38 (2022).

[34] *Id.*

[35] *See infra* notes 91-142.

[36] *See infra* notes 91-105.

[37] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

[38] *See infra* notes 106-42.

[39] *See infra* notes 106-12.

[40] *See infra* notes 113-24.

[41] *See infra* notes 125-31.

[42] *See* Eben Novy-Williams et. al., *Florida State Tops JP Morgan for Equity Raise as ACC Decision Looms*, SPORTICO (Aug. 4, 2023, 10:20 AM), https://www.sportico.com/business/finance/2023/florida-state-athletics-jpmorgan-private-equity-funding-acc-1234733152/.

could be structured as a new type of investment that improves NIL deals paid to athletes through the school's collective.[43]

Part IV is the empirical part of my study. It presents NIL deal data from a Power Five conference school,[44] and survey results from 36 schools that track their organizational relationship to collectives.[45] Part IV.A describes my research methods and limitations,[46] while Part IV.B provides data and findings.[47] Part IV.C explains survey findings on the organizational relationships between schools and their collectives.[48] This discussion shows no evidence of any functional connection between these organizations.[49] While the result is unsurprising, given that any formal relationship between a school and collective would likely attract an NCAA inquiry for possible infractions of amateurism rules, it leaves open the question of how a de facto labor market matches roster preferences of coaches with funding from a school's collective.

Part V explores whether the empirical findings support a finding of a joint employment relationship between schools and their collectives.[50] Three different legal tests for joint employment are explained: a well-established approach taken by the Department of Labor under the FLSA,[51] and two different approaches recently taken by the NLRB.[52] The NLRB General Counsel proposed a joint employment approach for college athletics,[53] and separately, the NLRB issued a proposed final rule for employers who reserve control over the work of another entity's employees.[54] In Table 9, I show twelve different risk assessments for joint employment between a school and its NIL collective depending on the type of NIL model and the type of joint employment law.[55] In a related discussion, I explain my reasons for these risk assessments.[56]

Part VI provides caveats and conclusions.[57]

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[43] *See id.*

[44] *See infra* notes 143-55.

[45] *See infra* note 146.

[46] *See infra* notes 143-46.

[47] *See infra* note 147.

[48] *See infra* notes 148-55.

[49] *Id.*

[50] *See infra* notes 156-227.

[51] *See infra* notes 174-86.

[52] *See infra* notes 187-200.

[53] *See infra* notes 201-08.

[54] *See infra* notes 209-27.

[55] *See infra* Table 9.

[56] *See infra* notes V.D.

[57] *See infra* notes 228-240.

II. THE COMPLICATED HISTORY OF AMATEURISM IN COLLEGE ATHLETICS

Although NIL rights for college athletes have recent origins, this subject cannot be fully understood without exploring the history of amateurism in American college athletics. Remarkably, the first intercollegiate contest, pitting the rowing team of Harvard against Yale in 1852,[58] was a glamourous event that resembled a football game today. A crowd of seemingly affluent fans was feted to social events connected to the races.[59] Notably, some athletes were offered nonwage enticements in 1852 that resemble NIL compensation for players today.[60]

As the century progressed, a national trend emerged with schools playing each other in athletic contests.[61] While schools in this period appeared to assume that their athletes were not professionals,[62] the National Association of Amateur Athletes of America took it upon itself in 1879 to define principles of amateurism:

> An amateur is any person who has never competed in an open contest, or for a stake, or for public money, or for gate money, or under a false name; or with a professional for a prize, or where gate money is charged; nor has ever at any period of his life taught or pursued athletic exercises as a means of livelihood.[63]

By 1880, critics of college athletics complained of creeping professionalization and insinuated that some schools cheated in composing their rosters. Edward Mussey Hartwell's *Physical Training in American Colleges and Universities* observed: "Professionalism has done much within the last five

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[58] *Harvard-Yale Regatta - 150 Years of Tradition*, GO CRIMSON, https://gocrimson.com/sports/2020/5/9/harvard-yale-regatta-150-years-of-tradition.aspx?id=3628 (last visited Mar. 16, 2024).

[59] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2148 (2021), stating: "But this was no pickup match. A railroad executive sponsored the event to promote train travel to the picturesque lake," quoting T. MENDENHALL, THE HARVARD-YALE BOAT RACE 1852–1924, pp. 15-16 (1993)." See also *id.*, noting that the "event filled the resort with 'life and excitement,'" quoting N.Y. Herald, Aug. 10, 1852, p. 2, col. 2.

[60] Steve Rushin, *Inside the Moat Behind the Forbidding Façade of NCAA Headquarters, the Very People Who Enforce the Organization's Rigid Rules Also Question Its Godlike Powers and Ultimate Mission*, SPORTS ILLUSTRATED (Mar. 3, 1997), https://vault.si.com/vault/1997/03/03/inside-the-moat-behind-the-forbidding-facade-of-ncaa-headquarters-the-very-people-who-enforce-the-organizations-rigid-rules-also-question-its-godlike-powers-and-ultimate-mission ("the superintendent of the Boston, Concord & Montreal Railroad offer[ed] 'lavish prizes' and 'unlimited alcohol' to Harvard and Yale rowing crews to compete on Lake Winnepesaukee in New Hampshire and thus lure wealthy train passengers up to watch.").

[61] *See* HENRY D. SHELDON, STUDENT LIFE AND CUSTOMS 52 (William T. Harris ed., 1901).

[62] *See* HOWARD J. SAVAGE ET AL., AMERICAN COLLEGE ATHLETICS 37-38 (Bull. No. 23, 1929).

[63] *Id*. at 37.

years to bring discredit upon college sports."[64] He complained, "[q]uestionable means are sometimes employed to enable professionals or semi-professionals to play in college teams."[65] More specifically, he urged reform: "When college men are willing to travel with professional ball players, and especially under assumed names, it is time for college authorities to recognize and regulate college athletics."[66] A speaker to the Phi Beta Kappa Society at Harvard in 1893 deplored the recent growth of college athletics at the expense of scholarly identity at universities:

> The past ten years have witnessed a remarkable development in the direction indicated, which we may well pause to consider. The rising passion for athletics has carried all before it. Thus far, at least, there is no sign of reaction, or even of the exhaustion of the forward impulse. Honors in football, in baseball, and in rowing have come to be esteemed of equal value with honors in the classics, in philosophy, or in mathematics. If the movement shall continue at the same rate, it will soon be fairly a question whether the letters B.A. in the college degree stand more for Bachelor of Arts or for Bachelor of Athletics.[67]

To address growing concerns about intermingling professionals with college athletes, the Southern Intercollegiate Athletic Conference (formed in 1894), Western Conference (formed in 1895, also known as the Big Ten), and the Maine Intercollegiate Track and Field Association (formed in 1896) promulgated amateurism principles.[68] During this period, conference records from the Big Ten's faculty representatives show a sustained and serious effort to refine and enforce these rules.[69]

When the Intercollegiate Athletic Association of the United States (later, NCAA) formed in the 1905-06 school year,[70] some college leaders doubted that

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[64] EDWARD MUSSEY HARTWELL, PHYSICAL TRAINING IN AMERICAN COLLEGES AND UNIVERSITIES 124 (1885).

[65] *Id.*

[66] *Id.*

[67] Francis A. Walker, *College Athletics*, 2 HARV. GRADUATES MAG. 1 (Sept. 1893).

[68] Savage et al., *supra* note 62, at 27.

[69] PROCEEDINGS OF THE INTERCOLLEGIATE CONFERENCE OF FACULTY REPRESENTATIVES OF THE ATHLETIC COMMITTEES OR BOARDS OF CONTROL OF THE FOLLOWING UNIVERSITIES: CHICAGO, ILLINOIS, INDIANA, IOWA, MICHIGAN, MINNESOTA, NORTHWESTERN, PURDUE, WISCONSIN (1901), https://catalog.hathitrust.org/Record/003294173.

[70] PROCEEDINGS OF THE THIRD ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 1 (Jan. 2, 1909), https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=96&q1=agitation.

college athletics could be conducted without subverting the amateurism principle.[71] Nonetheless, this national association adopted rules and principles of amateur competition.[72]

Published reports exposed deviations from the amateurism principle. This commentator on college athletics wrote in 1914 in *The Atlantic*:

> As a matter of fact, every man who has lived among college athletes knows that many of them have at some time received money, directly or indirectly, for athletic competition. Actual proof of professionalism in any one case is as difficult as proof of bribe-taking among aldermen. Payments are not made by check and are often disguised in more or less clever ways. I know of one athlete who received a goodly sum for acting as watchman of a building. His duty was to sleep in the building every night. In the day-time he played baseball with a professional team. I know of another who played a game with a professional team, — for which he was not paid. But after the game the manager went to his room and said, — 'I'll bet you twenty dollars that you can't jump over that suit-case.' The bet was taken, and the jump was successfully made.[73]

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[71] *Id.* at 30, publishing the address Cap't. Palmer E. Pierce. As president of the body, he appealed for more schools to join but also enumerated their concerns:

> (a) "Your Association is accomplishing little or nothing. It has no particular influence."
>
> (b) "Your eligibility rules are not as advanced as our own. No good, then, could come to us by joining."
>
> (c) "We prefer to keep independent and believe we can do more good as an independent leader than by joining in a national movement."
>
> (d) "You require the faculties to take control of athletics, while at our institution the faculties have little power."
>
> (e) "There is too much talk about college athletics. Don't see the need of this agitation."
>
> (f) "There are members in your organization so impure athletically we do not care to associate with them."

[72] *See* PROCEEDINGS OF THE SECOND ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 78-79 (Dec. 28, 1907), https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=144&q1=shall%20represent. Rule 1 required a student to take a full schedule of courses. Rule 2 required a student who serves as a trainer or instructor had never been paid for athletic competition. Rule 3 required a student who played in an athletic contest had never been paid for this activity. Rule 4 prohibited a student from competing if he had participated the four previous years. Rule 5 required a student to complete a year of instruction at his school before competing in athletics. Rule 6 required a football player to complete two out of three terms in the prior year. Rule 7 required students to complete a card with information about his previous athletic competitions. *Id.*

[73] C. A. Stewart, *Athletics and the College*, ATLANTIC 153, 155 (Feb. 1914), https://cdn.theatlantic.com/media/archives/1914/02/113-2/132218127.pdf

By the 1920s, coaches were linked to recruiting of college athletes.[74] Schools rationalized these practices, stating that "all the others are doing it" and "we are doing very little of it compared to our competitors."[75] In 1929, the Carnegie Foundation issued a lengthy analysis of college athletics, noting that many athletic departments subsidized the employment of good athletes.[76] Football, in particular, was commercialized in ways that are familiar a century later.[77] Recruitment practices from the 1920s resemble NIL sponsorships in this study:

> Further evidence concerning the job as subsidy is available in the following documentary citations:
>
> An alumnus who has enquired concerning help for two promising athletes is answered thus by the university business manager: 'If you say these two boys can make the team then we sure want to take care of them.'
>
> And again: 'If he is an honest-to-goodness athlete, that is, one who can make our teams, we will, of course, do our best to help him with a job.'
>
> A director-coach, in writing to a recruiting agent that he can provide a fifty-dollar job for an athlete who is good enough, and referring to a particular young man asks, 'Is he worth it?'

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[74] Savage et al., *supra* note 62, at 228.

[75] *Id.* at 227.

[76] *Id*. at 250-51, reporting:

> Hence, athletes at a number of universities have been subsidized under the guise of salesmen of insurance or bonds (Columbia, Wisconsin), clothing store clerks (California, Drake, Ohio State), agents for business firms (Chicago, Colgate, University of Iowa, Southern Methodist, Wyoming), sporting goods salesmen (Dartmouth, Drake, Texas, University of Washington, Wyoming), advertising solicitors (Michigan, Missouri, Northwestern, Pennsylvania), motion picture employees (Southern California), companions to children (Denver, Harvard), writers (Michigan), and otherwise . . . out of all proportion to service rendered.

These examples are especially noteworthy because "agents for business firms" correspond to current types of NIL paid sponsorships of college athletes, and "advertising solicitors" similarly correspond to NIL deals whereby college athletes promote a product or a service.

[77] *Id*. at viii:

> [T]he football contest that so astonishes the foreign visitor is not a student's game, as it once was. It is a highly organized commercial enterprise. The athletes who take part in it have come up through years of training; they are commanded by professional coaches; little if any personal initiative of ordinary play is left to the player. The great matches are highly profitable enterprises. Sometimes the profits go to finance college sports, sometimes to pay the cost of the sports amphitheater, in some cases the college authorities take a slice of the profits for college buildings.

> Regarding other athletes, he asks in the same letter, 'How much are they worth?'[78]

While the Carnegie Foundation exposed professionalism in college athletics in the 1920s, these questionable practices continued during the Great Depression.[79] Thirteen schools in the Southeastern Conference began to openly award athletic scholarships, prompting University of North Carolina president, Frank Porter Graham, to warn that the amateurism principle was "thrown overboard."[80] He developed principles to reform college athletics by de-emphasizing professionalism and strengthening academics.[81] Graham's initial efforts were successful, but were thwarted by the school's fans and alumni.[82]

Page v. Regents of University System of Georgia involved a heavily commercialized version of college football in the context of a federal excise tax on entertainment, including college football games.[83] The school system defended college athletics as an integral part of education, an argument that led a federal appeals court to deny enforcement of the tax collection for football games. Judge Joseph Hutcheson jabbed at this institutional hypocrisy:

> My associates, apparently to their own satisfaction, have rationalized themselves into the frame of mind to believe and to say that these modern gladiatorial spectacles, conducted in vast and costly amphitheaters, for the excitement and amusement of the American public, all present being keyed to a pitch and under a tension wholly foreign to that ordinarily associated with academic and educational pursuits, are an essential part of higher education in Georgia, and, as such, a governmental function of that State. They have not rationalized me into that frame of mind; I cannot rationalize myself into it. It seems to me that the mental processes by which the din and

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[78] *Id.* at 244.

[79] Richard Stone, *The Graham Plan of 1935: An Aborted Crusade to De-Emphasize College Athletics*, 64 N.C. HIST. REV. 274, 277-78 (1987).

[80] *Id.* at 278.

[81] STANDARDS OF ATHLETIC ELIGIBILITY AS ENDORSED BY THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES 1 (1935), https://blogs.lib.unc.edu/uarms/wp-content/uploads/sites/8/2017/10/graham_plan_1935.pdf. To summarize, the main principles prohibited any recruit or college athlete from receiving "preferential consideration" for any academic scholarship or other remuneration, a faculty oversight group to determine an athlete's eligibility, and successful completion of one year of academic work as a condition for eligibility. *Id.*

[82] Stone, *supra* note 79, at 281 ("the Graham Plan aroused bitter denunciations from coaches, fans, alumni").

[83] Page v. Regents of Univ. Sys. of Ga., 93 F.2d 887, 889-90 (5th Cir. 1937). Federal law levied a fourteen cents tax on each ticket that cost over forty-one cents, with the seller designated as the agent to collect the tax. The University of Georgia and Georgia Tech sold football tickets to the public for $1.50 apiece, while students received free tickets because they paid an athletic fee. *Id.* at 893-95 (Hutcheson, dissenting).

> delight, the struggle and stress, the flying arms and legs, the alternate tangles and extrications, and all the heady actions of an intercollegiate football game, are envisioned as higher education, are a 'reductio ad absurdum' of even modern higher educational theory. They seem to me in the slangy but expressive vernacular common in the stadiums, to 'take higher education for a ride.'[84]

The NCAA expanded its sanctioning powers in the 1950s, while promulgating more rules that defined the meaning of amateur athletics.[85] During this time, the NCAA invented a new term, "student-athlete."[86] The NCAA also issued rules that allowed four-year scholarships, called grants-in-aid, to further delineate the educational nature of college athletics.[87] Exposing its own hypocrisy, the NCAA revised its rules in 1973 to the detriment of student athletes, limiting schools to awarding only one year, renewable scholarships.[88] Compounding this restriction on the availability of grants-in-aid, the NCAA in its 1975 "convention on economy" agreed to measures that would enable the NCAA to put hard caps on the number of scholarships that could be allotted per sport.[89] The four year scholarship was not renewed until 2014, well into the current era of massive commercialization of NCAA sports.[90]

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[84] *Id.* at 895.

[85] Romano, *supra* note 33. Other scholarly studies of NCAA amateurism include Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL'Y REV. 181, 183 (2017); Neil Gibson, *NCAA Scholarship Restrictions as Anticompetitive Measures: The One-Year Rule and Scholarship Caps as Avenues for Antitrust Society*, 3 WM. & MARY BUS. L. REV. 203, 203 (2012); Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of "Big Time" College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 4 (2000); Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41, 43-46 (2006) (describing the deceptive nature of the athletic-scholarship "contract").

[86] WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995) (where a former executive director of the NCAA described in an expose how the NCAA invented the term "student-athlete" to protect schools from litigation that could interfere with the NCAA's unregulated governance of college athletics.).

[87] *Id.* at 72-73.

[88] *See* Louis Hakim, *The Student-Athlete vs. the Athlete Student: Has Time Arrived for an Extended-Term Scholarship Contract*, 2 VA. J. SPORTS & L. 145, 158 (2000).

[89] Gordon S. Write Jr., *N.C.A.A. Cuts Athletes' Aid*, N.Y. TIMES (Aug. 15, 1975), https://www.nytimes.com/1975/08/15/archives/ncaa-cuts-athletes-aid-ncaa-cuts-athlete-aid.html; *see also* Gordon S. Write Jr., *N.CA.A. Football Cutbacks Irk Major College Powers*, N.Y. TIMES (Aug. 31, 1975), https://www.nytimes.com/1975/08/31/archives/ncaa-football-cutbacks-irk-major-college-powers-ncaa-economies.html.

[90] Ben Strauss, *Colleges' Shift on Four-Year Scholarships Reflects Players' Growing Power*, N.Y. TIMES (Oct. 28, 2014), https://www.nytimes.com/2014/10/29/sports/colleges-shift-on-four-year-scholarships-

III. NIL COLLECTIVES IN AN EVOLVING LEGAL AND BUSINESS LANDSCAPE

A. Origins of College Athlete NIL Rights

From the 1970s until recently, college athletes lost their lawsuits when they challenged unreasonable restraints of trade imposed by the NCAA.[91] *O'Bannon v. National Collegiate Athletic Ass'n*[92] changed this trajectory by ruling that the NCAA's blanket restrictions on name, image, and likeness (NIL) compensation for college athletes was an unreasonable restraint of trade.[93] District Judge Claudia Wilken questioned the underpinnings of the NCAA's amateurism principles for major athletic programs.[94]

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reflects-players-growing-power.html#:~:text=Colleges%27%20Shift%20on%20Four%2DYear%20Scholarships%20Reflects%20Players%27%20Growing%20Power,-Share%20full%20article&text=Earlier%20this%20month%2C%20the%20Big,scholarship%20that%20can%20be%20renewed. The NCAA's one-year penalty survived an antitrust challenge in *Agnew v. Nat'l Collegiate Athletic Assoc.*, 1:11-cv-0293-JMS-MJD, 2011 WL 3878200 at *2, *8 (S.D. Ind. Sep. 1, 2011) *aff'd but criticized*, 683 F.3d 328 (7th Cir. 2012).

[91] The district court in Jones v. Nat'l Collegiate Athletic Ass'n, 392 F. Supp. 295, 303 (D. Mass. 1975) held that the Sherman Act does not apply to NCAA eligibility standards. Shelton v. Nat'l Collegiate Athletic Ass'n, 539 F.2d 1197, 1198-99 (9th Cir. 1976), ruled against a college athlete in an antitrust case because the student crossed the amateur boundary by signing a contract to play a professional sport. Smith v. Nat'l Collegiate Athletic Ass'n, 139 F.3d 180, 182, 185-86 (3d Cir. 1998), upheld the NCAA's mobility restrictions and penalties (rule prevented participation by graduate student who had been an undergraduate at a different institution). Courts ruled similarly in Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1082, 1089-90 (7th Cir. 1992) (rules revoked athlete's eligibility to participate in an intercollegiate sport in the event that the athlete chose to enter a professional draft or engage an agent to help secure a position with a professional team); Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (rules revoked athlete's eligibility to participate in an intercollegiate sport in the event that the athlete chose to enter a professional draft or engage an agent to help secure a position with a professional team); and Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 382 (D .Ariz. 1983) (rule denied athlete eligibility to participate in an intercollegiate sport if the athlete accepted pay for participation in the sport). Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 626 (Colo. App. 2004) upheld the NCAA's amateurism model, stating: "*Student participation in intercollegiate athletics is an avocation*, and student-athletes should be protected from exploitation by professional and commercial enterprises (emphasis added)," quoting NCAA regulations from that time. *See also* Banks v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 850, 852 (N.D. Ind. 1990) (NCAA organizes amateur intercollegiate athletics "as an integral part of the educational program and . . . retain[s] a clear line of demarcation between intercollegiate athletics and professional sports."). More recently, *see* Rock v. Nat'l Collegiate Athletic Ass'n, 928 F. Supp. 2d 1010, 1014, 1026 (S.D Ind. 2013) (denying motion for class certification in a case that challenged the NCAA's rules prohibiting granting athletes multi-year, Division I football scholarships from 1973 to 2012, thereby eliminating competition among schools for their labor).

[92] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

[93] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

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

> What's more, there is no evidence to suggest that any schools joined Division I originally because of its amateurism rules. These schools had numerous other options to participate

After *O'Bannon*, Sen. Nancy Skinner, a state lawmaker in California, explored legislation to provide college athletes economic rights.[95] In 2019, she successfully sponsored the first NIL law for college athletes.[96] By July 2021, twenty-five states passed NIL laws by July 2021 for college athletes.[97]These

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> in collegiate sports associations that restrict compensation for student-athletes, including the NCAA's lower divisions and the NAIA. Indeed, schools in FCS, Division II, and Division III are bound by the same amateurism provisions of the NCAA's constitution as the schools in Division I. The real difference between schools in Division I and schools in other divisions and athletics associations, as explained above, is the amount of resources that Division I schools commit to athletics. Thus, while there may be tangible differences between Division I schools and other schools that participate in intercollegiate sports, these differences are financial, not philosophical.

Id. at 981.

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

[96] *Id.* (Sen. Skinner's bill prohibited an athletic association or conference from penalizing a student athlete for earning money on their own name, image, or likeness).

[97] Alabama (H.B. 404, 2021 Reg. Sess. (Ala. 2021)), https://legiscan.com/AL/text/HB404/2021; Arizona (S.B. 1296, 2021 Reg. Sess. (Az. 2021)), https://legiscan.com/AZ/text/SB1296/id/2353037/Arizona-2021-SB1296-Chaptered.html; Arkansas (H.B. 1671, 2021 Reg. Sess. (Ark. 2021)), https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills%2F2021R%2FPublic%2FHB1671.pdf; California (S.B. 206, 2019 Reg. Sess. (Cal. 2019)), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206; Colorado (S.B. 20-123, 2021 Reg. Sess. (Colo. 2021)), https://leg.colorado.gov/sites/default/files/2020a_123_signed.pdf; Connecticut (H.B. 6402, 2021 Reg. Sess., (Conn. 2021), at https://legiscan.com/CT/text/HB06402/id/2420389; Florida (S.B. 646, 2020 Reg. Sess. (Fla. 2021)), https://www.flsenate.gov/Session/Bill/2020/646/BillText/er/PDF; Georgia (H.B. 617, 2020 Reg. Sess. (Ga. 2020)), https://legiscan.com/GA/text/HB617/id/2356824; Illinois (S.B. 2338, 2021 Reg. Sess. (Ill. 2021)), at https://legiscan.com/IL/text/SB2338/id/2421670; Kentucky (Exec. Order 2021-418, June 24, 2021), https://governor.ky.gov/attachments/20210624_Executive-Order_2021-418_Student-Athletes.pdf; Maryland (S.B. 439, 2021 Reg. Sess. (Md. 2021)), https://legiscan.com/MD/text/SB439/id/2401696; Michigan (H.B. 5217), 2020 Reg. Sess. (Mich. 2020)), https://legiscan.com/MI/text/HB5217/id/2242295; Mississippi (S.B. 2313, 2021 Reg. Sess. (Miss. 2021)), at https://trackbill.com/bill/mississippi-senate-bill-2313-mississippi-intercollegiate-athletics-compensation-rights-act-allow-athletes-to-be-compensated-for-name-image-and-likeness/1982225/; Montana (S.B. 248, 2021 Reg. Sess. (Mont. 2021)), https://leg.mt.gov/bills/2021/SB0299/SB0248_1.pdf; Nevada (A.B. 254, 2021 Reg. Sess. (Nev. 2021)), https://www.leg.state.nv.us/Session/81st2021/Bills/AB/AB254_EN.pdf; New Jersey (S.B. 971, 2021 Reg. Sess. (N.J. 2021)), https://legiscan.com/NJ/text/S971/id/2209738; New Mexico (S.B. 94, 2021 Reg. Sess. (N.M. 2021)), https://legiscan.com/NM/text/SB94/id/2360396; North Carolina (Exec. Order No. 223, July 2, 2021)), at https://files.nc.gov/governor/documents/files/EO223-07022021-NIL.pdf; Ohio (Exec. Order 2021-10D, June 28, 2021), https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2021-10D?utm_medium=email&utm_source=sharpspring&sslid=Mzc1MTc1MTA3NDU1BQA&sseid=MzIytjQzMjCwtAQA&jobid=ed5262f4-d053-41c8-98c8-04fab7888818; Oklahoma (S.B. 48, 2021 Reg. Sess. (Ok. 2021)), https://legiscan.com/OK/text/SB48/id/2404631; Oregon (S.B. 5, 2021 Reg. Sess. (Or. 2021), https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB5/Enrolled?utm_medium=email&utm_source=sharpspring&sslid=Mzc1MTc1MTA3NDU1BQA&sseid=MzIytjQzMjCwtAQA&jobid=ed5262f4-d053-41c8-98c8-04fab7888818; Pennsylvania (S.B. 381, 2021 Reg. Sess. (Penn. 2021)), https://legiscan.com/PA/text/SB381/id/2420743; South Carolina (S.B. 685, 2021 Reg. Sess. (S.C.

state NIL laws influenced the NCAA to implement a loosely worded policy for NIL deals.[98]

Meanwhile, the NCAA lost a more significant antitrust case. Following the *O'Bannon* lawsuit, the NCAA was enjoined in *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation* "from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball."[99] *NCAA v. Alston*, a related case that was consolidated with *Grant-in-Aid Cap Antitrust Litigation*, involved an antitrust claim for education-related compensation that *non-athlete* students were eligible to receive from schools.[100] The term "education related benefits" referred to college expenses above and beyond cost-of-attendance, such as musical instruments, computers, internships, classroom equipment, and similar.[101]

In June 2021, the Supreme Court unanimously ruled in *Alston* that the NCAA's education-benefits restrictions for athletes violated the Sherman Act.[102] The Court questioned the NCAA's amateurism model without rejecting it.[103] Although *Alston* was a watershed ruling, it was not the last chapter in

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2021)), https://www.scstatehouse.gov/sess124_2021-2022/bills/685.htm; Tennessee (S.B. 248, 2021 Reg. Sess. (Tenn. 2021)), https://publications.tnsosfiles.com/acts/112/pub/pc0845.pdf; Texas (S.B. 1385, 2021 Reg. Sess. (Tex. 2021)), https://legiscan.com/TX/text/SB1385/id/2407682.

[98] Hosick, *supra* note 1.

[99] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2153 (2021).

[100] *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., No. 14-CV-02758-CW, 2018 WL 1524005 at *6 (N.D. Cal. Mar. 28, 2018).

[101] *Id.*

[102] *Alston*, 141 S. Ct. at 2147. Justice Brett Kavanaugh's concurring opinion went far beyond the issue of non-monetary educational benefits, stating:

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

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

[103] *Id.* at 2166. Justice Kavanaugh continued:

> Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far

athlete antitrust challenges. In a current lawsuit,[104] athletes are challenging NCAA rules that required them to forego NIL compensation while being compelled to assign their NIL rights to schools and conferences.[105]

B. The Rapid Evolution of NIL Models for College Athletes

My analysis of joint employment for NIL collectives is organized around business models that have evolved from 2021 through 2023. They reflect whirlwind changes in how NIL deals are financed and what athletes provide in exchange for this compensation. As these models evolve, they bring collectives closer to athletic departments, particularly for joint venture and private equity deals that are housed in schools. The following discussion identifies the key features of each model.

1. Individual Endorsement Model

Figure 1 (see appendix: Figure 1) depicts the simplicity of NIL deals at the dawn of this new pay system for college athletes. In the individual endorsement model, college athletes enter into NIL deals that conform to state laws, school policies, and NCAA rules.[106] Advertisers and sponsors pay college athletes directly (Fig. 1, Box 2).[107] Schools utilize third-party, online platforms to book deals that conform to their internal NIL policies (Fig. 1, Box 1).

> by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: "'The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.'" (Citation omitted.) That review persuades us the district court acted within the law's bounds.

[104] House v. Nat'l Collegiate Athletic Ass'n, 2021 WL 3578572 (N.D. Cal. 2021). This differed from O'Bannon by challenging NCAA rules that barred conferences and schools from sharing their network revenues, as well as money from marketing contracts for sports apparel, and other revenue sources that involve athletes' NIL. *Id*. at 808-09. The athletes also alleged that while NCAA rules fixed athlete NIL compensation at zero dollars, schools used these revenues to build extravagant facilities and pay coaching salaries. *Id*. at 809 ("Plaintiffs aver that, absent the challenged rules, the NCAA and its member conferences and schools would allow student-athletes to take advantage of opportunities to profit from their NIL, and NCAA member conferences and schools would share with student-athletes the revenue they receive from third parties for the commercial use of student-athletes' NIL.").

[105] *Id.* at 808.

[106] *See* LeRoy, *supra* note 9, at 69-70 (finding that in twenty-one out of twenty-five states laws required athletes to report their NIL deals to their institutions, while seventeen laws prohibited NIL deals that were used for recruitment. Twelve state laws required schools to communicate to athletes, and where applicable, to the athlete's agent, any specific conflict in the pending NIL deal with school policies.).

[107] Bruce Schoenfeld, *Student. Athlete. Mogul?*, N.Y. TIMES (Jan. 24, 2023), https://www.nytimes.com/2023/01/24/magazine/ncaa-nba-student-athlete.html.

Opendorse, an Internet platform used by many schools to serve as a third-party booking agent for athletes and sponsors (Fig 1, Box 3 & Box 4), estimates that athletes earned $917 million during the first year of NIL payments, starting in July 2021.[108] Male athletes received 93% of donor compensation, with 67% of NIL pay concentrated in football and men's basketball (Fig. 1, Box 3).[109] Excluding all money from football NIL deals, NIL women earned slightly more pay than men.[110] Opendorse boasted of its "brand network of thousands of major companies, including 29 of the Fortune 50,"[111] enabling it "to connect interested advertisers with in-network athletes for campaign participation (Fig. 1, Box 4)."[112]

2. Collective Model (Pay-to-Play) (see Appendix: Figure 2)

NIL deals that look like pay-for-play agreements were reported in news outlets in 2022.[113] Collectives, funded by school supporters, pay for these NIL deals.[114] The collectives, with a visible online presence, match donors with athletes who are paid to make social media posts or endorsements, autograph memorabilia, and perform other activities that are not directly related to athletic performance.[115]

While early endorsement deals were tied to the large social media popularity of some college athletes,[116] the collective model served from the outset as a recruiting and pay-for-play workaround that allowed schools to facially comply

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[108] Josh Schafter, *NIL: Here's How Much Athletes Earned in the First Year of New NCAA Rules*, YAHOO FIN. (July 1, 2022), https://au.news.yahoo.com/nil-heres-how-much-ncaa-athletes-earned-185901941.html.

[109] *Id.*

[110] OPENDORSE, NIL AT TWO (PDF file available upon request from author), at 4.

[111] *Id.* ("30 of the top collectives in the country use Opendorse to make automated payments and compliance disclosures").

[112] *Id.*

[113] Madison Williams, *Miami's Isaiah Wong Says He Won't Transfer After Threat Over NIL*, SPORTS ILLUSTRATED (Apr. 30, 2022), https://www.si.com/college/2022/04/30/miami-isaiah-wong-transfer-portal-statement-threat-nil-deal-lifewallet-nba-draft. The same company also paid Isaiah Wong in a $100,000 NIL deal after the Miami guard threatened to enter the NCAA transfer portal.

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

[115] 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/.

[116] Andrew Cohen, *How College Basketball Stars Haley and Hanna Cavinder Leveraged Their Social Media Presence to Land NIL Deals*, SPORTS BUS. J. (July 11, 2022), https://www.sportsbusinessjournal.com/Daily/Issues/2022/07/11/Technology/college-basketball-stars-haley-hanna-cavinder-social-media-nil-deals.aspx (women's basketball players earned more than $1 million in NIL sponsorship deals).

with NCAA rules. Mid-American Conference (MAC) Commissioner Jon Steinbrecher summarized the contradictory character of collectives: "We are exactly where we didn't want to go. We've talked long and hard about how institutions are not supposed to be in the business of setting up things, and we are seeing that institutions are now setting up these collectives. That's not name, image and likeness—that's pay for play."[117] In a short time, collectives expanded from recruiting a particular athlete to recruiting groups of athletes by position or team.[118] By 2023, at least 120 collectives operated in college athletics.[119] Another estimate placed that figure at 230 collectives.[120] Some collectives bankroll a de facto salary operation for premium athletes.[121]

Collectives have pushed the boundaries of the NCAA's threadbare amateurism model, evolving into sophisticated businesses to support athletes.[122] Recognizing that the NCAA is failing to offer enough NIL regulation, The Collective Association (called TCA) organized to regulate aspects of the chaotic NIL-deal competition for college students.[123]

And the pretense of paying college athletes large sums of money through tax-exempt corporations operating as collectives led the I.R.S. to warn that "NIL opportunities for student-athletes are not tax exempt and described in section 501(c)(3) because the private benefits they provide to student-athletes are not incidental both qualitatively and quantitatively to any exempt purpose furthered by that activity."[124]

3. Joint Venture-Collective Model

The University of Alabama athletic program appears to have a unique joint venture business arrangement with Learfield, a media company, that

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[117] *NIL Deals Across College Athletics Continue to Spark Controversy*, *supra* note 7.

[118] Planos, *supra* note 5.

[119] Fahrenthold & Witz, *supra* note 3.

[120] Alex Kirshner, '*Everything's on Fire': NIL Collectives Are the Latest Patchwork Solution for College Athlete Pay*, GLOB. SPORT MATTERS (Jan. 17, 2023), https://globalsportmatters.com/business/2023/01/17/nil-collectives-latest-patchwork-solution-college-athlete-pay/.

[121] Wilson, *supra* note 4.

[122] Jesse Dougherty, *In Latest Hearing on NIL, Collectives Get Their Shot*, WASH. POST (Oct. 17, 2023, 5:19 PM), https://www.washingtonpost.com/sports/2023/10/17/senate-hearing-on-nil/ (comments by Hunter Baddour, stating that collectives "have evolved throughout the past 12 to 24 months"); Doug Lederman, *Conference Realignment Poses Threats to Big-Time Sports*, INSIDE HIGHER ED (Sept. 5, 2023), https://www.insidehighered.com/news/students/athletics/2023/09/05/conference-realignment-poses-risks-big-time-college-sports (highlighting the "potential stripping of the federal tax exemption that college athletics programs enjoy because they use 'amateur' athletes and are activities cloaked in their institutions' underlying educational mission").

[123] Nakos, *supra* note 115 (TCA seeks certification for athlete-agents).

[124] Office of Chief Counsel Internal Revenue Service, *supra* note 6.

coordinates activities with the school's NIL collective.[125] By the school's own account of its relationship with Learfield, "[t]he two organizations collaborated on the development and build-out of the center to deliver a physical home and team of dedicated staff to provide education, content creation, and personal brand building resources for student-athletes with respect to NIL opportunities, as well as a location to showcase successful local and national NIL brand/sponsor relationships."[126] Called "The Advantage Center," this enterprise is housed in the football stadium.[127] It is similar to NIL efforts at other schools with strong branding presence—for example, Division Street, an NIL collective at Oregon that draws upon the marketing expertise of Nike.[128]

Alabama's enterprise is different, however. The school entered into a multi-media rights agreement with Learfield, valued at $150 million over 10 years.[129] Learfield— a media and technology company with ties to more than 1,200 college athletic programs[130]— opened an NIL shop for Alabama athletes to

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[125] Gibson, *supra* note 8.

[126] University of Alabama Athletics, *supra* note 11.

[127] *Id.*

[128] Eric Jackson, *Phil Knight-Backed NIL Venture Focuses on Oregon College Athletes*, SPORTICO (Sept. 30, 2021, 11:33 PM), https://www.sportico.com/leagues/college-sports/2021/phil-knight-oregon-nil-venture-1234642926/.

[129] University of Alabama Athletics, *supra* note 11, explaining in a press release:

> With ties to over 1,200 collegiate institutions and over 15,000 local and national brand partners, LEARFIELD's presence in college sports and live events delivers influence and maximizes reach to target audiences. With solutions for a 365-day, 24/7 fan experience, LEARFIELD enables schools and brands to connect with fans through licensed merchandise, game ticketing, donor identification for athletic programs, exclusive custom content, innovative marketing initiatives, NIL solutions, and advanced digital platforms.

[130] *Id.*, elaborating on how the joint venture operates:

> 'We've been looking forward to opening the doors of The Advantage Center from the day we started discussing this concept,' said Alabama Director of Athletics Greg Byrne. 'Having a dedicated, multifunctional space for our student-athletes to do things like record podcasts, film videos in a green room, engage with brand partners and participate in educational workshops was very important to us, and we're appreciative of Learfield for taking this idea and making it come to life. The University of Alabama offers a great academic, athletic and social experience and provides a stage and, now with the addition of The Advantage Center, a structure around it to support our student-athletes at the highest level when it comes to NIL.'

Id. Alabama also explained how the joint venture provides marketing synergies and business expertise for athletes:

> LEARFIELD is a diversified and influential media and technology company powering college athletics. Through its digital and physical platforms, LEARFIELD owns and leverages a deep data set and relationships in the industry to drive revenue, growth, brand awareness, and fan engagement for brands, sports, and entertainment properties. With ties to over 1,200 collegiate institutions and over 15,000 local and national brand partners,

develop their brands, get legal and financial advice, and market themselves.[131] It seems possible, if not probable, that Alabama athletes could be steered to Learfield advertisers for endorsement deals. This joint venture appears to create a synergy that ties Alabama's athletic brand, Learfield's advertising relationships and revenues, and NIL recruiting in an integrated business.

This complex business partnership is depicted in Figure 3 (see Appendix: Figure 3). The joint venture's key business relationships are shown in red lines. One relationship connects Alabama directly to Learfield in a lucrative media rights deal (see Box 1). The joint venture is shown inside the NIL model, not as an external and separated business entity. This reflects the physical placement of the joint venture in the football stadium, and integration in the school's athletic program.

The red arrow labeled in Box 2 shows the joint venture's connection to Alabama's collective. While there is no explicit proof of this connection, it is all-but revealed in Learfield's press release with the heading, "Unique NIL Facility to Provide Resources, Education and Support to Crimson Tide Student-Athletes."[132] The third business linkage (red arrow labeled as Box 3) connects Alabama's NIL collective and Alabama athletes. Again, this is not a formal connection but suggested in the overlapping messages from Yea Alabama,[133] an NIL collective, and the Learfield-Alabama partnership. Box 4 shows the funding connection between a pool of NIL donors and the collective.

4. Private Equity-Collective Model

Some context is necessary to explain this model. Schools with major athletic programs are facing financial pressures from ongoing antitrust litigation.[134]

> LEARFIELD's presence in college sports and live events delivers influence and maximizes reach to target audiences.

Id.

[131] *Id.*

[132] *Id.*

[133] *About Yea Alabama*, YEA ALA. (Feb. 11, 2023), https://www.yea-alabama.com/about, stating:

> Yea Alabama is the official University of Alabama NIL program established to cultivate and harness Name, Image, and Likeness opportunities for Alabama student-athletes. As a contributor to Yea Alabama you have the opportunity to gain access to exclusive fan experiences, content, merchandise, and more.

[134] Ross Dellenger, *Is College Athletics Headed for The Great Split? 'We Need to Recreate or Relaunch the NCAA'*, YAHOO SPORTS (Nov. 21, 2023), https://sports.yahoo.com/is-college-athletics-headed-for-the-great-split-we-need-to-recreate-or-relaunch-the-ncaa-160523061.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAADQOyqxPXLoUe-woNBJTNiF0D9AvqJltHv05juvKNAEFE-PbFsTweKRoSp7GhHpcXk5Lqe1

Their pursuit of lucrative media deals has driven a destabilizing cycle of conference realignments.[135] Poor management of media contracts have left some schools with budget shortfalls.[136] Coast-to-coast travel for games is expected to add significantly to athletic budgets.[137] Coaching salaries are exorbitant.[138]

A few schools have considered private equity financing to navigate their future.[139] This development can be traced to 2019, when the Pac-12 hired the Raine Group to see if its schools could enter into short-term capital deals.[140] Although this idea was shelved, Florida State recently held exploratory discussions with JPMorgan for a $150 million investment.[141] This investment would be used to purchase the school's multi-media rights from the ACC conference, freeing up Florida State to join a conference with a more lucrative media deal.[142]

Figure 4 (see Appendix: Figure 4) shows how a school's outside investor would allow the school's NIL collective to participate outside the university's control for its own financial support. An arrow pointing in two directions (Fig. 4, Box 1) indicates shared ownership in a school's multi-media rights, outside the school's collective model that is structured like the NIL-Collective model. While this this concept is vague, it could allow an investor to attract companies with popular brands to take a stake in the investment. Theoretically, the investor

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V0SJe8e3zWlU5u1vZqeA4TQaRqt2ONYTLDJVjbj0glFcsRgwCCUoc9RtQOTDzEqTemnK5MJ57U8Frc WxNGXpnvlXGCEl2NCu-3YMx (major athletic programs are facing up to $3 billion in antitrust damages stemming from House v. NCAA [in re College Athletes NIL Litigation] and are contemplating a major restructuring that would allow them to share revenue directly with athletes in the future).

[135] Novy-Williams et al., *supra* note 43. The relationship between the university, its athletics department, and private investors remains undetermined, but this university may combine its media rights in a company in which private equity funds are invested.

[136] Eben Novy-Williams, *Private Equity Has Infiltrated Pro Sports. Now It's Going to College*, SPORTICO (Aug. 6, 2020, 2:45 AM), https://www.sportico.com/leagues/college-sports/2020/private-equity-college-sports-1234610639/ (e.g., "Wisconsin, for example, has said its athletics department could lose more than $100 million in revenue this year.").

[137] Nicole Auerbach, *Inside USC, UCLA and the Big Ten's Prep for Realignment's Toughest Travel Puzzle*, ATHLETIC (July 31, 2023), https://theathletic.com/4734532/2023/07/31/usc-ucla-big-ten-travel-schedules/ (detailing new expenses, from travel to meals to need for increased mental health resources).

[138] Tom Schad & Steve Berkowitz, *Nick Saban, Kirby Smart Among Seven SEC Coaches Making $9 Million or More*, USA TODAY (Oct. 3, 2023, 11:46 AM), https://www.usatoday.com/story/sports/ncaaf/2023/10/03/nick-saban-kirby-smart-pace-sec-2023-college-football-pay/71037759007/ (reporting individual coaching salaries that sometimes exceed $10 million a year).

[139] Novy-Williams, *supra* note 136.

[140] Eric Fisher, *Private Equity Eyes College Sports as Next Big Potential Opportunity*, FRONT OFF. SPORTS (Sept. 17, 2023, 11:01 PM), https://frontofficesports.com/private-equity-eyes-college-sports-as-next-big-potential-opportunity/.

[141] Novy-Williams et. al., *supra* note 43.

[142] *Id.*

could enter into NIL deals with a school's collective (Fig. 4, Box 2), attracting athletes to sponsored deals for companies in the investment consortium (Fig. 4, Box 3 and Box 4). Presumably, this organizational arrangement would allow a school to comply with NCAA rules by distinguishing pay for athletes as brand sponsors from pay for athletic recruitment or performance.

IV. NIL DEAL DATA AND SURVEY RESULTS FOR COLLECTIVES: EMPIRICAL METHODS AND FINDINGS

A. Research Methods

I sent informational requests under state laws to all public schools in Power Five conferences, and the same request to the legal departments of private schools. My research strategy aimed to elicit answers rather than non-responses.[143] Thus, my request asked for basic information about the relationship between a school's athletic department and NIL collective.[144] These questions were phrased to explore how much control a school's athletic department exercised or reserved over a NIL collective with respect to pay, recruitment, and retention of athletes. My seventh and last question asked: "For

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[143] Some schools resist information requests for NIL deals citing privacy rights of college athletes. Dennis Romboy, *Deseret News Seeks Dismissal of Schools' Challenge to Release of NIL Contracts*, DESERET NEWS (Dec. 22, 2023, 5:07 PM), https://www.deseret.com/sports/2023/12/22/24012879/nil-name-image-likeness-college-sports-public-records-universities-court-challenge/#:~:text=By%20Dennis%20Romboy,and%20likeness%20contracts%20public%20records.

[144] My survey asked for the following information:

> I request information on NIL compensation related to a collective at your school. Examples of collectives include those at The Ohio State University (*see* https://ohiostatebuckeyes.com/news/2022/12/8/nil-collectives) and Clemson University (*see* https://clemsontigers.com/reign/#what).
>
> 1. What is (or are) the name (or names) of the collective (or collectives) at your school? You may reply with one or more internet links.
>
> 2. Does your school have a role in approving a student-athlete's compensation from a collective? A "yes" or "no" answer will suffice. You may elaborate or reply with an internet link.
>
> 3. Does your athletic department have any type of fund-raising relationship with a collective? A "yes" or "no" answer will suffice. You may elaborate or reply with an internet link.
>
> 4. Does your school's foundation have an NIL collective? A "yes" or "no" answer will suffice. You may elaborate or reply with an internet link.
>
> 5. How many athletic department employees work with student-athletes on compensation related to collectives? Include in this count employees who have overlapping responsibilities for NIL activities outside of collectives.
>
> 6. What rules and requirements must a student-athlete satisfy to participate in your athletic department's NIL collective program? Include:
>
> a. school policies on NIL compensation through collectives given to (i) student-athletes, and (ii) donors and subscribers to collectives.
>
> b. compliance forms, checklists and similar communications given to (i) student-athletes, and (ii) donors and subscribers to collectives. The request in Point 6 is only for policies and forms, not individual student-athlete or donor/sponsor information on compliance matters.

the 2022-2023 academic year, what was the total compensation for each NCAA men's and women's team at your school from a collective?"[145]

I received responses from thirty-six schools, mostly consisting of brief answers to my six questions.[146] Every responding school reported that it has no relationship with the NIL collective or collectives that support their athletes. Two schools, UCLA and Indiana, shared specific details of their NIL policies (*infra* in Part IV.C).

Only one school shared its NIL data with me. As the school shared an Excel data file, it stated in its email: "Pursuant to your request, attached please find the responsive information. Please note we have redacted some information pursuant to the Family Educational Rights and Privacy Act (FERPA). (The school) respectfully requests a copy or access to the national information when your project is completed." Because only one school shared data for this research project, the school and I reached an understanding to proceed with my study by anonymizing its participation, except for verifying the authenticity of this data source to the publishing journal.

B. Empirical Results and Findings from the NIL Deal Database

The database contained records for 494 NIL deals that were transacted from August 2, 2022, through May 31, 2023. The first data field, "SA Sport," referred to the student athlete's team and sport. The second field, "Deal Category," contained entries for social media posts, autographs, business ventures, merchandise, endorsements, and personal appearances. The third field, "Deal Amount," was expressed in dollars, followed by a fourth field, "Merchandise or Item Value." The fifth data field, "Created," indicated the date of the NIL deal. The sixth and final data field was "Total." Most NIL deals had no merchandise or item, so the data in "Deal Amount" and "Total" were the same. However, in some cases an athlete would have an entry for "merchandise or item value." For example, an NIL deal dated August 23, 2022, showed $100 for merchandise and $1,500 for a social media post, leading to a total NIL deal of $1,600.

The dataset posed two significant limitations for my research results. The dataset did not indicate how many NIL deals were generated through the

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[145] My request concluded by stating: "If your athletic department is interested in the results of my research, please contact me (Prof. Michael H. LeRoy, School of Labor and Employment Relations, 504 E. Armory, University of Illinois at Urbana-Champaign, Champaign, IL 61822) at mhl@illinois.edu. Thank you for your assistance."

[146] The schools are listed in alphabetical order: Alabama, Arizona, Arkansas, California, Clemson, Colorado, Florida, Georgia Tech, Iowa, Iowa State, Kansas, Kentucky, LSU, Maryland, Michigan, Minnesota, Mississippi, Mississippi State, North Carolina, Purdue, Rutgers, Ohio State, Oklahoma, Oklahoma State, Oregon, Oregon State, South Carolina, Texas, Texas A&M, Texas Tech, UCLA, Utah, Virginia Tech, Washington, Washington State, and Wisconsin.

endorsement model (Fig. 1) and the school's NIL collective (Fig 2). Large NIL deals, and multiple NIL deals recorded for the same date and team, appear to be from the school's collective, though I could not verify that inference. In contrast, NIL deals with small values (for example, a $5 social media post) appear to be from the endorsement model. Important to note, in this study I treat all NIL deals as being generated by the school's collective. When I asked for clarification, I received no response. This might indicate the school's lack of knowledge of a funding source due to its separation from NIL deals.

Second, while each data entry is for a separate NIL deal, this does not necessarily mean that each line represents an NIL deal for different athletes. One athlete could be the recipient of two or more NIL deals logged into the dataset on the same date. This lack of identifying NIL deals per each athlete safeguarded student privacy rights.

Taken together, these two data limitations cannot be ignored, downplayed, or explained away. They mean that my results might lead me to overstate my legal inferences when the NIL deal data reflect a smaller number of athletes who have pay deals that resemble employment. To illustrate my point, for the NIL deals on August 22, 2022, showing eighty data entries for football, I assume that eighty athletes received this pay, but in reality, perhaps ten key athletes each received eight NIL deals that day.

The data file was organized in two tabs: "By Sport Aug.22-May.23," and "Disclosures_Aug.22-May.23." The following data table (Table 1) is reproduced from the first tab. Following the table, I report my findings by evidence of (1) gender inequality in NIL deal payments, (2) NIL payments that correlate with employment of athletes in football, men's basketball, women's basketball, and softball, (3) group NIL deals in football and men's basketball that correlate with collective bargaining in the NFL and NBA, and (4) labor in NIL activities.

1. Evidence of Gender Inequality in NIL Deal Payments

Table 1 presents striking evidence of gender inequality in NIL deal payments.

Table 1
NIL Deals by Gender and Sport in a Power Five Conference School (2022-2023)

Men's Athletics	
Baseball	$3,534
Football	$3,267,089
Men's Basketball	$1,658,775
Men's Golf	FERPA
Men's Tennis	FERPA
Men's Track & Field	$11,280
Men's Total	**$ 4,949,678**
Women's Athletics	
Soccer	$2,710
Softball	$234,955
Volleyball	$3,466
Women's Basketball	$282,985
Women's Golf	FERPA
Women's Track & Field	$2,898
Women's Total	**$527,014**
Total (Excluding FERPA Deals)	**$5,476,692**
Total (Including FERPA Deals)	**$5,608,647**
Total of FERPA Deals	**$ 131,955**

Fact Finding 1: The monetary value of NIL deals for men was much greater than for women. Men earned 90.4% of the money in NIL deals, excluding the small amount NIL deals with undisclosed FERPA data due to privacy concerns. Even if women earned all the NIL money in undisclosed FERPA entries, they would earn only 11.7% of dollars in NIL deals.

Fact Finding 2: Football and men's basketball players made most of the NIL money. Athletes in these two sports garnered NIL deals worth $4,925,864, compared to $682,783 in all other sports. Football and men's basketball players earned 89.9% of NIL money. Excluding these sports, NIL deals for men and women totaled $541,828.

Fact Finding 3: Women earned more NIL money than men, once football and men's basketball deals were excluded. In non-revenue sports, women earned $527,014 (about 97.2%), compared to $14,814 for men (about

2.8%). Even if all money in FERPA deals were counted for men, they would have earned only $146,769— about 27.8% of money in non-revenue sports NIL deals.

Fact Finding 4: Softball and women's basketball generated most of the NIL money earned by women. These two sports generated 98.3% of the NIL money for women athletes, excluding unreported earnings in FERPA-shielded NIL deals.

2. Evidence of NIL Payments That Correlate with Employment of Athletes in Football, Men's Basketball, Women's Basketball, and Softball

Finding 5: Data for men's basketball and football show NIL payments that equate to an amount that exceeds the minimum wage rate the FLSA. In men's basketball, the median NIL deal was $25,000. If this amount were paid for roughly six months during the season, and athletes were employed for 40 hours per week, the implied hourly wage rate would be about $24 per hour.[147] For football, where the school recorded 100 NIL deals worth $25,000, the same hourly wage rate would be implied, assuming six months of work at 40 hours per week.

Table 2
NIL Deals Men's Basketball (Dollars)

		Frequency	Percent	Valid Percent	Cumulative Percent
Dollars	25	1	2.4	2.4	2.4
	50	1	2.4	2.4	4.8
	250	1	2.4	2.4	7.1
	850	2	4.8	4.8	11.9
	1000	1	2.4	2.4	14.3
	6250	2	4.8	4.8	19.0
	11250	2	4.8	4.8	23.8
	12500	5	11.9	11.9	35.7
	24000	1	2.4	2.4	38.1
	25000	8	19.0	19.0	57.1
	26875	1	2.4	2.4	59.5

[147] The minimum wage under FLSA is $7.25 per hour. *Wages and the Fair Labor Standards Act*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/flsa.

	36000	3	7.1	7.1	66.7
	37500	2	4.8	4.8	71.4
	50000	8	19.0	19.0	90.5
	86000	1	2.4	2.4	92.9
	130000	1	2.4	2.4	95.2
	170000	1	2.4	2.4	97.6
	350000	1	2.4	2.4	100.0
	Total	42	100.0	100.0	

Table 3
NIL Deals Football (Dollars)

		Frequency	Percent	Valid Percent	Cumulative Percent
Dollars	0	24	9.8	9.8	9.8
	10	2	.8	.8	10.6
	12	1	.4	.4	11.0
	15	2	.8	.8	11.8
	16	2	.8	.8	12.7
	25	1	.4	.4	13.1
	30	20	8.2	8.2	21.2
	35	1	.4	.4	21.6
	40	2	.8	.8	22.4
	50	22	9.0	9.0	31.4
	60	3	1.2	1.2	32.7
	100	4	1.6	1.6	34.3
	150	4	1.6	1.6	35.9
	160	1	.4	.4	36.3
	200	1	.4	.4	36.7
	300	1	.4	.4	37.1
	350	3	1.2	1.2	38.4
	450	1	.4	.4	38.8
	465	1	.4	.4	39.2
	500	2	.8	.8	40.0
	600	5	2.0	2.0	42.0
	1000	3	1.2	1.2	43.3

	1200	1	.4	.4	43.7
	1500	15	6.1	6.1	49.8
	1550	1	.4	.4	50.2
	1600	3	1.2	1.2	51.4
	2500	2	.8	.8	52.2
	3000	1	.4	.4	52.7
	3500	1	.4	.4	53.1
	4000	1	.4	.4	53.5
	4500	1	.4	.4	53.9
	5000	1	.4	.4	54.3
	7500	2	.8	.8	55.1
	10000	2	.8	.8	55.9
	12500	1	.4	.4	56.3
	15000	5	2.0	2.0	58.4
	17500	1	.4	.4	58.8
	25000	100	40.8	40.8	99.6
	75000	1	.4	.4	100.0
	Total	245	100.0	100.0	

Fact Finding 6: Nearly 34% of NIL deals in women's basketball paid $25,000, an amount that exceeds the minimum wage rate the FLSA. If this amount were paid for six months during the season, and athletes were employed for 40 hours per week, the implied wage rate would be about $24 per hour, assuming that 11 players received deals for $25,000.

Fact Finding 7: Nearly 64% of NIL deals in women's softball paid $10,000, an amount that exceeds the minimum wage rate the FLSA. If this amount were paid for six months during the season, and athletes were employed for 40 hours per week, the implied wage rate would be about $9.61 per hour.

Table 4
NIL Deal Women's Basketball (Dollars)

		Frequency	Percent	Valid Percent	Cumulative Percent
Dollars	0	1	3.1	3.1	3.1
	10	1	3.1	3.1	6.3
	15	1	3.1	3.1	9.4
	25	1	3.1	3.1	12.5

	60	1	3.1	3.1	15.6
	75	1	3.1	3.1	18.8
	100	3	9.4	9.4	28.1
	200	2	6.3	6.3	34.4
	250	2	6.3	6.3	40.6
	400	1	3.1	3.1	43.8
	500	6	18.8	18.8	62.5
	1200	1	3.1	3.1	65.6
	25000	11	34.4	34.4	100.0
	Total	32	100.0	100.0	

Table 5
NIL Deal Women's Softball (Dollars)

		Frequency	Percent	Valid Percent	Cumulative Percent
Dollars	0	2	5.6	5.6	5.6
	30	1	2.8	2.8	8.3
	35	3	8.3	8.3	16.7
	60	2	5.6	5.6	22.2
	200	2	5.6	5.6	27.8
	300	1	2.8	2.8	30.6
	1500	1	2.8	2.8	33.3
	2500	1	2.8	2.8	36.1
	10000	23	63.9	63.9	100.0
	Total	36	100.0	100.0	

3. Evidence of Group NIL Deals in Football and Men's Basketball That Correlate with Collective Bargaining in the NFL and NBA

Fact Finding 8: Nearly 50% of NIL deals in football were recorded in August 2022— the start of the football season— in a deal-signing pattern that resembles signing periods for NFL free agents under a collective bargaining agreement. Moreover, nearly 33% of NIL deals were recorded on the same day, August 22, 2022.

Table 6
Date of Football NIL Deals

		Frequency	Percent	Valid Percent	Cumulative Percent
DATE	08/05/22	1	.4	.4	.4
	08/10/22	1	.4	.4	.8
	08/17/22	19	7.8	7.8	8.6
	08/19/22	1	.4	.4	9.0
	08/22/22	80	32.7	32.8	41.8
	08/24/22	1	.4	.4	42.2
	08/30/22	2	.8	.8	43.0
	08/31/22	16	6.5	6.6	49.6
	09/01/22	2	.8	.8	50.4
	09/03/22	3	1.2	1.2	51.6
	09/08/22	1	.4	.4	52.0
	09/16/22	2	.8	.8	52.9
	09/17/22	2	.8	.8	53.7
	09/19/22	1	.4	.4	54.1
	09/21/22	3	1.2	1.2	55.3
	09/22/22	1	.4	.4	55.7
	09/23/22	3	1.2	1.2	57.0
	10/02/22	1	.4	.4	57.4
	10/10/22	1	.4	.4	57.8
	10/12/22	1	.4	.4	58.2
	10/13/22	1	.4	.4	58.6
	10/15/22	6	2.4	2.5	61.1
	10/17/22	7	2.9	2.9	63.9
	10/18/22	2	.8	.8	64.8
	10/19/22	2	.8	.8	65.6
	10/20/22	2	.8	.8	66.4
	10/21/22	4	1.6	1.6	68.0
	10/22/22	8	3.3	3.3	71.3
	10/23/22	7	2.9	2.9	74.2
	10/24/22	2	.8	.8	75.0
	10/25/22	1	.4	.4	75.4
	10/26/22	1	.4	.4	75.8

	10/27/22	1	.4	.4	76.2
	10/30/22	2	.8	.8	77.0
	11/01/22	4	1.6	1.6	78.7
	11/02/22	1	.4	.4	79.1
	11/10/22	1	.4	.4	79.5
	12/20/22	1	.4	.4	79.9
	01/31/23	1	.4	.4	80.3
	02/07/23	1	.4	.4	80.7
	02/19/23	1	.4	.4	81.1
	02/23/23	1	.4	.4	81.6
	02/24/23	12	4.9	4.9	86.5
	02/25/23	1	.4	.4	86.9
	02/28/23	1	.4	.4	87.3
	03/01/23	1	.4	.4	87.7
	03/04/23	6	2.4	2.5	90.2
	03/10/23	1	.4	.4	90.6
	03/29/23	2	.8	.8	91.4
	03/31/23	1	.4	.4	91.8
	04/24/23	1	.4	.4	92.2
	04/26/23	1	.4	.4	92.6
	04/29/23	1	.4	.4	93.0
	04/30/23	1	.4	.4	93.4
	05/02/23	1	.4	.4	93.9
	05/04/23	1	.4	.4	94.3
	05/08/23	1	.4	.4	94.7
	05/15/23	1	.4	.4	95.1
	05/16/23	1	.4	.4	95.5
	05/17/23	1	.4	.4	95.9
	05/18/23	1	.4	.4	96.3
	05/20/23	1	.4	.4	96.7
	05/22/23	1	.4	.4	97.1
	05/31/23	1	.4	.4	97.5
	08/09/23	1	.4	.4	98.0
	08/31/23	4	1.6	1.6	99.6
	10/30/23	1	.4	.4	100.0

	Total	244	99.6	100.0	
Missing	Data	1	.4		
Total		245	100.0		

Fact Finding 9: More than 47% of NIL deals in basketball were recorded in a week in early January 2022 in a pattern that resembles signing periods for NBA players with their teams in a collective bargaining agreement.

Table 7
Date of Men's Basketball NIL Deals

		Frequency	Percent	Valid Percent	Cumulative Percent
Date	05/23/22	1	2.4	2.4	2.4
	08/01/22	1	2.4	2.4	4.8
	08/22/22	1	2.4	2.4	7.1
	09/30/22	1	2.4	2.4	9.5
	10/19/22	1	2.4	2.4	11.9
	11/14/22	4	9.5	9.5	21.4
	12/07/22	4	9.5	9.5	31.0
	01/03/23	4	9.5	9.5	40.5
	01/09/23	16	38.1	38.1	78.6
	02/07/23	4	9.5	9.5	88.1
	02/22/23	1	2.4	2.4	90.5
	05/02/23	2	4.8	4.8	95.2
	05/08/23	1	2.4	2.4	97.6
	05/11/23	1	2.4	2.4	100.0
	Total	42	100.0	100.0	

4. Evidence of Labor in NIL Activities

Fact Finding 10: Only about 10% of NIL deals involved activities that are traditionally associated with work, including personal appearances (10%), content creation (5%), business ventures (1%), and video (1%). The most common NIL activity, social media posts (73%), were indistinguishable in their form from what many people do on platforms such as Facebook, TikTok, Instagram, and other social media platforms.

Table 8
Activity in NIL Deals

	Frequency	Rounded Percent
Social Media	324	73%
Personal Appearance	48	11%
Merchandise	42	10%
Streaming	40	10%
Personal Appearance	40	10%
Content Creation	21	5%
Endorsement	24	5%
Autograph	5	1%
Business Venture	5	1%
Video	4	1%
Lesson	2	1%

C. Survey Responses to Questions About Each School's Relationship to a Collective

Some schools replied that under state law I had no right to information. But many of the thirty-six schools responded along the lines of the University of Oregon:

> The University of Oregon has received your public records request, made 6/27/2023 for '…information on NIL compensation related to a collective at your school.'
>
> The University of Oregon does not have an NIL collective that is affiliated with the University.
>
> The office considers this to be fully responsive to your request and will now close your matter. Thank you for contacting the office with your request.
>
> Sincerely,
>
> Office of Public Records
>
> 6207 University of Oregon | Eugene, OR 97403-6207

Two schools were much more responsive. UCLA disclosed its comprehensive NIL policies, including disclosure of NIL agreements,[148] permissible institutional uses of an athlete's NIL,[149] and compensation.[150] The policies also provided "parameters for institutional involvement," including

[148] UCLA – NAME IMAGE AND LIKENESS (NIL) POLICY, *UCLA Disclosure Requirements*, § 9, UNIV. OF CAL. L.A. (July 5, 2022), https://uclabruins.com/documents/2023/1/12/UCLA_NIL_POLICY__Updated_12192022_.pdf.

> a) A SA who enters into an agreement for Compensation regarding a NIL Activity shall disclose the following details of such agreement:
>
> i) Contact information for commercial entities;
>
> ii) Use of Professional Service Providers;
>
> iii) Other involved parties;
>
> iv) Compensation arrangements with such individuals or entities;
>
> v) Goods or services being transacted; and
>
> vi) Times when the activities will occur.

[149] *Id.*, *Permissible Institutional Uses of an SA's NIL*, at § 4:

> UCLA, the NCAA, and the Pac-12 Conference may use the NIL of an SA to generally promote or to support activities considered incidental to the SA's participation in intercollegiate athletics (e.g., conference championships, NCAA championships or other NCAA events, activities or programs) provided the provisions in NCAA Bylaw 12.5.1.1 are satisfied. SAs will have the opportunity to review and agree to these rights annually.

[150] *Id.*, *Compensation, Student-Athlete Compensation Guidelines*, at §§ 3(c), 5:

> NCAA Bylaw 12.4.1 defines compensation as any remuneration for provided services or goods. SAs may be paid for work performed and a rate commensurate to market value for similar activities.
>
> Student-Athlete Compensation Guidelines
>
> a) A SA may earn Compensation for the use of their NIL provided:
>
> i) The Compensation is not provided in exchange of athletics performance (e.g. pay-for-play);
>
> ii) The Compensation (or prospective compensation) is not provided as a recruiting inducement;
>
> iii) The Compensation is commensurate with market value; and
>
> iv) The Compensation is not provided by or on behalf of an institutional staff member.

prohibitions on school support of NIL activities and agreements,[151] and non-permissible activities.[152]

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[151] *Id.*, *Parameters for Institutional Involvement*, at § 6 (Dec. 2, 2022):

> a) California law does not prohibit the institution or a member of the institution's staff (including contractors), from facilitating a SA's NIL Activity. Notwithstanding the above, the institution's department of intercollegiate athletics staff (DIA), including contractors, cannot:
>
> i) Purchase of good or service from a SA's owned business in excess of what is needed for personal use or for a price above market value.
>
> ii) Provide direct or indirect compensation to a SA for the use of the SA's NIL;
>
> iii) Communicate with NIL entities regarding specific student-athletes NIL request;
>
> iv) Develop, create, execute or implement a student-athletes' NIL activity;
>
> v) Provide access through donation or otherwise to provide assets to NIL entities directly or indirectly in order to incentivize the NIL entity to engage with student-athletes, unless those assets are made available under sponsorship agreements under the same terms as other sponsors.
>
> vi) Provide free services or equipment to student-athletes to support NIL activities, unless the services or equipment are generally provided to the entire student body.
>
> vii) Permit the use of institutional facilities without prior campus approval;
>
> viii) Permit the use of Institutional Marks without prior campus approval;
>
> ix) Act as an agent or professional service provider to represent an SA or negotiate a contract;
>
> x) Be employed by a NIL entity;
>
> xi) Accept compensation or benefits of any kind, for assisting in the identification, development, operation, or promotion of a NIL compensation opportunity involving a SA, or for any related work performed with respect to SA NIL activities; or
>
> xii) Offer any guarantees of present or future NIL compensation as a recruiting inducement or otherwise.
>
> b) The following activities are permitted without triggering impermissible institutional involvement in a SA's NIL Activity:
>
> i) DIA's staff (including contractors) facilitating an SA's NIL activity;
>
> (1) Directing third parties and/or SA's to the UCLA NIL marketplace, or other marketplaces;
>
> (2) Assisting with evaluation of professional service providers;
>
> (3) Arranging spaces on campus for NIL entities to meet with student-athletes;
>
> ii) Assisting with evaluating NIL opportunities;
>
> iii) Providing NIL education programming;
>
> iv) Promotion student-athletes' NIL activities so long as the going rate is paid by the student athlete or NIL entity (e.g., ad on videoboard) or there is no value or cost for the institution (e.g., liking, favoriting, reposting social media post)
>
> v) Purchasing goods or services from a third party that provides NIL opportunities to SAs.

Indiana University also disclosed NIL policies for athletes' use of the school intellectual property,[153] obligations to their team and academics,[154] and disclosure of NIL activities.[155]To summarize Part IV: NIL pay for this school's athletes in most sports for men and women is far below any amount that suggests an employment relationship arising out of an NIL collective. And most NIL pay deals lack any of the timing and team characteristics that are familiar in collective bargaining under the NLRA.

However, some NIL deals point to an employment relationship. The amounts and timing of pay for football, while much less than for NFL players, are like employment contracts under the NLRA: These deals have seasonal timing that roughly equates to player signings for rookies and journeymen in the NFL. In men's basketball, NIL pay deals in this study are too limited to suggest the same conclusion for most of a team. However, some of these NIL deals paid the most money in this study, suggesting a comparison to NBA signings for elite players.

In addition, social media posts seem to be the most efficient way to compensate college athletes in a de facto employment relationship. These posts seem to take little or no effort but are completely unrelated to athletic performance—the perfect combination for complying with NCAA rules while compensating for athletic talent in the NCAA's labor market.

Pay alone does not establish an employment relationship. In fact, there is not a singular definition of an employment relationship in federal laws. In Part V, I explore different approaches to defining a joint employment relationship under the Fair Labor Standards Act and National Labor Relations Act.

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[153] POLICY - INDIANA UNIVERSITY ATHLETICS, *Use of University Intellectual Property*, § 5, IND. UNIV. (July 1, 2021), https://iuhoosiers.com/sports/2023/9/7/policy.

> Student-athletes are not permitted to use IU's intellectual property, including its trademarks, logos, or symbols, to either implicitly or expressly endorse a third party or product without the prior written approval of IU's Office of Licensing and Trademarks. Student-athletes may autograph and sell officially licensed memorabilia that includes University marks. Per NCAA rules, student-athletes may not sell products provided by IU Athletics or awards received for intercollegiate athletic participation while they are a student-athlete.

[154] *Id.*, *Team Activities and Academic Obligations*, at § 6,

> Student-athletes cannot engage in NIL activities during the course of team activities, which include competitions, practices, and team gatherings and meetings. Student-athletes also must not allow NIL activities to interfere with their academic obligations.

[155] *Id.*, *Disclosure of NIL Activities*, at § 9,

> In the course of their education and participation at IU, student-athletes must disclose any NIL activities to IU Athletics through the NIL Disclosure Form within ten (10) days following the activity. IU Athletics highly recommends that student-athletes complete the NIL Disclosure Form prior to the NIL activity whenever possible so that the Office of Compliance Services can ensure the activity does not jeopardize the student-athlete's eligibility.

V. DO THE RESULTS SUPPORT A FINDING OF A JOINT EMPLOYMENT RELATIONSHIP BETWEEN AN NIL COLLECTIVE AND A SCHOOL?

In the past decade, beginning with *Berger v. NCAA*, college athletes have sued the NCAA and schools under FLSA, claiming that they legally qualify as employees for purposes of receiving minimum wages.[156] The Seventh Circuit denied Gillian Berger's claim in 2016,[157] explaining that her legal arguments for minimum wages did "not take into account this tradition of amateurism or the reality of the student-athlete experience."[158] This conclusion drew from *Vanskike v. Peters*,[159] where an inmate assigned to kitchen work sued Illinois unsuccessfully for minimum wages.[160] *Berger* analogized amateur college athletics to prison labor, concluding that the FLSA does not cover some work.[161] In 2019, the NCAA won similar cases in *Dawson v. NCAA*[162] and *Livers v. NCAA*.[163] College athletes are now on their fourth FLSA lawsuit to become employees, *Johnson v. NCAA*, after defeating a motion to dismiss their lawsuit.[164]

Even if college athletes prevail in *Johnson*, the ultimate question of employment status for these players will not be resolved: at best, from their vantage point, there will be a split among the federal courts of appeal.[165] Furthermore, even if college athletes prevailed in overcoming a circuit split, their litigation would only establish a right to pay under a federal minimum wage law. There would remain an open question whether employee status under the FLSA would mean that college athletes are employees under the NLRA

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[156] Berger v. NCAA, 843 F.3d 285, 288 (7th Cir. 2016).

[157] *Id.* at 294.

[158] *Id.* at 291.

[159] Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992).

[160] *Id.* at 813.

[161] Michael McCann, *SEC Fears of Johnson v. NCAA Labor Case Laid Out in Amicus Brief*, SPORTICO (June 20, 2022, 12:01 AM), https://www.sportico.com/law/analysis/2022/southeastern-conference-amicus-1234679127 (stating "In repelling previous efforts by college athletes to gain recognition as employees under the FLSA, the NCAA emphasized case law (*Vanskike v. Peters*) indicating that while the 13th Amendment abolished slavery and involuntary servitude, there is a so-called 'slavery loophole' for prisoners and, arguably, college athletes.").

[162] Dawson v. NCAA, 932 F.3d 905, 911 (9th Cir. 2019) (referencing when the court cited Vanskike once to support the idea that a multi-factor employment test is not suitable for college athletes in an FLSA case).

[163] Livers v. NCAA, No. CV 17-4271, 2018 WL 2291027, *15 (E.D. Pa. 2019) (stating "Vanskike is not controlling on this Court."); (reasoning the lawsuit was filed after the statute of limitations had run on a claim for FLSA violations that are not willful, and never proceeded beyond the pleading stage).

[164] Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2021); *see also* Johnson v. NCAA, No. CV 19-5230, 2021 WL 6125095 (E.D. Pa. Dec. 28, 2021) (granting Motion to Certify for Interlocutory Appeal).

[165] Berger v. NCAA, 843 F.3d 285, 288 (7th Cir. 2016); *Dawson*, 932 F.3d at 911.

because the laws define the scope of an employment relationship differently.[166] In fact, given the NLRA's exclusion for public employers and employees, most Power Five schools and athletes would remain outside the NLRA.[167]

This background underscores why joint employment between their schools and another entity— an athletic conference in a current NLRB case,[168] or in the context of an NIL collective, a private entity[169]— is potentially useful for athletes who seek a break from the amateurism model.

In the following analysis, I explain three models of joint employment that could be applied to college athletes. First, there is a long-standing joint employment model under the FLSA, originating in Department of Labor rules from 1939.[170] Second, and more recently, the NLRB's General Counsel issued a memorandum that outlines her rationale for treating athletic conferences as joint employers with schools in their relationship to college athletes.[171] The third joint employment model is posed by a more recent NLRB rule, one that emphasizes joint employment when an entity reserves control over terms and conditions of employment for workers of another entity.[172] For example, the rule could make a franchisor corporation a joint employer with its franchisees.[173]

Following an explanation of these models, I analyze how the NIL deal data and findings of my study fit these joint employment approaches.

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[166] *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (2024), (defining an employer comprehensively as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency....") § 203(d); (defining a "person" as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.") § 203(a); *See* National Labor Relations Act, ch. 372, 49 Stat. 449 (2024), codified as amended at 29 U.S.C. §§ 151-69 (2016), (defining an employer and employee more narrowly as "any employee, . . . unless this subchapter explicitly states otherwise"). The same section then excludes "any individual employed by . . . any other person who is not an employer as herein defined." § 152(3). An employer excludes "any State or political subdivision thereof . . .." § 152(2).

[167] *See supra* note 146 (illustrating all thirty-six schools in this study are public institutions).

[168] Billy Witz, *At What Point Should College Athletes Be Considered Employees?*, N.Y. TIMES (Dec. 23, 2023), https://www.nytimes.com/2023/12/23/us/college-athletes-employees-nlrb-hearing.html?searchResultPosition=1.

[169] David A. Fahrenthold & Billy Witz, *The Best Teams That Money Could Buy*, N.Y. TIMES (Dec. 31, 2023), https://www.nytimes.com/2023/12/31/us/college-athletes-nil-sugar-rose-bowl.html (more than seventy collectives are organized as tax-exempt charitable organizations).

[170] S*ee* U.S. Dep't of Labor, *Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule*, 86 Fed. Reg. 40939, 29 C.F.R. § 791 (2022) (referencing "Interpretative Bulletin No. 13, 'Hours Worked: Determination of Hours for Which Employees are Entitled to Compensation Under the Fair Labor Standards Act of 1938, ¶ ¶ 16-17").

[171] Abruzzo, *supra* note 18.

[172] *Standard for Determining Joint Employer Status*, *supra* note 19.

[173] *Id.* at 73960.

A. Joint Employer Doctrine under the Fair Labor Standards Act

The FLSA sets a minimum wage rate and requires time-and-a-half overtime pay for employees in the private and public sectors.[174] Section 203(g) of the FLSA defines "employ" as "to suffer or permit to work."[175] Because of the law's remedial purposes,[176] the Supreme Court has broadly defined the meaning of "employ."[177]

Eventually, the Court ruled on the Department of Labor's joint employment rules in *Falk v. Brennan the Dep't of Labor*.[178] In this landmark case, Drucker & Falk (D & F), a management company, provided different services for owners of apartment buildings.[179] Under management contracts for individual apartment buildings, D & F employed janitors for each building.[180] The Department of Labor sued D & F for backpay under FLSA, contending that this company was the joint employer of janitors with owners of each building.[181]

D & F disagreed, believing that that the agreements for each apartment building could not be combined as a single joint employer; and because revenues for each building were below the interstate commerce amount for FLSA coverage, the company had no minimum wage obligations.[182] The Department of Labor countered that "the contracts between the owners and D & F as 'employees of the project owners'"[183] exceeded the FLSA interstate commerce threshold, making the FLSA applicable to D & F and each building as joint employers.[184]

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[174] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2021) (also called FLSA).

[175] *Id.* at § 203(g).

[176] IBP v. Alvarez, 546 U.S. 21, 25 (2005) ("relying on the remedial purposes of the statute and Webster's Dictionary, we described 'work or employment' as 'physical or mental exertion … controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business (citations omitted).").

[177] Tenn. Coal, Iron & R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 603 (1944) (travel time to remote work area is compensable); Armour & Co. v. Wantock, 323 U.S. 126, 132 (1944) ("work" does not necessarily require an employee to engage in "exertion"); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-91 (1946) ("the statutory workweek" includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace"); and Steiner v. Mitchell, 350 U.S. 247, 248-49 (1956) (postliminary compensable time includes safety-related showering on premises).

[178] Falk v. Brennan, 414 U.S. 190, 191 (1973) (informing readers that the basis of the Secretary of Labor's claim come from the Fair Labor Standards Act of 1938); *See* U.S. Dep't of Labor, *Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule*, 86 Fed. Reg. 40939, 29 C.F.R. § 791 (2022).

[179] *Falk*, 414 U.S. at 192.

[180] *Id.*

[181] *Id.* at 191-92.

[182] *Id.* at 193.

[183] *Id.*

[184] *Id.* at 194.

Finding merit in the Department of Labor's position, the Supreme Court ruled that a joint employment relationship had been created because "D & F's managerial responsibilities at each of the buildings … gave it substantial control of the terms and conditions of the work of these employees."[185] This resulted in D & F meeting the "the statutory definition (of) an 'employer' of the maintenance workers."[186]

B. Joint Employment in NLRB General Counsel's Memorandum for College Athletics

The NLRB's General Counsel issued Memorandum GC 21-08 in 2021 to advise the agency's regional directors to consider treating athletic conferences as joint employers with schools.[187] This idea addresses a fundamental problem that college athletes encountered in the efforts by Northwestern University football players to form a union: the NLRA only applies to private employers and their employees.[188] GC 21-08 suggests that the common control of athletic labor performed by college athletes between private conferences and schools fits common law principles for joint employment.[189] Because most major athletic programs are part of public universities,[190] and because the NLRA

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[185] *Id*. at 195.

[186] *Id.*

[187] Abruzzo, *supra* note 18.

[188] *Id.* at 9, n.34, stating:

> As explained in Northwestern University, where an athletic conference is an 'independent, 'private entity, created by the member schools," exerting jurisdiction over the conference is appropriate even where some member institutions are public. 362 NLRB at 1354 n.17, citing Big East Conference, 282 NLRB 335, 340-42 (1986) (asserting jurisdiction over athletic conference where two of nine member institutions were state institutions, because those two institutions 'cannot control the operations' of conference). Therefore, I will consider pursuing charges against an athletic conference or association even if some member schools are state institutions.

[189] *Id.* at 3, stating:

> The Board has also applied common-law agency rules governing the employer-employee relationship when applying the Act's expansive language and purpose to determine employee status. Under common law, an employee includes a person 'who perform[s] services for another and [is] subject to the other's control or right of control.' In addition, '[c]onsideration, i.e., payment, is strongly indicative of employee status.' That law fully supports a finding that scholarship football players at Division I FBS private colleges and universities, and other similarly situated Players at Academic Institutions, are employees under the NLRA. Indeed, Players at Academic Institutions perform services for their colleges and the NCAA, in return for compensation, and subject to their control.

[190] Northwestern Univ., Emp. & Coll. Athletics Players Ass'n, 362 N.L.R.B. No. 167 (2015), *2 ("Northwestern's football team competes in the NCAA Division I Football Bowl Subdivision (FBS)…. At present, about 125 schools compete at that level. Only 17 of those schools— including Northwestern— are private colleges or universities, and Northwestern is the only private school in the 14-member Big Ten.").

excludes governmental employers,[191] most athletes in Power Five schools cannot form a union under the NLRA.[192] GC 21-08 outlines an approach to sidestep these statutory obstacles, and the NLRB's ruling in the Northwestern case.[193]

The apparent goal of GC 21-08 is to test in an NLRB proceeding whether major athletic conferences are joint employers with schools, evident in the General Counsel's intention that "in appropriate circumstances I will consider pursuing a joint employer theory of liability."[194] While not spelled out clearly or in detail, this theory means that "it may be appropriate for the Board to assert jurisdiction over the NCAA and an athletic conference, and to find joint employer status with certain member institutions, even if some of the member schools are state institutions."[195] The General Counsel's point is that college athletes "perform services for, and (are) subject to the control of, the NCAA and their athletic conference, in addition to their college or university."[196] This joint employment theory could circumvent the public sector exclusion of college athletes at state universities because their joint employer is a private non-profit association.[197]

The NLRB filed an unfair labor practice complaint against USC, the Pac-12 Conference, and NCAA in 2023 in apparent effort to apply GC 21-08 to college football.[198] The essential charges are that USC football players are employees under Section 2(3) of the NLRA; that the respondents are joint employers of the players; and that the players are misclassified as student athletes rather than employees, thereby depriving them of rights under the NLRA.[199] During an administrative law hearing, players testified to devoting about 60 hours a week to football activities while under tight control by the school's coaches, including electronic monitoring of team activities such as

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[191] Section 2(2) of the NLRA provides: "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof…." 29 U.S.C. § 152(2).

[192] Northwestern Univ., *supra* note 190, at *7, stating: "The Board has never asserted jurisdiction, or even been asked to assert jurisdiction, in a case involving scholarship football players or similarly situated individuals, and for the reasons stated above, we decline to do so in this case."

[193] Abruzzo, *supra* note 18, at 2.

[194] Abruzzo, *supra* note 18, at 9, n.34.

[195] *Id.* at n.34.

[196] *Id.*

[197] *See* Pac-12 Conf., IRS Form 990, Line K ("unincorporated nonprofit association"), https://projects.propublica.org/nonprofits/organizations/941459048/202321329349302092/full.

[198] Complaint & Notice of Hearing, Univ. of S. Cal.; Pac-12 Conf.; and Nat'l Collegiate Athletic Ass'n (Joint Employers) and Nat'l Coll. Players Ass'n, N.L.R.B. (May 13, 2023), https://apps.nlrb.gov/link/document.aspx/09031d4583a5defb.

[199] *Id.* at ¶ 7(a), (b), and (c).

dining together and lifting weights.[200] In addition to the fingerprint monitoring of players at the team dining hall, use of class monitors, and hydration and weight checks, USC allegedly required players to remain in the team hotel when they were on the road unless they left with the team — even if the game was many hours away.

C. Joint Employment Under NLRB's "Reserved Control" Rule

The NLRB issued a final rule for joint employment in October 2023.[201] It replaced an NLRB rule that used an entity's direct control over workers to determine a joint employment relationship.[202] The new rule broadens the legal scope of when an employer for one entity is a joint employer with another entity by focusing on whether the former reserves a right to control aspects of the latter's employment practices and policies.[203] The crux of this definition is whether the two employers share or codetermine one or more of the employees' essential terms and conditions of employment.[204] The NLRB will consider seven factors to make this determination:

> (1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees.[205]

The Board explained that its reserved control test draws from common law principles of employment.[206] The Board also clarified the rule's limits. First, the

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[200] Witz, *supra* note 168.

[201] Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946-74018 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103).

[202] *Id.* (referencing "Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184-11236, at 11186 (Feb. 26, 2020) (to be codified at 29 C.F.R. pt. 103)" stating that the Board is proposing a rule "to define 'share or codetermine' as the possession and exercise of 'such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees.'").

[203] Standard for Determining Joint Employer Status, 88 Fed. Reg., at 73948.

[204] *Id.* at 73946.

[205] *Id.* at 73956.

[206] *Id.* at 73983 ("the Board has modified this provision from the version set forth in the NPRM by clarifying that, in every case, the object of a common-law employer's control that is relevant to the question of whether it is also a joint employer under the Act must be an essential term and condition of employment as defined in § 103.40(d)").

rule will not change how liability among several employers is apportioned in unfair labor practice (ULP) complaints.[207] Second, the Board said that the rule would continue to recognize "that some kinds of control, including some of those commonly embodied in a contract for the provision of goods or services by a true independent contractor, are not relevant to the determination of whether the entity possessing such control is a common-law employer."[208]

D. Assessing How Joint Employment Rules Apply to NIL Collectives

Table 9
Probability of Collectives as Joint Employers of College Athletes
(Darker Shading Indicates Higher Risk of Joint Employment)

	Legal Theory of Joint Employment		
Type of NIL Collective	FLSA (D.O.L. & *Falk* (1974))	NLRA (N.L.R.B. GC 21-08 for College Athletes)	NLRA (N.L.R.B. "Reserved Control" Rule)
NIL Endorsement *(NIL Deals and Policies in Part IV.B)*	Low 1	Low 2	Low 3
NIL Collectives *(NIL Deals and Policies in Part IV.B)*	Low 4	Medium 5	High 6
NIL Joint Venture-Collective	Medium 7	High 8	High 9

[207] *Id.* at 73981 ("while the final rule establishes a joint-employer standard that will apply in unfair-labor-practice cases, it does not purport to assign liability or otherwise depart from well-established principles regarding how to apportion responsibility for unlawful conduct among multiple parties").

[208] *Id.* at 73983.

NIL Private Equity-Collective	High 10	High 11	High 12

Table 9 summarizes my joint employment analysis for the four NIL models (far left-hand column) by applying three joint employment approaches (listed in a row above the numbered cells). This yields twelve cells, each indicated by a number. In the cells, I offer my probability assessment of a legal finding of joint employment for a collective and a school, with an explanation that draws from the anonymized NIL database and policies provided by UCLA and Indiana.

NIL Endorsement (Cell 1-Cell 3): For Cell 1, the *Falk* decision involved a joint employment relationship based on a managerial services contract between a company and individual building owners, where the company and building owners exerted common control over the terms and conditions of employment for janitors. In the NIL Endorsement model, the policies of UCLA and Indiana require athletes to disclose NIL deals and adhere to school rules that preserve their amateur status.

However, the schools have no contractual involvement in an athlete's NIL deal. Thus, a key factual element in *Falk* is not present for NIL endorsement deals. No less importantly, the schools exercise no direct control of an athlete's activities. Instead, their policies clearly and concretely separate NIL activities in an athlete's personal sphere and an athlete's athletic recruitment, participation, and amateur standing within the bounds of NCAA and school policies. For Cell 2, GC 21-08 states that '"consideration, i.e., payment, is strongly indicative of employee status.'" [209] The Memorandum states that athletes are employees because they render "services for their colleges and the NCAA, in return for compensation, and (are) subject to their control."[210]

Applying the main legal thought behind GC 21-08 there is no direct or indirect evidence of athlete compensation in return for athletic services, nor is there any indication of school control of the athletes' NIL activities. The fact that UCLA and Indiana have NIL policies in furtherance of complying with NCAA rules falls short of indicating school control of NIL activities. In short, there is a low probability, if at all, for a joint employment relationship.

For Cell 3, the endorsement model also presents a low probability for joint employment for college athletes. However, the risk seems higher than the FLSA and GC 21-08 joint employment approaches because the first test involves

[209] Abruzzo, *supra* note 18, at 3.

[210] *Id.*

"wages, benefits, and other compensation." [211] The "other compensation" element could be applied to NIL endorsement deals. The other element that could be applied is "tenure of employment" because NIL deals appear to have limited terms of duration. Nonetheless, the same can be said for independent contractor work that the NLRB states is outside the scope of the new rule.[212]

NIL Collective (Cell 4-Cell 6): For Cell 4, the probability of a joint employment relationship under the FLSA and *Falk* decision remain low. As in the endorsement model, there is no evidence of a contract between the school and its collective that compares to the managerial services contract between a company and individual building owners, where the company and building owners exerted common control over the activities of janitors.

For Cell 5, there is a medium probability of a joint employment relationship under GC 21-08. This assessment is based on the Memorandum's observation: "Under common law, an employee includes a person 'who perform[s] services for another and [is] subject to the other's control or right of control.'"[213] Fact Finding 5, showing that 100 NIL deals for football players paid a uniform amount, $25,000, implies a degree of coordination between the NIL collective and football team. There is no direct evidence of coordination, nor any evidence that the collective controlled the services of these athletes. The ambiguity in the data lends support to my assessment of a medium probability of a joint employment relationship.

Cell 6 shows that the probability of a joint employment relationship is high for collectives under the NLRB's reserved control rule. Two factors support this inference: wages, benefits, and other compensation; and the tenure of employment, including hiring and discharge. Table 6 shows that the football team registered 80 NIL deals on August 22nd, and another 16 NIL deals on August 30th. These deals appear to be part of the 100 NIL football deals for exactly $25,000. The timing and grouping of these NIL deals looks like a hiring function timed around the start of the football season. The value of these deals appear to be a proxy for wages.

NIL Joint Venture-Collective (Cell 7-Cell 9): To begin with, Alabama responded to my FOIA request on July 20, 2023, stating: "Mr. LeRoy, I received your open records request below, dated June 27, 2023. You do not appear to be a citizen of the state of Alabama; therefore, you do not have standing to make a request pursuant to the Alabama Open Records Act."[214] Thus, I do not have survey data, nor files like the ones sent by UCLA and Indiana, to evaluate

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[211] Standard for Determining Joint Employer Status, 88 Fed. Reg., at 73956.

[212] *Id.*

[213] Abruzzo, *supra* note 18, at 3.

[214] E-mail on file with author.

whether Alabama has any functional intersection with its NIL collective. For this analysis, I assume that the school is similarly disassociated with its collective, at least in a formal sense.

Nonetheless, Cell 7 indicates a medium probability that a joint venture-collective model at Alabama meets the standard for joint employment under D.O.L. rules. The *Falk* decision placed special emphasis on the fact that "D & F's managerial responsibilities at each of the buildings … gave it substantial control of the terms and conditions of the work of these employees."[215]

Figure 3 shows an interaction arrow from the joint venture—consisting of the athletic department and a media company— as well as an interaction arrow from the athletes to the collective. Both arrows represent financial transactions. In addition, the interaction arrow from NIL sponsors to the collective shows how money flows to athletes in NIL deals.

Ostensibly, this arrangement is designed to separate pay for athletes from how they play. And to a significant degree, this disassociation occurs. Neither the collective nor the media company controls player workouts and practices, designates starters and substitutes, or calls plays.

Nonetheless, collectives serve as a recruitment conduit,[216] and this is a hiring function. Moreover, the joint venture is intentionally located in the Alabama football stadium. While the school's motivations for this location are not explicit, it allows football players to practice, play, and market themselves in one central location. The arrangement is laden with opportunities for football players to parlay team or individual performances in games with lucrative NIL sponsorships. The fact that pay for play is not made an explicit benefit for athletes but play for pay can be monetized in the stadium supports my assessment of a medium risk of joint employment.

Cell 8 and Cell 9 would result in a high probability of joint employment for Alabama's joint venture. In Cell 8, GC 21-08 articulates a policy to facilitate collegiate unionization that would circumvent the NLRB's decision in the Northwestern case.[217] The memorandum unabashedly states that "it may be appropriate for the Board to assert jurisdiction over the NCAA and an athletic conference, and to find joint employer status with certain member institutions, even if some of the member schools are state institutions."[218] This theory of joint employment would expose state university athletic programs— involving most

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[215] Falk v. Brennan, 414 U.S. 190, 195 (1973).

[216] Fahrenthold & Witz, *supra* note 169.

[217] Abruzzo, *supra* note 18, at 2.

[218] *Id.* at 9 n.34.

major athletic programs— to the Board's jurisdiction. Alabama's premier football program is a prime example.[219]

Adding to this employment risk assessment, published NIL deals at Alabama are highly indicative of the GC 2021-23's reference to a common law test, where "[c]onsideration, i.e., payment, is strongly indicative of employee status."[220] In 2022, Bryce Young earned $3.1 million in NIL pay; Will Anderson earned $1.3 million; Jahmyr Gibbs earned $632,000; Jordan Battle earned $615,000; Jermaine Burton earned $524,000; Ga'Quincy ('Kool-Aid') McKinstry earned $473,000; and Eli Ricks earned $469,000.[221] Evidence of these payments would likely be construed as consideration for rendering services to the Alabama football team, especially in a national NIL market in which collectives compete for athletes.

The analysis for Cell 9 relies on the same NIL data and financial relationships depicted in Figure 3 (*supra*). In addition, Alabama's joint venture model is like a franchisor-franchisee relationship with the school granting a branding and NIL franchise to the multi-media company. In this vein, it is pertinent to note that in the NLRB's final rule the Board rejected comments that suggested exempting franchisor-franchisee relationships from joint employment.[222]

NIL Private Equity-Collective (Cell 10-Cell 12): There is a high likelihood of a joint employment relationship under the DOL rule and the NLRB's two scenarios. In *Falk*, where D & F managed properties owned by different entities, a joint employment relationship was found where D & F substantially controlled the terms and conditions of the work of each building's janitors. In Figure 4, arrows between the equity investor and school, and between the investor and NIL collective, imply similar control over athletes in how they are recruited, retained, and marketed. These relationships are highly likely to yield a joint employment relationship under the FLSA.

For Cell 11, the main principles of GC 21-08 would likely result in joint employment of athletes by the school, its equity investor, and its collective. Like the analysis in Cell 8 for Alabama's joint venture with Learfield, payments funded by the equity partner to recruit and retain athletes at Florida State would

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[219] Fahrenthold & Witz, *supra* note 169.

[220] Abruzzo, *supra* note 18, at 3.

[221] *See* Lauri Springer, *Alabama Football: NIL Evaluations for Top Tide Players*, BAMA HAMMER (May 30, 2022), https://bamahammer.com/2022/05/30/alabama-football-nil-evaluations-top-players/.

[222] Standard for Determining Joint Employer Status, 88 Fed. Reg., at 73946, 73960, stating: "We similarly decline other commenters' invitation to exempt other kinds of businesses, including cooperative businesses, franchise businesses, and firms and independent contractors operating in the insurance and financial advice industry, from the joint-employer standard we adopt in this final rule."

likely be construed as consideration for rendering services to the school's athletic department.

Florida State's reported interest in a private equity investment to buy its media rights from the ACC to move to a conference with a better TV deal suggests that investors would have a profit motive.[223] If Florida State moved from a smaller to better media deal, this could help the school recruit elite athletes. In other words, an equity deal would possibly be tied in some way to the school's collective, where investors—not the school—would pay for recruiting athletes and retaining them based on athletic performance.[224]

For Cell 12, also showing a high probability of joint employment, the equity partner could aim for a virtuous cycle of investing in a school's athletic department while also investing outside the school in the school's collective. The school's high-quality athletes might grow the athletic department's revenue stream, not only in media money but licensing of its brand. The private equity investor could have a stake in both revenue streams. In other words, the private investor might see an opportunity by putting money into the school's media rights buyout and profiting from the school's collective.

This arrangement would implicate three factors in the NLRB's reserved control rule. First, an investment in the school's NIL collective would constitute a wage substitute, captured in the rule's mention of "other compensation."[225] The equity investment to move from the ACC to another conference would impact the hours of work and scheduling of athletes.[226] Even if the quantum of work was less—that is, the move was to a conference such as the SEC with less distant schools than the Big Ten or ACC—there would be an effect on work and scheduling. Third, any involvement with the collective could be construed as hiring.[227]

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[223] Novy-Williams, et al., *supra* note 135.

[224] Fahrenthold & Witz, *supra* note 169, reporting:

> The collective, called Texas One Fund, did it by exploiting the new system, which allowed endorsement-seeking companies to pay players for the rights to their name, image and likeness. Collectives flipped that. They bought the rights, so they could buy the player — ensuring they remained happy and playing for their school.

[225] Standard for Determining Joint Employer Status, 88 Fed. Reg., at 73956.

[226] *E.g.*, Jeff Faraudo, *An Early Look at Cal's Travel Requirements for ACC Football, Basketball*, CAL SPORTS REP. (Sept. 3, 2023, 2:43 PM), https://www.si.com/college/cal/news/cal-travel-in-the-acc

> (In men's and women's basketball, Cal would again trek to the traditional landscape of the ACC three or four times each season, playing a pair of games on each trip…. In baseball and softball, teams would travel east for weekend series, allowing athletes to remain on campus to attend classes for much of the week.).

[227] Standard for Determining Joint Employer Status, 88 Fed. Reg., at 73948, explaining: "The final rule set forth an 'exhaustive' list of essential terms and conditions of employment comprised of 'wages, benefits, hours of work, *hiring*, discharge, discipline, supervision, and direction'" (emphasis added).

VI. CONCLUSIONS

My study sheds new light on the possibility of joint employment between NCAA schools and NIL collectives, which are typically private entities. I requested information from all Power Five schools in 2023 to look for evidence of joint employment in the relationship between schools and collectives. My survey asked schools several basic questions about their relationship with, and control over, NIL collectives. All responding schools denied any connection to the collective for their athletics program. This result was not surprising. Any direct linkage between an NIL collective and a school would potentially violate NCAA rules that prohibit schools from using money from boosters to pay athletes. Only one school responded to my request for NIL data for its athletes. The data from this school suggest conclusions, set forth below, as I ask whether the NLRB or a court would impute a collective's activities to a school to find a joint employment relationship.

1. At present, the collective model allows schools to do two contradictory things. A third-party payer system compensates a school's athletes without violating NCAA rules. It also mimics employment without taking on the costs, legal obligations, and tax burdens of being an employer. But my research shows that this delicately balanced separation of payers from schools faces medium-to-high-risk of a joint employment ruling under the FLSA and NLRA.

Football programs are at the highest risk for being found as joint employers with collectives because of large NIL payments combined with deal dates at the beginning of a season that mimic NFL player signings.[228] Men's basketball poses a similar risk for joint employment.[229]

There is an upside for schools that want to avoid a joint employment ruling, assuming that the NLRB or a court would consider joint employment for only certain sports and not the whole athletic program. My study finds no evidence to support a broad joint employment finding for entire athletic departments. Apart from football, men's and women's basketball, and softball, NIL pay is too negligible to impute joint employment to the school's collective.[230]

2. My study depicts the evolution of four NIL models in college athletics.[231] There is an emerging trend of co-marketing between schools, NIL collectives, and partnering businesses or capital investors to provide third-party payments to athletes. The Alabama joint venture model ties the NIL payment source too closely to the athletic program to avoid a high probability of a joint employment

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[228] *Supra* Fact Finding 8.

[229] *Supra* Fact Finding 9.

[230] *Supra* Table 1.

[231] *Supra* Part III.B.

rulings.[232] The school's joint venture would certainly test whether the separation between Learfield—a media company—and Alabama athletes is meaningful in a legal sense for joint employment approaches under the FLSA and NLRA. Florida State's possible use of a private equity model raises a similar concern.

My findings are not so dire for most athletic programs that, so far, have not embedded outside financial entities or sources directly into their athletic programs. In this respect, the survey results from UCLA and Indiana demonstrate strong institutional reluctance to breach the wall between collectives and schools for NIL funding of athletes. However, even if these institutions strictly adhere to their own policies, my survey results do not answer how athletes find NIL deals with collectives that match the roster preferences of coaches. The NCAA recruiting portal shows a de facto labor market that works efficiently in sorting rising and falling players with appropriate market opportunities for NIL pay. In other words, my study does not tell the whole story about how NIL collectives and athletic departments work toward a common purpose of paying some athletes.

3. The possibility of joint employment for college athletes has been reported in the media, with a focus on the NLRB unfair labor practice complaint against USC, the Pac-12, and NCAA.[233] However, this reporting omits two other joint employment approaches—an approach under the FLSA,[234] and the NLRB's recently promulgated reserved control rule.[235] Table 9 shows that risk assessments for the four NIL models—three of which involve collectives—vary as a function of different joint employment approaches under the FLSA and NLRA.

Even if my risk assessments are questionable, my research improves the analysis of NIL collectives by encouraging the NLRB, courts, scholars, and media pundits to consider whether collectives—apart from conferences and the NCAA—jointly employ athletes with schools. Also, my research shows that joint employment must be contextualized by comparing the type of collective to a particular joint employment approach. A one-size-fits-all joint employment theory fails to consider variations of these approaches. A one-size-fits-all model of NIL collectives misses their business variations.

4. If the NLRB or a federal court determines that an employment relationship exists, this would potentially enable college athletes to form a labor union to negotiate terms and conditions of employment. More generally,

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[232] *See supra* Part III.B.3.

[233] Complaint & Notice of Hearing, Univ. of S. Cal. V. Nat'l Coll. Players Ass'n, No. 31-CA-290326, 1 (N.L.R.B. Div. of Judges Feb. 8, 2022).

[234] Falk v. Brennan, 414 U.S. 190, 196 (1973).

[235] Standard for Determining Joint Employer Status, 88 Fed. Reg., at 73946, 73947.

without specific regard to college athletics, a new NLRB rule expands the joint employer doctrine,[236] including to franchisors and franchisees.[237] This could also have implications for college athletics insofar as a court could find that the NCAA or conference acts like a franchisor while schools are like franchisees, possibly implicating the NLRB's reserved control rule for joint employment.

5. My conclusions have caveats. To begin with, this study is based on data from only one school. The data are from 2022-2023. My fact findings from the data might not even be valid for that school in 2023-2024 or beyond. Such is the nature of rapidly evolving NIL collectives.

My analysis is also limited by legal uncertainties. The FLSA joint employment model has been longstanding and stable.[238] It also generates the lowest risk of joint employment outcomes for schools.[239] The higher risk outcomes apply to two NLRB joint employment approaches,[240] but neither approach has been tested by the NLRB's adjudicatory board or an appellate court.

In sum, NIL collectives are poorly understood even though they have altered college athletics. They are shrouded behind third-party payer walls that create private spaces for boosters to pay athletes. Their transactions are beyond the reach of NCAA rules and employment laws. NIL collectives have destabilized competition between schools, pitting wealthy booster corporations against smaller and less business-savvy competitors. More disquieting, NIL collectives have achieved a workaround that avoids the employment relationship, depriving athletes long-term benefits of employment—access to a union to bargain for an even greater share of the wealth they produce, coverage under employment discrimination laws for racial and sexual harassment by coaches, pension contributions that could grow over several decades into significant benefits, worker's compensation for injuries, and long-term disability care for debilitating injuries, such as chronic traumatic encephalopathy. My study offers a new way to address these inequities by matching joint employment approaches to emerging NIL collectives.

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[236] Abruzzo, *supra* note 18.

[237] Standard for Determining Joint Employer Status, 88 Fed. Reg., at 73960.

[238] *Falk*, 414 U.S. at 196.

[239] *Supra* Table 9 (Cells 1–3).

[240] See *supra* Table 9 (Cells 10–12).

APPENDIX

Figure 1: Individual Endorsement Model

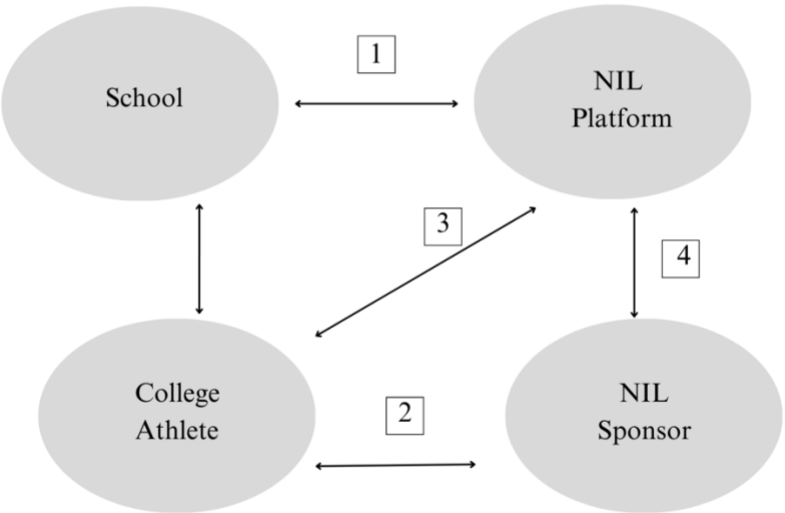

Figure 2: Collective Model (Pay-to-Play)

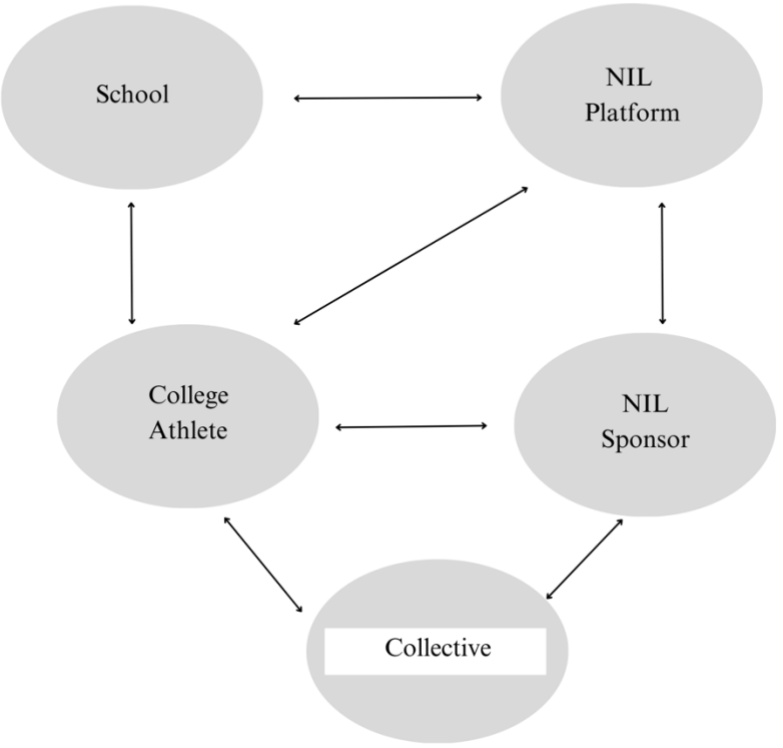

Figure 3: Joint Venture-Collective Model (Alabama)

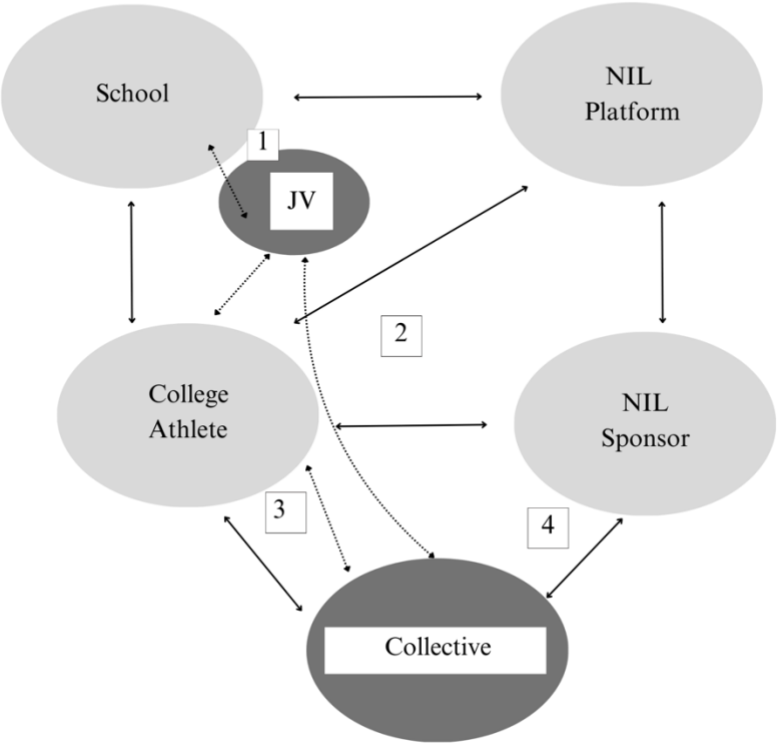

Figure 4: Private Equity-Collective Model
(Florida State Possibility)