

Embracing Competition: Protecting the Name, Image, and Likeness of Student-Athletes

Cole G. Merritt

In the wake of the Supreme Court's unanimous decision in *NCAA v. Alston* and new state laws, the NCAA issued an [interim policy](#) over the summer allowing collegiate student-athletes to exploit their Name, Image, and Likeness ("NIL"). Subsequently, collegiate student-athletes have been making headlines by signing large deals, like the Ohio State quarterback who recently signed a [contract worth \\$1.4 million](#) over 3 years. Though many of the headlines are tied to the biggest names in college sports, these new revenue streams can also [benefit student-athletes in smaller markets](#).

The NCAA has been subjected to several lawsuits that at least partially prompted its new NIL policy. Most notably, in *NCAA v. Alston*, the Supreme Court applied antitrust analysis to the NCAA's restrictions on education related benefits provided to student-athletes. The Court's opinion makes clear that the NCAA is subject to antitrust law, ultimately holding that the NCAA could not restrict education related benefits. The Court's application of antitrust law to the NCAA [potentially influenced](#) the NCAA's new stance on NIL rights for student-athletes. The NCAA is also currently facing related litigation that may further shape NIL rights for collegiate student-athletes. *Johnson v. NCAA* is pending in federal court and focuses on whether the plaintiffs, current and former student-athletes, are entitled to minimum wage protection. The NCAA is also facing challenges to its previous restrictions on exploiting NIL in *House v. NCAA* despite its new NIL policies.

NIL protections are [derived from the right of publicity](#), which is generally governed by state law. In the background of the litigation surrounding NCAA policies, many states have [independently adopted legislation](#) specifically governing collegiate student-athletes' right to exploit their NIL. These laws vary from state to state, conferring differing protections and restrictions to collegiate student-athletes'. Because student-athletes ultimately have a choice of which college to attend, variation between states can foster increased competition in the market for college athletes. Future athletes will presumably consider the NIL laws of a particular state when choosing where to enroll due to the related financial incentives. Insofar as states are motivated to maximize the athletic success of the colleges within their borders, an assumption that [public university coaching salaries](#) tend to support, the added recruiting competition NIL brings can move states in the direction of maximizing benefits to student-athletes.

Regardless of the adoption of interim rules allowing student-athletes to monetize their NIL in compliance with state law, the NCAA has been clear that it hopes for federal legislation to provide uniformity. Any federal legislation on NIL rights for collegiate student-athletes, however, is likely to be significantly influenced by the NCAA; at least [one senator](#) has already indicated the need for the NCAA's advice on this matter. The NCAA's influence in this process increases the risk of valuing the NCAA's goals over the needs of student-athletes in any forthcoming federal legislation. Given the relative success that states have governing the right of publicity in other contexts, federal legislation may not be the most effective way to protect the rights of student-athletes.

In fact, the NCAA's desire for uniformity is in tension with the *Alston* Court's focus on competition. By preempting any state laws, federal legislation would remove competition as

safeguard for maximizing protections of student-athletes' rights. Student-athletes may be better served by state governance, where their NIL rights are more likely to be protected by competitive forces.

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Summary

The NCAA has issued an interim ruling allowing student-athletes to exploit their Name, Image, and Likeness in response to new state laws and the Supreme Court's holding in *NCAA v. Alston*. The NCAA is seeking federal legislation, but its purposes and the rights of student-athletes may be better served by embracing state control of the right of publicity.

About the Author

Cole G. Merritt is a 2L from California who worked as an engineer prior to enrolling at Vanderbilt Law School. He enjoys playing golf in his free time and hopes to practice patent law after graduation.