

BLOWING THE WHISTLE ON NIL SECRECY: COLLEGE ATHLETE ENDORSEMENT AGREEMENTS AND STATE FREEDOM-OF-INFORMATION LAWS

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INTRODUCTION

College athletes are suddenly benefiting from a windfall of endorsement deals that once were reserved exclusively for nonstudent professionals.¹ Each of these “name, image and likeness” (NIL) endorsement agreements creates a paper trail of documentation. Under state law, those documents typically must be shared with the athletes’ colleges.² Records held by state colleges are presumed to be accessible to public

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1. See Dan Murphy, *Let’s Make a Deal: NCAA Athletes Cashing In on Name, Image and Likeness*, ESPN (July 1, 2021), https://www.espn.com/college-sports/story/_/id/31738893/ncaa-athletes-cashing-name-image-likeness [https://perma.cc/9KUG-S8ZK].

2. Cullen Browder, *As College Athletes Cash In, Schools Keep Records of Name, Image, Likeness Deals Under Wraps*, WRAL SPORTSFAN (Feb. 28, 2022), <https://www.wralsportsfan.com/as-college-athletes-cash-in-schools-keep-records-of-name-image-likeness-deals-under-wraps/20163152/> [https://perma.cc/5622-V7UQ].

inspection.³ But colleges have balked at releasing NIL records,⁴ making it likely that freedom-of-information disputes will end up in court.

This Article explores whether the public and press can gain access to the records memorializing NIL agreements from state colleges, why access has public importance, and what arguments for and against access are likely as freedom-of-information cases are litigated. The Article examines the first wave of disputes over public access to college athlete endorsement deals and how some state legislatures are preemptively walling off these agreements from public inspection. It concludes that concealing NIL records from the public disservices the interests of every stakeholder—the public, the athletes, and college sports itself—in making sure that competition is fair, honest, and passes the test of legitimacy, and that athletes have equitable earning opportunities befitting their level of accomplishment.

This Article proceeds in four sections. Section I explains the workings of state public records statutes and how those statutes apply—or sometimes do not apply—in the setting of publicly supported higher education institutions and their athletic programs. Section II then traces the rapidly evolving NIL right of college athletes to leverage their recognition to earn money. It discusses how the National College Athletic Association's (NCAA) long-established insistence on “amateurism” crumbled under the weight of state statutes and judicial antitrust decisions, shifting power into the hands of athletes. Section III analyzes whether records memorializing athletes' NIL agreements shared with state colleges qualify as publicly accessible records. It describes how several states have preemptively decided by legislation that college athletes' NIL contracts should be shielded from public inspection. And it anticipates and analyzes the primary arguments against disclosure likely to arise in the remaining states when access to NIL agreements is litigated: student privacy and “trade secret” protection. Section IV sets out the public policy imperatives that favor transparency, including the public's interest in fair and honest competition, and equitable treatment of traditionally undercompensated female athletes. Finally, the Article concludes by emphasizing that secrecy in college sports often accrues to the benefit of hidebound wrongdoers and the detriment of vulnerable students and that public scrutiny is the most effective check on the abuses and excesses that inevitably will result as untold millions pour into a minimally regulated endorsement system.

I. PUBLIC RECORDS 101

Every state and the federal government maintain freedom-of-information (FOI) laws that entitle the public to inspect documents and data that agencies create or

3. See Charles N. Davis, *Scaling the Ivory Tower: State Public Records Laws and University Presidential Searches*, 21 J. COLL. & U.L. 353, 356 (1994) (“State courts have ruled in cases related to presidential-search records, as well as in other cases, that a public university meets the definition of ‘state agency’ under the states’ respective public-records laws.”); see also David Pritchard & Jonathan Anderson, *Forty Years of Public Records Litigation Involving the University of Wisconsin: An Empirical Study*, 44 J. COLL. & U.L. 48, 58 (2018) (“Media organizations make frequent use of Wisconsin’s public records law for the purpose of obtaining newsworthy information about university affairs.”).

4. See Browder, *supra* note 2 (reporting that journalists were rebuffed when requesting records of NIL agreements from state universities in North Carolina).

maintain.⁵ Openness in government is understood to serve two primary and complementary purposes: enabling citizens to have well-informed input into the formulation of government policy and promoting better government by enlisting the press and public as watchdogs over malfeasance.⁶ Public records are an indispensable investigative reporting tool, helping journalists hold government agencies and officials accountable.⁷ FOI laws are supposed to be interpreted broadly, with a bias toward disclosure in doubtful cases.⁸ But certain categories of records are widely recognized as exempt from disclosure, such as records that might compromise ongoing police investigations.⁹ Battles regularly arise over access to records of public educational institutions, because of a federal statute—the Family Educational Rights and Privacy Act¹⁰ (FERPA)—that has been interpreted as obligating schools and colleges to deny requests for records about their students.¹¹

The starting assumption is that public colleges, like any other state agency, are subject to requests for their records unless an exemption excuses compliance.¹² But the culture of higher education does not generally welcome public scrutiny and oversight.¹³

5. Cheryl M. Sheinkopf, *Balancing Free Speech, Privacy and Open Government: Why Government Should Not Restrict Truthful Reporting of Public Record Information*, 44 UCLA L. REV. 1567, 1569 (1997).

6. Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 399 (2009).

7. See Gerry Lanosga & Jason Martin, *Journalists, Sources, and Policy Outcomes: Insights from Three-Plus Decades of Investigative Reporting Contest Entries*, 19 JOURNALISM 1676, 1685–86 (2018) (reporting results of study of entries submitted to leading U.S. investigative reporting awards competition, which found that, in recent years, 90.6% of the entrants said they drew on government records and 41.7% explicitly mentioned using public records laws, a percentage that has been growing over time).

8. See *State ex rel. Thomas v. Ohio State Univ.*, 643 N.E.2d 126, 128 (Ohio 1994) (stating that the Ohio Public Records Act “generally is construed liberally in favor of broad access, and any doubt must be resolved in favor of disclosure of public records”).

9. See Nicholas T. Davis, *Illuminating the Dark Corners: The New Mexico Inspection of Public Records Act's Law Enforcement Exception*, 50 N.M. L. REV. 59, 68–69 (2020) (explaining the evolution of the law enforcement exemption to New Mexico's Inspection of Public Records Act, which is understood to cover confidential police techniques or sources, or details about accused persons, witnesses, or victims until charges are filed); Michele Bush Kimball, *Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law*, 8 COMM'N L. & POL'Y 313, 315–16 (2003) (summarizing results of various surveys of government agencies' compliance with open government laws and asserting: “If one had to choose one area of government records that seemed to be most difficult to obtain, it would be law enforcement records.”).

10. 20 U.S.C. § 1232g.

11. See *United States v. Miami Univ.*, 294 F.3d 797, 811 (6th Cir. 2002) (characterizing FERPA as a statute that excuses compliance with the Ohio Public Records Act, which exempts records from public inspection if their release is “prohibited by federal law”).

12. See, e.g., *State ex rel. James v. Ohio State Univ.*, 637 N.E.2d 911, 914 (Ohio 1994) (holding that tenure and promotion records maintained by state university are subject to inspection under state public records law); *Red & Black Pub. Co. v. Bd. of Regents*, 427 S.E.2d 257, 259 (Ga. 1993) (“[T]he Board of Regents and its universities are state agencies or bodies for purposes of Georgia's Open Records and Meetings laws.”).

13. See Bryan Dean, *Oklahoma Universities' Parking Ticket Secrecy Stirs Questions*, OKLAHOMAN (May 9, 2010), <https://www.oklahoman.com/story/news/2010/05/09/oklahoma-universities-parking-ticket-secrecy-stirs-questions/61249738007/> [<https://perma.cc/XT6A-DPE9>] (quoting head of National Freedom of Information Coalition, who called universities “among the most secretive institutions in government”).

Colleges often resist complying with requests for public records,¹⁴ forcing disputes into court.¹⁵ College sports, in particular, have regularly produced disagreements over access to documents and data. For example, journalists with sports network ESPN were forced to sue Michigan State University to obtain the identities of athletes named as suspects in crimes in campus police reports, which Michigan State fought—ultimately, unsuccessfully—to conceal.¹⁶ The tension is understandable. The public and press are interested in knowing as much as possible about college sports, and colleges are highly motivated to withhold as much information as possible, particularly if the information detracts from the athletic program's reputation.

As of 2022, litigants have asked courts to order public disclosure of NIL records in two states: Louisiana and Georgia. In 2021, WAFB-TV and its parent, Gray Media Group, Inc., sought access to endorsement contracts on file with Louisiana State University's (LSU) athletic department.¹⁷ The college defended its decision not to disclose on multiple grounds, arguing that disclosure would constitute a FERPA violation, would invade the athletes' privacy, and would compromise the endorsee companies' confidential business practices.¹⁸ A state district court judge ruled in LSU's favor,¹⁹ and the television station elected not to appeal.

In Georgia, the *Athens Banner-Herald* sued the University of Georgia's athletic association in 2021, alleging that its refusal to turn over NIL contracts violated the Georgia Open Records Act.²⁰ The college's primary defense was that the documents

14. See Collin Binkley, *Amid Push for Transparency, Few Colleges Reveal Investments*, ASSOCIATED PRESS (Mar. 17, 2016), <https://apnews.com/article/2ad2caa02e1d4e28873ee0cd99cdc85a> [<https://perma.cc/H376-ZCFN>] (reporting that, in an Associated Press survey of how major universities invest their endowment funds, thirty-nine out of fifty universities refused to turn over any information, and even the eleven responding institutions only disclosed information about a fraction of their investments). In an especially vivid example of obfuscation, the University of Michigan refused to honor a sports reporter's request for the roster of current football players, claiming that no such list existed. Ryan Dunleavy, *Michigan's Latest Ploy for not Providing Football Roster: No List of Scholarship Players*, N.J. ADVANCE MEDIA (Aug. 24, 2017), https://www.nj.com/rutgersfootball/2017/08/michigans_latest_ploy_for_not_providing_football_r.html [<https://perma.cc/6GS6-XZGR>].

15. See Pritchard & Anderson, *supra* note 3, at 50 ("The culture of autonomy in higher education is so powerful, in fact, that it is not uncommon for public universities to resist requests from citizens, news organizations, or others for access to information. In such situations, requesters have the option of asking a court to order that the records in question be released.").

16. *ESPN, Inc. v. Mich. State Univ.*, 876 N.W.2d 593 (Mich. Ct. App. 2015).

17. Petition for Writ of Mandamus, *Gray Media Grp., Inc. v. Tate*, No. C-712-007 (La. Dist. Ct. Oct. 5, 2021) (copy on file with authors); see also Daniel Libit, *Georgia, LSU NIL Deals Spark Fights Over Media and Privacy Rights*, SPORTICO (Nov. 22, 2021), <https://www.sportico.com/leagues/college-sports/2021/nil-georgia-lsu-face-1234647071/> [<https://perma.cc/87SM-9PWG>] (describing litigation against LSU and the University of Georgia and how both institutions invoked student-athletes' privacy as a defense).

18. See Libit, *supra* note 17.

19. *Gray Media Grp., Inc. v. Tate*, No. C-712-007 (La. Dist. Ct. Dec. 3, 2021) (copy on file with authors).

20. GA. CODE ANN. § 50-18-71 (West 2022); Complaint, *Athens Banner-Herald v. Univ. of Ga. Athletic Ass'n, Inc.*, No. 21-CV-0558 (Ga. Super. Ct. Nov. 15, 2021) (copy on file with authors); see also Fletcher Page, *Banner-Herald Files Complaint Against UGA Athletic Association Alleging Open Records Violation*, ATHENS BANNER-HERALD (Nov. 16, 2021), <https://www.onlineathens.com/story/news/local/2021/11/16/athens-banner-herald-files-complaint-against-uga-athletic-association/8636497002/> [<https://perma.cc/G327-ESJZ>].

constituted FERPA-protected “education records” exempt from disclosure.²¹ In September 2022, the court decided that the NIL agreements do meet the threshold definition of “education records” because they pertain to particular students and are maintained by the institution, but allowed the case to proceed on the question of whether the records could be adequately redacted to make them unidentifiable.²²

Given the enormous public interest in college sports and in prominent college athletes, recurring disputes over access to the details of NIL arrangements are likely. As more and more money flows into NIL deals, the public’s interest in transparency will only intensify.

II. THE NIL MOVEMENT

For decades, athletes were forbidden from earning any outside income by both NCAA and institutional rules.²³ The NCAA fiercely defended its insistence on “amateurism” on multiple grounds: that college sports is primarily an educational undertaking and not a job, that fans choose to watch college sports specifically because the athletes are not professionals, and that money could be a corrupting influence or unsettle the competitive balance among teams.²⁴ The organization has insisted that keeping money out of sports is for the students’ own good to guard against “exploitation by professional and commercial enterprises.”²⁵ A more cynical explanation is that the NCAA, and the college presidents who run it, did not want to be obligated to pay athletes or offer them any employee-like benefits.²⁶ NCAA rules historically not only required

21. Motion to Dismiss, *Athens Banner-Herald v. Univ. of Ga. Athletic Ass’n, Inc.*, No. 21-CV-0558 (Ga. Super. Ct. Jan. 5, 2022) (copy on file with authors).

22. Order on Defendant’s Motion to Dismiss, *Athens Banner-Herald v. Univ. of Ga. Athletic Ass’n, Inc.*, No. 21-CV-0558 (Ga. Super. Ct. Sept. 6, 2022) (copy on file with authors).

23. See Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639, 642 (2010) (“NCAA amateurism requirements relegate college football and men’s basketball players to a period of servitude, where they must provide their valuable labor to their universities without personal profit.”); see also Audrey C. Sheetz, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 873 (2016) (pointing out that athletes could not share either directly or indirectly in the fruits of their labor: “Since the NCAA and its member institutions sell and license products using the names, images, and likeness of current and former student-athletes, the organizations receive 100% of the royalties. This means that student-athletes are precluded from receiving compensation for any video games, rebroadcasts of classic games, DVDs of games, photographs, and replica jerseys that use their name, image, or likeness.” (footnotes omitted)).

24. See Michael D. Fasciale, Comment, *The Patchwork Problem: A Need for National Uniformity to Ensure an Equitable Playing Field for Student-Athletes’ Name, Image, and Likeness Compensation*, 52 SETON HALL L. REV. 899, 902–04 (2022) (describing NCAA’s proffered rationales for opposing professionalization of college sports).

25. NCAA, NCAA 2021–22 DIVISION I MANUAL (2021) CONSTITUTION, ART. 2, § 2.9, at 3 <https://www.ncaapublications.com/productdownloads/D122.pdf> [<https://perma.cc/Z5HQ-SHJB>] (“Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”).

26. See Luke Tepen, *Pay to Play: Looking Beyond Direct Compensation and Towards Paying College Athletes for Themselves*, 65 WASH. U. J.L. & POL’Y 213, 217–18 (2021) (explaining that NCAA concocted the phrase “student-athlete” out of fear of liability for workers’ compensation benefits if athletes were categorized

athletes to forswear accepting any compensation directly, but also required them to sign over their NIL rights to the NCAA and its assignees, which can, and do, freely profit from licensing athletes' likenesses.²⁷ The amateurism concept even bore the Supreme Court's stamp of approval. In a 1984 opinion, the Court, although delivering the NCAA a setback in its monopolization of television broadcast rights, validated the NCAA's claim that the amateur nature of college sports is what makes the "product" unique and marketable.²⁸

While athletes have long been limited to a subsistence level of financial support, with limited opportunities to earn their own spending money, colleges and the NCAA have been reaping billions off athletic competitions, turning big-name coaches into multimillionaires.²⁹ After decades of accepting their status as the only participants in a multi-billion-dollar industry not sharing in the profits, college athletes began fighting back in court for fair compensation. In a breakthrough decision, the Ninth Circuit Court of Appeals decided in favor of a coalition of former college players led by Ed O'Bannon, a one-time UCLA basketball standout, holding that the NCAA could be held liable under antitrust law for its rule against awarding scholarships that cover the full cost of college attendance.³⁰ Seemingly overnight, the tectonic plates underlying the NCAA's "amateurism" policy shifted, and an earthquake of change ensued.

In September 2019, California became the first state to enact NIL legislation entitling athletes to earn endorsement income.³¹ However, the NCAA did not immediately change its name, image, and likeness rules in response.³² Soon, other states began to follow. In 2020, Florida enacted NIL legislation with a July 1, 2021, effective date, and Texas, Alabama, Georgia, Mississippi, New Mexico, Kentucky, and Ohio later

as employees and suffered injuries: "The term was created to justify denying paying college athletes for the work they perform.").

27. Sheetz, *supra* note 23, at 873–74.

28. See Nat'l Collegiate Athletic Ass'n. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984) ("[T]he NCAA seeks to market a particular brand of football—college football. The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the 'product,' athletes must not be paid . . .").

29. See Ira Boudway & Kim Bhasin, *Bloomin' Onions, Dodge Durangos, and Six-Figure Paydays: College Athletes Finally Make Some Cash*, BLOOMBERG (Mar. 18, 2022), <https://www.bloomberg.com/news/features/2022-03-18/ncaa-nil-deals-help-college-athletes-get-paid> [<https://perma.cc/VEV7-W9HG>] ("[C]ollege sports has grown into an entertainment juggernaut that generates almost \$19 billion a year for the NCAA's 1,100 schools—and affords top football coaches \$10 million salaries."); see also Mark Schlabach & Chris Low, *Georgia Bulldogs, Kirby Smart Agree to New 10-year, \$112.5 Million Contract, Making Him Highest-Paid Coach in College Football*, *Sources*, ESPN (July 21, 2022), https://www.espn.com/college-football/story/_/id/34275946/georgia-bulldogs-kirby-smart-agree-new-10-year-1125-million-contract-making-highest-paid-coach-college-football-sources [<https://perma.cc/SZ4N-6K4W>] (reporting that University of Georgia rewarded its head football coach for winning the 2021–22 national championship with a record-high, nine-figure contract).

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

31. S.B. 206, 2019–2020 Leg., Reg. Sess. (Cal. 2019); Jada Allender, *The NIL Era Has Arrived: What the Coming of July 1 Means for the NCAA*, HARV. J. SPORTS & ENT. L. (July 1, 2021), <https://harvardjsel.com/2021/07/the-nil-era-has-arrived-what-the-coming-of-july-1-means-for-the-ncaa/> [<https://perma.cc/Y3ZR-Y6ZL>].

32. Allender, *supra* note 31.

followed suit.³³ The majority of NIL legislation comes in the form of prohibiting colleges from preventing a student from earning compensation from the use of their name, image, likeness, or athletic reputation.³⁴

With the July 1, 2021, effective date looming overhead, the NCAA had to decide what it would do about college athletes and the possibility of them profiting from their name, image, and likeness rights. The organization issued interim guidance that purported to regulate the types of entities that athletes could endorse, among other restrictions.³⁵

But then, the earth shifted some more.

The Supreme Court's 2021 decision in *National Collegiate Athletic Association v. Alston*³⁶ further upended the power imbalance between athletes and the NCAA. In *Alston*, former football and basketball players alleged that the NCAA violated federal antitrust law by limiting the compensation college athletes could receive in exchange for their athletic services.³⁷ The relevant antitrust law, the Sherman Antitrust Act of 1890,³⁸ "prohibits 'contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce.'"³⁹ Although the college athletes challenged all limitations on their compensation, the district court only found unlawful the NCAA rules limiting the education-related benefits colleges may make available to college athletes, such as rules prohibiting colleges from offering graduate or vocational scholarships.⁴⁰ The Supreme Court found that the NCAA and its member colleges are commercial enterprises subject to the Sherman Act, and as a result, found the limitation on the education-related benefits unlawful, affirming the lower courts.⁴¹

The NCAA and its allies fiercely argued in the *Alston* case that the public cares about whether college sports competitors are paid or unpaid. "The NCAA's amateurism rules allow it to offer a distinct product, one that offers myriad benefits to student-athletes and the educational environment at their schools, and that is enjoyed by millions of fans," NCAA lawyers told the Court.⁴² In a supporting amicus brief, the American Athletic Conference and ten other major conferences argued that

judges, including Justices of this Court, have long found it obvious that not paying student athletes to play is what defines that college-sports product. Absent limits on such payments, college athletes would become poorly (and,

33. *Id.*

34. See CAL. EDUC. CODE § 67456(a)(1) (West 2021); GA. CODE ANN. § 20-3-681 (West 2021); MISS. CODE ANN. § 37-97-105 (West 2022).

35. See Stephen R. Agnatovech, *Let's Make a Wager: NCAA's Procompetitive Justification Will Not Survive the Aftermath of Alston and Congressional Legislation*, 22 J. HIGH TECH L. 213, 252–53 (2021) (explaining terms of NCAA's October 2020 interim regulation, which limited athletes from endorsing controlled substances or sports gambling and restricted the use of school logos in endorsements or collaborative deals in which schools and athletes participate as partners).

36. 141 S. Ct. 2141 (2021).

37. *Id.* at 2147.

38. 15 U.S.C. §§ 1–7.

39. *Alston*, 141 S. Ct. at 2151 (alterations in original) (quoting 15 U.S.C. § 1).

40. *Id.* at 2151–54.

41. *Id.* at 2158–60.

42. Brief for Petitioner, Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512), 2021 WL 408325, at *33.

sometimes, not-so-poorly) paid professionals, the “particular brand” of college sports would lose its distinct character, and consumers would lose a desired product.⁴³

Even though the Supreme Court did not explicitly address compensation of college athletes, its finding that the NCAA will be subject to antitrust scrutiny opened the door for such conversations.⁴⁴ If the Court found the limitation of education-related benefits to be in restraint of trade or commerce, it is hard to fathom that they would not reach the same result if asked to hear a case regarding college athlete compensation. Justice Brett Kavanaugh even signaled as much in a concurrence deeply skeptical of the NCAA’s exploitative financial model.⁴⁵ For decades, the NCAA has held unyielding power over college athletes in the compensation realm,⁴⁶ but *Alston*’s ruling almost ensures that such power will decrease dramatically in the coming years.

Just days after the Court’s ruling came down, the NCAA revised its October 2020 interim NIL guidelines, perhaps recognizing that its top-down controlling approach was no longer tenable after *Alston*.⁴⁷ The replacement guidelines eschew centrally imposed restrictions on what athletes can or cannot endorse, leaving the details to be decided by individual NCAA member colleges or state policymakers.⁴⁸ The “center of gravity” for decision-making on NIL policy has thus shifted from the NCAA, a private entity that is not subject to FOI laws,⁴⁹ to colleges, many of which *are* subject to FOI law.⁵⁰

43. Brief for Petitioners, Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512), 2021 WL 398167, at *16.

44. See *Alston*, 141 S. Ct. at 2164–66.

45. See *id.* at 2168 (Kavanaugh, J., concurring) (“[T]he NCAA’s business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes.”).

46. See Christopher Palmieri, *The Billion Dollar Industry That Has Never Paid Its Money-Makers: The NCAA’s Attempt at Compensation Through Names, Images and Likeness*, 37 *TOURO L. REV.* 1605, 1605 (2021).

47. See Alan Blinder, *College Athletes May Earn Money from Their Fame, N.C.A.A. Rules*, *N.Y. TIMES* (June 30, 2021), <https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html> [<https://perma.cc/VTV3-VAPM>] (remarking that, after *Alston*, NCAA executives “feared that a host of national restrictions around N.I.L. would all but invite more lawsuits, so they opted for a more hands-off approach that they hope will prove more legally durable”).

48. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, *NCAA* (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/5F7U-LX6D>].

49. See *Kneeland v. Nat’l Collegiate Athletic Ass’n*, 850 F.2d 224, 231 (5th Cir. 1988) (holding that NCAA and Southwest Conference, as private membership organizations, are not subject to Texas Public Information Act requests, even though they receive considerable indirect governmental support).

50. See Scott Reinardy & Charles N. Davis, *A Real Home Field Advantage: Access to Public University Foundation Records*, 34 *J.L. & Educ.* 389, 406, 408 (2005).

III. ARE NIL AGREEMENTS PUBLIC RECORDS?

A. *The Word from the Statehouse*

As of mid-2022, twenty-nine states had enacted statutes that govern the rights of college athletes to earn endorsement income.⁵¹ What these statutes say about NIL documents, and about the relationship between athletes and their colleges, will influence how courts adjudicate disputes over disclosure of the deals.

Some states appear to open their college athletes to scrutiny through public records laws. In California, Connecticut, Georgia, Nebraska, New Jersey, South Carolina, and Tennessee, the NIL statutes expressly require college athletes to disclose their NIL contracts to the college.⁵² It is likely that other states, or individual institutions, will require disclosure by way of policy as well.⁵³ A state agency can be compelled to produce a document only if the document is in the agency's custody or control.⁵⁴ So, if NIL agreements remain purely a private contractual matter between the athlete and the corporate endorsee, the case for FOI access essentially disappears. But once athletes disclose their NIL contracts to state colleges, those contracts at least arguably become "public records," since they are in the college athletic department's possession.⁵⁵ So the public should—theoretically, at least—be allowed to inspect and copy those contracts through FOI requests.

Four states have preemptively headed off FOI disputes by statutorily insulating college athletes' contracts from public records laws in whole or in part: Connecticut, Kentucky, Nebraska, and Louisiana.⁵⁶

51. The law firm Saul Ewing Arnstein & Lehr LLP maintains a tracker of federal and state NIL legislation at <https://www.saul.com/nil-legislation-tracker#2>, which reports that the following states have enacted laws: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. *NIL Legislation Tracker*, SAUL EWING ARNSTEIN & LEHR, LLP, <https://www.saul.com/nil-legislation-tracker#2> [<https://perma.cc/NBC6-V3BQ>] (last visited Feb. 1, 2023).

52. CAL. EDUC. CODE § 67456(e)(2) (West 2021); CONN. GEN. STAT. ANN. § 10a-56(c) (West 2022); GA. CODE ANN. § 20-3-681(d)(2) (West 2021); N.J. STAT. ANN. § 18A:3B-89(a) (West 2020); NEB. REV. ST. ANN. § 48-3604 (West 2022); S.C. CODE ANN. § 59-158-60(A) (2021); TENN. CODE ANN. § 49-7-2802 (West 2022).

53. See Steve Reed, *Colleges Scramble To Ensure NIL Deals Are Safe, Compliant*, ASSOCIATED PRESS (July 2, 2021), <https://apnews.com/article/college-sports-basketball-football-business-college-basketball-21c6dd25e7845497e35bebb58ee874f3> [<https://perma.cc/TG57-ULDP>] (quoting University of Connecticut basketball coach who asks players to seek his approval before entering into NIL deals, and describing how athletic departments' compliance offices are taking on added responsibilities for monitoring endorsement activity).

54. See, e.g., *CII Carbon, L.L.C. v. St. Blanc*, 764 So. 2d 1229, 1232 (La. Ct. App. 2000) (holding that the fact that a state regulatory agency has authority to demand a private company's documents does not make those documents public records, if there is no indication that the agency actually has obtained, used or reviewed them); *Mintus v. City of W. Palm Beach*, 711 So. 2d 1359, 1361 (Fla. Dist. Ct. App. 1998) (explaining that, to be a "custodian" of a record for purposes of a public records request, a government employee must "have supervision and control over the document or have legal responsibility for its care, keeping or guardianship").

55. See *Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp.*, 663 N.E.2d 302, 306 (N.Y. 1995) (holding that lists of textbooks received by university auxiliary entity on university's behalf were public records subject to disclosure under state FOI law).

56. See *infra* notes 56–64 and accompanying text.

Connecticut's NIL statute provides that, notwithstanding the state Freedom of Information Act (FOIA),⁵⁷ "no institution of higher education shall disclose any record of the compensation received by a student athlete from an endorsement contract or employment activity entered into or engaged in" without the athlete's written consent.⁵⁸ In Kentucky, recently enacted legislation states:

For the purposes of the Kentucky Open Records Act . . . an NIL agreement submitted pursuant to subsection (2) of this section to a public postsecondary institution and the information obtained from the agreement shall be considered as containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy . . . and not subject to disclosure.⁵⁹

This provision essentially shields all NIL agreements from disclosure requirements under public records laws.

In Louisiana, a law enacted in 2022 states that, "[a]ny document disclosed by the intercollegiate athlete to the postsecondary education institution that references the terms and conditions of the athlete's contract for compensation shall be confidential and not subject to inspection, examination, copying, or reproduction pursuant to the Public Records Law."⁶⁰ Like Kentucky, Louisiana's provision prevents any NIL agreements from being subject to the public records laws in the state.⁶¹ The Louisiana bill was enacted in the shadow of the LSU litigation, premitting any further attempts to access colleges' copies of NIL agreements.

In Nebraska, the relevant statute states:

Any student-athlete who enters into a contract or agreement that provides compensation for the use of such student-athlete's name, image, or likeness rights or athletic reputation shall disclose such contract or agreement to an official of the postsecondary institution for which such student-athlete participates in an intercollegiate sport. . . . Unless otherwise required by law, each postsecondary institution shall be prohibited from disclosing any terms of such contract or agreement that the student-athlete or the student-athlete's professional representation deems to be a trade secret or otherwise nondisclosable.⁶²

Like Connecticut, Kentucky, and Louisiana, Nebraska's provision shields NIL agreements from disclosure.⁶³ But Nebraska does not place an absolute bar on disclosure and instead only bars access to contracts that are considered trade secrets or "otherwise nondisclosable."⁶⁴ Although this seems to leave the door open for access, the college athlete or their professional representative is empowered—without any statutory guidelines or standards—to designate a contract as a trade secret.⁶⁵ Without a process to

57. CONN. GEN. STAT. §§ 1-200–1-259 (West 2021).

58. *Id.* § 10a-56(f)(2).

59. KY. REV. STAT. ANN. § 164.6947(7) (West 2022).

60. S.B. 250, 2022 Leg., Reg. Sess. § (2)(b)(M) (La. 2022).

61. *Id.*

62. NEB. REV. STAT. § 48-3604 (West 2022).

63. *Id.*

64. *Id.*

65. *See id.*

define what qualifies as nondisclosable, the statutory exemption could easily end up encompassing all, or almost all, NIL agreements.

B. *The Public Records Threshold*

In states where legislators have not spoken directly about the FOI status of athlete endorsement agreements, disputes over access will require federal courts to puzzle through a thicket of uncertain judgment calls. First, do NIL agreements in the hands of state college athletic departments even meet the threshold to qualify as public records at all? And even if so, can proponents of secrecy justify withholding the records on the grounds of statutory exemptions?

1. NIL Records Are Used in Transacting College Business.

Documents held by the athletic departments of public colleges are presumed to be open to the public just like any other record in the custody of a state agency.⁶⁶ A college resisting disclosure of an NIL agreement might argue that the contract does not even cross the threshold to qualify as a public record at all because it is a purely private agreement that does not memorialize any governmental activity. Courts have sometimes, though not always, interpreted public records laws to exclude purely personal documents that happen incidentally to be stored on government property, such as a personal email sent on a government computer.⁶⁷ In a state with a narrow understanding of what constitutes a public record, opponents of disclosure might argue that a document memorializing payments of nongovernmental funds, created by a private entity, does not meet the definition of a “record” subject to disclosure at all.⁶⁸

However, the active role of college athletic departments in reviewing NIL arrangements indicates that the documents are not just incidentally stored with the government but are, in fact, being used in the course of college business.⁶⁹ Many states

66. See, e.g., *Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 377 (Ky. 1992) (deciding that report prepared by university athletic department to respond to allegations of rule violations uncovered by NCAA investigators qualified as public record under Kentucky law).

67. See, e.g., *Denver Publ'g. Co. v. Bd. of Cnty. Comm'rs of Arapahoe*, 121 P.3d 190, 195–96 (Colo. 2005) (en banc) (ruling that flirtatious personal email messages exchanged between county officials are not public records because they do not “relate to the performance of public functions or the receipt and expenditure of public funds”); *State v. City of Clearwater*, 863 So. 2d 149, 153–54 (Fla. 2003) (holding that agency’s “mere possession” of personal emails sent using a city account did not automatically render the emails public records, because they were not made or received in the course of transacting city business). *But see Pulaski Cnty. v. Ark. Democrat-Gazette, Inc.*, 264 S.W.3d 465, 468 (Ark. 2007) (finding that emails documenting romantic relationship between county official, who was facing charges of embezzlement, and vendor’s representative qualified as public records subject to disclosure under Arkansas law). See also Helen Vera, “Regardless of Physical Form”: *Legal and Practical Considerations Regarding the Application of State Open-Records Laws to Public Business Conducted by Text Message*, 32 COMM’NS LAW. 24, 29–30 (2017) (discussing Michigan trial court’s ruling that romantic text messages exchanged between Detroit’s mayor and a city employee, which helped lead to mayor’s removal from office and indictment, were public records despite their personal nature).

68. See *ESPN, Inc. v. Univ. of Notre Dame Police Dept.*, 62 N.E.3d 1192, 1197–98 (Ind. 2016) (holding that, even though its police department exercises state policing authority, a privately funded university need not disclose police department records under state FOI law, which in Indiana applies only to agencies “of government” or those acting “pursuant to government control”).

69. See Bill King, *Miami Booster John Ruiz’s NIL Deals Are Controversial and Aggressive, but He’s Confident They Are Within Rules and Bring Value to His Businesses*, *Athletes*, SPORTS BUS. J. (June 6, 2022),

explicitly authorize college athletic departments to review, and exercise veto authority over, NIL agreements if the agreement calls for endorsing a product or service that competes with the athletic program's sponsors or otherwise runs afoul of college policies.⁷⁰ Colleges, too, have their own policies prohibiting (or strongly discouraging) athletes from contracting to endorse products considered contrary to institutional "values," such as tobacco, alcohol, or controlled substances.⁷¹ For example, the University of Louisville ordered athletes to cease accepting NIL compensation from Barstool Sports, a digital media company that is notorious for blog posts and videos containing tasteless and offensive comments about minorities and women.⁷² Even if an NIL contract is regarded as personal to the athlete, an otherwise "personal" document can become a public record if it is used in the course of government business.⁷³ When athletic department employees at state colleges exercise their state-delegated authority to review NIL agreements, they are engaging in the type of government activity that FOI laws are designed to expose to public scrutiny.⁷⁴

Moreover, college athletic departments have increasingly taken an active role in facilitating NIL deals.⁷⁵ For instance, the University of Alabama recently announced a deal with Fanatics, an online retailer of sports collectibles, which will include creating a shop at the college's storied Bryant-Denny Stadium where players can "provide autographed memorabilia, conduct fan meet and greets, and conduct social media

<https://www.sportsbusinessjournal.com/Journal/Issues/2022/06/06/Portfolio/NIL-side.aspx> [<https://perma.cc/8JN9-EQHK>] (quoting billionaire University of Miami booster whose prolific use of NIL has attracted NCAA scrutiny, who said the university's compliance department approves all of his NIL offers before they take effect).

70. See Palmieri, *supra* note 46, at 1629 (2021) ("[S]tudent athletes have to disclose any NIL contracts with the institution they attend, to ensure that these agreements do not conflict with any other deals the institution is a party to."). For an example of a broadly worded grant of authority, see CONN. GEN. STAT. § 10a-56(a)(10) (2021) (authorizing universities to enact policies that identify taboo products, brands, or industries that athletes are forbidden from endorsing for pay).

71. See Sam C. Ehrlich & Neal C. Ternes, *Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech*, 45 COLUM. J.L. & ARTS 47, 58 (2021) (describing NIL policies gathered from university athletic departments that forbid or discourage endorsements of industries considered taboo, including alcoholic beverages and adult entertainment).

72. *Id.* at 49; see also Alicia Sadowski, *Barstool Sports Is a Cesspool of Misogyny and Bigotry*, MEDIA MATTERS FOR AM. (Aug. 18, 2021), <https://www.mediamatters.org/barstool-sports/barstool-sports-cesspool-misogyny-and-bigotry> [<https://perma.cc/3E9S-GAE5>] (detailing allegations against Barstool Sports and its founder); Robert Silverman, *Inside Barstool Sports' Culture of Online Hate: 'They Treat Sexual Harassment and Cyberbullying as a Game'*, DAILY BEAST (Mar. 14, 2019), <https://www.thedailybeast.com/inside-barstool-sports-culture-of-online-hate-they-treat-sexual-harassment-and-cyberbullying-as-a-game> [<https://perma.cc/YDH7-46HS>] (describing unflattering portrait of culture within media company as promoting harassment and verbal abuse toward women).

73. See, e.g., *Tiberino v. Spokane Cnty.*, 13 P.3d 1104, 1108 (Wash. Ct. App. 2000) (finding that fired county employee's emails on government email account, which would not normally have qualified as public records because they were about purely personal matters, became public records because they were used as a basis for her termination and gathered by her county employer in connection with her termination).

74. See *U.S. Dept. of Just. v. Repts. Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) ("Official information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose.").

75. See Palmieri, *supra* note 46, at 1634 (citing statements from officials at the University of Colorado and University of Nebraska that they are developing programs "designed to help student-athletes build their personal brand" to become more competitive for NIL deals).

marketing to support sales of their NIL merchandise.”⁷⁶ The University of Miami boasted of a comparable relationship with an athlete marketing company, Altius Sports Partners, to, in the college’s words, “develop the school’s NIL program,” which hardly suggests that NIL deals are a private matter between athletes and the businesses they endorse.⁷⁷ In Missouri, state lawmakers went as far as to legitimize direct college involvement by statute, authorizing coaches and other college employees to “assist with opportunities for a student-athlete to earn compensation” as long as they do not serve as the athletes’ agents or attend meetings on their behalf.⁷⁸ The University of Missouri accepted the invitation and, as soon as the governor signed the bill expanding the college’s permissible role in NIL deals, appointed a new assistant athletic director to specifically oversee NIL marketing efforts.⁷⁹ Predictably, the nascent NIL marketplace will likely continue to evolve in the direction of agreements facilitated through college athletic departments, so that companies need not bargain individually with dozens of athlete representatives and lesser-known team members may share in the revenue.⁸⁰ The more that a public college actually uses a document or participates in its formulation—as opposed to serving as a mere passive repository—the weaker the case will be for withholding it. Indeed, there would seem to be little purpose for legislators to instruct athletes to put copies of NIL contracts on file with their colleges unless the colleges somehow intended to use the documents.

In an instructive case involving college athletics, a Florida appellate court decided that documents created by the NCAA became public records when they were uploaded to an online “cloud” platform for representatives of Florida State University (FSU) to use.⁸¹ The records, which concerned NCAA findings of academic irregularities within the FSU athletic department and FSU’s appeal of those findings, were prepared by the NCAA and shared with the college’s law firm under a confidentiality agreement.⁸² However, the court found that the documents still qualified as public records under Florida law because they were “received in connection with the transaction of official business by an agency.”⁸³ Based on that understanding of the scope of FOI law, records

76. Christopher Walsh, *The Next Phase of NIL: Alabama, Fanatics Announce Game-Changing Partnership*, SPORTS ILLUSTRATED FAN NATION (July 25, 2022), <https://www.si.com/college/alabama/bama-central/alabama-and-fanatics-announce-new-platform-partnership> [<https://perma.cc/PJX6-F384>].

77. *Miami Athletics Teams with Altius Sports to Enhance NIL Program*, UNIV. OF MIAMI ATHLETICS (Apr. 27, 2022), <https://miamihurricanes.com/news/2022/04/27/miami-athletics-teams-with-altius-sports-to-enhance-nil-program/> [<https://perma.cc/39VX-ZZNV>]. It is worth noting that the University of Miami is a private institution, so its involvement in NIL arrangements would not cause otherwise-private NIL records to become publicly accessible.

78. S. 718, 101st Gen. Assemb., 2d Reg. Sess. § 173.280 (Mo. 2022).

79. *Mizzou Athletics Enhances NIL Program*, UNIV. MO., (June 16, 2022), <https://mutigers.com/news/2022/6/16/general-mizzou-athletics-continues-to-evolve-nil-program.aspx> [<https://perma.cc/SR8J-5VNN>].

80. See Taylor P. Thompson, *Maximizing NIL Rights for College Athletes*, 107 IOWA L. REV. 1347, 1382–83 (2022) (predicting that NIL deals will evolve into co-branded agreements in which athletes go hand in hand with their universities, which would give the athletes the ability to use university logos and other advantages).

81. Nat’l Coll. Athletic Ass’n v. Associated Press, 18 So. 3d 1201, 1204 (Fla. Dist. Ct. App. 2009).

82. *Id.* at 1207.

83. *Id.* at 1204.

of NIL deals that state college athletic departments review as part of their state-delegated authority almost certainly qualify as public records, unless an exemption applies.

2. When Public Agencies . . . Are Not So Public

One wrinkle that could complicate requesters' access to NIL records is the growing trend of "privatizing" athletic departments at otherwise-public universities.⁸⁴ Incorporating a formerly governmental athletic association as a private entity may enable the association to argue that it is excused from honoring requests for its records.⁸⁵ Florida State—the same university that was embroiled in litigation over access to records of its dispute with the NCAA over academic integrity—decided in 2019 to join other large Florida universities in declaring its athletic department to be a nonprofit corporation separate from the university, in a move explicitly designed to insulate athletics from public oversight.⁸⁶

Courts have been willing to look beyond the veneer of private incorporation when public colleges try to withhold records about athletics. In a 1986 case, the Georgia Supreme Court ordered the University of Georgia's nominally privatized athletic association to disclose documents pertaining to its finances in response to a public records request.⁸⁷ The court recognized that the college president—a public official—has ultimate responsibility for the operations of athletics and that the association is merely a "management tool" to carry out that governmental responsibility.⁸⁸ More recently, a sports journalist won access to financial records and correspondence from the athletic booster and fundraising organizations at the University of New Mexico, which tried to rely on the organizations' private, nonprofit status to avoid disclosure.⁸⁹ Only in Florida, where a unique state law⁹⁰ carves out athletic associations and other colleges' "direct support organizations" from the state Public Records Act,⁹¹ should privatized status be a barrier to access.

84. See Ehrlich & Ternes, *supra* note 71, at 62 ("Many athletic departments at public universities have begun positioning themselves as 'private' entities in recent years.")

85. See *id.* ("Distancing universities and their athletic departments from the state through 'privatization' has . . . been understood in some circumstances as an attempt to avoid public disclosures and open records requests required by state agencies.")

86. See Will Hobson, *Fsu Privatizing Athletics as Some Raise Concerns*, DAILY COMMERCIAL (June 18, 2019), <https://www.dailycommercial.com/story/sports/college/2019/06/18/fsu-privatizing-athletics-as-some-raise-concerns/4885792007/> [<https://perma.cc/ACZ6-GF5W>]; Lauren Theisen, *Florida State Is Privatizing Its Athletic Department to Shield Itself from Scrutiny*, DEADSPIN (June 10, 2019), <https://deadspin.com/florida-state-is-privatizing-its-athletic-department-to-1835378761> [<https://perma.cc/4S3A-T9YY>].

87. *Macon Tel. Publ'g Co. v. Bd. of Regents*, 350 S.E.2d 23, 25 (Ga. 1986).

88. *Id.*

89. *Libit v. Univ. of N.M. Lobo Club*, 516 P.3d 217, 222–23 (N.M. Ct. App. 2022), *cert. granted*, No. S-1-SC-39396 (N.M. Aug. 16, 2022).

90. FLA. STAT. ANN. §§ 119.01–119.15 (West 2022).

91. See *id.* § 1004.70(6) (West 2019) (declaring that all records of state college "direct-support organizations" such as athletic associations are "confidential and exempt" from the Public Records Act).

C. *Do NIL Records Qualify for Exemption?*

If college athletic departments receive copies of NIL agreements and review those agreements while conducting state business, then the default assumption should be that the agreements are accessible to the public. However, colleges can be expected to try to withhold the documents by invoking exceptions to state FOI laws.

1. Are NIL Records “Education Records”?

One frequent tactic that colleges employ to evade public scrutiny is categorizing otherwise-public records as “education records” that the college can withhold from the public in reliance on the Family Educational Rights and Privacy Act (FERPA).⁹² FERPA is a 1974 federal statute that requires all federally subsidized educational institutions to enforce a policy of keeping students’ “education records” confidential.⁹³ The poorly drafted statute provides little guidance about what qualifies as an education record, leading to widespread confusion and a patchwork of inconsistent applications.⁹⁴ The very same document may be categorized as a confidential education record at one college, yet made available for public inspection at a sister college within the same state.⁹⁵ Because the statute is so malleable, critics have charged that colleges opportunistically abuse FERPA to conceal unflattering information that is not genuinely a matter of student privacy, including scandalous information about college athletic departments.⁹⁶

An educational institution can be declared ineligible for federal funding if it is found to maintain a policy or practice of failing to secure FERPA-protected education records.⁹⁷ However, the sanction is so drastic that it has never been applied in the

92. 20 U.S.C. § 1232g; see also Christopher Schwarz, *Are Student-Athletes Alleged of Sex-Crimes Granted Educational Privacy Protections? FERPA’s Misinterpretation by Academic Institutions*, 14 OHIO STATE J. CRIM. L. 809, 810 (2017) (“[U]niversities frequently attempt to benefit from FERPA by utilizing its (often-misinterpreted) language to shield [them] from making potentially embarrassing disclosures about students.”).

93. 20 U.S.C. § 1232g.

94. See Mary Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 CARDOZO L. REV. 1555, 1590 (2012) [hereinafter Penrose, *Tattoos*] (“[T]he academic and athletic worlds are steeped in FERPA confusion.”).

95. See *Secrecy 101*, COLUMBUS DISPATCH (Oct. 14, 2010), <https://www.dispatch.com/story/news/2010/10/14/secrecy-101/24080624007/> [<https://perma.cc/5F4U-H764>] (reporting that survey of 119 college athletic departments yielded “wildly different legal interpretations” about commonplace records requested by journalists, including list of passengers on team flights, list of complimentary ticket recipients, records of athletes’ summer jobs, and reports in which colleges self-disclosed rule violations to the NCAA).

96. See Penrose, *Tattoos*, *supra* note 94, at 1566 (“FERPA was always meant to protect students. And, more specifically, to protect students from the schools and universities they attend. It is rich in irony that schools continue to benefit from legislation that was intended to curtail their stranglehold on student-related information.” (footnotes omitted)); see also Konrad R. Krebs, *ESPN v. Ohio State: The Ohio Supreme Court Uses FERPA to Play Defense for Offensive Athletic Programs*, 20 JEFFREY S. MOORAD SPORTS L.J. 573, 576 (2013) (asserting that universities have sought “to use FERPA’s privacy requirements as a shield to protect themselves from having to disclose documents that would reflect negatively or impose negative consequences on its students, athletes, or programs”).

97. Significantly, because FERPA is a condition on the receipt of federal education funding, it applies only to educational institutions that accept federal money (such as federal Pell Grants, in the case of a university). So if an athletic department is genuinely “privatized,” see *supra* Part A.2, then the department should not have

forty-eight-year history of the statute.⁹⁸ FERPA's text does not mention public records at all, and federal regulations implementing FERPA provide a safety valve by which an educational institution can avoid penalties simply by notifying the federal government that a conflict exists between the institution's duties under FERPA and state law.⁹⁹ Nevertheless, courts have widely read the statute as a prohibition against honoring requests for records under state FOI law.¹⁰⁰

Privacy law seems, at first blush, an inapt fit with college sports. Athletes forfeit a substantial measure of their privacy rights when they put on the team's uniform.¹⁰¹ As one appellate court wrote, in rejecting privacy-based objections to NCAA-mandated drug testing:

Unlike the general population, student athletes undergo frequent physical examinations, reveal their bodily and medical conditions to coaches and trainers, and often dress and undress in same-sex locker rooms. In so doing, they normally and reasonably forgo a measure of their privacy in exchange for the personal and professional benefits of extracurricular athletics.¹⁰²

Some colleges even tell athletes that their dorm rooms are subject to suspicionless searches at any time, a measure of scrutiny above and beyond what ordinary students are expected to endure.¹⁰³ It seems difficult to argue that fans have a legitimate interest in knowing whether Joe Quarterback has the stomach flu but not in whether Joe Quarterback is making \$1 million to play for a state college.

Predicting whether courts will find that NIL records fall within the scope of FERPA confidentiality is uncertain business. The Supreme Court has interpreted FERPA quite narrowly, holding that it applies only to the small subset of student records that are maintained in a central institutional file corresponding to a particular student, such as a college registrar's office.¹⁰⁴ The Court's narrow understanding of FERPA is consistent

grounds to argue that the records it maintains—as a private corporation not offering federally funded educational services—are covered by FERPA.

98. Steve Zansberg, *Removing FERPA's "Invisibility Cloak" from Records Showing Public Employees Behaving Badly*, 37 COMM'NS LAW. 5, 7 (2022).

99. 34 C.F.R. § 99.61 (2012).

100. See Erin Escoffery, *FERPA and the Press: A Right to Access Information?*, 40 J. COLL. & U.L. 543, 549 (2014) (noting that many courts regard FERPA as an affirmative prohibition on disclosure "because it imposes contractual obligations on colleges and universities: once they have accepted federal funds, they are required to keep pertinent information private"). But see Zansberg, *supra* note 98, at 9 (noting that several courts have declined to interpret FERPA as a direct prohibition on honoring a public records request, because it is merely a funding condition that raises the possibility that the U.S. Department of Education could choose to take federal money away). But see *supra* notes 20–22 for a discussion of the *Athens Banner-Herald* case, in which the Georgia Superior Court found NIL agreements do meet the threshold definition of "education records."

101. See Michael Bragg, *FERPA Defense Play: Universities Often Cite the Federal Student Privacy Law to Shield Athletic Scandals*, STUDENT PRESS L. CTR. (Mar. 21, 2015), <https://splc.org/2015/03/ferpa-defense-play/> [https://perma.cc/8UCX-A2HD] (explaining that intercollegiate athletes are required to sign broad privacy waivers, including agreeing to disclose their education records to the NCAA).

102. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 637 (Cal. 1994) (en banc).

103. Johnette Howard, *Athletes Give Up Constitutional Rights*, ESPN (Apr. 18, 2014), https://www.espn.com/college-sports/story/_/id/10798904/howard-athletes-surrender-constitutional-rights-othe-r-students-keep [https://perma.cc/27B2-3XWK].

104. *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 435 (2002).

with the Act's legislative history and purpose.¹⁰⁵ But state courts have not consistently followed the Supreme Court's guidance in subsequent open records disputes, including disputes over records of college athletic departments.¹⁰⁶

In one especially expansive interpretation, the Ohio Supreme Court allowed Ohio State University to invoke FERPA to deny a request for records about a scandal within the football program that included allegations that boosters provided athletes with loaner cars and other improper benefits.¹⁰⁷ Even emails that the head football coach exchanged with an external booster of the athletic program, the court held, could be withheld as confidential "education records."¹⁰⁸

But other courts have called a narrower FERPA strike zone. Maryland's highest court refused to defer to the University of Maryland's characterization of parking tickets issued to athletes as "education records," finding that the campus newspaper was entitled to inspect the records as part of an investigation into the preferential treatment of men's basketball players.¹⁰⁹ "The legislative history of the Family Educational Rights and Privacy Act indicates that the statute was not intended to preclude the release of any record simply because the record contained the name of a student," the court wrote.¹¹⁰ "The federal statute was obviously intended to keep private those aspects of a student's educational life that relate to academic matters or status as a student."¹¹¹ Thus, there is no judicial consensus as to whether records relating to participation in college athletics fall within the confidentiality duties of FERPA.

Records involving sexual misconduct allegations against athletes have been the subject of recurring disputes, producing divergent outcomes. The University of North Carolina-Chapel Hill (UNC) invoked FERPA when confronting a 2016 demand for public records by several news organizations.¹¹² The news organizations were relying on a specific FERPA exemption for the outcomes of disciplinary proceedings that resulted in a finding that a student committed the equivalent of a crime of violence or a sex

105. See Schwarz, *supra* note 92, at 812 (stating that congressional sponsors "understood their piece of legislation to apply only to a succinctly and specific list of education records and not to every document that references a student's information").

106. Compare *Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480 (Iowa 2012) (holding that FERPA applied to special counsel's investigative report regarding how University of Iowa administrators responded to allegations that two athletes sexually assaulted another athlete), with Memorandum from Hon. Howard E. Manning, Jr., N.C. Super. Ct. J., to Hugh Stevens, Amanda Martin, Alexander McC. Peters, and Melissa L. Trippe (Apr. 19, 2011), available at http://s3.amazonaws.com/cdn.getsnworks.com/spl/pdf/uncathletics_ruling.pdf [<https://perma.cc/4K55-AQ6S>] (concluding that FERPA did not extend to records of athletes' cellphone numbers in telephone bills, or records of parking tickets issued to athletes' vehicles).

107. *State ex rel. ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 946–47 (Ohio 2012).

108. *Id.* at 218–19. For a critique of the court's deferential reading of FERPA and refusal to challenge Ohio State's categorization of records as confidential, see Krebs, *supra* note 96, at 600 ("When considering congressional intent in the [FERPA] statute, it is clear that 'education records' is a narrow term, not originally contemplated to include correspondence pertaining to NCAA compliance. Given the narrow interpretation of 'education records' adopted by other courts, including the United States Supreme Court . . . it seems clear that the records in *ESPN* should not have been 'education records' protected by FERPA.").

109. *Kirwan v. The Diamondback*, 721 A.2d 196, 207 (Md. 1998).

110. *Id.* at 204.

111. *Id.*

112. *DTH Media Corp. v. Folt*, 841 S.E.2d 251, 254 (N.C. 2020).

crime.¹¹³ But UNC declined to honor that exception, forcing the dispute into court.¹¹⁴ After several years of litigation, the dispute landed at the North Carolina Supreme Court, which, in 2020, decided in favor of disclosure.¹¹⁵ UNC claimed that FERPA's carve-out for disciplinary records of violent misconduct made disclosure purely discretionary and not compulsory.¹¹⁶ But the justices disagreed with this interpretation.¹¹⁷ Since FERPA expressly removed the federal statutory prohibition against disclosure, the court reasoned, FERPA is inapplicable, and the case is simply a straightforward application of the North Carolina public records law, which carries a heavy presumption in favor of access.¹¹⁸

At the University of Montana, however, the court came to a different conclusion regarding a somewhat comparable public records request. In January 2014, author Jon Krakauer demanded the production of public records about disciplinary proceedings involving one particular college athlete, the former quarterback of the University of Montana Grizzlies.¹¹⁹ Specifically, Krakauer sought files from the State Commissioner of Higher Education about how and why the commissioner vacated a disciplinary board's finding that the athlete committed sexual assault.¹²⁰ Krakauer had the force of Montana's unusually strong state constitutional entitlement to examine records of public agencies.¹²¹ But the Montana Supreme Court ultimately sided with the state and against disclosure.¹²² The justices explained that the right to know is not absolute and can be overcome when the demands of individual privacy clearly exceed the merits of public disclosure.¹²³ The court found, in the case of college disciplinary appeals, that students reasonably relied on the assurance that their records would be kept confidential, and the disciplinary process normally operated in total confidentiality.¹²⁴ The court held that student privacy laws do not discriminate between classifications of students and apply even to high-profile athletes who receive publicly funded scholarships.¹²⁵ The difference

113. *Id.*

114. Lev Facher, *Daily Tar Heel Files Complaint Against UNC for Sexual Misconduct Records*, STUDENT PRESS L. CTR. (Nov. 23, 2016), <https://splc.org/2016/11/daily-tar-heel-files-complaint-against-unc-for-sexual-misconduct-records/> [<https://perma.cc/S46T-N5BN>].

115. *DTH Media Corp.*, 841 S.E.2d at 259.

116. *Id.* at 258.

117. *Id.* at 259.

118. *Id.* at 257–58.

119. See Jon Krakauer, *How Much Should a University Have to Reveal About a Sexual-Assault Case?*, N.Y. TIMES (Jan. 21, 2016), <https://www.nytimes.com/2016/01/20/magazine/how-much-should-a-university-have-to-reveal-about-a-sexual-assault-case.html> [<https://perma.cc/Y5E5-553K>] (explaining the backstory of rape allegations against Montana quarterback Jordan Johnson that were ultimately deemed unfounded by state officials, leading author to sue for their records).

120. *Krakauer v. State*, 445 P.3d 201, 204 (Mont. 2019).

121. See MONT. CONST. art. II, § 9 (“No person shall be deprived of the right to examine documents . . . of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”).

122. *Krakauer*, 445 P.3d at 214 (“Doe’s demand of individual privacy in his records clearly exceeds the merits of public disclosure. Accordingly, we reverse the District Court’s decision ordering the Commissioner to release Doe’s records. . .”).

123. *Id.* at 206.

124. *Id.* at 208.

125. *Id.*

between the Montana and North Carolina outcomes was the presence of an on-point FERPA exception in the North Carolina case.¹²⁶ The exception evidenced clear congressional intent for the public—particularly those on campus who might be living alongside violent sex offenders—to know who has been found liable for serious wrongdoing.¹²⁷ In the *Krakauer* case, there was ultimately no finding that the athlete committed the sex offense; hence, the urgency for public disclosure diminished.¹²⁸

There is, of course, no such on-point congressional guidance regarding the accessibility of records in the nascent NIL marketplace. While many proposed federal NIL statutes have circulated in recent years, Congress does not appear close to passing one.¹²⁹ Even if Congress eventually acts, there is no guarantee that federal legislation will settle the question of public disclosure. For the foreseeable future, then, state courts will be left to puzzle through the morass of conflicting FERPA interpretations and opaque statutory language.

Ultimately, FERPA is simply not a fit with NIL endorsement contracts given the statute's purpose, structure, and function. It is important to remember that FERPA began its life in 1974 as a student-rights statute to protect students against educational institutions that might be keeping undisclosed files about their behavior, which could prove damaging if disclosed to police or other outsiders.¹³⁰ In other words, the “rights” part of FERPA is a prodisclosure regimen that requires all federally funded educational institutions to allow students (or, with minors, their parents) to inspect and correct documents kept as part of their official school records.¹³¹ Once a record is categorized as a FERPA education record, a set of rights attach: the school must make the record available for the student to inspect at no charge, the student gets an opportunity to submit any corrections to the document if it is incomplete or misleading, and the student is entitled to a hearing if those corrections are not made.¹³²

126. Compare *id.*, with *DTH Media Corp. v. Folt*, 841 S.E.2d 251, 258–59 (N.C. 2020).

127. *DTH Media Corp.*, 841 S.E.2d at 258 (discussing the congressional intent of the FERPA); see also Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to Its Original Design*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 75, 76–77 (2011) [hereinafter Penrose, *In the Name of Watergate*] (discussing the congressional intent behind FERPA of “ensuring that parents were able to receive, review and, where necessary, correct all educationally related documents that could affect their child’s educational progress”); Matt R. Huml & Anita M. Moorman, *Student-Athlete Educational Records? The Involvement of FERPA Within Recent NCAA Division I Academic Scandals*, 27 J. LEGAL ASPECTS SPORT 127, 129 (2017) (noting that the 1998 amendments to FERPA specify that “disciplinary outcomes involving crimes of violence or sex crimes were excluded from FERPA’s protections”).

128. See *Krakauer*, *supra* note 119.

129. See Dan Murphy, *Members of Congress to Host Virtual Summit in Hopes of Stoking Momentum for NCAA Reform*, ESPN (Mar. 24, 2022), https://www.espn.com/college-sports/story/_/id/33583916/members-congress-host-virtual-summit-hopes-stoking-momentum-ncaa-reform [<https://perma.cc/H8UA-F2VS>] (“More than a half dozen members of Congress have introduced bills during the past two years designed to reshape the NCAA in a variety of ways, but so far none has made significant progress toward becoming law.”).

130. See Penrose, *In the Name of Watergate*, *supra* note 127, at 103 (2011) (“FERPA was undoubtedly intended to protect and further the rights of students and their parents, not to help schools shield non-academic records from others.”).

131. 20 U.S.C. § 1232g(a)(1)(A).

132. *Id.* § 1232g(a)(2).

Plainly, the “rights” protocols of FERPA make no sense in connection with NIL agreements.¹³³ Athletes do not need their colleges to provide access to copies of the records that the athletes themselves have submitted to their college athletic department. And athletes do not have any reason to demand that the college correct the records; indeed, the college would have no authority to unilaterally insert revised language into a contract between a student and an endorsee. Properly understood, FERPA applies only to the records that a college maintains in a central repository—such as the registrar’s office or dean of students’ office—memorializing the student’s educational life, which might be used adversely by graduate schools, employers, or law enforcement if the records contain uncorrected errors.¹³⁴

2. Are NIL Records “Employment Records”?

Because FERPA applies only to students’ education records, it typically does not come into play when a requester seeks records about a public employee, such as a personnel file.¹³⁵ Public records are essential tools that journalists use to keep watch over the behavior of government employees, including employees at higher education institutions.¹³⁶ But federal regulations say that FERPA applies to employment records if

133. See Penrose, *Tattoos*, *supra* note 94, at 1594 (making the point that universities, in particular athletic departments, do not observe the disclosure provisions of FERPA with the same ardor that they observe the confidentiality provisions: “Every document that a university classifies as an ‘education record’ in response to an open records request must be deposited in the student’s actual file that he or she has access to. This right of reciprocity already exists but is not likely being protected with the same measure of zeal as is afforded the athletic department.”).

134. See Huml & Moorman, *supra* note 127, at 129 (commenting that Congress understood FERPA to apply to “records maintained by the institution for students in the normal course of business and used by the institution in making decisions affecting the life of the student”). Additionally, there are unsettled questions as to whether FERPA should apply to a document that has independent existence apart from the school, i.e., a document created for non-educational purposes by someone outside the school who has the original. One might question whether that is a document “maintained” by the school for FERPA purposes, when the school merely is the repository of one of, potentially, many duplicates. For example, the school might keep a file of newspaper clippings with news about the accomplishments of students, but that does not transform the newspaper articles into confidential education records.

135. See *Wallace v. Cranbrook Educ. Cmty.*, No. 05-73446, 2006 WL 2796135 (E.D. Mich. 2006) at *4 (“While it is clear that Congress made no content-based judgements with regard to its education records definition, it is equally clear that Congress did not intend FERPA to cover records directly related to teachers and only tangentially related to students.”). Thus, in *Wallace*, the court held that statements provided by students in connection with the investigation of a school employee’s purported misconduct did not qualify under FERPA as records “directly related” to identifiable students. See also *Ellis v. Cleveland Muni. Sch. Dist.*, 309 F.Supp.2d 1019, 1022 (N.D. Ohio 2004) (“FERPA applies to the disclosure of student records, not teacher records”); *Briggs v. Bd. of Trs. of Columbus State Cmty. Coll.*, No. 2:08-CV-644, 2009 WL 2047899 (S.D. Ohio 2009) at *5 (finding that records of student complaints against professor are not “education records” under FERPA because they relate directly to the professor and only indirectly to the complainants).

136. See, e.g., Colleen Shalby & Robert J. Lopez, *CSU Halts Program that Paid Millions to Executives After They Departed*, L.A. TIMES (Mar. 22, 2022), <https://www.latimes.com/california/story/2022-04-13/csu-provost-reported-harassment-against-presidents-husband-then-faced-retaliation-records-say> [https://perma.cc/N6GK-E5RQ] (reporting on results of a *Times* investigation, in which reporters used public records to document that the California State University system had paid \$4 million in severance and buyouts to eleven departing executives since 2015 with little oversight or justification); Kenny Jacoby, Nancy Armour & Jessica Luther, *LSU Mishandled Sexual Misconduct Complaints Against Students, Including Top Athletes*, USA TODAY (Nov. 16, 2020), <https://www.usatoday.com/in-depth/sports/ncaaf/2020/11/16/lsu-ignored-campus->

the employment exists “as a result of” student status—that is, the type of job that only a student could hold, such as a graduate teaching assistant.¹³⁷

Courts have seldom had an opportunity to interpret the regulation, so it is unclear how broadly the notion of employment “as a result of” student status will be applied. In a rare application of this provision, Connecticut’s highest court ruled that a state college could deny a freedom-of-information request for the names of students employed as campus police officers because “the students employed by the department held positions reserved exclusively for students of the university.”¹³⁸

As with so much of FERPA, the regulation is shoddily drafted so that it is unclear whether “employed” necessarily means “employed *by the educational institution*.” If that is the regulation’s intent, colleges cannot tenably insist that NIL contracts are student employment records because they have spent decades insisting that athletes are *not* employees.¹³⁹ Indeed, it is well-documented that the term “student-athlete” was coined as a strategic euphemism to help colleges avoid having to pay workers’ compensation benefits, death benefits, or other benefits associated with employment.¹⁴⁰

In recent years, the NCAA and its member institutions have aggressively pushed back against attempts to categorize athletes as employees for purposes of federal labor law—a status that might entitle them to unionize and collectively bargain over working conditions.¹⁴¹ When an athlete-rights advocate asked the National Labor Relations Board (NLRB) to recognize members of the Northwestern University football team as employees of the college entitled to the protection of the National Labor Relations Act, the higher education community protested that a decision in the athletes’ favor would destroy the character of college sports.¹⁴² Based on decades of well-entrenched position

sexual-assault-allegations-against-derrius-guice-drake-davis-other-students/6056388002/

[<https://perma.cc/7M4J-Y2Q4>] (using Title IX case reports, police reports, and other public records to document that Louisiana State University repeatedly allowed students, including star athletes, who had committed serious sex offenses and dating-violence offenses to remain on campus).

137. “Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records . . .” 34 C.F.R. § 99.3 (2012).

138. *Univ. of Conn. v. Freedom of Info. Comm’n*, 585 A.2d 690, 693 (Conn. 1991), *abrogated on other grounds* by *State v. Courchesne*, 816 A.2d 562 (Conn. 2003).

139. *See* Agnatovech, *supra* note 35, at 214–15 (“For years, the NCAA has prohibited compensation for college athletes beyond the payment of their education based on the concept of amateurism.”).

140. *See* Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/5GRY-FZ6X>] (citing WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 390 (1997)); Tepen, *supra* note 26, at 217 (stating that “student-athlete” was a term “created to justify denying paying college athletes for the work they perform”); *see also* Dawson v. Nat’l Collegiate Athletic Ass’n, 932 F.3d 905, 912 (9th Cir. 2019) (explaining that, after a college athlete’s family was awarded death benefits when he perished in a plane crash, California legislators amended the workers’ compensation law to specifically exclude playing college sports from the definition of compensable employment).

141. *See* Dan Wolken, *NCAA President Mark Emmert Decries College Union Effort*, USA TODAY (Apr. 6, 2014), <https://www.usatoday.com/story/sports/college/2014/04/06/mark-emmert-ncaa-structure-presidents-press-conference-unionization-labor/7382025/> [<https://perma.cc/E2SX-87SS>] (quoting NCAA President Mark Emmert condemning Northwestern petition and “grossly inappropriate” concept of athletes unionizing, which he said would “blow up everything about the collegiate model of athletics”).

142. *See* Palmieri, *supra* note 46, at 1613 (quoting NCAA attorney’s reaction when NLRB declined jurisdiction without ruling on the Northwestern case: “This union-backed attempt to turn student-athletes into employees undermines the purpose of college: an education. Student-athletes are not employees.”); *see also*

statements, it would be quite unlikely for a college athletic department to espouse the position—solely for purposes of invoking the FERPA exclusion for student employee records—that athletes are college employees.

There is no ambiguity in Connecticut, Mississippi, and Virginia, where the state NIL statutes specifically state that “student-athletes” who earn compensation based on of their name, image, and likeness are not “employees” of the college.¹⁴³ In those states, it would be especially difficult for colleges to argue that the FERPA regulation for student employment extends to records of NIL agreements.

Colleges might predictably argue that the FERPA regulation applies beyond just employment at the educational institution. In other words, because the regulation is phrased in terms of employment “as a result of” student status, and not employment *by* the educational institution, a college might argue that FERPA applies even to records of work performed for an external employer, if the college maintains the records. This scenario could, defensibly, apply to a record such as a performance evaluation from placement in a practicum setting, where the record is shared with the college to assign a grade and file with the student’s academic records. But “product endorser” plainly is not the type of education-related employment that Congress and the U.S. Department of Education could have contemplated decades ago when the FERPA statute and regulations were written.¹⁴⁴ Since businesses are not allowed to actually pay players *for* playing, the “job” for which they are “hiring” athletes is endorsing a product.¹⁴⁵ The job of “endorser” is not exclusively reserved for college students at all (indeed, the “job” has existed for many years before college athletes were allowed to hold it). Thus, the position probably does not meet the regulation’s threshold of a position that exists solely because of student status, so FERPA should not apply.¹⁴⁶

Larry Scott, *Wrong Prescription for College Sports: Column*, USA TODAY (Apr. 5, 2014, 7:01 AM), <https://www.usatoday.com/story/opinion/2014/04/05/larry-scott-pac-twelve-unions/7273567/> [<https://perma.cc/QMF2-GBPB>] (relating sentiments of Pac-12 Conference commissioner, asserting that categorizing athletes as university employees is “a terrible idea that will do nothing to improve college sports and may well destroy them”). In a brief filed with the NLRB urging reversal of the regional counsel’s interpretation, college athletic directors from major universities throughout the country argued: “If scholarship football players are determined to be ‘employees’ and collective bargaining is imposed in this case, the educational process will suffer, and the student-athlete model of education will be undermined—without providing additional safeguards to commerce.” Brief for Nat’l Ass’n. of Collegiate Dirs. of Athletics and Div. 1A Athletic Dirs. Ass’n as Amici Curiae at 20, NLRB Case No. 13-RC-121359 (July 3, 2014).

143. CONN. GEN. STAT. ANN. § 10a-56(d) (West 2022); MISS. CODE ANN. § 37-97-105(3) (West 2022); VA. CODE ANN. § 23.1-408.1(J) (West 2022).

144. See Penrose, *In the Name of Watergate*, *supra* note 127 (discussing the congressional intent behind FERPA of “ensuring that parents were able to receive, review and, where necessary, correct all educationally related documents that could affect their child’s educational progress”).

145. See Boudway & Bhasin, *supra* note 29 (explaining that, under NCAA rules, “athletes have to do *something* to be paid (post on Instagram, go to an event, be in an ad, etc.)” (italics in original)).

146. See *Univ. of Conn. v. Freedom of Info. Comm’n*, 585 A.2d 690, 693 (Conn. 1991), *abrogated on other grounds by State v. Courchesne*, 816 A.2d 562 (Conn. 2003).

D. *Do NIL Records Contain “Trade Secrets”?*

In addition to objections from the colleges themselves, some companies will likely balk at disclosure of the terms of their endorsement deals on trade secret grounds.¹⁴⁷ State and federal FOI laws recognize that companies have a protectable interest in confidential business practices and strategies that might be disclosed in records exchanged with the government (for example, manufacturing processes that might be disclosed to environmental regulators).¹⁴⁸ FOI laws allow government agencies to withhold or redact otherwise-public records if their contents give away competitively valuable information that businesses have taken precautions to keep secret.¹⁴⁹ Obviously, the fact that Joe Quarterback has a deal to endorse Nike footwear is not confidential since a “confidential endorsement” is a contradiction in terms. So, a company maintaining that its NIL agreements contain trade secrets would have to argue that the dollar amount of compensation is the protectable secret.

Even if an NIL agreement does not qualify for withholding on the basis of FERPA confidentiality, colleges—or sponsoring entities—may argue for fully or partially withholding the records because its terms constitute trade secrets of the sponsors.¹⁵⁰ FOI law recognizes that sensitive information about business processes and strategies shared with government agencies could, if revealed, have economic value to competitors.¹⁵¹ Accordingly, a document can be redacted, or, if necessary, entirely withheld, on the grounds that its disclosure would give away trade secrets. When a disagreement arises over whether the contents of a public record qualify as a trade secret, state courts generally resolve the disagreement by looking to factors such as “the extent to which the information is already known outside the business, how zealously the business safeguarded the information, how valuable the information would be to competitors, the effort that the business expended in developing the information, and how easily competitors could replicate it.”¹⁵² The invocation of “trade secrets” to conceal information about businesses has come under scrutiny in recent years, with critics arguing that overuse of confidentiality obscures safety hazards that consumers and

147. See Daxton “Chip” Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1 J. CIVIC INFO. 1, 3 (2019) (decrying “a parade of darkness that appears to be advancing largely unabated” resulting from aggressive use of trade-secret exemptions in freedom-of-information laws to conceal records reflecting government interactions with industry).

148. See Hannah Wiseman, *Trade Secrets, Disclosure, and Dissent in a Fracturing Energy Revolution*, 111 COLUM. L. REV. SIDEBAR 1, 6–7 (2011) (describing how energy companies have successfully asserted trade secret protection to avoid public disclosure of information shared with regulators about chemicals used in hydraulic fracturing, or “fracking,” process of extracting fossil fuels from bedrock formations).

149. 5 U.S.C. § 552(b)(4).

150. See Aimee Edmondson & Charles N. Davis, “Prisoners” of Private Industry: *Economic Development and State Sunshine Laws*, 16 COMM’N L. & POL’Y 317, 346 (2011) (observing that states’ “open records and meetings laws generally exempt trade secrets and other proprietary information, mirroring the federal statute”); see also *id.* at 319, n.10 (providing illustrative examples of the scope of trade secret exemptions from Michigan, Oregon, and Texas law).

151. See Stewart & Sanders, *supra* note 147, at 11–12.

152. Sabrina Conza, *Chasing Smokestacks in the Dark: The Amazon HQ2 Quest Revives Debate Over Economic Development Secrecy*, 2 J. CIVIC INFO. 1, 10 (2020).

employees need to know about.¹⁵³ Even a college athletic department has, successfully, asserted trade-secret protection for its list of ticket purchasers when faced with a demand for disclosure under state FOI law.¹⁵⁴

What qualifies as a trade secret has been interpreted relatively broadly for FOI purposes.¹⁵⁵ The most prominent example is the Supreme Court's 2019 ruling in *Food Marketing Institute v. Argus Leader Media Inc.*,¹⁵⁶ in which the Court sided with grocery store operators resisting disclosure of data kept by the U.S. Department of Agriculture about the amount each store received each year from users of federal food stamps.¹⁵⁷ In reaching its result, the Court arguably expanded the meaning of "trade secrets" for federal FOIA purposes by finding that information qualifies as a trade secret even without any reason to believe its release will inflict substantial competitive harm.¹⁵⁸

In other words, the mere showing that information held by a business is not normally shared with the public, regardless of its competitive value, will now be enough to render that information off-limits to public inspection. That "trade secrets" could even extend to the amount of taxpayer money paid to a corporation—information journalists argued was necessary as a check on food-stamp fraud—struck many open-government advocates as an especially egregious application of the exemption.¹⁵⁹ The editor of the *Argus Leader* newspaper that had requested the records called the Court's ruling "a massive blow to the public's right to know how its tax dollars are being spent, and who is benefiting," and the president of the *Argus Leader's* parent corporation decried the decision as "a step backward for openness and a misreading of the very purpose of the Freedom of Information Act."¹⁶⁰ Nevertheless, the much-reviled ruling is likely to

153. See Charles Tait Graves & Sonia K. Katyal, *From Trade Secrecy to Seclusion*, 109 GEO. L.J. 1337, 1412 (2021) ("Trade secret protection should not be viewed as a monolith where the skimpiest satisfaction of the elements of trade secrecy means that regulatory or other disclosure in the public interest is impossible. There are contexts where the public interest in disclosure is strong, and the case for competitive harm is weak.").

154. *Univ. of Conn. v. Freedom of Info. Comm'n*, No. HHBCV094021320S, 2010 WL 2106972, at *10 (Conn. Super. Ct. Apr. 21, 2010), *aff'd*, 36 A.3d 663 (Conn. 2012).

155. See Stewart & Sanders, *supra* note 147, at 7–8 (citing example of Texas Supreme Court's expansive interpretation of the scope of a state trade secret exemption in *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), which produced such "absurd outcomes" that the governor and legislature eventually agreed to revise the FOI law to overturn the ruling statutorily).

156. 139 S. Ct. 2356 (2019).

157. *Id.* at 2361–62.

158. *Id.* at 2365–66.

159. See Stewart & Sanders, *supra* note 147, at 8 (citing *Argus Leader* as an example of a "downward spiral toward secrecy" in judicial interpretation of FOI law); see also Jane E. Kirtley, Scott Memmel & Jonathan Anderson, *More "Substantial Harm" Than Good: Recrafting FOIA's Exemption 4 After Food Marketing Institute v. Argus Leader Media*, 46 MITCHELL HAMLIN L. REV. 497, 516 (2021) (asserting that the Court's ruling "fails to protect important public interests in government transparency, newsgathering, and the free flow of information" and calling for Congress to clarify the law to restore greater public access).

160. Jonathan Ellis & Richard Wolf, *Supreme Court Limits Access to Government Records in Loss for Argus Leader*, *Part of the USA TODAY Network*, USA TODAY (June 24, 2019), <https://www.usatoday.com/story/news/politics/2019/06/24/freedom-informationact-supreme-court-rules-south-dakota-case/1475089001/> [https://perma.cc/XG5V-YA5B]; Jessica Gresko, *Justices Side with Business, Government in Information Fight*, ASSOCIATED PRESS (June 24, 2019), <https://apnews.com/44d921a0323448fbaa4372c150eb655e> [https://perma.cc/PHQ6-9ZQJ].

influence interpretations of both state and federal FOI laws since many states read their FOI laws in parallel with the federal statutes they were modeled after.¹⁶¹

In the context of NIL agreements, an endorsement contract invariably will consist of unremarkable boilerplate phrases dealing with liability, independent contractor status, and other standard-issue contract terms.¹⁶² None of those would qualify for trade secret protection.¹⁶³ Nor is an NIL agreement likely to contain elaborate detail about a company's marketing strategies.¹⁶⁴ There would be no purpose in sharing such strategic information with a nonemployee whose involvement with the business might be nothing more than posing for a promotional photograph. Logically, once the standard-form contract language is removed, the only material contract term that arguably might qualify for trade-secret status is the amount of compensation. A business might predictably assert that what it pays for endorsements has strategic value because competitors might be better able to price their NIL offers with the benefit of knowing what a rival is paying.¹⁶⁵

There is no broad consensus on whether compensation qualifies as a trade secret under state laws, because the determination is inherently fact-specific and dependent on the practices of the secret-holder.¹⁶⁶ In some instances, courts have concluded that no trade secret protection applies, either because people are generally free to discuss their salaries, or because the going rate of pay is already well-known within particular industries.¹⁶⁷ For instance, a South Carolina court refused to block disclosure of physicians' compensation information as part of an FOI request to a public hospital.¹⁶⁸ In Maine, a state-regulated mutual insurance company failed to convince a court that the company's executive compensation should be withheld from an FOI requester as a trade secret.¹⁶⁹ Citing the Maine and South Carolina cases, an Iowa court declined to treat the budget for a motion picture, filed with a state agency for purposes of obtaining tax

161. See Stewart & Sanders, *supra* note 147, at 8.

162. See, e.g., *Student-Athlete Compensation for Use of Name, Image, and Likeness*, WRIGHT STATE UNIV. (Feb. 23, 2022) <https://policy.wright.edu/policy/3810-student-athlete-compensation-use-name-image-and-likeness> [<https://perma.cc/2DPC-4MRL>] (Policy Number 3810, 3810.2 Definitions: listing university NIL policy definitions that will likely be incorporated into any NIL contract language).

163. See, e.g., *Jeddo Coal Co. v. Rio Tinto Procurement (Singapore) PTD Ltd.*, No. 3:16-CV-621, 2019 WL 2612710, at *4 (M.D. Pa. June 26, 2019) (stating, after *in camera* review of disputed discovery documents that were characterized as containing trade secrets, that "many of these documents appear to contain contractual boilerplate language. As such, these provisions do not appear to be cloaked in any sensitive trade secret status.").

164. See, e.g., *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177, 184 (Pa. Commw. Ct. 2006) (summarizing the unsuccessful argument that "trade secrets pervade the requested documents, revealing business initiatives, customers called upon, purposes of marketing calls, sales and marketing methods, geographic marketing efforts and product development").

165. See Graves & Katyal, *supra* note 153 at 1341 ("[A]s trade secret disputes have increased, so too have assertions of trade secrecy that do not fit [the] traditional, market-competitive fact pattern.").

166. See generally Stewart & Sanders, *supra* note 147, at 12–18 (discussing the diverse range of approaches to open records laws taken by different state courts and statutes).

167. See, e.g., *Best Label Co. v. Custom Label & Decal, LLC*, No. 19-cv-03051, 2022 WL 1189884, at *5 (N.D. Cal. Apr. 20, 2022) (holding that salary schedule constituted "general knowledge those skilled in the trade would have" and was not protectable as a trade secret); see also *People v. Thain*, 874 N.Y.S.2d 896, 903 (N.Y. Sup. Ct. 2009) (holding that employer's salary schedule was not a trade secret when employees were free to share the information and did so routinely).

168. *Campbell v. Marion Cnty. Hosp. Dist.*, 580 S.E.2d 163, 169 (S.C. Ct. App. 2003).

169. *Medical Mut. Ins. Co. of Me. v. Bureau of Ins.* 866 A.2d 117, 121–22 (Me. 2005).

credits, as a trade secret, even though the movie producer asserted that disclosure would reveal proprietary information about the director's compensation.¹⁷⁰ But other disputes over the status of compensation have come out differently, based on a finding that the particular employer has taken steps to keep the information confidential.¹⁷¹

Asserting trade secret protection for the amount of athlete compensation is problematic on two grounds. Even accepting the broadest understanding of what qualifies information as a trade secret—that is, the *Argus Leader* understanding—a trade secret ceases being a trade secret once it is publicly shared.¹⁷² Agents, athletes, and even some coaches have shared details of what players are making on their NIL deals.¹⁷³ The University of Alabama's head coach, Nick Saban, famously bragged that his newly signed star quarterback recruit, Bryce Young, had lined up nearly \$1 million in deals before even setting foot on a college gridiron.¹⁷⁴ In the richest deal reported to date, a Miami billionaire is said to have paid \$9.5 million to induce a highly rated quarterback to choose the University of Miami Hurricanes.¹⁷⁵ The more routinely these details are shared, the more difficult it will be to assert trade secret protection.

Moreover, there is growing skepticism that compensation should be treated as confidential because confidentiality has enabled employers to systematically underpay

170. *Iowa Film Production Servs. v. Iowa Dept. of Econ. Dev.*, 818 N.W.2d 207, 220–21, 225 (Iowa 2012).

171. *See Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 620 S.E.2d 222, 228 (N.C. Ct. App. 2005) (concluding that equipment rental company's "personnel and salary information," when "taken together" with a host of other organizational information, met definition of a trade secret); *First Health Grp. Corp. v. Nat'l Prescription Adm'rs, Inc.*, 155 F. Supp. 2d 194, 224 (M.D. Pa. 2001) (accepting that a company administering health insurance plans could assert a claim for misappropriation of its salary structure, which the company had kept closely held by a few insiders).

172. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) ("Information that is public knowledge or that is generally known in an industry cannot be a trade secret."); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974) ("The subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business.").

173. *See, e.g.*, Brandon Brown, *Cade McNamara Makes NIL History*, SPORTS ILLUSTRATED (Aug. 25, 2021), <https://www.si.com/college/michigan/football/cade-mcnamara-nil-cryptocurrency-michigan-football-jim-harbaugh-quarterback-wolverines> [<https://perma.cc/B6D7-CBHG>] (reporting, based on statement from athlete's management company, that Michigan quarterback signed first known NIL deal in which compensation for personal appearances will be paid in cryptocurrency); Glenn Guilbeau, *Olivia Dunne, LSU's Million Dollar Gymnast and Social Media Queen, Could Strike NIL Gold*, USA TODAY NETWORK (July 8, 2021), <https://www.theadvertiser.com/story/sports/college/lsu/2021/07/08/lsu-gymnast-olive-dunne-social-media-queen-could-strike-nil-gold/7858287002/> [<https://perma.cc/7LQ4-RYUQ>] (reporting on Louisiana State gymnast who has built a following of 4 million on video-sharing platform TikTok and another 1.1 million on social networking site Instagram, positioning her for a seven-figure deal with a celebrity talent agency); David Taub, *Fresno State Twins Among First College Athletes to Cash in with Endorsements*, GV WIRE (July 1, 2021), <https://gvwire.com/2021/07/01/fresno-state-twins-among-first-college-athletes-to-cash-in-with-endorsements/> [<https://perma.cc/CC25-WT6T>] (reporting that twin sisters who play basketball for Fresno State University, and have a combined social media following of 5 million people, signed endorsement deals with cellphone company and nutritional supplement company on first day of NIL eligibility).

174. Des Bieler, *Nick Saban Reveals Alabama QB Bryce Young Is Already Making 'Ungodly' Profits off NIL Rights*, WASH. POST (July 20, 2021), <https://www.washingtonpost.com/sports/2021/07/20/nick-saban-bryce-young-ungodly-nil-profits/> [<https://perma.cc/MD25-SEB3>].

175. Scott Polacek, *Jaden Rashada Reportedly Agreed to \$9.5M NIL Contract with Miami Booster John Ruiz*, BLEACHER REPORT (June 26, 2022), <https://bleacherreport.com/articles/10040029-jaden-rashada-reportedly-agreed-to-95m-nil-contract-with-miami-booster-john-ruiz> [<https://perma.cc/7VZ5-5CV5>].

women and people of color.¹⁷⁶ Some states have even begun taking affirmative steps to protect the right to talk about one's own compensation without fear of retaliation.¹⁷⁷ The National Labor Relations Board has long regarded the ability to discuss concerns about pay as a federally protected right in NLRB-covered workplaces, including sharing information about compensation practices regardless of whether the employer designates it "confidential."¹⁷⁸ Concerns about equitable compensation apply to college athletics as well, given the long-established tradition of underfunding women's sports.¹⁷⁹ Up against this growing public policy consensus, it will become increasingly difficult for businesses to assert that what they pay college athletes is none of the public's business.

Regardless of which exemption a college invokes in resisting disclosure of NIL agreements, producing public records is not typically an all-or-nothing proposition. Courts regularly order colleges to disclose redacted records with only the genuinely confidential portions obscured.¹⁸⁰ Whether redaction of student identities would be a satisfactory split-the-difference remedy to afford the public some modicum of access to NIL deals is tricky. First, colleges regularly insist that redaction is impracticable because athletes are sufficiently prominent, and the pool is sufficiently small that a requester will be able to "re-identify" the redacted records.¹⁸¹ It is especially easy to match an

176. See Jessica Guynn, *How Much Does That Job Pay? New Laws Across the Country Are Helping Job Applicants Find Out*, USA TODAY (Feb. 3, 2022), <https://www.usatoday.com/story/money/2022/02/03/jobs-salary-range-pressure-pay-transparency/6637509001/> [<https://perma.cc/R6FB-C4EB>] (reporting that at least nine states have enacted "pay transparency" laws motivated by concerns over inequities in compensation).

177. See CAL. LAB. CODE §§ 232(a), (b) (West 2003) (providing that employers may not forbid employees from disclosing compensation information, or punish them for refusing to sign confidentiality agreements that restrict the ability to disclose compensation).

178. See *Lowe's Home Ctr., L.L.C. v. NLRB*, 850 F. App'x 886, 889–90 (5th Cir. 2021) (concluding that workplace policy forbidding employees from discussing information about their salaries was an unfair labor practice); *Banner Health Sys. v. NLRB*, 851 F.3d 35, 41 (D.C. Cir. 2017) (ruling that mandatory confidentiality agreement designating salaries as part of confidential information inhibited employees' exercise of NLRA-protected organizing rights); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66–67 (2d Cir. 1992) (finding that an employer's rule prohibiting employees from making statements about wages and other terms of employment violated the NLRA).

179. See Kelley L. Flint, *More Money, Fewer Problems: A Post-Alston v. NCAA Approach to Reducing Gender Inequities in Sports*, 25 RICH. PUB. INT. L. REV. 153, 167 (2022) ("Although Title IX was a catalyst for progress towards equality in education-related opportunities, athletics remain an area of inequity, even at the heavily regulated collegiate level. . . . [T]he NCAA has a pattern of offering better championship and playoff facilities and broadcast opportunities to men's sports, particularly revenue-generating ones, than women's sports.").

180. See, e.g., *Univ. of Ky. v. Kernel Press, Inc.*, 620 S.W.3d 43, 58–59 (Ky. 2021) (ordering University of Kentucky to release records of sexual misconduct cases involving faculty members with only student identifiers removed); see also Matthew R. Salzwedel & Jon Ericson, *Cleaning up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 WIS. L. REV. 1053, 1096–97 (2003) (noting that the U.S. Department of Education, which has sole authority to enforce FERPA, has told schools and colleges that they are free to release otherwise confidential records once they are "de-identified").

181. See Huml & Moorman, *supra* note 127, at 130 ("If a student-athlete is dismissed or suspended from team activities, their absence is noticeable to the general public and media outlets seeking information about the athlete's status. Thus, even an acknowledgment of an academic misconduct inquiry can effectively 'link' a student-athlete to the inquiry in a way a traditional student would likely not experience."); see, e.g., *Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 492 (Iowa 2012) ("[E]ducational records may be withheld in their entirety where the requester would otherwise know the identity of the referenced student or students even with

anonymized record with a known athlete when the underlying subject matter, a commercial endorsement, is inherently public; a redacted record saying that an unnamed athlete was paid \$50,000 to appear in a commercial for Dr. Pepper will not be a terribly effective disguise once the commercial appears on television.¹⁸² Second, while redacted records might be somewhat informative in revealing general trends, the records will not enable interested parties to verify whether NIL payments are influencing particular athletes' decisions (e.g., whether Joe Quarterback received a large NIL contract immediately after transferring from one college to another). For instance, accusations have been leveled that coaches and college athletic departments are unethically dangling NIL payments as incentives for star recruits.¹⁸³ The most outspoken skeptic of the distortive effects of NIL payments, Nick Saban, has publicly called out conference rival Texas A&M for abusing the system, claiming the entire football team was "bought."¹⁸⁴ De-identified data will not tell the story of how much any particular recruit was paid and what services are owed under the contract to whom.

IV. THE VALUE OF PUBLIC OVERSIGHT: TRANSPARENCY AND COLLEGE SPORTS

As recruiting season for the 2023 college football season ramped up, the University of Florida landed a coveted quarterback recruit, Jaden Rashada, a nationally ranked prospect hailed as the Gators' "quarterback of the future."¹⁸⁵ But just a few weeks later Rashada asked to be released from his letter of commitment so he could sign elsewhere, after an NIL deal with a collective of Gator football supporters worth a reported \$13 million—for a player yet to set foot on a college gridiron—fell through.¹⁸⁶ Plainly, NIL payments are substantively affecting competition within college sports, at times carrying decisive weight in star players' choice of colleges. Equally plainly, there is reason to suspect that boosters of sports programs are offering eye-popping, eight-figure deals for the express purpose of convincing recruits to enroll, not because there is any legitimate

redactions.”) *But see* State *ex rel.* ESPN, Inc. v. Ohio State Univ., 970 N.E.2d 939, 947–48 (Ohio 2012) (“With the personally identifiable information concerning the names of the student-athlete, parents, parents’ addresses, and the other person involved redacted, FERPA would not protect the remainder of these records.”).

182. See Jason Hall, *Dr Pepper Revealed First Active NCAA Player to Star in ‘Fansville’ Ads*, FOX SPORTS RADIO (Aug. 17, 2021), <https://foxsportsradio.iheart.com/content/2021-08-17-dr-pepper-revealed-first-active-ncaa-player-to-star-in-fansville-ads/> [<https://perma.cc/PY4J-F4CY>] (reporting that Clemson’s star quarterback D.J. Uiagalelei signed an agreement to appear in a Dr. Pepper commercial).

183. See Khari Thompson, *Nick Saban Accuses Deion Sanders, Jackson State of Paying a Player a Million Dollars*, CLARION LEDGER (May 18, 2022), <https://www.clarionledger.com/story/sports/college/jackson-state/2022/05/18/nick-saban-accuses-deion-sanders-jackson-state-paying-player-million-dollars/9833734002/> [<https://perma.cc/GEJ8-UYNG>] (reporting that Alabama’s head coach charged that Jackson State, a lesser-known football program, secured \$1 million in NIL payments to lure a top recruit).

184. *Alabama’s Saban Calls Out Texas A&M on NIL Deals, Saying They ‘Bought Every Player’*, NBC PHILA. (May 19, 2022), <https://www.nbcphiladelphia.com/news/sports/alabama-nick-saban-calls-out-texas-a-m-using-nil-deals-buy-every-player/3244288/> [<https://perma.cc/324B-9WL6>].

185. Zach Goodall, *QB Jaden Rashada Officially Signs with Florida Gators*, SPORTS ILLUSTRATED (Dec. 21, 2022), <https://www.si.com/college/florida/recruiting/florida-gators-recruiting-jaden-rashada-officially-signs> [<https://perma.cc/Q9R6-2DBC>].

186. Matt Baker, *Florida Gators Release QB Recruit Jaden Rashada from Letter of Intent*, TAMPA BAY TIMES (Jan. 20, 2023), <https://www.tampabay.com/sports/gators/2023/01/20/florida-gators-jaden-rashada-nil-nli/> [<https://perma.cc/ST78-TW7J>].

marketplace justification for paying an unproven teenage athlete \$13 million for endorsement services.

The public is intensely (fanatically, one might say) interested in college sports and college athletes. The National Football Foundation, which operates the College Football Hall of Fame, reports that fifty-six percent of American adults identify themselves as college football fans and that 47.5 million fans attended college football games in-person in 2019, while more than 145 million watched on television.¹⁸⁷ ESPN reported that 22.6 million viewers watched its telecast of the 2022 national football championship game between the University of Georgia Bulldogs and the University of Alabama Crimson Tide, making it the most watched program on cable television in two years.¹⁸⁸ College athletes have built celebrity followings on social media, rivaling those of movie stars or recording artists.¹⁸⁹ Whether sports competitions are conducted in a fair and above-board manner is, manifestly, a matter of public interest and concern.

State colleges are much more than venues for sporting events; they are well-funded government agencies with enormous influence over people's lives and the well-being of their communities.¹⁹⁰ How these agencies and their administrators perform their state duties is, likewise, a matter of public interest and concern, which is why they are obligated to respond to requests for their records—even if the records are damaging to the reputation of the agency or its officials.¹⁹¹ If colleges are using their authority to veto NIL agreements because they subjectively disagree with the endorsee, like telling a player to cancel a contract with Disney because the governor is feuding with Disney,¹⁹² then the public has a legitimate interest in knowing how that veto power is being used.

187. *2019-20 Report: Amazing College Football Popularity Highlighted by Impressive Ratings and Attendance Data*, NAT'L FOOTBALL FOUND. (May 28, 2020), https://footballfoundation.org/news/2020/5/27/2019_Attendance_and_Ratings.aspx [<https://perma.cc/BP6L-Y742>].

188. Amanda Brooks, *2022 College Football Playoff National Championship Nets 22.6 Million Viewers, Cable's Top Telecast in Two Years*, ESPN PRESS ROOM (Jan. 11, 2022), <https://espnpressroom.com/us/press-releases/2022/01/2022-college-football-playoff-national-championship-nets-22-6-million-viewers-cables-top-t-telecast-in-two-years/#:~:text=The%20New%20Year's%20Six%20and,were%20on%20New%20Year's%20D> [<https://perma.cc/4PAK-JMKC>].

189. See Charlotte Carroll, *'Mom, I Did a Thing': How Oregon's Sedona Prince Is Changing the Conversation About Women's Sports*, ATHLETIC (Mar. 14, 2022), <https://theathletic.com/3180730/2022/03/14/mom-i-did-a-thing-how-oregons-sedona-prince-found-her-strength-and-power/> [<https://perma.cc/BFU3-PZQC>] (reporting that Oregon basketball star Sedona Prince regularly receives 1 million views for her videos on the TikTok platform, second only to Super Bowl-winning quarterback Tom Brady, and that she has leveraged her popularity to sign nine NIL deals worth at least \$300,000).

190. See *Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 377 (Ky. 1992) (holding that the University of Kentucky was a "public agency" under applicable state law).

191. See *id.* (affording journalists access to state university's written response to NCAA ethics charges and explaining that the request "represents a legitimate inquiry into the operation of an agency of the Commonwealth. One of the purposes of the [Public Records] Act is to allow the public to scrutinize the action of such agencies.")

192. See Anthony Izaguirre, *Why Are Disney and DeSantis Feuding in Florida?*, AP NEWS (Apr. 22, 2022), <https://apnews.com/article/travel-business-arts-and-entertainment-florida-ron-desantis-cb735ebabdd6606b273e0c85f99112e8> [<https://perma.cc/BJ88-8JS4>] (explaining that Florida's Republican governor retaliated against Disney's Florida theme park, Walt Disney World, after company executives spoke out against legislation forbidding discussion of sexuality in public elementary schools).

In addition to the legal presumption in favor of access, there are compelling public policy arguments for disclosure. The public justifiably is curious to know whether star athletes' services are being "sold to the highest bidder" as NIL earning opportunities become an integral part of the courtship process for recruits.¹⁹³ Nick Saban has said openly that the NIL system "creates a situation where you can basically buy players."¹⁹⁴

The connection between recruiting and NIL compensation only intensified with the recent development of "collectives": organizations made up of monied fans of particular colleges or teams, often loosely affiliated with the colleges' athletic departments, that facilitate finding NIL deals for players, or even directly pool money to be shared among players.¹⁹⁵ Although the NCAA's official position is that boosters cannot be directly involved in recruiting, that disapproval has not slowed the explosive growth of collectives, which are in place at dozens of institutions throughout the country, sometimes paying five-figure rewards to every signee on a team in what has every outward appearance of a recruiting inducement.¹⁹⁶ The NCAA opened an inquiry at the University of Miami after a billionaire booster boasted of helping lure a sought-after transfer student to Miami with the help of an \$800,000 NIL deal with his company, LifeWallet.¹⁹⁷ Because these collectives are private corporate entities,¹⁹⁸ they have grounds to argue that they do not qualify as sufficiently governmental to trigger state FOI law.¹⁹⁹ So if the public is to have effective oversight over the activities of collectives, that oversight likely will have to be achieved indirectly, through examination of the NIL agreements that universities themselves maintain. Fans have a legitimate interest in

193. See Christopher J. Brooks, *In Choosing Colleges, Top Young Athletes Say: "Show me the NIL"*, CBS NEWS MONEYWATCH (June 3, 2022), <https://www.cbsnews.com/news/nil-college-athletes-boosters-collectives-nick-saban-coaches/> [<https://perma.cc/84PG-T7X8>] ("[E]xperts say the playing field is far from level and risks creating an environment where schools dangle NIL deals to 'buy' players.").

194. Madeline Coleman, *Nick Saban Says NIL Rules Creates System Where 'You Can Basically Buy Players'*, SPORTS ILLUSTRATED (Apr. 13, 2022), <https://www.si.com/college/2022/04/13/nick-saban-nil-rules-system-you-can-basically-buy-players> [<https://perma.cc/22SR-3BBZ>].

195. See Laine Higgins, *The Booster 'Collectives' Putting Money in the Pockets of College Athletes*, WALL ST. J. (May 5, 2022), <https://www.wsj.com/articles/ncaa-name-image-likeness-collectives-11651761397> [<https://perma.cc/HME8-6QPJ>] ("[C]ollectives are skirting [NCAA rules] by dangling lucrative endorsement deals to prospective athletes.").

196. Josh Planos, *The NCAA Doesn't Know How to Stop Boosters from Playing The NIL Game*, FIFTYTHREEEIGHT (May 16, 2022) [hereinafter Planos, *Boosters*], <https://fiftythreeeight.com/features/the-ncaa-doesnt-know-how-to-stop-boosters-from-playing-the-nil-game/> [<https://perma.cc/M864-TE3T>]; see also Don Williams, *Matador Club Offers \$25K Contracts to 100 Texas Tech Football Players*, LUBBOCK AVALANCHE-J. (July 18, 2022), <https://www.lubbockonline.com/story/sports/college/red-raiders/2022/07/18/matador-club-offers-25k-contracts-to-100-tech-football-players/65375501007/> [<https://perma.cc/DA3Z-KANP>] (describing how alumni-funded collective planned to bolster Texas Tech football recruiting by offering \$25,000 payments to all eighty-five scholarship-eligible players plus fifteen top nonscholarship invitees).

197. Nicole Auerbach & Manny Navarro, *Miami Faces NCAA Inquiry Regarding NIL Deals and Booster John Ruiz: Sources*, ATHLETIC (June 14, 2022), <https://theathletic.com/news/miami-ncaa-john-ruiz/XCmeUXyy3wYY/> [<https://perma.cc/7Y24-GNWS>].

198. See Planos, *Boosters*, *supra* note 196.

199. See *State ex rel. Oriana House, Inc. v. Montgomery*, 854 N.E.2d 193, 200–01 (Ohio 2006) (concluding that Ohio FOI statute did not extend to private corporation, even though it received state money to operate community correctional institution, because it did not qualify as a "public agency" for purposes of FOI law).

knowing whether University of Kansas basketball or Ohio State University football are perennially championship contenders because of better coaching and recruiting, or because those colleges are in a position to offer richer NIL earning opportunities.

There is already quite a bit of selective self-disclosure—by athletes, and at times even by college employees—about compensation packages, making it hard to argue that NIL compensation has been treated as a confidential matter on par with grades or other legitimately FERPA-protected materials.²⁰⁰ Full transparency will make it easier to verify or debunk the anecdotal claims already circulating widely.

Transparency does not merely scratch the itch of curiosity; it helps reassure a skeptical public that competitions are fair and honest and that wrongdoers will be detected and punished.²⁰¹ The “\$100 handshake” of boosters paying off star players under the table has been a well-known staple of college sports for decades, despite the NCAA’s disapproval.²⁰² In a vivid depiction of illicit recruiting practices in big-time college football, *Sports Illustrated* focused in 2013 on the Oklahoma State University Cowboys’ program, where eight former players admitted that they received under-the-table payments from boosters and observed such payments to be commonplace, with estimates running as high as \$25,000 a year.²⁰³ The FBI and Justice Department even escalated concern over the corrupting influence of money in college sports to the proverbial federal case in 2017, charging that coaches at four top-tier basketball programs “partook in systematic bribery schemes that steered players to certain schools and funneled money to players from sportswear companies and

200. See Erica L. Ayala, *Oregon Basketball Star Sedona Prince Lands NIL Deal with Beverage Company Riff*, FORBES (Apr. 22, 2022), <https://www.forbes.com/sites/ericalayala/2022/04/22/oregon-basketball-star-sedona-prince-lands-nil-deal-with-beverage-company-riff/?sh=2ab70b2d4d21> [<https://perma.cc/R9WB-FM4V>] (reporting that Oregon women’s basketball player Sedona Prince parlayed a vast social media following into a unique endorsement agreement with an energy drink company that gives her an equity stake in the firm plus a cut of sales); Stewart Mandel, *Five-Star Recruit in Class of 2023 Signs Agreement with Collective That Could Pay Him More Than \$8 Million*, ATHLETIC (Mar. 11, 2022), <https://theathletic.com/3178558/2022/03/11/five-star-recruit-in-class-of-2023-signs-agreement-with-collective-that-could-pay-him-more-than-8-million/> [<https://perma.cc/6AB4-MYV8>] (reporting that a high school recruit, whose name was withheld from the article, signed what is believed to be a record-high compensation agreement for a U.S. amateur athlete through an NIL collective affiliated with a college athletic program).

201. See Krebs, *supra* note 96, at 603 (“Institutional transparency is the best way to combat corruption in collegiate athletics.”).

202. See Daniel Rapaport, *Chris Simms Says He Was Paid by Boosters While at Texas*, SPORTS ILLUSTRATED (Aug. 18, 2017), <https://www.si.com/college/2017/08/18/chris-simms-paid-boosters-college-football-texas> [<https://perma.cc/ES8T-H3TA>] (reporting that former University of Texas quarterback admitted to accepting money from boosters for autographing footballs, “and said that it’s stupid to think that doesn’t happen everywhere in collegiate athletics”); Tania Ganguli, *Arian Foster Says He Took Benefits*, ESPN (Sept. 20, 2013), https://www.espn.com/college-football/story/_/id/9698504/arian-foster-says-took-benefits-playing-tennessee-volunteers [<https://perma.cc/95A2-FRQU>] (quoting comments by former University of Tennessee football star who claims he accepted “money on the side” from supporters of the football program); Charles Goldberg, *HBO Real Sports Says Former Auburn Players Received Money from Boosters*, AL.COM (Mar. 29, 2011), https://www.al.com/sports/2011/03/hbo_real_sports_says_former_au.html [<https://perma.cc/K2W6-BU94>] (recounting accusations by four former Auburn University football players, who admit to “receiving money in bookbags and handshakes involving hundreds of dollars” during the recruiting process).

203. *Special Report on Oklahoma State Football: Part 1—The Money*, SPORTS ILLUSTRATED (Sept. 10, 2013), <https://www.si.com/college/2013/09/10/oklahoma-state-part-1-money> [<https://perma.cc/YF2M-K4Y9>].

professional agents when they are supposed to be amateur players.”²⁰⁴ The case resulted in wire fraud convictions against an Adidas executive and others accused of making improper payments to athletes and toppled one of the nation’s most celebrated basketball coaches: the University of Louisville’s former head coach, Rick Pitino.²⁰⁵

However tainted college sports have historically been by payoffs to athletes, the NIL movement presents the prospect of far larger fistfuls of booster compensation passing under the virtual table, undetectably to the public—unless transaction records are made accessible.²⁰⁶ The NCAA has long maintained that amateurism preserves the integrity of its competitions (i.e., to prevent untoward involvement by gamblers or bad actors who might have an interest in influencing the outcomes of games).²⁰⁷ Vast sums are expected to pour into college sports in the coming years.²⁰⁸ Competitive pressure among sports agents and marketing companies may result in athletes as young as fifteen being wooed with offers of future NIL riches when the imbalance of knowledge and potential for exploitation is especially pronounced.²⁰⁹ Given that the NCAA itself has recognized the potentially corrupting influence of unregulated money, the public’s interest in knowing which athletes are taking money from which outside entities is self-evident. The NCAA and its members once insisted that providing a player with a free bagel smothered in cream cheese could compromise the integrity of its competitions.²¹⁰ The same organizations cannot defensibly assert that competition is unaffected by contracts running up to \$2 million for a single endorsement deal.²¹¹

Disclosing contracts to college athletic departments is no substitute for disclosing them to the larger public. College athletic departments have a well-known history of downplaying scandals, particularly where star players or successful coaches are

204. Dylan Scott, *NCAA Basketball’s Bribery Scandal and Its March Madness Conspiracy Theory, Explained*, VOX (Mar. 13, 2018), <https://www.vox.com/2018/3/13/17109874/ncaa-scandal-fbi-basketball-march-madness> [<https://perma.cc/FXG3-H3FV>].

205. Austin Malinowski, *The Adidas College Basketball Scandal and Its Aftermath*, 30 MARQ. SPORTS L. REV. 243, 251 (2019).

206. See Taylor P. Thompson, *Maximizing NIL Rights for College Athletes*, 107 IOWA L. REV. 1347, 1377 (2022) (“The current NIL framework appears to be especially vulnerable to abuse from boosters and businesses seeking to help their alma mater. Similarly, NIL benefits will lead athletic departments to see a competitive recruiting advantage by offering the greatest access to endorsement contracts for players.” (footnote omitted)).

207. See *O’ Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1054 (9th Cir. 2015).

208. See Blinder, *supra* note 47 (stating that “[a] few select stars, particularly in football and basketball, could make millions” and quoting an expert who anticipates athletes charging up to \$2,000 an hour for making personal appearances); see also Tepen, *supra* note 26, at 243–44 (predicting that businesses, which already pay vast sums to have their names on sports arenas, will dangle NIL incentives to help their hometown colleges recruit sought-after players).

209. See Fasciale, *supra* note 24, at 911 (“[I]t is plausible that agents will begin recruiting elite players during the early stages of their career, such as high school.”).

210. Holly Anderson, *Seeds of Change in NCAA Bagel Regulation*, SPORTS ILLUSTRATED (Jan. 18, 2013), <https://www.si.com/campus-union/2013/01/18/seismic-shift-in-ncaa-bagel-regulation> [<https://perma.cc/H9S5-2E8H>].

211. See Wilton Jackson, *Hercy Miller, Master P’s Son, Signs \$2 Million Deal After NIL Law Change*, SPORTS ILLUSTRATED (July 2, 2021), <https://www.si.com/college/2021/07/02/hercy-miller-master-p-son-signs-2m-deal-nil-law-change> [<https://perma.cc/3YGW-Y53K>] (reporting that rap artist’s teenage son inked a four-year, \$2 million endorsement deal to play college basketball just a day after NIL changes went into effect).

involved.²¹² For example, Ohio State University fought to conceal the extent of misconduct within the football program during a scandal over players receiving illicit financial benefits.²¹³ When the scandal was disclosed, head coach Jim Tressel, who had led the team to six straight seasons of double-digit wins and a 2002 national championship, was removed.²¹⁴ Given their culture of concealment,²¹⁵ leaving college athletic departments to self-police potential ethical transgressions in NIL arrangements is unlikely to produce successful results either in substance or in appearance. And with its post-*Alston* NIL policy declaration, the increasingly toothless NCAA has all but ceded oversight to institutions and their respective state legislatures, leaving athletic programs to operate largely on the honor system.²¹⁶

212. See *infra* note 214.

213. Lynn Zinser, *Tressel Quits as N.C.A.A. Investigates Ohio State*, N.Y. TIMES (May 30, 2011), <https://www.nytimes.com/2011/05/31/sports/ncaafootball/jim-tressel-resigns-as-ohio-state-football-coach.html> [<https://perma.cc/7JUP-2ZFX>].

214. *Id.*; see also *supra* notes 107–108 and accompanying text (discussing ESPN’s ultimately unsuccessful attempt to use Ohio’s Public Records Act to obtain documents about the Tressel scandal from Ohio State). Ohio State is, of course, not alone. During 2020–21, *USA Today* published a series of scathing investigative reports about sexual misconduct by players and employees within the athletic department at Louisiana State University and the university’s sluggishness in taking corrective action. See Kenny Jacoby & Nancy Armour, *LSU Conspired to Cover Up Reports of Sexual Misconduct and Dating Violence, New LawsUIT Claims*, USA TODAY (Apr. 26, 2021), <https://www.usatoday.com/story/news/investigations/2021/04/26/l-su-conspired-cover-up-sexual-misconduct-seven-women-claim-suit/7381875002/> [<https://perma.cc/DW8Z-5ZQM>] (reporting that seven plaintiffs, including three former members of the LSU women’s tennis team, “accused the school of prioritizing its reputation and football program above their safety and welfare and for creating a ‘culture of silence’ where student victims were discouraged from and retaliated against for reporting Title IX offenses”). And the president of Michigan State lost her job—and, briefly, faced a criminal indictment—for failing to take decisive action or sound the alarm on rampant sexual abuse of gymnasts by a longtime MSU team physician, Larry Nassar. Wajeeda Kamal, *A Timeline of Nassar’s Abuse, Charges and Michigan State’s Response*, STATE NEWS (Jan. 26, 2021), <https://statenews.com/article/2021/01/a-timeline-of-nassars-abuse-charges-and-michigan-states-response> [<https://perma.cc/9HHC-552F>].

215. See, e.g., Rick Maese & Keith L. Alexander, *Report on Maryland Football Culture Cites Problems but Stops Short of ‘Toxic’ Label*, WASH. POST (Oct. 25, 2018), <https://www.washingtonpost.com/sports/2018/10/25/report-maryland-football-culture-cites-problems-stops-short-toxic-label/> [<https://perma.cc/G6JU-SBG8>] (reporting on investigation into heat death of Maryland football player following practice session, which concluded that Maryland’s coaches and athletic department fostered “a culture where problems festered because too many players feared speaking out,” even when coaches subjected them to physical and verbal abuse); see also Curt Devine, Drew Griffin & Majlie de Puy Kamp, *Six Former Wrestlers Say Rep. Jim Jordan Knew About Abusive OSU Doctor*, CNN (Mar. 6, 2020), <https://www.cnn.com/2020/03/06/politics/jordan-osu-wrestlers-strauss-invs/index.html> [<https://perma.cc/XJJ7-H5PH>] (reporting on lawsuits alleging Ohio State University coaches knew for over fifteen years that a team doctor was molesting members of the wrestling team during medical exams but covered up the abuse).

216. See Ehrlich & Ternes, *supra* note 71, at 48 (commenting that, after *Alston*, “it was of little surprise that even the NCAA . . . decided to largely cede regulatory authority locally to the schools and controlling states rather than risk further antitrust exposure”). State legislators, who are typically supportive of home-state colleges and their athletic programs, have little incentive to rigorously police abusive recruiting practices; to the contrary, they have every incentive to enact the most permissive NIL standards as a competitive strategy. See Fasciale, *supra* note 24, at 900 (predicting that NIL opportunities will worsen competitive imbalance among athletic programs without some centralized nationwide regulation: “Because student-athletes will be incentivized to attend schools in states with the best regulatory environment for the player, power schools in states with NIL laws will enjoy massive and unfair recruiting and transfer advantages, thereby increasing the imbalances between the larger and smaller markets.”).

But those who oppose disclosure are also likely to make public policy-based appeals. Some athletes may understandably be hesitant about letting it be known that they have come into significant money. For instance, one volleyball player told *The Washington Post* that her institution, the University of Nebraska, has a “strict code of ethics” against discussing how much athletes are making.²¹⁷ But athletes may benefit from disclosure, even if they find the limelight uncomfortable. If the terms of NIL agreements remain undisclosed, colleges can make fanciful recruiting promises about the ability to earn untold wealth without any means of fact checking.²¹⁸

Finally, there are interesting economic arguments about whether transparency would work for or against athletes’ favor. If it is widely known that the going rate for a member of the University of Alabama football team is X dollars, then that could become a ceiling that depresses athletes’ asking price. On the other hand, transparency also can expose inequities in the distribution of endorsement dollars and whether a handful of star athletes—particularly male athletes in the marquee sports of football and basketball—are soaking up a disproportionate share of NIL compensation.²¹⁹ By enacting Title IX,²²⁰ the 1972 federal antidiscrimination statute, Congress evidenced a strong public policy imperative in favor of gender equity in athletics.²²¹ If a college athletic department is disproportionately steering NIL deals to male athletes or investing disproportionate resources in marketing male athletes, Title IX could be implicated.²²² Women athletes have made great recent strides in obtaining compensation parity in the professional ranks.²²³ After decades of effort to narrow the equity gap through Title IX, it would be

217. Robert O’Connell, *For the College Athletes Who Aren’t Stars, Making Money off Their Image Is a Job*, WASH. POST (Sept. 7, 2021), <https://www.washingtonpost.com/sports/2021/09/07/nil-money-college-athletes-non-stars/> [<https://perma.cc/WVC8-K8DF>].

218. See Higgins, *supra* note 195 (predicting how colleges will use NIL riches as a recruiting inducement: “[N]othing is stopping them from boasting to recruits about the school’s collective’s pot of money or citing six-figure deals star players have struck.”).

219. See Michael H. LeRoy, *Harassment, Abuse, and Mistreatment in College Sports: Protecting Players Through Employment Laws*, 42 BERKELEY J. EMP. & LAB. L. 117, 161 (2021) (critiquing shortcomings of NIL system, which “merely extends large-scale income inequality from coaches and administrators to a handful of brand-savvy superstar college players”).

220. 20 U.S.C. §§ 1681–1688.

221. See Flint, *supra* note 179, at 165 (“Title IX is a broad mandate that directly responds to the marked inequities and exclusions women face in education settings.”).

222. See Alicia Jessop & Joe Sabin, *The Sky Is Not Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men’s Sport and Women’s Sport Athletes*, 31 J. LEGAL ASPECTS SPORT 253, 271 (2021) (“[I]f the athletics department secured greater endorsement compensation for one gender’s athletes over the other gender’s athletes, a violation of Title IX’s equal athletic benefits and opportunities standard could be triggered.”).

223. See Rachel Treisman, *The U.S. National Women’s Soccer Team Wins \$24 Million in Equal Pay Settlement*, NPR (Feb. 22, 2022), <https://www.npr.org/2022/02/22/1082272202/women-soccer-contracts-equal-pay-settlement-uswnt> [<https://perma.cc/U9NX-UCAG>] (reporting that U.S. Soccer Federation agreed to pay women’s team members on par with men’s team members in World Cup and other competitions to resolve a class action pay equity lawsuit); Peter Bodo, *Follow the Money: How the Pay Gap in Grand Slam Tennis Finally Closed*, ESPN (Sept. 6, 2018), https://www.espn.com/tennis/story/_id/24599816/us-open-follow-money-how-pay-gap-grand-slam-tennis-closed [<https://perma.cc/2EQF-SP4K>] (reporting that four major Grand Slam tennis tournaments agreed to award equal prize money to winners of men’s and women’s tournaments after decades of underpaying women).

regrettable if NIL reopens or even widens the gap.²²⁴ Without disclosure, there will be no reliable way of knowing.

CONCLUSION

Although athletes are increasingly taking ownership of their collective power,²²⁵ the imbalance between students and institutions remains formidable. A scholarship athlete relies on college not just for an education but for food, shelter, and medical care.²²⁶ Colleges routinely cut off athletes from their best whistleblowing avenues by forbidding them from speaking to the press and rigidly controlling their use of social media.²²⁷ We saw this imbalance play out during the height of the COVID-19 pandemic that swept the United States beginning in March 2020, when athletes were widely required to come back to campus in-person while their classmates had the safer option of learning from home.²²⁸ While some athletes did speak out about safety concerns,²²⁹ the games largely went on, with the players as COVID-19 guinea pigs for the rest of the student body.²³⁰

224. See Erica Hunzinger, *'It's a Man's World': Male Athletes Leading Way in NIL Money*, ASSOCIATED PRESS (Jan. 27, 2022), <https://apnews.com/article/entertainment-sports-business-washington-volleyball-83b597ad309c74e224faa030665a016b> [<https://perma.cc/FC5T-FAH7>] (citing data gathered by private platforms that track NIL deals, which show that male athletes accounted for fifty-nine percent of reported NIL agreements and more than sixty-seven percent of endorsement dollars as of year-end 2021); see also Flint, *supra* note 179, at 172–73 (commenting that, although NIL may work to the benefit of women because of their relatively greater proficiency at building social media followings, “NIL critics worry that male athletes will vastly outpace women athletes, only furthering pay inequality”).

225. Sean Gregory, *College Athletes Are Realizing Their Power amid the George Floyd Protests and COVID-19*, TIME (June 18, 2020), <https://time.com/5855471/college-athletes-covid-19-protests-racial-equality/> [<https://perma.cc/Z95V-XTCT>].

226. See Mary Kate McCoy, *Survey: Nearly a Quarter of Division I Athletes Face Food Insecurity*, WIS. PUB. RADIO (May 6, 2020), <https://www.wpr.org/survey-nearly-quarter-division-i-athletes-face-food-insecurity> [<https://perma.cc/6V9E-DGR4>].

227. See Frank D. LoMonte & Virginia Hamrick, *Running the Full-Court Press: How College Athletic Departments Unlawfully Restrict Athletes' Rights to Speak to the News Media*, 99 NEB. L. REV. 86, 130 (2020) (“If athletes can neither speak to journalists without supervisory consent, nor use the alternative platform of social media, then an athlete has no unfiltered opportunity to share a message or exchange ideas with a public audience.”).

228. See Michael Rosenberg, *It Took a Pandemic To See the Distorted State of College Sports*, SPORTS ILLUSTRATED (Dec. 29, 2020), <https://www.si.com/college/2020/12/29/global-pandemic-exposed-ncaa-inc> [<https://perma.cc/3RQQ-DZUX>] (commenting that major college athletic powers, including UCLA and North Carolina, largely canceled face-to-face classes during the fall of 2020 because of the coronavirus pandemic yet required athletes to show up and play anyway); see also Agnatovech, *supra* note 35, at 242 (“The push to bring back college football during the COVID-19 pandemic has led numerous athletes to believe that it’s because both their university and the NCAA are losing money resulting in student-athletes being exploited by the NCAA’s amateurism rules once again.”).

229. See Josh Peter & Tom Schad, *From #WeAreUnited to COVID-19 Whistleblowing, College Athletes Are Raising Their Voices Like Rarely Before*, USA TODAY (Aug. 6, 2020), <https://www.usatoday.com/story/sports/ncaaf/2020/08/06/weareunited-covid-19-whistleblowing-college-athletes-speak-out/3299442001/> [<https://perma.cc/883Z-XB47>] (“[F]ootball players have spoken out about what they describe as lax or unenforced COVID-19 safety protocols, alleging disinterest or negligence from coaching staffs.”).

230. See LeRoy, *supra* note 219, at 162–63 (stating that some universities required athletes to sign COVID-19 liability waivers holding the institution harmless if they contracted the virus while participating in sports).

Several parties have a stake in each NIL transaction: the athlete, the sponsored corporation, the college, and the athlete's agent, if applicable. The latter three are all motivated by self-interests that do not necessarily align with the interests of the student (i.e., maximizing their own earnings, protecting their own reputations).²³¹ Without a disinterested advocate, athletes understandably may feel outgunned and fearful of being taken advantage of. As one track-and-field athlete told the sports statistics blog *FiveThirtyEight*, "I'm sure there's plenty of athletes who are business marketing majors, but I don't know what deals to not do. . . . In the end, it's like, we're not being told that we're basically being taken advantage of. There's really not a lot of guidance."²³² Notably, colleges and the NCAA have prioritized colleges' ability to block NIL contracts that conflict with their own financial interests.²³³ However, these colleges and the NCAA have not said anything about rejecting deals that are disadvantageous for the students. And even if their NIL agreements are vetoed without just cause, athletes are highly unlikely to sue their own colleges for obvious reasons. Suing puts the athlete into an adversarial relationship with the coaches who control playing time. It will rarely produce rapid, meaningful results for an athlete with limited years of competitive eligibility. Hence, public disclosure is the best hope of ameliorating the power imbalance.²³⁴ Public scrutiny can serve as a check on unfair or exploitative practices by corporate sponsors or censorious abuse of veto power by colleges.

Moreover, now that the post-*Alston* NCAA has largely ceded NIL standard setting to state legislatures, the traditional check of NCAA oversight has become less meaningful.²³⁵ The NCAA's abdication portends something of a perfect storm for potential corruption: vast new sums of money pouring into athletics, with no centralized oversight by any regulatory entity.²³⁶ If the public is not keeping watch, it is legitimate to ask, is anyone?

231. See Fasciale, *supra* note 24, at 901 (observing that the current regime of state NIL statutes does not adequately protect the interests of athletes: "Based on the differences in payment structures, effective dates, legal rights, requirements regarding financial literacy, and ill-defined provisions within each passed and proposed state bill, the welfare of student-athletes will not be uniformly protected.").

232. Josh Planos, *College Athletes Suffered When Schools Weren't Ready For NIL*, FIVETHIRTYEIGHT (June 30, 2022) (omission in original), <https://fivethirtyeight.com/features/college-athletes-suffered-when-schools-werent-ready-for-nil/> [<https://perma.cc/CBL5-CAVU>]. An attorney who advises athletes in Florida told *FiveThirtyEight* that he had reviewed some one hundred proposed contracts and did not advise his clients to sign a single one, finding them exploitative. See *id.* Given that insight, one can only wonder what types of agreements that athletes who do *not* have the benefit of advice from legal counsel may be signing.

233. See *infra* notes 70–72 and accompanying text.

234. See Schwarz, *supra* note 92, at 829 ("FERPA is designed to protect students, not the integrity of academic institutions. The role of state freedom of information acts further enforces this policy by compelling universities to disclose, regardless of the secondary impacts on the academic institution's finances or reputation.").

235. See Higgins, *supra* note 195 (stating that, although booster collectives have been growing explosively, "the NCAA has been loath to regulate this aspect of college athletes cashing in. The association has flagged a handful of deals, including one in which a nutrition bar company offered to endorse all walk-ons on Brigham Young's football team. But the NCAA hasn't doled out punishment for flouting the rules, which are so vague that it's hard to prove anything is illegal.").

236. See Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows To Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting> [<https://perma.cc/K9P3-M3F4>] ("[H]igh-level boosters

Now that state legislatures have begun enacting FOI carve-outs for endorsement agreements,²³⁷ legislators predictably will feel competitive pressure for their states to follow suit. There is already precedent for this in Georgia, where the University of Georgia's head football coach secured special legislative dispensation for college athletic departments to wait months before answering FOI requests, arguing that it would help Georgia compete against less transparent college athletic departments.²³⁸

Before joining the race to the bottom of transparency, state policymakers should carefully consider the risks of secrecy. Indeed, rather than concealing all NIL records from public scrutiny, as Connecticut, Kentucky and Louisiana have done,²³⁹ state and federal lawmakers should instead consider requiring transparency of *all* institutions, public and private. Then private colleges cannot strategically leverage their status as nongovernmental entities for competitive advantage.²⁴⁰ There is already precedent in the Federal Equity in Athletics Disclosure Act,²⁴¹ an adjunct to Title IX, which requires detailed disclosures about athletic spending from all institutions that receive federal money, public and private alike.²⁴²

We have repeatedly seen how secrecy contributes to abusive and exploitative conditions within college athletic programs, sometimes putting athletes' physical safety at risk and allowing wrongdoing to fester.²⁴³ The legal system has proven to be an inadequate recourse for protecting athletes' interests, in no small measure because colleges have made sure that athletes are denied the benefit of employment laws.²⁴⁴ The intimidating power imbalance between students and college athletic departments that still prevails in college athletics discourages athletes from speaking up and advocating for

are privately or publicly using name, image and likeness deals to bankroll their teams, attempting to outbid one another for talent and creating a new arms race in college sports. . . . [T]hese savvy and wealthy businesspeople are skirting vague NCAA guidelines that govern athlete compensation, many protected by their own state laws, with legislation in some areas being rewritten to further empower such behavior.”).

237. See *supra* notes 56–66 and accompanying text.

238. See Barry Petchesky, “Kirby’s Law” Will Make It Harder To Report on Georgia Athletics, DEADSPIN (Apr. 12, 2016), <https://deadspin.com/kirbys-law-will-make-it-harder-to-report-on-georgia-a-1770500372> [<https://perma.cc/GH57-GY8Q>] (reporting that Georgia governor signed FOI amendment that Bulldogs’ head football coach Kirby Smart had lobbied for).

239. See *supra* notes 56–61 and accompanying text.

240. See *A.H. Belo Corp. v. S. Methodist Univ.*, 734 S.W.2d 720, 723 (Tex. Ct. App. 1987) (refusing to compel athletic departments of private universities to comply with newspaper’s request for records under Texas Public Information Act, because private universities are not governmental bodies).

241. 20 U.S.C. § 1092.

242. *Id.* § 1092(g). It is also worth noting that the FERPA statute, including its affirmative disclosure requirements, applies equally to private as well as public institutions, as long as the private institution accepts any federal financial support. See 20 U.S.C. § 1232g(a)(3); 34 C.F.R. § 99.1(a)(1)–(2) (2000).

243. See LeRoy, *supra* note 219, at 142–44 (describing 2007 case of University of Iowa athlete who accused an Iowa football player of sexually assaulting her, but faced pressure to resolve the dispute internally within the athletic program, which an after-the-fact investigation concluded was “consistent with a culture of lack of transparency” within the university administration (internal quotation marks omitted)).

244. See *id.* at 159 (asserting, after study of dozens of unsuccessful attempts by athletes to hold college athletic programs liable through the judicial process, that “discrimination and negligence laws do not adequately protect NCAA players who are harassed, abused, and mistreated. With infrequent legal consequences, campus leaders have tolerated, acquiesced, and resigned themselves to an athletic culture that protects players and coaches who injure others.”); see also Fasciale, *supra* note 24, at 928 (commenting that courts have generally taken a hands-off approach to the management of sports, leaving sports leagues largely to police themselves).

their own interests. When vulnerable people are placed in potentially exploitative situations, the need for public oversight is at its highest. If the NIL experiment produces unfair or anticompetitive results, public pressure on state legislatures and Congress is the only realistic means of reform.