

# Stars on the Field, Benchwarmers on the Tax Return: Student-Athletes and the Tax Ramifications of Name, Image, and Likeness Deals

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*“The hardest thing in the world to understand is the income tax.”*

-Albert Einstein<sup>1</sup>

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<sup>1</sup> Francine J. Lipman, Pro Bono Matters: “*The Hardest Thing in the World to Understand is the Income Tax*,” A.B.A. SEC. TAX’N NEWSQUARTERLY 9 (Jan. 16, 2013), [http://www.americanbar.org/content/dam/aba/publishing/aba\\_tax\\_times/13win/06-pbm.pdf](http://www.americanbar.org/content/dam/aba/publishing/aba_tax_times/13win/06-pbm.pdf) [<http://perma.cc/254H-2HUV>].

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#### INTRODUCTION

Ben has trained his whole life for this moment. The January sun is glaring down on the Indianapolis football field for the 2023 College Football Playoff National Championship. There are 24 seconds left on the clock, and Ben's team is five points behind. They have worked so hard to get to this point in the season, and they cannot give it up now. The center snaps the ball to Ben, who drops back into the pocket while surveying the field, frantically searching for an open receiver. Everyone is covered, so he is forced to roll out of the pocket and make the play with his legs. As he nears the line of scrimmage, a wide receiver breaks away from the defensive back. With no time to think, Ben lays the ball out deep down the field. Miraculously, the wide receiver hauls in the pass, scoring the game-winning touchdown with only 6 seconds left on the clock. Ben simply cannot believe it; all his dreams are coming true! He and his teammates are National Champions! The crowd is roaring, the team is ecstatic, and Ben is having the best day of his life!

Over the next few days, Ben sees his face all over Adidas's Instagram. He had completed an exhausting photoshoot for the company before the championship game, so there was plenty of material to work with pursuant to his name, image, and likeness ("NIL") deal. Ben's contract with Adidas was the biggest NIL deal to date for a college player. It was a four-year commitment which, barring material adverse events, promised him a minimum of eight million dollars over the deal term. But the benefits certainly did not come without costs, burdens, and risks. Ben has never had to file a tax return before. In fact, he has never even seen an IRS Form 1040. However, now he has the overwhelming burden of submitting both federal and state tax returns (having no idea what proper tax compliance entails), while also prioritizing academics, attending football practice, performing well at games, and holding up his end of a multi-million dollar deal with Adidas.

Ben's financially gratifying situation is now the sobering reality for many student-athletes at colleges around the country. Recent common law and statutory changes have paved the way for student-athletes to earn compensation from their NIL deals.<sup>2</sup> Such revolutionary progress regarding student-athlete rights does not, however, come without ramifications.<sup>3</sup> Taxes are a necessary evil.<sup>4</sup> Everyone must pay their fair share, but filing timely and accurate tax returns can be difficult.<sup>5</sup> Even if a student-athlete (fresh out of high school) has managed to secure a lucrative NIL deal, they may have never faced the daunting challenge of filing a complicated tax return. Moreover, such individuals have both federal and state-level tax hurdles to clear.

This Article addresses the increased complexity and heightened tax-compliance requirements stemming from student-athletes' newfound freedom to receive education-related benefits from universities and NIL payments from third parties. These student-athletes are too young and inexperienced to independently maneuver the intricacies surrounding these tax implications. As such, a solution must be found to prevent the student-athletes from unnecessary burdens and unforeseen

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<sup>2</sup> See, e.g., Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (Kavanaugh, J., concurring) (discussing how the NCAA's limitation of student-athletes' income is generally a violation of antitrust law); S. 206, 2019-2020 Leg., Reg. Sess. (Cal. 2019).

<sup>3</sup> See *infra* Parts III & IV.

<sup>4</sup> See *Compania Gen. De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting) ("Taxes are what we pay for civilized society."); see also *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937) ("Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government.").

<sup>5</sup> See Lipman, *supra* note 1, at 1.

penalties. Part I discusses the background of the pay-for-play debate in college athletics and how the *NCAA v. Alston*<sup>6</sup> decision changed the face of college sports.<sup>7</sup> Part II walks through important aspects of federal taxes that student-athletes must consider in light of their newfound financial freedom stemming from the *NCAA v. Alston* decision.<sup>8</sup> Part III follows with provides a similar discussion regarding state taxes.<sup>9</sup> The federal and state obligations of student-athletes, who are young, inexperienced taxpayers, will be highly burdensome and immensely complicated.<sup>10</sup> Part IV sets forth recommendations to help student-athletes navigate the tax ramifications of their income stemming from NIL deals.<sup>11</sup>

## I. A BRIEF BACKGROUND OF COLLEGE ATHLETICS AND THE RESTRICTIONS ON PAYMENTS TO STUDENT-ATHLETES

### A. History of College Athletics and the Pay-for-Play Debate

Before intercollegiate sports existed, college students would participate in elaborate and violent intramural contests, called “class rushes.”<sup>12</sup> These informal contests eventually gained some organization, and students started competing against other schools.<sup>13</sup> The first intercollegiate competition was a boat race between Harvard and Yale in 1852.<sup>14</sup> The event was sponsored by a railroad superintendent who provided the competitors “an all-expenses-paid vacation with lavish prizes—along with unlimited alcohol.”<sup>15</sup> College sports at this time were still unregulated and

<sup>6</sup> *Alston*, 141 S. Ct. at 2141.

<sup>7</sup> See *infra* Part I.

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See *infra* Part III.

<sup>10</sup> See *infra* Parts II–III.

<sup>11</sup> See *infra* Part IV.

<sup>12</sup> See John R. Thelin & Jason R. Edwards, *College Athletics: History of Athletics in U.S. Colleges and Universities*, STATEUNIVERSITY.COM, <http://education.stateuniversity.com/pages/1846/college-athletics-history-athletics-in-u-s-colleges-universities.html> [<http://perma.cc/YT2F-9SCF>] (last visited Apr. 24, 2022).

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*; see also Nat’l Collegiate Athletic Ass’n v. *Alston*, 141 S. Ct. 2141, 2148 (2021) (citing THOMAS C. MENDENHALL, *THE HARVARD YALE BOAT RACE 1852–1924: AND THE COMING OF SPORT TO THE AMERICAN COLLEGE* 15–16 (1993)).

<sup>15</sup> See *Alston*, 141 S. Ct. at 2148 (first citing ANDREW ZIMBALIST, *UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS* 6–7 (1999); then citing Steve Rushin, *Inside the Moat Behind the Forbidding Façade of NCAA Headquarters, the Very People Who Enforce the Organization’s Rigid Rules Also Questions its Godlike Powers and Ultimate Mission*, SPORTS ILLUSTRATED, Mar. 3, 1997, <http://vault.si.com/vault/1997/03/03/inside-the-moat-behind-the-forbidding-facade-of-ncaa-headquarters-the-very-people-who-enforce-the-organizations-rigid-rules-also-question-its-godlike-powers-and-ultimate-mission> [<http://perma.cc/N252-A8T2>]).

extremely violent.<sup>16</sup> For example, the rules for football allowed anything.<sup>17</sup> Offensive players could pick up and throw other players into the endzone to score a touchdown, and defensive players could throw their backs at the offensive players to prevent them from scoring.<sup>18</sup> Because of the lack of rules and protective equipment, between 1880 and 1905, football caused 330 deaths and 1,149 serious injuries.<sup>19</sup> These statistics reflect an average of 13 deaths and 45 serious injuries per year.

By 1896, a few midwestern universities formed the Western Conference (now known as the Big Ten Conference).<sup>20</sup> By 1905, as a direct response to the immense dangers of college football, President Theodore Roosevelt summoned thirteen coaches and administrators and gave them a choice to either “[r]eform football’s rules or abolish the game.”<sup>21</sup> Despite President Roosevelt’s ultimatum, they failed to act, and six weeks later, another college football fatality occurred.<sup>22</sup> This incident motivated the coaches and college administrators to take action, and they created the Intercollegiate Athletic Association of the United States (“IAAUS”) to regulate college athletics.<sup>23</sup> By its second meeting in 1906, the IAAUS created rules that revolutionized college football.<sup>24</sup> The IAAUS “adopted the forward pass, established the one-yard neutral zone, cut game time from 70 to 60 minutes, required six men on the offensive line, and mandated a 10-yard gain (instead of the previous five) for a first down.”<sup>25</sup> The original by-laws included a provision recommending that “[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or

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<sup>16</sup> See Steve Rushin, *Inside the Moat Behind the Forbidding Façade of NCAA Headquarters, the Very People Who Enforce the Organization’s Rigid Rules Also Questions its Godlike Powers and Ultimate Mission*, SPORTS ILLUSTRATED (Mar. 3, 1997), <http://vault.si.com/vault/1997/03/03/inside-the-moat-behind-the-forbidding-facade-of-ncaa-headquarters-the-very-people-who-enforce-the-organizations-rigid-rules-also-question-its-godlike-powers-and-ultimate-mission> [<http://perma.cc/N252-A8T2>].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See Thelin & Edwards, *supra* note 12; see also *Big Ten History*, BIG TEN CONF., <http://bigten.org/sports/2018/6/6/trads-big10-trads-html.aspx> [<http://perma.cc/5E2X-M8WM>] (last updated July 2020).

<sup>21</sup> See Rushin, *supra* note 16.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> *Id.*

receives . . . any money.”<sup>26</sup> By 1911, the IAAUS changed its name to the National Collegiate Athletic Association (“NCAA”).<sup>27</sup>

Despite the NCAA’s recommendation against compensating student-athletes, many colleges were still using money to induce players to join their collegiate sporting programs.<sup>28</sup> As more conferences began to develop, the Southeastern Conference (“SEC”) and the Big Ten Conference (“Big Ten”) started to compete for national dominance.<sup>29</sup> The SEC was recruiting student-athletes by promising them large monetary benefits.<sup>30</sup> The Big Ten attempted to end the bidding war on student-athletes and maintain a competitive balance among universities. To accomplish this goal the Big Ten members lobbied college coaches and athletic directors, arguing that they should expand the NCAA’s power and protect the principle of amateurism within college football.<sup>31</sup> Simultaneously, concerns arose that these student-athletes could be viewed as employees, subjecting universities to labor rules concerning wages, overtime, and workers’ compensation.<sup>32</sup> As a result, the NCAA promulgated “The Principle of Amateurism.”<sup>33</sup> According to this principle, “[s]tudent-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.”<sup>34</sup>

Today, the NCAA is made up of 1,117 schools which are organized into 40 conferences and 3 divisions.<sup>35</sup> Division I is comprised of the most competitive and rigorous colleg athletic programs.<sup>36</sup> These Division I athletics programs traditionally have higher budgets than other programs.<sup>37</sup> Within Division I, there are

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<sup>26</sup> See *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2148 (2021) (citing *Intercollegiate Athletic Association of the United States Constitution By-Laws*, Art. VII, § 3 (1906)).

<sup>27</sup> See Rushin, *supra* note 16; see also Khadrice Rollins, *What Does NCAA Stand For?*, SPORTS ILLUSTRATED (Mar. 15, 2018), <http://www.si.com/college/2018/03/15/what-does-ncaa-stand-for-march-madness-tournament> [<http://perma.cc/PMH5-AYNV>].

<sup>28</sup> See *Alston*, 141 S. Ct. at 2149; see also Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL’Y REV. 181, 190 (2017). Student-athletes were being paid so much that, in the 1940s, Hugh McElhenny took a cut in salary when he switched from college to professional football. See *Alston*, 141 S. Ct. at 2149.

<sup>29</sup> See Crabb, *supra* note 28.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 190, 193.

<sup>32</sup> See *id.* at 191.

<sup>33</sup> *Id.*; see also NCAA, 2021-22 NCAA DIVISION I MANUAL 3 (2021) [hereinafter NCAA DIVISION I MANUAL], [http://auburntigers.com/documents/2021/8/2/2021\\_22\\_NCAA\\_Division\\_I\\_Manual.pdf](http://auburntigers.com/documents/2021/8/2/2021_22_NCAA_Division_I_Manual.pdf) [<http://perma.cc/P7HH-8XWB>].

<sup>34</sup> See NCAA DIVISION I MANUAL, *supra* note 33.

<sup>35</sup> See Rollins, *supra* note 27.

<sup>36</sup> See *United States v. Gatto*, 295 F. Supp. 3d 336, 339 (S.D.N.Y. 2018).

<sup>37</sup> *Id.*

subdivisions, with the Football Bowl Subdivision (“FBS”) being the highest caliber and most prominent subdivision.<sup>38</sup>

Historically, the NCAA has created a reputation of “play[ing] a critical role in the maintenance of a revered tradition of amateurism in college sports.”<sup>39</sup> Student-athletes lose their eligibility to compete in college athletics governed by the NCAA if they lose their amateur status.<sup>40</sup> Students have lost their eligibility by making videos that were reposted on ESPN and by making money on videos they posted on YouTube.<sup>41</sup> Injured players have been unable to obtain worker’s compensation because they were not *employees* of the university when they were injured.<sup>42</sup>

Per the NCAA Division I Manual, student-athletes could earn compensation for actual work performed at a job if that pay was commensurable to the usual pay rate for the job performed, but they could not use their name, image, and likeness for promotion.<sup>43</sup> The only money a college or university may give to student-athletes must be in the form of a scholarship.<sup>44</sup> These scholarships must be limited to the cost of tuition, required institutional fees, the cost of room and board, course-related books, and other expenses related to attendance, up to the cost of attendance.<sup>45</sup> The

<sup>38</sup> See Patrick Pinak, *College Football Trivia: What Does ‘FBS’ and ‘FCS’ Actually Mean?*, FANBUZZ (July 29, 2022, 12:00 PM), <http://fanbuzz.com/college-football/what-does-fbs-stand-for/> [<http://perma.cc/3HQS-68EC>].

<sup>39</sup> Nat’l Collegiate Athletics Ass’n v. Bd. of Regents, 468 U.S. 85, 120 (1984) (White, J., dissenting).

<sup>40</sup> See NCAA DIVISION I MANUAL, *supra* note 33, at 63 (“An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual . . . [u]ses athletics skill (directly or indirectly) for pay in any form in that sport . . .”).

<sup>41</sup> See Rebecca Crockett, *A Kansas City Teen Putts Around and Builds a YouTube Career*, AUDACY (Oct. 28, 2019, 2:00 AM), <http://www.audacy.com/kmbz/articles/kansas-city-teen-turns-trick-shots-youtube-career> [<http://perma.cc/57EH-TL29>] (explaining that golfer, Garrett Clark lost his NCAA eligibility because ESPN made money off his likeness when they reposted a video of him making a trick shot); *see also* Chuck Schilken, *Central Florida Kicker Donald De La Haye Loses his NCAA Eligibility Because of his YouTube Videos*, L.A. TIMES (Aug. 1, 2017, 8:40 AM), <http://www.latimes.com/sports/more/la-sp-ucf-kicker-ineligible-youtube-20170801-story.html> [<http://perma.cc/D52X-PSNZ>] (describing how after two seasons as a kickoff specialist for the University of Central Florida, De La Haye, who has over 95,500 YouTube subscribers, lost his NCAA eligibility because he made money off some YouTube videos and refused to accept the conditions of the NCAA’s waiver). *But cf.* @InsidetheNCAA, TWITTER (July 31, 2017, 1:40 PM), <http://twitter.com/InsidetheNCAA/status/892122868355657728> [<http://perma.cc/FS8M-Q9D5>] (claiming that De La Haye would not have lost his NCAA eligibility if he had separated athletically-related videos from non-athletic videos and only monetized on his non-athletic videos).

<sup>42</sup> *See, e.g.*, Graczyk v. Workers’ Comp. Appeals Bd., 229 Cal. Rptr. 494, 496–97 (Cal. Ct. App. 1986). *But see* Univ. of Denver v. Nemeth, 257 P.2d 423, 424–27, 430 (Colo. 1953).

<sup>43</sup> See NCAA DIVISION I MANUAL, *supra* note 33, at 193.

<sup>44</sup> *See id.* at 189–91.

<sup>45</sup> *See id.*

only third parties from which student-athletes may receive money are their parents/guardians and certain financial aid programs.<sup>46</sup> The NCAA has traditionally opined against and prohibited payments to student-athletes for their NIL as a part of their commitment to the principle of amateurism.<sup>47</sup> In general, the NCAA has traditionally set strict limitations on any money that student-athletes may receive and refused to allow a pay-for-play model within college athletics.<sup>48</sup>

## B. Challenges to the Traditional Reluctance to Allow Student-Athletes to Receive Pay

Recently, scholars have argued that student-athletes are employees, regardless of the language used by the NCAA.<sup>49</sup> Furthermore, courts and legislatures have begun reinstating student-athletes' rights to receive compensation.<sup>50</sup> Even the NCAA has "admitted that restrictions on student-athlete compensation should be loosened or eradicated."<sup>51</sup>

### 1. State Legislation

California became the first state to enact legislation allowing student-athletes to profit from their NIL when it passed the Senate Bill, "Collegiate athletics: student athlete compensation and representation," commonly referred to as the Fair Pay to Play Act ("FPTPA").<sup>52</sup> The FPTPA prohibited colleges, universities, athletics associations, conferences, and the NCAA from preventing student-athletes from earning compensation from their NIL.<sup>53</sup> The FPTPA's text as originally introduced made clear that profiting off

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<sup>46</sup> See *id.* at 192.

<sup>47</sup> See Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2151–52 (2021) ("The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports."). But see Steve Berkowitz, *Oliver Luck Brings Own Perspective to NCAA on O'Bannon Name and Likeness Issue*, USA TODAY SPORTS (Jan. 16, 2015, 6:05 PM), <http://www.usatoday.com/story/sports/college/2015/01/16/ncaa-convention-oliver-luck-obannon-name-and-likeness-court-case/21873331/> [<http://perma.cc/8YKW-KNUJ>] (noting that NCAA executive Oliver Luck's view in support of NIL payments is contrary to that of the NCAA).

<sup>48</sup> See Nat'l Collegiate Athletics Ass'n v. Bd. Of Regents, 468 U.S. 85, 102 (1984).

<sup>49</sup> See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 *passim* (2006) (arguing that student-athletes are employees under the National Labor Relations Act).

<sup>50</sup> See, e.g., S. 206, 2019-2020 Leg., Reg. Sess. (Cal. 2019); *Alston*, 141 S. Ct. at 2151–52.

<sup>51</sup> Grant House v. Nat'l Collegiate Athletic Ass'n, 545 F. Supp 3d 804, 814 (N.D. Cal. 2021).

<sup>52</sup> See S. 206, 2019-2020 Leg., Reg. Sess. (Cal. 2019); see also Paul McDonnell, *California's Fair Pay to Play Act and its Fight Against the Commerce Clause*, 39 J.L. & COM. 75, 75–76 (2020) ("California Senate Bill 206, more aptly referred to as the Fair Pay to Play Act, has sent shockwaves through the intercollegiate athletic community.").

<sup>53</sup> See S. 206, 2019-2020 Leg., Reg. Sess. § 2(a)(1)–(2) (Cal. 2019).



their NIL “shall not affect [a] student’s scholarship eligibility.”<sup>54</sup> This originally introduced text of the FPTPA also included some statistics from a study explaining why student-athletes should be able to receive money for their NIL.<sup>55</sup> For example, eighty-two percent of student-athletes living on campus and ninety percent of student-athletes living off campus were living below the poverty level during the 2010-2011 academic year.<sup>56</sup> In comparison, the coaches for those student-athletes made \$3,500,000 that same year.<sup>57</sup> The Act also included an estimation from a study finding that from 2011 to 2015, Division I FBS men’s football and basketball players forfeited \$6,200,000,000 of potential earnings.<sup>58</sup> California has 24 of the 254 Division I football teams, including 7 which are part of the Division I FBS.<sup>59</sup> Therefore, a large portion of the harm to student-athletes—who miss out on profiting from their NIL—occurs in California.<sup>60</sup>

The NCAA responded to the FPTPA by claiming that it would “erase the critical distinction between college and professional athletics” and upend the balance of maintaining an even playing

<sup>54</sup> See S. 206, 2019-2020 Leg., Reg. Sess. § 2(a)(1)–(2) (Cal. 2019) (as introduced by Senate, Feb. 4, 2019).

<sup>55</sup> See S. 206, 2019-2020 Leg., Reg. Sess. § 1 (Cal. 2019) (as introduced by Senate, Feb. 4, 2019) (citing RAMOGI HUMA & ELLEN J. STAUROWSKY, *THE \$6 BILLION HEIST: ROBBING COLLEGE ATHLETES UNDER THE GUISE OF AMATEURISM* (2012), [http://assets.usw.org/ncpa/pdfs/6-Billion-Heist-Study\\_Full.pdf](http://assets.usw.org/ncpa/pdfs/6-Billion-Heist-Study_Full.pdf) [<http://perma.cc/Y2N4-LV7K>]).

<sup>56</sup> See S. 206, 2019-2020 Leg., Reg. Sess. § 1(a)(2) (Cal. 2019) (as introduced by Senate, Feb. 4, 2019) (citing RAMOGI HUMA & ELLEN J. STAUROWSKY, *THE \$6 BILLION HEIST: ROBBING COLLEGE ATHLETES UNDER THE GUISE OF AMATEURISM* 12 (2012), [http://assets.usw.org/ncpa/pdfs/6-Billion-Heist-Study\\_Full.pdf](http://assets.usw.org/ncpa/pdfs/6-Billion-Heist-Study_Full.pdf) [<http://perma.cc/Y2N4-LV7K>]).

<sup>57</sup> See S. 206, 2019-2020 Leg., Reg. Sess. § 1(a)(4) (Cal. 2019) (as introduced by Senate, Feb. 4, 2019). The coaches are not the only people profiting off the student-athletes:

Those who run this enterprise profit in a different way than the student-athletes whose activities they oversee. The president of the NCAA earns nearly \$4 million per year. Commissioners of the top conferences take home between \$2 to \$5 million. College athletic directors average more than \$1 million annually. And annual salaries for top Division I college football coaches approach \$11 million, with some of their assistants making more than \$2.5 million.

Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2151 (2021) (quoting Brief for Players Ass’n of the Nat’l Football League et al. as Amici Curiae Supporting Respondents at 17–18, Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512)).

<sup>58</sup> See S. 206, 2019-2020 Leg., Reg. Sess. § 1(a)(6) (Cal. 2019) (as introduced by Senate, Feb. 4, 2019) (citing RAMOGI HUMA & ELLEN J. STAUROWSKY, *THE \$6 BILLION HEIST: ROBBING COLLEGE ATHLETES UNDER THE GUISE OF AMATEURISM* 12 (2012), [http://assets.usw.org/ncpa/pdfs/6-Billion-Heist-Study\\_Full.pdf](http://assets.usw.org/ncpa/pdfs/6-Billion-Heist-Study_Full.pdf) [<http://perma.cc/Y2N4-LV7K>]).

<sup>59</sup> See S. 206, 2019-2020 Leg., Reg. Sess. § 1(a)(7) (Cal. 2019) (as introduced by Senate, Feb. 4, 2019); Dave Manuel, *There Are 834 College Football Teams in the United States as of this Moment*, SportsKing.com (June 12, 2022, 5:45 PM), <http://www.sports-king.com/how-many-college-football-teams-3338/> [<http://perma.cc/DEE6-JNXP>].

<sup>60</sup> See S. 206, 2019-2020 Leg., Reg. Sess. § 1(a)(7) (Cal. 2019) (as introduced by Senate, Feb. 4, 2019).

field across the nation.<sup>61</sup> The NCAA clarified that it was working on creating a fair way for student-athletes to use their NIL to make income, but that it would not allow for a pay-for-play model, reiterating that “[t]he NCAA has consistently stood by its belief that student-athletes are students first, and they should not be employees of the university.”<sup>62</sup> The NCAA urged California to reconsider the “harmful” and “unconstitutional” bill.<sup>63</sup>

After California’s FPTPA was enacted, many states followed closely behind.<sup>64</sup> As of March 2021, thirty-five states had introduced NIL legislation, six of which had already been passed.<sup>65</sup>

## 2. *NCAA v. Alston*

On June 21, 2021, a case was heard by the Supreme Court of the United States that changed the game of paying student-athletes. In *NCAA v. Alston*, current and former Division I FBS football and men’s and women’s Division I basketball student-athletes asserted a class action against the NCAA and eleven Division I Conferences, claiming that the NCAA’s limits on student-athletes’ compensation violated federal antitrust law.<sup>66</sup> The *Alston* class argued that the NCAA held a monopsony over intercollegiate athletics because it used its power to restrict student-athletes’ pay below the market level.<sup>67</sup> In response, the NCAA argued that limiting student-athlete income preserved the brand of amateurism upon which the NCAA was built.<sup>68</sup> The district court held that the NCAA could not limit payments for education-related expenses.<sup>69</sup> In reaching this decision, the district court highlighted the ambiguity of the concept of amateurism in intercollegiate sports.<sup>70</sup> After multiple appeals, the Supreme Court

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<sup>61</sup> See *NCAA Responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM), <http://www.ncaa.org/news/2019/9/11/ncaa-responds-to-california-senate-bill-206.aspx> [<http://perma.cc/62D6-M8BS>].

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See Kathryn Kisska-Schulze & Adam Epstein, *Changing the Face of College Sports One Tax Return at a Time*, 73 OKLA. L. REV. 457, 461 (2021) [hereinafter *Changing the Face of College Sports*] (“California’s law has resulted in cascading legislation across multiple U.S. jurisdictions.”).

<sup>65</sup> See *id.* at 461, 473–76 (listing the status of all existing state NIL legislation and the status of such legislation as of March 7, 2021). The six states that already had NIL statutes at this point were California, Colorado, Florida, Michigan, Nebraska, and New Jersey. See *id.* at 473–76.

<sup>66</sup> See *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2151 (2021).

<sup>67</sup> See *id.* at 2152; see also *id.* at 2154 (defining monopsony as a monopoly on the buyer’s side of the market).

<sup>68</sup> See *id.* at 2152.

<sup>69</sup> See *id.* at 2153.

<sup>70</sup> See *id.* at 2152; cf. Oral Argument at 00:15, *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141 (2021) (No. 20-512), <http://www.oyez.org/cases/2020/20-512> (“[T]he distinct character of college sports has been that it’s played by students who are amateurs which is to say they are not paid for their play.”).

of the United States granted certiorari and affirmed the district court's judgment that the NCAA's limits on education-related benefits violated antitrust law.<sup>71</sup> The Supreme Court entered a unanimous decision against the NCAA and thereby allowed student-athletes to receive education-related benefits.<sup>72</sup>

In reaching this decision, the Supreme Court clarified that the NCAA's argument about maintaining amateurism “as a part of serving [the] societally important non-commercial objective’ of ‘higher education’” was a request for “judicially ordained immunity” from restraints of trade.<sup>73</sup> The Court highlighted that college athletics is a “massive business” generating profit for those who run the enterprise.<sup>74</sup> The Court explained that the NCAA cannot be exempt from restrictions merely because of the overlap between education, sports, and money.<sup>75</sup> The Court also foreshadowed possible future legislation by mentioning that the NCAA could argue for exemption from antitrust laws, but that argument should be addressed to Congress.<sup>76</sup>

Justice Kavanaugh's concurring opinion indicated that although the majority's opinion is limited to education-related benefits, the rest of NCAA's limits on compensation are subject to the same scrutiny.<sup>77</sup> Justice Kavanaugh referred to the

<sup>71</sup> See Alston, 141 S. Ct. at 2154, 2166.

<sup>72</sup> See *id.* at 2166.

<sup>73</sup> *Id.* at 2158–59 (alteration in original) (quoting Brief for Petitioner at 3, Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512)); see also *id.* at 2164 (explaining the NCAA's concern that the ability to receive paid post-eligibility internships will allow sneaker companies or auto dealerships to offer internships with “extravagant salaries as a ‘thinly disguised vehicle’ for paying professional-level salaries”) (quoting Brief for Petitioner at 37–38, Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512)).

<sup>74</sup> *Id.* at 2150 (“At the center of this thicket of associations and rules sits a massive business.”).

The NCAA's current broadcast contract for the March Madness basketball tournament is worth \$1.1 billion annually. Its television deal for the FBS conference's College Football Playoff is worth approximately \$470 million per year. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. For example, the Southeastern Conference (SEC) “made more than \$409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding \$650 million that year.” All these amounts have “increased consistently over the years.”

*Id.* at 2150–51.

<sup>75</sup> *Id.* at 2159.

<sup>76</sup> *Id.* at 2160.

<sup>77</sup> See *id.* at 2167 (Kavanaugh, J., concurring); see also Advisory Opinions, *Supreme Court Rules Against NCAA*, SPOTIFY, at 15:18 (June 21, 2021), <http://open.spotify.com/episode/0ngCluL54KEw0eMzIuZH4B?si=cef0e6cc66e2433e> (mentioning that Justice Kavanaugh is a basketball coach to help explain his strong opinion in favor of college athletes). In fact, in June of 2021, after the *Alston* decision was released, in *House v. NCAA*, a California district court refused to dismiss an action opposing the NCAA's rules restricting student-athletes' NIL income. See Grant House v.

NCAA's argument as "circular and unpersuasive" and mentioned that this "business model would be flatly illegal in almost any other industry."<sup>78</sup> He finished by emphasizing that "[t]he NCAA is not above the law."<sup>79</sup>

C. Further Changes to Paying Student-Athletes since *NCAA v. Alston*

Since the *NCAA v. Alston* decision was released, the NCAA has loosened its restrictions on student-athletes' income, more states have introduced and enacted legislation protecting student-athletes' ability to profit off their NIL, numerous federal bills have been introduced to create federal legislation for student-athletes' NIL income, and courts have maintained their reluctance to allow the NCAA to continue to restrict student-athletes' income.

1. NCAA Interim NIL Policy

Following *NCAA v. Alston* and the warning set forth in Justice Kavanaugh's concurring opinion, the NCAA publicized an interim policy allowing NIL payments to student-athletes and permitting them to sign with agents without tarnishing their amateur status.<sup>80</sup> This policy allows for college-athletes to engage in NIL activities pursuant to applicable state law.<sup>81</sup> Student-athletes

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Nat'l Collegiate Athletic Ass'n, 545 F. Supp. 3d 804, 808 (N.D. Cal. 2021). In doing so, the *House* court seemingly agreed with the student-athletes that the NCAA rules "prohibit student-athletes from receiving anything of value in exchange for the commercial use" of their NIL. *See id.* This was merely a denial to dismiss the claim; barring a settlement, the outcome of this case will greatly affect the student-athlete NIL discussion. *See id.*

<sup>78</sup> *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring); *see also id.* at 2169 ("Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate."); Thelin & Edwards, *supra* note 12 (presenting research from economists that showed that the NCAA "had become a highly lucrative cartel, and that athletes participating in big-time programs were, in essence, often being exploited by their institutions and associations as 'unpaid professionals'").

<sup>79</sup> *Alston*, 141 S. Ct. at 2169 (Kavanaugh, J., concurring).

<sup>80</sup> *See* Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NAT'L COLLEGIATE ATHLETIC ASS'N (June 30, 2021, 4:20 PM) [hereinafter *NCAA Interim Policy*], <http://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [perma.cc/D67H-UN5M].

<sup>81</sup> *See id.* Some of the largest college NIL deals include an unnamed athlete making up to \$8 million; Quinn Ewers, an Ohio State football player, signed with GT Sports marketing for \$1.4 million; and Olivia Dunne, an LSU gymnast, signed with the activewear brand Vuori for more than \$1 million. *See* George Malone, *Biggest NIL Deals in College Sports: College Athlete Endorsements are on the Rise*, GOBANKINGRATES (Mar. 16, 2022), <http://www.gobankingrates.com/net-worth/sports/biggest-nil-deals-in-college-sports/> [perma.cc/2SWV-PBGK]. Additionally, college gymnast and Olympic gold medalist, Sunisa Lee, and two college basketball players, the sons of Shaquille O'Neal, are expected to make even more money from NIL deals. *See* Khristopher J. Brooks, *These*

within states without such laws can engage in NIL activities as long as they do not violate the NCAA's rules.<sup>82</sup> The announcement claimed that this policy preserved the principle that "college sports are not pay-for-play."<sup>83</sup> Further, the NCAA clarified its intent to actively work with Congress to create legislation to "support student-athletes."<sup>84</sup> The NCAA subsequently clarified that the interim policy does not allow for pay-for-play or improper inducement of student-athletes.<sup>85</sup>

## 2. NIL Legislation

Additionally, since *NCAA v. Alston* was handed down, more legislation has developed to protect student-athletes' rights to profit off their NIL.<sup>86</sup> The following chart shows the status of current NIL legislation throughout the United States.<sup>87</sup> The chart includes four categories of states: (1) states with legislation that is signed into law and effective,<sup>88</sup> (2) states with legislation

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*Top College Athletes Could Grab the Most Money from NIL Deals*, CBS NEWS (Oct. 13, 2021 2:46 PM), <http://www.cbsnews.com/news/action-network-nil-shareef-oneal-ncaa-sunisa-lee/> [perma.cc/UCP8-24KH].

<sup>82</sup> *NCAA Interim Policy*, *supra* note 80.

<sup>83</sup> *Id.* (quoting Division II Presidents Council chair Sandra Jordan).

<sup>84</sup> *Id.*

<sup>85</sup> *See id.*; see generally NCAA Podcasts, *Social Series: Name, Image, and Likeness*, SPOTIFY, at 09:31 (July 2, 2021), <http://open.spotify.com/episode/11mt4CbLClM1UtB4ydZ1a?si=p-xTsHN-QIuXKM-B3AXCbg> (describing improper inducement as inducements to go to or stay at a specific school or to continue playing the sport for that school).

<sup>86</sup> *See Tracker: Name, Image and Likeness by State*, BUS. OF COLL. SPORTS, <http://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> [http://perma.cc/8DTX-H97A] (last updated June 17, 2022).

<sup>87</sup> This chart summarized current NIL legislation across the various states as of April 25, 2022. For updated state NIL legislation, see *id.*

<sup>88</sup> *See* ARIZ. REV. STAT. § 15-1892 (LexisNexis 2022) (effective as of Sept. 29, 2021); ARK. CODE ANN. § 4-75-1303 (2022) (effective as of Jan. 1, 2022); CAL. EDUC. CODE § 67456 (Deering 2022) (effective as of Jan. 1, 2020); COLO. REV. STAT. § 23-16-301 (2022) (effective as of July 1, 2021); CONN. GEN. STAT. § 10a-56 (2022) (effective as of July 1, 2021); FLA. STAT. ANN. § 1006.74 (LexisNexis 2022) (effective as of July 1, 2021); GA. CODE ANN. § 20-3-681 (2022) (effective as of July 1, 2021); 110 ILL. COMP. STAT. ANN. 190/10 (LexisNexis 2022) (effective as of July 1, 2021); KY. REV. STAT. ANN. § 164.6945 (LexisNexis 2022) (effective as of July 14, 2022); LA. STAT. ANN. § 17:3703 (2022) (effective as of July 1, 2021); ME. REV. STAT. ANN. tit. 20-A, §§ 12971-74 (2022) (effective as of Aug. 8, 2022); MICH. COMP. LAWS SERV. § 390.1734 (LexisNexis 2022) (effective as of Dec. 31, 2022); MISS. CODE ANN. § 37-97-107 (2022) (effective as of July 1, 2021); MO. REV. STAT. § 173.280 (2022) (effective as of Aug. 28, 2022); NEB. REV. STAT. ANN. § 48-3603 (LexisNexis 2022) (effective as of Nov. 14, 2020); NEV. REV. STAT. ANN. § 398.310 (LexisNexis 2021) (effective as of Jan. 1, 2022); N.M. STAT. ANN. § 21-31-3 (LexisNexis 2022) (effective as of June 18, 2021); N.C. Exec. Order No. 223 (2021), <http://governor.nc.gov/media/2546/open> [http://perma.cc/H2RQ-7PWL] (Executive Order signed into law by North Carolina Governor Roy Cooper on July 2, 2021, effective immediately); OHIO REV. CODE ANN. § 3376.02 (LexisNexis 2022) (effective as of Sept. 30, 2021); OKLA. STAT. tit. 70, § 820.23 (2022) (effective as of May 28, 2021); OR. REV. STAT. § 702.200 (2022) (effective as of June 29, 2021); 24 PA. CONS. STAT. § 20-2003-K (2022) (effective as of June 30, 2021); S.C. CODE ANN. § 59-158-20 (2022) (effective as of July 1,

that is signed into law, but not yet effective,<sup>89</sup> (3) states with legislation that has been introduced, but not signed into law,<sup>90</sup> and (4) states with no NIL legislation.<sup>91</sup>

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2022); TENN. CODE ANN. § 49-7-2802 (2022) (effective as of Jan. 1, 2022); TEX. EDUC. CODE ANN. § 51.9246 (West 2021) (effective as of July 1, 2021); VA. CODE ANN. § 23.1-408.1 (2022) (effective as of July 1, 2022).

<sup>89</sup> See MD. CODE ANN., EDUC. § 15-131 (LexisNexis 2022) (effective July 1, 2023); MONT. CODE ANN. § 20-1-232 (2021) (effective June 1, 2023); N.J. REV. STAT. § 18A:3B-87 (2022) (effective as of Sept. 14, 2020, but not applicable until the fifth academic year thereafter).

<sup>90</sup> See S. 2673, 30th Leg., Reg. Sess. (Haw. 2020) (introduced); S. 245, 89th Gen. Assemb., Reg. Sess. (Iowa 2021) (introduced); S. 832, 192d Gen. Ct., Reg. Sess. (Mass. 2021) (introduced); H.R. 3329, 91st Leg., Reg. Sess. (Minn. 2020) (introduced); H.R. 1505, 2020 Leg., Reg. Sess. (N.H. 2020) (introduced); S. 5891, 244th Leg., Reg. Sess. (N.Y. 2021) (introduced); H.R. 5082, 2021 Gen. Assemb., Jan. Sess. (R.I. 2021) (pending Senate Education Committee action as of June 25, 2021); S. 328, 2019-2020 Leg., Reg. Sess. (Vt. 2020) (introduced); H.R. 1084, 66th Leg., Reg. Sess. (Wash. 2019) (introduced).

<sup>91</sup> The states that never introduced any NIL legislation are not included in the list of statutes introduced and signed into law. See *Tracker: Name, Image and Likeness by State*, *supra* note 86. It is noteworthy that Alabama had an NIL legislation bill that was repealed. See H.B. 404, 2021 Leg., 2021 Reg. Sess. (Ala. 2021) (repealed 2022); see also John H. Glenn, *Alabama House Passes Repeal Bill for "Restrictive" NIL Law for Student-Athletes*, ALA. POL. REP. (Jan. 19, 2022, 2:32 PM), <http://www.alreporter.com/2022/01/19/alabama-house-passes-repeal-bill-for-restrictive-nil-law-for-student-athletes/> [<http://perma.cc/MP4K-UW4B>] (explaining that the bill was repealed to give student-athletes more freedom to profit off their NIL rights because the bill was more restrictive than the NIL standards). Additionally, Kansas and West Virginia had bills that died before they were signed into law. H.R. 2264, 2021 Leg., Reg. Sess. (Kan. 2021) (introduced and approved by the House, but died on Senate General Orders); H.R. 2583, 85th Leg., Reg. Sess. (W. Va. 2021) (introduced, but died in committee).

| Signed into law and effective | Signed into law, but not yet effective | Introduced, but not signed into law | No NIL legislation |
|-------------------------------|--|-------------------------------------|--------------------|
| Arizona                       | Maryland                               | Hawaii                              | Alabama            |
| Arkansas                      | Montana                                | Iowa                                | Alaska             |
| California                    | New Jersey                             | Massachusetts                       | Delaware           |
| Colorado                      |  | Minnesota                           | Idaho              |
| Connecticut                   |  | New Hampshire                       | Indiana            |
| Florida                       |  | New York                            | Kansas             |
| Georgia                       |  | Rhode Island                        | North Dakota       |
| Illinois                      |  | Vermont                             | South Dakota       |
| Kentucky                      |  | Washington                          | Utah               |
| Louisiana                     |  |                                     | West Virginia      |
| Maine                         |  |                                     | Wisconsin          |
| Michigan                      |  |                                     | Wyoming            |
| Mississippi                   |  |                                     |                    |
| Missouri                      |  |                                     |                    |
| Nebraska                      |  |                                     |                    |
| Nevada                        |  |                                     |                    |
| New Mexico                    |  |                                     |                    |
| North Carolina                |  |                                     |                    |
| Ohio                          |  |                                     |                    |
| Oklahoma                      |  |                                     |                    |
| Oregon                        |  |                                     |                    |
| Pennsylvania                  |  |                                     |                    |
| South Carolina                |  |                                     |                    |
| Tennessee                     |  |                                     |                    |
| Texas                         |  |                                     |                    |
| Virginia                      |  |                                     |                    |

A majority of states have NIL legislation signed into law. Oregon enacted additional legislation requiring makers of team jerseys, video games, and trading cards to pay royalties to student-athletes.<sup>92</sup> Taking a different approach, Alabama repealed its NIL statute in an effort to give student-athletes more freedom to earn NIL income; the state's statute was more restrictive than the NIL

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<sup>92</sup> See S. 1505, 81st Leg., Reg. Sess. (Or. 2022) (effective July 1, 2022).

standards.<sup>93</sup> State NIL legislation is rapidly changing, therefore this table will likely evolve as time passes.<sup>94</sup>

Additionally, many bills have been proposed to create federal NIL legislation.<sup>95</sup> These bills are all substantively similar, with a few distinct differences. It has been ten months since *NCAA v. Alston* and since then, numerous bills have developed with varying details; it is likely that there will continue to be movement towards federal NIL legislation in the coming months.

## II. FEDERAL TAXATION OF STUDENT-ATHLETES

Although taxation of student-athletes is evolving rapidly, in some ways, taxation of professional athletes can be used as a good

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<sup>93</sup> See H.R. 404, 2021 Leg., 2021 Reg. Sess. (Ala. 2021) (repealed 2022); see also John H. Glenn, *Alabama House Passes Repeal Bill for “Restrictive” NIL Law for Student-Athletes*, ALA. POL. REP. (Jan. 19, 2022, 2:32 PM), <http://www.alreporter.com/2022/01/19/alabama-house-passes-repeal-bill-for-restrictive-nil-law-for-student-athletes/> [<http://perma.cc/MP4K-UW4B>] (explaining that the bill was repealed to give student-athletes more freedom to profit off their NIL rights because the bill was more restrictive than the NIL standards).

<sup>94</sup> Between March of 2021 and March of 2023, the number of state legislatures that passed NIL statutes increased from six to twenty-nine. Compare *Changing the Face of College Sports*, *supra* note 64, at 473–76, with *infra* Part I.C.2.

<sup>95</sup> See *Tracker: Name, Image, and Likeness by State*, *supra* note 86 (listing federal NIL legislation that has been introduced). The first bill—introduced by Representative Mark Walker in 2019—would alter the definition of a tax-exempt sports organization to prevent the organizations from restricting student-athletes’ NIL rights. See H.R. 1804, 116th Cong. (2019). On June 18, 2020, Senator Marco Rubio introduced a bill which would require an intercollegiate athletic association to establish a policy allowing student-athletes to profit from their NIL and to hire agents to represent them. See S. 4004, 116th Cong. (2020). This bill seems remarkably similar to the NCAA’s interim policy, which was established twelve days after this bill was introduced. Compare S. 4004, 116th Cong. (2020), with *NCAA Interim Policy*, *supra* note 80. After the publication of the *NCAA v. Alston* decision, many more federal bills were released. By September of 2020, Representative Anthony Gonzalez had introduced a bill that would prohibit higher education institutions and athletic organizations from restricting student-athletes’ ability to enter into an endorsement contract or agency contract and would assign enforcement of the policy to the Federal Trade Commission. See H.R. 8382, 116th Cong. (2020). In December of 2020, three more bills were introduced. See S. 5003, 116th Cong. (2020); H.R. 9033, 116th Cong. (2020); S. 5062, 116th Cong. (2020). Senator Roger Wicker introduced a bill that would add a more uniform framework to the NIL compensation structure. See S. 5003, 116th Cong. (2020). Representative Janice D. Schakowsky and Senator Cory A. Booker created a similar comprehensive “College Athletes Bill of Rights” which outlines the student-athletes’ rights to use their NIL, to receive compensation from universities for education-related expenses, to be represented by an agent, to transfer between universities, and to lay claim to other rights and policies that are currently governed by the NCAA. See H.R. 9033, 116th Cong. (2020); S. 5062, 116th Cong. (2020). At the start of 2021, two more bills were introduced. See S. 414, 117th Cong. (2021); S. 238, 117th Cong. (2021). Senator Jerry Moran introduced a bill that aligned more closely with the NCAA’s goal to limit student-athletes from receiving compensation from NIL deals with unaffiliated third parties. See S. 414, 117th Cong. (2021). Senator Christopher Murphy also introduced a bill that prevents higher education from limiting compensation offered to student-athletes under NIL contracts; regulates athlete representation; authorizes grants for analyzing student-athlete NIL monetization; provides that the Federal Trade Commission is to regulate the policy; and preempts more restrictive state NIL laws. See S. 238, 117th Cong. (2021).



model.<sup>96</sup> Professional athletes, who used to receive preferential tax treatment, have faced heightened scrutiny on their taxes because of their public image.<sup>97</sup> Similarly, with the newly allowed NIL payments, student-athletes are becoming increasingly popular and known throughout the country and the world. It is likely that with the new fame from NIL payments, student-athletes will face heightened scrutiny similar to that faced by professional athletes.<sup>98</sup> A differentiating factor between the tax treatment of professional athletes and student-athletes is that professional athletes are employees of the team for which they play, whereas student-athletes are not.<sup>99</sup> However, even if professional athletes are employees of their athletic organization, this does not mean they are employees for purposes of their NIL deals.

Similar to how professional athletes became bigger tax targets as they were paid more, it is likely that because of the newly allowed NIL payments, student-athletes will become more highly scrutinized as taxpayers. However, unlike professional athletes, student-athletes are young and inexperienced in paying taxes or handling finances. Student-athletes are as young as seventeen; they cannot even legally vote, purchase alcohol, or purchase cigarettes, yet they are expected to keep track of, calculate, and pay complicated taxes.<sup>100</sup> Professional athletes,

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<sup>96</sup> See Robert W. Wood, *College Athletes Cutting Name Image Likeness Deals Could Be in for a Tax Shock*, FORBES (Aug. 30, 2021, 11:40 AM), <http://www.forbes.com/sites/robertwood/2021/08/30/taxing-college-athlete-name-image-likeness-deals/?sh=680070ca2c65> [http://perma.cc/PL4U-UEDF] (using taxation of professional athletes as an example and lightly touching on the use of different forms of business organizations to minimize tax liability); see also Andy Wittry, *Talking Taxes: How State Income Taxes, LLCs and Establishing Residency Could Affect NIL Income*, OUT OF BOUNDS WITH ANDY WITTRY (May 28, 2021), <http://andywittry.substack.com/p/talking-taxes-how-state-and-local?s=r> [http://perma.cc/ALV2-R74X] (noting that allocation of taxes will be partly “based on professional athlete rules that are already out there . . .”).

<sup>97</sup> See Kathryn Kisska-Schulze & Adam Epstein, “*Show Me the Money!*”—*Analyzing the Potential State Tax Implications of Paying Student-Athletes*, 14 VA. SPORTS & ENT. L.J. 13, 29 (2014) [hereinafter *Show Me the Money*] (discussing the heightened scrutiny of taxation of professional athletes); see also John DiMascio, *The “Jock Tax”: Fair Play or Unsportsmanlike Conduct*, 68 UNIV. PITT. L. REV. 953, 957 (2007) (recognizing that it is more difficult for professional athletes to avoid their taxes because of their public image and heightened popularity); see also John T. Holden & Kathryn Kisska-Schulze, *Taxing Sports*, 71 AM. UNIV. L. REV. 845, 856 (2022) [hereinafter *Taxing Sports*] (mentioning that the NFL enjoyed tax-exempt status as being not-for-profit between 1942 and 2015).

<sup>98</sup> See News & Brews Sports Biz, *Navigating Taxes on NIL Earnings*, NEWS & BREWS WITH JAMES MOORE & CO., at 3:40 (July 8, 2021), <http://www.jmco.com/news-brews-sports-biz-navigating-taxes-nil-earnings/> [http://perma.cc/P5AV-KTXZ] (discussing the differences between college athletes and professional athletes).

<sup>99</sup> See *id.* at 4:35 (highlighting that professional athletes have taxes withheld because they are employees, whereas college athletes are not employees and as such, will need to be more responsible than professional athletes); see also *infra* Part II.B.1.

<sup>100</sup> See Jim Probasco, *How to File Your Child’s First Income Tax Return*, INVESTOPEDIA (Dec. 31, 2021), <http://www.investopedia.com/articles/taxes/08/kids-first-income-tax-return.asp#:~:text=Minors%20have%20to%20file%20taxes,increasing%20to%20%241%2C150%20in%202022> [http://perma.cc/8BG4-FKTX].

who have more experience with NIL income and the related tax effects, likely also have assistance with the calculation, filing, and proper payment of their taxes. Student-athletes must be assisted to ensure they avoid penalties for dropping the ball on the compliance of their tax returns.

Because, historically, student-athletes were unable to receive most forms of income, student-athletes generally did not need to file taxes (unless they were also working while in college). With the newly allowed NIL income, as soon as a student-athlete earns \$12,550, they will need to file a federal tax return.<sup>101</sup>

#### A. Evolution of Taxation of Student-Athletes and the Decrease of Preferential Treatment

Since 1954, college and university students have received many forms of tax benefits.<sup>102</sup> Among others, these include a tax exclusion for reductions of tuition,<sup>103</sup> a tax deduction for interest paid on student loans,<sup>104</sup> and a tax exemption for parents of college students between the ages of nineteen and twenty-three.<sup>105</sup> Additionally, the Internal Revenue Code currently excludes any amount received as a “qualified scholarship” from gross income for tax purposes.<sup>106</sup> A “qualified scholarship” includes any money received as a scholarship used for tuition, required fees, books, supplies, and equipment required for courses.<sup>107</sup>

In recent decades, college athletics has received preferential treatment for federal tax purposes.<sup>108</sup> Since 1976, college athletics organizations and the NCAA have enjoyed tax exempt status because of their goal “to foster national or international amateur sports competition.”<sup>109</sup> For the same reason, any donation to either

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<sup>101</sup> See U.S. DEPT OF TREAS., IRS, PUB. NO. 501, DEPENDENTS, STANDARD DEDUCTION, AND FILING INFORMATION: FOR USE IN PREPARING 2021 RETURNS, at 2–4 (2022) (applying even if the college-athlete is still a minor); see also Probasco, *supra* note 100.

<sup>102</sup> See MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., R41967, HIGHER EDUCATION TAX BENEFITS: BRIEF OVERVIEW AND BUDGETARY EFFECTS 2 (2021), <http://sgp.fas.org/crs/misc/R41967.pdf>.

<sup>103</sup> See I.R.C. § 117.

<sup>104</sup> See I.R.C. § 221.

<sup>105</sup> See I.R.C. §§ 151(c), 152 (c)(3)(ii).

<sup>106</sup> See I.R.C. § 117(a).

<sup>107</sup> See I.R.C. § 117(b).

<sup>108</sup> See Kathryn Kisska-Schulze, *This is Our House!—The Tax Man Comes to College Sports*, 29 MARQ. SPORTS L. REV. 347, 348 (2019) [hereinafter *The Tax Man Comes to College Sports*] (“Prior to 2018, college athletics had historically enjoyed favorable federal tax treatment due to the tax-exempt status of universities, athletic departments, and the National Collegiate Athletic Association (NCAA).”); see also Kathryn Kisska-Schulze & Adam Epstein, *The Claim Game: Analyzing the Tax Implications of Student-Athlete Insurance Policy Payouts*, 25 JEFFREY S. MOORAD SPORTS L.J. 231, 250 (2018) (“[T]he college sports industry in general has enjoyed strikingly favorable tax positions over the past decades due to the tax-exempt status of colleges, athletic departments, and the NCAA itself.”).

<sup>109</sup> See I.R.C. § 501(c)(3).

college athletic departments or the NCAA is considered a charitable donation and is deductible from the donor's taxable income (within prescribed limits).<sup>110</sup> Another benefit college athletics enjoyed before 2017 was that eighty percent of amounts paid for the rights to purchase seats at college athletics events were deductible as charitable contributions.<sup>111</sup> In 2017, the Tax Cuts and Jobs Act ("TCJA") was rapidly enacted, which altered the historic preferential treatment of college athletics.<sup>112</sup> Mainly, the TCJA repealed the deduction for amounts paid in exchange for college athletic event seating rights.<sup>113</sup>

Additionally, the I.R.C. has traditionally qualified student-athletes' scholarships under the scholarship tax exclusion.<sup>114</sup> The IRS has maintained the exclusion for college athletic scholarships because of the absence of any *quid pro quo* relationship.<sup>115</sup> Courts have held that scholarship and grant funds qualify for the exclusion so long as those funds are not received in exchange for services rendered.<sup>116</sup> With the new ability for student-athletes to

<sup>110</sup> See I.R.C. § 170(a)(1), (c)(2)(B).

<sup>111</sup> See H.R. 4333, 100th Cong. § 6001(a) (1988) (enacted). This eighty percent deduction was not always allowed:

In 1984 the IRS issued Revenue Ruling 84-132, pronouncing that preferred seating at university sporting events had significant value, thus denying taxpayers the ability to deduct any part of their donation to a university athletic program that accompanied such right unless it was established that part of the contribution exceeded the value of the right to buy tickets. Following immediate backlash, the IRS suspended the Ruling, issuing an Announcement that the agency would hold a public session to discuss the issue. Two years later, the IRS issued Revenue Ruling 86-63, officially superseding Revenue Ruling 84-132, allowing for a deduction equal to the difference between the contribution and the value of the preferred seating. Once again, this ruling was met with criticism. Two years later, Congress enacted the Technical and Miscellaneous Revenue Act of 1988 which stipulated that 80% of amounts contributed to institutions of higher education that included a "right to purchase tickets for seating at an athletic event in an athletic stadium of such institution," would be allowed as a deduction.

*The Tax Man Comes to College Sports*, *supra* note 108, at 364.

<sup>112</sup> See H.R. 1, 115th Cong. (2017) (enacted); see also *The Tax Man Comes to College Sports*, *supra* note 108, at 377 (indicating that tax exemption for amateur athletic organizations was indirectly negatively affected by the 2018 Tax Cuts and Jobs Act).

<sup>113</sup> See H.R. 1, 115th Cong. § 13704 (2017) (enacted).

<sup>114</sup> See I.R.C. § 117; see also Rev. Rul. 77-263, 1977-2 C.B. 47; see also Letter from John A. Koskinen, U.S. Dep't of Treas., to Richard Burr, U.S. Sen. (Apr. 9, 2014), <http://www.irs.gov/pub/irs-wd/14-0016.pdf> ("It has long been the position of the Internal Revenue Service that athletic scholarships can qualify for exclusion from income under section 117."). But see Adam Hoefflich, *The Taxation of Athletic Scholarships: A Problem of Consistency*, 1991 U. ILL. L. REV. 581, 581 (1991) (arguing that student-athletes' scholarships should be taxed); Richard Schmalbeck & Lawrence Zelenak, *The NCAA and the IRS: Life at the Intersection of College Sports and the Federal Income Tax*, 92 S. CAL. L. REV. 1087, 1087-89 (2019) (criticizing the IRS for its favoritism of college athletics in allowing athletic scholarships to be excluded).

<sup>115</sup> See *The Tax Man Comes to College Sports*, *supra* note 108, at 356.

<sup>116</sup> See, e.g., *Smith v. Comm'r*, 51 T.C.M. (CCH) 1348 (1986) (holding that funds received by a graduate assistant were excludible because they were not compensation for

receive education-related benefits from their college or university, will this pay be included in the exclusion for qualified scholarships? According to the Supreme Court's interpretation of the statute for student athletic scholarships, they would still fall under the broad umbrella of the exception because the education-related benefits are not in exchange for services rendered.<sup>117</sup>

With the new ability to earn compensation from NIL deals, the applicability of the scholarship tax exclusion for athletic scholarships has been challenged.<sup>118</sup> In contrast, the NCAA clarified that its NIL interim policy "preserve[d] their commitment to avoid pay-for-play."<sup>119</sup> Senator Richard Burr introduced a bill that would deny the tax exclusion for athletic scholarships for student-athletes that make more than \$20,000 of profit during the taxable year from their NIL.<sup>120</sup> NIL income is unrelated to a student-athlete's athletic scholarship — the NIL income is from a third party, completely unrelated to the university and does not interfere with the avoidance of the pay-for-play model. So, the NIL income should not affect the ability to exclude the scholarships.<sup>121</sup> This challenge to the traditional preferential tax treatment for student-athletes is likely a benchmark for the beginning of a trend toward more heightened scrutiny in taxing student athletics.<sup>122</sup>

#### B. Complications with Independent Contractor Status

Independent contractors and employees have different rights and obligations, so it is important to determine whether a student-athlete is an independent contractor or an employee of the companies paying them pursuant to a NIL contract. Employers have an incentive to consider student-athletes as independent contractors to avoid vicarious liability, avoid paying them benefits, avoid issues regarding workers' compensation, and avoid their share of employment taxes.<sup>123</sup> Although independent contractors are unable to utilize employee benefits, workers' compensation, or lower employment taxes, they may deduct ordinary and necessary

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his services rendered). *But see* *Bingler v. Johnson*, 394 U.S. 741, 757–58 (1969) (holding that a Ph.D. student's stipend did not qualify for the Section 117 exclusion because it was compensation for services, rather than a scholarship).

<sup>117</sup> See *Bingler*, 394 U.S. at 757–58.

<sup>118</sup> See *Taxing Sports*, *supra* note 97, at 906.

<sup>119</sup> See *NCAA Interim Policy*, *supra* note 80.

<sup>120</sup> See *Taxing Sports*, *supra* note 97, at 869–70.

<sup>121</sup> See *id.* at 907; *NCAA Interim Policy*, *supra* note 80.

<sup>122</sup> See *Taxing Sports*, *supra* note 97, at 857 (acknowledging that some of the "wide berth of favorable tax treatment . . . is now shifting").

<sup>123</sup> See, e.g., RESTATEMENT (SECOND) OF AGENCY § 219 (AM. L. INST. 1958) (explaining that employers can be vicariously liable for the torts of their employees); see also I.R.C. §3402(a) (requiring employers to withhold employment taxes from the pay of employees).

business expenses.<sup>124</sup> Student-athletes making meager amounts of money from their NIL will benefit more from using the standard deduction because they will be able to minimize their taxes, without the administrative burden of keeping track of their ordinary and necessary business expenses.<sup>125</sup>

### 1. Student-Athletes Will Generally Be Independent Contractors

An independent contractor provides a service for the hiring party but is neither controlled nor subject to the hiring party's right to control the physical conduct of performing the task.<sup>126</sup> In that case, the hiring party has the right to control the end result of the work, but not how the work will be done.<sup>127</sup> In contrast, where there is an employer-employee relationship, the employee is subject to the employer's right to control the physical conduct of performing the service.<sup>128</sup> Whether a worker is an independent contractor or an employee is a fact-intensive determination which must be decided on a case-by-case basis.<sup>129</sup> Among other factors, the IRS considers the degree of control, the investment in facilities/equipment, the length of the relationship, and the parties' subjective belief of the worker's classification.<sup>130</sup> It is likely that companies paying student-athletes for their NIL will classify them as independent contractors, but their subjective belief about the nature of the relationship is not controlling; it is merely one factor in the fact-intensive

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<sup>124</sup> See Michael McCann & Robert Raiola, *College Athletes and Their Sponsors Face Tax Reality of NIL*, SPORTICO: THE BUS. OF SPORT (July 9, 2021), <http://sports.yahoo.com/college-athletes-sponsors-face-tax-160040471.html> [<http://perma.cc/8V9G-QQJ3>]; see also *infra* Part III.B.2.

<sup>125</sup> See McCann, *supra* note 124.

<sup>126</sup> See RESTATEMENT (SECOND) OF AGENCY § 2(3) (AM. L. INST. 1958); see also *Independent Contractor Defined*, INTERNAL REVENUE SERV., <http://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined> [<http://perma.cc/QH7V-X3T5>] (last visited Apr. 25, 2022).

<sup>127</sup> See *Independent Contractor Defined*, *supra* note 126.

<sup>128</sup> See RESTATEMENT (SECOND) OF AGENCY § 2(2) (AM. L. INST. 1958) (describing an employee but using the word "servant" instead of "employee" and "master" instead of "employer"); see also *Employee (Common-Law Employee)*, INTERNAL REVENUE SERV., <http://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee> [<http://perma.cc/X6AV-ZBCF>] (last visited Apr. 25, 2022) [hereinafter *Common-Law Employee*]. The restatement third uses the words "employee" and "employer" instead of "servant" and "master." See RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006).

<sup>129</sup> According to the IRS website, the right to control what will be done and how it will be done is determinative of whether a worker is an employee or independent contractor. See *Common-Law Employee*, *supra* note 128; *Independent Contractor Defined*, *supra* note 126. Courts use several factors to determine whether a worker is an independent contractor or an employee, including: (1) the degree of control, (2) investment in facilities, (3) the opportunity for profit or loss, (4) the right to discharge, (5) whether the worker is an integral part of the business, (6) the length of the relationship, (7) the relationship the parties believe they created, and (8) the provision of employee benefits. See *Keller v. Comm'r*, 103 T.C.M. (CCH) 1298 (2012).

<sup>130</sup> See *Keller*, 103 T.C.M. (CCH) at 1298.

determination.<sup>131</sup> It is likely that most students with NIL deals will be considered independent contractors.<sup>132</sup>

## 2. Ordinary and Necessary Business Expense Deductions

Certain student-athletes may be able to deduct certain expenses as ordinary and necessary business expenses. Taxpayers may deduct “all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.”<sup>133</sup> To reap the benefits of this deduction, the expense must be ordinary, necessary, and incurred in carrying on the taxpayer’s trade or business.<sup>134</sup>

To qualify as carrying on a trade or business, the taxpayer must be involved in the activity with continuity and regularity and be engaged in the activity for the primary purpose of income or profit.<sup>135</sup> In contrast, a mere hobby or sporadic activity will not qualify.<sup>136</sup> A professional athlete engages in a trade or business when they use NIL in exchange for endorsement income.<sup>137</sup> While the ultimate determination depends on the facts of each case, the

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<sup>131</sup> See *id.*; McCann & Raiola, *supra* note 124.

<sup>132</sup> See Jeremy Crabtree, *College Players Who Made NIL Money Have New Homework—Paying Taxes*, ON3 NIL (Apr. 18, 2022), <http://www.on3.com/nil/news/college-players-who-made-nil-money-have-new-homework-paying-taxes/> [<http://perma.cc/7KfV-KJV3>]. In NIL deals, it is unlikely that the employer will have the right to control how the student-athlete finishes the work. See generally *See Common-Law Employee*, *supra* note 128 (defining employee and using right to control as the determinative element); *Independent Contractor Defined*, *supra* note 126 (defining independent contractor). Additionally, (1) the employer probably does not have control over the details of student-athlete work; (2) student-athletes will use their own phones/equipment for their NIL deals and will provide their own place of work; (3) the opportunity for profit or loss will likely range from deal to deal, but student-athletes will likely get more income if, for example, their promotion of products attracts more costumers; (4) the company paying for student-athletes’ NIL likely has a right to end the partnership; (5) advertising is usually a part of businesses, but not usually an integral part of the business (this factor is a close call); (6) some NIL deals are a one-time thing, while others span multiple years, depending on the particular deal; (7) the parties will likely believe the student-athletes are independent contractors; and (8) NIL deals will not likely include any employee benefits. See generally *Keller*, 103 T.C.M. (CCH) at 1298 (listing these factors for how to determine whether a worker is an employee or independent contractor). Other than the fact that companies likely have the right to terminate their relationship with student-athletes, the factors lean toward student-athletes being classified as independent contractors. However, it seems possible for a student-athlete to be considered an employee where the athlete has a long-term NIL deal, the athlete is paid for time spent, and the hiring party has control over the details and the physical aspect of the work.

<sup>133</sup> I.R.C. § 162(a). Before 2018, Section 212 of the I.R.C. provided a deduction for “all ordinary and necessary expenses paid or incurred during the taxable year . . . for the production or collection of income,” but the deduction is not allowed to be taken for the taxable years starting on December 31, 2017, until January 1, 2026. See I.R.C. § 212; see also I.R.C. § 67(g).

<sup>134</sup> See I.R.C. § 162(a); see also BOBBY L. DEXTER, *FEDERAL INCOME TAXATION IN FOCUS* 341 (Rachel E. Barkow et al. eds., 2d ed. 2022).

<sup>135</sup> See *Comm’r v. Groetzinger*, 480 U.S. 23, 35 (1987).

<sup>136</sup> See *id.*

<sup>137</sup> See *Changing the Face of College Sports*, *supra* note 64, at 488–89.

IRS will likely view such activity as a trade or business.<sup>138</sup> NIL deals with longer terms and more continuous work are more likely to qualify as a trade or business.<sup>139</sup> In addition, using a business entity could further the argument that a student-athlete's NIL income is a trade or business because the development of the business entity creates structure and shows that the income is more than a mere hobby.<sup>140</sup>

Conversely, student-athletes' focus while in college is on their education and athletics. Because student-athletes' income is not classified as pay-for-play, the income is not in exchange for their work as a student-athlete, it could be considered a mere hobby.<sup>141</sup> Especially for a student athlete with a single, short-term NIL deal (possibly even a NIL deal for a single social media post or a single advertisement), the argument that the pursuit of NIL income is a mere hobby is stronger.<sup>142</sup> However, the student-athletes' NIL only has value because of their performance on the field.

Treasury regulations provide some guidance for endorsement contracts.<sup>143</sup> The treasury regulations clarify that a well-known chef and restaurant owner who receives endorsement income due to their skill and reputation is in the trade or business of being a chef, owning a restaurant, and earning endorsement fees.<sup>144</sup> Similarly, a well-known actor who enters into a partnership with a shoe company where the actor contributes their NIL in exchange for fifty percent of the income in the partnership is in the trade or business of receiving partnership interest in exchange for their NIL.<sup>145</sup> Following the guidance set forth in these treasury regulations, student-athletes' pursuit of NIL income will also be

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<sup>138</sup> See *id.*; see generally *Groetzinger*, 480 U.S. at 35–36 (setting forth the *Groetzinger* standard for distinguishing a trade or business from a mere hobby).

<sup>139</sup> See generally *Groetzinger*, 480 U.S. at 35–36 (setting forth the *Groetzinger* standard for distinguishing a trade or business from a mere hobby).

<sup>140</sup> See Brian T. Whitlock, *Untaxingly Yours: Tax Planning for College Athletes—Name, Image, and Likeness*, TAX MAG., Oct. 2021, at 17, 22.

<sup>141</sup> See generally *NCAA Interim Policy*, *supra* note 80 (clarifying that NIL income is not pay-for-play). Prior to the Tax Cuts and Jobs Act, I.R.C. Section 212 allowed individuals to take a deduction for ordinary and necessary expenses incurred in the production of income from an activity that does not constitute a trade or business, however, this Section is disallowed for the taxable years from December 31, 2017, to January 1, 2026. See I.R.C. §§ 67(g), 212.

<sup>142</sup> See generally *Groetzinger*, 480 U.S. at 35–36 (setting forth the *Groetzinger* standard).

<sup>143</sup> See Treas. Reg. § 1.199A-5(b)(3)(xv)–(xvi) (2019). This treasury regulation relates to another deduction. However, a trade or business within the meaning of IRC Section 199A has the same meaning as “a trade or business that is a trade or business under Section 162 . . . other than the trade or business of performing services as an employee.” See Treas. Reg. § 1.199A-1(b)(14) (2019). Because student-athletes are not employees, for the purposes of this article, the use of “trade or business” within I.R.C. Section 199A and I.R.C. Section 162 are synonymous.

<sup>144</sup> See Treas. Reg. § 1.199A-5(b)(3)(xv) (2019).

<sup>145</sup> See Treas. Reg. § 1.199A-5(b)(3)(xvi) (2019).

considered a trade or business. Ultimately, the qualification of the student-athletes' pursuit of NIL income as a trade or business will be a case-by-case determination based on the terms of the NIL deals, but it is likely that most student-athletes' pursuit of NIL income will be considered a trade or business.<sup>146</sup>

Student-athletes must also determine which expenses may be deducted as ordinary and necessary business expenses. To be "ordinary," incurring and paying such expense must be the "common and accepted means" of addressing a given business situation in the taxpayer's community.<sup>147</sup> To be "necessary," the expense must be "appropriate and helpful."<sup>148</sup> Before a student-athlete can take a deduction, they must determine if the expense, according to these definitions, is ordinary and necessary. Among the items allowed to be deducted are supplies, management expenses, advertising, and traveling expenses while away from home solely in the pursuit of a trade or business.<sup>149</sup> For student-athletes generating NIL income, this could include cameras for vlogging or recording unboxing videos of sponsored products and traveling to sports camps if the camps are in a different location than their tax home. If they hire an agent to help obtain NIL deals and manage the business, then payments to the agent (and many other ordinary and necessary expenses incurred in producing their NIL income) likely qualify. However, even if an expense would qualify as ordinary and necessary, the deduction would not be allowed for any expenses that are already covered by the student-athlete's college or university (such as traveling to compete in a sport on behalf of the school).<sup>150</sup>

For traveling expenses, student-athletes will need to determine their tax home because travel expenses are only deductible "while away from home."<sup>151</sup> Generally, a taxpayer's home for the purposes of Section 162 of the I.R.C. is their principal place of business.<sup>152</sup> This becomes more complicated when a taxpayer lives at multiple residences.<sup>153</sup> Circuits are split

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<sup>146</sup> See *Changing the Face of College Sports*, *supra* note 6464, at 488–89 (concluding that NIL income is derived from a trade or business). See generally *Groetzinger*, 480 U.S. at 35–36 (setting forth the *Groetzinger* standard).

<sup>147</sup> See *Welch v. Helvering*, 290 U.S. 111, 114 (clarifying that an expense was ordinary because it was "the common and accepted means" to respond to the situation at hand); see also *Gilliam v. Comm'r*, 51 T.C.M. (CCH) 515 (1986) (describing ordinary as "normal, usual, or customary" and explaining that "it must be of common or frequent occurrence in the type of business involved").

<sup>148</sup> See *Welch*, 290 U.S. at 113 (finding that an expense was necessary because it was "appropriate and helpful").

<sup>149</sup> See Treas. Reg. § 1.162-1(a) (1993).

<sup>150</sup> See *Changing the Face of College Sports*, *supra* note 64, at 490.

<sup>151</sup> See I.R.C. § 162(a)(2).

<sup>152</sup> See *Markey v. Comm'r*, 490 F.2d 1249 (6th Cir. 1974).

<sup>153</sup> See *Changing the Face of College Sports*, *supra* note 64, at 491.



as to whether a taxpayer's home is tied to their principal place of business or their actual residence.<sup>154</sup> When professional athletes play a team sport, their tax home is usually where their team is located.<sup>155</sup> Professional athletes who play an individual sport, such as swimming or gymnastics, have more flexibility in deciding their tax home.<sup>156</sup> However, student-athletes are more similar to professional athletes that play a team sport because, even if a student-athlete plays an individual sport, they are required to attend school, practice, and live a majority of the year where their school is located.

This deduction is helpful but is also extremely burdensome. To enjoy the benefits of this deduction, student-athletes would need to determine their tax home, track all their expenses related to their production of NIL income, and determine whether each expense is ordinary and necessary.<sup>157</sup>

### 3. Employment Taxes

Generally, employers are required to withhold employment taxes from employees' wages and pay those taxes to the IRS.<sup>158</sup> Wages include "all remuneration for employment."<sup>159</sup> Employment taxes include old age, survivors, and disability insurance ("OASDI") taxes and hospital insurance ("HI") taxes, for a total of 7.65% of wages being withheld (plus another 0.9% for HI taxes for wages after a certain threshold).<sup>160</sup> There is a cap on OASDI employment taxes called the contribution and benefit base, which is commonly referred to as the FICA Wage Base.<sup>161</sup> In practice, after the employment taxes are withheld on the wage base, the remaining wages are not subject to OASDI withholding,

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<sup>154</sup> See, e.g., *Coombs v. Comm'r*, 608 F.2d 1269, 1275–76 (9th Cir. 1979) (using the location of the taxpayer's principal place of business to determine their tax home); *Wallace v. Comm'r*, 144 F.2d 407, 410 (9th Cir. 1944) (holding that their tax home was their actual residence).

<sup>155</sup> See *Changing the Face of College Sports*, *supra* note 64, at 491–92.

<sup>156</sup> See *id.* at 491.

<sup>157</sup> An online database provides a simple Google sheet to track business expenses. See *Paying Taxes*, ON3 NIL, <http://www.on3.com/nil/news/college-players-who-made-nil-money-have-new-homework-paying-taxes/> [<http://perma.cc/CE8B-9HLZ>] (last visited Apr. 25, 2022); *Template for Expense/Income Tracking*, GOOGLE DOCUMENTS, [http://docs.google.com/spreadsheets/d/1S3GzyxfR9fK07\\_At moy-70yKFytZH2RjVN1iAh1nUvk/edit#gid=0](http://docs.google.com/spreadsheets/d/1S3GzyxfR9fK07_At moy-70yKFytZH2RjVN1iAh1nUvk/edit#gid=0) [<http://perma.cc/8TNN-4LSQ>] (last visited Apr. 25, 2022).

<sup>158</sup> See I.R.C. § 3402(a).

<sup>159</sup> See I.R.C. § 3121(a).

<sup>160</sup> See I.R.C. § 3101(a) (requiring individuals to pay 6.2% of wages for OASDI taxes); I.R.C. § 3101(b)(1) (requiring individuals to pay 1.45% of wages for HI taxes); I.R.C. § 3101(b)(2) (requiring individuals to pay an additional 0.9% of wages after a certain income threshold).

<sup>161</sup> See I.R.C. § 3121 (referring to the limit as the "contribution and benefit base"); see also DEXTER, *supra* note 134 (referring to the contribution and benefit base as the wage base); see also *Contribution and Benefit Base*, SOC. SEC., <http://www.ssa.gov/oact/cola/cbb.html> [<http://perma.cc/A3DS-C9MA>] (last visited Apr. 23, 2022) (providing the contribution and benefit bases for 1937 to the present).

but they are still subject to HI tax withholding.<sup>162</sup> The current wage base is \$147,000.<sup>163</sup> Additionally, employers are responsible for another 7.65% of their employee's wages for their half of employment taxes.<sup>164</sup>

As discussed above, student-athletes are not employees.<sup>165</sup> Employers are only obligated or authorized to withhold taxes from employees,<sup>166</sup> therefore none of a student-athlete's income will be subject to withholding by an employer. However, student-athletes will still be responsible for employment taxes if they make \$400 or more during the taxable year.<sup>167</sup> Those who are self-employed are responsible for double the amount of employment taxes on their self-employment income.<sup>168</sup> As self-employed individuals, they are required to pay 12.4% of self-employment income for OASDI taxes, 2.9% of self-employment income for HI taxes, and an additional 0.9% of self-employment income for HI taxes after a certain income threshold.<sup>169</sup> An individual's self-employment income includes "the gross income derived by an individual from any trade or business carried on by such individual, less the deductions . . . attributable to such trade or business."<sup>170</sup> Unlike employees, self-employed individuals calculate employment taxes after calculating in any deduction for their business.<sup>171</sup> Therefore, self-employed individuals pay employment taxes on a slightly lesser portion of their total income than employees. Like employees, self-employed individuals benefit from the same wage base limits on the OASDI tax.<sup>172</sup> Additionally, because student-athletes' employment taxes are not withheld before dispersing payments to them, the student-athlete will need to pay these taxes, in addition

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<sup>162</sup> See *Contribution and Benefit Base*, SOCIAL SECURITY, <http://www.ssa.gov/oact/cola/cbb.html> [<http://perma.cc/A3DS-C9MA>] (last visited Apr. 23, 2022).

<sup>163</sup> See *id.*

<sup>164</sup> See I.R.C. § 3111(a) (requiring employers to pay 6.2% of employees' wages for OASDI taxes); I.R.C. § 3111(b) (requiring employers to pay 1.45% of employees' wages for HI taxes). Employers are not subject to the same 0.9% increase as employees after a certain threshold income. Compare I.R.C. § 3111(a)–(b), with I.R.C. § 3101(a)–(b).

<sup>165</sup> See *supra* Part II.B.1.

<sup>166</sup> See I.R.C. § 3402(a).

<sup>167</sup> See I.R.C. § 6017.

<sup>168</sup> Compare I.R.C. § 1401(a)–(b), with I.R.C. § 3111(a)–(b), and I.R.C. § 3101(a)–(b).

<sup>169</sup> See I.R.C. § 1401(a)–(b).

<sup>170</sup> See I.R.C. § 1402(a). Here, trade or business has the same meaning as trade or business in I.R.C. Section 162 for ordinary and necessary business expenses. See I.R.C. § 1402(b). For an explanation on why student-athletes' use of their NIL for compensation is a trade or business, see *supra* Part II.B.2. (determining that student-athletes' use of their NIL for compensation likely satisfies the "trade or business" requirement for ordinary and necessary business expenses).

<sup>171</sup> See I.R.C. § 1402(a).

<sup>172</sup> See I.R.C. § 1402(b)(1); see also *Contribution and Benefit Base*, SOC. SEC., <http://www.ssa.gov/oact/cola/cbb.html> [<http://perma.cc/M5UL-72FU>] (last visited Apr. 23, 2022).

to their normal taxes, at the same time.<sup>173</sup> Rather than spreading the burden of the employment taxes over payments, they will have to pay large amounts in lumped sums, which will be added to any other taxes the student-athlete may already owe. Luckily, to ease the burden, the I.R.C. allows self-employed individuals to deduct one-half of their employment taxes.<sup>174</sup> Although it is helpful, this deduction does not completely eradicate the extra burden on self-employed individuals because a deduction merely decreases the amount of taxable income, rather than reducing the amount of tax owed. Further, self-employment taxes are only imposed on 92.35% of an individual's net income.<sup>175</sup>

#### 4. Quarterly Estimated Tax Payment

As self-employed individuals, student-athletes will be required to make quarterly estimated payments.<sup>176</sup> This requires student-athletes to not only become familiar with their finances and taxes for tax day, but also to calculate their taxes four times a year to get an accurate estimate to make their quarterly tax payment.

### C. Using the Limited Liability Company Business Form to Minimize Taxes

Student-athletes could consider using business organizations to avoid personal liability if they get sued for torts or other claims.<sup>177</sup> Avoiding personal liability will be especially beneficial for student-athletes organizing clinics and camps.<sup>178</sup> In deciding what kind of business entity to form, it is important to consider taxes.<sup>179</sup> The options for business organization types include: sole proprietorship, partnership, limited liability partnership, limited partnership, limited liability limited partnership, limited liability

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<sup>173</sup> See Kristi Dosh, *Navigating Taxes for Student Athletes with NIL Revenue*, BUS. OF COLL. SPORTS (Aug. 19, 2021), <http://businessofcollegesports.com/podcast/navigating-taxes-for-student-athletes-with-nil-revenue/> [<http://perma.cc/A8HW-5WX9>].

<sup>174</sup> See I.R.C. § 164(f)(1).

<sup>175</sup> See I.R.C. § 1402(a)(12) (allowing self-employment income to be reduced by 7.65%); see also *Changing the Face of College Sports*, *supra* note 64, at 494.

<sup>176</sup> See *Self-Employed Individuals Tax Center*, INTERNAL REVENUE SERV., <http://www.irs.gov/businesses/small-businesses-self-employed/self-employed-individuals-tax-center> [<http://perma.cc/HG3M-R4T3>] (last updated Sept. 22, 2022).

<sup>177</sup> See Wittry, *supra* note 177. This limited liability “does not apply to personal tortious acts or personal guarantees of corporate obligations.” J. DENNIS HYNES & MARK J. LOEWENSTEIN, *AGENCY, PARTNERSHIP, AND THE LLC: THE LAW OF UNINCORPORATED BUSINESS ENTERPRISES* 4 n.3 (10th ed. 2019).

<sup>178</sup> See generally Laine Higgins, *College Athletes Who Cashed In Have a Painful New Homework Assignment: Their Taxes*, WALL ST. J. (Apr. 14, 2022, 9:18 AM), <http://www.wsj.com/articles/college-sports-taxes-nil-endorsements-11649928654> [<http://perma.cc/LW8U-H2R3>] (including Trinity Thomas, a Florida Gators gymnast, mentioning she wants to start a gymnastics clinic).

<sup>179</sup> See HYNES & LOEWENSTEIN, *supra* note 177, at n.4.

company, corporation, and S corporation.<sup>180</sup> Out of these options, a limited liability company is the best choice for student-athletes.

A sole proprietorship is created when an individual owns an unincorporated business by themselves.<sup>181</sup> This is a default business organization;<sup>182</sup> if the student-athletes profit from their NIL by themselves, they would be viewed as sole proprietors. However, a sole proprietorship does not provide the limited liability shield from which a student-athlete would benefit.<sup>183</sup> Similarly, regardless of intent, a partnership is formed when an association of at least two people (human beings or business entities) carry on, as co-owners, a business for profit.<sup>184</sup> Therefore, if the student-athlete works with another person (perhaps a family member or the school the student-athlete attends) to create profit on the student-athlete's NIL, they could default into a partnership. Like a sole proprietorship, partnerships do not have the benefit of limited liability for the partners.<sup>185</sup>

It would be advantageous for the student-athlete to avoid the possibility of unintentionally forming a partnership and to limit liability by creating a different type of business organization. One option is a Limited Partnership, but a Limited Partnership would also have drawbacks. A Limited Partnership has at least two partners: a general partner and a limited partner.<sup>186</sup> The general partner has complete control of the Limited Partnership, but can also be held personally liable for the debts and obligations of the Limited Partnership.<sup>187</sup> The limited partner enjoys the protections of limited liability, but has no control over the Limited Partnership.<sup>188</sup> If the limited partner exhibits control over the partnership, they could become personally liable for the debts and obligations of the Limited Partnership as a general partner.<sup>189</sup>

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<sup>180</sup> *See id.* at 4–10.

<sup>181</sup> *See id.* at 6.

<sup>182</sup> *See id.*

<sup>183</sup> *See id.*

<sup>184</sup> *See, e.g.*, UNIF. P'SHIP. ACT § 6 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1914); *see also* REVISED UNIF. P'SHIP. ACT § 202(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2013); *see also* CAL. CORP. CODE § 16101(9) (West 2020).

<sup>185</sup> *See* HYNES & LOEWENSTEIN, *supra* note 177, at 9.

<sup>186</sup> *See id.* at 10.

<sup>187</sup> *See id.*

<sup>188</sup> *See id.*

<sup>189</sup> *See* UNIF. LTD. P'SHIP. ACT § 7 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1916) (holding a limited partner liable as a general partner if the limited partner takes control in the business) (amended 1976); *see also* REVISED UNIF. LTD. P'SHIP. ACT § 303(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1976) (holding a limited partner liable as a general partner if the limited partner exhibits substantially the same amount of control in the business as a general partner or exhibits control and transacts with a third party who has actual knowledge of the limited partner's participation in the control) (amended 1985); REVISED UNIF. LTD. P'SHIP. ACT § 303(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1985)

Although there is an opportunity for limited liability in a Limited Partnership, it is not the best choice for a student-athlete. This is because—in order to enjoy the benefits of limited liability—a student-athlete would need someone trustworthy who is willing to assume personal liability for the debts and obligations of the limited partnership as the general partner, and the student-athlete would need to relegate all control in the business to the general partner. If the student-athlete wanted to remain in control, the student-athlete could create a corporation to act as the general partner; however, there simply is no need to go through that entire process if the goal is merely to limit liability.

The Limited Liability Limited Partnership (“LLLP”) is similar to the Limited Partnership, except none of the partners are personally liable for the debts and obligations of the business.<sup>190</sup> LLLPs may be a good choice for student-athletes, but they do not exist in all states.<sup>191</sup> California is one of the states that does not have an LLLP statute.<sup>192</sup> The LLLP began to grow throughout the United States, but is now unnecessary because of the rise of the LLC.<sup>193</sup> Additionally, LLLPs require at least two partners; therefore, a student-athlete would be unable to create an LLLP by themselves without creating an extra business entity.<sup>194</sup>

A corporation would allow the student-athlete to avoid personal liability as the owner of the company but requires certain corporate formalities to be followed and requires an extra layer of taxation.<sup>195</sup> To form a corporation, the student-athlete would need to file the articles of incorporation with the respective Secretary of State.<sup>196</sup> If corporate formalities are not used, the student-athlete risks the possibility of being held personally

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(holding a limited partner liable as a general partner if the limited partner participated in the management of the limited partnership and a third party transacts business under a reasonable belief, based on the limited partner’s conduct, that the limited partner is a general partner) (amended 2001). *But see* UNIF. LTD. P’SHP. ACT § 303 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2001) (explaining that the limited partner will not be held liable as a general partner “even if the limited partner participates in the management and control of the limited partnership”) (amended 2013).

<sup>190</sup> See HYNES & LOEWENSTEIN, *supra* note 177, at 10.

<sup>191</sup> See *Limited Liability Limited Partnership*, UNITED CORP. SERVS., INC., <http://www.unitedcorporate.com/limited-liability-limited-partnership> [<http://perma.cc/LDP7-CFV2>] (last visited Apr. 25, 2022).

<sup>192</sup> See *id.*

<sup>193</sup> See generally HYNES & LOEWENSTEIN, *supra* note 177, at 10–11 (summarizing the LLLP and the LLC).

<sup>194</sup> See generally *id.* at 10; see also UNIF. LTD. P’SHP ACT § 102(11) (UNIF. L. COMM’N 2001) (noting that a limited liability limited partnership is a form of limited partnership, which is an “an entity, having one or more general partners and one or more limited partners, which is formed . . . by two or more persons.”).

<sup>195</sup> See *id.* at 4.

<sup>196</sup> See MODEL BUS. CORP. ACT § 2.01 (COMM. ON CORP. L. 2002) (amended 2016).

liable through a piercing the corporate veil claim.<sup>197</sup> The student-athlete would need to elect a board of directors, hold annual shareholder meetings, and keep corporate records.<sup>198</sup> Corporations are more ideal for large businesses that require substantial amounts of capital from selling shares on the public market.<sup>199</sup> Because a student-athlete's corporation would not likely have many shareholders, student-athletes may be able to benefit from close corporation rules.<sup>200</sup> In order to obtain these benefits, the student-athlete would need to elect to become a close corporation.<sup>201</sup> In some states, a close corporation can avoid certain corporate formalities by including in its articles of incorporation that the corporation will be managed by the stockholders of the corporation rather than the board of directors.<sup>202</sup> Even then, corporations are still subject to double taxation.<sup>203</sup> Certain small corporations can avoid double taxation by using the S corporation classification.<sup>204</sup> However, S corporations are subject to many technical restrictions.<sup>205</sup> An S corporation is defined by the IRS as a domestic corporation, with less than 100 shareholders, only one class of stock, and without any corporate partners, that elects for pass through taxation.<sup>206</sup> An additional downfall to the S corporation entity is that not all states have the S corporation classification.<sup>207</sup>

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<sup>197</sup> See *Sea-Land Servs., Inc. v. Pepper Source*, 941 F.2d 519, 520–21 (7th Cir. 1991) (using “failure to . . . comply with corporate formalities” as a factor to determine whether there is a unity of interest and ownership of the corporation to justify piercing the corporate veil).

<sup>198</sup> See HYNES & LOEWENSTEIN, *supra* note 177, at 4.

<sup>199</sup> See *id.* at 5.

<sup>200</sup> Close corporation statutes vary from state to state. Delaware defines close corporations as corporations with less than thirty shareholders, with only one class of stock, that is not sold on the public market. DEL. CODE ANN. tit. 8, § 342(a) (1953). California defines a close corporation as a corporation whose articles of incorporation contain a provision limiting the amount of shareholders to thirty-five or less and a provision stating, “[t]his corporation is a close corporation.” CAL. CORP. CODE § 158(a) (West 2017).

<sup>201</sup> DEL. CODE ANN. tit. 8, § 341 (1953).

<sup>202</sup> For example, in Delaware, if the Certificate of Incorporation (Delaware's name for the articles of incorporation) provides that the corporation will be managed by the stockholders of the corporation rather than the board of directors, then annual stockholder meetings are not necessary. DEL. CODE ANN. Tit. 8, § 351 (1953).

<sup>203</sup> See HYNES & LOEWENSTEIN, *supra* note 177, at 4.

<sup>204</sup> See I.R.C. § 1361(a)(1)–(b)(1) (defining an S corporation as a corporation with only one class of stock and less than one hundred shareholders—who are all individual residents of the United States—that elects to be an S corporation); I.R.C. § 1366 (explaining how items are passed through to be taxed by the shareholders).

<sup>205</sup> See HYNES & LOEWENSTEIN, *supra* note 177, at n.4.

<sup>206</sup> See *S Corporations*, INTERNAL REVENUE SERV., <http://www.irs.gov/businesses/small-businesses-self-employed/s-corporations> [<http://perma.cc/Z7L3-WNGC>] (last updated Sept. 2, 2022).

<sup>207</sup> See Christina Majaski, *LLC vs. S Corporation: What's the Difference?*, INVESTOPEDIA, <http://www.investopedia.com/articles/personal-finance/011216/s-corp-vs-llc-which-should-i-choose.asp> [<http://perma.cc/6R9J-DJAF>] (last updated July 21, 2022).

The Limited Liability Company (“LLC”) is a relatively new type of unincorporated business entity.<sup>208</sup> The first LLC statute was created in Wyoming in 1997 and has since become the most popular business entity in the country.<sup>209</sup> LLCs exist in every state.<sup>210</sup> The LLC combines the tax advantages of a partnership with the limited liability advantages of a corporation.<sup>211</sup> However, the benefits of limited liability, like in corporations, have limits. Similar to the corporate form, with LLCs, if the members do not keep the entity separate from personal activities, they risk being subject to personal liability from a piercing the LLC veil claim.<sup>212</sup>

LLCs allow for flexibility in the management of the business and can be created with only one owner.<sup>213</sup> An LLC can be member-managed or manager-managed.<sup>214</sup> Therefore, if the student-athlete wants to be the sole member of the LLC and have complete control of the business, they have the freedom to do so.<sup>215</sup> On the other hand, if the student-athlete wants to hire someone to manage the LLC (perhaps a parent, agent, accountant, or lawyer), or even manage the LLC with the help of

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<sup>208</sup> See HYNES & LOEWENSTEIN, *supra* note 177, at 797; *see also* Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 287 (Del. 1999) (“The limited liability company (LLC) is a relatively new entity that has emerged in recent years as an attractive vehicle to facilitate business relationships and transactions.”).

<sup>209</sup> See HYNES & LOEWENSTEIN, *supra* note 177, at 797; *see also id.* at 798 (describing LLCs as “the clear choice for new businesses in the United States”); Rodney D. Chrisman, *LLCs are the New King of the Hill: An Empirical Study of New LLCs, Corporations, and LPs Formed in the United States Between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006*, 15 FORDHAM J. CORP. & FIN. L. 459, 459–60 (2010) (emphasizing that LLCs are “undeniably the most popular form of new business entity in the United States”); *id.* at 473–75 (comparing amounts of new LLCs in each state with the number of new corporations and LPs in that state in 2007).

<sup>210</sup> See Chrisman, *supra* note 209, at 473–75 (listing all 50 states and Washington D.C. with each state’s statistics on new LLCs in 2007).

<sup>211</sup> See HYNES & LOEWENSTEIN, *supra* note 177, at 797–98 (explaining that owners are not vicariously liable for the obligations of the business and that income of the business passes directly to the owners of the LLC, avoiding being taxed at the entity level); *see also Jaffari*, 727 A.2d at 287 (“The limited liability company (LLC) is a relatively new entity that has emerged in recent years as an attractive vehicle to facilitate business relationships and transaction.”).

<sup>212</sup> See HYNES & LOEWENSTEIN, *supra* note 177, at 817. Piercing the corporate veil also requires some type of injustice which would be prevented by piercing the corporate veil. *See* Sea-Land Servs., Inc. v. Pepper Source, 941 F.2d 519, 520 (7th Cir. 1991). Additionally, one of the factors to find unity and ownership in piercing the corporate veil claims is avoiding corporate formalities. *See* HYNES & LOEWENSTEIN, *supra* note 177, at 817. However, to succeed on a piercing the LLC veil claim, corporate formalities are not considered. *See id.* Thus, piercing the LLC veil would not be identical to a piercing the corporate veil claim. *See id.*

<sup>213</sup> See HYNES & LOEWENSTEIN, *supra* note 177, at 10–11; *see also* UNIF. LTD. LIAB. CO. ACT § 202(a) (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1996) (“One or more persons may organize a limited liability company . . . .”) (amended 2013).

<sup>214</sup> See REVISED UNIF. LTD. LIAB. CO. ACT § 407 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2006) (amended 2013).

<sup>215</sup> *See id.*

a hired manager, the student-athlete has the freedom to do so.<sup>216</sup> Any managers hired to manage the LLC are subject to fiduciary duties to ensure that the manager is loyal, discharging their duties with care, and acting in good faith.<sup>217</sup> If the student-athlete is making small amounts of NIL income and does not have an agent, it may be easy for or a family member to manage the LLC. If a student-athlete is making millions of dollars on their NIL, it may be more beneficial to hire an agent and design the LLC to be managed by the agent so that the student-athlete can focus on their studies and athletics.

The LLC option is more advantageous than a corporation because it does not require burdensome corporate formalities and avoids double-taxation.<sup>218</sup> Even though S corporations are another way to avoid double-taxation, they still have burdensome restrictions, require a certain level of corporate formality, and do not exist in all states.<sup>219</sup> Therefore, the LLC is still the more advantageous choice. The LLC is a better option than the partnership because it allows the owners to have limited liability, even if they exert control over the organization.<sup>220</sup> The only reason the LLC is more burdensome than the partnership is that the LLC is not a default business organization.<sup>221</sup> However, creating an LLC is not difficult. To create an LLC, the student-athlete (or whoever is creating the LLC on their behalf) would simply need to file the articles of organization with the Secretary of State.<sup>222</sup> There is generally an affordable fee to file the articles of organization.<sup>223</sup> An LLC may also be subject to annual fees which are subject to the laws within each state.<sup>224</sup>

No matter what business entity is right for the student-athlete, there will be pros and cons. The creation of any

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<sup>216</sup> *See id.*

<sup>217</sup> *See id.* § 409.

<sup>218</sup> *See* HYNES & LOEWENSTEIN, *supra* note 177, at 798.

<sup>219</sup> *See id.*

<sup>220</sup> *See id.* at 797–98.

<sup>221</sup> *See id.*

<sup>222</sup> *See* CAL. CORP. CODE § 17702.01(a) (West 2022). The articles of organization for an LLC only needs to include the name of the LLC, the address of the office, the name and address of an agent of the LLC, a statement that the LLC “is to engage in any lawful act,” and in certain circumstances, a statement regarding the management structure of the LLC. *See id.* § 17702.01(b).

<sup>223</sup> *See, e.g., Business Entities Fee Schedule*, CAL. SEC’Y OF STATE, <http://bpd.cdn.sos.ca.gov/pdf/be-fee-schedule-062018.pdf> [<http://perma.cc/54DS-SSWX>] (last visited Aug. 25, 2022) (including that California’s initial filing fee is seventy dollars).

<sup>224</sup> *See Limited Liability Company*, STATE OF CAL. FRANCHISE TAX BD., <http://www.ftb.ca.gov/file/business/types/limited-liability-company/index.html> [<http://perma.cc/C72Y-6KXE>] (last visited May 14, 2022) (explaining that California LLCs are only subject to annual fees if the LLC makes more than \$250,000).



incorporated business comes with responsibilities.<sup>225</sup> It is hard to imagine an eighteen-year-old right out of high school who is already juggling school and athletics *also* carrying the added responsibility of a business entity. For many student-athletes earning less NIL income who do not have strong interests in limited liability, it may not even be worth setting up the LLC. However, for most student-athletes, it is likely worth the effort of filing the articles of organization and paying the affordable fee to protect themselves.<sup>226</sup>

### III. STATE TAXATION OF STUDENT-ATHLETES

#### A. In Which State(s) Must Student-Athletes File Taxes?

States have the constitutional power to tax both (1) residents on all sources of income no matter where derived and (2) nonresidents on all income earned from sources within the state.<sup>227</sup> Therefore, student-athletes may have the obligation to file taxes in more than one state.<sup>228</sup>

##### 1. Student-Athletes' State of Residency

So where are student-athletes legally residing? Each state has different rules for whether an individual is a resident of the state. In California, an individual is a resident when the individual is “in [the] state for other than a temporary or transitory purpose” and when they are “domiciled in [the] State [but are] outside the State for a temporary or transitory purpose.”<sup>229</sup> Additionally, there is a rebuttable presumption that an individual is a resident if they “spend in the aggregate more than nine months of the taxable year within [the] State.”<sup>230</sup> In Texas, an individual is a resident for tax purposes when they live in the state.<sup>231</sup> This includes “[a] person who is temporarily living in the state, and retains a permanent

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<sup>225</sup> See Wittry, *supra* note 96 (“[O]nce you go down that LLC, incorporated road . . . there’s [sic] hoops you have to jump through and we can’t ignore those hoops or they’ll come back and bite you.”).

<sup>226</sup> California only charges a seventy dollar filing fee for LLCs. See *Business Entities Fee Schedule*, *supra*, note 223.

<sup>227</sup> See *Shaffer v. Carter*, 252 U.S. 37, 52, 59 (1920) (holding that states may tax nonresidents on all income derived from a source within the state); see also *Show Me the Money*, *supra* note 97, at 46 (“[S]tates have the constitutional power to tax their own residents on all sources of income no matter where derived, and nonresidents on their income earned from sources within the state.”); *id.* at 48 n.192 (referring to the power to tax nonresidents on income earned from services actually performed within the state as “[s]ource taxation”).

<sup>228</sup> See *Changing the Face of College Sports*, *supra* note 64, at 495–98.

<sup>229</sup> CAL. REV. & TAX. CODE § 17014(a) (West 2022).

<sup>230</sup> *Id.* § 17016. Arizona’s residency statute mirrors California’s residency statute. See ARIZ. REV. STAT. ANN. § 43-104 (2022).

<sup>231</sup> 34 TEX. ADMIN. CODE § 3.71(a) (2022).

home in another state.”<sup>232</sup> The Texas Administrative Code clarifies that “[a] person . . . may be a resident of more than one state at a time.”<sup>233</sup> Comparing these residency statutes, it is possible for an individual to be a resident in both California and Texas at the same time for tax purposes.<sup>234</sup> To counteract the effects of being subject to taxes in multiple states, some states offer a tax credit.<sup>235</sup>

If a student-athlete moves out-of-state for college, they will need to navigate the residency requirements of both their home state and college state to determine in which state they are a resident (or whether they are a resident of both states).<sup>236</sup> If the student-athlete is a resident of both states, they will need to file state tax returns in both states and determine if there are any applicable tax credits in either state. It may be beneficial for a student to become a resident in the state where they attend college. For example, if the college student is from California, where the tax rate is particularly high,<sup>237</sup> and they are attending a college or university in Texas, where there are no state income taxes,<sup>238</sup> it would be beneficial for the student to declare residency in Texas for tax purposes. However, even if the student becomes a Texas resident, California still requires the student to pay part-year taxes for all income earned while a resident of California and all income from a source within California.<sup>239</sup> Calculating part-year taxes can be extremely complicated.<sup>240</sup>

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *See id.*; CAL. REV. & TAX. CODE § 17014 (West 2022).

<sup>235</sup> *See, e.g.*, CAL. REV. & TAX. CODE § 18001(a) (West 2022) (allowing California residents to take a tax credit “for net income taxes imposed by and paid to another state”); ARIZ. REV. STAT. ANN. § 43-1071 (2022) (offering a tax credit similar to California’s tax credit); Alan Pogroszewski, *When is a CPA as Important as Your ERA? A Comprehensive Evaluation and Examination of State Tax Issues on Professional Athletes*, 19 MARQ. SPORTS L. REV. 395, 417 (2009) (listing tax credit statutes for select states and indicating Texas’s lack of a tax credit). Although Texas does not have a tax credit, Texas also does not have any state income tax; therefore, Texas residents are not double-taxed if they are residents of Texas and another state. *See id.*

<sup>236</sup> *Changing the Face of College Sports*, *supra* note 6464, at 496 (“Depending on how any given state defines ‘residency’ for tax purposes, it is possible that student-athletes may find themselves having dual-residency status.”).

<sup>237</sup> *See* Sean Jackson, *California State Tax Rates 2021-2022: Income and Sales Tax Rates*, BANKRATE (Nov. 12, 2021), <http://www.bankrate.com/taxes/california-state-taxes/> [<http://perma.cc/3DF9-HH3X>].

<sup>238</sup> *See* Pogroszewski, *supra* note 235, at 417.

<sup>239</sup> *See* CAL. REV. & TAX. CODE § 17041(b), (i) (West 2022).

<sup>240</sup> For example, in California, nonresident or part-year resident taxpayers must first calculate their taxes as if they were fulltime California residents. *See Law Summary: Nonresident or Part-Year Resident Tax Liability 2002 and Subsequent Years*, CAL. FRANCHISE TAX BD., [http://web.archive.org/web/20161221014249/http://www.ftb.ca.gov/Law/summaries/NonResTxCA\\_2002S.pdf](http://web.archive.org/web/20161221014249/http://www.ftb.ca.gov/Law/summaries/NonResTxCA_2002S.pdf) [<http://perma.cc/54NE-ANQE>] (last updated Mar. 22, 2010). They must calculate their California tax rate by determining the percentage of taxes they would need to pay over their adjusted gross income (AGI) if they were full

## 2. Characterization and Source of Income

The characterization of NIL income has been the issue of tax controversy for some time.<sup>241</sup> If income is considered compensation for services, then the income will be taxed where the services were rendered.<sup>242</sup> Conversely, if income is considered royalties, the income will be taxed in the student-athlete's residential state.<sup>243</sup> Student-athletes are not earning money for their participation in games;<sup>244</sup> however, their NIL only has value because of their performance on the field. Because the connection between student-athletes' performance on the field and their NIL income is indirect, and the NCAA's reluctance to allow a pay-for-play model, student-athletes' NIL income will likely be classified as royalties and taxed at the student-athletes' place of residence.

## 3. Implications of the Jock Tax

Prior to 1990, professional athletes did not make enough money to be targets for taxation.<sup>245</sup> In the 1990s, professional athletes' salaries began to rise significantly, causing the potential revenues from taxing the professional athletes to outweigh the cost of collecting such taxes.<sup>246</sup> In April of 1992, Philadelphia was in a financial crisis that was estimated to grow to a \$1 billion deficit by 1996; therefore, the City had to get creative with raising revenue to decrease this deficit.<sup>247</sup> As part of these efforts, Philadelphia became the first city to tax professional athletes on income earned within the city.<sup>248</sup> Many other cities and states have followed Philadelphia's lead to increase their revenue, but some

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time California residents. *See id.* They then determine their California AGI which includes "any income from a source within California and income from non-California sources while taxpayer was a resident of California." *Id.* To calculate California taxable income, the taxpayer must subtract a prorated deduction amount based on a calculation of their deductions as if they were a permanent California resident. *See id.* Then, they must subtract the prorated amount from their California AGI. *See id.* The taxpayer must then multiply their California taxable income by their California tax rate to determine their California tax. *See id.* Tax credits are then deducted by using a prorated amount of tax credits based on the tax credits that would be allowed if the taxpayer were a full time California resident. *See id.*

<sup>241</sup> Whitlock, *supra* note 140, at 20 ("The characterization of payments for the use of name and likeness rights is not new. It has been the subject of both international tax controversies, and domestic tax controversies."); *see also* News & Brews Sports Biz, *supra* note 98, at 14:10 (explaining the complications of income from social media influencing).

<sup>242</sup> *See* Whitlock, *supra* note 140, at 20.

<sup>243</sup> *See id.*

<sup>244</sup> *See* NCAA *Interim Policy*, *supra* note 80 (clarifying that NIL income is not pay-for-play).

<sup>245</sup> *See* Kara Fratto, *The Taxation of Professional U.S. Athletes in Both the United States and Canada*, 14 SPORTS LAWS. J. 29, 40–41 (2007).

<sup>246</sup> *See id.*

<sup>247</sup> *See* Leslie A. Ringle, *State and Local Taxation of Nonresident Professional Athletes*, 2 SPORTS LAWS. J. 169, 169 (1995).

<sup>248</sup> *See id.*; Fratto, *supra* note 245, at 40.

states had other motivations.<sup>249</sup> Illinois Senator John Fullerton created a bill, informally titled “Michael Jordan’s Revenge,” that only taxed athletes from states that taxed Illinois athletes.<sup>250</sup> The nonresident income taxes imposed on professional athletes are commonly referred to as “jock taxes.”<sup>251</sup> The jock taxes create an issue of double taxation.<sup>252</sup> Many states that do not impose the jock tax do not give a tax credit for jock taxes paid in other states.<sup>253</sup> Some states have an opportunity for professional athletes to get a tax credit to avoid the issue of double taxation; however, the tax credits do not eliminate the issue of double taxation.<sup>254</sup>

Some states have jock tax statutes specifically directed at professional athletes, but it is likely that student-athletes will also fall under those statutes.<sup>255</sup> Even if student-athletes do not fall under the current jock tax statutes, these statutes may be amended to include student-athletes or new statutes could be created to tax student-athletes in a similar way.<sup>256</sup> Conversely, because student-athletes’ NIL income is not classified as pay-for-play, the student-athletes are not earning income when they are in another state for a game.<sup>257</sup> It is a stretch for forum states to try to tax the student-athletes’ NIL revenue as income earned from a source within the state when the student-athletes are merely

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<sup>249</sup> See Fratto, *supra* note 245, at 40 (“Some [statutes] were enacted purely as a method of generating revenue; however, others were enacted in retaliation to recover tax revenue that was lost to other states.”).

<sup>250</sup> See Richard E. Green, *The Taxing Profession of Major League Baseball: A Comparative Analysis of Nonresident Taxation*, 5 SPORTS LAWS J. 273, 277 (1998). For example, if State X taxes athletes from Illinois, but State Y does not tax Illinois athletes, then Illinois will tax State X athletes, but not State Y athletes. The Chicago Bulls’ basketball players paid approximately \$4,000 in taxes to California, and Illinois credited the players for those taxes. *See id.* Fullerton claims that the purpose of the bill was equity and fairness. *Id.* at 277 n.24.

<sup>251</sup> See *Show Me the Money*, *supra* note 9797, at 33 n.103 (using the term “jock tax” to refer to “the trend among taxing authorities toward levying state and local income taxes on traveling business professionals, particularly visiting professional athletes”).

<sup>252</sup> See *Changing the Face of College Sports*, *supra* note 64, at 497 n.260. *See generally* Shaffer v. Carter, 252 U.S. 37, 58 (1920) (clarifying that the United States Constitution does not forbid double taxation).

<sup>253</sup> See, e.g., DiMascio, *supra* note 97, at 955 n.23 (“Illinois refuses to grant a credit to its resident athletes for taxes paid to a foreign jurisdiction, effectively double taxing the athletes on dollars allocated to another jurisdiction. It is the only of the 20 states that impose a jock tax that does not grant such a credit.”).

<sup>254</sup> *Show Me the Money*, *supra* note 97, at 33 n.104; *Changing the Face of College Sports*, *supra* note 64, at 497 n.260.

<sup>255</sup> See News & Brews Sports Biz, *supra* note 98, at 04:12 (“Many states have specific statutes related to tax for professional athletes. College athletes are probably going to fall under those same statutes and therefore be subject to tax in those same jurisdictions.”).

<sup>256</sup> See *Show Me the Money*, *supra* note 97, at 46–47 (“Should student-athletes be paid in the future, they will be subject to the jock tax in the same fashion that professional athletes currently are.”); *see also* Wittry, *supra* note 96 (mentioning that allocation of taxes for student-athletes will be partly “based on professional athlete rules that are already out there”).

<sup>257</sup> See *generally* NCAA Interim Policy, *supra* note 80 (clarifying that NIL income is not pay-for-play).

there to perform at a game and are not being paid to play in the game. As mentioned in the previous Section,<sup>258</sup> the states can try to argue that the student-athletes' NIL only has value because of their performance in games, so the income is still derived indirectly from their performance within the forum state. This argument seems circular; yet many arguments related to the concept of amateurism appear to be similarly circular.<sup>259</sup> Additionally, even if states succeed using this argument, the allocation of NIL income to the performance in a specific state would present administrative difficulties.

If student-athletes are required to pay some type of jock taxes, they will need to keep track of how much income is earned while visiting another state. This becomes even more burdensome if a student-athlete remains a resident in the state where they lived before going to college (home state). This student-athlete will still need to pay taxes, at minimum, in their home state and in the state where they attend college (college state). This would require student-athletes to accurately track and allocate their NIL revenue between income earned while in their college state and income earned while in their home state. This is even more burdensome than the jock tax for professional athletes because professional athletes are generally residents in the state where their team is located.

The double taxation and the record keeping requirements of the jock tax are highly onerous for student-athletes. The possible implication of jock taxes for student-athletes further increases the complexity and compliance requirements for student-athletes.<sup>260</sup>

## B. Recruiting Inequity

The state tax effects of NIL deals could create a recruiting inequity between different schools.<sup>261</sup> Student-athletes expecting to earn large amounts of NIL income will be enticed to attend institutions in states with little to no income tax.<sup>262</sup> For example, if a top-recruited high school senior football player is deciding between Texas A&M in Texas (with no income tax) and UCLA in California (with high income tax), this football player would have

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<sup>258</sup> See *supra* Part III.A.2.

<sup>259</sup> See Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring) (describing the NCAA's argument that student-athletes' compensation must be restricted to conserve the concept of amateurism as "circular and unpersuasive").

<sup>260</sup> See *Show Me the Money*, *supra* note 97, at 47.

<sup>261</sup> See McCann & Raiola, *supra* note 124 ("[S]chools in one of the nine U.S. states without a tax on wages (Alaska, Florida, New Hampshire, Nevada, South Dakota, Tennessee, Texas, Washington and Wyoming) could enjoy a potential recruiting advantage on account of their tax laws.").

<sup>262</sup> See *id.*

much more net profit by choosing Texas A&M over UCLA.<sup>263</sup> The tax differential between states is more important for student-athletes generating large amounts of NIL income; therefore, the states with little to no income tax will have more of an edge in recruiting top athletes. Additionally, the recent introduction of the portal for student-athletes allows them to transfer between schools more easily.<sup>264</sup> The combination of the portal and the tax inequality between states may motivate many students to transfer from schools in states with high tax rates to schools in states with low tax rates.<sup>265</sup> Conversely, the tax inequity between states is just one of many factors student-athletes may consider when choosing a school (or choosing to transfer schools). It is unlikely that the mere tax inequity between states will be a controlling factor in deciding where to attend school.<sup>266</sup>

Ultimately, many federal and state ramifications of the new NIL payments create burdensome compliance difficulties for young and inexperienced taxpayers. An eighteen-year-old is expected to calculate and file taxes correctly while prioritizing academic success and athletic performance. If a student-athlete fails to track, calculate, and pay taxes correctly, there are consequences.<sup>267</sup> If taxes are left unpaid or underpaid, student-athletes will be subject to an additional payment as a penalty.<sup>268</sup> If taxes are willfully evaded, taxpayers can face jail time.<sup>269</sup> For example, Lawrence Taylor, former linebacker for the New York Giants with appearances in *The Waterboy* and *Any Given Sunday*, filed a false tax return and admitted to not paying over \$83,000 in

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<sup>263</sup> See generally *Tax Calculator, Tables, Rates*, STATE OF CAL. FRANCHISE TAX BD., <http://www.ftb.ca.gov/file/personal/tax-calculator-tables-rates.asp> [http://perma.cc/PLJ2-9AN3] (last updated Feb. 11, 2022) (providing the 2021 tax rate tables for Single, Joint, and Head of Household taxpayers); see also Lauren Perez, *9 States with No Income Tax*, SMARTASSET (Oct. 18, 2021), <http://smartasset.com/taxes/states-with-no-income-tax> [http://perma.cc/M5JY-4DBN] (including Texas in a list of states without an income tax).

<sup>264</sup> See Eli Boettger, *College Basketball's Most Powerful Force: The Transfer Portal*, ATHLETICDIRECTORU, <http://athleticdirectoru.com/articles/college-basketball-transfer-portal/#:~:text=In%20October%202018%2C%20the%20NCAA,days%20to%20publicize%20the%20information> [http://perma.cc/EU4A-TGEQ] (last visited May 11, 2022) (explaining that the transfer portal, which came into existence in October of 2018, enables student-athletes to transfer schools more easily and allows them to contact other schools without their coach's permission).

<sup>265</sup> See *Show Me the Money*, *supra* note 97, at 40–42, 47–49 (analyzing the recruitment inequity that would arise if student-athletes were paid for their participation in athletics).

<sup>266</sup> See Zack Pearson, *USC Football Lands Another Texas Transfer*, TROJANS WIRE (May 4, 2021, 6:44 AM), <http://trojanswire.usatoday.com/2021/05/04/usc-trojans-football-lands-another-texas-longhorns-transfer-for-clay-helton/> [http://perma.cc/4F2A-KDWV] (highlighting that a third player transferred from the University of Texas to USC).

<sup>267</sup> See I.R.C. § 6654.

<sup>268</sup> See I.R.C. § 6654(a).

<sup>269</sup> See I.R.C. § 7201.

taxes.<sup>270</sup> Taylor was sentenced to ninety days of house arrest.<sup>271</sup> Even though student-athletes are subject to the extra tax compliance burdens outlined throughout this article, it is crucial that they refrain from going out of bounds such that they are subject to extra penalties. Congress, the NCAA, and schools must work together to help student-athletes maintain adequate compliance to stay within bounds.

#### IV. SOLUTIONS

##### A. Develop an Online Platform for the Education and Assistance of Student-Athletes

The most helpful and immediate solution to the new tax burdens for student-athletes is to create a digital platform to educate student-athletes about their rights and responsibilities, to help keep track of and make recommendations for their finances, to aid students in taking steps to minimize their tax burdens (including forming an LLC), and to help students with calculation and filing of necessary tax documents.<sup>272</sup> This software could be even broader and incorporate an interface for student-athletes to connect with NIL deals and agents. It should be available to all student-athletes (and recruits) throughout the country. The software should also have many how-to pages and videos on helpful processes, such as explaining what kind of expenses need to be tracked and how to create an LLC. In addition to educational material, the platform should connect student-athletes to lawyers and CPAs who specialize in student athletics. There should be staff working to answer questions through messaging, over the phone, or on an online interface, such as Zoom, for digital meetings. The student-athletes should have the opportunity to create continuing business relationships with specific attorneys and/or CPAs and be able to communicate with them through the app. The software should be available online and should be made into an application for mobile devices. Student-athletes are busy and always traveling for games, so

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<sup>270</sup> See TS Staff, *Top 10 High Profile Athletes Involved in Tax Scandals*, THE SPORTSTER (Aug. 7, 2014), <http://www.thesportster.com/entertainment/top-10-high-profile-athletes-involved-in-tax-scandals/> [<http://perma.cc/XY7A-HTFA>].

<sup>271</sup> *Id.*

<sup>272</sup> There are already some platforms that are limited to management of sponsorships and education materials on finances and business. See, e.g., *NIL Protect Pro*, ATHLIANCE, <http://athliance.co/nil-protect-pro/> [<http://perma.cc/T73X-J22Z>] (last visited Aug. 19, 2022). I am suggesting a software that combines these features with the opportunity for students to acquire attorneys and CPAs. See *id.* Further, the software would be user-friendly, marketed toward young student-athletes, and available both online and as an app. This app would be a one-stop shop to help student-athletes manage the new responsibilities associated with NIL income.

having the software available in an app will allow them to record certain expenses or ask questions with ease.

This platform would be costly because at the start, it would require, at a minimum a CPA, a financial advisor, a specialized sports law attorney, a software developer, and a graphic designer. The software should be a subscription-based online software to offset the large costs. The subscription should have a range of levels for how much assistance a student-athlete would like to use. For example, a student-athlete that merely wants access to the educational materials should not pay nearly as much as a student-athlete who wants to use the app for help from a lawyer to create an LLC and help from a CPA to calculate and file all necessary tax paperwork. It may reach a level where, if a student-athlete wants to utilize services from the CPA and lawyer, the subscription cost is decided on a case-by-case basis.<sup>273</sup> The cost of the basic subscription level will be minuscule in comparison to the amount of money potentially saved on taxes and related expenses. This cost could possibly be covered by schools, especially schools with Division 1 athletic programs that have student-athletes who have the potential to make large amounts of money from their NIL.<sup>274</sup> This could even become a recruitment incentive for attending a particular school. Conversely, this recruiting incentive could amplify the unfair competitive advantage of certain schools.<sup>275</sup> It may be more beneficial for the NCAA to bear the cost of the software and make it available to all NCAA student-athletes.<sup>276</sup>

This software will be the most effective solution because it would be available to all student-athletes throughout the United States, would be affordable for student-athletes to begin utilizing, and would not require cooperation from the government, schools, or the NCAA. This solution is not perfect, however, because the creator of this platform would likely be a private company that is willing to fund the creation of the software and has the workforce in place. Further, the software

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<sup>273</sup> At the base level, for student-athletes making less money from NIL deals that would adequately benefit from a one-size-fits-all tax education, minimization, and compliance package, there would be standard subscription costs. As student-athletes make more money from NIL deals and require more hands-on help—along with a more customized tax minimization and compliance plan—the cost would be determined on a case-by-case basis.

<sup>274</sup> Such lawyers must account for professional conduct rules regarding payment from third parties. *See* MODEL RULES OF PRO. CONDUCT r. 1.8(f) (Am. Bar Ass'n, 2018) (preventing compensation from third parties “unless (1) the client gives informed consent; (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected...”).

<sup>275</sup> *See supra* Part III.B.

<sup>276</sup> *See supra* note 274.



would need to address not only federal and state tax requirements, but also contain an algorithm to address the variables associated with any combination of multiple states of residency. Nonetheless, there is a potential to make a large return on investment given the many users that would be paying for access to the proposed software, if it becomes successful.

#### B. Tax Support Centers Within Athletic Departments

Another possible solution that could alleviate the student-athletes' complicated tax compliance burdens is for athletic departments to provide resources to assist student-athletes. Such resources could include educational materials, financial advisors, CPAs, and/or specialized attorneys. Athletic departments should provide these resources to student-athletes to help address the complications of their tax returns. Athletic departments could provide legal counsel and/or tax specialists to help student-athletes structure their finances for tax minimization and to help calculate their taxes for their estimated quarterly payments and annual tax returns. The school could have in-house counsel dedicated to student-athletes, or the school could contract with a team of independent consultants, giving students more flexibility in what kind of help they desire.

Alternatively, the NCAA could have a centralized tax support center available to all NCAA student-athletes. In this scenario, the lawyers would work for the NCAA, and student-athletes would have access to them virtually. This option is less ideal though, as the lawyers would be less accessible than if they were in each school.

In either situation, the attorney's role would be to counsel student-athletes on their burdens and liabilities regarding taxes from NIL income; help student-athletes create an LLC, and counsel them on their responsibilities as members of the LLC, including keeping track of expenses; and/or be an agent for student-athletes in signing NIL deals and managing LLCs. The CPA would help with tracking of expenses, calculating quarterly estimated payments, and filing tax returns.

It is likely that the assistance, if paid for by the NCAA or athletic departments, could also be excluded. As mentioned above, the IRS has traditionally opined that student-athletes' scholarships qualify for the exclusion. Additionally, the Court has interpreted that, as long as scholarships and grant funds are not received in exchange for services rendered, the scholarship or

grant qualifies for the exclusion.<sup>277</sup> This service would not be compensation for the student-athletes' participation in sports, so it would likely fall under the scholarship tax exclusion and would not add another tax obligation for the student-athletes.

This type of assistance would be costly. It would not be a good solution for all schools. This type of tax support would be more fitting for Division I schools that have ample income from athletics and are bringing in many student-athletes receiving large compensation from their NIL. Further, although this would be costly for the institutions involved, universities have an incentive to prevent student-athletes from dropping the ball on their tax liability. Universities, understandably, want to avoid a headline that a student-athlete at their university was indicted for tax evasion. These services could even be used as a recruiting incentive to compel athletes to attend that school. Providing legal and tax help to student-athletes is a highly valued incentive that would otherwise cost these individuals a potentially large sum. This is not a one-size-fits-all solution, as it will only be feasible for a handful of schools. It is a great option for those schools, but not enough to alleviate the burden of the student-athletes across the country being thrown into complex tax returns with little to no tax experience.

An additional barrier to implementation of this solution is that this type of support center is not currently allowed by the NCAA guidelines.<sup>278</sup> This tax support center is not related to the student-athletes' education; therefore, the new guidelines from *NCAA v. Alston* are not broad enough to provide this type of support center.<sup>279</sup> The NCAA is generally only concerned with "protect[ing], support[ing], and enhanc[ing] the physical and mental health and safety of student-athletes."<sup>280</sup> However, the student-athletes need to be able to satisfy their tax obligations in order to focus on their physical and educational well-being.<sup>281</sup> The

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<sup>277</sup> See, e.g., I.R.C. § 117; Rev. Rul. 77-263, 1977-2 C.B. 47; Letter from John A. Koskinen, Internal Revenue Serv. Comm'r, Internal Revenue Serv., to Hon. Richard Burr, United States Sen. (June 27, 2014), <http://www.irs.gov/pub/irs-wd/14-0016.pdf> [<http://perma.cc/35YHCYSH>] ("It has long been the position of the Internal Revenue Service that athletic scholarships can qualify for exclusion from income under Section 117."); Smith v. Comm'r, 51 T.C.M. (CCH) 1348 (1986) (holding that funds received by a graduate assistant were excludible because they were not compensation for her services rendered). *But see* Bingler v. Johnson, 394 U.S. 741, 755-58 (1969) (holding that a Ph.D. student's stipend did not qualify for the Section 117 exclusion because it was compensation for services, rather than a scholarship).

<sup>278</sup> See *NCAA Division I Manual*, *supra* note 33, at 218.

<sup>279</sup> See Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2153-54 (2021).

<sup>280</sup> See *NCAA Division I Manual*, *supra* note 33, at 2.

<sup>281</sup> *Id.*

NCAA should promulgate guidelines allowing for these tax support centers within universities.

### C. A College Course on Student-Athlete Tax Liabilities

Another possible solution is for colleges to require that student-athletes participate in a class about their tax responsibilities. “Give a man a fish, and he will eat for a day. Teach a man to fish and he will eat for a lifetime.”<sup>282</sup> Some students begin college without even knowing whether they need to pay taxes or how that process begins. Some students may not need to file taxes, but student-athletes making money from their NIL will need to learn quickly. In their first term of college, student-athletes should be required to take a semester-long class (or if the school uses trimesters, then a trimester-long class) taught by tax lawyers and/or CPAs where they are taught and tested on tax planning techniques and calculation of taxes for their NIL income. Although an entire course could be described as overly onerous, the skills the student-athletes learn in this course will be utilized throughout the remainder of their lives. The course could be as little as one course unit/one lecture per week, throughout the term.

In addition to the semester-long class, athletic departments should provide references for students who need more help, including information for local CPAs and tax lawyers and handouts for useful information. The school should ensure the information is frequently updated and available to students online and/or in athletic departments.

Teaching student-athletes how to handle their own taxes will not only help them with their tax burdens in college, but it will also prepare them to handle their taxes for life. However, it is unlikely that one class will be sufficient to give students the tools to be able to calculate their own taxes. This solution is fairly weak because it leaves the burden of financial planning on the student-athletes, who are already full-time students and athletes. In addition, this would require schools to enforce the requirement for students to take the class. It is unlikely that all schools will cooperate in creating and offering this course without being required to do so. Schools could be required to enforce this type of education either through an NCAA policy or federal legislation. An NCAA policy would be more ideal because it would be quicker to enact and more cost-effective than federal action.

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<sup>282</sup> THE YALE BOOK OF QUOTATIONS 527 (Fred R. Shapiro ed., 2006) (quoting modern proverbs of unknown origin).

## CONCLUSION

With *NCAA v. Alston*, new state legislation, new NCAA guidance, and potentially new federal legislation, the landscape of financial planning and taxes for student-athletes is turning into a new game entirely.<sup>283</sup> These positive changes have added new burdens to student-athletes' tax responsibilities, including higher tax payments, more complex calculations, and more record keeping requirements.

As independent contractors, student-athletes need to pay twice as many employment taxes as employees and will need to pay quarterly estimated payments.<sup>284</sup> They will benefit from being able to deduct certain expenses as ordinary and necessary business expenses; however, this will require thorough record keeping and a determination of the student-athletes' tax home.<sup>285</sup> Student-athletes could create an LLC to minimize taxes, but this creates more responsibilities for a student-athlete.<sup>286</sup> Additionally, for purposes of state taxes, student-athletes must determine the state(s) in which they will be required to file state taxes (which could be multiple states), based on their states of residency, the characterization of their income, and the implication of the jock tax. Because of student-athletes' young age and lack of experience with taxes, and in light of the complicated tax compliance burden as a result of their newly allowed NIL income, solutions must be implemented to help student-athletes with tax compliance to avoid a host of potential penalties.

The most effective solution is to create a digital platform to educate student-athletes, help keep track of and make recommendations for their finances, aid students in taking steps to minimize their tax burdens (including forming an LLC), and help students with calculating and filing necessary tax documents.<sup>287</sup> Tax support centers staffed with lawyers and accountants, in addition to requiring a course on tax and finance responsibilities, could also help student-athletes avoid penalties for tax compliance errors.<sup>288</sup> By providing student-athletes with the tools, education, and advice they need to legally minimize their taxes and stay on top of filing and payment requirements, we can better protect them from dropping the ball on the compliance of their tax returns.

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<sup>283</sup> See *Taxing College Athletes After NCAA v. Alston*, TAX NOTES TALK, at 17:07 (July 16, 2021), <http://open.spotify.com/episode/0LeU6JZQTI3trB6viGmvPv?si=84C2Rw9lQNCTfbhWwTgOOA> (“[Taxation of student-athletes] remains the wild, wild west.”).

<sup>284</sup> See *supra* Part II.B.1, 3–4.

<sup>285</sup> See *supra* Part II.B.2.

<sup>286</sup> See *supra* Part II.C.

<sup>287</sup> See *supra* Part IV.A.

<sup>288</sup> See *supra* Part IV.B–C.