

# The State of Play on Name, Image, and Likeness

BY JENNIFER LANAHAN, ESQ.



**Prior to the U.S. Supreme Court’s landmark decision in *NCAA v. Alston*,<sup>1</sup> student athletes were completely banned from receiving compensation for the use of their name, image, and likeness. The collective phrase “name, image, and likeness” (NIL) refers to what is—essentially—a student athlete’s individual brand. Common examples of NIL activities include autograph signings, social media endorsements, and player appearances.**

Pre-*Alston*, running afoul of the NCAA’s prohibition on compensation for these types of activities meant risking the forfeiture of a student athlete’s amateur

status (and thus any attendant benefits like athletic scholarships). However, the Supreme Court’s decision, which deemed the NCAA’s compensation restrictions as anticompetitive and violative of the Sherman Antitrust Act, very rapidly changed all that.

## State Efforts to Regulate NIL

While the *Alston* decision officially came down in June 2021, there were a handful of states that had already passed laws allowing student athletes to benefit from the use of their NIL. In 2019, California passed the “Fair Pay to Play” law<sup>2</sup> that allowed student athletes to endorse products using their NIL, sport, and school (but not their school’s logos or other school-trademarked property). Many other states, including Colorado, Florida, Michigan, Minnesota, Nebraska, and New Jersey, passed their own NIL legislation in 2020.<sup>3</sup> As of June 2024, 34 states and the District of Columbia have statutes regulating NIL.<sup>4</sup> Typically, state legislation on NIL addresses matters involving contract

disclosure requirements and general prohibitions on certain types of NIL deals (e.g., adult entertainment, alcohol, tobacco, weapons, controlled substances, performance-enhancing drugs, casinos, gambling).

## NIL in Nevada

In May 2021, Nevada passed its first NIL law via Assembly Bill 254<sup>5</sup> (AB 254). AB 254 explicitly authorized student athletes to enter into NIL contracts, prohibited national collegiate athletic associations and Nevada higher-education institutions from unreasonably interfering with same, and created a legislative committee tasked with studying and reporting issues pertaining to NIL.<sup>6</sup> Following a series of public hearings during the 2021-22 Interim, the Committee to Conduct an Interim Study on NIL issued a report containing the following policy recommendations:

1. Send a letter to Nevada’s congressional delegation encouraging the development of a national, uniform policy for NIL.

Breanna Stewart gets ready to shoot a free throw during a NCAA Women's Basketball Tournament game as her teammate Gabby Williams prepares for a possible rebound. Williams is from Sparks, Nevada.



First, the bill set forth a new definition of NIL contracts, created registration requirements for entities deemed to regularly facilitate NIL deals, and established minimum reporting thresholds (*i.e.*, aggregate NIL deals valued at \$10,000 or more). Additionally, SB 70 tasked the Secretary of State (SOS) with maintaining a public repository for NIL disclosures and authorized the SOS to take certain enforcement actions against persons or entities violating the registration/disclosure requirements. Despite the seeming prudence of enhancing Nevada's NIL laws at that time, the bill died without a hearing on April 15, 2023.

### The NCAA's Post-Alston Policies

As noted above, the NCAA almost immediately reversed course on NIL following the *Alston* decision. On July 1, 2021, a mere 10 days after the Supreme Court's ruling, the NCAA enacted a new, interim policy on NIL.<sup>9</sup> The interim policy broadly proclaimed that student athletes in states without NIL laws could now partake in those activities without risk of NCAA sanctions; student athletes in states that did have existing NIL laws were instructed to follow those.<sup>10</sup> Per guidance, the interim policy was intended to be temporary and remain in effect only until new NCAA rules were adopted or federal legislation passed. To date, Congress has not passed any legislation governing NIL.

### Monumental Shifts

There have been several recent legal and policy developments on the NIL front across the nation.

First, in January 2024, a federal court ruled in favor of the State of Tennessee and the Commonwealth of Virginia, which sought to prevent the enforcement of the NCAA's "recruitment ban" on NIL.<sup>11</sup> Specifically, the ban prohibited certain athletic department officials and affiliates from engaging in NIL negotiations with prospective student athletes during the recruiting or transfer process. In its ruling, the court

concluded that the ban likely violated federal antitrust law by depriving student athletes of a critical negotiation window in which they could ascertain their true NIL market value.

Second, on April 18, 2024, Virginia successfully passed a first-in-the-nation NIL law granting its schools the right to *directly* enter into NIL deals with student athletes.<sup>12</sup> This was a historic college athletics "first" and a complete contradiction of the NCAA's interim policy on NIL.

Finally, in May 2024, the NCAA agreed to a multi-billion-dollar settlement involving three federal antitrust cases brought by current and former student athletes.<sup>13</sup> The settlement, which is still subject to final court approval, would pay out more than \$2.7 billion in damages to certain student athletes dating back to 2016.<sup>14</sup> Even more telling than the NCAA's sheer willingness to pay out such

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a large sum in damages is the fact that the settlement includes a provision (agreed upon by the NCAA and Power 5 conferences) that provides for revenue-sharing with its athletes. This is a huge about-face from the NCAA's longstanding ban on direct payments between schools and athletes, and it signals a willingness to forgo

challenges to legislation like Virginia's on the same topic.

### What's Next

Given the tidal shift in NIL policy in recent years, not to mention a general trend toward classifying student athletes as employees (meriting an entire article of its own), it seems there will be a strong push for uniform guidelines at the federal level, though any appetite to push this type of legislation may not come until after the 2024 elections. In the absence of congressional action, policymakers will have to continue gleaning insights from patchwork state laws and myriad court decisions. Nevada will have its next opportunity to revisit the state's NIL laws when the next Legislative session begins on February 3, 2025.

2. Include a list of NIL "best practices" in the report transmitted to the 2023 Nevada Legislature.
3. Send a letter to the Nevada System of Higher Education urging it to conduct a study regarding policies and challenges of implementing NIL at the junior college level (e.g., resources, funding, transfers between two- and four-year colleges and universities).
4. Send a letter to the Nevada Gaming Control Board and Nevada Gaming Commission urging it to conduct a study regarding the impact of NIL on the gaming industry (e.g., whether possibilities exist for NIL deals between student athletes and the gaming industry).
5. Propose NIL legislation to the 2023 Nevada Legislature.<sup>7</sup>

On January 23, 2023, the Legislature introduced Senate Bill 70 (SB 70).<sup>8</sup> SB 70 proposed a series of amendments to NRS Chapter 398 based on the findings of the committee's interim study on NIL.

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## ENDNOTES:

1. *NCAA v. Alston*, 594 U.S. \_\_\_\_ (2021).
2. California Senate Bill 206 (2019), available at <https://legiscan.com/CA/text/SB206/id/2055437>.
3. See State and Federal Legislation Tracker, Troutman Pepper, updated June 4, 2024, available at <https://www.troutman.com/state-and-federal-nil-legislation-tracker.html>.
4. See *id.*
5. Nevada Assembly Bill 254 (2021), available at <https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7714/Overview>.
6. *Id.*
7. Nevada Interim Study Report (Bulletin 23-18), available at <https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/30488>.
8. Nevada Senate Bill 70 (2023), available at <https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/9649/Overview>.
9. Michelle Brutlag Hosick, "NCAA adopts interim name, image and likeness policy," NCAA, June 30, 2021, available at <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.
10. *Id.*
11. Darius Walker Jr., "Tennessee Federal Court Issues Preliminary Injunction Blocking NCAA's NIL Restrictions," Ogletree Deakins, March 12, 2024, available at <https://ogletree.com/insights-resources/blog-posts/tennessee-federal-court-issues-preliminary-injunction-blocking-ncaas-nil-restrictions/>.
12. Virginia House Bill 1505 (2024), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?241+sum+HB1505>.
13. Dan Murphy and Pete Thamel, "NCAA, Power 5 agree to deal that will let schools pay players," ESPN.com, May 23, 2024, available at [https://www.espn.com/college-sports/story/\\_/id/40206364/ncaa-power-conferences-agree-allow-schools-pay-players](https://www.espn.com/college-sports/story/_/id/40206364/ncaa-power-conferences-agree-allow-schools-pay-players).
14. *Id.*



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