

# Name, Image, and Likeness (NIL): How did we get here and where are we going?

## Legal & Legislative Perspective

By Julie Sommer, Attorney



# About me

- Seattle-based attorney
- Executive Director, The Drake Group Education Fund, athlete advocate for collegiate sports reform and athletes' rights
- University of Texas at Austin alumna and member of National Championship Swim Team, U.S. Swimming National Team, NCAA All-American, U.S. Olympic Trials





# History of NIL: *Bloom v.* NCAA

- Filed 2002, decided 2004
- Olympic skier and college football player
- Engaged in endorsement deals as a skier and was declared permanently ineligible by the NCAA, which prematurely ended his college football career by two years

## The NCAA cut former NFL player Jeremy Bloom's college football career short. Now he's fighting to get college athletes endorsement rights.

Jackson Thompson Jun 12, 2021, 5:32 AM



Jeremy Bloom in a court hearing on April 7, 2004. Kathryn Osler/The Denver Post via Getty Images

# History of NIL: O'Bannon v. NCAA



- 2008: former UCLA basketball player, Ed O'Bannon, was depicted in a video game produced by Electronic Arts (EA) without consent or compensation for use of his likeness.
- 2009: O'Bannon sued the NCAA on behalf of NCAA DI football and men's basketball players (EA settled for \$40 mil before trial)
- 2014: U.S. District Court Nor. CA ruled in favor of O'Bannon

O'Bannon was the first instance of serious pushback against the NCAA's amateurism rules

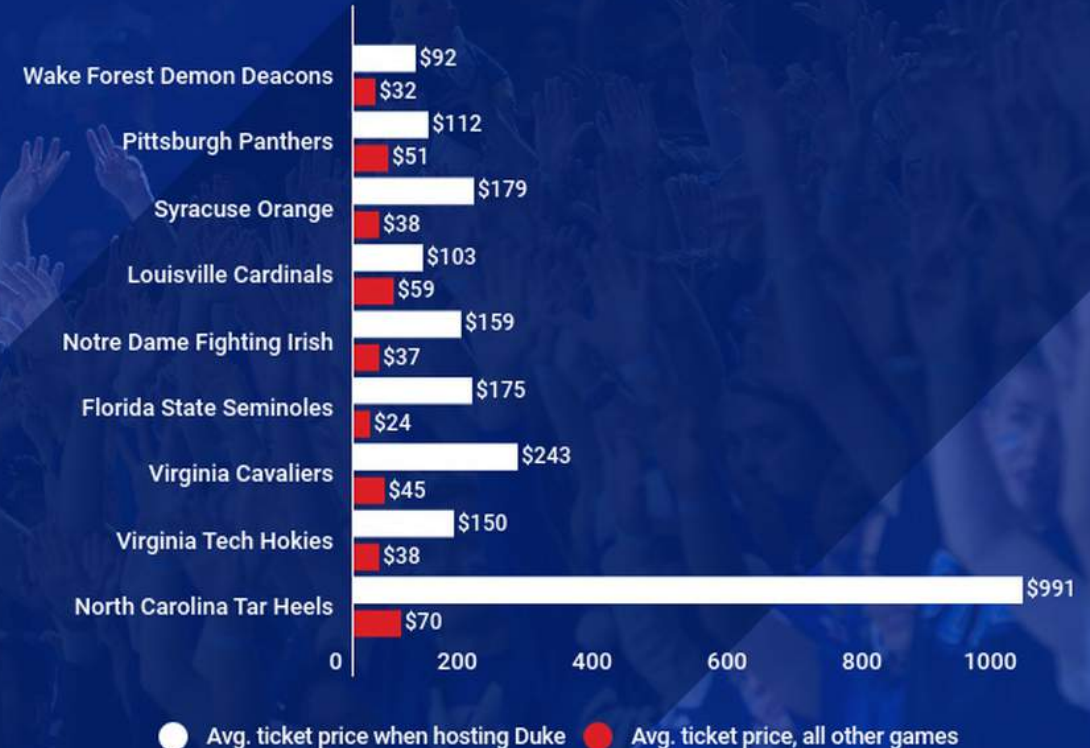


# The Zion Effect: Demand For Duke Tickets Reaches An All-Time High Because Of Zion Williamson



- 100 million annual NCAA March Madness viewers and \$1.2 billion in NCAA Tournament media revenue
- Demonstration of Zion's influence on an industry as a college athlete

## Inside the Zion Effect at Duke





# Alston v. NCAA

- ▶ Antitrust action brought by former W. Virginia football player Shawne Alston and others
  - ▶ NCAA retained a substantial amount of discretion over athlete compensation
- ▶ Wilken ruled in Alston v. NCAA that the NCAA can no longer cap the amount of educational benefits a school can reward an athlete
  - ▶ Schools can give athletes anything furthering their education: computers, musical instruments, science equipment, etc.
- ▶ June 2021: Supreme Court unanimously upheld district court ruling that NCAA rules limiting education-related compensation violated federal anti-trust laws by capping scholarships to student-athletes
- ▶ After years of saying it was impossible and immoral to compensate athletes, it took the NCAA 2 weeks to formulate policy after a SCOTUS smack down





# NCAA's 2021 Interim NIL Policy

**1. NCAA Bylaws, including prohibitions on pay-for-play and improper recruiting inducements, remain in effect, subject to the following:**

- **Schools in states without NIL laws or where NIL laws have not yet taken effect: athlete's eligibility will not be impacted if they choose to engage in an NIL activity**
- **Schools in states with NIL laws in effect: if an individual or member institution elects to engage in an NIL activity that is protected by law or executive order, the individual's eligibility for and/or the membership institution's full participation in NCAA athletics will not be impacted by application of NCAA Bylaws unless the state law is invalidated or rendered unenforceable by operation of law.**
- **Use of a professional services provider is also permissible for NIL activities, except as otherwise provided by a state law or executive action with the force of law that has not been invalidated or rendered unenforceable by operation of law.**

**2. The NCAA will continue its normal regulatory operations but will not monitor for compliance with state law.**

**3. Individuals should report NIL activities consistent with state law and/or institutional requirements.**

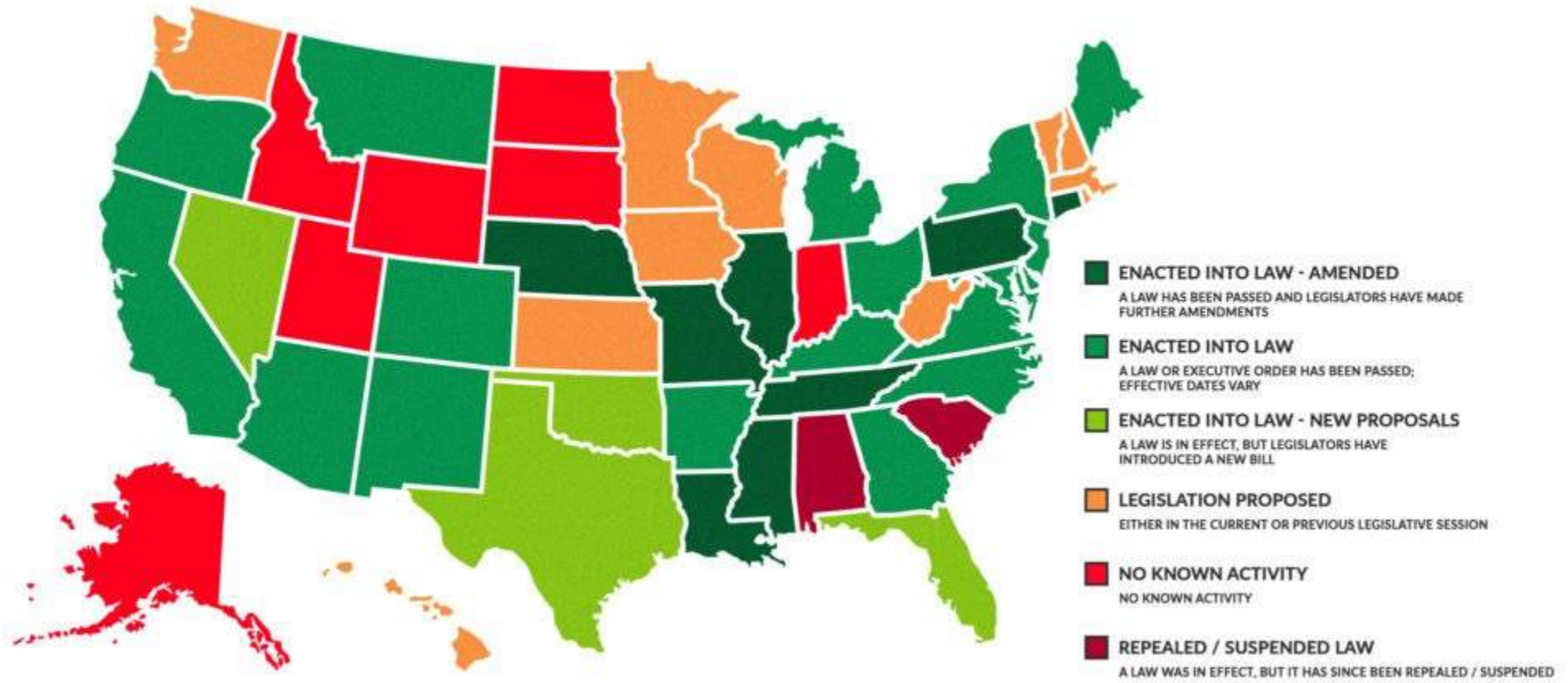
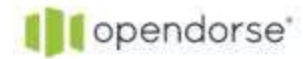
- ▶ **Effective 7/1/21 until federal legislation or new NCAA rules are adopted**

# 2019-2023 State Activity

- ▶ 2019: California's "Fair Pay to Play Act" signed
- ▶ Florida was first to pass bill with a 7/1/21 effective date
  - ▶ Many states followed suit to pass or amend in 2021 legislative session
- ▶ June 2021: Alston v. NCAA Supreme Court ruling required NCAA to create interim NIL Policy
- ▶ Shifted landscape and created new wave of state activity in which many states amended or repealed their laws
- ▶ Post-July 1, 2021 many stakeholders recognized it was the states who did *not* have a state law that had the upper-hand under the NCAA's Interim NIL Policy
  - ▶ For this reason, as well as the growing interest from institutions to take a more hands-on approach with NIL, the 2022-23 legislative cycle has seen an uptick in proposals, amendments, and repealing efforts



# Legislative Landscape



# Amendments and Repeals

- ▶ More than 40 states have introduced or enacted NIL legislation
- ▶ 8 states amended laws
  - ▶ Nebraska, Illinois, Tennessee, Mississippi, Connecticut, Pennsylvania, Louisiana, Missouri
  - ▶ Florida failed to amend theirs
- ▶ Alabama and South Carolina repealed or suspended their law
- ▶ 7 states with no activity
  - ▶ Alaska, Idaho, Utah, Wyoming, North Dakota, South Dakota, Indiana
- ▶ 4 states enacted laws and new proposals
  - ▶ Nevada, Texas, Oklahoma, Florida
- ▶ 9 other states proposed law in previous sessions



# Federal Bills

- ▶ Filed during the 116th (1/3/2019-1/3/2021) and 117th (1/3/2021-1/3/2023) sessions of Congress
- ▶ Many bills categorized as NIL or athletes' rights legislation include gender equity elements
- ▶ Legislation at state level creates inconsistencies among regulations
- ▶ Underlying commonality among the federal bills is that college athletes shall not have employee status

# NIL/Athletes' Rights/Heath and Safety

**H.R.3379** — Modernizing the Collegiate Student Athlete Experience Act

- **Sponsor:** Rep. Chabot, Steve [R-OH-1] (Introduced 05/20/2021)

**S.4004** —Fairness in Collegiate Athletics Act

- **Sponsor:** Sen. Rubio, Marco [R-FL] (Introduced 06/18/2020)

**S.414** — Amateur Athletes Protection and Compensation Act of 2021

- **Sponsor:** Sen. Moran, Jerry [R-KS] (Introduced 02/24/2021)

**H.R.2841** — Student Athlete Level Playing Field Act

- **Sponsor:** Rep. Gonzalez, Anthony [R-OH-16] (Introduced 04/26/2021)



# Companion Bills

## NILs

**S.238** – College Athlete Economic Freedom Act

- **Sponsor:** Sen. Murphy, Christopher [D-CT] (Introduced 02/04/2021)

**H.R.850** — College Athlete Economic Freedom Act

- **Sponsor:** Rep. Trahan, Lori [D-MA-3] (Introduced 02/04/2021)

## NILs/Athlete Rights

**S.5062** — College Athletes Bill of Rights

- **Sponsor:** Sen. Booker, Cory A. [D-NJ] (Introduced 12/17/2020)

**H.R.9033** — College Athletes Bill of Rights

- **Sponsor:** Rep. Schakowsky, Janice D. [D-IL-9] (Introduced 12/18/2020)

# Companion Bills: College Athletes' Right to Organize

**S.1929** — College Athlete  
Right To Organize Act

- **Sponsor:** Sen. Murphy,  
Christopher [D-CT]  
(Introduced 05/27/2021)

**H.R.4855** —Braeden's  
Commission: Protect our  
Athletes from Exertional Heat  
Stroke

- **Sponsor:** Rep. Smith,  
Christopher H. [R-NJ-4]  
(Introduced 07/29/2021)

**H.R.3895** — College Athlete  
Right to Organize Act

- **Sponsor:** Rep. Bowman,  
Jamaal [D-NY-16]  
(Introduced 06/15/2021)

**S.5003** — College Athlete  
Compensation Rights Act

- **Sponsor:** Sen. Wicker, Roger  
F. [R-MS] (Introduced  
12/10/2020)



# Companion Bills

## NCAA Enforcement

**S.3943** — NCAA  
Accountability Act of 2022  
**Sponsor:** Sen. Blackburn,  
Marsha [R-TN] (Introduced  
03/29/2022)

**H.R.5817** — NCAA  
Accountability Act of 2021  
• **Sponsor:** Rep. Kustoff, David  
[R-TN-8] (Introduced  
11/02/2021)

## NCAA Institutional Financial Reporting

**S.1225** — SCORE Act  
• **Sponsor:** Sen. Murphy,  
Christopher [D-CT]  
(Introduced 04/20/2021)

**H.R.2610** —SCORE Act  
• **Sponsor:** Rep. Price, David  
E. [D-NC-4] (Introduced  
04/16/2021)

# Companion Bills: Gender Equity and Title IX

## Gender Equity

**H.R.7336** — Gender Equity in College Sports Commission Act

- **Sponsor:** Rep. Maloney, Carolyn B. [D-NY-12]  
(Introduced 03/31/2022)

## Companion Bills – Title IX Separate Sex Sport

**S.251** — Protection of Women and Girls in Sports Act of 2021

- **Sponsor:** Sen. Lee, Mike [R-UT]  
(Introduced 02/04/2021)

**H.R.426** — Protection of Women and Girls in Sports Act of 2021

- **Sponsor:** Rep. Steube, W. Gregory [R-FL-17]  
(Introduced 01/21/2021)





Uniform Law Commission  
Better Laws. Stronger States.

# Uniform College Athlete Name, Image, or Likeness Act

- ▶ Uniform Act drafted by the ULC in 2021
- ▶ Allows college athletes to earn compensation for their NIL while also providing reasonable protections to educational institutions, athletic associations, and conferences.
- ▶ Following the request of the ULC, District of Columbia introduced Uniform College Athlete Name, Image, or Likeness Act which covers many of the standard provisions consistent with other NIL bills
- ▶ Sample bill for states to choose to adopt
  - ▶ Only NIL policy, no health care provisions



# Uniform College Athlete Name, Image, or Likeness Act



**UNIFORMITY:** Allows college athletes to earn compensation for the use of their NIL while ensuring that schools in each state are playing under the same general rules.



**RULES & REGULATIONS:** Provides reasonable guardrails by allowing institutions to adopt limited rules of conduct relating to NIL activities that apply when a college athlete is engaged in an official team activity.



**REMEDIES:** Provides a right of action for college athletes if their NIL rights are violated.

# Use of Institutional Marks and Logos

## ► Federal Bills:

- Example provisions for agreements between institution and third party:
  - In conjunction with an endorsement contract of a college athlete, an institution may enter into a separate agreement with the third party for the intellectual property rights or the NIL or athletic reputation rights of the institution, including the use of the logos and team uniforms, **if—**
  - The third party provides covered compensation directly to the college athlete pursuant to the contract; **AND**
  - The agreement between the institution and the third party is not initiated or coordinated by the institution



## Opinion

# It's time to compensate college athletes and support equity within collegiate sports

June 10, 2021 at 2:02 pm

By [Julie R. Sommer](#)

*Special to The Times*



**Julie Sommer**

@JulieRSommer



Sen. Maria Cantwell, D-Wash., chair of the Senate Commerce, Science, and Transportation Committee, joined at left by Sen. Roger Wicker, R-Miss., holds a hearing on student... (J. Scott Applewhite / AP) [More](#) ▼



# Julie Sommer Contact Info

Email: [jsommer@jsommerlaw.com](mailto:jsommer@jsommerlaw.com)

Phone: (206) 660-4431



**Julie Sommer**  
@JulieRSommer



**julie\_r\_sommer**