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Forget About FERPA: How FOIA Protects Student-Athlete Privacy in the NIL Era

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"I want to show you can do whatever you love—whether it's gymnastics or music or painting—and capitalize on it and create your own business."

Olivia Dunne[1]

ABSTRACT

The start of the name, image, and likeness (NIL) era stirred public fervor about the new earning potential of high-profile student-athletes. Since institutional policies and state laws governing NIL require student-athletes to broadly disclose information about their NIL activities to their respective institutions, the several state laws that follow the approach of the federal Freedom of Information Act (FOIA) can jeopardize the privacy of student-athlete NIL information. Major universities have repeatedly resorted to the unreliable defense of the Family Educational Rights and Privacy Act as well as sporadic state legislation to protect student-athlete privacy in the new NIL space. However, they have largely ignored the simpler solution embedded within their own state FOIA laws.

This Article argues that state FOIA laws bar student-athlete NIL information from public disclosure. FOIA laws serve the important societal function of informing the public about their government, but fundamental public misunderstandings about NIL based on a backwards misconception of the relationship between student-athletes

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1. Ryan Morik, *Olivia Dunne Details the 'Moment My Life Changed,' Wants Equal NIL Opportunities for Men and Women*, FOX (Mar. 8, 2023, 6:55 PM), https://www.foxnews.com/sports/olivia-dunne-details-moment-my-life-changed-wants-equal-nil-opportunities-men-women [https://perma.cc/A8DZ-XSNG].

and their institutions have caused the media to pry into details that are completely unrelated to any public interest. The recent shift toward student-athlete empowerment highlights the reality that student-athletes are autonomous actors, not simply children to be commandeered as an extension of coaches and other university personnel for public entertainment. The simplest way for universities to protect student-athletes in this new opportunity space is to reject FOIA requests for NIL information on the grounds that such requests propose an unwarranted invasion of personal privacy.

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For over a century, American college athletics governance has sought to maintain strict parameters regarding the types of compensation that student-athletes are allowed to earn.[2] Following an explosion in revenue and popularity of college sports over the past several decades, particularly major college football, industry perspectives have progressed from altogether prohibiting any form of student-athlete financial aid during the first half of the twentieth century toward allowing student-athletes greater access to the rewards generated by the college sports enterprise while still adhering to the

2. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 973–74 (N.D. Cal. 2014) (citing INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S., CONSTITUTION BY-LAWS art. VII, § 3 (1906) ("No student shall represent a college or university in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession, or emolument as past or present compensation for, or as prior consideration or inducement to play in, or enter any athletic contest, whether the said remuneration to be received from, or paid by, or at the instance of any organization, committee or faculty of such college or university, or any individual whatever.").

amateurism principles of the past.[3] A sizable segment of the public has historically voiced opposition during each period in which student-athletes achieved an additional means of compensation, generally based on a lamentation of the perceived departure from the original principles of college athletics.[4] Today, the rules of the National Collegiate Athletic Association (NCAA) attempt to balance modernity with tradition by continuing to prohibit student-athletes from receiving athletic salaries, performance incentives, or shares of departmental revenues.[5] The NCAA balances these restrictions by making available for student-athletes a litany of payments for ancillary benefits that it deems to be "actual and necessary," multiple cash stipends, and lucrative scholarships to some of the world's most exclusive colleges.[6]

The longstanding amateur tradition barred student-athletes from earning compensation based on their celebrity status.[7] Beginning July 1, 2021, a combination of different state laws and an abbreviated NCAA policy allowed all student-athletes to monetize their celebrity status for the first time.[8] Student-athletes relished the new opportunity

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3. *See, e.g.*, R.A. SMITH, PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM 81–99 (2010); George Van Bibber, *The Sanity Code and its Effect on Intercollegiate Athletics*, 13 PHYSICAL EDUCATOR 138, 138–40 (1956); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1054–55 (9th Cir. 2015); Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2148–49 (2021).

4. *See, e.g.*, *Colleges Adopt The 'Sanity Code' to Govern Sports; N.C.A.A. Bans Scholarships in which Athletic Ability is the Major Factor*, N.Y. TIMES, Jan. 11, 1948, at S1 (voicing concerns about compensation loopholes); Jake New, *More Money . . . If You Can Play Ball*, INSIDE HIGHER ED. (Aug. 11, 2015), https://www.insidehighered.com/news/2015/08/12/colleges-inflate-full-cost-attendance-numbers-increasing-stipends-athletes [https://perma.cc/MR3E-RAQS] (arguing that stipend payments to student-athletes are disingenuous); Terence Moore, *Collectives, NILs Combining to Kill College Football and Basketball as We Know It*, FORBES (May 10, 2022), https://www.forbes.com/sites/terencemoore/2022/05/10/collectives-nils-combining-to-kill-college-football-and-basketball-as-we-know-it/?sh=621c5f3e3604 ("So, with the predictable happening — you know, chaos in college football and basketball, courtesy of the NCAA growing as a punch line less than a year into allowing its athletes to profit from their name, image and likeness . . . . You can blame all of this on California deciding in 2019 to become the first state of several to pass a law allowing college athletes to earn money through activities such as making endorsements and signing autographs.").

5. *See* Jeff Dolan, *NCAA Ruling: What Does It Mean For College Athletes Getting Paid?*, WAVVE (Oct. 19, 2021), https://wavve.co/ncaa-ruling-meaning-for-college-athletes-getting-paid/ [https://perma.cc/Y3KQ-8JFR].

6. *See* NCAA, NCAA 2022–23 DIVISION I MANUAL (2022), art. 12 §§ 12.01, 12.02.2; *id.* art. 15 §§ 15.01.1, 15.02.2; *Alston*, 141 S. Ct. at 2150.

7. *See* NCAA, NCAA 2019–20 DIVISION I MANUAL (2019), art. 12, §§ 12.5.2.1, 12.4.2.

8. *See* THE DRAKE GROUP, INC., STATE-BY-STATE NILS EXECUTIVE SUMMARY 1 (July 1, 2021), https://www.thedrakegroup.org/wp-content/uploads/2020/03/July-1-Update-State-NIL-Legislation-Xsummary-and-Database.pdf [https://perma.cc/5MKA-4ZPK]; Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/H4YD-SYQZ].

to earn money from leveraging their name, image, and likeness through endorsements, autographs, public appearances, and other activities.[9] Widespread anticipation concurrently mounted after the nation's most popular student-athletes could earn sizable celebrity compensation through the phenomenon that is holistically referred to as "NIL."[10] The various state laws addressing NIL were largely similar in concept but included several nuanced distinctions that made overarching NCAA enforcement a practical impossibility.[11] Furthermore, the Supreme Court's contemporaneous decision in *NCAA v. Alston* lowered the NCAA's appetite to mandate rules governing student-athlete compensation such that the NCAA was hesitant to assume further legal and reputational risks by enforcing state NIL laws.[12] In response, the NCAA immediately scrapped a fulsome set of proposals around NIL, including one initiative to create a single third-party administrator to monitor all student-athlete NIL disclosures.[13] As a result, student-athletes and their colleges entered the NIL era without a fully-fledged consensus on the proper set of rules.[14] The NCAA formally announced that it would largely defer to state laws and specific institutional policies regarding the governance of NIL, subject only to brief and amorphous restrictions related to institutional pay-for-play and recruiting inducements.[15] Importantly, NCAA policy specifically

9. *See* Tommy Beer, *These NCAA Athletes Have Already Inked Endorsement Deals*, FORBES (July 1, 2021), https://www.forbes.com/sites/tommybeer/2021/07/01/these-ncaa-athletes-have-already-inked-endorsement-deals/?sh=7d2892f24676 [https://perma.cc/J8Y9-QSDZ].

10. *See, e.g.*, *id.*

11. *See* THE DRAKE GROUP, INC., *supra* note 8, at 1–35 (detailing the distinctions in state laws as it relates to student-athlete disclosure, conflicts with institutional contracts, agent qualifications, and several other areas).

12. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2156 ("Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions. Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review."); Hosick, *supra* note 8.

13. Kristi Dosh, *What Does NCAA's Abandonment of TPA Concept Mean for Its NIL Legislation?*, FORBES (June 18, 2021, 12:27 PM), https://www.forbes.com/sites/kristidosh/2021/06/18/what-does-ncaas-abandonment-of-tpa-concept-mean-for-its-nil-legislation/?sh=4f6ecd39326b [https://perma.cc/2JR2-EH7D]. The concept of a holistic third-party administrator continues to be a key topic of consideration in proposals for a federal NIL law. *See* Dennis Dodd, *House Subcommittee Considering Federal Regulatory Body to Oversee NIL Rights for College Athletes*, CBS (May 23, 2023, 5:19 PM), https://www.cbssports.com/college-football/news/house-subcommittee-considering-federal-regulatory-body-to-oversee-nil-rights-for-college-athletes/ [https://perma.cc/QV4S-7L9S].

14. *See* Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Sept. 1, 2021, 10:59 AM), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate [https://perma.cc/CU4U-U7WV].

15. Hosick, *supra* note 8.

prohibits institutions from providing NIL compensation to student-athletes.[16]

As opposed to institutional pay-for-play, one key restriction is that NIL must function completely as a third-party activity in which student-athletes can only earn compensation from non-institutional sources unrelated to their athletic eligibility or performance.[17] Despite the absence of a single authority, nearly every state NIL law and institutional NIL policy mandated that student-athletes disclose NIL compensation and other information to their colleges in the absence of a single third-party administrator.[18] As a result, colleges have become the practical destination for a significant amount of business and financial details about the budding NIL space.[19]

By early 2022, NIL was one of the primary topics in the national sports conversation.[20] Consistent media discussion about the seismic shift, coupled with coaches and athletic directors providing candid commentaries about their experiences, turned NIL into a public phenomenon about which seemingly everyone had an opinion.[21] The opportunity to earn third-party compensation reportedly became a crucial talking point in the recruitment and retention of a small number of high-profile student-athletes, feeding into a widespread feeling across the college sports industry that the new, unsteady, and unrestricted dynamic of NIL was now likely to become the most dispositive factor in competitive outcomes.[22] "It's totally changed

16. *Id.*

17. *Id.*

18. THE DRAKE GROUP, INC., *supra* note 8, at 8–35.

19. *See id.*

20. *See, e.g.*, Pete Nakos, *Why NIL has Fans, Coaches, Administrators Anxious About Future of College Sports*, ON3 (Aug. 18, 2022), https://www.on3.com/nil/news/nil-has-fans-coaches-and-administrators-anxious-about-the-future-of-college-sports/ [https://perma.cc/RQR2-C3TS].

21. *See, e.g.*, Dennis Dodd, *College Coaches, Leaders Share Candid Thoughts on Future of NIL: 'We All Feel Like There's No Rules*,*'* CBS (May 9, 2022), https://www.cbssports.com/college-football/news/college-coaches-leaders-share-candid-thoughts-on-future-of-nil-we-all-feel-like-theres-no-rules/ [https://perma.cc/UBL8-N9ZP].

22. *See* Madison Williams, *Miami Star Isaiah Wong Threatening Transfer Over NIL Compensation*, SPORTS ILLUSTRATED (Apr. 29, 2022), https://www.si.com/college/2022/04/29/miami-isaiah-wong-basketball-threatening-transfer-portal-nil-compensation-nijel-pack-john-ruiz-lifewallet [https://perma.cc/FD5T-ZCGG]; Joseph Salvador, *Oscar Tshiebwe to Earn About $2 Million in NIL, Per Report*, SPORTS ILLUSTRATED (Apr. 20, 2022), https://www.si.com/college/2022/04/20/oscar-tshiebwe-to-earn-about-2-million-in-nil#:~:text=Instead%20of%20opting%20for%20the,and%2015.1%20rebounds%20per%20game [https://perma.cc/Y9VL-4V3J]; Katie Windham, *Jackson State's Travis Hunter Responds to Nick Saban's Million Dollar Claim*, SPORTS ILLUSTRATED (May 19, 2022, 1:20 PM), https://www.si.com/college/alabama/bamacentral/jackson-states-travis-hunter-responds-to-nick-sabans-million-dollar-claim [https://perma.cc/558K-YZ8P]; Jelani Scott, *Texas Tech WBB Signs NIL Deal for $25K Per Player*,

recruiting," vented Ole Miss football coach Lane Kiffin. "Go ahead and build facilities and these great weight rooms and training rooms, but you ain't gonna have any good players in them if you don't have NIL money. I don't care who the coach is or how hard you recruit, that is not going to win over money."[23]

Fans naturally began to wonder about the amount of money student-athletes earned, generally motivated by either an interest in verifying high-profile rumors or anxieties about falling behind their rivals in the new NIL arms race.[24] Colleges thus found themselves in possession of highly coveted student-athlete financial information during a particularly tumultuous period without a consistent approach to handling that information.[25]

II. FOIA PRESENTS A PROBLEM

A scheme of broad governmental disclosure is essential to the legitimacy of a well-functioning democracy.[26] The primary means of the public attempting to gain access to student-athlete NIL disclosures has been through the several similar state laws that require government institutions to disclose information in their possession.[27] Sometimes called "sunshine laws," "open records acts," or "public records acts," this collection of state legislation endeavors to promote the public interest by allowing anyone to request documents and information from government entities for the purpose of holding public leadership

SPORTS ILLUSTRATED (July 29, 2022), https://www.si.com/college/2022/07/29/texas-tech-women-basketball-signs-nil-deal-25k-per-player-level-13-marketing [https://perma.cc/AC8X-EHES].

23. Ross Dellenger, *A Candid Lane Kiffin on NIL, Recruiting and Boosters: 'We're a Professional Sport,'* SPORTS ILLUSTRATED (May 25, 2022), https://www.si.com/college/2022/05/25/lane-kiffin-nil-recruiting-boosters-nick-saban [https://perma.cc/HRA7-YJ52].

24. *See* Nakos, *supra* note 20. *See also* Travis L. Brown, *Texas A&M Athletes Made More Than $4 Million in NIL Deals Last Year*, EAGLE (Sept. 6, 2022), https://theeagle.com/sports/college/aggiesports/texas-a-m-athletes-made-more-than-4-million-in-nil-deals-last-year/article_c6f812ae-2e3f-11ed-8ae5-7763ecc60fb9.html#tracking-source=article-related-bottom [https://perma.cc/6QRP-NV79].

25. *See* Nakos, *supra* note 20.

26. *See* Nat'l Archives and Recs. Admin. v. Favish, 541 U.S. 157, 171–72 (2004) ("FOIA is often explained as a means for citizens to know 'what their Government is up to.' This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy."); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.").

27. *See, e.g.*, Andy Wittry, *State, Federal Laws Protect NIL Deals Amid Calls for Transparency*, ON3 (July 19, 2022), https://www.on3.com/nil/news/oregon-ducks-division-street-nil-collective-ncaa-enforcement-ferpa-state-laws/ [https://perma.cc/8749-LSRP].

accountable.[28] It is predictably the case that media outlets regularly make these requests, and one study revealed a universal belief among journalists that these laws are important to do their job effectively.[29] This disclosure scheme has historically promoted the widespread sense of openness around the salaries of leadership, cost of capital expenditures, size of foundations, and other state university information that is expectedly available to the public.[30] While there are a handful of circumstances permitting government agencies to withhold information, courts have indicated that these common exceptions should be construed narrowly in favor of greater transparency.[31] Based conceptually on the federal Freedom of Information Act, each of the fifty states has set forth its own version to substantially similar effect and construction.[32] Due to the general similarity of state laws on this topic and the irregularity of amendments to their language on the relevant points, this Part analyzes the structure of the federal iteration of FOIA as a representation of the overall framework its several state analogues present.

Exemption 6 of FOIA includes an exception from disclosure to protect files "which would constitute a clearly unwarranted invasion of personal privacy."[33] The fundamental tension is simple but significant: While the public has a right to know what its government is doing, the government officials concerned also have a right to personal privacy.[34]

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28. *See* Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 66 n.6 (1996).

29. Derigan Silver, *The News Media and the FOIA, Communication Law and Policy*, 21 COMMC'N L. & POL'Y 493, 494, 506 (2016) (first citing Charles Davis, *Stacked Deck Favors Government Secrecy*, IRE J., Mar.–Apr. 2002, at 14, which found that 97 percent of surveyed journalists said that FOIA was important for them to fulfill their duties; then citing David Cuillier, *Pressed for Time: U.S. Journalists' Use of Public Records During Economic Crisis*, at 9, paper presented at the Global Conference on Transparency Research, Newark, N.J., (May 18–20, 2011), which found that 12 percent of surveyed journalists had used FOIA within the past month and nearly half had used FOIA at some point).

30. Jamie P. Horsely & Can Sun, *Information Disclosure Requirements and Issues for Universities in the United States: Letting Sunshine into the Ivory Tower*, 5 J. ZHEJIANG PROVINCIAL COMMUNIST PARTY SCH., at 2–8 (2014).

31. DOJ v. Julian, 486 U.S. 1, 8 (1988) (first citing FBI v. Abramson, 456 U.S. 615, 621 (1982); then citing CIA v. Sims, 471 U.S. 159, 167 (1985); and then citing Dept. of Air Force v. Rose, 425 U.S. 352, 361 (1976)).

32. Nowadzky, *supra* note 28, at 65.

33. 5 U.S.C.A. § 552(b)(6) (2016).

34. *See* U.S. Dep't. of State v. Wash. Post Co., 456 U.S. 595, 599 (1982) ("The House and Senate Reports, although not defining the phrase 'similar files,' suggest that Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information."); Cozen O'Connor v. U.S. Dep't. of Treasury, 570 F. Supp. 2d 749, 781 (E.D. Pa. 2008) ("The focus of the exemption is the individual's interest, not the government's."). Every state has a FOIA law. Nowadsky, *supra* note

Thus, the underlying question becomes whether the potential privacy invasion the FOIA request proposes would be unwarranted.[35] The Department of Justice has indicated that the agency or institution from which the information is being requested should make Exemption 6 determinations based on "balancing the privacy interests that would be compromised by disclosure against any public interest in the requested information."[36]

There are three steps to an Exemption 6 balancing test. First, the agency or institution must decide whether the requested information would violate a legitimate individual privacy interest.[37] Privacy interests should be considered broadly, as courts consider an individual to have a right to control his or her personal information, even if that information has become public to some degree.[38] Furthermore, privacy interests can exist where the information in question is not considered particularly intimate.[39] For instance, the Supreme Court has specifically indicated that individual work history can be covered by Exemption 6, though it is "not normally regarded as highly personal."[40] Second, the agency or institution must decide

28, at 65. Following the model of Exemption 6, the majority of state FOIA laws provide a broad exemption from disclosure when such disclosure would constitute an unwarranted violation of individuals' right to privacy. *Id.* at 65–66. Additionally, many other states without these kinds of privacy exemptions in the language of their FOIA laws have taken an analogous approach in case law that necessitates the same type of balancing of interests as required under Exemption 6. *Id.* at 79. As a result, the FOIA privacy analysis involves the same type of balancing of interests in almost every state. *See id.* In the few states that have not adopted any specific approach to this issue, it is not yet settled whether the balancing of interests would be a justification for nondisclosure under their state FOIA laws. *See id.* at n.23. However, this paper assumes that the privacy analysis in such anomalous states, if undertaken, would be the same as the remaining states which all follow the Exemption 6 framework. *See infra* notes 41–53 and accompanying text.

35. States have taken several haphazard approaches toward the same goal of creating such a balancing analysis. *See generally* Hawkins v. Town of S. Hill, 878 S.E.2d 408, 414–16 (Va. 2022) (detailing several state law frameworks capturing exceptions to disclosure for invasions of privacy based conceptually on the federal iteration of FOIA).

36. U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 6 417 (2004).

37. *Id.* at 423.

38. U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989) ("We reject respondents' cramped notion of personal privacy. To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another. Thus, the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private.").

39. Horowitz v. Peace Corps., 428 F.3d 271, 279 (D.C. Cir. 2005) ("Even seemingly innocuous information can be enough to trigger the protections of Exemption 6.").

40. U.S. Dep't. of State v. Wash. Post Co., 456 U.S. 595, 600 (1982).

whether the privacy interest would be considered substantial.[41] The threshold for substantiality is also decidedly generous.[42] Circuit courts have held that anything greater than a *de minimis* privacy interest should be considered substantial.[43] Moreover, courts have specifically indicated that the threat of public harassment can create a substantial privacy interest.[44] Several circuits have also found a substantial privacy interest in personal financial information.[45] Third, to complete the balancing test, the agency or institution must evaluate the public interest in the requested information.[46] Transparency around governmental activity, as opposed to the unrelated personal information of government personnel, is the primary interest and justification of FOIA.[47] In scrutinizing the public interest assessment, the Supreme Court has held that information not directly revealing

41. Nat'l Ass'n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989) ("[W]e must first determine whether [document] disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest. If no significant privacy interest is implicated (and if no other Exemption applies), FOIA demands disclosure.").

42. *See* Multi Ag Media LLC v. U.S. Dep't of Agric., 515 F.3d 1224, 1229–30 (D.C. Cir. 2008).

43. *Id.* ("Our use of the word substantial in this context means less than it might seem. A substantial privacy interest is anything greater than a *de minimis* privacy interest."); Am. Farm Bureau Fed'n v. EPA, 836 F.3d 963, 970 (8th Cir. 2016).

44. *See* Nat'l Archives and Recs. Admin. v. Favish, 541 U.S. 157, 167 (2004) (holding that protection from "unsavory and distasteful media coverage" constituted a protectible privacy interest under Exemption 7(C) of FOIA); *Am. Farm Bureau Fed'n*, 836 F.3d at 971 ("In this context, the disclosure of such information would constitute a substantial invasion of privacy, because it would facilitate unwanted contact with CAFO owners by FOIA requesters and their associates, and even potential harassment of CAFO owners and their families.").

45. *See Multi Ag Media*, 515 F.3d at 1230 (holding that the disclosure of information on farming practices implicated substantial privacy interests because it would "allow for an inference to be drawn about the financial situation of an individual farmer"). Government contractors on federal construction projects have substantial privacy interest in payroll records. *See* Sheet Metal Workers Int'l Ass'n, Local No. 9 v. U.S. Air Force, 63 F.3d 994 (10th Cir. 1995); Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of Air Force, 26 F.3d 1479 (9th Cir. 1994); Hopkins v. U.S. Dep't of Hous. & Urban Dev., 929 F.2d 81 (2d Cir. 1991).

46. *See Multi Ag Media*, 515 F.3d at 1228.

47. U.S. Dep't of Just. v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) (citing Dep't of the Air Force v. Rose, 425 U.S. 352, 360–61 (1976)) ("This basic policy of "full agency disclosure unless information is exempted under clearly delineated statutory language," indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case—and presumably in the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.").

activities of government officials "falls outside of the ambit of the public interest that FOIA was enacted to serve."[48] Colleges must undertake the proper balancing analysis before responding to FOIA requests regarding student-athlete NIL information.[49]

III. THE BATTLE BETWEEN FOIA AND FERPA

Significant uncertainty abounds surrounding the proper legal interaction between state FOIA laws and the federal Family Educational Rights and Privacy Act (FERPA).[50] State FOIA laws may allow requested information to be withheld if federal law otherwise prohibits the disclosure of such information.[51] While states like Utah explicitly address their FOIA conflicts in favor of federal law where on funding concerns are involved, other states, like Tennessee, simply include a general caveat that its FOIA law remains subject to the restrictions of federal law.[52]

Despite the practical challenges associated with state law preemption, FERPA is relatively simple in theory.[53] The law provides privacy for students and their parents in connection with education records.[54] Its legislative history indicates that FERPA was designed to protect privacy by providing students and their parents with exclusive access to the documents schools use in making academic decisions about a student.[55] The resulting application is that student education records cannot be disclosed to third parties without appropriate consent from parents or adult students, as applicable.[56] The law defines education records as those records that are (1) directly related to a student, and (2) maintained by an educational agency or institution or by a party

48. *Id.* at 775.

49. Horsely & Sun, *supra* note 30, at 20.

50. Mathilda McGee-Tubb, *Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Law Must Yield to FERPA*, 53 B.C. L. REV. 1045, 1045 (2012).

51. Nowadzky, *supra* note 28, at 68–70.

52. *Id.* at 67–69; UTAH CODE ANN. § 63G-2-201(3)(b) (West 2023) ("The following records are not public: a record to which access is restricted pursuant to court rule, another state statute, federal statute, or federal regulation, including records for which access is governed or restricted as a condition of participation in a state or federal program or for receiving state or federal funds."); TENN. CODE ANN. § 10-7-504(9)(c) (2023) ("Information received by the state that is required by federal law or regulation to be kept confidential shall be exempt from public disclosure and shall not be open for inspection by members of the public.").

53. DEP'T. OF EDUC., A PARENT GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) 1 (July 9, 2021), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/A%20parent%20guide%20to%20ferpa_508.pdf [https://perma.cc/QA5D-QJWJ].

54. *Id.*

55. 120 CONG. REC. 39858–59 (1974).

56. *Id.* at 39862.

acting for the agency or institution.[57] The Department of Education makes clear that "education records" can include more tangential information regarding a student's educational experience than transcripts, grades, class lists, and the like.[58] Importantly, FERPA applies to any school that receives funding from the Department of Education.[59] Therefore, the overwhelming majority of students covered by FERPA will be minors whose guardians control their privacy rights.[60] The 1974 Joint Statement in Explanation of the law includes a significant number of references to the role of parents in its implementation.[61]

Due in part to a general uptick in the annual number of FOIA requests, schools have adopted a loose habit of asserting a blanket defense to FOIA disclosure requirements based on FERPA.[62] Several scholars have criticized the prevalence of this approach, especially with respect to sensitive student-athlete behavior.[63] Courts have historically fluctuated reviewing this strategy, due in part to uncertainties surrounding what types of information should be deemed to be an education record.[64]

For instance, in Missouri, a federal court held that incident reports commissioned by the town police were not education records

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57. 20 U.S.C. § 1232g(a)(4)(A).

58. *Protecting Student Privacy: What Is an Education Record?*, DEP'T. OF EDUC. https://studentprivacy.ed.gov/faq/what-education-record [https://perma.cc/YF2E-4Y52] (last visited Oct. 24, 2023).

59. DEP'T. OF EDUC., *supra* note 57.

60. *See Fast Facts: Back-to-School Statistics*, NAT'L CENTER FOR EDUC. STATS., https://nces.ed.gov/fastfacts/display.asp?id=372 [https://perma.cc/CSG7-BVGU] (last visited Oct. 24, 2023) (noting that, as of fall 2021, public elementary and secondary school enrollment was about 49.4 million students, while about nineteen million students were attending a college or university).

61. 120 CONG. REC. 39862–63.

62. *See* Hannah Natanson & Karina Elwood, *Schools Forced to Divert Staff Amid Historic Flood of Records Requests*, WASH. POST (Mar. 27, 2023, 6:00 AM), https://www.washingtonpost.com/education/2023/03/27/school-district-foia-records-request/ [https://perma.cc/8DQB-J3LM] ("There is no national database tracking the number of FOIA requests sent to schools. Still, one company that offers FOIA processing software, Granicus, said it has seen a 62% increase in the number of K-12 school districts signing up for its product since 2020. Granicus serves more than 700 state, county and municipal governments and schools nationwide."); McGee-Tubb, *supra* note 50, at 1048.

63. *See* Mary Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 CARDOZO L. REV. 1555, 1556 (2012); Frank D. LoMonte & Rachel Jones, *Blowing the Whistle on NIL Secrecy: College Athlete Endorsement Agreements and State Freedom-of-Information Laws*, 95 TEMP. L. REV. (2023); Michael Bragg, *FERPA Defense Play: Universities Often Cite the Federal Student Privacy Law to Shield Athletic Scandals*, STUDENT PRESS L. CTR. (Mar. 21, 2015) https://splc.org/2015/03/ferpa-defense-play/ [https://perma.cc/GN4N-TSVE].

64. Penrose, *supra* note 63, at 1556–57.

because they were unrelated to the aims of FERPA.[65] The Supreme Court of Georgia also held that documents relating to social fraternity hazing were not "education records" because they were not the type of records meant to be protected by FERPA, namely, "those relating to individual student academic performance, financial aid, or scholastic probation."[66] A Maryland appellate court held that records of parking tickets and related correspondence between the NCAA and institutional personnel regarding a student-athlete loan to pay those parking tickets were not education records.[67] A Florida state court also held that documents related to academic improprieties were not education records because they pertained to allegations of institutional misconduct and were only tangentially related to affected student-athletes.[68] Similarly, the North Carolina Court of Appeals ruled that phone records and student-athlete parking tickets were not education records.[69] The FERPA defense failed in each case.[70]

However, some courts have taken a different path following a key case from the US Court of Appeals for the Sixth Circuit. In *United States v. Miami University*, the court effectively reversed the Ohio Supreme Court approach, which relied on existing cases, and held instead that student disciplinary records were education records based on a broad, but plain reading of the language of FERPA.[71] It is clear in retrospect that *Miami University* introduced a judicial trend of interpreting FERPA more broadly, thus shielding more student information.[72] A decade after, the Ohio Supreme Court cited *Miami*

65. Bauer v. Kincaid, 759 F. Supp. 575, 591 (W.D. Mo. 1991) ("[A]lthough they may contain names and other personally identifiable information, such records relate in no way whatsoever to the type of records which FERPA expressly protects . . . . These records are quite appropriately required to be kept confidential.").

66. Red & Black Publ'g Co. v. Bd. of Regents, 427 S.E.2d 257, 261 (Ga. 1993).

67. Kirwan v. Diamondback, 721 A.2d 196, 206 (Md. 1998).

68. Nat'l Collegiate Athletic Ass'n v. Associated Press, 18 So. 3d 1201, 1210–11 (Fla. Dist. Ct. App. 2009).

69. Order at 5, News & Observer Publ'g Co. v. Baddour, No. 10CVS1941 (N.C. Super. Ct. Apr. 19, 2011).

70. *Id.*; *Kincaid*, 759 F.Supp. at 591; *Red & Black Publ'g Co.*, 427 S.E.2d at 261; *Diamondback*, 721 A.2d at 206; *Nat'l Collegiate Athletic Ass'n,* 18 So. 3d at 1210.

71. United States v. Miami University, 294 F.3d 797, 810–12 (6th Cir. 2002) ("Under a plain language interpretation of the FERPA, student disciplinary records are education records because they directly relate to a student and are kept by that student's university.").

72. *See* Sam Schmitt & David Aronofsky, The Chicago Tribune v. the University of Illinois*: The Latest Iteration of New Textualist Interpretation of FERPA by the Federal Courts*, 39 J. COLL. & UNIV. L. 567, 596 (2013) ("[I]t might appear that FERPA litigants now find themselves in an impossible position. Plaintiffs who construe the conflict in terms of state FOIA will go to state court and risk effective reversal of improper interpretations of federal law in federal court . . . . However, recent state court FERPA litigation has demonstrated an awareness of a trend toward textualism

University in holding that documents related to an NCAA compliance investigation were education records protected by FERPA.[73] Legal scholars immediately criticized this ruling due to the perception that the Ohio Supreme Court was inappropriately expanding the law to effectively estop an investigation into student-athlete misbehavior.[74]

A few years later, the Supreme Court of Alabama agreed that student-athlete financial aid forms providing only students' names and sports constituted education records that FERPA could likewise legally protect from university disclosure.[75] Around the same time, the Supreme Court of North Carolina also stated that records related to student violations of an institutional sexual assault policy were education records.[76] The Supreme Court of Iowa then took a similar approach in ruling that documents related to student-athlete sexual assault allegations were protected education records under FERPA.[77] It proves difficult to make sense of the discord between the two camps. If any dispositive trend can be articulated, greater institutional involvement in the fact pattern giving rise to the requested information seems to increase the likelihood that courts will find such requested information to fall within the domain of FERPA.

Beyond the case law uncertainty, issues of statutory interpretation persist in the battle between FOIA and FERPA that color its overall viability.[78] The basic problem is that much of FERPA's wording is "broad and nonspecific" such that institutions are unsure about the information they can release in different instances.[79] Some courts maintain that the requirements of FERPA automatically bar disclosure under FOIA where education records are at stake, but other courts insist that the plain language of the statutes does not create a

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in the federal courts and applied FERPA in such a way that litigation has not proceeded to federal court.").

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

74. *See* Konrad R. Krebs, ESPN v. Ohio State: *The Ohio Supreme Court Uses FERPA to Play Defense for Offensive Athletic Programs*, 20 JEFFREY S. MOORAD SPORTS L. J. 573, 603 (2013) ("By expanding the protections of FERPA fully to athletic departments and student-athletes, the Ohio Supreme Court's holding will assist athletic departments in covering up student athlete misconduct and academic corruption, thus inhibiting the type of transparency required to clean up college athletics.").

75. Kendrick v. Advertiser Co., 213 So. 3d 573, 577 (Ala. 2016).

76. DTH Media Corp. v. Folt, 841 S.E.2d 251, 258 (N.C. 2020) ("Just as the student disciplinary records at issue in the instant case are considered to be 'public records' under the state's Public Records Act, they are also considered to be 'education records' under FERPA."). However, the Court still mandated disclosure of these records based on specific statutory requirements to disclose the particular information that was requested. *Id.* at 309.

77. Press-Citizen Co. v. Univ. of Iowa, 817 N.W.2d 480, 486 (Iowa 2012).

78. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (Breyer, J., concurring).

79. *Id.*

direct conflict.[80] The crux of the argument is whether FERPA's threat of withholding federal funding from noncompliant institutions allows state institutions to use the federal law as a defense against neglecting to provide information relating to education records pursuant to FOIA requests.[81] While the Supreme Court has suggested the question could be reasonably answered in the affirmative, no clear resolution has emerged.[82] The appropriate statutory interpretation is not at issue in this Article, but it proves important to note the constitutionality of universities using FERPA as a defense against state FOIA laws remains an open question.[83]

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80. *See* United States v. Miami Univ., 294 F.3d 797, 809 (6th Cir. 2002) ("Once the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent."); Belanger v. Nashua, N.H., Sch. Dist., 856 F. Supp. 40, 46 (D.N.H. 1994) ("The language of FERPA reveals a congressional intent to impose obligations directly on educational agencies or institutions . . . . To be eligible for federal funds the educational agency or institution must provide parents with access to the education records of their children. This is not merely a congressional preference for a certain action but rather a congressional requirement imposing a mandatory obligation on the educational units to provide such access."); Kernel Press, Inc., v. Univ. of Ky., No. 2017-CA-000394, No. 2017-CA-001347, 2019 WL 2236421, at *6 (Ky. Ct. App. May 17, 2019) ("Although Kentucky law is scant on FERPA, there is sufficient published law to conclude Kentucky takes the view that FERPA prohibits disclosure of education records under the Open Records Act."), *aff'd*, 620 S.W.3d 43 (Ky. 2021). *But see* Chi. Tribune Co. v. Bd. of Trs. of the Univ. of Ill., 680 F.3d 1001, 1004–05 (7th Cir. 2012) ("Any state can turn down the money and disclose whatever it wants. The most one can say about federal law is that, *if* a state takes the money, *then* it must honor the conditions of the grant, including nondisclosure. Honoring a grant's conditions is a matter of contract rather than a command of federal law."); Bauer v. Kincaid, 759 F. Supp. 575, 587 (W.D. Mo. 1991) ("This Court also concludes that FERPA does not close from public view the SMSU criminal investigation and incident reports because FERPA does not prohibit disclosure by law, therefore it does not fall within the ambit of subsection fourteen of § 610.021."); Red & Black Publ'g Co. v. Bd. of Regents, 427 S.E.2d 257, 261 (Ga. 1993) ("First, we have serious questions whether the Buckley Amendment even applies to the exemptions argued by the defendants since the Buckley Amendment does not prohibit disclosure of records. Rather, as noted by the trial court, the Buckley Amendment provides for the withholding of federal funds for institutions that have a policy or practice of permitting the release of educational records.").

81. 20 U.S.C. § 1232g(b)(1). *See generally* Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 97 (2008); McGee-Tubb, *supra* note 50, at 1063–65; Kristin Knotts, FOIA vs. FERPA/Scalia vs. Posner, 38 S. ILL. U. L.J. 241, 251–59 (2014).

82. Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 428–29 (2002) ("Under FERPA, schools and educational agencies receiving federal financial assistance must comply with certain conditions. One condition specified in the Act is that sensitive information about students may not be released without parental consent.").

83. *See generally* Daggett, *supra* note 81, at 99. ("This case demonstrates the difficult situation that schools face when records are requested under state public records statutes, which are arguably not exempt under those state statutes. Schools that refuse such requests on the grounds that the records are protected by FERPA risk the consequences that befell the school in this case: defending, and losing, a claim under the state public records statute, with resulting responsibility for the claimant's attorney's fees and costs, as well as statutory penalties. To be blunt, this is a stiffer set of risks than those that loom under FERPA if the school hands over the

IV. RECENT EFFORTS

A. The University of Georgia *Case*

Within the first six months of the NIL era, the FOIA versus FERPA debate sprang into action in a predictable set of circumstances.[84] The University of Georgia (UGA) sponsors a football juggernaut.[85] Its program has recently won multiple national championships, consistently boasting some of the nation's most prominent student-athletes.[86] Largely for this reason, the local Athens community holds the stereotypical Southern college town pride in UGA athletics, including a growing interest in the NIL activities of UGA student-athletes.[87] Georgia state law requires student-athletes to disclose NIL information to their colleges.[88] The *Athens Banner-Herald*, a local newspaper, requested copies of student-athlete NIL disclosures from the UGA Athletics Association pursuant to the Georgia Open Records Act.[89] UGA repeatedly denied their requests on the grounds that FERPA protects student-athlete NIL records as a type of education record.[90]

The UGA Athletic Association prevailed on a motion to dismiss because the NIL records "contain[ed] information directly related to individual students, and they are maintained by [the UGA Athletic

records in violation of FERPA."); McGee-Tubb, *supra* note 50, at 1059 ("Absent an explicit exemption for FERPA, however, the significant variation in statutory language means that state open records laws' exemptions for student records may or may not align with FERPA's definitions and requirements.").

84. LoMonte & Jones, *supra* note 63, at 257.

85. Jordan Ritter Conn, *Kirby Smart and Georgia Defied the Ghosts of Program Past. The Future Could Be College Football History.*, THE RINGER (Sept. 1, 2023, 6:30 AM), https://www.theringer.com/college-football/2023/9/1/23854221/kirby-smart-georgia-bulldogs-2023-college-football-season-preview [https://perma.cc/PS44-Y7BX].

86. *Id.*

87. Dan Morrison, *Kirby Smart Brags About Georgia's NIL Deals Last Season*, ON3 (July 20, 2022), https://www.on3.com/college/georgia-bulldogs/news/kirby-smart-brags-about-georgia-bulldogs-nil-deals-last-season-name-image-likeness/ [https://perma.cc/ZC73-3DYT] (UGA Head Football Coach Kirby Smart said, "Trust me, there's a lot there . . . . We arguably, I don't know for a fact, had the highest-paid defensive lineman (Jordan Davis), the highest-paid tight end (Brock Bowers) and probably the highest-paid corner (Kelee Ringo) in the NIL market. Because after the national championship, there's three guys there that just exploded . . . . There's countless number of stories. I would rival anybody in the country to have 95 NIL deals, coming off a national championship. It's a pretty gaudy number, total, that we've been able to give out.").

88. GA. CODE ANN. § 20-3-681(d)(2) (2023).

89. GA. CODE ANN. § 50-18-70 (2023); Complaint at 2, Athens Banner-Herald v. Univ. of Ga. Athletic Ass'n, Inc., No. 21-CV-0558 (Ga. Super. Ct. Nov. 15, 2021).

90. Complaint at 2–3, *Athens Banner-Herald*, No. 21-CV-0558.

Association]."[91] The Superior Court of Clarke County also held FERPA covers NIL disclosures, noting that the FERPA defense was specifically added to the list of Georgia Open Records Act exceptions in 2012.[92] The court necessarily reconciled this expansive interpretation with its own precedent, asserting that the prior *Red & Black* holding does not mean "*only* records concerning a student's academic performance, financial aid or scholastic probation can be considered 'education records' under FERPA."[93] Ultimately, the court mandated the disclosure of redacted NIL information but restricted access to any personally identifying details.[94] Though the UGA Athletic Association ultimately provided the *Athens Banner-Herald* with aggregated data, the Association did not release individualized information about the NIL activities of the uniquely high-profile student-athletes.[95]

B. The Louisiana State University *Case*

While UGA was fighting a familiar legal battle on a new front, Louisiana State University (LSU) found itself facing a nearly identical test.[96] Not unlike UGA, LSU is an athletics powerhouse.[97] Its programs have recently garnered national championships in several high-profile sports, and its fans are unquestionably among the nation's most

91. Order on Defendant's Motion to Dismiss at 7, *Athens Banner-Herald*, No. 21-CV-0558.

92. *See id.* at 5. Clarke County, Georgia includes Athens, home of UGA. *See* Elizabeth B. Cooksey, *Clarke County*, NEW GEORGIA ENCYC. (Mar. 31, 2006), https://www.georgiaencyclopedia.org/articles/counties-cities-neighborhoods/clarke-county/ [https://perma.cc/J4WN-VQA5]; *Visit Georgia: Explore Athens: The Classic City*, UNIV. OF GA., https://visit.uga.edu/athens/ [https://perma.cc/96DE-KPWV] (last visited Sept. 28, 2023).

93. *See* Order on Defendant's Motion to Dismiss at 8, *Athens Banner-Herald*, No. 21-CV-0558. The court stated the definition of "education records" was itself "very broad." *Id.*

94. *See id.* at 9, 10 ("[O]nce all identifying information is removed from a document, it ceases to be a FERPA 'education record,' and if it is otherwise subject to the state's open-records law, it must be turned over.").

95. *See* Marc Weiszer, *Inside NIL at UGA: The Numbers Behind Athletes' Deals and Teams that are Thriving*, ATHENS BANNER-HERALD (Mar. 8, 2023) 2023 WLNR 8617743 https://www.onlineathens.com/story/sports/college/bulldogs-extra/2023/03/08/georgia-football-georgia-athletics-kirby-smart-josh-brooks-name-image-likeness-nil-uga/69974671007/# [https://perma.cc/9VHM-XZ62]

96. *See* Daniel Libit, *Georgia, LSU NIL Deals Spark Fights Over Media and Privacy Rights*, SPORTICO (Nov. 22, 2021), https://www.sportico.com/leagues/college-sports/2021/nil-georgialsu-face-1234647071/ [https://perma.cc/U5X4-VLG].

97. *See* James Parks, *Ranking College Sports Programs by Revenue: Ohio State, Texas Lead the Way*, SPORTS ILLUSTRATED (June 19, 2023), https://www.si.com/fannation/college/cfbhq/ncaa-football-rankings/college-football-sports-rankings-by-revenue-2022-ohio-state-texas [https://perma.cc/W7SV-WJF4].

passionate and active.[98] Less than a month after the NIL era began, a local media company in Baton Rouge made a request for "Copies of all Name, Image & Likeness (NIL) agreements LSU has in its possession" pursuant to the Louisiana Public Records Act.[99] LSU refused to disclose the NIL agreements, asserting a handful of defenses, including that the documents should be protected from disclosure as a "part of a student's record" under FERPA.[100] The media company filed suit, and their writ of mandamus argued for broad access to NIL records based largely on public interest in LSU.[101]

The Judicial District Court for the Parish of East Baton Rouge ruled in favor of LSU in an oral hearing.[102] After giving its perspective on the question of statutory interpretation, the court ultimately found that FERPA could be a defense to disclosure under the Louisiana Public Records Law and that the NIL disclosures were FERPA-covered education records.[103] The court also suggested that the records may be exempt under the private business records exemption included in the Louisiana Public Records Law.[104] LSU was not required to disclose any NIL information.[105]

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98. *See, e.g.*, Michael Shapiro, *LSU Officially Names Brian Kelly Next Head Coach*, SPORTS ILLUSTRATED (Nov. 30, 2021), https://www.si.com/college/2021/11/30/lsu-officially-names-brian-kelly-next-head-coach [https://perma.cc/3FC3-K3J9] (describing how LSU Head Football Coach Brian Kelly lauds the "rich traditions, and unrivaled pride and passion of LSU football" and describing his contract worth nearly $100 million); Tyler Eschette, *Report: LSU Fans Ranked as the Most 'Hardcore' Tailgaters in College Football*, GEAUX NATION (Aug. 11, 2023), https://wgno.com/sports/geaux-nation/report-lsu-fans-ranked-as-the-most-hardcore-tailgaters-in-college-football/#:~:text=LSU%20leads%20the%20charge%20of,many%20people%20attend%20the%20tailgate [https://perma.cc/YHP3-QSXZ] ("LSU leads the charge of all college football teams as the 'most' hardcore tailgaters with a score of 87.91."); Jaylon Thompson, *LSU Women's Sports is Having a Moment: Interest Soars for Tigers Gymnastics, Basketball and More*, USA TODAY (Apr. 14, 2023), https://www.usatoday.com/story/sports/2023/04/14/lsu-womens-sports-gymnastics-basketball-softball-thrives-high-interest-attendance/11616653002/ [https://perma.cc/2RSU-8DMB] (detailing the uptick in interest among hundreds of thousands of LSU fans in sports that are otherwise less popular across the nation).

99. *See* Petition for Writ of Mandamus at Ex. A, Gray Media Grp., Inc. v. Tate, No. C-712-007 (La. Dist. Ct. Oct. 5, 2021); 2020 La. Acts 44 1.

100. *See id.* at Ex. B.

101. *Id.* at 28, 30 ("The student-athletes benefitting from this [NIL] law at the state's flagship University are of great public interest.").

102. Motion Hearing Transcript at 39, *Gray Media Grp., Inc.*, No. C-712-007. Baton Rouge, La. is home to LSU. *See LSU Campuses*, LA. STATE UNIV. https://www.lsu.edu/campuses.php [https://perma.cc/BG5L-PR4H] (last visited Sept. 28, 2023).

103. Motion Hearing Transcript at 37, *Gray Media Grp., Inc.*, No. C-712-007 ("The standard is that the record has to be related to the student-athlete and be maintained by LSU or by a person acting on behalf of LSU. Finding that the NIL agreements are education records under FERPA, they are not subject to disclosure under FERPA.").

104. *Id.*

105. *See id.* at 39.

C. Legislative Responses

The public fixation on NIL convinced a handful of prescient state leaders that it would be best to block these types of FOIA requests altogether by enacting preventative legislation.[106] Connecticut first anticipated the problem, including a provision against the disclosure of NIL records in its initial NIL law.[107] Kentucky passed a full NIL law nearly a year after a state executive order explicitly permitted its institutions to require disclosures of student-athlete NIL activities.[108] Ostensibly in response to endless FOIA requests at its most prominent two colleges during that first year, Kentucky's law prudently declared that a university's disclosure of student-athlete NIL information would constitute a per se violation of its state FOIA disclosure exemption prohibiting "a clearly unwarranted invasion of privacy."[109]

Shortly thereafter, the Louisiana legislature heeded the lesson from the litigation at LSU and passed an amended NIL law allowing its

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106. *See, e.g.*, CONN. GEN. STAT. § 10a-56(f)(2) (2023); 2022 Ky. Acts 6, 8.

107. 2021 Conn. Acts 22-132 (Reg. Sess.) ("Notwithstanding section 1-210 of the general statutes with respect to public institutions of higher education, no institution of higher education shall disclose any record of the compensation received by a student athlete from an endorsement contract or employment activity entered into or engaged in pursuant to subsection (b) of this section unless the institution receives the written consent of the student athlete for each disclosure."). Nearly one year later, Connecticut amended its NIL law to grant flexibility around the use of institutional trademarks and left this provision intact. *See* 2022 Conn. Act 22-11 (Reg. Sess.) (codified at CONN. GEN. STAT. § 10a-56).

108. 2022 Ky. Acts 6; Ky. Exec. Order No. 2021-418 (June 24, 2021) ("The postsecondary educational institution may require the disclosure of any contract or agreement between a student-athlete and third party to a designated official of the institution that pertains to compensation for the commercial use of the student-athlete's name, image and likeness."). The University of Kentucky and the University of Louisville, hosting the state's two most prominent athletic departments, elected to require NIL disclosure in their respective athletic department policies. UK COMPLIANCE, UK ATHLETICS NAME, IMAGE & LIKENESS POLICY FOR STUDENT-ATHLETES 2 (July 29, 2022), https://storage.googleapis.com/ukathletics-com/2022/07/9995275d-uk-athletics-nil-policy-for-sas-6.28.22-revised-for-state-bill.pdf [https://perma.cc/3NZZ-P3PR]; UNIV. OF LOUISVILLE ATHLETICS, UNIVERSITY OF LOUISVILLE NAME, IMAGE, AND LIKENESS (NIL) POLICIES 15 (Nov. 16, 2022), https://gocards.com/documents/2022/11/18/UofL_-_NIL_POLICY_-_November_2022.pdf [https://perma.cc/KCN5-VW3Q].

109. KY. REV. STAT. ANN. 164 § 4(7) (2021) ("For the purposes of the Kentucky Open Records Act, KRS 61.870 to 61.884, a NIL agreement submitted pursuant to subsection (2) of this section to a public postsecondary institution and the information obtained from the agreement shall be considered as containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy under KRS 61.878 and not subject to disclosure."). Leading representatives from athletic departments at University of Kentucky and the University of Louisville attended the Governor's signing of the law. *See* Crystal Staley, *Gov. Beshear Signs Legislation Allowing Kentucky's Student-Athletes to Profit from their Name, Image and Likeness*, UKNOW (Mar. 11, 2022), https://uknow.uky.edu/campus-news/gov-beshear-signs-legislation-allowing-kentucky-s-student-athletes-profit-their-name [https://perma.cc/K5SR-56TD].

institutions to withhold NIL agreements from FOIA requests without stating any specific justification.[110] Similarly, after two years of FOIA requests about the conspicuous NIL initiatives at the University of Texas-Austin and Texas A&M University, the State of Texas added a plain prohibition against disclosure in its amended NIL law.[111] Nebraska pursued the unique approach of restricting NIL disclosures based on trade secrecy, but still provided student-athletes with authority to bar disclosures altogether.[112] Each of these states allowed its institutions to artfully sidestep the FERPA question by preemptively barring disclosure through legislative means.[113]

In 2023, Missouri became the only state to attempt to prevent public NIL disclosures through an acute use of FERPA.[114] Its amended NIL law explicitly states that FERPA prohibitions will govern the details of student-athlete NIL activities, but only in the case of private postsecondary schools.[115] Private colleges are generally not subject to state FOIA laws but often still have other legal and policy disclosure obligations that can mirror FOIA in practice.[116] By including this

110. LA. STAT. ANN. § 17:3703(M) (2023) ("Any document disclosed by the intercollegiate athlete to the postsecondary education institution that references the terms and conditions of the athlete's contract for compensation shall be confidential and not subject to inspection, examination, copying, or reproduction pursuant to the Public Records Law"); Motion Hearing Transcript at 37–39, Gray Media Grp., Inc. v. Tate, No. C-712-007 (La. Dist. Ct. Oct. 5, 2021).

111. TEX. EDUC. CODE ANN. § 51.9246(L) (West 2023) ("Information written, produced, collected, assembled, or maintained by an institution to which this section applies that includes or reveals any term of a contract or proposed contract for the use of the student athlete's name, image, or likeness is confidential and excepted from required public disclosure in accordance with Chapter 552, Government Code. An institution to which this section applies may withhold information described by this subsection without requesting a decision from the attorney general under Subchapter G, Chapter 552, Government Code.").

112. NEB. REV. STAT. § 48-3604 (2022) ("Unless otherwise required by law, each postsecondary institution shall be prohibited from disclosing any terms of such contract or agreement that the student-athlete or the student-athlete's professional representation deems to be a trade secret or otherwise nondisclosable.").

113. *See*, *e.g.*, Andy Wittry, *State, Federal Laws Protect NIL Deals Amid Calls for Transparency*, ON3NIL (July 19, 2022), https://www.on3.com/nil/news/oregon-ducks-division-street-nil-collective-ncaa-enforcement-ferpa-state-laws/ [https://perma.cc/MTJ2-VB4F].

114. *See* MO. REV. STAT. § 173.280 (2022).

115. *Id.* § 173.280(6)(1) ("If a private postsecondary educational institution collects, retains, or maintains the terms of a student athlete's contract or proposed contract detailing compensation to such student athlete for the use of such student athlete's name, image, likeness, or athletic reputation, such postsecondary educational institution shall consider such contract terms to be student governed by the Family Education Rights and Privacy Act (FERPA).").

116. Horsely & Sun, *supra* note 30, at 20 ("While private universities continue to be exempted from most State open records laws with their broad disclosure requirements, Federal law increasingly blurs the lines between public and private universities with respect to certain disclosure obligations . . . . Moreover, other Federal laws impose affirmative reporting and disclosure obligations on both private and public universities that accept Federal funding . . . .").

unique provision in its amended NIL law, Missouri seems to tacitly permit universities to use FERPA as a powerful superseding defense against any disclosures that separate legal regimes may otherwise mandate.[117] This conceptual approach suggests that public institutions in Missouri can specifically use FERPA as a superseding defense against state FOIA laws. However, the amendment carefully remains silent on that point.[118] In a separate provision of the amendment, Missouri followed the trend of other state legislatures in plainly granting all its institutions the right to prevent the release of NIL disclosure.[119]

V. FOIA PROVIDES THE SOLUTION

The battle between FOIA and FERPA can most fairly be described as a stalemate. McGee-Tubb aptly characterizes the two laws to be in "significant tension" due to their critically important, but competing, democratic aims.[120] Courts and legal scholars have set forth strong arguments both for and against FOIA disclosure in the context of institutions that assert the FERPA defense.[121] Thus, the conflict has not been definitively resolved in either direction.[122]

Beyond the legal debates, the lack of clarity on this issue is partially attributable to the practical reality that FERPA was enacted principally to benefit primary and secondary school students, not college students.[123] Its legislative history, combined with an appreciation that the general application of FERPA is significantly

117. This interpretation would signal a legislative departure from *Bauer,* in which the Western District of Missouri held that "FERPA does not prohibit disclosure by law." Bauer v. Kincaid, 759 F. Supp. 575, 587 (1991).

118. *See* MO. REV. STAT. § 173.280.

119. *Id.* § 173.280(6)(2) ("The terms of a contract or proposed contract detailing compensation to a student athlete for the use of such student athlete's name, image, likeness, or athletic reputation shall be deemed a closed record under chapter 610. A public postsecondary educational institution subject to this subsection may withhold or refuse to release or otherwise disclose such contract terms without seeking a formal opinion of the attorney general of this state as authorized in section 610.027.").

120. McGee-Tubb, *supra* note 50, at 1051 ("A significant tension arises between two core democratic concepts—individual privacy and the public's right to know about the government's activities—in the context of public universities.").

121. *See id.*; Penrose, *supra* note 63, at 1597; Natanson & Elwood, *supra* note 62.

122. *See* Penrose, *supra* note 63, at 1590.

123. 120 CONG. REC. at 39863, col. 1, ¶ 5 ("A number of exceptions to the blanket right to see and challenge education records are made for students attending institutions of postsecondary education.").

skewed toward minors, helps clarifies FERPA's primary focus.[124] Courts have generally not found FERPA's legislative history particularly conclusive because of the unorthodox process through which it came to be enacted, and its murky beginning is an essential reason why FERPA is not always reliable as a legal defense to disclosure.[125] More telling is that its strongest threat—the withholding of federal funding for noncompliance—has never been employed.[126] Colleges asserting the FERPA defense against FOIA face the classic predicament of attempting to place a square peg into a round hole, and that is why the approach frequently invites challenges that often result in legal action.

Fortunately, a modern, more lenient jurisprudence has developed that could help resolve the conflict in favor of student-athlete privacy.[127] Since *Miami University*, courts have taken greater latitude to appreciate the importance of privacy for students and generously seem to be allowing colleges to repurpose the imperfect framework of FERPA to prioritize student interests over public disclosure.[128] The shift has overlapped temporally with a new trajectory of exposure and popularity for college student-athletes, which provides popular justifications for the contemporary movement toward increased student-athlete opportunity and empowerment.[129]

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124. *Id.* at ¶ 4 ("Much concern has been expressed by institutions of higher education concerning the potential impact of the Buckley Amendment on a number of traditional institutional practices.").

125. *Id.* at col. 3, ¶ 5 ("That language was written in haste and has raised serious questions in the minds of school officials."); *see* U.S. Dept. of State v. Wash. Post Co., 456 U.S. 595, 600 (1982).

126. LoMonte & Jones, *supra* note 63, at 271–72 (citing Steve Zansberg, *Removing FERPA's "Invisibility Cloak" from Records Showing Public Employees Behaving Badly,* 37 COMMC'NS L. 5, 7 (2022)) ("An educational institution can be declared ineligible for federal funding if it is found to maintain a policy or practice of failing to secure FERPA-protected education records. However, the sanction is so drastic that it has never been applied in the forty-eight-year history of the statute."). However, the empty threat of eliminating federal funding remains a common scare tactic as it relates to FERPA. *See also* Motion Hearing Transcript at 37, Gray Media Grp., Inc. v. Tate, No. C-712-007 (La. Dist. Ct. Oct. 5, 2021) ("It is important to note that the wrongful release of NIL agreements may expose LSU to losing, I would suspect, millions of dollars in federal funding.").

127. *See* United States v. Miami Univ., 294 F.3d 797, 824 (6th Cir. 2002); State *ex rel.* ESPN v. Ohio State Univ., 970 N.E.2d 939, 947 (Ohio 2012); Press-Citizen Co. v. Univ. of Iowa, 817 N.W.2d 480, 492 (Iowa 2012); Kendrick v. Advertiser Co., 213 So.3d 573, 577–78 (Ala. 2016); DTH Media Corp. v. Folt, 841 S.E.2d 251, 262 (N.C. 2020).

128. *See Miami Univ.*, 294 F.3d at 807 ("In other words, Congress places the privacy interests of students and parents above the federal government's interest in obtaining necessary data and records."); *id.* at 818 ("Moreover, millions of people in our society have been or will become students at an educational agency or institution, and those people are the object of FERPA's privacy guarantees."); *Ohio State Univ.*, 970 N.E.2d at 946–47.

129. *See* Dan Murphy, *College Athletes Advocating for Revenue Sharing, New Model*, ESPN (Nov. 16, 2022, 6:00 PM), https://www.espn.com/college-sports/story/_/id/35041631/college-athletes-advocating-revenue-sharing-new-model [https://perma.cc/65RU-XWC4] ("'NIL opened the

Even though recent approaches undoubtedly provide some valuable precedents, serendipity cannot suddenly transform FERPA into a reliable legal defense to FOIA disclosure in the emerging NIL space. Cases involving high-profile student-athletes from Florida State and North Carolina show that FERPA may not always provide a workable defense, despite the *Miami University* precedent.[130] Notably, FERPA was effective in the especially relevant scenario of FOIA requests for NIL information at UGA and LSU, but elected judges sitting in the shadow of two of the nation's largest and most successful athletic programs reviewed both cases.[131] It is hard to say whether the UGA-LSU trend would continue in normal political circumstances. College athletics has become a polarizing topic about which public and judicial perspectives can be delicate, fickle, and highly regionalized.[132] Understanding this dynamic suggests that recent fortune in just two exceptional settings may not serve as a helpful analogy for most campuses. To protect student-athlete NIL privacy more broadly, colleges should abandon the uncertainty of FERPA and choose a different approach toward this issue.

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floodgates for stuff like this,' Dickinson [a University of Michigan men's basketball student-athlete] said. 'It's easier to see now how the idea of amateurism in sports is misleading . . . . Seeing the money athletes are getting goes to show how much is in college sports and how much some are hoarding it.'").

130. *See* Nat'l Collegiate Athletic Ass'n v. Associated Press, 18 So. 3d 1201, 1210–11 (Fla. Dist. Ct. App. 2009) (holding that documents related to academic improprieties of Florida State student-athletes were not "education records"); Order at 3–5, News & Observer Publ'g Co. v. Baddour, No. 10CVS1941 (N.C. Super. Ct. April 19, 2011) (holding that student-athlete phone records and parking tickets were not protected by FERPA).

131. *See* Order on Defendant's Motion to Dismiss at 7, 10, Athens Banner-Herald v. Univ. of Ga. Athletic Ass'n, Inc., No. 21-CV-0558 (Ga. Super. Ct. Sept. 6, 2022); Transcript of Oral Argument at 37, Gray Media Grp., Inc. v. Tate, No. C-712-007 1-41 (La. Dist. Ct. Oct. 5, 2021). According to Sportico's College Athletic Departments Financial Database, the athletic departments at both UGA and LSU generated approximately $200 million in total operating revenues for fiscal year 2021-2022, which was more than double the national average, ranking fifth and sixth in the nation, respectively. *See College Athletic Departments Financial Database*, SPORTICO, https://www.sportico.com/business/commerce/2021/college-sports-finances-database-intercollegiate-1234646029/ (last visited Oct. 1, 2023) [https://perma.cc/97DE-DXZR].

132. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring) ("Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law."); Jonathan D. Wohlwend, *Alabama and Florida Call an Audible on NIL Laws*, NAT'L L. REV. (Mar. 8, 2022), https://www.natlawreview.com/node/164043/printable/pdf [https://perma.cc/HV2Z-J3NL] (outlining the patchwork of amendments to state laws throughout the Southeast, including specific approaches to third-party booster groups); City News Service, *College, NFL Football Dominate TV Ratings Race,* L.A. TIMES (Jan. 5, 2023, 12:03 PM), https://www.latimes.com/entertainment-arts/tv/story/2023-01-05/tv-ratings-story-for-the-week-of-dec-26-2022-jan-1-2023-thu-jan-5-2023 [https://perma.cc/4WLW-ZNRV] (detailing the tremendous viewership of premier college football games).

Legislation conceivably offers an effective means of protecting NIL disclosures from FOIA, but practical challenges exist with creating a single national standard on this issue. A legislative approach necessarily introduces disparate and unpredictable political dynamics as a barrier to individual privacy that should be straightforward.[133] Former NCAA President Mark Emmert appropriately described the jumble of competing state NIL laws as a "patchwork" on five occasions during one speech to Congress.[134] Considering the ever-evolving iterations of state laws, executive orders, and amendments that have shaped the NIL policy landscape thus far, a clear pattern has already emerged in which legislatures in the Southeast have been the first segment—and sometimes the only segment—to move on crucial NIL issues.[135] For instance, whereas the Louisiana legislature has repeatedly responded to the evolutions of the NIL landscape, legislators in New York displayed a discreditable misunderstanding of its basic

133. *See* Kokh Staff, *Oklahoma Lawmakers Override Vetoes on Bills Dealing with Tribal Regalia and NIL Laws*, OKCFOX (May 25, 2023, 3:21 PM), https://okcfox.com/news/local/319kla-homa-lawmakers-override-vetoes-on-bills-dealing-with-tribal-regalia-and-name-image-likeness-laws-kevin-stitt-john-holden-cindy-nguyen-laws-in-effect-politics-legislature [https://perma.cc/6AVT-8H3B] (detailing the Oklahoma legislature's decision to override the gubernatorial veto of an amendment to the state's NIL law on grounds completely unrelated to college athletics).

134. *See A Level Playing Field: College Athletes' Rights to Their Name, Image, and Likeness: Hearing Before the H. Subcomm. On Consumer Prot. & Com.*, 117 Cong. 1–2, 4 (2021) (statement of Mark Emmert, President, National Collegiate Athletic Association).

135. *See generally* Dave Matter, *Missouri Lawmakers Revise State's NIL Law, Expand College Coaches' Role in Negotiations*, ST. LOUIS POST-DISPATCH (May 9, 2023), https://www.stltoday.com/sports/college/mizzou/missouri-lawmakers-revise-states-nil-law-expand-college-coaches-role-in-negotiations/article_56ee420a-ee95-11ed-bbf8-077630df774d.html [https://perma.cc/4QFQ-SD2S] (Mo. State Rep. Kurtis Gregory remarked, "Ever since NIL started at first it was, 'We've got to jump on the train . . . . As it's gone on you see where it can get to. Some of the positions the NCAA has gotten in, it's basically said if your state has a statute, that's what you need to follow. So seeing where some of the other states have gone, we really kind of sat back and looked at what happened, and we're kind of mimicking (bills proposed in) Texas, Oklahoma and Arkansas. I think it really puts us ahead of all the other (Southeastern Conference) school states.'"); *id.* (discussing that passing NIL laws "is the new arms race"). At the start of the NIL era on July 1, 2021, only seven states had full NIL legislation in effect (Alabama, Florida, Georgia, Illinois, Louisiana, Mississippi and Texas). *See NIL State Laws*, NIL NETWORK (Aug. 26, 2022), https://www.nilnetwork.com/nil-laws-by-state/#:~:text=NIL%20STATE%20LAWS&text=The%20interim%20NCAA%20NIL%20policy,in%20place%20for%20their%20athletes [https://perma.cc/HL3R-R4R5]. Except for Illinois, all of those states have at least one institution that is a member of the Southeastern Conference. *See Southeastern Conference*, NCAA, https://www.ncaa.com/standings/football/fbs/sec [https://perma.cc/778Q-9FWG] (last visited Oct. 5, 2023). As state laws have been amended in response to developments across in the NIL landscape, southeastern legislatures have consistently signed amendments into law more quickly than those of other regions. *See also* Ross Dellenger, *Inside the NIL Battle that is Splintering the SEC: 'We're All Money Laundering*,*'* SPORTS ILLUSTRATED (May 30, 2023), https://www.si.com/college/2023/05/30/sec-meetings-nil-athlete-employment-collectives-hot-topics [https://perma.cc/J6UM-MDCP].

mechanics during a legislative hearing nearly a full year into the NIL era.[136]

The disjointed nature of state-specific legislation makes it an unlikely approach to a national solution.[137] While almost thirty states have enacted NIL legislation, only the four mentioned here address the issue of FOIA disclosures, and only Kentucky's law does so on privacy grounds.[138] Nearly half of state legislatures still had not passed an NIL law at all by January 1, 2023, and they ostensibly have no plans to do so.[139] Without sufficient success and interest in college athletics, these initiatives simply lack legislative momentum in certain pockets of the nation.[140] But dissimilar political realities should have no bearing on identical student-athlete rights to privacy. If state law or institutional policy requires all student-athletes to disclose NIL information, then individual right to privacy with respect to that information should not

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136. *See generally* Jeremy Crabtree, *New York Representatives Say NIL Bill Would Ban Collectives*, ON3 (June 7, 2022), https://www.on3.com/nil/news/new-york-representatives-say-nil-bill-would-ban-collectives/ [https://perma.cc/4J42-9VPG] ("[N.Y. State Rep. Michaelle C. Solages said] '[J]ust for the record, the NCAA actually came out with a ruling and about two weeks ago. It's a guidance that says collectives are considered pay-to-play and that is a violation of the NCAA. Not only are we going to be putting that in the statute. But that's also about within the bylaws of the NCAA.' . . . [Attorney and national NIL pundit Dan Greene responded] 'I think it's because lawmakers up North are not as educated in NIL as those down South, at least from what I can tell by watching some hearings. This is definitely clear from the one post with the video where an assemblywoman says how the NY bill bans collectives and that the NCAA has done that as well. It's not a surprise considering the popularity of college sports in each region.'").

137. *See* Dellenger, *supra* note 135.

138. *See Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS (Feb. 16, 2023), https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/ [https://perma.cc/4HGT-WYT5]; KY. REV. STAT. ANN. § 164.6947 (2022); CONN. GEN. STAT. § 10a-56 (2023); LA. STAT. ANN. § 17:3703(M) (2023); TEX. EDUC. CODE ANN. § 51.9246(l) (West 2023).

139. *See Tracker: Name, Image and Likeness Legislation*, *supra* note 142.

140. *See* Dellenger, *supra* note 135. As of June 1, 2023, 20 states have never had an NIL law in effect. *See* Katlyn Andrews, *Navigating the NCAA's Interim NIL Policy and State Regulations*, BAKERTILLY (Nov. 15, 2021), https://www.bakertilly.com/insights/navigating-the-ncaas-interim-nil-policy-and-state-regulations [https://perma.cc/4ZUN-JC3E]; *NIL State Laws*, NILNETWORK (Aug. 26, 2022), https://www.nilnetwork.com/nil-laws-by-state/#:~:text=NIL%20STATE%20LAWS&text=The%20interim%20NCAA%20NIL%20policy,in%20place%20for%20their%20athletes [https://perma.cc/T6HJ-L9W9]. With two specific exceptions, none of these states has an institution that has won an NCAA championship in football, men's basketball, baseball, women's basketball, softball, women's gymnastics or women's volleyball since 2010 (excluding the University of Notre Dame women's basketball in 2018 and the University of Wisconsin-Madison women's volleyball in 2021). *See* Nick Shepkowski, *Notre Dame Women's Basketball NCAA Tournament History*, USA TODAY: FIGHTING IRISH WIRE (Mar. 15, 2023, 5:00 AM), https://fightingirishwire.usatoday.com/lists/notre-dame-womens-basketball-ncaa-tournament-history/ [https://perma.cc/6N5C-6PGE]; Michella Chester, *Wisconsin Wins the 2021 D1 Women's Volleyball National Title for the First Time in Program History*, NCAA (Dec. 19, 2021, 12:17 AM), https://www.ncaa.com/live-updates/volleyball-women/d1/wisconsin-wins-2021-di-womens-volleyball-national-title-first-time-program-history [https://perma.cc/GV5D-MHDT].

be limited only to those represented by legislatures most focused on this issue.[141]

The best approach to prohibiting NIL disclosure under the state FOIA laws ironically lies within the language and interpretations of the laws themselves. The required balancing analysis would land strongly in favor of student-athlete privacy. The first step is surely satisfied.[142] Disclosure of student-athlete NIL information violates a legitimate privacy interest of the individual student-athlete.[143] Judicial precedent regarding the breadth of privacy interests bodes well for student-athletes, as the Supreme Court has explicitly rejected overly narrow interpretations of personal privacy with respect to FOIA.[144] Moreover, the personal information in question need not be especially sensitive; it can be as simple as work history.[145] Because NCAA policy and state laws around NIL always require student-athletes to perform additional work,[146] satisfying this step should be legally uncontroversial.

The second step of the balancing test is equally favorable.[147] The generous threshold for a privacy interest to qualify as "substantial" merely requires greater than a *de minimis* privacy interest.[148] The D.C. Circuit has already determined that inferential information about a personal financial situation would satisfy this threshold.[149] Information

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141. *See* Hosick, *supra* note 8.

142. *See* DEP'T OF JUST., DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 6 1–2 (2022).

143. *See id.* at 13.

144. *See* U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 764 (1989); Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 165 (2004).

145. *See* Horowitz v. Peace Corps, 428 F.3d 271, 279 (D.C. Cir. 2005); U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 600 (1982); Nat'l Ass'n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 875 (D.C. Cir. 1989).

146. Dan Murphy, *NCAA to Discuss NIL Changes Allowing More School Involvement*, ESPN (Oct. 9, 2023, 1:17 AM), https://www.espn.com/college-sports/story/_/id/38615589/ncaa-discuss-nil-changes-allowing-more-school-involvement [https://perma.cc/CN2Z-BZ2Z] (discussing how NCAA policy might change to allow the schools more proactive involvement in helping the student set up deals and manage the financial repercussions of the deals, i.e., taxes); Dan Murphy, *Universities, NCAA See Pros and Cons of New State NIL Laws*, ESPN (July 1, 2023, 7:00 AM), https://www.espn.com/college-sports/story/_/id/37940566/universities-ncaa-nil-laws-texas-texas-am [https://perma.cc/Q6VX-NL9T] (discussing the state NIL rules); Jay Bilas, *Why NIL Has Been Good for College Sports… and the Hurdles That Remain*, ESPN (June 29, 2022, 7:00 AM), https://www.espn.com/college-sports/story/_/id/34161311/why-nil-good-college-sports-hurdles-remain [https://perma.cc/394S-ZWAV] (discussing amateurism restrictions and the increase in social media work required).

147. *See* Consumers' Checkbook Ctr. for the Study of Servs. v. HHS, 554 F.3d 1046, 1050 (D.C. Cir. 2009).

148. *Id.*

149. *See id.* at 1050–51 ("We have consistently held that an individual has a substantial privacy interest under FOIA in his financial information, including income.").

about specific NIL arrangements would unquestionably provide clear personal financial information that constitutes a substantial privacy interest.[150] However, redacted or aggregated information also reveals personal financial information where one can piece together available data to infer conclusions about individuals.[151] For instance, the aggregated NIL information about UGA student-athlete earnings provided by the university to the *Athens Banner-Herald* reasonably created inferences for the public about the financial situation of specific student-athletes who compete on UGA's teams.[152]

The final step of the balancing test is similarly unequivocal but critically important. Even though the consistent popular discourse about NIL shows an enormous level of social intrigue, the public has no legal interest in student-athlete NIL information because that information does not concern the government.[153] The Supreme Court and lower courts have consistently held that information that does not provide insight into government actions is not subject to FOIA.[154] This point requires a discussion about a common, fundamental misunderstanding about the way that NIL arrangements necessarily operate: NIL is not institutionally controlled compensation.[155] While institutions can provide support and direction for NIL, the NCAA has made clear that institutional personnel are strictly prohibited from dictating the NIL opportunities that student-athletes will earn.[156] NIL

150. *See* Weiszer, *supra* note 95.

151. *See id*.

152. *See id*. ("Georgia athletes had 22 total NIL deals worth $50,000 or more since the start of NIL and 400 between $1,000–$49,999. Another 335 were less than $1,000 each. A total of 552 had no agreed upon value, meaning they were based on royalties, in-kind or per endorsement percentages. Football players totaled 776 total NIL deals or roughly 6 in every 10 of those by Georgia athletes . . . . Men's basketball was second with 109 deals with soccer third with 101."); Collier Logan, *Texas A&M Athletes Raked in Over $4 Million in NIL Money in 2021*, SPORTS ILLUSTRATED (Sept. 9, 2022), https://www.si.com/college/tamu/news/aggies-athletes-4-million-nil-money-2021-aggies-football [https://perma.cc/C56K-NL7C] ("Naturally, the Aggies football program led the way, bringing in around $3.3 million . . . . Texas A&M athletes, for example, outearned Texas Longhorns athletes nearly 2 to 1. The Longhorns athletes brought in just north of $2 million (compared to the Aggies' $4.1 million), with the football team earning a shade under $900k.").

153. *See* Multi Ag Media, 515 F.3d at 1231–32 (citing Nat'l Ass'n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989)).

154. *See* Hawkins v. Town of S. Hill, 878 S.E.2d 408, 414–16 (Va. 2022).

155. NCAA, INSTITUTIONAL INVOLVEMENT IN A STUDENT-ATHLETE'S NAME, IMAGE AND LIKENESS ACTIVITIES 1 (Oct. 26, 2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf [https://perma.cc/T893-J5PH].

156. *See id*. at 3–4 (specifically outlining numerous activities that are impermissible for institutional personnel).

money is third-party money, and it must operate outside of the institutional framework.[157]

As a matter of policy, NIL has provided student-athletes with the powerful chance to earn their own money based on their own celebrity that they generate from their own initiatives.[158] From its inception, the NIL movement, and the broader empowerment campaign underlying it, have been ideologically rooted in the premise of moving toward a greater student-athlete autonomy more reminiscent of professional sports.[159] FOIA is based on the completely separate theory that governmental officials should be accountable to the public for their actions.[160] These two philosophies come into conflict here because the legal legitimacy of a FOIA request for NIL information necessarily requires that state action is at play.[161] Therefore, FOIA requests for student-athlete NIL information inadvertently propose a rejection of the idea that student-athletes are now becoming autonomous actors and instead endorse the archaic dogma that any university must necessarily control its student-athletes.[162]

Extending the latter perspective has problematic social implications. The logic behind these FOIA requests is subtly grounded in the longstanding but lazy image of the "dumb jock" who has lucked his way into a free ride on the campus of an elite university due to the efforts of the hardworking institutional personnel that must carry him along the way.[163] It is worth noting too that this caricature has been

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157. *See id.* at 1.

158. *See id.*

159. *See, e.g.*, Dan Greene, *Ed O'Bannon: How to Fix College Sports and Revamp the Student-Athlete Experience*, SPORTS ILLUSTRATED (Feb. 9, 2018), https://www.si.com/college/2018/02/09/ed-obannon-interview-court-justice-ncaa-lawsuit-college-athletes-paid [https://perma.cc/29H8-H9QL] (explaining the justifications of the student-athlete movement and the increased activism around student-athlete compensation). O'Bannon was the named plaintiff in *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, the landmark case that is widely credited with jumpstarting the NIL movement. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

160. *Freedom of Information Act: Frequently Asked Questions,* FOIA.GOV, https://www.foia.gov/faq.html [https://perma.cc/A8KY-QF56].

161. *See id*.

162. *See id*.

163. *See* Patricia Adler & Peter Adler, *From Idealism to Pragmatic Detachment: The Academic Performance of College Athletes*, 58 SOCIO. EDUC. 241, 246 (1985) (finding a negative relationship between athletic participation and academic performance that promotes detachment from academic interests and a gradual resignation from pursuits outside of athletics); *see also* Motion Hearing Transcript at 37, Gray Media Grp., Inc. v. Tate, No. C-712-007 (La. Dist. Ct. Oct. 5, 2021) ("Most, if not all, of the student-athletes at LSU are under 25 years of age with brains that are not fully matured. Many come from or may come impoverished family situations. Many have limited support systems, and all come from different life experiences.").

insidiously racialized for as long as it has been invented.[164] That perception is broadly inaccurate, highly disrespectful, and decidedly ignorant about the copious statistical as well as anecdotal evidence from the past several decades detailing the academic and professional superiority of student-athletes relative to their peers.[165] Student-athletes are young people, but the law correctly categorizes them as full-grown adults.[166]

Fortunately, this perspective can be intuitively analogized to the highly visible university personnel that sometimes have third-party financial interests. Consider that while the institutional salaries of head coaches are widely available, public inquiries into outside investments or outside marketing compensation would unquestionably go too far.[167] But that is the intrusive line of reasoning embedded in

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164. *See* Harry Edwards, *The Black "Dumb Jock": An American Sports Tragedy*, 131 COLL. BD. REV. 8, 8–13 (1984) (criticizing the cultural myths and stereotypes that typify African-American male student-athletes). The pervasive image of the black dumb jock is particularly problematic when considering the several major colleges that have both a strong history of success in sports and a troubling history of race relations. *See id.*

165. *See* Meghan Durham and Saquandra Heath, *Crossing the Finish Line: Division I Graduation Rates (GSR) on the Rise*, NCAA (Dec. 2, 2021), https://www.ncaa.org/news/2021/12/2/general-college-athletes-continue-to-graduate-at-record-highs.aspx [https://perma.cc/MK9G-K4PH] ("Even when using the less-inclusive federal graduation rate, college athletes graduate at a higher rate than the general student body."); James Tompsett & Chris Knoester, *The Making of a College Athlete: High School Experiences, Socioeconomic Advantages, and the Likelihood of Playing College Sports*, 39 SOCIO. SPORT J. 2, 31 (2021) ("Young athletes develop through early and varying sports participation opportunities; they also receive differing levels of academic nurturance and support and both athletic and academic development are influenced by class-based parenting strategies and resources . . . . Consequently, cumulative advantages allow for more advantages individuals to become more likely to participate in college sports."); Nanette Fondas, *Research: More Than Half of Top Female Execs Were College Athletes*, HARV. BUS. REV. (Oct. 9, 2014), https://hbr.org/2014/10/research-more-than-half-of-female-execs-were-college-athletes [https://perma.cc/5QZ2-ED8S] ("The study by EY Women Athletes Business Network and espnW surveyed more than 400 female executives in five countries (20% were U.S. women). Half are C-Suite level executives, meaning that they serve as CEO, CFO, COO or the board of directors at a company. Of these top executives, over half (52%) played a sport at the college or university level.").

166. *See generally* James Foster, *Transfer Portal, Extra Eligibility Contributes to Unprecedent Results in March Madness*, THE OBERLIN REV. (Mar. 31, 2023), https://oberlinreview.org/29665/sports/transfer-portal-extra-eligibility-contributes-to-unprecedented-results-in-march-madness/ [https://perma.cc/J69E-XVMV] (analyzing the success of older men's and women's college basketball teams due to physical maturity of student-athletes). Due particularly to rise of student-athletes who compete while attending graduate school and the NCAA decision to grant an additional year of eligibility based on COVID cancellations, student-athletes are broadly older than they traditionally have been. *See* Dean Golembeski, *Graduate Transfers Become a Disruptive Force in College Sports*, BEST COLLS. (Apr. 15, 2022), https://www.bestcolleges.com/news/analysis/2022/04/15/ncaa-graduate-transfers-nil-disrupt-college-sports/ [https://perma.cc/Q88Y-PHPB].

167. *See, e.g.*, David Port, *Sports Figures Invest in a Sweet Startup*, ENTREPRENEUR (Mar. 16, 2012), https://www.entrepreneur.com/franchises/sports-figures-invest-in-a-sweet-startup/223035 [https://perma.cc/T2ZM-EVWU] (detailing University of Kentucky Head Men's

FOIA requests for student-athlete NIL information.[168] In fact, the student-athlete scenario presents an even weaker argument for the public interest than that of head coaches because student-athletes are not currently institutional employees and, therefore, not government personnel in the first place.[169] The invasion of privacy proposed by FOIA requests for NIL information is both legally and conceptually unwarranted because the public interest in third-party compensation details is nonexistent.[170]

Institutions should adopt the legal position that disclosure of NIL information would constitute an unwarranted invasion of personal privacy under their state FOIA law. Legally, this strategy is better situated than FERPA, where judicial fluctuations combined with questionable legislative history suggest that FERPA's viability as a defense to FOIA will produce uncertainty resulting in the extensive litigation that met UGA and LSU.[171] Politically, this strategy is also more practical than the fragmented path of legislation. Kentucky has admirably led by setting forth its per se prohibition, but a cumbersome path to legislating student-athlete privacy can be avoided altogether by simply leveraging existing laws.[172] A shift in institutional approaches that looks to the pervasive exceptions within state FOIA laws is the most reliable means to privacy for all student-athletes.

Basketball Coach John Calipari's ownership of several local ice cream shops); Khari Thompson, *Deion Sanders, Nick Saban Squash Beef, Team Up for New Aflac Commercial After NIL Accusations*, USA TODAY (Jul. 16, 2022), https://www.usatoday.com/story/sports/ncaaf/2022/07/16/deion-sanders-no-beef-nick-saban-new-aflac-commercial/10077015002/ [https://perma.cc/YTU8-QKGG] (detailing the television promotions involving Football Head Coaches Nick Saban (University of Alabama) and Deion Sanders (University of Colorado Boulder)).

168. *See* Daniel Limit, *'Damn if I Know': College Athlete Pay Rules Clouded by Disclosure Limits*, SPORTICO (June 2, 2021), https://www.sportico.com/leagues/college-sports/2021/ncaa-nil-disclosure-debate-1234631006/ [https://perma.cc/B7MJ-VRCH].

169. The potential for student-athletes to be reclassified as employees in the future is a matter of significant legal and public debate. *See* Nat'l Lab. Rels. Bd., General Counsel Memorandum GC 21-08, *Statutory Rights of Players at Academic Institutions (Student Athletes) Under the National Labor Relations Act* (Sept. 29, 2021) ("In sum, it is my position that the scholarship football players at issue in *Northwestern University*, and similarly situated Players at Academic Institutions, are employees under the [National Labor Relations] Act."); Johnson v. Nat'l Collegiate Athletic Ass'n, 556 F. Supp. 3d 491, 512 (E.D. Penn. 2021) ("For the foregoing reasons, we conclude that the Complaint plausibly alleges that Plaintiffs are employees of the [colleges] for purposes of the FLSA.").

170. *See* Nat'l Archives and Recs. Admin. v. Favish, 541 U.S. 157, 167 (2004).

171. *See* Athens Banner-Herald v. Univ. of Ga. Athletic Ass'n, Inc., No. 21-CV-0558 (Ga. Super. Ct. Sept. 6, 2022); Transcript of Oral Argument at 37, Gray Media Grp., Inc. v. Tate, No. C-712-007 1-41 (La. Dist. Ct. Oct. 5, 2021).

172. *See* KY. REV. STAT. ANN. 164 § 4(7) (2021).

Appreciating that the disclosure of NIL information to the public would constitute an unwarranted invasion of personal privacy has productive symbolic value. Institutions that insist on student-athlete privacy as a matter of policy will find themselves in alignment with the inevitable progress of the movement toward student-athlete autonomy.[173] To support this approach, campus leaders must shift away from traditional mindsets and remain careful not to share details about the NIL arrangements to which they may be privy.[174] Even where outsized NIL income shines a positive light on athletic programs, it is symbolically powerful for athletic directors, coaches, and other campus personnel to refrain from providing student-athlete information that is not theirs to be shared. Doing so validates the modern perspective that student-athletes have personal rights worth protecting and affirms the sovereignty of the autonomous, mature young adults that institutions strive to support.

VI. CONCLUSION

Student-athlete privacy must be protected in this time period of increased student-athlete visibility. The use of FOIA laws is the best legal strategy to accomplish this important goal as it relates to NIL earnings. Without proper protections, prominent student-athletes increasingly find themselves at risk of overexposure to unrelenting fan bases.

In early 2023, LSU decided that it would increase security around its women's gymnastics program following its season opener.[175] LSU gymnast Olivia Dunne was the victim of an incident in which a group of chanting men waited outside the arena and demanded to see

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173. *See generally* Ross Dellenger, *Significant NLRB Move Will Aid Pursuit of College Athletes Becoming Employees*, SPORTS ILLUSTRATED (Dec. 15, 2022), https://www.si.com/college/2022/12/15/nlrb-college-athletes-employees-pursuit [https://perma.cc/S8WK-VPW3] (highlighting an N.L.R.B. complaint to be brought against the University of Southern California, the PAC 12 Conference, and the NCAA).

174. *See* Morrison, *supra* note 87; Alex Scarborough, *Alabama QB Bryce Young Approaching $1M in Endorsement Deals, Says Coach Nick Saban*, ESPN (July 20, 2021), https://www.espn.com/college-football/story/_/id/31849917/alabama-qb-bryce-young-approaching-1m-endorsement-deals-says-head-coach-nick-saban [https://perma.cc/5RVY-U7L9]; Bryce Lazenby, *Texas A&M Student-Athletes Have Signed 'About $10 Million' in NIL Deals, per Athletic Director,* THE NIL DEAL (Feb. 24, 2023), https://www.nildealnow.com/texas-am-student-athletes-signed-10-million-nil-deals-athletic-director/ [https://perma.cc/WKZ3-5SZ8].

175. Alyssa Roenigk, *LSU Ups Security After Fans of Olivia Dunne Disrupt Gymnastics Meet*, ESPN (Jan. 12, 2023), https://www.espn.com/college-sports/story/_/id/35433866/lsu-ups-security-fans-olivia-dunne-disrupt-gymnastics-meet [https://perma.cc/496D-E92X]. Dunne was injured and did not compete. *Id.*

her in a scene that a journalist described as "scary and disturbing."[176] Dunne boasted nearly 7 million followers on TikTok and over 3 million followers on Instagram at the time.[177] She has rightfully earned her reputation as a social media star and an NIL standout.[178]

Dunne's persona extends well beyond LSU. "We have some of the same core values, and I think it's so great how they care about the environment," said Dunne after entering into a partnership with a major athleisure company that relies heavily on social media promotions.[179] "They are also committed to happiness, and that's really important to me."[180] She is a part of a national contender on the mat, but she is more than a college gymnast, far from a "dumb jock," and certainly more than a social media prop for the public to shamelessly sexualize.[181] Dunne is an adult woman. Though she often chooses to live parts of her life in the public eye, both LSU and her supporters should still respect her right to privacy. Where FERPA litigation delivered a successful court outcome at LSU, it may ultimately prove broadly ineffective against the increasing FOIA requests that continuously seek

176. *Id.* ESPN analyst and member of the 2008 U.S. Olympic gymnastics team Sam Peszek wrote, "This is actually so scary and disturbing and cringey." *Id.*

177. *Id.*

178. *See generally* Alan Dawson, *How Olivia Dunne, LSU Gymnast and the Highest-Paid Woman in College Sports, Makes and Spends her Millions*, INSIDER (Mar. 29, 2023), https://www.insider.com/olivia-dunne-is-a-millionaire-college-athlete-thanks-to-big-nil-money-2023-3 [https://perma.cc/TT2G-KFLX].

179. Kristi Dosh, *LSU Gymnast Olivia Dunne Announces First NIL Brand Deal Is With Activewear Brand Vuori*, FORBES (Sept. 14, 2021), https://www.forbes.com/sites/kristi-dosh/2021/09/14/lsu-gymnast-olivia-dunne-announces-first-nil-brand-deal-is-with-activewear-brand-vuori/?sh=6657828f2c78 [https://perma.cc/B56W-MYK2]; *see* Rimma Kats, *How Vuori Is Positioning Its Business Strategies During the Pandemic*, INSIDER INTEL. (Apr. 9, 2020), https://www.insiderintelligence.com/content/how-vuori-is-positioning-its-business-strategies-during-the-pandemic [https://perma.cc/BQ6D-M284] (quoting Vuori Founder Joe Kudla: "Our customer acquisition strategy has really remained unchanged. We use paid social, like Facebook and Instagram. But we're also using other platforms to acquire customers, like native advertising.").

180. Dosh, *supra* note 179.

181. Press Release, Louisiana State University Athletics, Gymnastics Finishes Fourth at NCAA Championships (Apr. 15, 2023), https://lsusports.net/news/2023/04/15/gymnastics-finishes-fourth-at-ncaa-championships/ [https://perma.cc/NGU9-AG6Q]. As of June 1, 2023, r/oliviadunne, a racy Reddit thread labeled "Not Safe for Work," had ten moderators and nearly 60,000 members. *r/oliviadunne*, REDDIT, https://www.reddit.com/r/oliviadunne/ [https://perma.cc/F2QE-CHWA] (last visited Oct. 1, 2023). Press Release, Louisiana State University Athletics, Thirteen Tigers Named to Winter SEC Academic Honor Roll (Apr. 26, 2023), https://lsusports.net/news/2023/04/26/thirteen-tigers-named-to-winter-sec-academic-honor-roll/ [https://perma.cc/5TDL-5DQ4] (indicating that Dunne was named to the SEC academic honor roll for a third time in 2023).

to grab further information about an NIL landscape.[182] The fan-focused state of Louisiana has wisely enacted legislative protections against future FOIA requests for NIL information, but that approach is not likely to be replicated in other areas with less interest in college sports.[183] But the other student-athletes who do not have the judicial and legislative advantages available to Dunne have no less need for personal privacy and are no less susceptible to public harassment.[184]

The best move for all institutions to support student-athletes is to refuse disclosure of student-athlete NIL information as a matter of policy. Releasing student-athlete NIL information would be an unwarranted invasion of personal privacy under their state FOIA laws. This approach has ample legal support to protect student-athlete privacy, and it will position institutions in alignment with a landscape that is marching steadily toward increased student-athlete autonomy.

182. *See generally* Steve Berkowitz, *Congressional Hearing Highlights Challenges of NCAA's Strategy of Pursuing Federal NIL Legislation*, USA TODAY (Mar. 29, 2023), https://www.usatoday.com/story/sports/college/2023/03/29/ncaa-nil-legislation-congress-challenges-hearing/11565385002/ [https://perma.cc/RRD5-S4MR] (outlining the difficulties of a federal legislative hearing on NIL).

183. *See* LA. STAT. ANN. § 17:3703(M) (2023).

184. *See supra* notes 47–51.