Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech

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ABSTRACT

Following a unanimous defeat at the Supreme Court in National Collegiate Athletic Association (NCAA) v. Alston *and facing an impending start date for various state laws that would force action on athletes' ability to profit off their name, image, and likeness (NIL), the NCAA recently made the decision to simply allow states and member colleges and universities to promulgate NIL restrictions on their own. But while such a delegation helps the NCAA stave off relevant antitrust action against them, placing regulatory authority over college athlete endorsement and sponsorship deals in the hands of government actors like state legislators, governors, and public educational institutions brings constitutional analysis into play in a way that has not previously been seen in sports due to the wholly private natures of sports leagues and the NCAA.*

Along these lines, this Article applies First Amendment jurisprudence to three recurring NIL restrictions imposed by states and schools: (1) restrictions on athlete deals that conflict with institutional endorsement deals; (2) restrictions on athlete deals with vice industries like gambling and alcohol; and (3) broad restrictions on deals that conflict with undefined "institutional values." To do so, we apply several First Amendment doctrinal frameworks—those concerning commercial speech, student speech, public employee speech, and the overbreadth doctrine—to provide a range of different means by which courts may interpret how the rights of college athletes are affected by NIL policies. In the end, we find that the nature of these restrictions as overbroad prior restraints of free speech creates significant doubt as to the constitutionality of many of these restrictions under the First Amendment. We conclude that such restrictions in no uncertain form "present a 'realistic danger' [that these actors] could significantly compromise recognized First Amendment protections," including the advanced protections for political speech.

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INTRODUCTION

After years of debate, advocacy, and delay, on July 1, 2021, the National Collegiate Athletic Association (NCAA) finally ceded to calls to allow college athletes to profit off their name, image, and likeness (NIL) in commercial advertisements, sponsorships, and endorsements.[1]

This monumental policy shift by the NCAA hardly came about by choice. Indeed, the NCAA's interim rules were adopted just about eight hours prior to the effective dates of legislation and executive orders in several states that would have made it generally illegal for the overseeing athletic association and its member institutions to restrict athlete NIL rights within those states.[2] And just two weeks prior, the NCAA had suffered a decisive antitrust defeat at the Supreme Court in *NCAA v. Alston*,[3] a decision that stripped the association of its long-enjoyed "ample latitude" from antitrust scrutiny for its actions in defense of "the revered tradition of amateurism in college sports."[4]

Given this one-two punch of legal pressure, it was of little surprise that even the NCAA—an organization known (and oft criticized) for a level of micromanagement that recently included stripping a women's tennis team of three years of victories based on an improper reimbursement of a $252 phone bill[5]—decided to largely cede regulatory authority locally to the schools and controlling states rather than risk further antitrust exposure.

This concession by the NCAA has created a vast patchwork of NIL policies on a state-by-state (or even school-by-school) basis as colleges and universities, sponsors, and athletes themselves attempt to navigate through vague and uncertain state limitations and a commercial marketplace that has been compared to the "Wild

1. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021), https://perma.cc/G7NF-VSV9.

2. *Name, Image and Likeness (NIL): What It Means, Why It Matters, and how It's Impacting the NCAA and College Sports*, ATHLETIC (July 1, 2021), https://perma.cc/K5G7-MWTW. While the NCAA's tentative rules open up the monetization of NIL for all NCAA Division I athletes, the states that forced the NCAA into taking such action by implementing state NIL laws with July 1, 2021 start dates were Alabama, Florida, Georgia, Illinois, Kentucky (via executive order), Mississippi, New Mexico, Ohio (via executive order), Oregon, Pennsylvania, and Texas.

3. 141 S. Ct. 2141 (2021) (affirming lower court injunction barring the NCAA from enforcing caps on education-based compensation, as such caps constitute price-fixing in violation of the Sherman Antitrust Act).

4. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 120A (1984) ("The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role."). The *Alston* decision found the *Board of Regents* language to be dicta, holding instead that NCAA rules should not receive any particular protection under the antitrust laws unless Congress deems it appropriate to grant that protection through legislative action. *Alston*, 141 S. Ct. at 2157–60. *See also* Sam C. Ehrlich, *The NCAA's Massive Loss in Alston, Explained*, EXTRA POINTS (June 22, 2021), https://perma.cc/BLL5-38DS (explaining the impact of the Supreme Court declaring the *Board of Regents* "ample latitude" language to be dicta in *Alston*).

5. Mike DeCourcy, *Stripping UMass Women's Tennis of Atlantic 10 Championship Could Be the Worst Miscarriage of NCAA Justice, Ever*, SPORTING NEWS (Oct. 29, 2020), https://perma.cc/K56L-G5XA.

West."[6] One interpretive conflict that has already arisen concerns the media group Barstool Sports. While Barstool has signed deals with dozens of college athletes since the NIL floodgates opened on July 1, 2021, many commentators have advised caution due to Barstool's ties to sports betting—a link that makes such a partnership questionable under many state NIL laws.[7] To this end, the American International College (AIC) compliance office tweeted in early July 2021 that a partnership with Barstool is directly forbidden due to these gambling connections.[8] Similarly, the University of Louisville sent an email to its athletes in August 2021 informing them that they must "cease involvement with 'Barstool Sports'" as "Barstool Sports does not comply with University of Louisville policies and it does not comply with the criteria outlined in the Kentucky Governor's Executive Order"—though unlike AIC, the University of Louisville initially gave no reason why partnerships with Barstool do not comply with its institutional and Kentucky's state-level NIL restrictions.[9]

The NCAA's localization and delegation of authority over athlete NIL regulations to public institutions and state legislatures provides a new angle for scholars to examine the legality of such restrictions: the protections afforded to individuals under the Bill of Rights. While the Supreme Court has found the NCAA itself to be a strictly private actor, state legislatures and public schools are unequivocally state actors and thus bound by the Constitution's restrictions on government power.[10] In

6. *See, e.g.*, Daniel Kaplan, *As NIL Era Arrives, Marketing of College Athletes Is About To Become Wild West of Sports Business World*, ATHLETIC (June 29, 2021), https://perma.cc/EVA4-C5AJ.

7. Leah Vann, *One Week into NIL, Lawyers Caution Athletes on Barstool, YOKE Gaming and Misinformation that Could Affect Iowa Athletes*, GAZETTE (Aug. 27, 2021), https://perma.cc/N9M7-JGV7.

8. @AIComplies, TWITTER (July 8, 2021, 10:37 AM), https://perma.cc/E4TR-VUDD ("Working with Barstool is not allowed because even if you don't promote gambling directly, you are still promoting a company that owns a sports betting site/app and that goes against NCAA rules and Massachusetts state laws."). Massachusetts did not have a NIL law in place when that tweet was posted, so AIC's statement regarding "state law" may have been based on Massachusetts state gambling law rather than the state NIL laws discussed and explored in this Article. Still, AIC's interpretation is notable since it is likely shared by fellow athletic compliance offices in states that do have such statutes (including those that explicitly forbid athlete NIL deals with gambling products and companies), and it would likely be applied to interpretation of a Massachusetts NIL law should one be passed that contains this language. Moreover, AIC's interpretation applies to its own *institutional* NIL policy, as the compliance department explained in an earlier tweet. @AIComplies, TWITTER (July 8, 2021, 9:55 AM), https://perma.cc/SG37-VGVN ("If you want to take part in an NIL deal, please contact the Compliance Office first to make sure you don't cause eligibility issues. You are not allowed to work with companies that promote alcohol, drug use (including marijuana), gambling/sports betting (including Barstool) #NIL.").

9. Darren Heitner (@DarrenHeitner), TWITTER (Aug. 9, 2021, 8:45 PM), https://perma.cc/JQU3-TYMT ("Louisville Assistant AD has told athletes to cease #NIL involvement with Barstool Sports. [via @TyInLouisville]"). *See also* Ransom Campbell, *Louisville Tells Student-Athletes To Cease NIL Involvement with Barstool Sports*, TALKING POINTS SPORTS (Aug. 11, 2021), https://perma.cc/XA4G-BDJM. The university's stated rationale ended up being much simpler: University of Louisville Athletics spokesman Kenny Klein later told the *Louisville Eccentric Observer* that the reason for the directive was Barstool's unauthorized use of materials and images without obtaining the appropriate permissions and licenses from the university. Erica Rucker & Danielle Grady, *UofL Tells Student Athletes Not To Work with Barstool Sports—But the Reason Is Business, Not Personal*, LEO WEEKLY (Aug. 13, 2021), https://perma.cc/9AZH-BDDL.

10. NCAA v. Tarkanian, 488 U.S. 179, 192 (1988) ("A state university without question is a state actor.").

the Barstool Sports example detailed above, for instance, while the NCAA would be immune from First Amendment discussions if the organization were to create such regulations itself, the public University of Louisville, as a state actor, is not. This leads to a novel and important question: Do institutions like the University of Louisville violate the First Amendment when they forbid athletes from endorsing entities such as Barstool?

This Article begins this conversation by looking at state government actions to restrict athlete NIL rights through the lens of the First Amendment's rights to free speech and free expression. In doing so, we explore how NIL policies have been crafted and applied at the state and institutional level in a way that unwittingly restricts athletes' rights to off-campus free speech and free expression under the First Amendment.[11] We apply several First Amendment doctrinal frameworks—those concerning commercial speech, student speech, and public employee speech—to provide a range of different means by which courts may interpret how the rights of college athletes are affected by NIL policies.

We find that the nature of these restrictions creates significant doubt as to their constitutionality under the First Amendment, especially given the heightened level of scrutiny placed by courts on government preclearance requirements to speech. Indeed, such application is particularly problematic given the overbroad nature of many of these policies, both in wide-ranging definitions of impermissible vice industries like gambling and—even more problematically—in other common NIL policy clauses that allow institutions to forbid athlete NIL deals that conflict with institutional values or otherwise may harm the institutional reputation of the college or university.[12] We conclude that such restrictions "present a 'realistic danger' [that these actors] could significantly compromise recognized First Amendment protections" like the advanced protections surrounding political speech.[13]

Part I of this Article provides an overview of how, when, and why regulatory authority was placed in the hands of states and NCAA member institutions, identifying recurring themes in these entities' use of this regulatory power to protect institutional interests through restrictions on athletes' NIL rights. Part II further discusses how these shifts in regulatory authority within the college athletics governance scheme have now attached state action to NIL regulations promulgated by public colleges and universities, state legislators and executives, and even private colleges and universities acting to comply with compulsory NIL restrictions within governing state law frameworks. Part III analyzes NIL limitations under the frameworks established for commercial speech, student speech, and public employee

11. An important limitation to the analysis offered in this Article is that we focus on NIL deals that are activated off the field, including through social media posts and public or media appearances. We do not discuss, for example, the wearing of conflicting apparel on the field of play, which has long been a source of conflict in Olympic and professional sports.

12. *See infra* notes 55–58 and accompanying text.

13. Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1183 (6th Cir. 1995) (citing Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984)). *See also* Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 481–86 (1989) (discussing the application of the First Amendment's overbreadth doctrine to commercial speech and finding that commercial speech restraints that also restrain noncommercial speech must be deemed unconstitutional as overbroad).

speech. Finally, Part IV discusses the restrictions' problematic nature as overbroad prior restraints that touch on more protected speech contents, and how that nature creates significantly more challenges for states and institutions in attempting to shape NIL policy in compliance with the First Amendment. We conclude with possible solutions enabling institutions to best navigate out of the lose-lose situation created when—in this legally-fraught, post-*Alston* college sports environment—national NIL policy likely violates antitrust law, and when localized NIL regulations likely violate the First Amendment.

I. INSTITUTIONAL RESTRICTIONS ON ATHLETE NIL: PAST, PRESENT, AND FUTURE

A. A BRIEF HISTORY OF THE NCAA'S PROHIBITIONS ON ATHLETE USE OF NIL

Before scrutinizing various NIL restrictions under the First Amendment, it is important to define specifically the restrictions of athlete NIL rights at issue and explain how the use of NIL by athletes should be considered "speech" within First Amendment jurisprudence. Restrictions by the NCAA and its stakeholders on athlete use of NIL rights were a natural outgrowth of the NCAA's general principles of amateurism, under which only amateur athletes may participate in college sports.[14] These rules necessarily included Bylaw 12.5.2.1, which makes ineligible for intercollegiate athletic competition any athlete who "[a]ccepts any remuneration for or permits the use of [his or her] name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind" or "[r]eceives remuneration for endorsing a commercial product or service through [his or her] use of such product or service."[15]

This bylaw and related NCAA rules strictly limiting the use by athletes of their NIL for endorsement and sponsorship deals have been the subject of a long string of litigation over the last few decades—with mixed results. In 2004, for example, a Colorado state appellate court affirmed dismissal of a challenge to NIL prohibitions by a University of Colorado (CU) football player, finding that "[t]he clear import of the bylaws is that, although student-athletes have the right to be professional athletes, they do not have the right to simultaneously engage in endorsement or paid media activity and maintain their eligibility to participate in amateur competition."[16] The

14. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 332–37 (2007) (detailing the recent history of amateurism in college sports leading to modern NCAA amateurism rules).

15. *Bylaw 12.5.2.1*, NCAA, https://perma.cc/27B9-NPNL (last visited June 28, 2021). *See also* Bloom v. NCAA, 93 P. 3d 621, 625 (Colo. Ct. App. 2004) (quoting Bylaw 12.5.2.1 as evidence that "the NCAA bylaws prohibit every student-athlete from receiving money for advertisements and endorsements."). For a recent example of this rule's application, see Beth Brown, *Breaking Down the NCAA Bylaw Johnny Manziel Is Accused of Violating*, EAGLE (Oct. 17, 2019), https://perma.cc/2ZAP-AJE4 (explaining how the rule applies to former Texas A&M quarterback Johnny Manziel, who was suspended by the NCAA for one half of one game for signing autographs for a dealer who later sold those autographs, even if it was not proven that Manziel himself was paid for signing those autographs).

16. *Bloom*, 93 P. 3d at 626.

plaintiff in this case—a professional and Olympic skier prior to enrolling at CU—had previously engaged in various endorsement activities, including endorsing ski equipment and modeling for Tommy Hilfiger. Upon his recruitment by CU, he was forced by the NCAA to choose between those endorsement opportunities and his career as an intercollegiate football player.[17]

By contrast, in 2015 the NCAA lost a critical challenge to its NIL bylaws on antitrust grounds in *O'Bannon v. NCAA*.[18] The Ninth Circuit found significant anticompetitive effect in the NCAA's price-fixing scheme capping compensation to college athletes for the use of their NIL rights at zero that was not counterbalanced by any of the NCAA's offered procompetitive rationales.[19] However, neither the U.S. District Court for the Northern District of California nor the Ninth Circuit Court of Appeals were willing to fully enjoin the NCAA from enforcing its ban on athlete NIL use: The courts were bound by the Supreme Court's language in *NCAA v. Board of Regents*,[20] which called on courts to grant the NCAA "ample latitude" in the "maintenance of the revered tradition of amateurism in college sports."[21]

Several recent developments have changed the NCAA's legal positioning on outright bans on athlete NIL. First, a number of states have passed legislation designed to force the NCAA and its stakeholders to allow college athletes to profit off of their NIL rights in the commercial marketplace. This movement was led by California, whose governor signed the Fair Pay to Play Act into law on September 30, 2019.[22] While the NCAA was briefly content to simply threaten California with ineligibility from intercollegiate play,[23] California's bill would be quickly emulated by several other states, including a bill passed by Florida intended to leapfrog California's 2023 effective date by two full years to take effect in July 2021.[24]

The rapid flurry of additional states enacting similar legislation forced the NCAA to propose new rules that would allow for compensated use of NIL by athletes.[25] These proposed changes would have allowed athletes use of their own NIL in third-party endorsements, compensated social media activity, personal appearances, and their own businesses, but only with significant guardrails to ensure that athlete NIL use was done "in a manner consistent with the collegiate model" and with the

17. *Id.* at 622.

18. 802 F.3d 1049 (9th Cir. 2015).

19. *Id.* at 1070–74.

20. NCAA v. Bd. of Regents, 468 U.S. 85 (1984).

21. *O'Bannon*, 802 F.3d at 1074–79. *See Bd. of Regents*, 468 U.S. at 120A.

22. Press Release, Office of Governor Gavin Newsom, *Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports* (Sept. 30, 2019), https://perma.cc/5BSU-FC4H. *See* S.B. 206, Collegiate Athletics: Student Athlete Compensation and Representation, 383d Reg. Sess. (Cal. 2019).

23. Letter from Stevie Baker-Watson et al., NCAA Board of Governors, to Gavin Newsom, Governor of California (Sept. 11, 2019), https://perma.cc/APD4-S8VG.

24. Ben Kercheval, *Florida Gov. Ron DeSantis Signs Bill Allowing College Athletes To Be Paid for Name, Image and Likeness*, CBS SPORTS (June 12, 2020), https://perma.cc/DBW3-XH2W.

25. Barrett Sallee & Adam Silverstein, *NCAA Takes Big Step Toward Allowing Name, Image and Likeness Compensation for Athletes*, CBS SPORTS (Apr. 29, 2020), https://perma.cc/A9Z8-FURR.

NCAA's principles of amateurism.[26] Such "guardrails"—deemed essential to the preservation of amateurism in college sports—included prohibitions on NIL deals tied to athletic participation or performance and limitations on athlete NIL deals with certain industries which were deemed to have a history of "encouraging or facilitating recruiting and other rules infractions,"[27] prohibition of the use of school or conference intellectual property in connection with endorsement activity, and restrictions on the use of athlete NIL in certain vice industries, including alcohol, tobacco, and gambling.[28]

This rulemaking process hit a major snag in January 2021 when the Department of Justice sent the NCAA a letter warning that the proposed rules would likely violate antitrust law.[29] This letter—along with the Supreme Court's December 2020 grant of certiorari in *NCAA v. Alston*—compelled the NCAA to put a hold on the proposed rules while awaiting the Court's decision, in the hope that the Court would grant the association wider latitude under the antitrust laws to restrict compensation to athletes.[30]

This hope for wider latitude would not come to pass. While the Supreme Court's decision in *Alston* was—by its mandate—narrowly tailored towards the caps on education-related grant-in-aid compensation, the targeted intent of the Court's opinion was not so narrow.[31] Previously, even the most NCAA-unfriendly decisions, including *O'Bannon*, had still abided by the Supreme Court's prior instruction to grant the association "ample latitude" to preserve amateurism in college sports—even while dismissing that language as dicta.[32] In *Alston*, the Court discarded this instruction entirely, noting that the commercial landscape of college sports had changed considerably since *Board of Regents* was decided in 1984 and that the

26. *Id. See also* Stacey Osburn, *Board of Governors Starts Process To Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019), https://perma.cc/WW83-82QG (noting guidance from the NCAA that the Board of Governors' NIL proposal would ensure that allowing athletes to be paid for NIL would be done "in a manner consistent with the collegiate model").

27. This restriction is almost certainly tied in large part to the recent FBI investigation into apparel deals in college basketball. Coaches, athlete managers, and an Adidas executive were criminally charged with creating a scheme to funnel payoffs from apparel companies to the families of top recruits in order to ensure that the recruits would sign with a school that the apparel company sponsored. *See* Tom Winter & Tracy Connor, *4 NCAA Basketball Coaches, Adidas Executive Charged in Bribe Scheme*, NBC NEWS (Sept. 26, 2017), https://perma.cc/SSH9-ZJKZ.

28. Sallee & Silverstein, *supra* note 25.

29. Steve Berkowitz & Christine Brennan, *Justice Department Warns NCAA Over Transfer and Name, Image, Likeness Rules*, USA TODAY (Jan. 8, 2021), https://perma.cc/X658-RNHW.

30. Michelle Brutlag Hosick, *Division I Council Tables Proposals on Name, Image, Likeness and Transfers*, NCAA (Jan. 11, 2021), perma.cc/KJ2F-9TQQ.

31. *See, e.g.*, Ehrlich, *supra* note 4; Amanda Christovich, *Supreme Court Issues Unanimous Pro-Athlete Decision in NCAA v. Alston*, FRONT OFFICE SPORTS (June 21, 2021), https://perma.cc/YBY9-7DLV; DJ Ben-Aime II, *SCOTUS Ruling's True Effect on NCAA Likely Won't Be Seen for Years*, N.Y. DAILY NEWS (June 23, 2021), https://www.nydailynews.com/sports/more-sports/ny-ncaa-alston-scotus-20210623-txlfbayf4vcsfgk4kdth4qcugq-story.html; Samuel Estreicher & Zachary Fasman, *NCAA v Alston: A Brave New World for College Sports*, VERDICT (June 25, 2021), https://perma.cc/Q4DU-QHMN.

32. *See supra* notes 20–21 and accompanying text.

NCAA deserved no such latitude unless Congress was willing to grant it through targeted legislation.[33]

Complicating matters for the NCAA was the fact that *Alston* was released just ten days before the first batch of state NIL laws was scheduled to come into effect.[34] As a result, the NCAA was forced to rapidly change course on NIL to prevent further litigation—both under antitrust laws and from states enforcing their NIL laws.[35] With no hope for its desired overarching federal legislation in sight,[36] the NCAA released a new interim NIL policy in June 2021 that handed over all institutional control and restrictive power over NIL to member schools and their respective states.[37] This proposal was approved by the Division I Board of Directors on June 30, 2021, opening the doors for athlete compensation for NIL as controlled by the athletes' individual schools and, where applicable, state law.[38]

B. RECURRING THEMES IN NIL LEGISLATION AND REGULATION

The result of this history is that there is currently no nationwide policy regarding NIL in college sports. Instead, the NCAA has simply allowed each state and each

33. NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021) ("When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984. . . . Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that.").

34. *See* Megan L.W. Jerabek & Nicholas J. Probst, *NCAA v. Alston: A "Buzzer-Beater" Victory for College Athletes as Name, Image and Likeness Shot Clock Counts Down To July 1*, NAT'L L. REV. (June 24, 2021), https://perma.cc/4XQ3-V4HX.

35. Interestingly, several legal scholars have suggested that the NCAA would likely have had a very strong case to challenge the various state laws as an unconstitutional restraint of interstate commerce. *See, e.g.*, Timothy Z. LaComb & Jennifer M. Oliver, *California's College Athletes May Profit from Their Positions, Kicking Off a National Wave and a Bout with the NCAA*, NAT'L L. REV. (Oct. 5, 2019), https://perma.cc/2H6Y-QKUE; David Cruikshank, Note, *The Fair Pay To Play Act: Likely Unconstitutional, yet Necessary To Protect Athletes*, 81 OHIO ST. L.J. ONLINE 253 (2020), https://perma.cc/7WEE-DRW6; Alex Blutman, *What if the NCAA Litigated State NIL Legislation?*, HARV. J. SPORTS & ENT. L. BLOG (Dec. 28, 2020), https://perma.cc/XYG7-MBUP; *NCAA Athlete NIL Rights: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 117th Cong. 5 (June 9, 2021) (statement of Matthew J. Mitten, Professor of Law and Executive Director, Marquette University Law School). As these scholars have noted, such efforts by the NCAA to curb an individual state from forcing it to adopt certain rules through state legislation had previously failed, as Nevada's attempt to force the NCAA to enact more comprehensive due process procedures following the forced firing of renowned University of Nevada-Las Vegas head men's basketball coach Jerry Tarkanian was struck down on dormant commerce clause grounds. *See* NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993). However, the NCAA made no official moves towards challenging the constitutionality of the various state laws, and its acceptance of state efforts through its own legislative efforts suggests perhaps that the association feels that regardless of the strength of its legal position the political cost of challenging these laws is simply not worth the effort.

36. *See* Michael McCann, *Federal NIL Bill Stalls in Congress, Setting Table for July Chaos*, SPORTICO (June 17, 2021), https://perma.cc/5C7V-65RQ.

37. Nicole Auerbach, *NCAA Drafts Interim NIL Policy for College Athletes*, ATHLETIC (June 26, 2021), https://perma.cc/RTN8-N478.

38. *NCAA Approves Interim NIL Policy for College Athletes*, ATHLETIC (June 30, 2021), https://perma.cc/P87K-LRXU.

member institution to set its own policy.[39] This, ironically, has created a vast "patchwork" effect across the county, exactly as the NCAA had feared.[40]

Currently, each state and member institution has its own hyperlocal rules regarding what athletes can and cannot do while selling their NIL to commercial entities. Still, there are several consistent themes and provisions. All generally prohibit NCAA member schools, member conferences, and governing athletic associations—most prominently the NCAA and the National Association of Intercollegiate Athletics (NAIA)—from limiting athletes' ability to profit from their NIL, and all set up varying enforcement mechanisms to prevent entities from punishing athletes for that use by revoking the athletes' scholarships or by making them ineligible for athletic competition.[41] The laws also allow athletes to retain agents and attorneys to represent them in NIL-related negotiations, though many states require agents to register with the state.[42]

Of the most common provisions, this Article focuses on three in particular that stand out as conceivably problematic under the First Amendment:

Prohibitions on athletes signing individual sponsorship deals that conflict with school sponsorship deals. The very first state NIL bill—California's Fair Pay to Play Act—was amended midway through its legislative cycle to include a provision forbidding athletes from entering into NIL agreements that are "in conflict with a provision of the athlete's team contract."[43] While the intended effect of that addition was left somewhat unclear due to ambiguous wording, the added provision was widely reported at the time of its proposal as intended to prohibit deals that create a conflict with exclusive school sponsorship deals.[44] Since then, bills passed by several other states have included similar language.[45] Other states are much more direct with their language and by their terms allow schools to specifically prohibit

39. Ralph D. Russo, *NCAA Moving Towards Hyperlocal Solution to NIL as Placeholder*, ASSOCIATED PRESS (June 24, 2021), https://perma.cc/86AE-DWTV.

40. Dennis Dodd, *Desperation Is Setting in for the NCAA as Congress Looks Slow To Move on Name, Image and Likeness*, CBS SPORTS (June 9, 2021), https://perma.cc/HRQ7-ZBDW.

41. *See* Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE (Apr. 21, 2021), https://perma.cc/PW8M-JQMS.

42. *Id.* The most extreme limitation to this end comes from Texas's NIL law, which has been reported to restrict those who are able to represent athletes in NIL deals to attorneys licensed in the state. *See* Matt Brown, *Ohio and Texas Show that Not All State NIL Bills Are Equal*, EXTRA POINTS (May 26, 2021), https://perma.cc/8NZF-VG63 (discussing the provision's implications).

43. S.B. 206, 2019 Leg., 383d Reg. Sess. (Cal. 2019).

44. *See, e.g.*, Steven A. Bank, *The Olympic-Sized Loophole in California's Fair Pay To Play Act*, 120 COLUM. L. REV. F. 109 (May 21, 2020) (comparing the discussed provision in California's NIL bill to the IOC's infamous Rule 40 which prohibits conflicting sponsorships and endorsements); Mit Winter, *California's College Athlete Name, Image, and Likeness Bill Amended To Prohibit Conflicts Between Athlete Contracts and University Contracts*, KENNYHERTZ PERRY, https://perma.cc/7XVW-FVBD (last viewed June 20, 2021).

45. *See, e.g.*, S.B. 6462020 Leg., Reg. Sess. (Fla. 2020) ("An intercollegiate athlete may not enter into a contract for compensation for the use of her or his name, image, or likeness if a term of the contract conflicts with a term of the intercollegiate athlete's team contract."); S.B. 439, 2020 Leg., Reg. Sess. (Md. 2021) ("A [student athlete] may not enter into a contract providing compensation [to the student athlete] for use of [the student athlete's] name, image, or likeness if a [provision] of the contract [is in conflict] with a [provision] of the [student athlete's athletic program] contract.").

athletes from entering into conflicting deals.[46] Most directly, the executive order issued by Kentucky governor Andy Beshear allowing athletes to enter into NIL deals includes an exemption for deals involving "[c]ompensation in exchange for a contract of endorsement, promotion or other activity that the postsecondary educational institution determines is in conflict with an existing contract of endorsement, promotional or other activity entered by the postsecondary educational institution," thus explicitly and directly banning such deals in the state.[47] As reported, such terms are most directly applied to endorsement contracts where, for example, an athlete wishes to wear Under Armour shoes but is required under the terms of his or her scholarship contract with the school to only wear Nike shoes.[48] But the broadness of the statutory language in most of these bills—along with the preclearance abilities that have been granted to schools in much of this legislation[49]—may allow a school to reject an athlete's deal in less direct conflicts including, for example, if an athlete wishes to contract with a local car dealership even though their school has its own sponsorship agreement with another car dealership.

Prohibitions on athletes signing deals with so-called "vice" industries.[50] None of the first state NIL laws (California, Colorado, and Florida) contained exceptions for so-called vice industries like alcohol, tobacco, marijuana, gambling, and adult entertainment businesses.[51] Instead, a vice industry statutory exemption was first seen in one of the early *federal* NIL bills, specifically the bipartisan House bill introduced by Rep. Anthony Gonzalez (R-OH) and Rep. Emanuel Cleaver (D-MO) in September 2020.[52] While the Gonzalez-Cleaver bill did not gain any traction in Congress, several later state laws emulated its vice industry clause. For example, Texas's NIL bill expressly prohibits athletes from entering into contracts if the

46. *See, e.g.*, S.B. 381, 2021 Leg., Reg. Sess. (Pa. 2021) ("An institution of higher education may prohibit a college student athlete's involvement in name, image or likeness activities that conflict with existing institutional sponsorship agreements at the time the college student athlete discloses a contract to the institution of higher education."); S.C. CODE ANN. § 59-158-40(B)(1)(a) (2021) ("An institution of higher learning may prohibit an intercollegiate athlete from using his name, image, or likeness for compensation if the proposed use of his name, image, or likeness conflicts with . . . existing institutional sponsorship agreements or other contracts."); S.B. No. 60, 2021 Leg., Reg. Sess., § 3703(E)(1)(a) (La. 2021) ("A postsecondary education institution may prohibit an intercollegiate athlete from using the athlete's name, image, or likeness for compensation if the proposed use of the athlete's name, image, or likeness conflicts with . . . [e]xisting institutional sponsorship agreements or contracts.").

47. Ky. Exec. Order No. 2021-418 § I(B) (June 24, 2021), https://perma.cc/N7MX-NH7Y.

48. *See* Winter, *supra* note 44.

49. For example, the portion of Pennsylvania's bill cited *supra* note 46 allows schools to reject an athlete's deal for conflict purposes "at the time the college student athlete discloses a contract to the institution of higher education" rather than just barring it up front.

50. As categorized by Keller, *supra* note 41.

51. Andy Wittry, *Pandora's Keg: Will There Be an Unrestricted Market for Alcohol-Related Name, Image and Likeness Endorsements for College Athletes?*, OUT OF BOUNDS WITH ANDY WITTRY (Feb. 26, 2021), https://perma.cc/KZ89-DUKX. The author did note that the California, Colorado, and Florida bills contained broad clauses prohibiting sponsorship deals that conflict with team contracts and that schools may include clauses in their team contracts forbidding alcohol sponsorships in similar fashion to team rules regarding alcohol use.

52. *Id. See also* Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. § 2(a)(2) (2020).

attached compensation is provided "in exchange for an endorsement of alcohol, tobacco products, e-cigarettes or any other type of nicotine delivery device, anabolic steroids, sports betting, casino gambling, a firearm the student athlete cannot legally purchase, or a sexually oriented business."[53] Arkansas's NIL bill contains a similar clause but greatly expands its scope, including adult entertainment, alcohol products, casinos and gambling products, tobacco, marijuana, vaping, pharmaceuticals, any "dangerous or controlled substance," drug paraphernalia, weapons, and "[a]ny product, substance, or method that is prohibited in competition by an athletic association, athletic conference, or other organization governing varsity intercollegiate athletic competition."[54]

Prohibitions on athletes signing deals that otherwise conflict with institutional values (broadly defined). Interestingly, while Mississippi's NIL bill, signed in March 2021, contains a clause forbidding athletes from signing deals in certain enumerated vice industries, the law goes several steps further, also containing a clause that prohibits athletes from signing deals regarding:

> any other product or service that is reasonably considered to be inconsistent with the values or mission of a postsecondary educational institution or that negatively impacts or reflects adversely on a postsecondary education institution or its athletic programs, including, without limitation, bringing about public disrepute, embarrassment, scandal, ridicule or otherwise negatively impacting the reputation or the moral or ethical standards of the postsecondary educational institution.[55]

NIL laws passed in New Jersey and Illinois contain similar language prohibiting both deals with enumerated vice industries and any other deals considered to be "inconsistent with the values or mission of a postsecondary educational institution."[56] By contrast, while Alabama's NIL law contains the same broad language, its statutory text leaves definition, enforcement, and regulation solely up to the schools, stating instead that applicable educational institutions "*may* prohibit" endorsement contracts, even in the enumerated vice industries.[57] Similar language that permits but does not compel restrictions on NIL deals in conflict with institutional values appears in executive orders passed by the governors of North Carolina and Kentucky.[58]

53. S.B. 1385, 87th Leg., Reg. Sess. § 2(g)(2)(B)(iv) (Tex. 2021).

54. H.B. 1671, 93d Gen. Assemb., Reg. Sess. § 4-75-1307(b) (Ark. 2021).

55. S.B. 2313, 2021 Leg., Reg. Sess. § 4(14) (Miss. 2021).

56. S.B. 971, 2020 Leg., Reg. Sess. § 2(b) (N.J. 2020); S.B. 2238, 102d Gen. Assemb., Reg. Sess. § 20(i) (Ill. 2021).

57. H.B. 404, 2021 Leg., Reg. Sess. § 2(b)(1)(b) (Ala. 2021).

58. N.C. Exec. Order No. 223 § 1(B)(iii) (July 2, 2021), https://perma.cc/7AN5-X6BK (stating that schools "may impose reasonable limitations" on endorsement of products or brands that the institution determines to be "antithetical to the values of the institution"); Ky. Exec. Order No. 2021-418 § I(D) (June 24, 2021), https://perma.cc/78ZS-PQAM (allowing schools to reject "contracts for compensation of name, image and likeness that the postsecondary educational institution determines is incompatible or detrimental to the image, purpose or stated mission of the postsecondary educational institution such as, but not limited to, the promotion or advertisement of alcohol, tobacco products, firearms or sexually-oriented activities").

On or around the July 1, 2021 start date for NIL deals, several institutions released their own individual NIL policies.[59] While many of these policies are left quite broad and open-ended, some do contain guidelines specific to the three categories described above. For example, Florida State University (FSU)'s NIL guidelines state that "state law prohibits student-athletes from entering into a contract for NIL compensation that conflicts with a term in an FSU team contract."[60] The guidelines also (indecisively) state that athletes "should fully evaluate any potential consequences to their personal brand before engaging in NIL activities, in particular those involving gambling/sports wagering, alcohol, tobacco, marijuana/CBD, athletic performance-enhancing supplements, and adult entertainment," suggesting that endorsement activities in those categories are merely discouraged rather than banned outright.[61] The University of Alabama (UA)'s policy specifically bars athlete endorsement contracts in tobacco, alcohol, controlled substance, adult entertainment, and gambling industries—making what was merely optional by its state's statutory text into a compulsory rule—as well as contracts determined by the school to "conflict[] with a term of a contract held by UA."[62]

Similar NIL policies extend from a wide range of schools; for example, the policy enacted for all University of Louisiana System schools also bars endorsements in the areas of "tobacco, alcohol, illegal substances or activities, banned athletic substances, and gambling," along with any opportunities that "conflict[] with an existing institutional sponsorship agreement/contract or go[] against the values of the postsecondary education institution."[63] Additionally, some schools have created policies that contain NIL restrictions even in the absence of state NIL legislation. For example, North Dakota State University (NDSU)—a public school located in a state that, as of this writing, has not passed or even introduced an NIL bill[64]—prohibits its athletes from promoting activities associated with "tobacco, alcohol, banned athletic substances, illegal substances or activities, or sports wagering" and asks for preclearance when athletes wish to "engag[e] in NIL activities that involve NDSU corporate sponsors."[65]

59. Links to these policies are helpfully collected by Kristi Dosh, *Tracker: NIL Policies by Institution*, BUS. OF COLL. SPORTS, https://perma.cc/G5AQ-WVC8 (last visited July 1, 2021).

60. *Florida State NIL Guidelines*, FLA. STATE SEMINOLES (June 29, 2021), https://perma.cc/5MEZ-ZSMF.

61. *Id.*

62. *Student-Athlete Name, Image, and Likeness Compensation Policy*, UNIV. OF ALA. (July 1, 2021), https://perma.cc/LT2T-47WF.

63. *Intercollegiate Athlete Name, Image and Likeness (NIL) Policy*, UNIV. OF LA. SYSTEM at 3, 5 (July 1, 2021), https://perma.cc/V63Z-9SKK.

64. Dosh, *supra* note 59.

65. *Student-Athlete Name Image and Likeness Policy*, N.D. STATE UNIV. ATHLETICS at 1–2 (July 1, 2021), https://www.scribd.com/document/513854314/North-Dakota-State-NIL. From its text, a restriction by NDSU on athlete "NIL activities that involve NDSU corporate sponsors" may apply only to NIL activities with the sponsors themselves, rather than NIL activities with *competitors* of the sponsors (as this Article discusses). The document is otherwise silent on the permissibility of NIL deals with competitors to institutional sponsors. However, the language of this provision is broad enough to conceivably cover such conflicted activity as well—an argument can surely be made that NIL activity with a competitor of one of NDSU's corporate sponsors does "involve" that sponsor, even if indirectly. Regardless, the breadth and vagueness of this policy (from a public institution) is a fine example of how

II. HOW THE STATE ACTION CALCULUS CHANGED ON JULY 1, 2021

A necessary threshold issue in any discussion of an alleged violation of an individual's constitutional rights is state action. It is well-settled that only state actors—the government, or private entities acting for or on behalf of the government—are subject to constitutional restrictions. Some level of government involvement in violating a constitutional right is required for a § 1983 action to be sustained.[66]

Up until July 1, 2021, finding state action in NIL regulations was unlikely due to *NCAA v. Tarkanian*, a Supreme Court decision holding that the NCAA is not a state actor.[67] This precedent has been a significant barrier to actions against the NCAA's regulatory actions on a variety of different constitutional theories.[68] However, until the NCAA passes nationwide NIL regulations (and thereby subjects itself to attack on antitrust grounds), the association is no longer the primary actor promulgating and enforcing NIL policies (beyond the four recruiting-based rules already in place at the time the NCAA ceded regulatory authority to the states and schools).[69]

This concession of governance by the NCAA makes state action analysis fairly straightforward. The state governments that have passed NIL policies through legislation or executive order are unquestionably state actors, as are public

NIL policies can be seen as overbroad under First Amendment jurisprudence, potentially drawing additional scrutiny as creating a "realistic danger" that such policies can be used against otherwise protected NIL speech (including political speech). *See* Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1182–83 (6th Cir. 1995) (voiding a public university discriminatory harassment policy on the grounds that "there is nothing to ensure the University will not violate First Amendment rights even if that is not their intention"); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984) (holding that statutes and state policies may be found unconstitutional under the First Amendment on overbreadth grounds if there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court"). For further discussion of First Amendment scrutiny of NIL policy on overbreadth grounds, see *infra* Part **Error! Reference source not found.**.

66. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) ("In accord with the text and structure of the Constitution, [the Supreme] Court's state-action doctrine distinguishes the government from individuals and private entities."); Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) ("Thus, we say that state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974))).

67. 488 U.S. 179, 192–99 (1988).

68. *See, e.g.*, Hall v. NCAA, 985 F. Supp. 782, 799 (N.D. Ill. 1997) (rejecting the plaintiff's Fourteenth Amendment equal protection claims on the grounds that the NCAA is not a state actor); Matthews v. NCAA, 79 F. Supp. 2d 1209, 1222 (E.D. Wash. 1999) (rejecting the plaintiff's due process claims regarding student applications for rule waivers on the grounds that the NCAA is not a state actor); Bloom v. NCAA, 93 P.3d 621, 624 (Co. Ct. App. 2004) (finding that an arbitrary and capricious claim against the NCAA was inappropriate and rejecting the plaintiff's contention that the NCAA acts as a "quasi-state actor with respect to individual student-athletes"); Spirit Lake Sioux Tribe of Indians v. NCAA, No. 11-cv-95, 2012 WL 12886993, at *7–8 (D.N.D. May 1, 2012) (rejecting the plaintiff's § 1983 civil rights claim, noting that "*Tarkanian* foreclosed any claim that UND may have had that the NCAA is a state actor"); Bd. Of Trs. of Ark. Tech Univ. v. NCAA, No. 17-cv-00439, 2018 WL 2347062, at *2 (E.D. Ark. May 23, 2018) (rejecting the plaintiff's § 1983 civil rights claim on the grounds that the NCAA is not a state actor).

69. *See* Hosick, *supra* note 30.

universities.[70] In fact, public colleges and universities have been held as state actors even when enforcing or responding to NCAA rules.[71] Private universities acting of their own accord do not fit this standard, however, and thus—without fear of First Amendment scrutiny—seemingly have less liability and more regulatory freedom than public universities.[72]

However, three factors complicate this analysis: (1) compulsory restrictions in some state NIL laws that direct private schools to enact certain restrictions; (2) California's Leonard Law, which transmutes some constitutional requirements onto private colleges and universities in the state; and (3) the actions by some schools to privatize their athletic departments.

The first complication is the compulsory nature of some of the legislative text in the various NIL statutes and its effect on the perceived lack of First Amendment liability for private institutions. Generally, private actors—including private universities—cannot be held to constitutional restrictions, as private actors are not arms of the State. However, the Supreme Court has outlined a bevy of circumstances in which private action is sufficiently intertwined with the actions of the state to support a finding that the private actor acted under the color of state law.[73] One such circumstance is when the private action in question "results from the State's exercise of 'coercive power,'" i.e., when the State forces the private actor to act in a certain way.[74] In applying this test to a private action, courts examine "whether or not the private entity had a choice to act or refrain from acting."[75]

As discussed in Part I.B, state legislation imposes (or simply allows) certain NIL restrictions in an inconsistent manner.[76] For example, Alabama's NIL law states that schools *may* prohibit endorsement contracts in vice industries like alcohol, tobacco, or gambling, while NIL laws passed in Texas, Arkansas, Mississippi, New Jersey, and Illinois make these restrictions mandatory for all institutions within the state.[77]

70. *See Tarkanian*, 488 U.S. at 192 ("A state university without question is a state actor.").

71. *See, e.g.*, Crue v. Aiken, 370 F.3d 668 (7th Cir. 2004) (holding the public University of Illinois liable for violating the First Amendment by restricting faculty communications with prospective athletic recruits to conform with NCAA recruiting regulations).

72. *See, e.g.*, McHale v. Cornell Univ., 620 F. Supp. 67, 70 (N.D.N.Y. 1985) ("[C]ompliance by Cornell University, a private education corporation, with the NCAA rule does not constitute state action."); Doe v. Wash. & Lee Univ., No. 14-cv-00052, 2015 WL 4647996, at *8 (W.D. Va. Aug. 5, 2015) ("Had Plaintiff been enrolled at a public university, he would have been entitled to due process. . . . Unfortunately for Plaintiff, W & L is a private university, and as such, is generally not subject to the constitutional protections of the Fifth Amendment.").

73. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295–96 (2001).

74. *Id.* at 296 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

75. Julie K. Brown, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 566 (2008).

76. *See, e.g.*, *supra* notes 39–42 and accompanying text.

77. *Compare* H.B. 404 § 2(b)(1)(b) (Ala. 2021) ("A postsecondary educational institution *may* prohibit a student athlete from entering into an endorsement contract with, or otherwise receiving compensation from, any of the following categories of brands or companies . . . .") (emphasis added), *and* N.C. Exec. Order No. 223 § 1(B)(iii) (July 2, 2021) ("An institution *may* impose reasonable limitations or exclusions on the categories of products and brands that a student-athlete may receive compensation for endorsing . . . to the extent that the institution reasonably determines that a product or brand is antithetical to the values of the institution.") (emphasis added), *with* S.B. 1385 § 2(g)(2)(B)(iv) (Tex. 2021) ("A

When state policy "permits but does not compel" certain private action, there is no state action.[78] As such, in an example where a private school has prohibited an athlete from entering into an agreement with a gambling company, Samford University (Alabama), Duke University (North Carolina), and Bellarmine University (Kentucky) would each likely not be found to be a state actor and thus would not draw First Amendment scrutiny, while Baylor University (Texas), Princeton University (New Jersey), and Northwestern University (Illinois) would likely be found to be acting under color of state law as the school would be following the coercive statutory directives of its respective state.[79] Additionally, the state itself would potentially be liable for such unconstitutional actions.[80]

The second complication that could turn certain private institutional NIL policies into state action is exclusive to California. Section 94367 of the California Education Code (also known as the Leonard Law) extends certain constitutional rights to private universities within the state by prohibiting the universities from subjecting students to disciplinary sanctions based on speech that is protected from government restrictions.[81] Notably, the Leonard Law does include an exception for religious

student athlete participating in an intercollegiate athletic program at an institution to which this section applies . . . may not enter into a contract for the use of the student athlete's name, image, or likeness if . . . the compensation for the use of the student athlete's name, image, or likeness is provided . . . in exchange for an endorsement of alcohol, tobacco products . . . ."), *and* Arkansas Student-Athlete Publicity Rights Act, Act 810 § 4-75-1307(b) (Ark. 2021) ("[A] student-athlete participating in varsity intercollegiate athletics is prohibited from earning compensation as a result of the commercial use of the student-athlete's publicity rights in connection with any person or entity related to . . . adult entertainment . . . ."), *and* Mississippi Intercollegiate Athletics Compensation Rights Act, S.B. 2313 § 4(14) (Miss. 2021) ("No student-athlete shall enter into a name, image, and likeness agreement or receive compensation from a third-party licensee for the endorsement or promotion of gambling . . . ."), *and* New Jersey Fair Play Act, S. 971 § 2(b) (N.J. 2020) ("[A] student participating in intercollegiate athletics shall be prohibited from earning compensation as a result of the use of the student's name, image, or likeness in connection with any person, company, or organization related to or associated with the development, production, distribution, wholesaling, or retailing of: adult entertainment products and services . . . ."), *and* Student-Athlete Endorsement Rights Act, S.B. 2338 § 20(i) (Ill. 2021) ("No student-athlete shall enter into a publicity rights agreement or receive compensation from a third party licensee for the endorsement or promotion of gambling . . . .").

78. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 165 (1978); Heineke v. Santa Clara Univ., 965 F.3d 1009, 1013 (9th Cir. 2020) ("Nor is compliance with generally applicable laws sufficient to convert private conduct into state action."); Sutton v. Providence St. Joseph Med. Center, 192 F. 3d 826, 839 (9th Cir. 1999) (rejecting the idea that "governmental compulsion in the form of a general statute, without more, is sufficient to transform every private entity that follows the statute into a governmental actor.").

79. Of course, private schools in states that are entirely silent on particular NIL restrictions (or do not have an NIL law at all) would obviously not be found to be state actors while implementing such restrictions found within the school's own policy. For example, Brigham Young University (BYU), a private university in Utah, broadly prohibits "NIL agreements with companies, businesses, causes or products that do not conform to the BYU Honor Code Standards" including deals involving "alcohol, tobacco, gambling, adult entertainment, coffee, etc." Jon McBride, *BYU Institutes NIL Policies*, BYU COUGARS (July 1, 2021), https://perma.cc/V59M-2DUB. Since (as of this writing) Utah does not have a state NIL law that forces (or even permits) BYU to implement these restrictions, BYU's implementation of this policy is pure private action that belies any First Amendment scrutiny.

80. Norwood v. Harrison, 413 U.S. 455, 465 (1973) (holding that "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish" (quoting Lee v. Macon City. Bd. of Ed., 267 F. Supp. 458, 475–76 (MD. Ala. 1967))).

81. CAL. EDUC. CODE § 94367 (West. 2009).

institutions that restrict speech based on the tenets of their faith.[82] Hypothetically, this could mean that the private Jesuit-aligned Santa Clara University could prevent its athletes from partnering with an abortion clinic on religious grounds, but secular private institutions like Stanford University would have fewer avenues to prevent such a partnership.

Finally, the organization of many athletic departments is worthy of some discussion here as well. Many athletic departments at public universities have begun positioning themselves as "private" entities in recent years[83]—a label which may confuse some in relation to the issue of state action discussed in this Article. The "private" label has been colloquially used to describe the increasing reliance of college athletic departments on private donors, booster groups, and sponsorship deals in lieu of state financing.[84] Distancing universities and their athletic departments from the state through "privatization" has also been understood in some circumstances as an attempt to avoid public disclosures and open records requests required by state agencies.[85]

While targeted jurisprudence towards the purported "private" nature of such arrangements is currently nonexistent, there is little reason to think that such organization would immunize athletic departments associated with public colleges and universities from First Amendment scrutiny regarding NIL policies. Simply put, while the media and the public may refer to athletic departments as private, the label does not dissolve the structural ties between public postsecondary institutions and state governments. For example, in Florida—where the privatization of college athletics has been the most prolific[86]—the state supreme court has held that the actions of the private entity operating a university athletic department are still protected by sovereign immunity.[87]

82. *Id.* § 94367(c).

83. Timothy O'Brien, *Understanding Legal Implications for Privatizing, Outsourcing Athletics Operations*, 16 COLL. ATHLETICS & L. 1, 1–3 (2019).

84. It is worth noting that the increasing reliance on private financing for intercollegiate athletic departments represents a broader trend within postsecondary education. Critical scholars have noted for over a decade that the decrease in public funding for colleges and universities is correlated with an increasing reliance on corporate donors by athletic departments. *See, e.g.*, CHARLES T. CLOTFELTER, BIG-TIME SPORTS IN AMERICAN UNIVERSITIES (1st ed. 2011); Neal C. Ternes & Michael D. Giardina, *"A Common-Sense, Fiscally Conservative Approach": Sport, Politics, and the Death of Higher Education in Wisconsin*, *in* SPORT AND THE NEOLIBERAL UNIVERSITY: PROFIT, POLITICS, AND PEDAGOGY (Ryan King-White ed., 2018).

85. Methods for achieving this effect vary substantially from state to state. The University of Florida and Florida State University have received particular attention for their creation of private "direct support organizations" that are given control over athletic departments. However, other universities have managed to skirt public records requests by other means, including through state legislation and by deleting internal communications. Will Hobson, *Florida State Says Privatizing Athletics Won't Change Anything. Skeptics Aren't so Sure*, WASH. POST (June 12, 2019), https://perma.cc/LAK9-EASN.

86. *Id.*

87. *See* Plancher v. UCF Athletics Ass'n, Inc., 175 So. 3d 724 (Fla. 2015) (holding that the private entity running the University of Central Florida's Athletic Department was a state agency entitled to limited sovereign immunity in a tort case).

III. APPLYING SPEECH FRAMEWORKS TO NIL

This Part explores the contours of First Amendment jurisprudence that could be implicated in litigation regarding NIL restrictions for college athletes. The argument that NIL restrictions violate the First Amendment rights of athletes is a complicated one—and our reasoning requires navigation through several different issues relating to free speech that cover disparate areas of case law. Importantly, different forms of speech and different types of speech restrictions are evaluated using varying levels of scrutiny, which are often specific to the contextual relationship between the speakers and the state actors.

A. OVERVIEW AND APPLICATION OF THE *CENTRAL HUDSON* COMMERCIAL SPEECH STANDARD TO NIL SPEECH RESTRICTIONS

Different forms of speech carry with them varying degrees of First Amendment protection. Speech regarding political activity, for example, receives particularly strong defenses against government intrusion.[88] Commercial speech, or speech that "proposes a commercial transaction," receives considerably less protection.[89] Generally speaking, concern over athlete NIL rights has focused on the latter—with NIL restrictions seemingly intended to prevent athletes from creating business agreements that conflict with the existing corporate partnerships and businesses that may be seen as harmful to the reputation of the university.[90] We feel that NIL restrictions are not exclusively an issue of commercial speech, but we progress from the perspective of athlete NILs as commercial speech to illustrate how the present NIL landscape is legally problematic using even the standard of scrutiny most favorable to the state.

It was not until *Bigelow v. Virginia* that the Court explicitly acknowledged that at least some First Amendment protections extend to commercial speech.[91] In *Bigelow*, the Court ruled that a Virginia statute prohibiting the circulation or publication of advertisements for abortion services violated the First Amendment by preventing the publication of important public information.[92] The following year, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court acknowledged a level of protection for commercial speech that, while less robust than the safeguards on political speech, acknowledged that a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[93] The decision in *Virginia Pharmacy*

88. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 219 (1966) (noting "practically universal agreement that major purpose of [the First] Amendment was to protect the free discussion of governmental affairs" which "includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political process").

89. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

90. *See, e.g.*, *Name, Image and Likeness Policy for Student-Athletes*, UNIV. OF MICH. at 3 (June 30, 2021), https://perma.cc/Z2XB-SDW8.

91. 421 U.S. 809 (1975).

92. *Id.* at 826.

93. *Virginia Pharmacy*, 425 U.S. at 763.

furthered the Court's reasoning in *Bigelow* that the publication of truthful commercial information served a significant public interest worthy of constitutional protection. However, the circumstances under which commercial speech could be regulated remained an open question.[94]

The Court finally crafted a standard for evaluating restrictions on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, holding that a complete ban on promotional advertising by a utility company was unconstitutional even though the ban only restricted pure commercial speech.[95] Courts have used a test derived from this case as the standard to determine whether restrictions on commercial speech fall within constitutional limits. The *Central Hudson* test, as it is now known, comprises four elements: (1) The speech in question must neither concern unlawful activity nor be misleading; (2) the government interest at the heart of any speech restriction must be provably substantial; (3) the restrictions implemented must directly advance the stated government interest; and (4) restrictions must not be more extensive than necessary to achieve the state's interest.[96]

A useful example to demonstrate how the *Central Hudson* test might be applied in the context of NIL restrictions is the restriction guidelines promulgated by the University of Michigan ("U-M").[97]

Michigan state law requires athletes to disclose any verbal or written NIL offer to universities for approval at least seven days prior to accepting the offer, in order to allow the university an opportunity to object based on state or institutional policy.[98] Notably, the state legislation specifically prohibits university contracts from restricting NIL opportunities for athletes "when the student is not engaged in official team activities."[99] Additionally, the U-M policy specifically states that:

94. It is worth noting that in the time between *Virginia Pharmacy* and *Central Hudson*, the Court ruled on two additional cases which furthered the trend of the Court viewing truthful commercial speech as having at least some constitutional protection. In the first, *Bates v. State Bar of Arizona*, the Court found that truthful advertising of routine legal services was protected against blanket prohibition by the State. 433 U.S. 350 (1977). In the second, *Ohralik v. Ohio State Bar Association*, the Court ruled that the State may discipline lawyers who solicit clients in person for pecuniary gain, as such tactics rely less on simply providing information and more on coercive tactics that threaten to undermine the credibility of a profession which is essential to the ability of the government to administer justice. 436 U.S. 477 (1978).

95. 447 U.S. 557, 588 (1980).

96. *See, e.g.*, Metromedia Inc. v. San Diego, 453 U.S. 490, 507 (1981) (articulating the four-part *Central Hudson* test). *See generally* Joseph J. Hemmer Jr., *Commercial Speech: Assessing the Function and Durability of the Central Hudson Test*, 34 FREE SPEECH Y.B. 112 (1996).

97. We choose to use U-M as an example here because the school's specific policy language covers several distinct speech content areas and restriction types that will allow us to demonstrate how analysis under *Central Hudson* applies in a multitude of NIL situations, focused on the three identified in Part I.Recurring Themes in NIL Legislation and Regulation, *supra*. While parts of this analysis may vary somewhat based on the language of NIL restrictions at other institutions, we believe the discussion here adequately demonstrates the general issues in NIL restrictions.

98. H.B. 5217 § 7(1-2) (Mich. 2020). The seven-day window is also crafted to provide opportunities for the athlete to negotiate a revision of the opportunity to avoid said conflict.

99. *Id.* § 7(3).

> Those who have chosen to be a student-athlete have chosen to act as public representatives of the University and may not engage in name, image and likeness activities that may harm the reputation of the institution. This may include but is not limited to: promoting products or services such as gambling, adult entertainment, tobacco, or banned substances. . . . Student-athletes may not engage in name, image and likeness activities which involve disparaging any organization or provider with whom Michigan Athletics has an existing sponsorship agreement.[100]

As such, the U-M policy contains all three restriction provisions discussed in Part I.B: (1) prohibitions on conflicting sponsorship deals; (2) prohibitions on vice industry endorsements; and (3) prohibitions on deals that conflict with institutional values.[101]

Applying the *Central Hudson* test to both the state law and the U-M NIL policy, we begin with the first required element: that the regulations prohibit forms of speech which are not misleading and do not concern unlawful activity. Hypothetically, an athlete endorsement for a cigarette brand or casino without false information about the product would fit this description, since neither purchasing cigarettes nor visiting a casino is illegal but endorsements of both are prohibited by the U-M policy.

We next ask whether the government interest in restricting an athlete's endorsement of cigarettes or casinos was substantial. The U-M policy asserts the need to protect its reputation as the government interest for our hypothetical scenario. Given the Supreme Court's opinion in *Board of Trustees v. Fox* (asserting that a university's general interest in "promoting an educational rather than commercial atmosphere" and "preventing the commercial exploitation of students" fulfilled the second prong of *Central Hudson*), U-M's interest in protecting its reputation would likely fulfill this requirement.[102]

The third question posed by *Central Hudson* requires analysis of whether the U-M regulations directly advance the stated interest of protecting U-M's institutional reputation. This point is less straightforward, since the burden for this prong would be on U-M to justify the restriction. As the Court noted in *Edenfield v. Fane*, "this burden is not satisfied by mere speculation or conjecture," and the government actor defending a restraint on commercial speech must show that the "harms it recites are real and that its restriction will in fact alleviate them to a material degree."[103] This does not mean, however, that all assertions of harm or potential harm must be predicated on direct evidence. The Court has also accepted justifications of speech restrictions supported by "studies and anecdotes pertaining to different locales

100. *See, e.g.*, UNIVERSITY OF MICHIGAN, *supra* note 90, at 3.

101. *See supra* Part I.B.

102. 492 U.S. 469, 476 (1989).

103. 507 U.S. 761, 770–71 (1993). *See also* Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (finding that a municipal code prohibiting the distribution of commercial handbills via news racks on public property did not sufficiently achieve the State's interest in safety or aesthetics when noncommercial publications were still permitted to position news racks in public spaces).

altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'"[104]

In our hypothetical, it would be difficult for U-M to demonstrate a material difference in its reputation if an athlete were to appear in advertisements for a tobacco company, for example, particularly since the supposed harm to the university's reputation would be predicated on college athlete NIL deals which have, until recently been purely hypothetical. While it is conceivable that U-M could produce evidence that athletes having the ability to endorse products including gambling or tobacco could harm the school's reputation, it represents a significant hurdle for U-M in our hypothetical case.

Our final question under *Central Hudson* is whether the restrictions U-M has placed on athlete NIL rights are more restrictive than necessary to achieve this goal. The standard is whether the state has narrowly tailored its restrictions to achieve the desired objective.[105] Here, U-M would face its most significant challenge, as it would need to prove that the significant restrictions it places on types of speech and its insistence on prior review do not overstep the magnitude of its stated harms. While *Central Hudson* does state that commercial speech is worthy of First Amendment protection, it also describes significant differences in the level of scrutiny given to specific methods of speech restrictions for commercial speech compared to political speech.

While the enforcement mechanisms behind the present patchwork of NIL restrictions vary significantly, the common theme connecting most of these policies—including those from U-M in our hypothetical case—is an attempt to preemptively bar athletes from using their public personas to endorse entities or products which may conflict with the university or its corporate partners. Because these policies seek to prohibit speech which has not yet been uttered, they are a prior restraint and thus require further analysis with significantly more scrutiny.[106] *Central Hudson* has been used to broadly justify an intermediate scrutiny standard for the implementation of prior restraint and content-specific restrictions on commercial speech. However, the ability of the state to impose such restrictions is still significantly limited, and it is often specific to the circumstances under judicial review, rather than applying to a broad class or category of speech.

Prior restraint has been held unconstitutional in numerous circumstances. The prior restraint doctrine "encompasses any system enforced by any branch of government that forbids speech or requires permission from a government official before speaking."[107] Two prominent examples are the Supreme Court's decisions in *Near v. Minnesota* (striking down a state law banning the publication of "malicious"

104. Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995) (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992)).

105. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

106. *See, e.g.*, FW/PBS, Inc. v. Dallas, 493 U.S. 215, 225–29 (1990) (discussing the "evils" of prior restraint and the additional analyses needed to determine their constitutionality).

107. Frank D. LoMonte & Virginia Hamrick, *Running the Full-Court Press: How College Athletic Departments Unlawfully Restrict Athletes' Rights To Speak To the News Media*, 9 NEB. L. REV. 86, 106 (2020).

materials)[108] and *New York Times v. United States* (holding that the *Times*'s publication of government documents related to the history of U.S. activity in Vietnam could not be restricted by the Nixon administration despite a claimed government interest in national security).[109]

Expressing its firm distaste for prior restraints, the Supreme Court wrote in *Southeastern Promotions v. Conrad* that "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand," as "the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."[110] The Court later noted in *Nebraska Press Association v. Stuart* that it has long interpreted the First Amendment's language "to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a 'previous or 'prior' restraint on speech.'"[111] As such, "[a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity."[112]

The standard for prior restraint in the context of commercial speech is more complicated. The Supreme Court wrote in a footnote to *Central Hudson* that "commercial speech is such a sturdy brand of expression. . . that traditional prior restraint doctrine may not apply to it," and that a state could implement "a system of previewing advertising campaigns to insure that they will not defeat [state] policy."[113] However, the modern applicability of this aside is questionable. Writing in dissent to the decision in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, Justice Stevens noted that the majority overlooked a "regime of censorship" through prior restraint which allowed the Tourism Company to preapprove publicity for gambling establishment in various media outlets.[114] As such, there is not much clarity from the Court to this point in time on the full extent of permissible prior restraint by state actors.

Subsequent implementations of the *Central Hudson* test have taken various approaches to determining the extent to which commercial speech restrictions utilizing prior restraint should receive heightened scrutiny. Lower courts allowing prior restraint of commercial speech under *Central Hudson* have typically done so with an eye to protecting proprietary interests such as copyright and trademark.[115]

108. 283 U.S. 697, 701–02 (1931).

109. 403 U.S. 713, 718–20 (1971).

110. 420 U.S. 546, 559 (1975).

111. 427 U.S. 539, 556 (1976).

112. *Se. Promotions*, 420 U.S. at 558 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

113. Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 571 n.13 (1980). This sentiment was echoed in another footnote in *Virginia Pharmacy*, where the Court wrote that "[t]he greater objectivity and hardiness of commercial speech may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker" and thus "may also make inapplicable the prohibition against prior restraints." Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, 425 U.S. 748, 771 n.24 (1976).

114. 478 U.S. 328, 361 (1986) (Stevens, J., dissenting).

115. *See, e.g.*, Dallas Cowboys Cheerleaders v. Scoreboard Posters, 600 F.2d 1184 (5th Cir. 1979) (upholding an injunction against the producer of a topless calendar featuring former Dallas Cowboys

Allowances for prior restraint to protect specific marks or individual NILs have a well-established history in the case literature. For example, in *Bosley v. WILDWETT.com*, the Northern District of Ohio granted a temporary restraining order preventing an adult video company from distributing non-consensually obtained footage of a news anchor participating in a spring break wet t-shirt contest, citing *Central Hudson* to hold "that the prior restraint doctrine is *inapplicable* to commercial speech."[116] Similarly, the Southern District of New York granted an injunction against a pornographic magazine for including a nude centerfold model who resembled Muhammad Ali with the caption "The Greatest" in one of its publications.[117] While it could certainly be argued that the intent of NIL restrictions is to prevent the commercial tarnishment of the university's marks or brand,[118] realizing that goal by imposing state-sponsored limits on the commercial viability of athlete's' NILs would raise serious concerns about the status of individual privacy rights relative to the commercial business of the state.

On the other hand, lower courts have also found reason to reject prior restraint of commercial speech because the restrictions created were more extensive than necessary to achieve the State's interests, and thus failed the final prong of the test elaborated in *Central Hudson*. Perhaps the broadest rebuke of prior restraint on commercial speech came from the Second Circuit in *New York Magazine v. Metropolitan Transport Authority*.[119] The court noted that the difficulty in drawing a distinction between commercial and noncommercial speech made creating a unique standard for each highly questionable.[120] The court even went so far as to question whether safeguards against prior restraint should be loosened at all for purely commercial speech.[121] Regarding the *Central Hudson* test, the majority noted that prior restraint of the magazine's advertisement was more extensive than necessary because the display "would not result in irreparable harm" to the Transit Authority.[122]

Similarly, the Ninth Circuit held in *Desert Outdoor Advertising v. City of Moreno Valley* that a local ordinance requiring billboard operators to obtain prior approval from the city to erect their signs was an unconstitutional form of prior restraint.[123]

cheerleaders dressed and posed in nearly identical fashion to an authentic Dallas Cowboys cheerleader poster).

116. 310 F. Supp. 2d. 914, 930 (N.D. Ohio 2004).

117. Ali v. Playgirl, 447 F. Supp. 723 (S.D.N.Y. 1978).

118. *See* Lanham Act § 43(c)(2)(C), 15 U.S.C. § 1125(c)(2)(C) (defining "dilution by tarnishment" as "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark").

119. 136 F.3d 123 (2d Cir. 1998) (ruling that restricting an advertisement for the magazine reading "Possibly the only good thing in New York Rudy [Giuliani] hasn't taken credit for" on public buses was an unconstitutional restriction of speech).

120. *Id*. at 131 ("We need not decide whether the Advertisement is actually commercial speech or core-protected speech; the difficulty of the questions alone convinces us that the requirement of procedural safeguards in a system of prior restraints should not be loosened even in the context of commercial speech.").

121. *Id*. ("Although the Supreme Court has indicated that commercial speech may qualify as one of the exceptions to the bar on prior restraints . . . we see no reason why the requirement of procedural safeguards should be relaxed whether speech is commercial or not.").

122. *Id*. at 132.

123. 103 F.3d 814 (9th Cir. 1996).

Despite the commercial nature of the speech, the court ruled that the ordinance gave city officials full discretion to deny permits for billboard construction and did not require city officials to provide evidence supporting the denial.[124] A similar preapproval process was heavily scrutinized and limited by the Supreme Court in *Freedman v. Maryland*.[125] The Court held that such restraints must place the burden of proving that speech is unprotected on the government censor (rather than requiring the speaker to prove the speech is protected) and allow for a prompt final judicial decision.[126] Similarly, the Court stated in *Shuttlesworth v. Birmingham* that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."[127]

Restrictions by institutions on athletes' commercial speech would seem to fit a similar description and therefore represent an unconstitutional form of prior restraint. As presently written, state-level and university-level NIL restrictions for college athletes either constitute blanket prohibitions on certain types of speech or empower universities to give prior approval of athletes' commercial speech—and sometimes both. This includes the NIL policy passed by the state of Michigan and the policy enforced by U-M, as both require athletes' NIL deals to undergo a seven-day review period. While Michigan's statute explicitly prohibits state universities from restricting athlete NIL use that occurs off campus, it undermines this prerogative by requiring athletes to submit all NIL activities (ostensibly including those occurring off campus) to school officials for prior review.[128] If universities are barred from regulating off-campus speech, then the prior restraint mechanism created by Michigan's statute is wholly unnecessary. U-M makes no note of this restriction to its regulatory authority in its own NIL policy.

It would also be difficult to argue—regarding both the state law and U-M policy—that the prior restraint of athlete NIL speech off campus was appropriately tailored to the desire of the university to protect its business relationships and maintain its reputation. The U-M policy specifically notes that athletes looking to use the university's name or marks must receive licensing approval and that athletes must complete a rental agreement for use of campus facilities or resources.[129] Prior restraints in both the state law and the university policy restrict all NIL deals, not just those with companies seeking to benefit from the institution's resources in their advertisements. In *Bosley* and *Ali*, the courts upheld prior restraints only when there was certainty that the material misappropriated the image of an individual. Michigan's state NIL restrictions theorize the possibility of a future violation and impose prior restraint as a de facto licensing program for the university to review all

124. *Id*. at 819.

125. 380 U.S. 51 (1965).

126. *Id*. at 58–59. *See also* Frank D. LoMonte & Virginia Hamrick, *Running the Full-Court Press: How College Athletic Departments Unlawfully Restrict Athletes' Rights To Speak To the News Media*, 9 NEB. L. REV. 86, 106 (2020) (summarizing the "rigorous procedural safeguards" placed on preapproval procedures in *Freedman*).

127. 394 U.S. 147, 150–51 (1969).

128. H.B. 5217 § 7(3) (Mich. 2020).

129. *See* UNIVERSITY OF MICHIGAN, *supra* note 90, at 3.

transactions for possible conflicts. The university already has ample means at its disposal for litigating violations of its intellectual property or misuse of its campus resources such that it would be highly unlikely that potential harms caused by an athlete NIL deal would meet the threshold of irreparable harm established in *New York Magazine v. Metropolitan Transport Authority*.[130]

Additionally, the restrictions in both the state law and the University of Michigan policy restrict speech based on its content. The courts have long held that content-based restrictions on speech require a greater level of scrutiny than restrictions that focus only on the time, place, and manner of speech.[131] Furthermore, the level of scrutiny that content-based restrictions trigger regarding commercial speech is significantly clearer than the level of scrutiny applied to prior restraint. *Central Hudson* does not preclude the possibility of content-specific restrictions, indicating that "a more limited restriction on the content of promotional advertising" may better serve the interests elaborated by the state.[132] However, the Supreme Court in *Sorrell v. IMS Health* noted that a Vermont statute prohibiting the sale of information identifying physicians by the medications they prescribed to pharmaceutical manufacturers for marketing purposes was subject to heightened scrutiny because it imposed content- and speaker-based restrictions.[133] *Sorrell* was not the first Supreme Court case to indicate that content-based restrictions on commercial speech may trigger heightened scrutiny,[134] but the decision was still a substantial doctrinal shift for commercial speech as it directly "imported from noncommercial speech doctrine the idea that the government may not enact content-based burdens."[135] Lower courts have not consistently interpreted *Sorrell* as a change in law, with some viewing it as a maintenance of the standards in *Central Hudson*.[136] Under either interpretation, the present standard "is clear that commercial speech is subject to a demanding form of intermediate scrutiny analysis."[137]

As written, both the Michigan statute and the U-M policy regarding athlete NILs create content- and speaker-based speech restrictions. Both specifically burden university athletes as speakers, distinguishing athletes from other individuals connected to their schools. Neither the statute nor university policy would, for

130. *See supra* notes 119–122 and accompanying text.

131. *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (holding New York City requirements that musicians at the band shell in Central Park only use amplification equipment and technicians provided by the city to limit noise to be a constitutional restriction of speech narrowly tailored to only impact time, place, and manner); RAV v. St. Paul, 505 U.S. 377 (1992) (ruling that a city ordinance prohibiting the burning of crosses was unconstitutional as it was based purely on the content of the speech); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (finding that prohibiting a religious student organization from receiving payments meant to fund student publications was unconstitutional as it was specifically targeted to limit student speech based on its content).

132. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 570 (1980).

133. Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011).

134. *See* 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996) (finding that advertising alcohol prices is protected by the First Amendment).

135. Hunter B. Thomson, *Whither Central Hudson? Commercial Speech in the Wake of* Sorrell v. IMS Health, 47 COLUM. J.L. & SOC. PROBS. 171, 203 (2013).

136. *Id.* at 193–99.

137. Minority Television Project v. FCC, 676 F.3d 869, 881 n.8 (9th Cir. 2012).

example, prohibit a student musician from endorsing specific products or ideas, but both explicitly impose such a burden on a talented volleyball player. As the Supreme Court has noted on multiple occasions, such speaker-based burdens on speech trigger heightened scrutiny[138]—including in instances of commercial speech.[139]

The three types of NIL restrictions we focus on in this paper are all forms of content-specific restrictions. Michigan's state law applies three content restrictions: (1) specifically prohibiting athlete NIL agreements that require display of sponsor apparel during team activities that conflicts with university apparel deals; (2) giving universities a broad latitude to identify potential conflicts between athlete NILs and existing contracts; and (3) a broad waiver for universities to establish and enforce their own standards or policies for athlete conduct.[140] The U-M policy contains a series of restrictions which explicitly target the content of athlete speech, including prohibitions on promoting tobacco, gambling, and adult entertainment as well as disparaging any current sponsor of the athletic department. Moreover, the U-M policy implies a broad power for university officials to censor speech which may be determined to harm the reputation of the university.[141] These content- and speaker-based restrictions would merit the same "demanding form of intermediate scrutiny analysis" used in *Sorrell*.[142]

There is some tension between the U-M NIL policy and the Michigan statute regarding athlete deals made off campus that conflict with school contracts. Michigan's statute explicitly notes that universities are prohibited from using "team contracts" as a rationale for preventing athletes from earning compensation from NIL deals when not engaged in team activities.[143] Since this statute has not yet been subject to First Amendment scrutiny by the courts, we choose to interpret "team contracts" in the view most favorable to the university policy, which is that the term "team contracts" refers specifically to corporate partnerships with the school's athletic program. This would allow the university a degree of flexibility to restrict off-campus NIL deals through enforcement of codes of conduct under Section 10(3) of the state statute.[144] Since the U-M policy explicitly prohibits NIL activity that

138. *See, e.g.*, Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983) (finding that a tax on ink and paper purchased beyond a certain amount specifically targeted and limited the speech of local publishers); Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (finding that a state tax on newspaper publishers of a certain size was a violation of the First Amendment).

139. *See supra* notes 133–137 and accompanying text.

140. H.B. 5217 §§ 7(1-2); 10(3) (Mich. 2020).

141. *See* UNIVERSITY OF MICHIGAN, *supra* note 90, at 3.

142. *See supra* notes 133–137 and accompanying text.

143. H.B. 5217 § 7(3) (Mich. 2020).

144. *Id.* § 10(3). The full text of this statutory provision reads:

> This act does not limit the right of a postsecondary educational institution to establish and enforce any of the following:
>
> a) Academic standards, requirements, regulations, or obligations for its students.
> b) Team rules of conduct or other rules of conduct.
> c) Standards or policies regarding the governance or operation of or participation in intercollegiate varsity athletics.
> d) Disciplinary rules and standards generally applicable to all students of the postsecondary educational institution.

disparages athletics sponsors,[145] it seems plausible that athletes could still be restricted from off-campus NIL deals for other brands if the content of the advertising explicitly compared a product to the product of a U-M sponsor.

However, even if the state law in Michigan did not prohibit the university from creating off-campus restrictions on NIL activity that conflicted with athletics department contracts, it is unlikely that such restrictions would survive the level of scrutiny applied in *Sorrell*. Professional athletes routinely sign sponsorship agreements with companies in competition with league or team sponsors that allow them to use their NILs outside of team activities.[146] Any reasonable fit between a university's goals and its method of restricting NILs would raise the question as to why state universities ought to have more control over the market around their brand than professional sports leagues. As many of the same companies that sponsor college sports programs also sponsor professional sports, it would be reasonable to assume that state universities are unlikely to be substantially harmed by a model of NIL usage that resembles the professional paradigm that has been profitably sustained for decades.

Restrictions on deals with vice industries are also unlikely to withstand First Amendment scrutiny. A U-M athlete would be restricted from endorsing tobacco or casino gambling, even off campus, under the institutional policy without any conflict from the state law. However, the Supreme Court has noted on multiple occasions that the State cannot restrict the dissemination of truthful information regarding legal activity even if the product or service in question is something the State has an interest in curbing. In *Greater New Orleans Broadcasting Ass'n v. United States*, the Court ruled that a federal law prohibiting advertisements of lotteries and casino gambling could not be used to block advertisements for legal casino gaming in Louisiana.[147] Similarly, in *44 Liquormart v. Rhode Island*, the Supreme Court struck down a statute prohibiting the advertisement of retail liquor prices outside of the store where they were being sold.[148] Also, in *Lorillard Tobacco Co. v. Reilly*, the Supreme Court explained that the First Amendment could moderate "state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is

145. UNIVERSITY OF MICHIGAN, *supra* note 90, at 3.

146. For example, the NFL's official insurance sponsors are Nationwide Mutual and USAA, but prominent stars Aaron Rodgers and Patrick Mahomes are both spokespeople for State Farm Insurance. *Compare Nationwide Proudly Continues Support of Walter Payton NFL Man of the Year Award*, NATIONWIDE NEWSROOM (Feb. 8, 2021), https://perma.cc/6VH4-DC6T, *and* Ben Fischer, *USAA Renews NFL Deal Despite Likely Anthem Protests*, SPORTS BUS. J. (Sept. 10, 2020), https://perma.cc/L9D3-G92F, *with* Kendra Meinert, *Aaron Rodgers, Patrick Mahomes Are Back for a New Season of State Farm Commercials*, GREEN BAY PRESS GAZETTE (Sept. 10, 2020), https://perma.cc/QX57-LXFW. Similarly, tennis star Serena Williams is not barred from Wimbledon because she is a spokesperson for Lincoln Motors and the tournament is sponsored by Jaguar Land Rover. *Compare* Sean Szymkowski, *Lincoln Taps Serena Williams as Latest Face for Navigator*, MOTOR AUTHORITY (Feb. 16, 2018), https://perma.cc/F49Z-BH2Z, *with* Holly Hunt, *Jaguar UK To "Push the Boundaries" in Wimbledon Renewal*, INSIDER SPORT (June 16, 2021), https://perma.cc/W27Q-H8QP.

147. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 195–96 (1999).

148. 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996).

lawful for adults, the tobacco industry has a protected interest in communicating information about its products."[149]

By prohibiting athletes from endorsing tobacco, casino gambling, and other legal products, U-M and other institutions with similar policies hope to avoiding appearing as if they institutionally support vice products. However, these restrictions fail to achieve a reasonable fit for the state's interests. The university could simply refuse to allow athletes the use of institutional spaces or marks in advertisements for these products. Moreover, the Supreme Court noted in *Greater New Orleans*, *Lorillard Tobacco*, and *Sorrel* that the public policy interests of the State to protect against vice industries do not serve as a sufficient interest to support content-based speech restrictions.[150] Given the myriad options available to universities to express their opposition to vice products (e.g., policies restricting use of alcohol or tobacco on campus, advertising, or inviting certain speakers to conduct campus events), restrictions on NILs for athletes looking to partner with these industries off campus go beyond the State's interest in limiting its institutional connection to vice industries.

It does not help that these vice industries are restricted in the U-M policy as part of a broader prohibition against NIL activities "that may harm the reputation of the institution."[151] This broad language opens a wealth of restriction possibilities that extend even beyond the realm of commercial speech.[152] As written, the U-M policy grants its agents seemingly unchecked power to restrict athlete NIL in the name of institutional reputation. This type of language—which we must stress is far from unique to either U-M or the State of Michigan—vests within a state entity exactly the sort of boundless authority to regulate speech that the courts have repeatedly rejected. In short, if the U-M or another similar policy were subjected to First Amendment scrutiny, the policy would almost certainly fail the fourth prong of the *Central Hudson* test. The use of prior restraints and content-based restrictions to broadly protect university contracts, prohibit promotions of vice industries, and shield a vague notion of institutional reputation represents a significant chasm between the interests of the state and the dramatic efforts undertaken to achieve them. As written, such policies are not narrowly tailored to fit the government interest, and therefore represent an unconstitutional violation of athletes' First Amendment rights.

149. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001).

150. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 186 ("But in the judgment of both the Congress and many state legislatures, the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits."); *Lorillard Tobacco*, 533 U.S. at 564 ("The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products."); Sorrell v. IMS Health, 564 U.S. 552, 577–78 (2011) ("The State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.").

151. UNIVERSITY OF MICHIGAN, *supra* note 90 at 3.

152. For extensive discussion of the overbroad nature of these and other NIL clauses, see *infra* Part IV.

B. FIRST AMENDMENT RESTRICTIONS IN POSTSECONDARY INSTITUTIONS

While it is clear that off-campus restrictions on athlete NIL deals that are in conflict with institutional endorsement deals, connected to vice industries, or inconsistent with "institutional values" do not withstand First Amendment scrutiny under *Central Hudson*, we must also consider the special relationship between the university and its athletes, who are enrolled as students. Numerous commentators have argued that the correct standard for reviewing speech codes at universities stems from *Tinker v. Des Moines*, wherein the court restricted the ability of academic institutions to prohibit speech to only that speech which would cause a material and substantial disruption to the educational environment or would violate the rights of other students.[153] Yet the standard put forth by *Tinker* has also prompted a significant diversity of opinion on whether *Tinker* prohibits[154] or allows[155] institutional restrictions on athletes' off-campus speech. Arguments in favor of university restriction on off-campus athlete speech have relied on subsequent Supreme Court decisions tightening the restrictions in *Tinker* to include allowances for institutional use of prior restraint[156] and censorship for off-campus activities.[157] These and similar cases, proponents argue, demonstrate the authority of educational institutions to enforce speech restrictions against athletes whose speech could undermine the discipline and team dynamics of the locker room.

We feel that this argument fails for two major reasons. First, subsequent decisions by lower courts indicate *Tinker* must be read narrowly. Second, we believe that this argument neglects the role of forum analysis in First Amendment jurisprudence.

First, many of the restrictions made to *Tinker* in subsequent years have created a patchwork of narrow decisions that vacillate between two approaches: Some position the authority of educational institutions somewhere between *Tinker*'s standard and the anachronistic approach of *in loco parentis*, and others apply the theory that schools have the authority to act as surrogate parents over their

153. Tinker v. Des Moines, 393 U.S. 303 (1969). *See, e.g.*, Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C. & U.L. 91, 98–101 (1996); Thomas L. McAllister, Note, *Rules and Rights Colliding: Speech Codes and the First Amendment on College Campuses*, 59 TENN. L. REV. 409, 419–20 (1992); Matthew Silversten, Note, *What's Next for Wayne Dick—The Next Phase of the Debate over College Hate Speech Codes*, 61 OHIO ST. L.J. 1247, 1284–98 (2000).

154. *See, e.g.*, Davis Walsh, *All a Twitter: Social Networking, College Athletes, and the First Amendment*, 30 WM. & MARY BILL RTS. J., 619, 630–31 (2011); Eric D. Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments*, 38 J.C. & U.L. 451, 470–74 (2012).

155. *See, e.g.*, Meg Penrose, *Sharing Stupid $h*t with Friends and Followers: The First Amendment Rights of College Athletes To Use Social Media*, 17 SMU SCI. & TECH. L. REV. 449, 477–78 (2014); Meg Penrose, *Tinkering with Success: College Athletes, Social Media and the First Amendment*, 35 PACE L. REV. 30 *passim* (2014).

156. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (finding that high school officials may utilize prior restraint to exercise editorial control over a school newspaper).

157. *See* Morse v. Frederick, 551 U.S. 393 (2007) (finding that high school officials could punish students for unfurling a banner reading "BONG HITS 4 JESUS" at an off-campus event that was supervised by the school).

students.[158] In his concurrence to *Morse v. Frederick*, Justice Thomas explicitly notes that these mismatched exceptions to the Court's precedent in *Tinker* now create an environment where "students have a right to speak in schools except when they do not."[159] In short, the myriad restrictions to student speech meant *Tinker* must be read narrowly, not as a broad reintroduction of the principle of *in loco parentis* at all public schools.

Narrow examination of the patchwork exceptions to *Tinker* demonstrates that nearly all of these exceptions have been applied in the context of primary and secondary schools, drawing into question their applicability to college athletes. The Supreme Court has noted on multiple occasions that high school students are "distinguishable from their counterparts in college education,"[160] in that college students are "young adults" who are "less impressionable than younger students."[161] Generally speaking, college speech codes that limit the content of student speech, even on campus, have been subject to strict scrutiny analysis—which the overwhelming majority fail[162]—as "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[163] We do not expect colleges and universities to stand *in loco parentis* for individuals who are generally considered adults by the time they enroll. The college experience in the United States is culturally associated with moving away from one's parents and learning to live independently.[164] Thus, we do not believe that college students' speech can be restricted to the same degree as that of younger students, whose relationships to their schools may more closely resemble those between parent and child.

Second, we believe that proponents of university authority to regulate athletes' off-campus speech neglect the role of forum analysis in First Amendment jurisprudence. The Court outlined three different types of public forums in *Perry Education Association v. Perry Local Educators' Association*:

1) Public forums, which are spaces devoted to assembly and debate and in which the State may restrict speech content only if it meets a compelling

158. *Id* at 418 (Thomas, J., concurring)

159. *Id.*

160. Bd. of Regents v. Southworth, 529 U.S. 217, 238 n.4 (2000).

161. Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981).

162. *See, e.g.*, Iota Xi v. George Mason Univ., 773 F. Supp. 792 (E.D. Va. 1991) (ruling that a fraternity party encouraging members to dress as "ugly women" was constitutionally protected speech); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (finding that the university policy prohibiting discriminatory speech would unconstitutionally limit discourse on controversial theories regarding race on campus); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (ruling that a campus policy denying funding to student groups who were not ideologically neutral on issues of religion was a violation of students' First Amendment rights).

163. Healy v. James, 408 U.S. 169, 180 (1972) (finding that a public university's denial of official status to the Students for a Democratic Society, a left-leaning political organization, was a form of prior restraint and violated the First Amendment rights of the students).

164. *See, e.g.*, STANLEY ARONOWITZ, THE KNOWLEDGE FACTORY: DISMANTLING THE CORPORATE UNIVERSITY AND CREATING TRUE HIGHER LEARNING (2000); MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION (2000).

state interest and must use a mechanism that is narrowly crafted to that purpose.

2) Limited public forums are spaces opened by the State for expressive activity. The State must apply the same standards for restricting speech as are applied to a public forum as long as the space remains open.
3) Non-public forums are spaces operated by the government that do not serve an expressive function, such as a military base. Speech can be restricted based on its content provided that the regulations are reasonable.[165]

For universities, forum analysis has shown how institutional funds and campus spaces serve as limited public forums which are subject to the same general standards of speech restrictions as a public sidewalk.[166] Generally speaking, we agree with the analysis of Erwin Chemerinsky and Howard Gillman, who argue that college campuses should be considered to have two separate zones of speech: one zone for formal educational and scholarly settings such as classes that allows for free speech but imposes regulations that are intended to facilitate responsible conduct, and a larger speech zone in all other areas of campus where the limits on speech restrictions are the same as in any other public forum.[167]

However, our analysis focuses solely on speech that occurs away from the university campus when athletes are not directly engaged in team activities. While colleges may act as arbiters of the limited public forums on their own campuses, they are not positioned as arbiters of the public forums beyond their campus or university activities. This does not mean that the university has no ability to interact within forums not directly inside of its orbit, but rather that the university's ability to speak and act is positioned as a form of government speech. A university, as with any other state entity, is not prohibited from promoting ideas or programs on behalf of its constituent members within public forums.[168] However, "the Free Speech Clause itself may constrain the government speech if, for example, the government seeks to compel private persons to convey the government's speech."[169] Through NIL restrictions, universities specifically ask us to see athletes as full-time representatives of their institutions while still accepting that college athletes are not employees of their institutions. This is not a tenable position. The Colorado Supreme Court specifically noted that college athletes do not hold a "greatly diminished expectation of privacy" that would allow a university to infringe upon their constitutional rights

165. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–47 (1983).

166. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (finding that a university cannot restrict access to publicly available meeting spaces to groups based solely on the viewpoint of the group).

167. ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 77 (2017).

168. *See* Walker v. Sons of Confederate Veterans, 576 U.S. 200, 214–19 (2015) (ruling that the State of Texas designing license plates was not the creation of a limited public forum, but a type of direct state speech).

169. *Id.* at 208.

as part of their participation in an athletic program.[170] Forcing college athletes to abandon NIL opportunities simply because the university does not like the message is a form of compelled speech that similarly strips athletes of their First Amendment rights.

Recent precedent only furthers our interpretation of athletes' relationships with their institutions. In June 2021, the Supreme Court decided a case involving a high school student who was suspended from the junior varsity cheerleading squad because, while off campus, she created a Snapchat post reading in part "Fuck Cheer" after she did not make the varsity squad.[171] The Court held that the suspension imposed by the school violated the student's right to free speech and, specifically, that the school's interest in regulating the student's speech was significantly diminished in light of the fact that she used her own private cellphone to communicate the message at an off-campus location when she was not engaged with a school function.[172] Moreover, the student's comments did not significantly disrupt school activities or affect team morale, further reducing the interests of the State in disciplining the student for her speech.[173]

We argue that while *Mahanoy* does note that limited circumstances may exist where a school's interests in regulating student speech may extend beyond the campus, the interests articulated in *Mahanoy* seem to harken back to schools acting *in loco parentis*.[174] As noted previously, we do not believe that postsecondary institutions share this role, and, therefore, believe that the capacity for colleges to restrict speech beyond campus boundaries is even more limited than the level of restriction permitted in primary and secondary schools. Finally, the Court also noted that "America's public schools are the nurseries of democracy" and that there is a fundamental interest in schools educating students and the public about the value of differences in opinion.[175] While the extension of this logic is perhaps somewhat less urgent for commercial speech than for political speech, it cannot be denied that America's public colleges and universities have a concerted interest in free market expression. In restricting athlete NIL deals, universities seem to have prioritized

170. Univ. of Co. v. Derdeyn, 863 P.2d 929, 945 (Colo. 1993) (finding that a University of Colorado policy requiring athletes to sign a waiver granting the university the right to conduct random drug tests violated the Fourth Amendment rights of the athletes).

171. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2042–43 (2021).

172. *Id.* at 2046.

173. *Id.* at 2046–47.

174. *Id.* at 2045–46. The *Mahanoy* majority held that "a school, in relation to off-campus speech, will rarely stand *in loco parentis*" because, for primary and secondary school students, parents will typically resume responsibility in these zones. *Id.* at 2046. However, the Court does briefly discuss hypothetical situations involving school computers or online lessons, instances of harassment or threats aimed at teachers or other students, or the content of homework assignments where the school's role as parent may be significant enough to intervene in off-campus speech. *Id.* at 2045. None of these scenarios would seem to implicate restrictions on athlete NILs, which do not exist as part of the educational mission of the school or relate to disruptions on campus spaces. Moreover, as the Court noted in *Tinker*, fear of potential disruption to school activities, including potential disruptions to team morale in the case of athlete NILs, "is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

175. *Mahanoy*, 141 S. Ct. at 2046.

their business prerogatives over their essential educational role in American democracy. We believe that it is fair to question whether the interests of the university, as an arm of the State, are served by restricting athletes' off-campus speech. As the Court noted in *Mahanoy*, while "[i]t might be tempting to dismiss B.L.'s words as unworthy of the robust First Amendment protections discussed herein . . . sometimes it is necessary to protect the superfluous in order to preserve the necessary."[176]

As such, we do not believe that the unique relationship of the university to its students significantly alters the impact of our analysis under *Central Hudson*, as the University does not stand *in loco parentis* over its athletes while they are off campus and cannot compel students to speak on its behalf when they are off campus.

C. THE VOLUNTARY NATURE OF SPORTS: APPLYING PUBLIC EMPLOYEE SPEECH DOCTRINE

While the default may be for courts to treat college athletes as students (and thus apply one of the avenues for analysis discussed in Section B) or simply treat NIL restrictions as restraints on commercial speech under *Central Hudson*, a subset of cases take a different approach. In particular, a 2007 case from the Sixth Circuit, *Lowery v. Euverard*, focused instead on the nature of college sports as a voluntary activity, concluding that, while "[c]ases involving government employees are generally inapplicable to cases involving students, . . . student athletes have greater similarities to government employees than the general student body."[177] As such, the court applied the First Amendment framework befitting the speech rights of public employees rather than the framework applied to public school students and the general population.[178]

176. *Id.* at 2048.

177. 497 F.3d 584, 596–97 (6th Cir. 2007). *Lowery*'s holding was based in large part on an assertion that the Supreme Court "has held that student athletes are subject to more restrictions than the student body at large." *Lowery*, 497 F.3d at 589 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995)). Of course, the Supreme Court's opinion in *Vernonia* was tailored to high school students, not college students. While it was a state supreme court decision decided before *Vernonia*, we feel that the better applicable precedent here is *University of Colorado v. Derdeyn*, which held that "it cannot be said that university students, simply because they are university students, are entitled to less [constitutional] protection than other persons" as the *in loco parentis* doctrine no longer applies to relationships between college students and universities as it does for high school students and high schools. 863 P.2d 929, 938–39 (Colo. 1993). *See supra* notes 160–171 and accompanying text. Still, we analyze the NIL fact pattern based on *Lowery* for the sake of completeness.

178. *Lowery*, 497 F.3d at 596–97. Of note, a concurring judge agreed with the overall conclusion in favor of the school but disagreed with the application of public employee speech standards, preferring instead to apply *Tinker* while analogizing the case to another speech involving high school athlete speech, *Pinard v. Clatskanie School District*. *Lowery*, 497 F.3d at 604 (Gilman, J., concurring) (citing Pinard v. Clatskanie Sch. Dist. *6J*, 467 F.3d 755 (9th Cir. 2006)). In a particularly persuasive portion of this analysis, the judge directly quoted a statement from *Tinker* discussing how students have First Amendment rights to express their opinions "in the cafeteria, *or on the playing field*, or on the campus during the authorized hours." *Id.* at 605 (Gilman, J., concurring) (emphasis in original) (quoting Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 512–13 (1969)). The majority was clearly not convinced.

Lowery involved a claim by high school football players who were dismissed from their team after signing a petition asking their principal to replace the disliked head coach.[179] The Sixth Circuit viewed this fact pattern as analogous to a dispute between public employees and their government employers and thus similar to *Connick v. Myers*.[180]

While it can be argued that many of the same principles noted by the Sixth Circuit in analyzing high school athlete speech can also be applied to college athlete speech,[181] the thought of applying employee speech doctrines to college athletes is normatively problematic. Up until very recently,[182] the law has been exceptionally clear that college athletes are *not* employees. Nearly every court that has analyzed the question of college athlete employment in cases where employment status would benefit the *athlete* (rather than the "employer," as in *Lowery*) has concluded that college athletes cannot and should not be considered employees. For example, a California court ruled in 2002 that college athletes are not employees for the purpose of the state's employment discrimination statutes.[183] At least two state courts have rejected claims of athlete employment in the tort context.[184] And over the years,

179. *Lowery*, 497 F.3d at 585–86 (majority opinion).

180. 461 U.S. 138 (1983); *Lowery*, 497 F.3d at 597–99 (comparing the facts of the case to *Connick*).

181. For example, an overarching theme of the Sixth Circuit *Lowery* decision was voluntariness—namely the fact that high school sports are voluntary and "the ability of the government to set restrictions on voluntary programs it administers." *Id.* at 559. Indeed, the opinion was framed by a relevant quote from the movie *Hoosiers* ("Basketball is a voluntary activity. It's not a requirement. If any of you feel you don't want to be on the team, feel free to leave right now. Did you hear what I just said?"). Judge Zatkoff (sitting by designation and authoring the majority opinion) began his discussion of the applicability of *Tinker* with a hypothetical question of whether the players in *Hoosiers* would have a First Amendment claim against Coach Dale if *Tinker* was in force at the time the movie was set. *Id.* at 587. Other cases have similarly noted the voluntary nature of participation in college sports. *See, e.g.*, Berger v. NCAA, 843 F.3d 285, 293 (7th Cir. 2016) ("Student participation in collegiate athletics is entirely voluntary."). The sheer irony of the applicability of this statement from *Berger* in this context is certainly both acknowledged and welcomed, as the quoted sentence from *Berger* was used to deny college athletes rights as employees under the Fair Labor Standards Act, whereas in *Lowery*, discussion of the voluntary nature of sports participation is used to hold athletes *analogous to employees* for the purposes of denying them relief under the First Amendment. Of note, the Tenth Circuit in *Marcum v. Dahl*, 658 F.2d 731, 733–34 (10th Cir. 1981), did affirm a district court opinion that had applied employee speech standards expressed in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and *Schmidt v. Fremont County School Dist. No. 25*, 558 F.2d 982 (10th Cir. 1977), but did so without any relevant explanation as to why the court felt the employee speech doctrines were appropriate. Further, the age of the *Marcum* decision—decided in 1981—creates significant questions as to its continued relevance. Indeed, a 2005 decision by a district court within the Tenth Circuit's jurisdictional bounds explicitly rejected the use of public employee standards for college athletes, finding that the college athlete plaintiff "[was] not an employee of defendants." Richard v. Perkins, 373 F. Supp. 2d 1211, 1217 (D. Kan. 2005). At the same time, however, this district court opinion still cited and relied upon several public employee speech retaliation cases (including *Marcum* and *Connick*) to reject the athlete's First Amendment retaliation claim, thus unfortunately giving no answers to the remaining questions about *Marcum*'s continued relevance in the Tenth Circuit and what view the Tenth Circuit might take on the comparison between college athletes and public employees today. *Id.*

182. *See infra* notes 186–187.

183. Shephard v. Loyola Marymount Univ., 125 Cal. Rptr. 2d 829 (Cal. Ct. App. 2002).

184. *See* Korellas v. Ohio State Univ., 121 Ohio Misc. 2d 16 (Ohio Ct. Cl. 2002); Kavanagh v. Trs. of Bos. Univ., 440 Mass. 195, 198–201 (Mass. 2003) (each rejecting a plaintiff's vicarious liability claim against a university after being injured by an athlete "employed" by that university). The Ohio state court

courts in three states have rejected athletes' pleas for employment status for the purpose of collecting worker's compensation.[185]

Still, there is certainly a possibility that a court weighing the First Amendment against NIL speech restrictions will reason similarly to the Sixth Circuit and apply public employee doctrine. Indeed, this possibility is enhanced by the fact that there have recently been affirmative declarations that college athletes are employees under both the National Labor Relations Act (NLRA)[186] and the Fair Labor Standards Act (FLSA).[187] In fact, the former was heavily supported by Justice Kavanaugh in his *Alston* concurrence, opining that the NCAA should consider collective bargaining as a way to cure various legal ills.[188] As such, it is prudent to discuss how the First

would later also reject a negligent hiring claim on the basis that the athlete who attacked the plaintiff was never "hired" by the university according to the statutory definition. Korellas v. Ohio State Univ., 2004-Ohio-3817, 2004 WL 1598666 (Ohio Ct. Cl. July 12, 2004).

185. *See* Van Horn v. Indus. Accident Comm'n., 219 Cal. App. 2d 457 (Cal. Ct. App. 1963); Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E. 2d 1170 (Ind. 1983); Coleman v. W. Mich. Univ., 336 N.W. 2d 224 (Mich. Ct. App. 1983).

186. Indeed, the opinion of the general counsel of the National Labor Relations Board (NLRB) is that college athletes *are* employees under the NLRA; this opinion was most recently expressed in a September 2021 memorandum. N.L.R.B. Guidance Mem. 21-08 (Sept. 29, 2021). Prior to this, a regional office of the NLRB had famously found that college athletes at Northwestern University were union-eligible employees, though that decision was reversed by the full board on jurisdictional grounds. *See* Nw. Univ., No. 13-RC-121359, 2014 N.L.R.B. WL 1246914 (Mar. 26, 2014); Nw. Univ., 362 N.L.R.B. 1350 (2015). Notably for the purposes of this Article, an NLRB associate general counsel issued an advice memo about a year later finding Northwestern's social media prohibitions contained in the football handbook to be unlawful interference with athletes' rights under Section 7 of the National Labor Relations Act. N.L.R.B. Adv. Mem. Case No. 13-CA-157467 (Sept. 22, 2016). The memo "assume[d], for purposes of this memorandum, that Northwestern's scholarship football players are statutory employees," though it of course did not purport to make any factual findings on that specific issue. *Id.* at 1 n.1. For more information on this memo, see Roger M. Groves, *Memorandum from Student-Athletes To Schools: My Social Media Posts Regarding My Coaches or My Causes Are Protected Speech—How the NLRB is Restructuring Rights of Student-Athletes in Private Institutions*, 78 LA. L. REV. 71 (2018).

187. *See* Johnson v. NCAA, No. 19-cv-05230, 2021 WL 3771810 (E.D. Pa. Aug. 25, 2021) (holding that plaintiffs successfully pled that college athletes can plausibly be deemed FLSA employees of their attended schools based on application of the primary beneficiary test from *Glatt v. Fox Searchlight Pictures*, 811 F.3d 528, 536 (2d Cir. 2016)); Johnson v. NCAA, No. 19-cv-05230, 2021 WL 4306022 (E.D. Pa. Sept. 22, 2021) (holding the plaintiffs successfully pled that college athletes can plausibly be deemed FLSA employees of the NCAA under a joint employment theory); Livers v. NCAA, No. 17-4271, 2018 WL 3609839, at *6 (E.D. Pa. July 26, 2018) (refusing to dismiss an FLSA claim by a football player against his school and the NCAA, holding that the plaintiff had "alleged sufficient facts to plausibly state his entitlement to relief under the FLSA" and thus allowing the case to proceed to limited discovery). The Ninth Circuit had also shown movement in this regard by significantly scaling back a district court opinion holding broadly that college athletes were not employees, instead deferring on the "pure question of employment." Dawson v. NCAA, 932 F.3d 905, 907 (9th Cir. 2019). However, the Ninth Circuit's ruling here was likely based more on the plaintiff's (inexplicable) refusal to include his university in the complaint, alleging instead that he was an employee of the NCAA and his conference. *Id.* The Ninth Circuit rejected this joint employment claim but did crack the door open to a more traditional employment claim in future litigation in its much narrower decision. *See* Sam C. Ehrlich, *"But They're Already Paid": Payments In-Kind, College Athletes, and the FLSA*, 123 W.VA. L. REV. 1, 10–11 (2020).

188. NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) (noting that "colleges and student athletes could potentially engage in collective bargaining" to both solve various potential legal issues created by compensating athletes and "to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues").

Amendment calculus changes under the public employee doctrine, both under analyses of the college athletics as analogous to public employment (as in *Lowery*) and for the emerging trend of college athletes being deemed by courts and by the NLRB to be employees of their schools.

The principal standard used to evaluate public employee speech rights under the First Amendment is the balancing test derived from the Supreme Court's decision in *Pickering v. Board of Education*.[189] Under the *Pickering* standard, a public employee's right to free speech is balanced against the government's interest in efficient delivery of services and "the electorate's interest in honest and effective government that is facilitated by unimpeded access to information."[190] The *Pickering* test was further refined in *Connick*, which held that while public employee speech involving matters of public concern is generally protected, speech involving internal matters not of public concern receives fewer safeguards.[191]

However, *Pickering* and its ilk involve claims that employers retaliated against employees' engagement in protected First Amendment speech. Restrictions on NIL under state law and university policy are prior restraints, necessitating a different analysis.[192] As with restraints imposed on the general population, courts are much less favorable to the State's position when faced with cases involving preclearance requirements to public employee speech.

The standard for preclearance requirements to public employee speech comes from *United States v. National Treasury Employees Union (NTEU)*.[193] In *NTEU*, the Supreme Court struck down a federal law broadly prohibiting federal employees from "accepting any compensation for making speeches or writing articles."[194] Unlike in *Pickering* cases, because the ban in question "chills potential speech before it happens," it raises "far more serious concerns than could any single supervisory decision" and thus the burden on the government is much greater.[195] The rule established in *NTEU* requires the government actor to "show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."[196] Further, the government actor must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[197]

189. 391 U.S. 563 (1968). *See generally* LoMonte & Hamrick, *supra* note 126, at 116–19 (summarizing the relevant employment speech Supreme Court cases and the doctrinal framework they collectively create).

190. LoMonte & Hamrick, *supra* note 126, at 116.

191. Connick v. Myers, 461 U.S. 138, 145–49 (1983).

192. *See generally* Crue v. Aiken, 370 F.3d 668, 678 (7th Cir. 2004) ("To oversimplify, *Pickering* applies to speech which has already taken place, for which the public employer seeks to punish the speaker. [*United States v. National Treasury Employees Union*] applies when a prior restraint is placed on employee speech."). For discussion of NIL restrictions as a prior restraint, *see supra* notes 106–130 and accompanying text.

193. 513 U.S. 454 (1995).

194. *Id.* at 457.

195. *Id.* at 468.

196. *Id.* (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968)).

197. *Id.* at 475 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 624 (1994)).

The *NTEU* doctrine would be an extremely difficult standard for colleges and universities (along with state legislatures) to meet in the context of NIL speech. As a threshold issue, a recent law review article exploring *NTEU*-descendent case law (in the specific context of college athletes' speech to the press) noted that "lower courts have consistently found mandatory-approval policies to be unlawfully broad."[198] The authors found that even "if college athletes have First Amendment rights comparable to those of public employees, there is no support for the proposition that a government agency can enforce a categorical policy requiring approval before speaking to the press."[199]

While the main focus of that article was the admittedly more protected context of communications between government employees and the general public through the press, the authors found more generally that courts have "repeatedly declared public employers' pre-approval policies to be unconstitutional when they lack rigorous procedural safeguards."[200] For example, in *Swartzwelder v. McNeilly*, the Third Circuit found that a police department's mandatory preapproval process for officers serving as expert witnesses in excessive force cases was unconstitutional, as the preclearance requirement was not "carefully crafted" to serve the "legitimate and substantial" government interest in preventing public confusion about the city's policies and practices.[201] Given the exceedingly overbroad nature of the NIL limitations explored later in this Article[202]—and the fact that in many circumstances the restrictions are explicit bans on certain types of speech, not merely preclearance requirements—it is difficult to imagine a scenario where such policies meet the *NTEU* standard, even if the attached government interest is deemed "legitimate and substantial" as it was in *Swartzwelder*.

A useful example of the application of the *NTEU* doctrine in the specific context of college sports comes from *Crue v. Aiken*.[203] In *Crue*, University of Illinois faculty members—protesting the school's use of a Native American mascot—told a newspaper that they intended to contact athletic department recruits to "inform them of the Chief Illiniwek controversy and the implications of competing athletically on behalf of a university which . . . employs racial stereotypes."[204] The university chancellor, fearing that such communication would constitute impermissible contacts in violation of NCAA recruiting rules, sent an email to the university

198. LoMonte & Hamrick, *supra* note 126, at 120. *See, e.g.*, Harman v. City of New York, 140 F.3d 111, 124 (2d Cir. 1998) (holding that the New York City health department cannot lawfully require all employees to refrain from responding to questions from the press).

199. LoMonte & Hamrick, *supra* note 126, at 122.

200. *Id.*

201. 297 F.3d 228, 239–40 (3d Cir. 2002).

202. *See infra* Part IV. In *Swartzwelder*, the expert witness preclearance requirement was not "carefully crafted" to fit the government interest because the policy was "not limited to testimony related to an employee's official duties," and if the policy specifies "any standard for determining whether testimony will be approved, the standard is not closely tied to the impact of the testimony on the operations of the Bureau." *Id.* at 240. Similarly, as we discuss in Part IV, the NIL policies at issue arguably touch on protected political speech and matters wholly unrelated to an athlete's official functions for his or her college or university.

203. 370 F.3d 668 (7th Cir. 2004).

204. *Id.* at 674.

informing them of NCAA rules regarding contacting recruits while stating that "[a]ll members of the University community are expected to abide by these rules, and certainly any intentional violations will not be condoned."[205] After the NCAA confirmed many of his suspicions, the chancellor sent a second email, directing that contacts with recruits "should occur only with the express authorization of the Director of Athletics or his designee" and that the university "expect[s] members of the University community to express their viewpoints without violating NCAA rules concerning contacts with prospective student-athletes."[206]

Viewing this email as a preclearance requirement, the faculty members filed a declaratory judgment action against the university, winning a temporary restraining order and a retraction of the preclearance policy from the university.[207] The Seventh Circuit found on appeal that "[t]he broad scope" of the emailed directive "requires . . . an analysis under the *NTEU* test," even though the prior restraint in question was much narrower than the restraint in *NTEU*.[208] The court reasoned that the chancellor's directive was "a broad prohibition on speech on a matter of significant importance and public concern" and that *Pickering* was not the appropriate standard since the court was not faced with a dispute where "the university improperly disciplined an individual for a single statement."[209] Applying *NTEU*, the court found that "[t]he free-speech interest of the plaintiffs—members of a major public university community—in questioning what they see as blatant racial stereotyping is substantial" and was "not outweighed by fear that an athletic association might not approve of what they say."[210]

There are several takeaways from *Crue* that relate strongly to the balancing of state interests and athlete interests in an NIL speech fact pattern. Clearly, the strong public importance of the particular speech in *Crue*—speaking out against the racial stereotype represented by the university's choice of mascot—was a driving factor in the Seventh Circuit's decision.[211] While most athlete NIL speech may not rise to that level of concern, some could. Requiring athletes to submit to preclearance for all NIL speech—even NIL speech that touches on matters of public concern, such as the speech in *Crue*—would clearly violate the *NTEU*.

A second takeaway from *Crue* actually comes from its dissent. In this dissenting opinion, Judge Manion disagreed with the majority's characterization of the emailed directives as the type of prior restraint at issue in *NTEU*.[212] Arguing that "[t]he distinction between a relatively mild preclearance directive and a broad general prohibition on speech in the employment context—i.e., a full-fledged prior restraint—is significant," Judge Manion wrote that the university still allowed plenty of speech on the mascot issue, noting that the email "d[id] not purport to prohibit the

205. *Id.* at 674–75.
206. *Id.* at 676.
207. *Id.* at 676–77.
208. *Id.* at 677–78.
209. *Id.* at 678.
210. *Id.* at 680.
211. *See id.*
212. *Id.* at 682 (Manion, J., dissenting).

right to leaflet, make speeches, write letters to the editor, or freely debate/discuss the merits or demerits of the Chief in any forum."[213] The prohibition applied only to one specific form of speech thus degraded the relative power of the plaintiff employees' speech interests in comparison to the university's interests.[214] As such, he felt that the employee speech interests should not automatically outweigh the university's interests in avoiding NCAA penalties, as would necessarily be required under *NTEU*'s heightened burden.[215]

As far as the breadth of restrictions is concerned, restrictions on NIL speech are often compulsory, thus placing these restrictions closer to the "sweeping general ban[s]" that Judge Manion acknowledged should be treated with *NTEU*'s strict scrutiny standard.[216] Further, even if one categorizes the noncompulsory preclearance requirements contained within state and university NIL guidelines as "relatively mild preclearance directive[s]" (as Judge Manion framed the *Crue* email), such directives span the entirety of NIL speech at most institutions, particularly those with requirements that NIL deals align with the university's institutional values.[217] The breadth of NIL restrictions is striking, causing such restrictions to fit well within *NTEU*'s realm of exposure. And, regardless of Judge Manion's feelings as to these distinctions, the majority clearly disagreed, thereby holding even the University of Illinois chancellor's "relatively mild preclearance directive" as befitting *NTEU* analysis.[218]

Given *NTEU*'s applicability to NIL policies, it is ultimately inconsequential whether college athletes are characterized as employees, as students, or as members of the general population. As NIL restrictions are clearly a prior restraint with a conspicuously overbroad nature, there is a substantially strong argument that the restrictions on athlete NIL speech discussed in this Article violate the First Amendment—even with the more generous standards befitting public employee speech.

IV. NIL RESTRICTIONS—REGARDLESS OF THE FRAMEWORK APPLIED—ARE UNCONSTITUTIONALLY OVERBROAD

The sheer breadth of the NIL restrictions discussed in this Article should be of significant concern to colleges and universities moving forward, even if *NTEU* is not deemed to be the applicable test. Courts can find a statute or government policy to be unconstitutionally overbroad when there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court."[219]

213. *Id.* at 683.
214. *Id.* at 682–85.
215. *Id.* at 686–88.
216. *Id.* at 682.
217. *Id. See supra* notes 55–58 and accompanying text.
218. *Crue*, 370 F.3d at 682 (Manion, J., dissenting).
219. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984).

While the overbreadth doctrine dates back to the Supreme Court's 1940 decision in *Thornhill v. Alabama*,[220] it was perhaps most specifically laid out by the Court in *Broadrick v. Oklahoma*, a challenge to an Oklahoma statute restricting the political activities of civil servants within the state.[221] Writing for the majority, Justice Byron White wrote that it has "long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn."[222] Additionally, Justice White wrote that such statutes must "represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society."[223] Along these lines, the Court found that a challenge to state action on the grounds that the action is overbroad under the First Amendment is so important that it even gives cause to relax the traditional rules of standing, allowing litigants to "challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[224] The key, according to the *Broadrick* majority, is assuring that state action which restricts speech is as narrowly tailored to a compelling government interest as possible, where "any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."[225]

The overbreadth doctrine is a "strong medicine," and as such, the Supreme Court has stressed that it should be applied "sparingly and only as a last resort."[226] Moreover, courts reviewing statutes and other state action for overbreadth are thus instructed to first determine whether the act can be subject to a limiting construction or whether the problematic terms can be severed.[227] However, the Court has held that a law "may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep,'" including whether the statute can be deemed to apply to "common depictions of ordinary and lawful activities."[228]

Colleges and universities regularly face overbreadth problems in attempting to craft campus speech codes.[229] One especially notable case, *Dambrot v. Central*

220. 310 U.S. 88 (1940) (noting that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected). *See also City Council*, 466 U.S. at 798–99 (noting that the overbreadth doctrine "has its source in *Thornhill*" and summarizing *Thornhill*'s holdings to that end).

221. 413 U.S. 601, 602 (1973).

222. *Id.* at 611.

223. *Id.* at 611–12.

224. *Id.* at 612.

225. *Id.* at 613.

226. *Id.*

227. New York v. Ferber, 458 U.S. 747, 769 n.24 (1982).

228. United States v. Stevens, 559 U.S. 460, 473 (2010).

229. *See, e.g.*, UWM Post, Inc. v. Bd. of Regents of Univ. of Wis., 774 F. Supp. 1163, 1176–77 (E.D. Wis. 1991) (finding that a general university system policy against discriminatory harassment was overbroad, as it regulated speech not covered by the fighting words doctrine); McCauley v. Univ. of the

Michigan University, directly involves intercollegiate sports.[230] In *Dambrot*, a basketball coach at Central Michigan was fired after repeatedly using the "n-word" in the locker room in speeches to his players.[231] Critically, the coach was fired in accordance with the school's discriminatory harassment policy despite several African American players telling the athletic director that they were not offended by their coach's use of the term and, in fact, had given him "permission" to do so.[232] Indeed, five members of the basketball team joined the coach's lawsuit against the university, arguing that the university's discrimination policy was overbroad and vague, thus violating their First Amendment rights as well.[233]

In reviewing the university's antidiscrimination policy, the Sixth Circuit found that the language of the policy was "sweeping and seemingly drafted to include as much and as many types of conduct as possible."[234] In particular, the court pointed to the subjective manner by which the policy defined racial and ethnic discrimination, noting that the players themselves were not offended by the coach's use of racial slurs.[235] To this end, the court found that the policy, "as written, d[id] not provide fair notice of what speech will violate the policy," instead "wholly delegat[ing] to university officials" what was deemed offensive and therefore discriminatory.[236] Therefore, the court held the policy to not only be unconstitutionally overbroad, but void for vagueness as well.[237]

While the Supreme Court has noted that the overbreadth doctrine "does not normally apply to commercial speech," the doctrine does apply when "the alleged overbreadth . . . consists of [the policy's] application to noncommercial speech."[238]

V.I., 618 F.3d 232, 241–52 (3d Cir. 2010) (finding that several paragraphs of a university's speech code—including one prohibiting misbehavior at sporting events and another prohibiting conduct causing emotional distress—were facially overbroad in violation of the First Amendment).

230. 55 F.3d 1177 (6th Cir. 1995).

231. *Id.* at 1180–81.

232. *Id.*

233. *Id.* at 1170–80.

234. *Id.* at 1182.

235. *Id.* at 1184. In describing the importance of the subjective nature of the offense of the remarks, the court wrote:

> In order to determine what conduct will be considered "negative" or "offensive" by the university, one must make a subjective reference. Though some statements might be seen as universally offensive, different people find different things offensive. The facts of this case demonstrate the necessity of subjective reference in identifying prohibited speech under the policy. Several players testified they were not offended by Dambrot's use of the N-word while student Norris and affirmative action officer Haddad were extremely offended. The CMU policy, as written, does not provide fair notice of what speech will violate the policy. Defining what is offensive is, in fact, wholly delegated to university officials. This "unrestricted delegation of power" gives rise to the second type of vagueness. For these reasons, the CMU policy is also void for vagueness.

Id.

236. *Id. See also* Wash. Mobilization Comm. v. Cullinane, 566 F.2d 107, 117 (D.C. Cir. 1977) ("A vague ordinance denies fair notice of the standard of conduct to which a citizen is held accountable.").

237. 55 F.3d 1177, 1184–85 (6th Cir. 1995).

238. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 481–86 (1989) (holding a challenge to a university's policy barring private commercial enterprises from operating on campus or in other university facilities was overbroad despite its clear focus on commercial speech, as the lower courts did not consider or otherwise recognize the fact that noncommercial speech could be impacted by the policy). Notably, the dissent in this case felt that the majority was too weak on overbreadth grounds and that the

So even while NIL speech is at its root commercial speech, it is not difficult to think of hypothetical instances where NIL restrictions restrain noncommercial speech. All three policies discussed herein—prohibitions on conflicting sponsorship deals, prohibitions on vice industry endorsement, and prohibitions on deals that conflict with institutional values—are remarkably broad and ambiguous. Each of these provisions may extend to noncommercial speech, including highly protected political speech (though, for reasons discussed below, the conflicting sponsorship deals provision is much less overbroad, and therefore less constitutionally problematic, than the others).

To give a hypothetical example of how the conflicting sponsorship deals provision can be applied to noncommercial speech, we shall assume that an athlete at the University of Louisville wants to partner with the apparel company Nike. This deal would likely be rejected by the University of Louisville after review, as the Kentucky executive order granting athlete NIL rights still forbids compensated endorsement deals that conflict with deals made by the athlete's institution,[239] and the University of Louisville has their own longstanding arrangement with another apparel company (Adidas).[240]

However, this hypothetical Nike advertisement would feature the athlete speaking about her experiences as an African American female athlete—a clear matter of public concern.[241] In this situation, the conflicting endorsement provision in Kentucky's executive order barring the athlete from receiving compensation for speaking out about racial and gender issues through Nike's microphone would disincentivize her speech about a matter of clear public concern.[242] However, Supreme Court precedent does dictate that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded [to] noncommercial speech."[243] For this provision in particular, it may be difficult for courts to parse the promotional content from the political speech, making this provision more likely to be enforceable than the other two provisions.

policy's overbroad nature was "readily apparent" and thus did not require further analysis by the lower courts. *Id.* at 487 (Blackmun, J., dissenting).

239. K.Y. Exec. Order No. 2021-418 § I(B) (June 24, 2021), https://perma.cc/X5LD-J4LA. *See supra* note 47 and accompanying text.

240. Jeff Greer, *University of Louisville Celebrates New $160 Million Adidas Contract*, COURIER J. (Aug. 25, 2017), https://perma.cc/QM2E-7C79.

241. *See, e.g.*, Keith Rathbone, *Nike's Courageous New Ad Campaign Mixing Racial Politics with Sport Will Be Vindicated*, CONVERSATION (Sept. 5, 2018), https://perma.cc/H7ZZ-DY5Z; Jessica Golden, *Soccer Star Megan Rapinoe Speaks Out About Race and Change as Part of New Nike Campaign*, CNBC (July 30, 2020), https://perma.cc/ZWH5-6WYU.

242. While it could be argued that Kentucky's restriction in this case only bars her from receiving compensation for this speech, not from making the speech altogether, this argument is analogous to that of the state of Colorado in *Meyer v. Grant*, 486 U.S. 414, 428 (1988), whose statute prohibiting the payment of petition circulators was found to violate the First Amendment as an unjustified burden of political expression. It also bears significant comparable impact to the prohibition on the operation of private commercial enterprises in *Fox*, which involved a company attempting to sell Tupperware to students in college dorms. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 472 (1989).

243. Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 68 (1983) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 n.5 (1980)).

Indeed, we have already seen an example of the vice industry prohibition's overbreadth and vague nature: Barstool Sports being deemed a gambling company and thus ineligible to contract with athletes affected by these prohibitions.[244] Just ten days after the July 1, 2021, floodgates opened allowing athletes to enter into compensated NIL deals, Barstool had already signed over 100,000 athletes as "Barstool Athletes" and provided them with exclusive merchandise in exchange for bilateral social media exposure.[245] But due to Barstool's ties to gambling— the company operates a sportsbook and casino owner Penn National owns a thirty-six percent stake in the firm—many have questioned whether Barstool NIL deals pass muster under those state statutes and institutional policies that prohibit athletes from signing deals with gambling industry entities.[246] Indeed, at least one (private) school has affirmatively stated that Barstool would be considered a gambling company under their own institutional NIL policy.[247]

Several legal scholars have objected to the classification of Barstool as a gambling company, particularly due to the breadth of the gambling definition. Gambling law expert Daniel Wallach tweeted that the classification is "[p]ainting with a very broad brush," as "Barstool the company does not receive any sports betting revenues."[248] Sports industry consultant and former director of the Arizona State Sports Law and Business Program, Sam Renault, noted that a similar interpretation could also be applied to more mainstream media entities like Fox, Sports Illustrated, and ESPN.[249] Such an interpretation has not been shared by all schools; the University of Wisconsin, for example, has deemed deals with Barstool to be appropriate so long as they do not expressly involve gambling promotion.[250]

The nebulousness of whether entities like Barstool qualify as gambling companies under state laws and institutional policies draws significant comparisons to how the Sixth Circuit applied the void for vagueness doctrine to Central Michigan's antidiscrimination policy in *Dambrot*.[251] While the provision barring athlete deals

244. *See, e.g.*, Vann, *supra* note 7. *See also supra* notes 7–9 and accompanying text.

245. Vann, *supra* note 7.

246. *Id.*

247. @AIComplies, TWITTER (Jul. 8, 2021, 9:55 AM), https://perma.cc/CL87-MUPK ("If you want to take part in an NIL deal, please contact the Compliance Office first to make sure you don't cause eligibility issues. You are not allowed to work with companies that promote alcohol, drug use (including marijuana), gambling/sports betting (including Barstool) #NIL"). Of note, AIC made clear in a follow-up tweet that the prohibition in question was their own institutional policy and not tied to any NCAA prohibition against college athlete gambling activities. @AIComplies, TWITTER (Jul. 8, 2021, 3:54 PM), https://perma.cc/YU3R-2A5T ("Would like to clarify since we've gotten questions . . . this is our institutional policy (not NCAA) to protect our athletes from potential eligibility issues since this is such a gray area!").

248. @WALLACHLEGAL, TWITTER (July 11, 2021, 8:47 AM), https://perma.cc/5W74-8343. Wallach also argued that such a definition is hypocritical, pointing to a recent deal signed between the University of Colorado and sportsbook PointsBet. *Id. See* Ross Dellenger, *Inside Colorado's Unprecedented $1.625M+ Deal with Gambling Outlet*, SPORTS ILLUSTRATED (Oct. 3, 2020), https://perma.cc/7GTZ-8R4W.

249. @SamRenaut, TWITTER (July 10, 2021, 6:36 PM), https://perma.cc/9ULL-WD8V.

250. Todd D. Milewski, *UW Wants to Educate Badgers Athletes on NIL, Not Oversee Contracts; Some Proposed Deals Raise Questions*, KENOSHA NEWS (July 16, 2021), https://perma.cc/U3UJ-TM9K.

251. Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1182–84 (6th Cir. 1995).

with conflicting endorsement companies at least gives the athlete some notice as to what deals may be conflicted—the school's sponsors are often well known by the athletes due to signage and in-game promotions and listed on official athletic department websites,[252] and some schools also publish a reference list of exclusive sponsors[253]—policies that allow schools to make *post hoc* determinations of what does and does not fit within the restriction is an entirely different story. Barstool may well be a gambling company, but that is not the point; under the *Dambront* precedent, if an athlete is unaware that Barstool is deemed to be a "gambling company" based solely on their promotion of gambling or ties to a sportsbook until after they submit their deal for approval, the policy both relies on "a subjective reference" by the university and thus "does not provide fair notice of what speech will violate the policy."[254] Painting Barstool with such a "broad brush"[255] raises overbreadth concerns as well, considering that Barstool was at least initially launched as a media outlet (raising concerns with the free press clause of the First Amendment) that regularly participates in political activity both alongside and separate from its more commercial and sports-focused activities and—unlike Nike—often does so outside of the sale of its products.[256]

Finally, the third common prohibition discussed in this article—the prohibition on any NIL deals that conflict with institutional values—is far and away the most easily overbroad, ambiguous, and thus inherently problematic of the three. Returning to the Barstool Sports example, in informing its athletes that they are barred by institutional policy and state law from partnering with Barstool, the University of Louisville originally did not give a reason why such deals were forbidden.[257] While this lack of clarity and transparency alone raises significant vagueness and overbreadth doctrine concerns, the vacuum of explanation by the university could lead one to believe that its rationale was based on Barstool's infamously controversial and problematic nature, which has endangered or even felled several

252. *See, e.g.*, Lee Douglas, *Florida Gators Sports Properties*, FLORIDA GATORS, https://perma.cc/5Y38-9BKH.

253. *See, e.g.*, @KATVKyle, TWITTER (July 1, 2021, 9:04 AM), https://perma.cc/VB23-PVBJ ("[University of Arkansas] Razorback student-athletes are prohibited from entering agreements with companies that are exclusive partners of the U of A without a special exception, according to the handbook posted online. Those include UAMS, Tyson, JB Hunt, Nike, Gatorade and local Ford dealerships."); 2021–22 OFFICIAL CORPORATE SPONSORS & EXCLUSIVITIES, TEXAS SPORTS (June 2021), https://perma.cc/ZB42-LPD8; SIGNIFICANT PARTNERSHIPS SUMMARY, TEXAS SPORTS (July 1, 2021), https://perma.cc/E9F9-MM32.

254. *Dambrot*, 55 F.3d 1177 at 1184; Wash. Mobilization Comm. v. Cullinane, 566 F.2d 107, 117 (D.C. Cir. 1977).

255. @WALLACHLEGAL, TWITTER (Jul. 11, 2021, 8:47 AM), https://perma.cc/5W74-8343.

256. *See, e.g.*, Matthew Walther, *Rise of the Barstool Conservatives*, WEEK (Feb. 1, 2021), https://perma.cc/8FTL-LYFM; Alex Silverman, *Trump Campaign Finds Young, Politically Engaged and GOP-Leaning Audience with Barstool Sports Interview*, MORNING CONSULT (July 24, 2020), https://perma.cc/AJ6C-4JZH. *See also generally Barstool Politics*, APPLE PODCASTS, https://perma.cc/E8V9-GCRD (a landing page for Barstool's politics-focused podcast, where Barstool personalities and guests discuss political issues).

257. Darren Heitner (@DarrenHeitner), TWITTER (Aug. 9, 2021, 8:45 PM), https://perma.cc/C5K3-RYA9 ("Louisville Assistant AD has told athletes to cease #NIL involvement with Barstool Sports. [via @TyInLouisville]."). *See supra* note 9 and accompanying text.

other Barstool partnerships.[258] Given this nature, the University of Louisville could hypothetically be within its rights to deny such deals under Kentucky's NIL executive order, which allows Kentucky postsecondary educational institutions to forbid "contracts for compensation for name, image and likeness that the postsecondary educational institution determines is incompatible or detrimental to the image, purpose or stated mission of the postsecondary educational institution."[259]

In the end, the University of Louisville's blanket rejection of Barstool deals ended up not being related to this provision.[260] But the controversy and debate that the Louisville statement created shows exactly why this application of the Kentucky executive order is impermissibly broad. The text of the provision in the Kentucky executive order does not define what would be "reasonably considered to be inconsistent with the values or mission of a postsecondary educational institution" and effectively allows institutions to restrict any NIL-related speech so long as the institution subjectively determines that the product or service in question is in conflict with institutional values—whatever those values may be.[261] Just as with the vice industry provision, the entirely subjective manner by which the university is given the power to determine which NIL deals conflict with its values—along with the entirely subjective and clandestine manner by which those values are defined—resembles the antidiscrimination policy deemed overbroad and void for vagueness in *Dambrot*. To an even greater extent than the vice industry provision, the institutional values provision certainly "does not provide fair notice of what speech will violate the policy."[262]

Certainly, universities (and the states that oversee them) may have strong reservations about having their athletic marks attached to provocative and scandal-ridden brands like Barstool. But regardless of the merits and rationale of the policy, this simply cannot be constitutionally accomplished through boundless policy that allows for the restriction of any NIL speech the universities deem incompatible with their values—even if this speech is purely political in nature. An example of how this provision can implicate political speech is not difficult to imagine. Say, for example, an athlete wished to be paid to film a political advertisement in support of Palestine against perceived Israeli aggression. That athlete's school could very easily justify barring the athlete from participating in this advertisement, fearing political backlash and claiming that such activity would violate its institutional values in

258. *See, e.g.*, Scott Allen, *ESPN Cancels "Barstool Van Talk" After One Episode*, WASH. POST (Oct. 23, 2017), https://perma.cc/TH77-P2M (noting criticism by ESPN personality Sam Ponder over Barstool's "history of misogynistic blog posts" as a likely reason for the show's cancelation); Sheryl Ring, *MLB's Talks with Barstool Show the Cowardice of Both Rob Manfred and MLB Players*, SBNATION (Aug. 12, 2021), https://perma.cc/J69A-ZPB3 (criticizing Major League Baseball for its burgeoning television deal talks with Barstool and while laying out in great detail the controversy surrounding Barstool).

259. K.Y. Exec. Order No. 2021-418 § I(D) (June 24, 2021), https://perma.cc/X5LD-J4LA.

260. Rucker & Grady, *supra* note 9 (noting that the reason for the university's actions was that Barstool was using unauthorized materials and images without obtaining the appropriate permissions and licenses from the university).

261. K.Y. Exec. Order No. 2021-418 § I(D) (June 24, 2021).

262. Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1184 (6th Cir. 1995). *See supra* notes 235–237 and accompanying text.

support of Israel. However, forbidding an athlete from engaging in such activity would be barring the athlete from engaging in the purest form of political speech.[263]

Granted, these examples are merely hypotheticals; no evidence exists that any of them have yet become an issue. But such speculation is not inappropriate for overbreadth analysis due to the relaxed standing requirements attached to the doctrine.[264] As noted by the Supreme Court in *Board of Trustees v. Fox*, "[t]he First Amendment doctrine of overbreadth was designed as a 'departure from traditional rules of standing,' to enable persons who are themselves unharmed by the defect in a statute nevertheless 'to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.'"[265] Indeed, the Court added that "the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application *to someone else*."[266] Thus, a party challenging an NIL policy does not need to show that they have tried and failed to enter into a deal like those above; the challenging party merely needs to show that they or others are inhibited in such a fashion by the challenged policy.

Nor is it necessary under the overbreadth doctrine's relaxed standing requirements for the challenging party to be an athlete. The underlying justification of the overbreadth doctrine, according to the Supreme Court, is in fact "the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court."[267] This means that even if athletes themselves are not motivated to challenge the statutes in the courts, such a role can be taken by a potential endorser instead. After all, the speech of the endorsers themselves is inhibited by these statutes as well, as they are being cut off from the ability to employ college athletes as endorsers in their speech activities.[268] And the relaxed standing requirements for overbreadth would allow them to challenge a statute if the policies merely "constitutionally might be applied" to them.[269]

A further danger here is that the manner by which the governing institution intends to exercise the policy's restrictions does not matter, so long as the policy *can* be used in a way that inhibits protected speech. In *Dambrot*, the university had included language in its antidiscrimination policy stating that the university "will not extend its application of discriminatory harassment so far as to interfere impermissibly with

263. The university could even face significant viewpoint discrimination claims for engaging in such a restraint should it bar this particular speech without wholly banning political advertisements in general.

264. *See* Eisenstadt v. Baird, 405 U.S. 438, 445 n.5 (1972) ("Indeed, in First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech.").

265. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 484 (1989) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

266. *Id.* at 483.

267. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984).

268. Whether such a lawsuit by an endorsement company would prevail outside of the overbreadth doctrine is outside the scope of this Article but would be well worth analysis in follow-up scholarship.

269. Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 462 n.20 (1978). *See also Fox*, 492 U.S. at 482–83 (quoting *Ohralik* to support the finding that even regulations targeting commercial speech may be deemed unconstitutionally overbroad if they also infringe on protected noncommercial speech).

individuals' rights to free speech."[270] The Sixth Circuit was entirely unreceptive to this line of reasoning, however, writing that "there is nothing to ensure the University will not violate First Amendment rights even if that is not their intention" and that "[t]he broad scope of the policy's language presents a realistic danger the University could compromise the protection afforded by the First Amendment."[271]

Indeed, the Supreme Court has put forward a similar line of thought to the Sixth Circuit's reasoning in *Dambrot*, holding that an unconstitutional statute should not be upheld "merely because the Government promised to use it responsibly."[272] The Supreme Court's point is particularly notable given that the statutory language at issue purported to "reach only 'extreme' cruelty [to animals]" and the government "invok[ed] its prosecutorial discretion several times" in defense of the statute.[273] The Court's ruling here would bely any potential efforts by states and educational institutions to call on courts to defer to institutional interpretations of whether companies conflict with an existing endorsement deal or are considered to be gambling or other vice industries, let alone institutional interpretations of which athlete deals may be "incompatible or detrimental to the image, purpose or stated mission of the postsecondary educational institution."[274]

As the Supreme Court held in *Fox*, "a statute regulating commercial speech must be 'narrowly tailored'" to avoid being struck down for overbreadth.[275] Based on the examples provided above, the three recurring NIL provisions discussed herein are certainly not narrowly tailored. Even the standard vice industry prohibitions—in which specific industries are selected explicitly named in reflection of the accompanying government interest—would likely be found as overbroad due to the ambiguous nature as to how a particular endorser can be defined as within those industries. And the conflicting endorsement and reputational restrictions are certainly overbroad as they are certainly not "'narrowly tailored' to serve a significant governmental interest."[276]

V. CONCLUSION

When this Article's analysis is put up against the Supreme Court's *Alston* decision, it becomes clear that the college athletic governance scheme is in something of a no-win situation—assuming that the "guardrails" seemingly required are truly a priority within the industry. If such restrictions are imposed at a national level, these restrictions would very likely represent violations of the Sherman Antitrust Act—which is why the NCAA spun off governance responsibilities to schools and states after the *Alston* decision was rendered. But as this Article makes clear, delegating governance responsibilities over NIL to state actors raises First Amendment

270. Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1183 (6th Cir. 1995).
271. *Id.*
272. United States v. Stevens, 559 U.S. 460, 480 (2010).
273. *Id.*
274. K.Y. Exec. Order No. 2021-418 § I(D) (June 24, 2021).
275. Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 478 (1989).
276. *Id.*

concerns. Given that such constitutional concerns are only applicable to public schools and private schools in the states that have passed NIL legislation with compulsory requirements, private schools not tied to state-level legislation have a significant competitive advantage.

Should NIL governance be kept at the local level, states and institutions can certainly adapt by rewriting policy to reduce vagueness and overbreadth by narrowly tailoring policy to specific commercial speech. Such changes would undoubtedly require specificity in what sponsorship categories are to be deemed protected from conflict (as some schools have already done),[277] specific definitions of gambling, alcohol, or other vice industry enterprises, and complete revocation of the extremely overbroad institutional values provision. Policies with such definitions are admittedly inflexible, but such inflexibility is needed to provide objectivity and "fair notice of what speech will violate the policy."[278] The competitive balance issues between public and private schools can similarly be remedied through passage of a federal NIL statutory scheme—though that law would of course need to be specific enough in its terms to comply with the First Amendment.

There is, however, an easier solution. Restriction of NIL speech had been ongoing for years to a much broader degree at the NCAA level, unchallenged thanks in large part to the *NCAA v. Tarkanian* precedent holding the NCAA immune from constitutional concerns as a purely private actor.[279] While—again—nationwide NCAA regulation of NIL would be heavily scrutinized (and likely illegal) under antitrust law, we echo Justice Kavanaugh's view that such "difficult questions could be resolved in ways other than litigation," including legislation and collective bargaining.[280] As legislation immunizing the NCAA from antitrust law in whole or in part is problematic, this Article adds to the growing chorus calling for the NCAA to explore allowing athlete collective bargaining—both for the benefit of the college athletes and for the benefit of the NCAA's own legal risk management strategy.[281]

Regardless of how the NCAA chooses to proceed from here, this Article makes clear that the association's current, impulsive strategy of simply handing regulatory authority off to states and schools is unsustainable, causing consequences that were almost certainly unforeseen. While the Constitution has long been much of a concern for sports leagues, the NCAA's actions—combined with the states' and schools'

277. *See* Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1184 (6th Cir. 1995). *See also* Wash. Mobilization Comm. v. Cullinane, 566 F.2d 107, 117 (D.C. Cir. 1977).

278. *Dambrot*, 55 F.3d at 1184.

279. 488 U.S. 179 (1988). *See generally* Aaron Hernandez, Note, *All Quiet on the Digital Front: The NCAA's Wide Discretion in Regulating Social Media*, 15 TEX. REV. ENT. & SPORTS L. 53, 59–62 (2013), https://perma.cc/456E-3EFY (discussing the applicability of *Tarkanian* to First Amendment free speech concerns).

280. NCAA v. Alston, 594 U.S. ___, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

281. *See, e.g.*, Ray Glier, *Chris Murphy and Bernie Sanders Introduce Senate Bill that Would Allow College Athletes to Unionize*, FORBES (May 27, 2021), https://perma.cc/4DF3-P8K2; Denise J. Mazzeo, *The Crossroads of College Sports, COVID-19, and Collective Bargaining: How a Hashtag that Went Viral During a Pandemic Resuscitated the Conversation on Unionization*, 31 ENT. ARTS & SPORTS L.J. 28 (2020); Sam C. Ehrlich, *The FLSA and the NCAA's Potential Terrible, No Good, Very Bad Day*, 39 LOY. ENT. L. REV. 77, 110–11 (2019).

problematically overbroad drafting of NIL policy—have very much put the First Amendment's free speech clause in play for athletes' rights.