



AMBUSHING NIL RESTRICTIONS

HOW NIL “CONFLICT LANGUAGE” POLICIES CONFLICT WITH THE FIRST AMENDMENT

SAM C. EHRLICH, DEPARTMENT OF MANAGEMENT, BOISE STATE UNIVERSITY
& NEAL C. TERNES, DEPARTMENT OF SPORT MANAGEMENT, ARKANSAS STATE UNIVERSITY

What is ambush marketing?

MAYO CLINIC MONDAY MILES MAYO CLINIC MONDAY MILES MAYO CLINIC MONDAY MILES



MAYO CLINIC
Sports Medicine

MAYO CLINIC MONDAY MILES

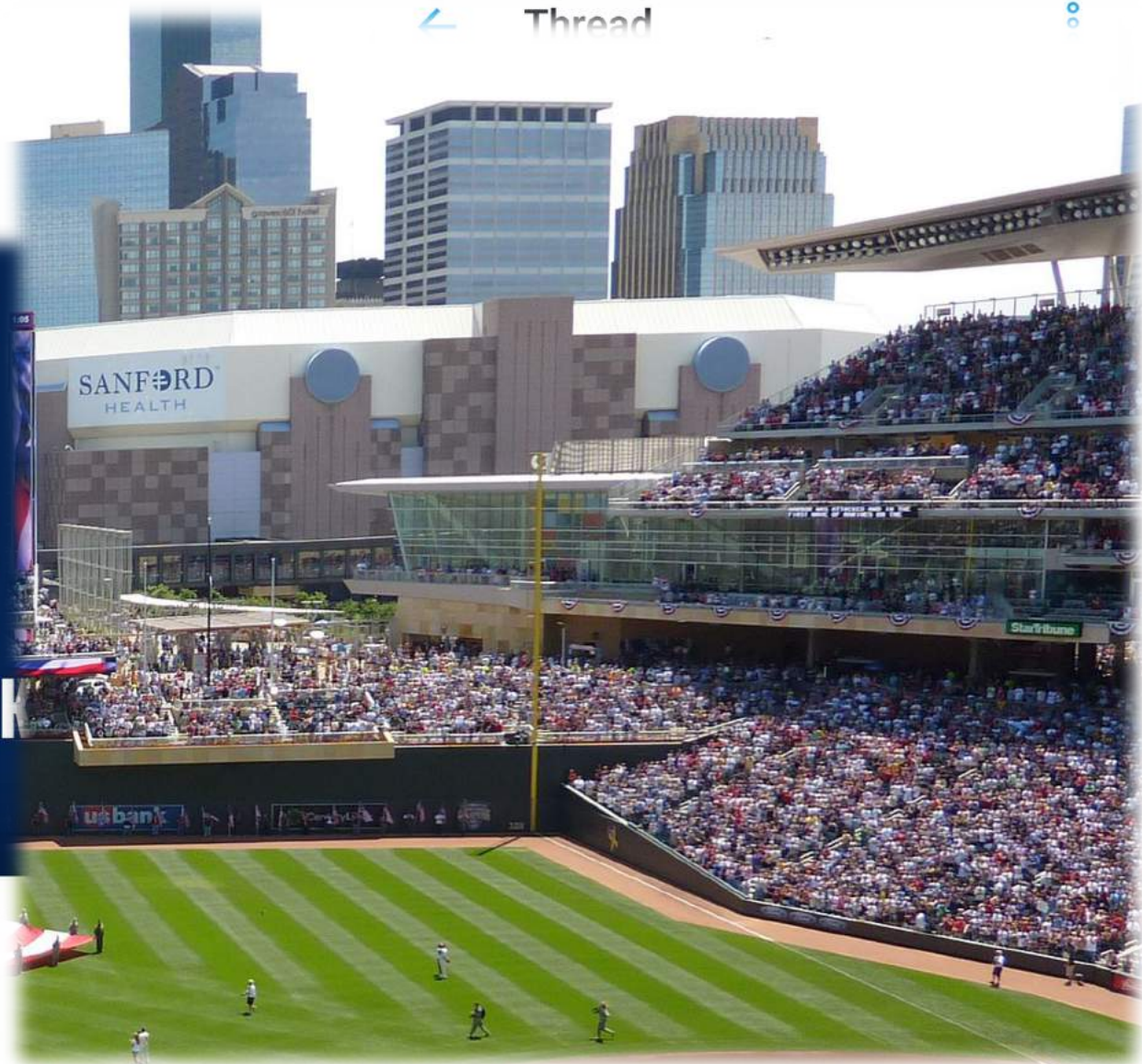
COME WALK THE TARGET
FIELD WARNING TRACK!

12:00 - 1:00 PM

May 20	July 15
June 3	July 29
June 10	Aug. 12
June 24	Aug. 26
July 1	Sept. 23

Restrictions apply. Must be 21+ to enter. Void where prohibited.
See www.draftkings.com/corona for details. Gambling problem? Call 1-800-GAMBLER.

Brewed and Bottled by
CERVECERIA MODELO



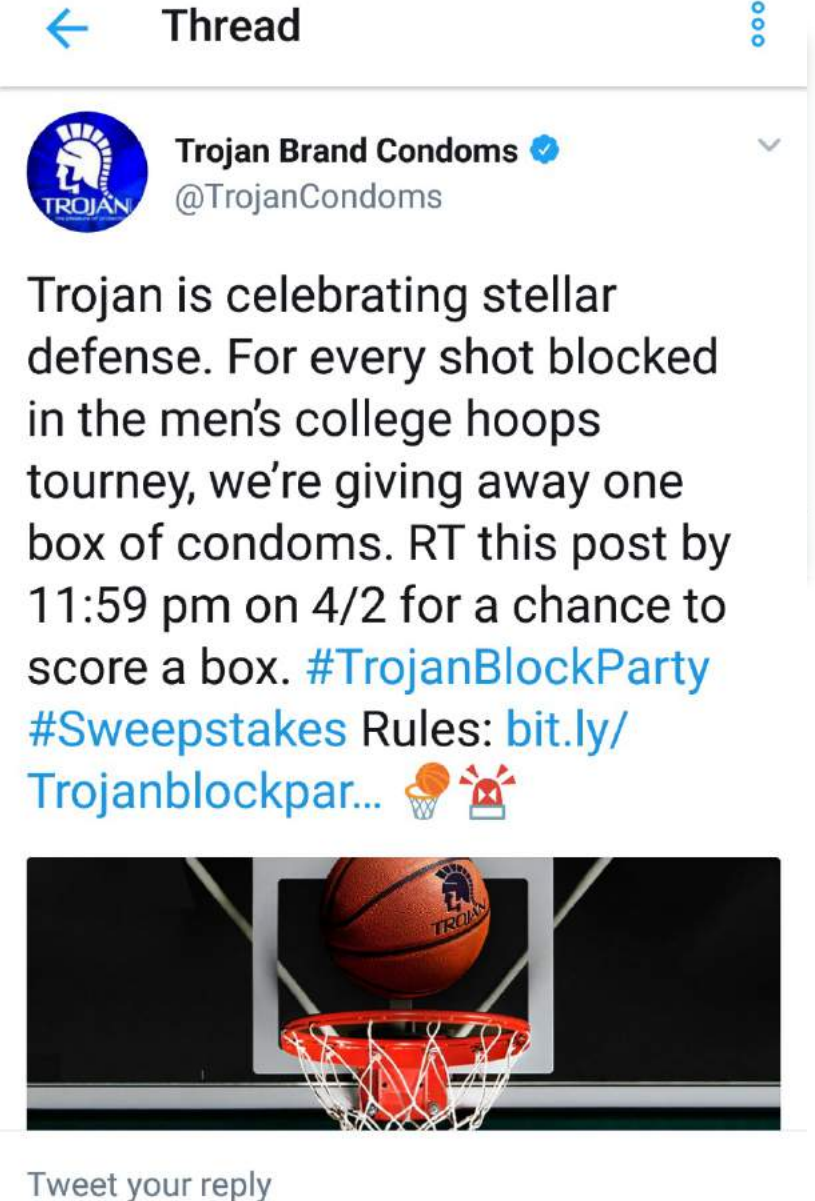
Tweet your reply

What is ambush marketing?

■ Ambush Marketing Defined:

- A marketing strategy in which a company or brand seeks to associate itself with a particular event, such as a sporting event, without being an official sponsor or partner of that event.
- This type of marketing involves exploiting the publicity and exposure generated by the event, without actually investing in the event or having any official affiliation with it.

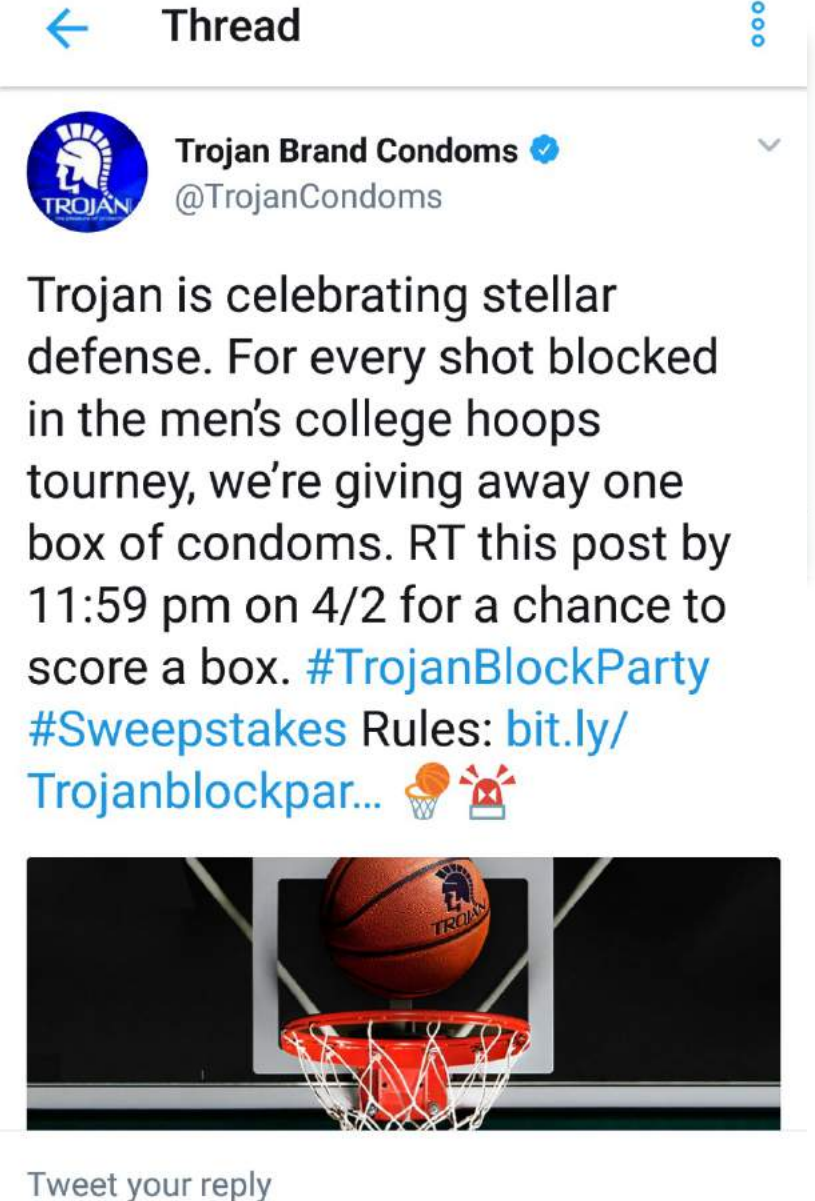
Unsurprisingly, the NCAA, conferences, and universities are not huge fans of ambush marketing.



What is ambush marketing?

- While consumers are typically indifferent towards the activity, organizational leaders (in some cases rightfully) see it as an unethical practice that threatens the integrity of an event and significantly devalues their own official sponsorships.
- **After all, why pay for exclusive access when it's not actually exclusive? Why would a brand pay for an official sponsorship when they can just employ ambush marketing tactics instead?**

Unsurprisingly, the NCAA, conferences, and universities are not huge fans of ambush marketing.



NIL provides even more opportunities for brands to engage in ambush marketing



Bronco Sports Properties
@bspbronco

Join us in welcoming back Lithia Ford of Boise! Lithia Ford has been vital in the success of Boise State Athletics over the years. We look forward to building upon our successes and encourage Bronco Nation to consider them for any future car needs.
[#WhatsNext](#) [#BleedBlue](#) [#Ford](#)



10:46 AM · Jan 27, 2022

Instagram



tdeggie13
Lyle Pearson Acura



Liked by bronconationupdates and others

tdeggie13 If you or anyone you know is looking for a car, tell them to check out Lyle Pearson. They have a great option of new and used cars from brands such as Acura, Land Rover, Mercedes Benz and many more. Check out Lyle Pearson to find the perfect car for you!

View all 7 comments

bronconationupdates Nice whip!



Add a comment...



**Boise State volleyball's
Paige Bartsch**

ATHLETE NIL AND AMBUSH MARKETING

That's not Puma...





LSU Board of Supervisors

Policy on Student-Athlete Name, Image and Likeness (NIL)

IV. Institutional Responsibilities

Student-athletes will have the freedom to earn compensation for their name image and likeness, subject only to certain limitations contain in statute and this policy.

- a) A postsecondary education institution may prohibit an intercollegiate athlete from using their NIL for compensation if such opportunity conflicts with an existing institutional sponsorship agreement or contract or goes against the values of the postsecondary education institution.

*"Institutional Values" shall be based upon the current limitations and parameters placed on organizations (and products) that may engage in university sponsorships.

- b) The institution shall educate student-athletes on the limitations described above and promptly determine where conflicts exist and notify student-athletes.
- c) An institutional staff member of a postsecondary education institution shall not be involved in arranging compensation for an intercollegiate athlete or providing compensation themselves.
- d) Athletics boosters are prohibited from creating or facilitating NIL compensation opportunities for prospective student-athletes as a recruiting inducement or current student-athlete as an inducement to remain enrolled at her respective postsecondary institution.

LOUISIANA STATE UNIVERSITY – NIKE ALL-SPORT AGREEMENT

THIS IS AN AGREEMENT made and entered into by and between the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU Board"), on behalf of the Athletics Department of the Louisiana State University and Agricultural and Mechanical College (hereinafter "UNIVERSITY"), having its principal administrative office in Baton Rouge, Louisiana with an address of P.O. Box 25095, Baton Rouge, Louisiana 70894-5095, and NIKE USA, Inc., an Oregon corporation having its principal offices at One Bowerman Drive, Beaverton, Oregon 97005-6453 ("NIKE").

- (b) UNIVERSITY shall ensure that no Team member, Coach or Staff member shall:
 - (1) Alter or permit the alteration of any NIKE Product worn or used by them to resemble a non-NIKE Product; or
 - (2) Wear any non-NIKE Products which have been altered to resemble NIKE Products.
- (c) UNIVERSITY shall ensure that no Coach, Staff or Team member shall wear and/or use any athletic footwear, or other Products, manufactured by companies other than NIKE except as expressly permitted herein.
- (d) UNIVERSITY acknowledges that "spatting" or otherwise taping, so as to cover any portion of the NIKE footwear worn by Team members during practices, games, exhibitions, clinics, sports camps and other occasions during which Team members wear athletic shoes, is inconsistent with the purpose of this Agreement and the benefits to be derived from it by NIKE and is a material breach of this Agreement. Notwithstanding the foregoing, isolated spatting or taping as is deemed medically advisable, for example in instances where a player is injured during competition and the in-game determination is made that the player can continue to play if the player's ankle and shoe are taped-over, shall not be deemed a breach of this Agreement.
- (e) UNIVERSITY shall not (1) permit any trade name, trademark, name, logo or any other identification other than NIKE, UNIVERSITY, the Conference, or the NCAA, unless approved by NIKE, to appear on NIKE Products worn or used by Coaches, Staff or Team members, (2) permit any third party to screenprint upon, or otherwise embellish, any NIKE Product worn or used by Coaches, Staff or Team members, or (3) re-sell any Product provided pursuant to this Agreement except through an on-campus "tent" sale, "garage" sale or the like and in no event shall Product be sold to liquidators, jobbers, distributors or any other individual or entity in the trade.

NIL AND AMBUSH MARKETING

Per the *Wall Street Journal*, LSU allowed Flau'jae Johnson's deal with Puma because they didn't hear any concerns from Nike

- But if Nike did complain, LSU would presumably have to stop Flau'jae's deal... right?
- ***Could*** they stop her Puma deal?

But would LSU—a state institution—violate the First Amendment free speech clause by restricting Flau'jae's NIL-based speech and expression?



2022 Regular Session

ACT No. 307

ENROLLED

SENATE BILL NO. 250

BY SENATOR CONNICK AND REPRESENTATIVES GLOVER AND STEFANSKI

E:(1) A postsecondary education institution may prohibit an intercollegiate athlete from using the athlete's name, image, or likeness for compensation if the proposed use of the athlete's name, image, or likeness conflicts with either of the following:

- (a) Existing institutional sponsorship agreements or contracts.
- (b) Institutional values as defined by the postsecondary education institution.

NIL “CONFLICT LANGUAGE”

Table 1. Regulatory Framework of State NIL Legislation

Type of Restraint	Applicable States	Sample Statutory Language
Mandatory Statutory Restraint	Arizona, Arkansas#, California, Colorado#, Florida, Georgia, Illinois, Maryland, Michigan, Missouri#, Montana, Nebraska#, New Jersey, Ohio, Oklahoma, Oregon, Tennessee*, Texas	Arkansas: A third-party licensee or student-athlete shall not enter into a contract ... Ohio: A student-athlete shall not enter in a contract ...
Mandatory Institutional Restraint	Connecticut	Connecticut: Each institution of higher education shall adopt one or more policies regarding student athlete endorsement contracts ... Such policy or policies shall include provisions ... prohibiting a student athlete from entering into an agreement that conflicts ...
Permissive Institutional Restraint	Kentucky, Louisiana, Maine, Nevada, North Carolina, Pennsylvania#, Tennessee*, Virginia	North Carolina: Post-secondary educational institutions may, but are not required to, impose the following regulations and limitations on student-athletes ... Virginia: An institution may prohibit a student-athlete from using his or her name, image or likeness to earn compensation if the proposed use conflicts with an existing agreement between the institution and a third party

- Per Moorman and Cocco (2023), 26 of the 30 states that currently have state NIL laws in force have what they categorize as this “conflict language” in place.
- **Eighteen** states have “mandatory” conflict language, meaning that athletes are expressly prohibited from entering into deals that conflict with team contracts
- **Eight** states have “permissive” conflict language, which merely *allows* schools to institute this policy

STATE ACTION AND THE CONSTITUTION



By giving up regulatory authority over NIL to states and schools, the NCAA transferred NIL governance to state actors (i.e., the government)

- *Only state actors are subject to Constitutional restrictions*
- ***NCAA v. Tarkanian (U.S. 1988)***: Despite its relationships with state institutions, the NCAA is a *private actor* that is not held to Constitutional restrictions
- *But beyond the mild and narrow restrictions on “pay for play” and requiring a quid pro quo, the NCAA no longer is in charge of regulating NIL: the states and schools are*

STATE ACTION POST-JULY 1, 2021

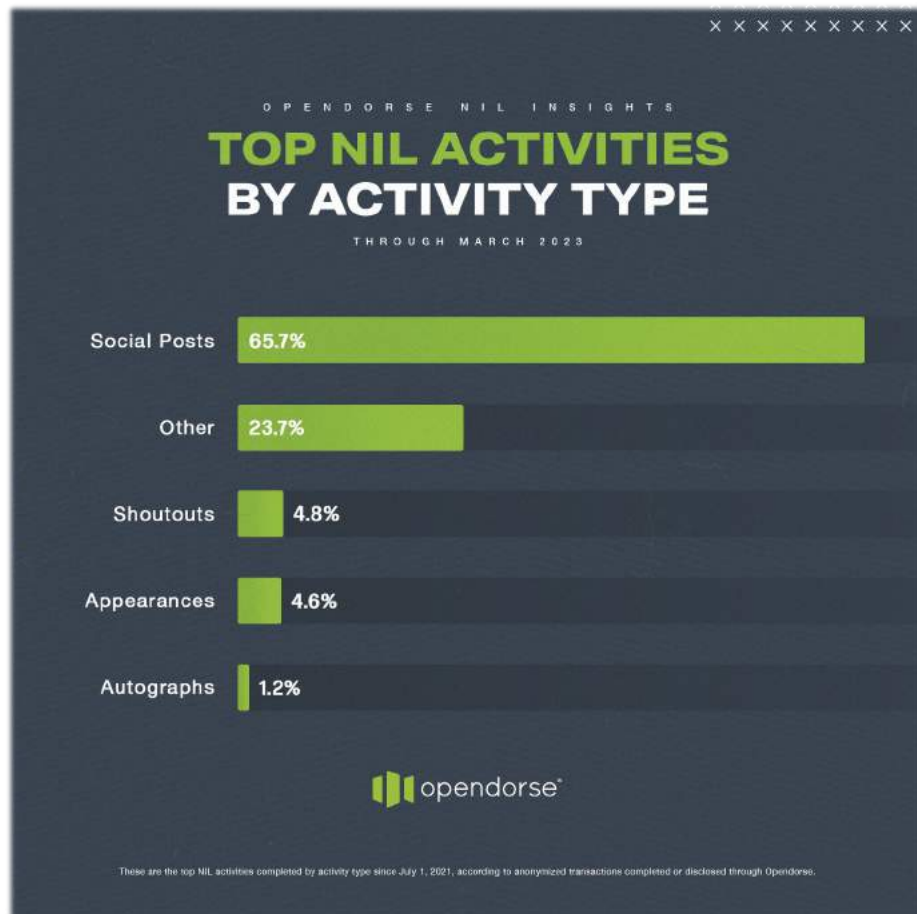
As of July 1, 2021:

Who would be considered as a state actor in regulating NIL?

- Public colleges and universities
- State legislatures, for *mandatory* restraints
- Private universities who are following their states' *mandatory* restraints

- **Flagg Bros v. Brooks (U.S. 1978):**
When state policy “permits but does not compel” specified private activity, there is no state action.
- So the distinction whether when state laws merely “permit” certain restraints vs. when state laws require certain restraints is important.

NIL ACTIVITY AS PROTECTED SPEECH



NIL activity content is certainly protected speech, if not expressive conduct.

But how protected is it?

- Most NIL endorsement activity will likely be considered commercial speech, i.e., speech that “does no more than propose a commercial transaction”
(*Va. Pharmacy Bd. v. Va. Consumer Council*, U.S. 1976)
- Commercial speech is less protected than other forms of speech, but that does not mean that it is “wholly outside the protection of the First Amendment”

CENTRAL HUDSON & COMMERCIAL SPEECH

Four Parts to the *Central Hudson* Test for Commercial Speech

1. The speech in question must neither unlawful nor misleading
2. The government interest at the heart of any speech restriction must be provably substantial
3. The restrictions implemented must directly advance the stated government interest
4. Restrictions must not be more extensive than necessary to achieve the state's interest

■ *Reasonable fit, not least restrictive means*

Is protecting official sponsors a “substantial government interest”?
Probably not.

Many NIL conflict policies are extremely overbroad and ill-defined

“NO MORE EXTENSIVE THAN NECESSARY”

Most state law “conflict language” only restrains athletes during “official team activities.”

But many statutes are woefully inadequate at defining what “official team activities” means.

Of the 26 state statutes that have conflict language, 22 limit the scope of restrictions to just during “official team activities.” Of those 22...

- Three have actual definitions for “official team activities” (*and those definitions are super broad*)

“NO MORE EXTENSIVE THAN NECESSARY”

Most state law “conflict language” only restrains athletes during “official team activities.”

But many statutes are woefully inadequate at defining what “official team activities” means.

“Official team activities” means activities a postsecondary educational institution requires a student athlete to participate in as part of a written team contract that includes but is not limited to games, practices, exhibitions, scrimmages, trainings, meetings, team appearances, team photograph and video sessions, individual photograph and video sessions, media interviews and appearances, *marketing activities, team travel*, and institutional camps and clinics (*emphasis added*). (Ky. Rev. Stat. § 164.6941(12), 2022)

“NO MORE EXTENSIVE THAN NECESSARY”

Most state law “conflict language” only restrains athletes during “official team activities.”

But many statutes are woefully inadequate at defining what “official team activities” means.

Of the 26 state statutes that have conflict language, 22 limit the scope of restrictions to just during “official team activities.” Of those 22...

- Three have actual definitions for “official team activities” (*and those definitions are super broad*)
- Fifteen “simply use the [official team activities] phrase or something similar without any additional descriptive lists or examples of the covered activities provided.”

“NO MORE EXTENSIVE THAN NECESSARY”

Most state law “conflict language” only restrains athletes during “official team activities.”

But many statutes are woefully inadequate at defining what “official team activities” means.

Of the 26 state statutes that have conflict language, 22 limit the scope of restrictions to just during “official team activities.” Of those 22...

- Three give descriptive lists, but...
 - **Virginia** includes “academic or department activities, including community service or travel” (*and all NIL activity is prohibited during this time*)
 - **Arkansas** includes a catch all “other activity” at the end of their list
- And **Maine** leaves it up to athletic departments to define the term (Moorman & Cocco, 2023)

“NO MORE EXTENSIVE THAN NECESSARY”



STUDENT-ATHLETE NAME, IMAGE, LIKENESS GUIDELINES

- You may not enter into an NIL agreement if the agreement conflicts with an Ohio State agreement. At the current time, among other potential conflicts, it is possible that a conflict will exist if your proposed NIL agreement requires you to do the following:
 - Wear products competitive to Nike during team activities – ex. practices, competitions, media, team travel, community service, photo sessions, team-building activities, etc.
 - Promote beverages competitive to Coca-Cola on-campus

Moreover, it's certainly not a guarantee that all NIL activity will be commercial speech

Caitlin Clark, Caleb Love star in NIL advertisement calling for modernization of Small Business Administration

Pete Nakos • 03/15/23

Article written by:



Pete Nakos

[Pete_Nakos96](#)



David Berding/Getty Images)

[Caitlin Clark](#) and [Caleb Love](#) appear to have made [NIL](#) history.

While some athletes have used their publicity rights to throw their support behind political figures, the pair of college basketball players are advocating for federal policy in a deal announced Wednesday.

“NO MORE EXTENSIVE THAN NECESSARY”

- ***What if the Caitlin Clark/Caleb Love advertisement was not for Goldman Sachs’s call to modernize the SBA but was with a “conflicted” sponsor calling for their states to overturn the NIL “conflict language”?***

“In the instant case, there is nothing to ensure the University will not violate First Amendment rights even if that is not their intention. It is clear from the text of the policy that language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university. The broad scope of the policy’s language presents a ‘realistic danger’ the University could compromise the protection afforded by the First Amendment.”

Dambrot v. Central Michigan Univ., 55 F.3d 1177, 1183 (6th Cir. 1995) (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).)

CONCLUSION

So what can institutions do (if anything) to prevent athletes from using NIL for ambush marketing activities?

- Corporate sponsorships are a huge source of revenue for college athletic departments and the NCAA; the industry reportedly took in \$1.24 billion in corporate sponsorship money during the 2017-18 season. **It is entirely reasonable for institutions to be concerned about the potential for these deals to decrease in value.**
- But the cure for NIL ambush marketing activities *cannot come through state action*. After all, athletes (and even ambush marketers) have free speech rights.

CONCLUSION

From the most recent federal NIL bill proposed by Sen. Roger Wicker, R-Miss.

4 (f) CONFLICTS WITH CONTRACTS OR RULES OF IN-
5 STITUTION.—

6 (1) IN GENERAL.—Except as provided in para-
7 graph (2), a third party may not enter into, or offer
8 to enter into, a name, image, and likeness agreement
9 with a student athlete that provides covered com-
10 pensation if a provision of the name, image, and
11 likeness agreement conflicts with a provision of a
12 contract, rule, regulation, standard, or other require-
13 ment of the applicable institution.

CONCLUSION

So what can institutions do (if anything) to prevent athletes from using NIL for ambush marketing activities?

- **The cleanest solution? Recognizing athletes as employees and embracing collective bargaining.**
- Professional team sport leagues have been able to bargain for prohibitions on ambush marketing in CBAs (e.g., Urlacher here →)
- Not only would that take the First Amendment off the table, but it would also protect the NCAA and member institutions from antitrust scrutiny (see, e.g., the ongoing House v. NCAA litigation)





AMBUSHING NIL RESTRICTIONS

HOW NIL “CONFLICT LANGUAGE” POLICIES CONFLICT WITH THE FIRST AMENDMENT

SAM C. EHRLICH, DEPARTMENT OF MANAGEMENT, BOISE STATE UNIVERSITY

& NEAL C. TERNES, DEPARTMENT OF SPORT MANAGEMENT, ARKANSAS STATE UNIVERSITY