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## NAME, IMAGE, AND LIKENESS: MAJOR PROBLEMS FOR MINORS

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# NAME, IMAGE, AND LIKENESS: MAJOR PROBLEMS FOR MINORS

Paul A. Clowes\*

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*“If they’re good enough, they’re old enough.”* –Sir Matt Busby.<sup>1</sup>

## I. INTRODUCTION

The chances are that if you like sports (and even if you don’t) you have probably seen or heard the phrase “Name, Image, and Likeness,” also known as “NIL,” splattered across sports networks, uttered on university campuses, or included in some inflammatory twitter rant. There have been many keyboards bashed and heated arguments had over whether *collegiate* athletes in South Carolina, and indeed the country, should be compensated for the use of their name, image, and likeness.<sup>2</sup> However, drowned out by the stadium-like noise surrounding collegiate athletes are the breaking voices of mid-pubescent South Carolina highschoolers asking, “What about us?”

In some states, high school student-athletes are permitted to earn compensation through licensing their NIL rights and still maintain eligibility to compete.<sup>3</sup> Others, however, ban athletes who engage in NIL activities from competing in high school.<sup>4</sup> For example, a high school student-athlete in a state that permits NIL activities could earn money for endorsing a local business on their social media accounts, while a highschooler in a state that does not permit these NIL activities would be rendered ineligible for the same endorsement. Currently, South Carolina has no active NIL law after its

1. *The Busby Babes: A Dream That Will Never Die*, FOOTYFAIR, <http://www.footyfair.com/2016/02/the-busby-babes-dream-that-will-never.html> [https://perma.cc/Q42D-UQ8Y].

2. See, e.g., Pat Forde, *Jimbo Fisher and Nick Saban’s Jaw-Dropping Public Spat Is an SEC Shock Wave*, SPORTS ILLUSTRATED (May 19, 2022) (emphasis added), <https://www.si.com/college/2022/05/19/nick-saban-jimbo-fisher-feud-alabama-texas-am> [https://perma.cc/CT9Q-3STT].

3. See Braly Keller, *High School NIL: State-by-State Regulations for Name, Image and Likeness Rights*, OPENDORSE (Oct. 11, 2022), <https://biz.opendorse.com/blog/nil-high-school/> [https://perma.cc/2EKT-C6NT] (outlining whether various high school state athletic associations permit high school students to engage in NIL activities and maintain competitive eligibility).

4. See *id.*

previous law was suspended in June 2022 by a proviso in the state budget.<sup>5</sup> Further, the governing bodies of South Carolina high school athletics do not directly permit or deny NIL rights for athletes in their amateurism guidelines.<sup>6</sup> As a result, high school athletes and their parents, institutions, and businesses may be left wondering if NIL activities are permissible or not.<sup>7</sup>

It may appear that only a very small percentage of student-athletes in South Carolina would be presented with the opportunity to earn money from their NIL rights. However, across the country, high school student-athletes have signed NIL deals prior to enrolling in college, with some worth up to \$8 million.<sup>8</sup> Although most high-school NIL deals are much smaller and limited to traditional revenue-generating sports like football and basketball,<sup>9</sup> high-school athletes in other sports have reportedly signed NIL agreements, too.<sup>10</sup>

Despite presenting financial opportunities for minor athletes, allowing minors to enter into NIL deals could result in the exploitation of minors. Perhaps worryingly, athletes as young as twelve years old have been offered NIL deals.<sup>11</sup> It is also disconcerting to recall that major sports brands affiliated with collegiate athletic programs have been engaged in illegal recruiting of

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5. See S.C. CODE ANN. §§ 59-158-10 to -85 (2021) (suspended 2022). This law was enacted following Senate Bill 685 and introduced in the South Carolina Senate on March 23, 2021. S. 685, 2020–2021 Gen. Assemb., 124th Sess. (S.C. 2020).

6. See S.C. HIGH SCH. LEAGUE, 2022–23 BY-LAWS art. II, § 14 (2022), <https://schsl.org/wp-content/uploads/2022/07/2022-23-By-laws-1.pdf> [<https://perma.cc/E2S7-SJFH>] [hereinafter *SCHSL Bylaws*]; S.C. INDEP. SCH. ASS'N, BLUE BOOK 2021–22 CONSTITUTION RULES AND PROCEDURES art. VI, § 6 (2021), [https://www.scisa.org/images/athletics/21-22\\_Constitution.pdf](https://www.scisa.org/images/athletics/21-22_Constitution.pdf) [<https://perma.cc/F83Q-SVU8>] [hereinafter *SCISA Constitution*].

7. See Keller, *supra* note 3.

8. Stewart Mandel, *Five-star Recruit in Class of 2023 Signs Agreement With Collective That Could Pay Him More Than \$8 Million*, THE ATHLETIC (Mar. 11, 2022), <https://theathletic.com/3178558/2022/03/11/five-star-recruit-in-class-of-2023-signs-agreement-with-collective-that-could-pay-him-more-than-8-million/> [<https://perma.cc/S6CY-CZS3>].

9. See, e.g., *Performance Brand Signs California High School Players to Historic NIL Deal*, SPORTS BUS. J. (Aug. 23, 2022), <https://www.sportsbusinessjournal.com/Daily/Issues/2022/08/23/Marketing-and-Sponsorship/High-school-football-NIL-deal.aspx> [<https://perma.cc/23PY-V7YC>] (providing an example of an NIL deal offered to players in football, a revenue generating sport).

10. See, e.g., Tom VanHaaren, *Nike Signs Sister Soccer Players to Company's First High School Name, Image, and Likeness Deal*, ESPN (May 17, 2022), [https://www.espn.com/college-sports/story/\\_/id/33933056/nike-inc-signs-sister-soccer-players-company-first-high-school-name-image-likeness-deal](https://www.espn.com/college-sports/story/_/id/33933056/nike-inc-signs-sister-soccer-players-company-first-high-school-name-image-likeness-deal) [<https://perma.cc/K8ME-HH6E>] (providing an example of a NIL deal offered to athletes who play a sport other than football or basketball).

11. Daniel Chavkin, *12-Year Old Golfer Signs NIL Deal With Cobra Puma*, SPORTS ILLUSTRATED (May 27, 2022), <https://www.si.com/golf-archives/2022/05/28/cobra-puma-signs-nil-deal-12-year-old> [<https://perma.cc/63RD-X6ZJ>].

high school student-athletes.<sup>12</sup> Without regulation in South Carolina, illusory NIL deals present a ripe opportunity for bad actors to capitalize on minors in the state and improperly influence their university choice.<sup>13</sup> For example, it is not hard to imagine that the next Zion Williamson<sup>14</sup> might receive lucrative, competing NIL offers from Under Armour and Nike as a highschooler while being recruited by the University of South Carolina (sponsored by Under Armour) and Clemson University (sponsored by Nike).<sup>15</sup> Without regulating or expressly disallowing NIL deals for high school student-athletes, South Carolina leaves its minors open to exploitation and influence, making them expendable pawns within the amateur athletic “money machine.”<sup>16</sup>

Part II of this Note outlines the current NIL landscape and a minor’s capacity to contract in South Carolina. Next, Part III of this Note addresses several major issues facing minors wishing to conduct NIL activities. Part IV of this Note then discusses some ways in which the state of South Carolina can act to protect its minor-athletes, educational institutions, and businesses in NIL agreements. Ultimately, Part V of this Note concludes that South Carolina should allow high school student-athletes to enter into NIL deals but should regulate these deals to safeguard the interests of its minors, institutions, and businesses. Although the state could maintain its course of no action, this creates uncertainty for all stakeholders and does not protect vulnerable minors.<sup>17</sup> At one extreme, the state could *outright disallow* NIL deals for high school student-athletes. But, to do so would deny South Carolina minors self-autonomy and prevent them from defraying their educational expenses, unlike opportunities granted to minors in other states.<sup>18</sup> At the other extreme, South Carolina could plainly permit NIL agreements for high school athletes *without*

12. See Jeff Borzello, *Adidas Consultant Details Payments to Influence Two Kansas Players*, ESPN (Oct. 11, 2018), [https://www.espn.com/mens-college-basketball/story/\\_/id/24960936/adidas-consultant-details-payments-influence-dennis-smith-jr-two-kansas-players](https://www.espn.com/mens-college-basketball/story/_/id/24960936/adidas-consultant-details-payments-influence-dennis-smith-jr-two-kansas-players) [https://perma.cc/AHA4-2ZNZ].

13. See *infra* Section III.D.1.

14. See Mina Kimes, *The education of Zion Williamson*, ESPN MAG. (June 4, 2019), <https://www.espn.com/espn/print?id=26406892&type=Story&imagesPrint=off> [https://perma.cc/527V-HGXZ] (explaining that Zion Williamson is a professional basketball player who attended Duke University after attending high school in Spartanburg, South Carolina).

15. At the time of writing, Under Armour sponsors the University of South Carolina’s Athletic Department, and Nike sponsors Clemson University’s Athletic Department. See *Under Armour Partnership Extended Through 2026*, GAMECOCKS ONLINE (Feb. 19, 2016), <https://gamecocksonline.com/news/2016/02/19/under-armour-partnership-extended-through-2026/> [https://perma.cc/4V95-7Y5S]; *The Clemson & Nike Partnership*, CLEMSON TIGERS, <https://clemsontigers.com/nike/> [https://perma.cc/FZ6T-FHKE].

16. See Jon Weinbach, *Inside College Sports’ Biggest Money Machine*, WALL ST. J. (Oct. 19, 2007), <https://www.wsj.com/articles/SB119275242417864220> [https://perma.cc/9CH8-JMDT].

17. See *infra* Section II.A.3.

18. See *infra* Part IV.

*any regulation.* However, this would not safeguard minors from bad actors or unforeseen issues they may later encounter if they enter into collegiate athletics.<sup>19</sup> Therefore, South Carolina should regulate NIL activities for highschoolers in a way that firmly shelters vulnerable student-athletes from predatory actors without unduly restricting their ability to engage in the marketplace. An ideal approach would be one that allows high school student-athletes to earn compensation for their NIL rights, as permitted in other states, while erecting barriers to reduce the risk of exploitation. South Carolina has long protected children from predatory actors in the marketplace.<sup>20</sup> It would be prudent of the state to do so in this context.

## II. BACKGROUND: WHERE WE STAND TODAY

Before addressing some issues minor student-athletes face regarding NIL agreements, it is useful to first identify the origins of “name, image, and licensing” rights in interscholastic athletics, and second, to review the contractual capacity of minors in South Carolina.

### A. Name, Image, Likeness, and South Carolina

#### 1. NIL History

The National Collegiate Athletic Association (NCAA) was founded in 1906 to regulate collegiate sports.<sup>21</sup> The NCAA has always placed a high value on the concept that “[a]n amateur sportsperson is one who engages in sport solely for the physical, mental, or social benefits” derived and not for profit.<sup>22</sup> Today, the NCAA still values the concept of amateurism and aims for its member institutions and athletes to maintain a “clear line of demarcation” between collegiate athletics and professional sports.<sup>23</sup> This line is blurred in that many athletes receive compensation in the form of scholarships, known as “grant in aid” from their universities.<sup>24</sup> However, these scholarships are capped at the total “cost of attendance” at the student-

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19. See *infra* Part III.

20. See, e.g., Caryn E. Neumann, *Child Labor*, S.C. ENCYC. (Apr. 15, 2016), <https://www.scencyclopedia.org/sce/entries/child-labor/> [<https://perma.cc/4Y4A-Q74E>] (discussing child protection bills and legislation dating back to the nineteenth century).

21. History, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> [<https://perma.cc/4N86-NFMH>].

22. BRIAN L. PORTO, THE SUPREME COURT AND THE NCAA 25–26 (2012).

23. NCAA, 2022–23 NCAA DIVISION I MANUAL art. 12, § 12.01.2 (2022), <https://web3.ncaa.org/lsdbi/reports/getReport/90008> [<https://perma.cc/W9C3-VM4V>] [hereinafter *NCAA Manual*].

24. *Id.* § 12.01.4.

athlete's institution.<sup>25</sup> If an athlete receives pay for their athletic play, commonly referred to as "pay-for-play,"<sup>26</sup> then the student-athlete loses their amateur status and becomes ineligible for intercollegiate competition.<sup>27</sup>

Since 2015, there have been several high-profile cases litigated to trial involving the rights of student-athletes competing for NCAA member institutions. The first of these was *O'Bannon v. NCAA*.<sup>28</sup> In *O'Bannon*, former University of California, Los Angeles (UCLA) basketball player, Ed O'Bannon, was the named plaintiff in a class-action lawsuit against the NCAA that claimed the NCAA had unreasonably and illegally restrained trade by using the name, image, and likeness of student-athletes in a college basketball video game produced by EA Sports.<sup>29</sup> The athletes featured in the video game had not consented to the use of their likenesses or received compensation for the use of their likenesses.<sup>30</sup> In balancing between the NCAA potentially "surrender[ing] its amateurism principles entirely" and "offering student-athletes education-related compensation," the *O'Bannon* court found that the NCAA had cured the harm by introducing a policy allowing colleges to offer student-athletes additional compensation up to the full cost of attendance beyond what would be covered under a full scholarship.<sup>31</sup> Interestingly, this policy—which allowed universities to offer student-athletes compensation of up to \$5,000 stipend to cover the full cost of attendance—was introduced *during* the *O'Bannon* litigation.<sup>32</sup> This compensation is provided to athletes in excess of what would be covered under a full scholarship and was designed to help student-athletes pay for miscellaneous personal expenses while enrolled as a student.<sup>33</sup>

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25. Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships*, NCAA (Jan. 19, 2015, 6:58:13 AM), <https://www.ncaa.org/news/2015/1/18/autonomy-schools-adopt-cost-of-attendance-scholarships.aspx> [<https://perma.cc/SA43-5ZHW>].

26. Nicole Auerbach, *Schools Question Whether the NCAA Can Enforce Pay-for-play Rules in NIL: 'Is There Going to Be Accountability?'*, THE ATLANTIC (Mar. 10, 2022), <https://theathletic.com/3173521/2022/03/10/schools-question-whether-the-ncaa-can-enforce-pay-for-play-rules-in-nil-is-there-going-to-be-accountability/> [<https://perma.cc/Y5G4-G3ZY>].

27. *NCAA Manual*, *supra* note 23, § 12.01.3.

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

29. *Id.* at 1055.

30. *Id.*

31. *Id.* at 1078–79.

32. See Tim Dahlberg, *Judge Rules Against NCAA in O'Bannon Case*, AP NEWS (Aug. 8, 2014), <https://apnews.com/article/college-football-lawsuits-football-basketball-ed-obannon-000d63c73cac443b8c7d16b31de6e8bb> [<https://perma.cc/J9FH-464J>].

33. See Eric Prisbell, *What is Full Cost of Attendance for NCAA Athletes?*, USA TODAY, <https://www.usatoday.com/story/sports/college/2014/08/17/ncaa-full-cost-of-attendance/14200387/> [<https://perma.cc/T4Z3-PX9E>].

The *O'Bannon* case set the stage for *NCAA v. Alston*,<sup>34</sup> which began shortly before the conclusion of the *O'Bannon* case in 2015.<sup>35</sup> In *Alston*, former NCAA football and basketball players brought a claim challenging the NCAA's rules limiting an athlete's compensation.<sup>36</sup> The U.S. Supreme Court unanimously affirmed the district court's holding that the NCAA's limitations on education-related benefits to student athletes were unlawful restraints on trade and violated Section I of the Sherman Antitrust Act.<sup>37</sup> The Supreme Court, however, left undisturbed the NCAA's rules limiting student-athlete compensation unrelated to education to the full cost of attendance (that is, the cost of a full scholarship plus the \$5,000 cost of attendance stipend).<sup>38</sup>

Nevertheless, shortly after the *Alston* decision, the NCAA voted to allow student-athletes to receive compensation for NIL activities, a benefit unrelated to education.<sup>39</sup> The NCAA adopted an Interim NIL Policy (Interim Policy), which took effect July 1, 2021, and remains in effect today.<sup>40</sup> The policy maintains the effect of Article 12 of the NCAA Bylaws prohibiting pay-for-play and improper recruiting<sup>41</sup> but, with regards to NIL, defers to state laws and institutional requirements.<sup>42</sup> The Interim Policy does not address high school student-athletes' eligibility, which has been instead left up to state legislatures and state high school athletic associations.<sup>43</sup>

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34. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

35. See *Sherman Act—Antitrust Law—College Athletics—NCAA v. Alston*, 135 HARV. L. REV. 471, 472 (2021) (providing timeline regarding *NCAA v. Alston*).

36. See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F.Supp.3d 1058, 1061–62 (N.D. Cal. 2019).

37. See *Alston*, 141 S. Ct. at 2166; see also Sherman Antitrust Act, 15 U.S.C. §§ 1–38 (2004).

38. *Alston*, 141 S. Ct. at 2166.

39. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021, 4:20:00 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/W926-DXUC>].

40. *Interim NIL Policy*, NCAA, [http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_InterimPolicy.pdf](http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf) [<https://perma.cc/39TA-W4JG>] [hereinafter *NCAA Interim Policy*].

41. See *NCAA Manual*, *supra* note 23, § 12.1.2.1 (highlighting various NCAA restrictions associated with improper recruiting).

42. See *NCAA Interim Policy*, *supra* note 40.

43. See *id.*; Darren Heitner, *The Fight for NIL Rights Reaches a New Class: High Schoolers*, OUTKICK, <https://www.outkick.com/the-fight-for-nil-rights-reaches-a-new-class-high-schoolers/> [<https://perma.cc/5WKC-J6FL>] (“The NCAA refused to opine as to whether such NIL activity could separately jeopardize a college athlete’s high school eligibility and instead referred high school athletes to consult their high school athletics associations regarding questions about their ability to compete.”).



## 2. *State Laws and NIL for Collegiate Student-Athletes*

The NCAA's Interim Policy sent universities and state politicians scrambling to pass laws through legislation or executive orders.<sup>44</sup> This has led to a patchwork of rapidly evolving state-by-state laws.<sup>45</sup> California was the first state to pass NIL legislation—in 2019—which was set to go into effect on January 1, 2023.<sup>46</sup> Following the seminal *Alston* case and the NCAA's Interim Policy, California legislators passed a revised bill which accelerated the effective date of the law to September 1, 2021.<sup>47</sup> While some states, like California, quickly (if not hastily) adopted NIL legislation, some state governors instead issued executive orders to the same effect.<sup>48</sup> Most states later passed NIL laws through legislation; however, notably, North Carolina has not enacted legislation and still relies on an executive order issued by its Governor, Roy Cooper, on July 2, 2021.<sup>49</sup>

Conversely, South Carolina Governor Henry McMaster has issued no executive orders regarding NIL. Instead, in 2020, the South Carolina legislature introduced Senate Bill 935, the state's first NIL bill.<sup>50</sup> This proposed bill was highly restrictive and contained several difficult-to-administer requirements.<sup>51</sup> This rejected bill required that monies earned by athletes not exceed \$25,000 per athlete and that all NIL compensation be paid into trusts which student-athletes would later gain access to upon university graduation and completion of a "state-approved financial literacy course."<sup>52</sup> Although seemingly well-intentioned for the long-term benefits of student-athletes, the bill did not pass the Committee on Education.<sup>53</sup> Undeterred, the state legislature introduced a second NIL bill, Senate Bill 685, to the senate

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44. See Rivkin Radler LLP, *Businesses Can Cautiously Proceed With Student-Athlete Sponsorship Deals*, JD SUPRA (July 19, 2011), <https://www.jdsupra.com/legalnews/businesses-can-cautiously-proceed-with-7201660/> [<https://perma.cc/PGA8-VGFB>]; See *Tracker: Name, Image, and Likeness Legislation by State*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> [<https://perma.cc/8TGX-ST27>] [hereinafter *Tracker*] (collecting various NIL laws enacted by individual states).

45. See *Tracker*, *supra* note 44.

46. CAL. EDUC. CODE § 67456 (2021).

47. S.B. 26, 2021–2022 Assemb., Reg. Sess. (Cal. 2021).

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

49. N.C. Exec. Order No. 223 (July 2, 2021), <https://governor.nc.gov/media/2546/open> [<https://perma.cc/8SB5-JXNF>]; see *Tracker*, *supra* note 44.

50. S. 935, 2020–2021 Gen. Assemb., 123rd Sess. (S.C. 2020).

51. See *id.*; Brian P. Bunner, *NIL Bills—An Examination of the Implications of Compensating College Athletes Under Name, Image, and Likeness Legislation*, 18 PITT. TAX REV. 355, 366–370 (2021).

52. S.C. S. 935.

53. *Id.*

floor on March 23, 2021.<sup>54</sup> This new bill dropped the cumbersome requirements regarding trusts, graduation, and financial literacy courses for student-athletes to realize NIL compensation.<sup>55</sup> Further, Senate Bill 685 also removed the \$25,000 per-athlete limit.<sup>56</sup> The bill was enacted at light speed, becoming law only fifty-one days after its first senate reading.<sup>57</sup> The speedy passage of the law in May 2021 was likely due to pressures from the state's university athletic departments who wished to have an NIL law in place before the start of the academic school year—and football season—to competitively recruit against universities in other states with active NIL laws.<sup>58</sup>

South Carolina's NIL law became effective on July 1, 2021.<sup>59</sup> The act was written to become effective upon the earlier of either July 1, 2022, or upon certification by the Attorney General to the Governor that the NIL law was consistent with any provisions set forth by the NCAA.<sup>60</sup> This meant that the NCAA's Interim Policy (published on June 30, 2021) essentially granted Attorney General Alan Wilson the unilateral power to accelerate the law's effective date. On July 1, 2021, one day after the Interim Policy was released, Attorney General Wilson certified that South Carolina's NIL law conformed with the NCAA's Interim Policy, thus giving immediate effect to the state law.<sup>61</sup> In a public statement, Attorney General Wilson referenced the importance of the law to "protect student-athletes so they can benefit financially without being taken advantage of."<sup>62</sup> However, the law only

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54. S. 685, 2020–2021 Gen. Assemb., 124th Sess. (S.C. 2021).

55. Compare S.C. S. 935 (proposing NIL requirements regarding trusts, graduation, and financial literacy courses), with S.C. S. 685 (removing the aforementioned restriction proposals).

56. Compare S.C. S. 935 (proposing a \$25,000 per-athlete limit for NIL deals), with S.C. S. 685 (removing the \$25,000 per-athlete limit proposal).

57. S.C. S. 685.

58. See Anna Adams, *Clemson Director of Athletics Graham Neff Discusses NIL, Streaming Service, Basketball*, 247 SPORTS (Feb. 2, 2022), <https://247sports.com/college/clemson/Article/Clemson-Director-of-Athletics-Graham-Neff-182052022/> [https://perma.cc/DYE3-GC28] (discussing the competitiveness between institutions regarding NIL); Patrick Rishe, *NIL Earnings: The Factors Impacting How Much A College Athlete Can Make From Endorsements*, FORBES (July 4, 2021, 8:22 PM), <https://www.forbes.com/sites/prishe/2021/07/04/nil-earnings-the-factors-impacting-how-much-a-college-athlete-can-make-from-endorsements/?sh=43af00b575dd> [https://perma.cc/8F8V-RW3Y] (discussing the relative advantages institutions have in states with less restrictive NIL rules).

59. S.C. CODE ANN. §§ 59-158-10 to -85 (2021) (suspended 2022).

60. See *id.*

61. Letter from Alan Wilson, S.C. Att'y Gen. to Henry McMaster, S.C. Governor (July 1, 2021), <https://www.scag.gov/wp-content/uploads/2021/07/02629763.pdf> [https://perma.cc/YV8G-ZTJF].

62. Press Release, S.C. Att'y Gen., Attorney General Wilson Takes Action to Enact State's Name, Image, and Likeness Law (July 1, 2021), <https://www.scag.gov/about-the-office/news/attorney-general-wilson-takes-action-to-enact-state-s-name-image-and-likeness-law/> [https://perma.cc/S7FA-PRW9] [hereinafter Attorney General Wilson Takes Action].

applied to collegiate student-athletes and expressly did not apply to high school student-athletes,<sup>63</sup> a subset of the student-athlete population that arguably requires additional protection given their legal status as minors.

Although the NIL law was designed to allow collegiate student-athletes compensation for their name, image, and likeness, the law also contained limitations and exceptions on the types of compensation a student-athlete could receive.<sup>64</sup> For example, student-athletes could not use a university's facilities, intellectual property, or uniforms, even if the student-athlete licensed their use as could any other student.<sup>65</sup> Universities could prohibit a student-athlete from using his or her NIL for compensation if the use conflicted with "existing institutional sponsorship agreements or contract" or "institutional values as defined by the [university]."<sup>66</sup> Upon a student-athlete's admission to the university or signing of a financial aid agreement, universities were required to inform the student-athlete of any prohibited NIL activities based on the university's existing sponsorships or institutional values.<sup>67</sup> A further restriction imposed by the law stipulated that student-athletes were not able to receive compensation for the endorsement of tobacco, alcohol, illegal or banned substances, or gambling products.<sup>68</sup> This restriction applied even if a university did not have a conflicting agreement or prohibition on a specific NIL activity for conflicting with its values.<sup>69</sup> Another restriction, which later became an issue for university athletic departments and their donors (commonly known as "boosters"), was that universities were not able to "*directly or indirectly* create or facilitate compensation opportunities" for student-athletes related to NIL.<sup>70</sup> While boosters were permitted to engage with student-athletes in NIL deals, university employees were not allowed to arrange the promotion, or they would be indirectly facilitating NIL opportunities.<sup>71</sup> The South Carolina Department of Consumer Affairs (SCDCA) oversaw NIL activities before the suspension of South Carolina's NIL laws and still oversees the use of an "athlete agent" to help facilitate NIL deals for student-athletes.<sup>72</sup> Athlete agents must be licensed by the SCDCA and must limit compensation received from agreements they facilitate to

63. S.C. CODE ANN. § 59-158-10(5)–(6) (2021) (suspended 2022).

64. *See id.* § 59-158-20, 40, 60.

65. *Id.* § 59-158-20(E).

66. *Id.* § 59-158-40(B)(1).

67. *Id.* § 59-158-40(C).

68. *Id.* § 59-158-40(B)(2).

69. *Id.* § 59-158-40(B)(2).

70. *Id.* § 59-158-20(C) (emphasis added).

71. *See Booster O&A*, CLEMSON TIGERS, <https://clemsontigers.com/nilinfo-boosters/> [<https://perma.cc/4Z8N-P9CA>].

72. *See* Tyler Gilliam & Jeffery Stover, *Guide To NIL In South Carolina For Athletes and Businesses*, JD SUPRA (July 9, 2021), <https://www.jdsupra.com/legalnews/guide-to-nil-in-south-carolina-for-2762169/> [<https://perma.cc/KHC8-4Y5J>].

10%.<sup>73</sup> This below-market-rate limit often discourages licensed athlete-agents from facilitating NIL deals.<sup>74</sup> Accordingly, student-athletes were largely left to arrange and negotiate their own NIL deals because universities were not allowed to help facilitate deals for their athletes, and agents were (and remain) disincentivized from doing so.<sup>75</sup>

The state's NIL law remained untouched until March 2022, when the state legislature voted to suspend the NIL law as part of the 2022–23 budget.<sup>76</sup> During the school year, South Carolina universities found that the state law, which restricted their ability to facilitate compensation for student-athletes, “prevented [them] from really taking a hands-on approach.”<sup>77</sup> The quickly-passed law had inadvertently put South Carolina universities at a competitive disadvantage to universities in other states with less restrictive (or no) NIL laws.<sup>78</sup> Under the law, collegiate student-athletes in South Carolina were allowed to enter into NIL deals only if the deals complied with three limitations: the state law; institution-imposed restrictions; and the NCAA's Interim Policy.<sup>79</sup> However, student-athletes at universities in states without NIL laws were required only to comply with institution-imposed restrictions and the NCAA's Interim Policy.<sup>80</sup> Because South Carolina restricted institutional facilitation of NIL deals for its athletes and imposed specific product-type endorsements, universities in states that did not have a similar law in place were able to help their athletes earn NIL compensation limited only by self-imposed restrictions, giving those universities a competitive recruiting advantage.<sup>81</sup> Thus, South Carolina's NIL law was suspended by a proviso in the state's 2022–23 budget,<sup>82</sup> again, likely under pressure from the state's university athletic departments. Now, universities in South Carolina are free to facilitate NIL deals for their student-athletes with few restrictions.<sup>83</sup>

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73. S.C. CODE ANN. §§ 59-102-100(H), -30(A) (2021).

74. Interview with David Wyatt, Wyatt Law, P.A. (Nov. 3, 2022). Mr. Wyatt is a licensed athlete agent and attorney in South Carolina and has represented National Football League (NFL) clients for over a decade.

75. *Id.*

76. H.R. 5150, 2021–2022 Gen. Assemb., 124th Sess. § 117.172 (S.C. 2022). Note, if South Carolina wishes to continue to suspend the NIL Act beyond fiscal year 2022–23, it must extend the suspension in the next annual budget meeting.

77. Ben Portnoy, *Suspension of Statewide NIL Law Means Quite a Shift for Gamecock Athletics. Here's How*, THE STATE (July 1, 2022, 9:05 AM), <https://www.thestate.com/sports/college/university-of-south-carolina/usc-football/article263037093.html>, [https://perma.cc/3L92-J3W8].

78. *See id.*

79. S.C. CODE ANN. §§ 59-158-20(A)(1), -40(A), -40(B)(1) (2021) (suspended 2022).

80. *NCAA Interim Policy*, *supra* note 40.

81. *See* Portnoy, *supra* note 77.

82. *See id.*

83. *See id.*

After the law was suspended, South Carolina's universities quickly set up support systems for their student-athletes to facilitate NIL deals.<sup>84</sup> The University of South Carolina has a unique arrangement with a sports marketing company, Everett Sports Management, through which the university pays the marketing company to facilitate deals for all of its student-athletes at no cost to the athletes.<sup>85</sup> This is atypical, as collegiate student-athletes usually personally engage agencies to facilitate these deals and pay the agency a percentage rate of compensation generated for the athlete,<sup>86</sup> albeit limited to 10% in South Carolina.<sup>87</sup> The University of South Carolina's arrangement helps it recruit elite athletes, as it essentially foots the bill for student marketing on each athlete's behalf.<sup>88</sup>

NIL recruiting has been characterized as an "arms race"<sup>89</sup> across the country, and universities nationwide seek to take advantage of the opportunities given to them by their state's laws to entice top recruits. Given the existing patchwork of state laws, some scholars have called for federal action to pre-empt state laws and harmonize the NIL landscape across the country.<sup>90</sup> Currently, Senators Manchin and Tuberville are preparing a new federal NIL bill.<sup>91</sup> However, its passage does not appear imminent, if at all, especially considering several previous failed attempts to enact federal NIL legislation.<sup>92</sup> It may be wise for the federal government to allow states to craft

84. See *Clemson Announces NIL Program, Reign*, CLEMSON TIGERS (Apr. 8, 2022), <https://clemsontigers.com/clemson-announces-nil-program-reign/> [https://perma.cc/PCA8-HCQR]; see also *Institutions and Corporations*, EVERETT SPORTS MKTG., <https://everettsm.com/institutions-and-corporations/> [https://perma.cc/359E-XXRJ].

85. Front Office Sports (@FOS), TWITTER (Aug. 31, 2022, 10:32 AM), <https://mobile.twitter.com/FOS/status/1564984411292160006> [https://perma.cc/M7N7-K92A].

86. See, e.g., Adam Rittenberg, *South Carolina Partners with Sports Marketing Agency to Become First Major College Program with In-house NIL Firm*, ESPN (Aug. 30, 2022), [https://www.espn.com/college-sports/story/\\_/id/34489568/south-carolina-partners-sports-marketing-agency-become-first-major-college-program-house-nil-firm](https://www.espn.com/college-sports/story/_/id/34489568/south-carolina-partners-sports-marketing-agency-become-first-major-college-program-house-nil-firm) [https://perma.cc/ANX4-WDG9] (providing an example of a sports agency with student-athlete clients who personally engage an agency for services rather than through their institution).

87. S.C. CODE ANN. § 59-102-100(H) (2021).

88. See Portnoy, *supra* note 77.

89. 'Arms Race': NIL Compensation Now a Potent Recruiting Weapon, USA TODAY (Aug. 31, 2022, 2:25 AM), <https://www.usatoday.com/story/sports/ncaaf/2022/08/31/arms-race-nil-compensation-now-a-potent-recruiting-weapon/50662165/> [https://perma.cc/34L4-FUS8].

90. Michael D. Fasciale, *The Patchwork Problem: A Need for National Uniformity to Ensure an Equitable Playing Field for Student-Athletes' Name, Image, and Likeness Compensation*, 52 SETON HALL L. REV. 899, 900 (2022); Bunner, *supra* note 51, at 370–73.

91. Andy Berg, *Senators Manchin, Tuberville Prep New NIL Bill*, ATHLETIC BUS. (Aug. 5, 2022), <https://www.athleticbusiness.com/operations/governing-bodies/article/15295265/senators-manchin-tuberville-prep-new-nil-bill> [https://perma.cc/WMR5-AY2Q].

92. E.g., S. 4004, 116th Cong. (2020); H.R. 8382, 116th Cong. (2020); S. 5003, 116th Cong. (2020).

their own NIL laws because federal preemption in this space may violate the Tenth Amendment's anti-commandeering principle.<sup>93</sup> Regardless, even if such a bill did pass, it seems to be aimed only at NCAA intercollegiate athletics and not at the high school level.<sup>94</sup> At the time that this Note was being written, no states have enacted legislation expressly allowing high school student athletes to earn compensation from NIL activities, although multiple state high school athletic associations permit it.<sup>95</sup> Maryland has proposed legislation to grant NIL rights to high school student-athletes, but this legislation has not yet passed.<sup>96</sup> Because South Carolina has no laws regarding NIL, high school student-athletes must rely on the governance of high school athletic associations

### 3. *South Carolina High Schools and NIL*

Participation in interscholastic athletic competition in South Carolina is “a mere privilege and not a right,” and high school associations may require eligibility standards for participation.<sup>97</sup> Because no state law addresses NIL activities for high school student-athletes, high school athletic associations are the highest authority regarding athlete eligibility and NIL activities in South Carolina. There are two main high school athletic governing bodies in South Carolina: the South Carolina High School League (SCHSL), which governs a total of 220 high schools in the state;<sup>98</sup> and the South Carolina Independent School Association (SCISA), which governs a total of 122 private and independent schools in South Carolina and four schools in Northern Georgia.<sup>99</sup> The bylaws and constitutions of these organizations govern

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93. See U.S. CONST. amend. X; Andrew Weiss, *The California Fair Pay to Play Act: A Survey of the Regulatory and Business Impacts of a State-Based Approach to Compensating College Athletes and the Challenges Ahead*, 16 RUTGERS BUS. L. REV. 259, 278–79 (2020) (“[W]ith California’s action and the ensuing number of states who have pursued NIL student-athlete compensation laws, the states would seize individual power over NIL compensation, eliminating a uniform, national model of amateurism”); cf. *Murphy v. Nat’l Collegiate Athletic Ass’n*, No. 16–476, slip op. at 18 (S. Ct. 2018) (striking down a federal law, the Professional and Amateur Sports Protection Act of 1992 (PAPSA), on constitutional grounds because the law violated the anti-commandeering principle of the Tenth Amendment by dictating to state legislatures regarding the legalization of sports betting).

94. See Berg, *supra* note 91.

95. Francesca Casalino, *Call to the Bullpen: Saving High School Student Athlete Name, Image, and Likeness Rights*, 29 JEFFEREY S. MOORAD SPORTS L.J. 263, 275 (2022).

96. H.D. 1431, 2022 Leg., Reg. Sess. (Md. 2022).

97. *Bruce v. S.C. High Sch. League*, 258 S.C. 546, 551–52, 189 S.E.2d 817, 818–19 (1972).

98. S.C. HIGH SCH. LEAGUE, 2022–23 INTRODUCTION (2022), <https://schsl.org/archives/7959> [<https://perma.cc/4QDL-QNGF>] [hereinafter *2022–23 Introduction*].

99. See *Member Listing by County*, S.C. INDEP. SCH. ASS’N, <https://www.scisa.org/schools/member-listing-by-county.html> [<https://perma.cc/88QR-B6S2>].

member schools and their athletes. Neither the SCHSL nor the SCISA have adopted any bylaws or amendments to their constitutions addressing NIL activities or publicly taken a position regarding their permissibility.<sup>100</sup> In comparison, many other state high school associations expressly allow or deny NIL rights to high school student-athletes.<sup>101</sup> As such, high school student-athletes in South Carolina are left to interpret the permissibility of NIL activities within existing amateurism bylaws which were adopted long before the contemplation of NIL issues within high school athletics.<sup>102</sup>

Importantly, it is worth noting that the SCHSL is a state actor under the parameters set forth by the Supreme Court of the United States in *Brentwood Academy*.<sup>103</sup> In *Brentwood Academy*, the Court held that a public high school athletic association is a state actor if the “private character of the Association is overborne by the pervasive entwinement of public institutions.”<sup>104</sup> Likewise, in *NCAA v. Tarkanian*, an earlier case, the Supreme Court also mentioned in dicta that it would be likely to find an athletic association to be a state actor if its members were mostly public schools located in one state.<sup>105</sup> Because the SCHSL’s members are all public schools in South Carolina,<sup>106</sup> it qualifies as a state actor. Further, the SCHSL Constitution articulates in its belief statement that it believes to be “the recogn[ized] state authority on interscholastic athletic programs.”<sup>107</sup> It is, however, uncertain whether SCISA would be found to be a state actor because its members are not public schools, and it has members in Georgia as well as South Carolina.<sup>108</sup> Therefore, based on this distinction and the fact that the vast majority of high school student-athletes in South Carolina compete under SCHSL’s guidelines and not SCISA’s, this Note will focus on public high school student-athletes.<sup>109</sup>

Because the SCHSL Bylaws do not directly grant or deny high school student athletes the right to earn compensation from NIL activities,<sup>110</sup> student-

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100. See *SCHSL Bylaws*, *supra* note 6; *SCISA Constitution*, *supra* note 6.

101. See Keller, *supra* note 3.

102. See discussion *infra* Section III.A.1 regarding the SCHSL’s amateurism rules.

103. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001).

104. *Id.* at 298.

105. *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988).

106. 2022–23 *Introduction*, *supra* note 98.

107. S.C. HIGH SCH. LEAGUE, 2022–23 CONSTITUTION art. IV, <https://schsl.org/wp-content/uploads/2022/07/2022-23Constitution9122.pdf> [https://perma.cc/LJ9K-N4NW] [hereinafter *SCHSL Constitution*].

108. See *Member Listing by County*, *supra* note 99.

109. Although this Note focuses on public schools and student-athletes governed by the SCHSL, Section VI of the SCISA’s “Blue Book” contains very similar language to Article 14 of the SCHSL Bylaws, and so an interpretation of the two guidelines as currently written may be comparable. See *SCISA Constitution*, *supra* note 6, at art. VI; *SCHSL Bylaws*, *supra* note 6, § 14.

110. See *SCHSL Bylaws*, *supra* note 6.

athletes, coaches, and parents from both public and private high schools are left wondering whether engaging in NIL activities would “maintain” their amateur status or not. Yet, an important threshold question first remains: can a minor legally enter into a contract to perform NIL activities in South Carolina?

*B. A Minor’s Capacity to Contract in South Carolina*

Contractual capacity is a requirement for a contract to be valid and enforceable.<sup>111</sup> In South Carolina, a contract entered into by a minor is voidable but is not void *ab initio*.<sup>112</sup> A contracting minor has the power to disaffirm and void a contract; however, the other party who contracted with the minor cannot void the contract based on the minor’s infancy.<sup>113</sup>

In South Carolina, a minor can ratify a contract entered into as an infant upon reaching the age of majority.<sup>114</sup> The act of ratification makes the contract enforceable and cannot later be disaffirmed.<sup>115</sup> By statute, a minor must ratify the contract by a signed writing upon reaching the age of majority, unless the benefit received is for necessities.<sup>116</sup> But, if a minor receives benefit from the contract after reaching the age of majority and has not ratified the contract in writing, the minor may nevertheless be estopped by conduct from disaffirming the contract and claiming the benefit of the statute.<sup>117</sup> Stated differently, a minor cannot sign a contract and receive their benefit from it, and then, after remaining silent for some time after reaching the age of majority, subsequently disaffirm the contract.<sup>118</sup> The choice to ratify or disaffirm a contract rests with a minor; however, the minor is disallowed from ratifying only *some* terms of the contract and voiding others.<sup>119</sup> This is an all-or-nothing doctrine, whereby the contract is either fully ratified and enforceable in its entirety, or wholly disaffirmed and entirely voided.<sup>120</sup>

There are two notable statutory exceptions in South Carolina where a minor is *not* permitted to disaffirm a contract entered into during infancy.

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111. RESTATEMENT (SECOND) OF CONTRACTS § 12 (AM. L. INST. 1981).

112. *Morgan v. Blackwell*, 286 S.C. 457, 458, 334 S.E.2d 817, 818 (1985) (citing *Parks v. Lyons*, 219 S.C. 40, 64 S.E.2d 123 (1951)).

113. *Parks v. Lyons*, 219 S.C. 40, 64 S.E.2d 123, 126 (1951).

114. *Smith v. Williams*, 141 S.C. 265, 139 S.E. 625, 632 (1927); 21 S.C. JUR. CHILD. & FAM. § 77.

115. 21 S.C. JUR. CHILD. & FAM. § 77.

116. S.C. CODE ANN. § 63-5-310 (2010); *see also* *Greenville Hosp. Sys. v. Smith*, 269 S.C. 653, 239 S.E.2d 657 (1977).

117. *See* *Bearn v. McBrayer*, 132 S.C. 72, 128 S.E.2d 34, 35. (1925).

118. *See* *Jones v. Godwin*, 187 S.C. 510, 198 S.E. 36, 39 (1938).

119. *Power v. Allstate Ins. Co.*, 312 S.C. 381, 383, 44 S.E.2d 406, 407 (Ct. App. 1994) (citing *Dickert v. Aetna Life Ins. Co.*, 176 S.C. 476, 180 S.E.2d 462 (1935)).

120. *See id.*



First, a minor may enter into a contract with full legal capacity to borrow money to “defray the expenses of attending any institution of higher learning.”<sup>121</sup> Second, a minor may consent to health services and procedures under certain circumstances.<sup>122</sup> The first exception is more relevant to this Note. It is hard to reconcile that a South Carolinian minor is permitted to take out a large, multi-year loan to aid the payment of expenses to attend an institution of higher learning yet would be denied the opportunity to earn compensation from NIL activities which would help “defray” educational costs while in high school. It appears that the South Carolina legislature would prefer minors take on debt to pay for their education rather than earn money for the same purpose through their own name, image, and likeness. Additional income for high school student-athletes may be particularly useful for less affluent families given that, for families in the urban South with a household income of less than \$59,200, it costs an average of \$10,110 to raise a child from the ages of fifteen to seventeen.<sup>123</sup> Further, there may be some societal value in advancing a minor’s appreciation for financial independence. Although minors in South Carolina can earn money via employment,<sup>124</sup> high school student-athletes are not employees of any high school or high school athletic association through their athletic participation, and so employment law does not apply in the NIL context.

Some states have adopted specific statutory exceptions for minors entering contracts for licensing use of their likeness,<sup>125</sup> but South Carolina has permitted no such exceptions. Thus, capacity-to-contract issues remain for minors seeking to enter a contract allowing them to capitalize on the use of their name, image, or likeness. This is particularly relevant and presents a

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121. S.C. CODE ANN. § 63-5-320 (2010).

122. South Carolina law permits a married child to consent to health procedures “as if such minor . . . were eighteen years of age.” S.C. CODE ANN. § 63-5-330 (2010) South Carolina law also permits a child of sixteen years of age or older to “consent to any health service[]” for themselves “unless such involves an operation which shall be performed only if such is essential to the health or life of such child in the opinion of the performing physician and consultant physician if one is available.” S.C. CODE ANN. § 63-5-340 (2010). South Carolina law further permits “health services of any kind” to be “rendered to minors of any age without the consent of a parent or legal guardian when . . . such services are deemed necessary unless such involves an operation which shall be performed only if such is essential to the health or life of such child in the opinion of the performing physician . . .” S.C. CODE ANN. § 63-5-350 (2010). Lastly, South Carolina law permits “[a]ny minor who has been married or has borne a child [to] consent to health services for [the] child.” S.C. CODE ANN. § 63-5-360 (2010).

123. MARK LINO ET AL., U.S. DEP’T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2015, at 28 (2015).

124. *South Carolina Child Labor Regulations Summary*, S.C. OFF. WAGES & CHILD LAB., <https://llr.sc.gov/wage/cll.aspx> [<https://perma.cc/5JHM-E67T>].

125. *See, e.g.*, N.C. GEN. STAT. ANN. § 48A-11(2) (West 2013) (allowing minors to enter into a contract licensing their image rights to a third party irrevocably with court approval of the contract).

predicament for minors who enter into an NIL contract *prior* to enrolling at college.<sup>126</sup> The Section below discusses this and other major issues that might face a minor who wishes to enter into an NIL deal.<sup>127</sup>

### III. MAJOR PROBLEMS FOR MINORS

This Section outlines some issues for South Carolina minors who seek to enter or have entered into NIL deals. These issues include: eligibility to compete in high school; collegiate eligibility and recruiting; contract ratification; and contract conflicts.

#### A. “*Am I Eligible to Compete in High School?*”

As previously mentioned, participation in interscholastic public high school sports in South Carolina is not a right and is instead a privilege that can be denied based on the SCHSL’s eligibility requirements.<sup>128</sup> The most immediate question for a South Carolinian highschooler would be whether they would still be able to compete if they entered into an NIL deal. In addition to their participatory enjoyment, ineligibility to compete in high school may impact an athlete’s ability to be recruited by colleges, thus impacting their future education and athletic career. Eligibility for a high school student-athlete in South Carolina depends upon academic and athletic eligibility and permission from the high school to compete, in line with its own policies.<sup>129</sup> Maintaining athletic eligibility requires student-athletes to maintain “amateur” status.<sup>130</sup>

#### 1. *South Carolina High School League*

It is not clear if the SCHSL’s Bylaws currently permit its student-athletes to earn compensation for NIL activities because the bylaws do not directly address NIL. Article III, Section 14 of the SCHSL Bylaws contains the following rules regarding amateurism of a high school student-athlete, which is required to maintain athletic eligibility to compete:

- A. A student must maintain an amateur status during the period he/she competes in any League sponsored sport program.

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126. *See infra* Section III.C.1.

127. *See infra* Part III.

128. *Bruce v. S.C. High Sch. League*, 258 S.C. 546, 551–52, 189 S.E.2d 817, 819 (1972).

129. *See SCHSL Bylaws*, *supra* note 6, at art. III.

130. *Id.* at art. III, § 14.

- B. A student may not have *competed for money or valuable consideration* other than prizes with symbolic value. No participants may accept *material awards in excess of actual expenses*, including hotel bills and transportation.
- C. It is not a violation of this rule for a student athlete to accept a standard fee or salary for instructing, supervising or officiating in an organized youth sports program not operated by a member school or the South Carolina High School League.<sup>131</sup>

The first sentence of Article III, Section 14, Part B<sup>132</sup> appears to ban pay-for-play<sup>133</sup> and prevents SCHSL athletes from earning compensation in exchange for competing. The second sentence prevents athletes from accepting “material awards”<sup>134</sup> but does not seem to narrow the definition of an award. One reasonable interpretation would be that “awards” are a specific type of “prize[] with symbolic value.”<sup>135</sup> “The word symbolic is used to mean that the *award* must have some relationship to the sport being played,” per Article XII, Section 4 of the Bylaws.<sup>136</sup> It then follows that Part B does not speak to any compensation paid to SCHSL athletes outside of a pay-for-play context. This interpretation is furthered by the placement of the two sentences together within the same subsection. Further, Parts A and C also do not speak to the effect on an athlete’s amateurism eligibility if receiving money for NIL-related activities. Therefore, although the SCHSL does not definitively state that its athletes *will* maintain amateurism for earning NIL compensation, it appears that high school student-athletes *could* permissibly enter into an NIL deal under these Bylaws. If the state (via the SCHSL or otherwise) wishes to prevent or permit this, it should say so.

The National Federation of State High School Associations strongly opposes permitting high school student-athletes to engage in NIL activities.<sup>137</sup> Despite this, several state high school associations have amended their rules to allow high school student-athletes to earn compensation for NIL activities and maintain eligibility.<sup>138</sup> Similarly, but without formally amending its rules, the Louisiana High School Athletic Association issued a position statement in

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131. *Id.* (emphasis added).

132. *Id.*

133. See discussion *supra* Section III.A.1.

134. *SCHSL Bylaws*, *supra* note 6, at art. III, § 14.

135. *Id.*

136. *Id.* at 28.

137. Karissa Niehoff, *NIL Rulings Do Not Change for High School Student-Athletes*, NFHL NEWS (July 7, 2021), <https://www.nfhs.org/articles/nil-rulings-do-not-change-for-high-school-student-athletes/> [<https://perma.cc/4PRQ-4G7N>].

138. See Keller, *supra* note 3.

which it approved the permissibility of NIL activities for its student-athletes.<sup>139</sup> In contrast, other states have expressly denied such activities,<sup>140</sup> and others have voted against changing their bylaws to allow for NIL compensation.<sup>141</sup> State high school associations who have not approved for their athletes to maintain eligibility if earning NIL compensation may face litigation.<sup>142</sup> Further, though not yet litigated in the context of high school student athletes, there are constitutional free speech considerations if denying students the right to participate in NIL activities.<sup>143</sup>

While the SCHSL appears averse to taking any official position, it is at risk by not taking a position. If the permissibility of NIL activities remains vague and open to interpretation, the SCHSL may be vulnerable to litigation if it renders an athlete ineligible for failing to maintain their amateurism on account of earning NIL compensation. Upon an eligibility determination, athletes may challenge the ruling in court.<sup>144</sup> With no structure or due process in place regarding NIL and amateurism, the SCHSL may issue “arbitrary” rulings, potentially leading to “timely and costly legal battles.”<sup>145</sup> Sadly, even if a child’s eligibility were to be reinstated after litigation, the enjoyment of participation would be irretrievably lost, and the impact upon the individual’s academic and athletic career would be lasting. Thus, for the reasons discussed above, a definite position would not only help this state’s athletes, institutions, and parents, but it would also help reduce the SCHSL’s litigation risk.

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139. *LHSAA Allows Student-Athletes to Receive NIL Benefits; Partners With Eccker Sports to Provide Required NIL Educational Services Throughout the State*, LA HIGH SCH. ATHLETIC ASS’N (Apr. 7, 2022), [https://www.lhsaa.org/siteuploads/lhsaa/20583\\_pdf\\_eccker-sports-partner-lhsaa-release.pdf](https://www.lhsaa.org/siteuploads/lhsaa/20583_pdf_eccker-sports-partner-lhsaa-release.pdf) [<https://perma.cc/6JVB-UN93>] [hereinafter *LHSAA Allows Student-Athletes to Receive NIL Benefits*].

140. See Keller *supra* note 3.

141. See Paul Steinbach, *Ohio High Schools Vote Against NIL Proposal*, ATHLETIC BUS. (May 17, 2022), <https://www.athleticbusiness.com/operations/governing-bodies/article/15292086/ohio-high-schools-vote-against-nil-proposal> [<https://perma.cc/K2VE-Q355>].

142. See Class Complaint for Declaratory Relief and Damages at 1, *Stewart v. Fla. High Sch. Athletic Ass’n, Inc.*, No. 22-427 CA-01 (FL. Cir. Ct. Jan. 10, 2022).

143. See Sam C. Ehrlich & Neal C. Ternes, *Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech*, 45 COLUM. J.L. & ARTS 47, 92–94 (2021).

144. See, e.g., *Bruce v. S.C. High Sch. League*, 258 S.C. 546, 551–52, 189 S.E.2d 817, 819 (1972) (providing an example of an athlete challenging an ineligibility determination in court).

145. Amanda Siegrist et al., *Interscholastic Athletics and Due Process Protections: Student-Athletes Continue to Knock on the Door of Due Process*, 6 MISS. SPORTS L. REV. 1, 22 (2016).

## 2. *High School Policies*

In addition to complying with the SCHSL guidelines, high school student-athletes must also abide by high school and school district policies to remain members of their high school athletic squads.<sup>146</sup> While policies may differ between schools and school districts, the requirements for competition typically include compliance with criteria related to academic performance, behavioral conduct, and social media usage.<sup>147</sup> Although these limitations generally do not interfere with NIL activities, limitations on social media postings<sup>148</sup> are a consideration for high school athletes in South Carolina who wish to enter into an NIL deal. Athletes ought to carefully review applicable institutional policies before entering into any agreement that may jeopardize their eligibility to compete.

### B. *“Will I Be Eligible to Compete in College?”*

A less immediate, though arguably more important, question for elite high school athletes is whether an athlete who has entered into an NIL agreement in high school will be eligible to compete in college. This Note focuses on eligibility at NCAA institutions. Overall, whether a high school athlete will be eligible to compete in college not only depends upon compliance with the NCAA’s policies but also with the individual requirements of each university and state in which the university is located, as further explained below. Importantly, ineligibility at the high school level will not determinatively preclude a student-athlete from competing in college.

### 1. *State Law*

The eligibility of a student-athlete at a university in South Carolina depends only upon NCAA rules and university policies because there is currently no state NIL law in South Carolina.<sup>149</sup> Although it is beyond the purview of this Note, high school student-athletes in South Carolina should be aware that other states may have NIL laws restricting the enforceability of a contract for collegiate student-athletes. For example, intercollegiate student-athletes in Illinois may not enter into agreements promoting performance-

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146. *See generally, e.g.*, SPARTANBURG SCHOOL DISTRICT THREE ATHLETIC HANDBOOK 2022–2023 (providing an example of the requirements placed upon a high school student-athlete by a school district for the athlete to be permitted to be a member of an interscholastic athletic team).

147. *See id.* at 6, 13–17.

148. *See id.* at 15–17.

149. *See discussion supra* Section II.A.2.

enhancing supplements,<sup>150</sup> a restriction that is not imposed by South Carolina legislature (but could still be imposed by a university).

## 2. *NCAA Eligibility*

As discussed earlier, intercollegiate athletes can earn compensation for NIL activities so long as they comply with the NCAA's Interim Policy and Bylaws.<sup>151</sup> Therefore, if a high school student-athlete has entered into an NIL agreement that has not violated the NCAA's Interim Policy or Bylaws, including restrictions on illegal recruiting inducements, then the athlete would not be precluded from receiving NCAA eligibility.<sup>152</sup>

## 3. *University Policies*

Universities in South Carolina are permitted to impose their own requirements upon student-athletes.<sup>153</sup> For example, the University of South Carolina does not permit its student-athletes to participate in NIL activities on university facilities unless approved through its facility rental process.<sup>154</sup> These policies may differ widely between institutions, so prudent student-athletes should be aware that, although an NIL deal entered into as a high schooler may not immediately affect their eligibility, it may impact their intercollegiate eligibility if the agreement runs counter to a future university's policy. This issue thus necessitates an inquiry into whether student-athletes are bound to NIL contracts signed as highschoolers and, if so, what happens if the contracts conflict with a university policy.

### C. *"Am I Bound to an NIL Deal I Signed Before College?"*

If a high school student-athlete enters into an NIL contract on or after their eighteenth birthday (not as a minor), they will be bound as would any other adult.<sup>155</sup> However, an analysis of whether a collegiate student-athlete is bound to an NIL contract entered into as a *minor* depends on whether the student-athlete turned eighteen prior to college enrollment and whether they ratified the contract or not.

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150. 110 ILL. COMP. STAT. 190/20(h) (2022).

151. See discussion *supra* Section II.A.1.

152. See *NCAA Interim Policy*, *supra* note 40.

153. See *Bruce v. S.C. High Sch. League*, 258 S.C. 546, 551–52, 189 S.E.2d 817, 819 (1972) (discussing that interscholastic competition is a privilege that can be conditioned upon eligibility compliance).

154. *Gamecock NIL Hub*, GAMECOCKS ONLINE, <https://gamecocksonline.com/nil-policies/> [<https://perma.cc/FKF6-9C2S>].

155. See 21 S.C. JUR. CHILD. & FAM. § 77.

### 1. *Turning Eighteen While in College*

This issue of whether a minor is bound to an NIL agreement is particularly relevant because an increasing number of student athletes now accelerate high school graduation to start college early, often prior to their eighteenth birthday.<sup>156</sup> As outlined in Section II.B, a contracting minor may disaffirm a contract at any point prior to their eighteenth birthday.<sup>157</sup> To be sure, if a high school student-athlete disaffirms a contract while a minor, they are not later bound to its terms. Thus, collegiate student-athletes who turn eighteen *after* enrolling in college may choose to ratify a contract at eighteen or disaffirm it while still a minor. Student-athletes should speak to their college athletic department before turning eighteen to discuss the implications of voiding or ratifying an NIL contract entered into as a minor.

### 2. *Turning Eighteen Before Enrolling in College*

However, it is not so simple for student-athletes who turn eighteen *before* enrolling at college, such as those who have early birthdays in the school year or who opt to take time away from education between high school and college. A collegiate student-athlete will be bound to the terms of a contract entered into as a minor if, upon turning eighteen, the student-athlete ratified the contract.<sup>158</sup> Similarly, if a contracting student-athlete receives benefit from a contract and neither disaffirms nor ratifies the contract after turning eighteen, they may be estopped from voiding the contract and may be bound to the contract terms.<sup>159</sup> Therefore, actions by the student-athlete upon turning eighteen may determine whether they will remain bound to a contract in college, where the contract duration extends into college enrollment. If the student-athlete acts to ratify the contract, they will be bound to its terms. Likewise, if the student-athlete acts in a way that is consistent with the existence of a contract, such as accepting compensation for engaging in NIL activities, the student-athlete may be estopped from voiding the contract and thus also may become bound to its terms.<sup>160</sup>

In itself, a collegiate student-athlete remaining bound to a contract entered into as a highschooler presents no issues. However, issues may arise if the

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156. See Morgan Moriarty, *Early Enrollment Means More and More of the Best Recruits on Campus Before Signing Day*, SBATION, <https://www.sbnation.com/college-football-recruiting/2017/1/31/14404204/early-enrollees-enrollment-college-football-recruiting> [<https://perma.cc/CP6T-33TR>].

157. See discussion *supra* Section II.B.

158. See 21 S.C. JUR. CHILD. & FAM. § 77; see also discussion *supra* Section II.B.

159. See *Beam v. McBrayer*, 132 S.C. 72, 128 S.E. 34, 35 (1925).

160. See *id.*

contract to which the student-athlete is bound conflicts with their university's contractual obligations or institutional values.

*D. "What If My Existing NIL Deal Conflicts with a University's Sponsors or Values?"*

Universities may place limits on the types of NIL activities a student-athlete can undertake.<sup>161</sup> Limits on activities tend to be imposed where a student-athlete's agreement conflicts with existing university sponsorships or university values. For example, Furman University's NIL policy provides that "[s]tudent-athletes may not conduct NIL Activities that Furman determines, in its sole discretion, conflict with its *existing sponsorships* or other relevant contracts . . . [or] its *institutional values*."<sup>162</sup> If a student-athlete fails to comply with Furman's policy, that failure could lead to loss of eligibility, suspension, or cancellation of scholarship aid.<sup>163</sup>

*1. Conflicting Contracts and "Brand Recruiting"*

The existence of a policy like Furman University's implies that a student-athlete's NIL agreement could conflict with an institution's existing sponsorships. For agreements entered into by collegiate student-athletes, this may not be an issue because student-athletes would likely have to disclose the deal to the university prior to engaging in NIL activities.<sup>164</sup> However, what would happen if a high school athlete entered into an NIL agreement *before* committing to a university, and the agreement conflicts with that university's existing sponsorships? This presents a situation where a high school student-athlete may be presented with the choice between immediately earning guaranteed compensation for NIL activities or being eligible to compete at the college level. Further, a student-athlete's university choices could be shaped based on NIL activities entered into as highschooler.

To illustrate the issue, consider the following hypothetical. Esme, an elite high school soccer player in South Carolina, entered into an NIL agreement with Under Armour on her eighteenth birthday worth \$3,000 per year for three years. She wishes to attend university in the state and has offers to attend the University of South Carolina (USC), sponsored by Under Armour,<sup>165</sup> and

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161. *E.g.*, FURMAN UNIV. ATHLETICS, FURMAN UNIVERSITY NAME, IMAGE, AND LIKENESS POLICY (2022).

162. *Id.* (emphasis added).

163. *Id.*

164. *See, e.g., id.*

165. *See Under Armour Partnership Extended Through 2026*, *supra* note 15.



Clemson University, sponsored by Nike.<sup>166</sup> Might Esme choose to attend USC over Clemson University so that she can continue to earn NIL compensation from Under Armour? Even if Esme would not be disallowed from continuing to engage in NIL activities with Under Armour, subtle pressures may influence her college selection. Although the compensation Esme could continue to earn at USC is modest in this example, it is not inconsequential considering that up to 86% of full-scholarship student-athletes may live below the federal poverty line.<sup>167</sup> Thus, a \$3,000 annual income may be a genuine consideration to Esme when deciding which university to attend, at the expense of other long-term consequences. This may be particularly true for less affluent students who do not receive financial support from parents or family while in college. Thus, students who have existing NIL deals before committing to a university may have their university choice swayed by actual or perceived conflicts between their own NIL deals and their prospective universities' existing sponsors. This conflict could create undesirable outcomes with lasting ramifications for a student-athlete's future.

Fortunately, universities have an interest in not enforcing their own policies, as doing so may be detrimental to their athletic success in at least two ways. First, enforcing eligibility punishments on student-athletes may deny the athlete from representing the university in competition, presumably harming the university team's on-field success. Second, punishing student-athletes for entering into conflicting contracts may limit a university's ability to recruit prospective student-athletes who may be looking to maximize their NIL income with as few limitations as possible.

Nevertheless, big-paying sponsors could exert pressure on universities to enforce policies penalizing athletes who have entered into conflicting contracts. Financial pressures on universities and student-athletes may be exploited by sponsors who might try to engage in what this Note will call "brand recruiting." That is, companies (brands) may attempt to sign high school student-athletes to NIL agreements to induce them to attend particular institutions that they sponsor. For example, could Nike begin signing hundreds of elite athletes, like Esme, to lucrative deals that would only be able to continue if they committed to a Nike-sponsored institution? Even if the contract did not expressly stipulate that the contract would terminate if the athlete committed to a non-Nike institution, a contract could require or incentivize the athlete to license institutional logos for NIL activities. This institutional licensing would be possible for institutions with Nike sponsors but impossible for non-Nike institutions. Therefore, a university's existing sponsorship deals with other competing brands could deny the student-athlete

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166. See *The Clemson & Nike Partnership*, *supra* note 15.

167. RAMOGI HUMA & ELLEN J. STAUROWSKY, *THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT* 4 (2011).

from engaging in their contractual obligations per the contract or maximizing the compensation they may earn under the terms of the agreement. Although brand recruiting would be a form of banned recruiting per NCAA policies,<sup>168</sup> major sports companies have engaged in similar activity before<sup>169</sup> and may use university policies to overtly or subtly sway a highschooler's college choice. A more cynical reality could be that universities encourage their sponsors to enter into NIL deals with student-athletes they wish to recruit. Many large, long-term sponsorship deals were entered into before NIL was a major consideration,<sup>170</sup> so it will be interesting to see if future sponsorship deals contain clauses regarding conflicting agreements entered into by student-athletes.

## 2. *Institutional Values*

Similarly to many universities nationwide, Furman University's NIL policy provides a non-exclusive list of endorsement activities a student-athlete may not partake in because the activities would conflict with its "institutional values."<sup>171</sup> These include endorsements or promotions of gambling, tobacco, guns, political messages, or hemp-based products.<sup>172</sup> To compare, Clemson University's NIL policy also prohibits student-athletes from NIL activities that promote tobacco, alcoholic beverages, or gambling activities, or "would bring disgrace or embarrassment to the University."<sup>173</sup> It is worth noting that Furman University is a private institution, while Clemson University is a public institution. Accordingly, public institutions, like Clemson University, must consider their constitutional requirement as a state institution to refrain from inhibiting its students' free speech rights, unlike Furman University, a private institution.<sup>174</sup>

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168. See *NCAA Interim Policy*, *supra* note 40; *NCAA Manual*, *supra* note 23, § 12.01.2.

169. See Borzello, *supra* note 12; RAY YASSER ET AL., *SPORTS LAW: CASES AND MATERIALS* 653 (9th ed. 2020) (discussing Adidas and Nike forging relationships with the best youth basketball players in the country and their parents by sponsoring competitive leagues for middle school and high school prospects, seeking to funnel these athletes sponsored by the brands).

170. See, e.g., *Under Armour Partnership Extended Through 2026*, *supra* note 15 (outlining details of the ten-year partnership between Under Armour and the University of South Carolina Athletic Department).

171. See, e.g., FURMAN UNIV. ATHLETICS, *supra* note 161.

172. *Id.*

173. *Name, Image and Likeness Information Page*, CLEMSON TIGERS (June 30, 2021), <https://clemonsontigers.com/nilinfo/> [<https://perma.cc/J49U-V4XQ>].

174. See Tyler Horn, *Power to the Player: Freedom of Speech, the Right to Protest, and Student-Athlete Claims Against the NCAA*, 32 MARQUETTE SPORTS L. REV. 317, 321–22 (2021) (discussing public forums within universities related to intercollegiate activities).

For example, if Esme, our fictional phenom, entered into an NIL agreement with a local gun range or abortion rights group instead of Under Armour, she might be denied from accepting scholarship money at Furman University but could do so at Clemson University. Thus, it is advisable for high school athletes to carefully consider any endorsements they give (paid or otherwise) because they may inadvertently deny themselves scholarship opportunities at potential universities, even by promoting causes they perceive as worthy.

### 3. *Maintaining Eligibility and College Choices*

At first blush, the solution to ensuring that high school athletes remain eligible to compete in college would be to wholly discourage NIL deals or deny eligibility to those who enter into such deals. However, this would deny athletes a source of potential income which could result in them opting to forgo high school competition altogether.<sup>175</sup> Regardless of whether South Carolina or the SCHSL permits or denies highschoolers from competing if they have engaged in NIL activities, athletes and parents should be educated on the long-term consequences of signing such an agreement. Information provided to student-athletes should include warnings about impermissible recruiting so that athletes can maintain NCAA eligibility. Information provided should also make athletes aware that an NIL deal *could* make them less attractive to a potential university if the deal conflicts with the university's existing sponsorships or institutional values. High school athletic administrators, educators, and legal advisors should also seek to offer personalized guidance counseling to athletes and parents.

The simplest solution to maintain college eligibility and university choice in an NIL agreement would be for the terms of the contract to permit the student-athlete to terminate the agreement at any time or upon the occurrence of a specific event, such as high school graduation, or commitment or enrollment at a university. However, this may not be desirable for businesses who want to engage with and provide compensation to high school athletes for the potential upside that these athletes may bring to their business as their athletic careers (and public profiles) progress. Businesses would likely factor this risk into the market rate offered to high school student-athletes, thus decreasing the contract value. One possible remedy to this issue would be for

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175. See, e.g., Tom VanHaaren, *Ohio State Buckeyes QB Quinn Ewers Has NIL Deal for \$1.4 million, Source Says*, ESPN (Aug. 31, 2021), [https://www.espn.com/college-football/story/\\_/id/32120440/ohio-state-buckeyes-qb-quinn-ewers-nil-deal-14-million-source-says](https://www.espn.com/college-football/story/_/id/32120440/ohio-state-buckeyes-qb-quinn-ewers-nil-deal-14-million-source-says) [<https://perma.cc/JT3E-U89G>] (discussing an athlete who chose to forgo high school competition altogether because he was unable to earn compensation as a high school student-athlete).

the terms of an NIL contract to allow student-athletes to terminate the agreement at any time, but also include a prorated liquidated damages clause whereby athletes are penalized if they terminate. This would likely mitigate risks to a business and disincentivize student-athletes from terminating the contract. Therefore, even if an existing NIL deal conflicts with a university's contractual obligations or institutional values, the student-athlete can make a responsible choice regarding their future: either continue to earn money from the deal or be eligible to attend a specific university.

Notwithstanding the suggested solutions outlined above, it is likely that all parties will continue to omit provisions that protect those engaged in NIL contracts from potential potholes ahead. Therefore, it is advisable that the state offer some official guidance to high school student-athletes to protect their long-term interests.

#### IV. HOW CAN SOUTH CAROLINA PROTECT ITS MINOR STUDENT-ATHLETES, EDUCATIONAL INSTITUTIONS, AND BUSINESSES?

South Carolina ought to act definitively regarding whether high school student-athletes can engage in NIL activities or not so that it can safeguard its minor student-athletes, educational institutions, and businesses.

Student-athletes must be protected from the risk of lost athletic eligibility and inconsistent enforcement of rules and regulations. High school institutions must be protected from potential disputes raised by student-athletes, parents, and businesses regarding NIL activities. The SCHSL must be protected from the risk of litigation it may bring upon itself by enforcing eligibility punishments *ex post facto* for which it has no clear guidelines. Without rules regarding NIL, the chance of arbitrary and capricious eligibility enforcements regarding NIL is greatly increased.<sup>176</sup> Lastly, businesses must be protected from the negative public image that may be imputed to them if they enter into a deal with a high school student-athlete who is then deemed ineligible to compete. Businesses ought to have clarity regarding the permissibility and enforceability of contracts they enter. Further, high school student-athletes and businesses should be empowered to enter into agreements in which both parties derive a benefit without the uncertainty as to whether the agreement is enforceable or not.

South Carolina's current lack of regulation regarding NIL activities for minors and high school student-athletes does not offer any protection for the parties discussed immediately above. However, regulation that is too stringent could place the state behind others in granting income opportunities to minors, unduly limit businesses from entering into otherwise legitimate agreements,

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176. See Siegrist et al., *supra* note 145, at 22.

and leave the state and the SCHSL at risk of litigation. There are also risks if the state permits NIL activities without restrictions.<sup>177</sup> Accordingly, a balance ought to be struck that falls within a Goldilocks zone of regulation. In other words, NIL regulation should permit and protect in equal measure. Notably, Attorney General Wilson encouraged passage of South Carolina's intercollegiate NIL bill because it protected "student athletes from being taken advantage of."<sup>178</sup> If the state was willing to enact laws to protect college-aged students, should it not be willing to enact laws to protect highschoolers, a more vulnerable population?

This Section first discusses how South Carolina could protect its minor student-athletes by enacting legislation to regulate NIL activities and then discusses how the state may offer definitive rules for high school student-athletes regarding NIL via the SCHSL.

#### A. Enacting Legislation

Legislation could plainly deny high school student-athletes from earning compensation from NIL activities or could grant them the right to do so. If the legislature chooses to allow NIL activities for minors, laws could broadly grant NIL rights for high school student-athletes or prescribe narrow limitations upon their allowance.

##### 1. Legislation Denying NIL Rights to High School Student-Athletes

At least three states statutorily bar high school student-athletes from engaging in NIL activities: Texas, Mississippi, and Illinois.<sup>179</sup> Recently, a Virginia bill that would have disallowed high school student-athletes from entering NIL agreements was vetoed by Governor Youngkin after being approved by the Virginia House and Senate.<sup>180</sup> Two of the reasons for Youngkin's veto may be illustrative for South Carolina legislatures. The first reason for his veto was that the Virginia High School League (VHSL) already "restricts paid endorsement deals."<sup>181</sup> Unlike the VHSL, the SCHSL does not restrict high school athletes from entering NIL deals.<sup>182</sup> However, if it did,

177. See *infra* Section IV.A.2.

178. Attorney General Wilson Takes Action, *supra* note 62.

179. TEX. EDUC. CODE ANN. § 51.9246(j) (2021); MISS. CODE ANN. § 37-97-107(13) (2022); 110 ILL. COMP. STAT. 190/20(h) (2022).

180. See H.D. 1298, Gen. Assemb. of Va., 2022 Sess. (Va. 2022) (providing that "[n]o high school student-athlete who participates in an athletic competition shall enter into any contract to receive compensation in relation to such student's athletic participation in exchange for the use of such student's name, image, or likeness").

181. H.D. 1298, 2022 Sess., Governor's Veto (Va. 2022).

182. See discussion *supra* Section III.A.1.

South Carolina legislature may avoid addressing the issue by legislation which could be timely and politically sensitive. Thus, Youngkin's first reason illustrates that a pre-existing high school association policy may relieve the legislature from addressing the issue head on, saving resources and the risk of needlessly expending political capital.

Secondly, Youngkin claimed that the law would have been a "premature prohibition that fails to recognize the continually evolving marketplace for content creation and monetization" with the potential "unintended consequence of limiting young people from engaging in economic activity via social media unrelated to their athletic performance."<sup>183</sup> This second reason highlights a possible negative consequence of statutorily denying NIL rights to highschoolers. Legislators should then ask whether the purported economic consequence set forth by Youngkin would be significant enough in this state to affect codification of a high school NIL law. A third obvious—but nonetheless important—consideration for South Carolina legislators is to consider Governor McMaster's position on a high school NIL bill. If Governor McMaster would veto a bill that conflicts with his personal or political opinions, as is his right, it would be futile to introduce such a bill.

## 2. *Legislation Granting NIL Rights to High School Student-Athletes*

A state law could grant unlimited NIL rights or could narrowly circumscribe limitations to any rights granted. It is likely that limitations would better protect highschoolers from predatory actors, but too many limitations could have the same effect as outright denying NIL rights. Thus, any legislation granting NIL rights to high school athletes would be most effective if it struck a balance between these two extremes. Limitations could be placed upon the total compensation earned by a highschooler.<sup>184</sup> Similarly, the total number of NIL agreements a high schooler may enter could be limited.<sup>185</sup> There could also be some arrangements for funds received from NIL agreements to be placed into trusts that could be accessed upon a minor reaching the age of majority.<sup>186</sup> Legislation could also require that a

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183. H.D. 1298, 2022 Sess., Governor's Veto (Va. 2022).

184. See Casalino, *supra* note 95, at 294.

185. See *id.*

186. This limitation was placed in South Carolina's original NIL bill for intercollegiate athletes. S. 935, 2018–2019 Gen. Assemb., 123rd Sess. (S.C. 2019). While this bill was ultimately not passed, possibly because of administrative or compliance difficulties, the inclusion of trusts could be more favorable given this context includes compensation paid to minors and this state is already familiar with appointing conservators to manage a minor's finances. See, e.g., S.C. CODE ANN. § 62-7-103 (2022) (providing an example in the South Carolina Trust Code of where a guardian may be appointed by a court to make decisions regarding the welfare of minor).

highschooler's NIL agreement be approved by their high school or sanctioned by a court.<sup>187</sup>

Further, legislation could require that a high school athlete may unilaterally revoke an NIL agreement at any time prior to enrollment at an institution of higher education. Of course, in South Carolina, a minor can already void the contract at any time.<sup>188</sup> But, for high school student-athletes who enter into or ratify NIL deals after turning eighteen, these deals could conflict with a university's existing sponsorships or institutional values and restrict where they may be able to attend university.<sup>189</sup> A limitation requiring an extended, unilateral voidable term would keep a student-athlete's college options available to them without the risk of conflicts arising from NIL agreements and would prevent impermissible "brand recruiting" from occurring.<sup>190</sup> This suggested requirement could allow liquidated damages clauses to disincentivize student-athletes who are over the age of eighteen from breaching the contracts, thus simultaneously protecting businesses' interests.<sup>191</sup> Placing a cap on liquidated damages clauses to the value of the benefits received by an athlete at the date a contract is voided would prevent the threat of large damages awards from unduly limiting the athlete's ability to void the contract.

A review of other state legislatures may provide useful insight for South Carolina legislators. Maryland State Delegate Jay Walker submitted a bill to the Maryland House that seeks to prevent institutions from "establish[ing] rules or other limitations to prevent a public high school student athlete from earning compensation for the use of the student athlete's name, image, or likeness."<sup>192</sup> This bill would permit student-athletes to enter into an NIL agreement if the contract does not conflict with the athlete's athletic program contract and if the student-athlete's parent or guardian cosigns the contract.<sup>193</sup> Like the SCHSL, the Maryland Public Secondary School Athletic Association (MPSSAA) does not expressly allow or prevent high school student athletes from entering into NIL deals.<sup>194</sup> Accordingly, Delegate Walker's bill would pre-empt any future MPSSAA policy that conflicts with the bill.<sup>195</sup>

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187. See Casalino, *supra* note 95, at 293.

188. *Morgan v. Blackwell*, 286 S.C. 457, 458, 334 S.E.2d 817, 818 (1985); see discussion *supra* Section II.B.

189. See discussion *supra* Section III.D.1.

190. See discussion *supra* Section III.D.

191. See discussion *supra* Section III.D.3.

192. H.D. 1431, Gen. Assemb., 2022 Sess. (Md. 2022).

193. *Id.*

194. MARYLAND ATHLETIC ASS'N, MARYLAND PUBLIC SECONDARY SCHOOLS ATHLETIC ASSOCIATION HANDBOOK 2022–2023, at 18–19 (2022).

195. H.D. 1431, Gen. Assemb., 2022 Sess. (Md. 2022).

The pending Maryland bill provides a template for how South Carolina legislators could start to develop a bill while considering limitations this state believes best protect and empower its constituent student-athletes, institutions, and businesses. However, introducing an NIL bill to the South Carolina Senate is admittedly politically risky considering the last NIL bill the state considered was hurriedly introduced and subsequently suspended.<sup>196</sup>

Another legislative act—one that could have the same effect as an NIL bill without being associated with athletics—could permit minors to license their likenesses to third parties. For example, North Carolina allows a minor to enter into a contract to license his or her likeness to a third party and prevents a minor from disaffirming the contract if it is approved by the superior court of the jurisdiction in which the minor resides or is employed, or in which a party to the contract has its principal North Carolina-based office.<sup>197</sup> The North Carolina law requires that at least 15% of the minor's gross earnings be placed in trust for benefit of the minor, to be withdrawn by the minor upon reaching the age of majority.<sup>198</sup> Typically, the parent or guardian of the minor is the trustee, unless a court believes it is in the best interests of the minor to appoint another individual as the trustee.<sup>199</sup> This perhaps leaves a minor whose earnings are held in a trust exposed to potential abuse in an instance where the trustee does not act with the minor's best interests at heart. Although trustees hold a duty to the minor to not misuse the trust's funds,<sup>200</sup> it may be hard for a minor to remedy and recover any losses, particularly if the one abusing the funds is the minor's parent or guardian. Additionally, the North Carolina statute permits minors to enter into "talent agency" contracts through which the agent may seek to procure employment for the minor to render professional services in entertainment enterprises.<sup>201</sup> It is not clear if this would include all forms of endorsements, though the statute does allow for television advertisements, radio features, and "other entertainment."<sup>202</sup>

South Carolina could enact similar legislation and, more specifically, include language permitting endorsements in it. Admittedly, the North Carolina statute makes a contract entered into as a minor not voidable where a court approves it,<sup>203</sup> which may not wholly protect minors; however, a similar South Carolina statute could differ in this aspect. South Carolina

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196. See discussion *supra* Section II.A.2.

197. N.C. GEN. STAT. ANN. § 48A-12(a) (2013).

198. See *id.* § 48A-14(a) (earnings placed in trust by court order); see also *id.* § 48A-14(d) (earnings placed in trust by employer).

199. See *id.* § 48A-14(b).

200. *Id.* § 48A-16.

201. *Id.* § 48A-17(a).

202. *Id.* § 48A-17(b).

203. *Id.* § 48A-12(a).



legislators could use the model of the North Carolina statute and then adapt its provisions to best serve the student-athletes, institutions, and businesses of the state.

Importantly, before starting any bill-drafting process regarding NIL or licensable rights for minors, South Carolina legislators should first consider encouraging changes to the SCHSL Bylaws. This could be a cheaper, simpler, and more flexible way to reach the same ends.

### *B. Action by the SCHSL*

The SCHSL governs high school interscholastic competition in South Carolina's public schools.<sup>204</sup> Accordingly, athletes participating at member schools must comply with the rules set forth in the SCHSL Bylaws as well as positions taken by the SCHSL regarding enforcement of its rules.<sup>205</sup> This Section first discusses the possibility and process of modifying the SCHSL Bylaws regarding NIL activities for high school student-athletes. Second, this Section suggests an alternative solution whereby the SCHSL could issue a position statement regarding its enforcement of amateurism rules regarding NIL activities.

#### *1. Modifying the SCHSL Bylaws*

The SCHSL publishes its Bylaws annually, frequently making modifications.<sup>206</sup> The process for amending the SCHSL Bylaws is outlined in Article VII, Section 2 of the SCHSL Constitution.<sup>207</sup> Proposed amendments must be submitted to Commissioner Jerome Singleton by the principal or superintendent of a member school before January 1st of each year.<sup>208</sup> Commissioner Singleton may also submit proposed amendments to the Bylaws.<sup>209</sup> Proposed amendments are then submitted to the SCHSL Executive Committee, which includes recommendations on each proposal when publishing the SCHSL's January Bulletin.<sup>210</sup> The Legislative Assembly, comprised of delegates representing the organization's membership, may then adopt proposed amendments by a two-thirds vote.<sup>211</sup> By requiring a super-majority vote, the SCHSL Constitution sets a high bar for passage of

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204. *SCHSL Constitution*, *supra* note 107.

205. *Id.*

206. *See e.g., SCHSL Bylaws*, *supra* note 6, at art. III, § 11(E) (highlighting a new amendment to the Bylaws that was not in the most recent edition of the Bylaws).

207. *SCHSL Constitution*, *supra* note 107, at art. VII, § 2.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

amendments. Given that NIL has been a somewhat divisive topic within the state at a collegiate level, it is unlikely that a super-majority of SCHSL delegates would approve such an amendment to its Bylaws. At the time that this Note was being written, no proposed amendments regarding NIL had been submitted to the SCHSL, and Commissioner Singleton indicated there were no plans to make any such amendments.<sup>212</sup>

The benefits to amending the SCHSL Bylaws would be to make high school athletes' ability to enter NIL deals relatively stable because removal of these rights would then require amendment to the Bylaws and thus another super-majority vote. Also, including delegates from the immediate membership of the SCHSL in the rulemaking process might lead to a more well-informed decision than would a law created by state legislation. One drawback to amending the SCHSL Bylaws, as opposed to enacting state legislation, may be that the SCHSL and its member schools could act in their own self-interest rather than empowering and safeguarding student-athletes and businesses. Unlike congresspeople, voting delegates in the SCHSL's Legislative Assembly are not officials elected by all eligible voters of this state.<sup>213</sup> Instead, they are designated by the governing board of a member school.<sup>214</sup> Accordingly, delegates may more fervently represent the interests of the member schools and the SCHSL than the interests of student-athletes and businesses.

## 2. *Issuing a Position Statement*

A possible solution for the SCHSL to provide guidance for its student-athletes and member institutions would be to issue a position statement regarding enforcement of its amateurism rules regarding NIL compensation earned by athletes. The SCHSL has yet to take an external position on this matter; however, as the sole enforcer of rules across its member institutions, *some* position necessarily exists internally. That is, in itself, no position *is* a position that seemingly does not deny eligibility to an athlete who engages in NIL activities under the current SCHSL Bylaws. All interested parties are harmed by the SCHSL's veiling of its position regarding NIL.

First, the SCHSL is harmed because absence of a policy leaves it exposed to an undesirable risk of litigation. While the SCHSL may be refraining from taking a position to reduce its current litigation risk, this strategy appears inadvisable in the long-term because, when litigation inevitably occurs in this state, the lack of due process and official guidance on this matter all but dooms the SCHSL's defense. Proof of an existing policy would help the SCHSL

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212. Telephone Interview with Jerome Singleton, Commissioner, SCHSL (Aug. 25, 2022).

213. *SCHSL Constitution*, *supra* note 107, at art. VII, § 1.

214. *Id.*

avoid issuing inconsistent rulings that may be susceptible to lawsuits alleging arbitrary and unfair enforcement of *ex post facto* regulations.<sup>215</sup> Further, the existence of a position regarding the SCHSL's policy shows an attempt to consistently enforce its own rules and enhances the SCHSL's chances of success in litigation.

Second, the SCHSL's member institutions are harmed because athletes and parents may be dissatisfied with the institutions' (understandable) inability to provide instructive guidance to their athletes regarding the permissibility of NIL activities. Typically, a highschooler's first point of contact regarding amateurism and competition for their high school would be the high school athletic administration department. Where athletic departments are unable to give answers, administration must face dissatisfied parents and students. High schools that provide overly permissive advice regarding NIL activities may be subject to litigation if an athlete follows their advice and is subsequently punished by the SCHSL. Conversely, if advice given is too restrictive, high schools may be at fault for denying opportunities to their athletes which may be inequitable and disproportionately impact less affluent families. While the SCHSL fails to take a position, it unfairly shifts the risks of litigation and student/parent dissatisfaction to high schools instead of taking responsibility as the "recogn[ized] state authority on interscholastic athletic programs" it believes itself to be.<sup>216</sup>

Third, high school student-athletes are adversely affected by the SCHSL's reluctance to share its position regarding the permissibility of NIL activities. Athletes are denied definitive answers if high school athletic departments and the SCHSL are unable to communicate an official position. As such, it is conceivable that highschoolers may engage in activities they do not understand to be impermissible. It is easy to imagine a highschooler believing that "if athletes can do it in college, then I can probably do it here." However, such an assumption may be dangerous for the athlete who could be subject to disciplinary action by the SCHSL, with possible implications for the student if they wish to compete in college. Likewise, there are negative financial implications for student-athletes who, based on the SCHSL's inaction, forgo NIL opportunities out of fear of being denied eligibility. Many families would greatly benefit from an additional household income, however trivial, during expensive years in which children live, sleep, and (most expensively for parents of athletes) eat in the family home. These families are denied this opportunity if a student-athlete is risk averse and chooses to turn down NIL opportunities because of the SCHSL's unclear position.

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215. See Siegrist et al., *supra* note 145, at 22.

216. *SCHSL Constitution*, *supra* note 107.

Other than the possibility of taking a position in its Bylaws, as discussed above,<sup>217</sup> the SCHSL could issue a position statement to offer guidance to its athletes and members schools. The Louisiana High School Athletic Association (LHSAA) did this when it issued a “positioning paper” in April 2022.<sup>218</sup> The LHSAA stated that its “bylaws do not prohibit student athletes from engaging in certain commercial activities in their individual capacities. [NIL] activities . . . will not jeopardize a student athlete’s amateur status if the student athlete complies with [LHSAA’s Bylaws].”<sup>219</sup> The issuance of this position statement was approved by the LHSAA Executive Committee and does not appear to have been submitted to a wider delegate vote.<sup>220</sup>

Benefits to issuing a position statement like LHSAA’s include the speed at which the position statement can be issued as well as the relative ease with which it could be amended in the future as compared to the difficulty inherent in amending bylaws. By not requiring a delegate vote, only its Executive Committee’s approval (which is administratively simpler, albeit still requiring a vote), the LHSAA was able to issue its position quickly. Similarly, the same process could be adopted for future changes to the LHSAA’s position on NIL. Further, a position statement provides guidance to athletes, parents, and institutions upon which informed decisions can be made, thus protecting eligibility to compete and future educational opportunities.

The issuance of a position statement by the SCHSL would provide immediate guidance to athletes and institutions. However, the SCHSL could quickly change its position if its Bylaws and Constitution remain untouched. This instability may be harmful to athletes and institutions who would need to remain vigilant for any changes to the SCHSL’s position to ensure continued compliance. The possibility of rapid change may be reduced given that the SCHSL Constitution provides for staggered terms in office on the SCHSL Executive Committee.<sup>221</sup> Thus, there would likely be no wholesale turnover that might quickly and drastically change the SCHSL’s position on NIL activities. As a practical point, if the SCHSL did issue a position statement, its communications should be thoroughly disseminated to its member institutions and athletes to ensure fairness and compliance.

In all, a position statement is probably the best solution through which the SCHSL can continue to govern high school student-athletes fairly and protect itself from future litigation. This method would be quicker and more flexible than a permanent change to its Bylaws or Constitution. Also, if the SCHSL issues a position statement that appears to work, this temporary solution could

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217. See discussion *supra* Section IV.B.1.

218. *LHSAA Allows Student-Athletes to Receive NIL Benefits*, *supra* note 139.

219. *Id.*

220. *Id.*

221. *SCHSL Constitution*, *supra* note 107, at art. VI, § 2.B.

become semi-permanent in the same way that the NCAA's Interim Policy remains the governing standard for collegiate athletics.<sup>222</sup> If the SCHSL issues a position statement, athletes, institutions, and businesses would receive some immediate and much needed guidance. Meanwhile, discussions and debates regarding NIL activities for highschoolers could take place between all stakeholders before any permanent changes are made to the SCHSL's Bylaws or Constitution.

#### V. CONCLUSION.

The current lack of guidance and information offered to high-school student athletes, institutions, and businesses regarding the permissibility of NIL activities for highschoolers in South Carolina is untenable. If the South Carolina state legislature and the SCHSL fail to act by issuing regulation or guidance regarding the eligibility of high school student athletes who engage in NIL deals, irreparable harm may come to high-school student athletes (many of whom are minors), businesses, and institutions of the state, including colleges and the SCHSL itself.

Accordingly, and for the reasons discussed in this Note, South Carolina should act through legislation of the SCHSL to regulate NIL activities for high school student-athletes. While it could ban NIL activities, a better solution would be to make NIL activities permissible for high school student-athletes and provide safeguarding limitations to protect minors from predatory actors. This state has previously sought to protect collegiate student-athletes from exploitation.<sup>223</sup> Therefore, the state should not deny protections to an even more vulnerable subsection of the student-athlete population. Regardless of whether the state and the SCHSL approve of high school student-athletes earning compensation through NIL activities or not, this issue is here to stay. It is time for South Carolina to lace up its cleats, get off the sidelines, and step into the game: this state's children are counting on it.

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222. See *NCAA Interim Policy*, *supra* note 40.

223. See *Attorney General Wilson Takes Action*, *supra* note 62.