A DETACHED AND DISINTERESTED STATE OF MIND: WHY CERTAIN NIL PAYMENTS ARE NONTAXABLE GIFTS

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I. INTRODUCTION

In 2024, the University of South Carolina ("USC") Women's Basketball team won their third national championship, completing a perfect 38-0 season.[1] To celebrate this, Charleston, South Carolina, native and famous USC alumnus, Darius Rucker, announced *Southern State of Mind: An Exclusive Night with Darius Rucker*, a concert put on by Rucker in which he

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1. *South Carolina Finishes Perfect Season with NCAA Championship*, UNIV. S.C. ATHLETICS (Apr. 7, 2024), https://gamecocksonline.com/news/2024/04/07/south-carolina-finishes-perfect-season-with-ncaa-championship/ [https://perma.cc/ZN5S-EA2M].

transferred the proceeds to the Gamecock Club—a name, image, and likeness[2] ("NIL") collective[3] that benefits college athletes financially.[4] As an avid supporter of USC and Gamecock athletics,[5] this is not the first time that Rucker offered his support to USC athletics—after USC's Women's Basketball team won its second national championship in 2022, Rucker held a free concert for USC students.[6] Because Rucker received nothing in exchange for transferring these concert proceeds, and has a significant sentimental relationship with USC, USC Athletics, and the State of South Carolina, the transfer of concert proceeds to USC athletes likely constituted a de facto nontaxable gift transfer for U.S. federal income tax purposes.[7] However, current National Collegiate Athletic Association ("NCAA") rules require NIL agreements to be structured as quid pro quo arrangements, a situation that converts otherwise gratuitous transfers into taxable exchanges that can produce income, gain, or loss for the parties involved.[8] This NCAA

2. Name, image, and likeness ("NIL") refers to an individual's legal right to control how their NIL is used for commercial purposes. *Breaking Down Name, Image, and Likeness (NIL)*, FIELDLEVEL (Sept. 8, 2021), https://recruiting.fieldlevel.com/2021/09/breaking-down-name-image-and-likeness-nil/ [https://perma.cc/V3BZ-ZH9P]. NIL falls under the "right to publicity," a legal concept recognized in South Carolina as a property right. This right is violated when one impermissibly uses an individual's NIL for their own benefit. Jennifer E. Rothman, *Rothman's Roadmap to the Right of Publicity*, UNIV. PA. CAREY L. SCH., https://rightofpublicityroadmap.com/state_page/south-carolina/ [https://perma.cc/N443-HESE]; Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 464, 684 S.E.2d 756, 762 (2009) (holding "South Carolina does recognize the right of publicity").

3. *See infra* note 108.

4. *Gamecock Club Presents Southern State of Mind: An Exclusive Night with Darius Rucker*, UNIV. S.C. ATHLETICS (Oct. 28, 2024), https://gamecocksonline.com/news/2024/10/28/gamecock-club-presents-southern-state-of-mind-an-exclusive-night-with-darius-rucker/ [https://perma.cc/8TXL-XSVG] [hereinafter *An Exclusive Night with Darius Rucker*].

5. Rebecca Angel Baer, *Darius Rucker Says Columbia, South Carolina, Is "Really a Town for College Kids"*, S. LIVING (Oct. 9, 2023), https://www.southernliving.com/darius-rucker-university-of-south-carolina-7551439 [https://perma.cc/GQ73-YXS6] ("To this day he's a loyal fan and heads back to Williams-Brice Stadium every chance he gets."); Jesse Breazeale, *Darius Rucker Earns Star on Hollywood Walk of Fame*, USC ALUMNI (Dec. 5, 2023), https://uofscalumni.org/news/darius-rucker-earns-star-on-hollywood-walk-of-fame/ [https://perma.cc/4L5R-NTRB] ("Rucker was an integral piece in raising $150 million to build MUSC Shawn Jenkins Children's Hospital in Charleston, SC. He can often be seen repping the Gamecocks during performances on-stage, broadcast live or when he comes home for special occasions.").

6. Xavier Martin, *PHOTOS: Darius Rucker Holds Free Celebratory Concert for USC Students*, DAILY GAMECOCK, https://www.dailygamecock.com/gallery/photos-darius-rucker-holds-free-celebratory-concert-for-usc-students [https://perma.cc/AW6U-LEPZ].

7. *See* discussion *infra* Part III.C.

8. *Name, Image and Likeness Policy Question and Answer*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf [https://perma.cc/A4TW-MMBM]; *see also* Julia Kagan, *Quid Pro Quo Contribution: What It Is, How It Works*, INVESTOPEDIA, https://www.investopedia.com/terms/q/quid-pro-quo-contribution.asp [https://perma.cc/QH32-D8KB] (Mar. 5, 2022) [hereinafter *Name, Image and Likeness Policy Questions and Answer*].

requirement forced USC athletes to provide autographs, phone calls, and merchandise to ticket purchasers to comply with these rules.[9] Thus, although Rucker likely satisfied the judicial standard for making a gift transfer,[10] USC athletes were forced to reciprocate, and, as a result, were required to recognize what otherwise would constitute a nontaxable gift as taxable income.

It was not until recently that Rucker and supporters could benefit college athletes directly without the NCAA imposing sanctions and punishments on recipient athletes and their athletic programs. Before the NCAA lost a series of antitrust lawsuits, NCAA rules prohibited college athletes from benefiting financially from their NIL. However, after *O'Bannon v. NCAA* and *NCAA v. Alston*, the NCAA changed its NIL policy—allowing college athletes to benefit financially from their NIL—and assigned the law governing this new policy to be determined by each individual state.[11] Despite the current growth of state-enacted NIL law, developing litigation against the NCAA is yet again changing the landscape for student-athlete compensation.[12] Currently, three pending cases, *House v. NCAA*, *Carter v. NCAA*, and *Hubbard v. NCAA*, recently consolidated as *In Re College Athlete Litigation*, are finalizing a historical settlement agreement with the NCAA regarding student-athlete compensation.[13] This settlement is expected to require the NCAA to pay $2.8

9. *See* Troy Brock, *Country Music Star Performing Concert to Raise Money for South Carolina NIL*, SPORTS ILLUSTRATED: NIL DAILY (Nov. 25, 2024), https://www.si.com/fannation/name-image-likeness/nil-news/country-music-star-performing-concert-to-raise-money-for-south-carolina-nil [https://perma.cc/VJA6-2VX5].

10. *See* discussion *infra* Part III.C.

11. *Interim NIL Policy*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [https://perma.cc/HL7M-BRRD]; Melanie Bennett, *Name, Image, Likeness; Rule Changes; and Unionization: HigherEd Athletics in 2024*, UNITED EDUCATORS (Feb. 2025), https://www.ue.org/risk-management/athletics/nil-rule-changes-and-unionization [perma.cc/5W92-CPPP].

12. *See* House v. NCAA, 545 F. Supp. 3d 804, 808 (N.D. Cal. 2021) (plaintiff college athletes challenging NCAA rules that "prohibit student-athletes from receiving anything of value in exchange for the commercial use of their names, images, and likenesses"); Complaint, Carter v. NCAA, No. 23-CV-6325 (N.D. Cal. Dec. 7, 2023) (antitrust class action suit against the NCAA and Power Five conferences to eliminate all restraints on student-athlete compensation); Complaint, Hubbard v. NCAA, No. 4:23-CV-01593 (N.D. Cal. Apr. 4, 2023) (antitrust damages class action against the NCAA and Power Five for depriving class members of educational benefits and academic achievement awards permitted by *NCAA v. Alston*).

13. Adam R. Bialek & Dara S. Elpren, *Update: Former Collegiate Football Stars' NIL Lawsuits for Retroactive Compensation*, NAT'L L. REV. (Jan. 29, 2025), https://natlawreview.com/article/update-former-collegiate-football-stars-nil-lawsuits-retroactive-compensation#google_vignette [perma.cc/9GXH-YUQV]; *see infra* note 120; *see also* Plaintiffs' Supplemental Brief in Support of Motion for Preliminary Settlement Approval, *In re* Coll. Athlete NIL Litig., No. 4:20-CV-03919-CW (N.D. Cal. Sept. 26, 2024), ECF 534.

billion in back-pay damages to athletes dating back to 2016.[14] It also lays out a ten-year revenue-sharing model which permits Division One Power Four[15] schools to distribute up to 22% of its annual revenue per season to its athletes beginning in the 2025-2026 season.[16] Finally, the settlement also allows the continuation of third-party NIL payments, which will not count toward the 22% cap.[17]

Amidst the rapidly changing scene of college athlete compensation, there has been much discussion amongst scholars on whether college athletes should be considered employees.[18] But this debate is grounded in an erroneous assumption: that all college athlete compensation should necessarily be treated as income. To be sure, performing services in exchange for payment is a quid pro quo arrangement that gives rise to ordinary income, and

14. Justin Williams, *House v. NCAA Settlement Takes Next Step Toward Schools Paying Athletes*, THE ATHLETIC (July 26, 2024), https://www.nytimes.com/athletic/5660945/2024/07/26/ncaa-house-settlement-college-sports/ [https://perma.cc/6VFH-HRVH].

15. Historically, the NCAA's five largest conferences were known as the "Power Five." Recently, however, ten of twelve members of the Pacific-12 Conference—a former Power Five Conference—joined a different NCAA conference, essentially dissolving the Pacific-12 Conference altogether. Hence, there are now only four large conferences, referred to as the "Power Four" conferences. Brad Adgate, *College Football 2024: Conference Realignments & Expanded Playoffs*, FORBES (Aug. 23, 2024, 10:23 AM), https://www.forbes.com/sites/bradadgate/2024/08/23/college-football-2024-conference-realignments--expanded-playoffs/ [perma.cc/J77D-DPCR].

16. Williams, *supra* note 14.

17. *Id.*

18. *See, e.g.*, Danielle L. Kennebrew, *The Employment Status of the Twenty-First Century NCAA Collegiate Athlete: An Evaluation of the Fair Labor Standards Act and the National Labor Relations Act*, 18 DEPAUL J. SPORTS L. 1, 3, 56 (2022) (concluding that one could reason that college athletes should be classified as employees pursuant to the NLRA and FLSA); Nicholas C. *Daly, Amateur Hour Is Over: Time for College Athletes To Clock In Under the FLSA*, 37 GA. ST. U.L. REV. 471, 471, 539 (2021) (asserting that the NCAA will face extinction if colleges athletes are not recognized as employees under the FLSA); Joshua Hernandez, *The Largest Wave in the NCAA's Ocean of Change: The "College Athletes Are Employees" Issue Reevaluated*, 33 MARQ. SPORTS L. REV. 781, 802 (2023) (arguing that NCAA, its athletes, and member institutions should implement regulations that provide labor rights to college athletes); Ryan Brida, *College Athlete Employment Model: An "Amateur" Attempt to Resolve the Exploitation Created by the NCAA*, 32 U. MIAMI BUS. L. REV. 96, 148 (2024) (concluding that although college athletes will likely be given employment status in the future, "the small 'win' of earning a wage will cost many college athletes their sport and many universities their programs"). This debate has recently tilted in favor college athletes being regarded as employees following the United States Court of Appeals for the Third Circuit's decision in *Johnson v. NCAA* to affirm the district court's denial of the NCAA's motion to dismiss and in doing so, holding that college athletes may be employees under the FLSA when they perform services for another party, necessarily and primarily for the other's party's benefit, under that party's control or right of control, and in return for express or implied compensation or in-kind benefits. *See* Johnson v. NCAA, 108 F.4th 163, 167, 180 (3d Cir. 2024). Despite the plethora of discussion addressing this issue, and the drastic implication that will arise once this question is answered, that analysis is beyond the scope of this Note.

depending on the circumstances, might result in an employee-employer relationship. But, as is well recognized in tax statutes and case law, some payments are properly treated as gifts.[19] These transfers include those absent a quid pro quo arrangement. For example, it seems like a gift if a celebrity gives away the proceeds from a concert without asking for anything in return. This Note argues that these sorts of transfers should be treated as gifts for tax purposes and satisfy what is known as the *Duberstein* standard, which is the judicial standard for characterizing a transfer of property as a gift for tax purposes. However, because the current NCAA NIL rules require that NIL deals be quid pro quo arrangements,[20] and USC athletes were forced to provide something in exchange for these proceeds, the proceeds from Rucker's NIL concert, although a de facto gift, must be recognized as taxable income for the athletes.

Because of this, this Note proposes that the NCAA should change its rules to conform with longstanding tax laws and precedents. In Part II, this Note discusses the background of the NCAA, the commercialization of college sports, and the current landscape of NIL and college athlete benefits. Part III lays out the judicial standard for gift transfers, presents competing policy principles for the exclusion of gifts, and argues that certain NIL transfers satisfy the requirements for gift characterization. This Note then makes the case that NCAA rules impose an unnecessary tax burden on athletes, and the NCAA should remove the quid pro quo requirement for NIL deals. Additionally, Part IV discusses the gift and estate tax consequences of NIL gift transfers and analyzes how these considerations might affect NIL payments as gifts.

II. BACKGROUND

A. History of the NCAA and the Commercialization of College Sports

Before the NCAA's formation in 1906, the first intercollegiate sport competition occurred in 1852 between Yale and Harvard's rowing crews on Lake Winnipesaukee in New Hampshire.[21] This event, along with many others, kickstarted the evolution of what we now cherish today as college athletics. Today, the college sports world is mostly dominated by football and

19. Bogardus v. Commissioner, 302 U.S. 34, 39 (1937).

20. *Name, Image and Likeness Policy Questions and Answer*, NCAA, *supra* note 8.

21. Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 AM. Q. 222, 224 (1970); *History*, NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx [https://perma.cc/T2QL-LVZR].

basketball;[22] however, football did not enter the stage until 1869 in the first intercollegiate game between Princeton and Rutgers,[23] and it was not until 1895 when the first college basketball game was played between Hamline University and the Minnesota State School of Agriculture in Saint Paul, Minnesota.[24] Football became increasingly popular amongst American universities following its inaugural bout as schools like Yale, Harvard, and the University of Pennsylvania each formed prominent teams.[25] While football today is nothing short of a violent contest, the participants in the late 19th and early 20th centuries competed against one another without wearing helmets, and wore uniforms consisting of only a heavy wool jersey, leather pants with no padding, and leather cleats with metal spikes.[26] According to historians, this generation of football appealed to young men who wished to "demonstrate the manly courage that their fathers and older brothers had recently proved on the bloody battlefields of the Civil War."[27] This motivation, along with the lack of protective equipment, likely contributed to the eighteen deaths and 159 severe wounds that occurred in the 1905 season alone.[28] Expectedly, there was a large public demand for a change in the rules of football.[29] In response, President Roosevelt and New York University Chancellor, Henry M. MacCracken, gathered schools and their athletic leaders to reform the game's rules, and soon after the governing rule-making body of college sports currently known as the NCAA was officially formed on March 31, 1906.[30]

As the NCAA's regulation increased the safety and sustainability of college football, the sport saw an explosion of popularity and

22. WebMaster, *Top 5 NCAA Sports by Viewership*, SCACCHOOPS.COM (Apr. 16, 2019, 1:00 AM), https://www.scacchoops.com/top-5-ncaa-sports-by-viewership [https://perma.cc/Q8MV-VRUC].

23. *College Football, 1884*, EYEWITNESS TO HIST. (2006), http://www.eyewitnesstohistory.com/football.htm [https://perma.cc/3V3X-BQG9].

24. Courtney Martinez, *The First Intercollegiate Basketball Game Was Played on Feb. 9, 1895*, NCAA (Feb. 9, 2017), https://www.ncaa.com/news/basketball-men/article/2016-02-09/possible-first-intercollegiate-basketball-game-was-played-feb [https://perma.cc/P4K3-SXJ3].

25. Michael Oriard, *Managing the Violence of the Game*, BRITANNICA, https://www.britannica.com/sports/American-football/Managing-the-violence-of-the-game [https://perma.cc/L57C-L3M6] (Dec. 27, 2024).

26. *Evolution of Football Equipment: Look at the Past, Present, and Future of Football Gear*, BATTLE SPORTS (Feb. 22, 2023, 2:34 PM), https://blog.battlesports.com/evolution-of-football-equipment [https://perma.cc/E9MG-TMER].

27. Amanda Brickell Bellows, *How the Civil War Created College Football*, N.Y. TIMES (Jan. 1, 2015, 4:51 PM), https://archive.nytimes.com/opinionator.blogs.nytimes.com/2015/01/01/how-the-civil-war-created-college-football/#more-155396 [https://perma.cc/8Z4L-L9W].

28. *Id.*

29. Lewis, *supra* note 21.

30. *Id.*

commercialization following World War I.[31] In the 1920s, the Roman Colosseum-modeled football stadiums for Harvard, Yale, and Princeton were constructed[32] along with the University of Michigan, the University of Illinois, and the University of Minnesota each building stadiums capable of hosting more than 50,000 fans.[33] Additionally, commercial radio stations featured broadcasts covering all the big games, magazines published articles about famous college coaches and players, and movie theatres screened musicals and dramas with college football-themed scripts.[34] The widespread coverage and media presence of college football contributed to its high performing players achieving superstardom.[35] Of these was Red Grange, the University of Illinois's three-time All-American halfback, who was a frequent subject of newspaper articles and radio broadcasts.[36] Red's superb performances against high-caliber opponents[37] earned him the nickname "the Galloping Ghost" from sportswriters and became a frequent topic in American media.[38] Thus, with massive stadiums hosting millions of fans each season,[39] college coaches earning salaries ranging from $15,000 to $20,000 a year,[40] and players being recognized as national celebrities, the heightened media attention and commercial presence surrounding college football today appears to be an American custom dating back over 100 years.

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31. Michael Oriard, *College Football's Golden Age*, BRITANNICA (Dec. 27, 2024, 2:00 AM), https://www.britannica.com/sports/American-football/College-footballs-golden-age [https://perma.cc/3TKY-Z3UF].

32. *Id.*

33. Tom Kacich, *1920s Were Boom Times for College Stadium Constriction*, THE NEWS-GAZETTE (Oct. 18, 2024), https://www.news-gazette.com/opinion/columns/tom-kacich-1920s-were-boom-times-for-college-stadium-constriction/article_cfe31d52-8674-11ef-9e67-573fb950b033.html [https://perma.cc/WQS8-SLJX].

34. Oriard, *supra* note 31.

35. *See* Michael Weinreb, *Amid College Football's 1920s Boom, Central Questions About the Sport Arise*, THE ATHLETIC (Apr. 8, 2019), https://www.nytimes.com/athletic/91011/04/08/college-football-1920s-boom-controversy-centre-carnegie-report/?redirected=1 [https://perma.cc/4A6B-K7X2] (Red Grange became the first modern celebrity-athlete in college football).

36. *The Road to Entitlement and Corruption*, TEX. LEGACY SUPPORT NETWORK (Nov. 27, 2023), https://texaslsn.org/the-roadto-entitlementand-corruption/ [https://perma.cc/C82K-DWSY].

37. Samuel Dodge, *Red Grange Dominated Michigan Football 100 Years Ago. Here's What Ann Arbor Papers Wrote*, MICH. LIVE, https://www.mlive.com/news/ann-arbor/2024/10/red-grange-dominated-michigan-football-100-years-ago-heres-what-ann-arbor-papers-wrote.html [https://perma.cc/DVJ6-LE8N] (Oct. 19, 2024, 2:10 PM) (Grange scored six touchdowns (four of them being in the first quarter) against the defending national champion Michigan on October 18, 1924).

38. TEX. LEGACY SPORTS NETWORK, *supra* note 36.

39. Weinreb, *supra* note 35.

40. *Id.*

With the college football business booming, university academics took issue with schools that utilized football popularity to increase student enrollment because interest in the sport was outweighing interest in the academic curriculum.[41] Recognizing these issues, the NCAA encouraged the Carnegie Foundation for the Advancement of Teaching to investigate how each college football program operated.[42] After three years of research, the Carnegie Foundation released a 383-page report in 1929 that covered the financial growth of college sports starting from the beginning of the 20th century.[43] The report revealed the large amounts of revenue that were attributable to each institution's football team.[44] For example, the report mentioned that the University of California-Berkeley's football team was responsible for $457,016 of the school's $486,162 athletic revenue, and that Harvard's football revenue was close behind at $429,000.[45] More notably, the report exposed the method by which schools obtained talented players. Of the 112 teams studied, the Carnegie Foundation found that the majority of the schools were recruiting and "subsidizing" their players—meaning that the athletes were getting paid through loans, jobs, scholarships, and miscellaneous assistance.[46] The jobs, however, usually required little work, and the scholarships were disguised as academic scholarships but were usually based solely on athletic ability.[47] Ultimately, the report reflected the Carnegie Foundation's concern that college sports posed a threat to education; however, most university presidents ignored these issues and defended the role of collegiate sports and the financial benefits that it brought to its universities.[48]

The commercialization of college athletics continued to grow exponentially throughout the 20th century.[49] With the growth of

41. *See id.*
42. *Id.*
43. HOWARD J. SAVAGE ET AL., AMERICAN COLLEGE ATHLETICS (1929).
44. *Id.* at 87.
45. *Id.*
46. *See id.* at 240–42; Weinreb, *supra* note 35.
47. Weinreb, *supra* note 35; *see also* SAVAGE ET AL., *supra* note 43, at 253–54.
48. *See The Carnegie Report*, MICH. IN THE WORLD, https://michiganintheworld.history.lsa.umich.edu/michiganathletics/exhibits/show/follow-the-money/the-carnegie-report [https://perma.cc/2G8N-NCXR]; SAVAGE ET AL., *supra* note 43, at 240 ("The recruiting of American college athletes, be it active or passive, professional or non-professional, has reached the proportions of nationwide commerce. In spite of the efforts of not a few teachers and principals who have comprehended its dangers, its effect upon the character of the schoolboy has been profoundly deleterious. Its influence upon the nature and quality of American higher education has been no less noxious. The element that demoralizes is the subsidy, the monetary or material advantage that is used to attract the schoolboy athlete.").
49. *See* Sheldon Anderson, *The Big Business of "Amateur" Intercollegiate Sports*, ORIGINS: CURRENT EVENTS IN HIST. PERSP. (Mar. 2023), https://origins.osu.edu/read/big-business-amateur-intercollegiate-sports [https://perma.cc/5C7J-4HYU].

commercialization came a growing number of gambling and point-shaving scandals.[50] Despite the evident need for regulation, the NCAA struggled to keep up with this growth, and it was not until 1948 that the NCAA issued the so-called "Sanity Code" as an effort to cut down on the illegal activity.[51] The Sanity Code banned all full scholarships and reduced the amount of grant in aid[52] student athletes could receive by limiting scholarships to only cover tuition and fees if the student demonstrated a financial need and met the school's general admission requirements.[53] This policy, however, was short-lived,[54] and in 1956, the NCAA altered its rules to permit full ride athletic scholarships, which covered costs of tuition, fees, room and board, books, and provided an extra $15 per month for laundry.[55] Although the purpose of these full grants in aid was to eliminate illegal benefits to athletes, boosters of universities still sought to provide their schools with a competitive advantage, and crafted strategies to pay athletes under the table.[56]

Booster-led payments to athletes have been a continuous practice in college sports and remain present today.[57] Because of this, the NCAA has issued severe punishments to universities, their athletic programs, and the individual athletes in cases where boosters and other third-parties provided substantial sums to players for recruiting and reward for performance.[58] One of the harshest punishments included the famously recognized "Death Penalty" enforced on Southern Methodist University ("SMU").[59] In the late 1970s and throughout the 1980s, SMU, a small university compared to its opponents Texas, Texas A&M, and Arkansas, sought recruiting assistance from the oil-rich businessmen who were enjoying the economic growth of

50. Nathan O. Courtney, The History of Athletic Scholarships 12 (2008) (graduate research paper, University of Northern Iowa), https://scholarworks.uni.edu/cgi/viewcontent.cgi?article=5148&context=grp [https://perma.cc/3W9B-VTAS].

51. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L.R. 9, 14 (2000).

52. "Grant in aid" is another term for money given to someone in the form of a scholarship.

53. Courtney, *supra* note 50, at 12–13.

54. *See id.* at 13 ("In 1952, the principles governing financial aid . . . gave individual institutions freedom to set their own financial aid policies for athletes, the only requirement being that such aid be administered by each athlete's institution.").

55. *Id.* at 14.

56. *Id.*

57. *See infra* text accompanying notes 60 and 212.

58. *See infra* notes 59-60.

59. Dave Wilson, *'Oh, s---, Here Come All the Billionaires': How SMU Came Back from the Dead*, ESPN (Dec. 17, 2024, 7:25 AM), https://www.espn.com/college-football/story/_/id/41136586/smu-football-acc-death-penalty-return-2024 [https://perma.cc/GGY2-R9HH].

Dallas.[60] Their efforts helped SMU steal Eric Dickerson, one of the nation's top prospects, from the grasp of its powerhouse competitor, Texas A&M.[61] Dickerson led the team to immediate success, but also brought heightened attention and skepticism from the NCAA.[62] After being placed on probation five times in twelve seasons, on February 25, 1987, the NCAA announced that SMU paid players $61,000 over the course of two seasons, and cast the "Death Penalty" on SMU, which completely shut down the football program for the entire 1987 season and imposed such heavy restrictions on the 1988 season that the program was forced to cancel participation for that year as well.[63]

Additionally, in 2002, the University of Michigan announced its decision to impose sanctions on itself following a federal investigation revealing that Michigan booster, Ed Martin, paid star power forward, Chris Webber, and three other Michigan basketball players roughly $600,000 during their careers as Wolverines.[64] Despite the university prohibiting post-season tournament play for the following season, vacating 112 victories over five seasons, and removing the 1992 and 1993 NCAA Final Four banners from Crisler Arena,[65] the NCAA further required the school to disassociate with Webber and the other compensated players for ten years.[66]

Importantly, Webber was a member of Michigan's popular 1991 recruiting class, famously known as the "Fab Five."[67] Aside from their unprecedented talent,[68] the group's style of play and pop-cultural influence

60. *See* Eric Dodds, *The 'Death Penalty' and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015, 6:00 AM EST), https://time.com/3720498/ncaa-smu-death-penalty/ [https://perma.cc/P9HE-5Q3Q].

61. *Id.*

62. *Id.*

63. Wilson, *supra* note 59.

64. Larry Lage, *Remember Michigan's Fab Five?*, THE WASH. POST (Feb. 11, 2007), https://www.washingtonpost.com/archive/sports/2007/02/11/remember-michigans-fab-five/1ee4ad93-b543-406c-a8c2-5508001d1363/. [https://perma.cc/93D4-PSNY].

65. *See* Associated Press, *Michigan Punishes Basketball Program*, THE WASH. POST (Nov. 7, 2002), https://www.washingtonpost.com/archive/sports/2002/11/08/michigan-punishes-basketball-program/b323006b-f836-4bf2-8c66-dc2f4713a15f/ [https://perma.cc/7MR7-JYUQ].

66. Lage, *supra* note 64.

67. Christopher Breiler, *It's Time to Hang the Banners*, SPORTS ILLUSTRATED (July 2, 2021), https://www.si.com/college/michigan/basketball/michigan-basketball-nil-fab-five-big-ten-ncaa-chris-webber [https://perma.cc/756T-MEXZ].

68. The "Fab Five," consisting of Chris Webber, Jalen Rose, Juwan Howard, Jimmy King, and Ray Jackson were the first all-freshman starting lineup in an NCAA national championship basketball competition. M. Fennell et al., *Fab Five: Pioneering Sociocultural Influence Within the Culture of Basketball and American Society*, 6 FRONTIERS SPORTS & ACTIVE LIVING 1, 1 (2024), https://pmc.ncbi.nlm.nih.gov/articles/PMC11363254/pdf/fspor-06-1228440.pdf. [https://perma.cc/4PRD-FDZJ].

was highly controversial.[69] Nonetheless, the group's success on the court and larger-than-life personalities became a cash-generating machine for Michigan and anyone else who associated with them.[70] After the freshmen's first season at Michigan, the school's merchandise revenue rose from $1.5 million to over $10 million annually.[71] Additionally, the group's popularity led Michigan to become one of the first college sports programs to sign a multi-million dollar endorsement deal with Nike.[72] Not only did the Fab Five's cultural presence influence this deal, the group's name was directly used for the promotion and selling of a shoe.[73] However, because of NCAA amateurism rules at the time, the players received none of the profits from this deal.[74]

Chris Webber is just one of the many examples of college athletes who have been punished for violating the NCAA's amateur policy after receiving compensation beyond the benefit of a full scholarship.[75] Given the fact that

69. Breiler, *supra* note 67 ("The Fab Five were the biggest attraction in college athletics during the early 90's, dominating their opponents on the court and playing with a never-before-seen style of swagger and cockiness that drew both praise and criticism from those within the Michigan fan base itself."); *see* Jimmy Spencer, *How Michigan's Fab Five Changed the NBA Forever*, BLEACHER REP. (Apr. 3, 2013), https://bleacherreport.com/articles/1592022-how-michigans-fab-five-changed-the-nba-forever [https://perma.cc/9PJW-8ABL] ("The team's trademark baggy shorts served as an emblem that stood for more than just fashion. The Fab Five, also in black socks, created a game powered by the players, a new tradition of doing things their way. . . . The teammates had no problem mouthing off in good fun with one another or jabbing at opponents. Much of the Fab Five's style and attitude intermingled with the increasingly popular hip-hop culture that was growing into the game.").

70. *See* Breiler, *supra* note 67 ("Their immense talent coupled with the trash talk, the baggy shorts, the black socks and black shoes created one of the most marketable groups in the history of college athletics.").

71. Elc Estrera, *Quid Pro Quo? Oh No: University Revenues and Compensation for Student-Athletes*, CHI. POLICY R. (Apr. 8, 2013), https://chicagopolicyreview.org/2013/04/08/quid-pro-quo-oh-no-university-revenues-and-compensation-for-student-athletes/ [https://perma.cc/4YVX-3787].

72. Kevin Blackistone, *The Impact of Michigan's 'Fab 5' On the Social Milieu of College Sports*, NAT'L. PUB. RADIO (Oct. 12, 2016, 5:10 AM), https://www.npr.org/2016/10/12/497637772/michigans-fab-5-impact-on-the-social-milieu-of-college-sports [https://perma.cc/EKQ6-WA8A].

73. Gary Washburn, *Jalen Rose Tries to Set Record Straight on Fab Five*, BOS. GLOBE (Mar. 11, 2023, 9:38 AM), https://www.bostonglobe.com/2023/03/11/sports/sunday-basketball-notes/ [https://perma.cc/7B9E-UZWG] ("We weren't just wearing the shoes they gave us, we had a shoe, Huaraches, the Fab Five Nikes. And it's been re-released three times since we went to college.").

74. *See* Breiler, *supra* note 67; Washburn, *supra* note 73.

75. *See, e.g.*, Lynn Zinser, *U.S.C. Sports Receive Harsh Penalties*, N.Y. TIMES (June 10, 2010), https://www.nytimes.com/2010/06/11/sports/ncaafootball/11usc.html [https://perma.cc/FSG9-ETHH] (detailing how the University of Southern California football team was forced to vacate all wins in which running back and Heisman Trophy winner, Reggie Bush, participated); *Reggie Bush To Be Stripped of Heisman Trophy*, BLEACHER REP. (Sept. 7, 2010), https://bleacherreport.com/articles/453979-reggie-bush-to-be-stripped-of-heisman-trophy

enormous amounts of revenue generated from college sports are mostly due to players much like those in the Fab Five, NCAA sanctions imposed on players for receiving compensation are highly criticized.[76] Critics of NCAA sanctions mostly take issue with the reputation-ruining ramifications suffered by these players for accepting prohibited payments when, in their eyes, the players should have been permissively compensated for their play to begin with.[77] While a "pay-for-play" model is technically still prohibited by NCAA rules, a recent change in the NCAA's NIL rules allows student-athletes to benefit financially from their NIL.[78] Thus, this rule change has equipped critics with grounds to demand retrospective nullification of the punishments suffered by athletes like Chris Webber.[79]

B. NIL and the New Landscape of College Athlete Compensation

Generally, college athletes may now receive compensation for the use of their NIL.[80] The first step of this new reality began in 2009 when Ed O'Bannon, a former UCLA basketball player, sued the NCAA and the Collegiate Licensing Company, arguing that, by preventing student-athletes from being compensated for the use of their NIL,[81] the NCAA's amateurism rules were an illegal restraint of trade under Section 1 of the Sherman Antitrust

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[https://perma.cc/3VG2-FWTV] (illustrating how, after being found to have received improper benefits from The University of Southern California, Reggie Bush was stripped of his Heisman Trophy); *The 'Illegal Procedure' of Paying College Athletes*, NAT'L. PUB. RADIO (Mar. 28, 2012, 11:59 AM), https://www.npr.org/2012/03/28/148610494/the-illegal-procedure-of-paying-college-athletes [https://perma.cc/F5RC-5ZP2] (discussing former sports agent Josh Luchs's book where he admits that he paid more than thirty college players to better his chances of eventually signing them once they decided to pursue professional leagues).

76. *See, e.g.*, Bill N., *Ten Reasons Why USC Football NCAA Sanctions are Not Fair*, BLEACHER REP. (July 14, 2010), https://bleacherreport.com/articles/420087-ten-reasons-why-usc-football-ncaa-sanctions-are-not-fair [https://perma.cc/52LN-6DZX].

77. *See id.* ("College coaches make millions of dollars. Conference expansion is all about money. However, athletes are deprived of their right to become professional until three years after their college class and their time commitment to sports keeps them from making extra money like other students.").

78. *See* 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/WL5P-33NK]; *supra* note 11.

79. Breiler, *supra* note 67.

80. Hosick, *supra* note 78.

81. *See* Ralph D. Russo, *How College Sports Video Games Became the Entry Point to Dismantle the NCAA's Amateurism Rules*, ASSOCIATED PRESS, (July 23, 2024, 1:28 PM), https://apnews.com/article/obannon-ncaa-ea-sports-video-game-e447b339ddf363ec7c93207cf7eac719 [https://perma.cc/49VK-6TN9] ("[O'Bannon] signed on as lead plaintiff of a lawsuit in 2009 after seeing his image in a popular video game from EA Sports authorized by the NCAA that he was not being paid for.").

Act.[82] In this case, the district court agreed with O'Bannon, finding that the prohibition of student-athletes receiving compensation for their NILs violated Section 1 of the Sherman Antitrust Act.[83] The court held that two legitimate alternatives to the NCAA's illegal rules exist: (1) NCAA member schools may provide players with an award covering their full cost of attendance, including costs beyond tuition such as dining and living expenses; and (2) student-athletes may receive cash compensation for their NIL, to be held in trust and be distributed to the student-athletes after they leave college.[84] On appeal, the Ninth Circuit in 2015 agreed with the district court that schools should provide full cost of attendance awards, but rejected the district court's holding that student-athletes could receive compensation for their NIL.[85] In rejecting the district court's allowance of NIL compensation, the Ninth Circuit based its reasoning on seeking to preserve the amateur status of college athletes.[86] Thus, despite O'Bannon's NIL being used, the court still prohibited players like O'Bannon from receiving this type of compensation.

This ruling stood until everything changed on June 21, 2021, following the groundbreaking decision issued by the Supreme Court in *NCAA v. Alston*.[87] In *Alston*, the plaintiffs, which consisted of current and former student-athletes in men's Division One FBS[88] football and men's and women's Division One basketball, filed a class action suit against the NCAA and eleven Division One conferences.[89] The student-athletes alleged that the NCAA's rules at the time—which limited the compensation student-athletes may receive in exchange for their athletic services—violated Section 1 of the Sherman Antitrust Act.[90] The NCAA turned to its longstanding defense that its rules preserved amateurism, and that because amateur colleges sports were distinct from professional sports, the NCAA rules provided a unique product

82. O'Bannon v. NCAA, 802 F.3d 1049, 1056 (9th Cir. 2015); *see* Jeff Yoder, *NIL's Full-Circle Moment*, THE SPORTSLETTER (Feb. 23, 2024), https://thesportsletter.com/essays/nils-full-circle-moment-%f0%9f%8e%ae/ [https://perma.cc/TJC9-HG8H].

83. *O'Bannon*, 802 F.3d at 1052–53; *see* 15 U.S.C. § 1.

84. *O'Bannon*, 802 F.3d at 1052–53.

85. *Id.* at 1074–76.

86. *Id.* at 1076 ("We cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both *equally* effective in promoting amateurism and preserving consumer demand.").

87. 594 U.S. 69 (2021).

88. "FBS" stands for "Football Bowl Subdivision." In NCAA Division One football, there are two subdivisions: (1) FBS and (2) "FCS," which stands for "Football Championship Series." Universities who are members of the FCS compete for a separate national championship than the teams who are members of the FBS. *See* Will Helms, *What Is the Difference Between FCS and FBS?*, COLL. SPORTS NETWORK (Aug. 29, 2024, 7:20 AM), https://collegefootballnetwork.com/what-difference-between-fcs-fbs-college-football [https://perma.cc/GGQ8-S3FN].

89. *Alston*, 594 U.S. at 80.

90. *Id.*

which widened consumer choice.[91] Finding that the NCAA's concept of amateurism has changed over the years and that the term itself has "never been clear," the district court rejected the NCAA's defenses and entered an injunction prohibiting the NCAA and its rules from limiting Division One football and basketball student athletes to only receiving educational-related compensation.[92] Seeing no errors in the district court's analysis, the Supreme Court of the United States unanimously affirmed the district court's decision on June 21, 2021.[93] Notably, Justice Kavanaugh concurred with the decision and expressed that the narrowness of the majority's opinion left the NCAA's remaining compensation rules potentially violating antitrust laws.[94] Specifically, he stated that the NCAA has:

> deci[ded] to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. 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.[95]

Although the injunction only narrowly prohibited the NCAA from limiting Division One football and basketball student-athletes to only receiving educational-related compensation, shortly after the Court's decision, the NCAA released an interim policy indicating that all "college athletes will have the opportunity to benefit from their name, image, and likeness" beginning July 1, 2021.[96] The policy highlighted that the NCAA was working with Congress to enact federal NIL legislation, but until then, student-athlete NIL deals were required to comply with the state laws in which their universities were located.[97] Accordingly, states across the country began enacting their own NIL legislation.[98] Many states, however, anticipatorily enacted legislation that became effective soon after the *Alston* ruling was

91. *Id.* at 82.
92. *Id.* at 83–84.
93. *Id.* at 107.
94. *Id.* at 108 (Kavanaugh, J., concurring).
95. *Id.* at 112.
96. Hosick, *supra* note 80.
97. *Id.*
98. *See* Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE, https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/ [https://perma.cc/K69W-A6CJ] (May 25, 2023).

finalized.[99] As for South Carolina, after enacting several different iterations of NIL legislation,[100] Governor Henry McMaster most recently signed House Bill 4957 into law on May 21, 2024, which allowed South Carolina student-athletes to benefit from their NIL.[101]

After the new rules became effective, college athletes did not waste any time entering deals, as former University of Miami quarterback, D'Eriq King, signed a deal with a local moving company to be a "student-athlete brand ambassador" at 12:01 AM on July 1, 2021.[102] King also took advantage of the new NIL rules by creating his own merchandise and selling autographs.[103] Initially, most NIL opportunities were similar to King's—deals with local companies and the creation of individual logos and brands that student-athletes utilized to market and sell merchandise and autographs.[104] Today, however, global companies are targeting players with large social media

99. *See, e.g.*, Fair Pay to Play Act, S.B. 26, 2021–2022 Leg., Reg. Sess. (Cal. 2019) ("On September 27, 2019, Governor Gavin Newsom signed into law Senate Bill 206 of the 2019–2020 Regular Session. . . ."); Intercollegiate Athlete Compensation and Rights, S.B. 646, 2020 Leg., Reg. Sess. (Fla. 2020).

100. Initially, South Carolina proposed a limited NIL bill that imposed a $25,000 limit on NIL compensation, but it did not pass into law. S. 935, 2019–2020 Gen. Assemb., 123d Sess. (S.C. 2020). A second proposed bill was passed in May 2021 and became effective on July 2021 after Attorney General Alan Wilson certified that the NIL law conformed with the NCAA's newly issued interim policy. *See* S. 685, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2021); S.C. CODE ANN. §§ 59-158-10 to -85 (2021) (suspended 2022). Although this law was less restrictive than the first proposed bill, it still limited student-athletes by prohibiting institutional facilitation and only permitting specific product-type endorsements. These restrictions eventually led to the law being suspended in May 2022 because they left South Carolina universities' athletic departments at a disadvantage compared to out-of-state competitors with different NIL laws. Currently, House Bill 4957 allows the universities to facilitate its athletes' NIL deals and allows the athletes to use their school's facilities and intellectual property for the purposes of NIL deals. This leveled the playing field for South Carolina athletic programs by giving their athletes a less-restrictive NIL policy that opens the door for attractive NIL opportunity. *See* Paul A. Clowes, *Name, Image, and Likeness: Major Problem for Minors*, 74 S.C. L. REV. 635, 642–44 (2023); Mike Ingersoll & Bryant S. Caldwell, *South Carolina's New NIL Law and What it Means for Collegiate Athletes in the State*, WOMBLE BOND DICKINSON: ALERTS (June 11, 2024), https://www.womblebonddickinson.com/us/insights/alerts/south-carolinas-new-nil-law-and-what-it-means-collegiate-athletes-state [https://perma.cc/HW4D-4SF8].

101. Ingersoll & Caldwell, *supra* note 100; S.C. CODE ANN. § 59-158-20 (2024).

102. Elizabeth Karpen, *Players Getting Paid: Here's Who Signed NIL Deals on Policy's First Day*, N.Y. POST, https://nypost.com/2021/07/01/here-are-players-who-signed-nil-deals-on-policys-first-day/ [https://perma.cc/2AN5-5D7Q] (July 1, 2021, 4:30 PM); @OmarSolimanCEO, X (July 1, 2021, 12:49 AM), https://x.com/OmarSolimanCEO/status/1410460550019137536?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1410460550019137536%7Ctwgr%5E%7Ctwcon%5Es1_c10&ref_url=https%3A%2F%2Fwww.stateoftheu.com%2F2021%2F7%2F1%2F22558910%2Fmiami-hurricanes-capitalize-quickly-on-new-nil-rules-announce-agreements [https://perma.cc/X86D-V72F].

103. Karpen, *supra* note 102.

104. *See id.*

presence and are making headlines by entering into multi-million dollar deals.[105]

Additionally, the new rules introduced "NIL collectives," which are the subject of much debate in the controversial NIL universe.[106] "NIL collectives" are organizations that, although independent from universities, affiliate with a specific school and pool funds from boosters and businesses, facilitate NIL deals for athletes, and create opportunities for a school's athletes receive NIL compensation.[107] These organizations usually take the form of either a limited-liability corporation or a § 501(c)(3) non-profit organization.[108] Unsurprisingly, most NIL collectives are operated by university boosters.[109] The controversy surrounding NIL collectives mostly stems from the boosters being so heavily involved in them both managerially and financially.[110] Critics of NIL collectives point out that collectives are essentially used to disguise payments to players directly from boosters as NCAA compliant NIL compensation.[111] Moreover, it is apparent that boosters use this loophole to induce high-school recruits and players in the transfer portal[112] to commit to the schools they affiliate with by offering substantial "NIL" contracts.[113]

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105. *See infra* notes 212-214.

106. *When One (NCAA) Door Closes, Another (NIL) Door Opens: What Pre-Collegiate Enrollment NIL Deals Mean for Schools & NIL Collectives*, MONTGOMERY MCCRACKEN (Mar. 13, 2024), https://www.mmwr.com/when-one-ncaa-door-closes-another-nil-door-opens-what-pre-collegiate-enrollment-nil-deals-mean-for-schools-nil-collectives/ [https://perma.cc/525E-WRWJ].

107. Pete Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3 (July 6, 2022), https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/ [https://perma.cc/XW4Y-NT4D].

108. *Id.* There has been controversy as to whether these organizations actually qualify for 501(c)(3) status. The Internal Revenue Service issued a memo disqualifying NIL collectives as 501(c)(3) organizations, but many are still operating and promoting non-profit status. *See* I.R.S. Tech. Adv. Mem. AM-2023-004 (June 9, 2023), https://www.irs.gov/pub/lanoa/am-2023-004-508v.pdf [https://perma.cc/N8WJ-6272].

109. Nakos, *supra* note 107.

110. *See id.* (explaining that collectives pool funds, help facilitate NIL deals and create ways for athletes to monetize their brands).

111. *See id.* ("They basically wash the donor money, paying these players in an NCAA-compliant manner.").

112. The transfer portal is an online database in which college athletes can declare their intentions to enroll in a new school. Historically, unless approved by the NCAA, college athletes were forced to forgo a year of on-field participation after transferring and were only permitted one transfer during their athletic career. However, after these limitations were removed, the total number of players who have transferred has doubled. *See* Max Olson, *What Is the College Football Transfer Portal? When Is It?*, ESPN (Nov. 15, 2024, 4:00 PM), https://www.espn.com/college-football/story/_/id/42394369/what-college-football-transfer-portal-works-dates-explained [https://perma.cc/DC3P-UYV4].

113. *See* Nakos, *supra* note 107; *see, e.g.*, Madeline Coleman, *Report: Class of 2023 Football Recruit Signed NIL Deal Potentially Worth Over $8 Million*, SPORTS ILLUSTRATED

In light of this NIL chaos, the game is changing yet again. Thus far, the most impactful court rulings, *O'Bannon* and *Alston*, have come out of the United States District Court for the Northern District of California, which permitted college athletes to receive stipend payments and benefit financially from their NIL respectively.[114] Both of these decisions were ordered by Judge Claudia Wilken,[115] who has now granted preliminary approval of a historic settlement agreement between the NCAA and current and former college athletes in a consolidated antitrust class-action suit.[116] The case began on June 15, 2020, when Grant House, former Arizona State University swimmer, and Sedona Price, current Texas Christian University women's basketball player, brought antitrust and unjust enrichment claims against the NCAA and its five largest conferences ("Power Five")[117] for prohibiting college athletes from receiving benefits for the commercial use of their NIL.[118] After years of extensive litigation, settlement discussions began in November 2022, and a year later, Price, along with Duke football player, DeWayne Carter and Stanford soccer player, Nya Harrison filed a complaint against the NCAA, alleging that its rules prohibiting payments for athletic services violated antitrust laws.[119]

These claims have since been consolidated as *In re College Athlete NIL Litigation*[120] and have reached a settlement agreement that will drastically change the college sports business model.[121] First, the settlement provides

(Mar. 12, 2022), https://www.si.com/college/2022/03/12/five-star-recruit-signed-nil-deal-8-million [https://perma.cc/C67D-U2ML].

114. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1052–53 (9th Cir. 2015); *see also* NCAA v. Alston, 594 U.S. 69, 106–108 (2021).

115. Chris Vannini et al., *NCAA Power Conferences Approve Settlement That Makes Way for Players to Be Directly Paid*, N.Y. TIMES: THE ATHLETIC (May 23, 2024), https://www.nytimes.com/athletic/5510354/2024/05/23/house-v-ncaa-settlement-votes/ [https://perma.cc/GYP4-PHDP].

116. Dan Murphy, *Settlement Designed to Pay College Athletes Gets Preliminary Approval*, ESPN (Oct. 7, 2024, 3:00 PM), https://www.espn.com/college-sports/story/_/id/41665307/settlement-designed-pay-college-athletes-gets-preliminary-approval [https://perma.cc/57LR-B4ZK].

117. The Southeastern Conference, Big Ten Conference, Big 12 Conference, Pacific-12 Conference, and Atlantic Coastal Conference. Note, this article previously refers to these conferences as the "Power Four." That is because, at the time of this litigation, the Pacific-12 Conference had not yet dissolved, and each conference was a member of the litigation.

118. Plaintiffs' Notice of Motion and Motion for Preliminary Settlement Approval at 3–4, *In re* Coll. Athlete NIL Litig., No. 4:20-CV-03919-CW (N.D. Cal. July 26, 2024) [hereinafter Plaintiffs' Settlement Motion], ECF No. 450.

119. *Id*. at 4–5.

120. The litigation, however, is commonly referred to as "the House v. NCAA settlement" or "House Settlement."

121. *See* Nicole Auerbach & Justin Williams, *How the House v. NCAA Settlement Could Reshape College Sports: What You Need to Know*, N.Y. TIMES: THE ATHLETIC (May 20, 2024),

monetary relief to plaintiff classes by requiring the NCAA to pay more than $2.5 billion in backpay for damages to student-athletes who were unable to take advantage of the NIL benefits that became permissible following *Alston*.[122] Most notably, the settlement also enjoins the NCAA to amend its rules prohibiting Division One schools from directly providing monetary benefits to its athletes.[123] This injunctive relief provides a ten-year settlement term where NCAA Power Five schools may compensate their athletes with benefits worth up to 22% of its athletic revenue each year.[124] The percent cap may increase by 4% each year, and the student-athlete's attorneys and experts estimate this will allow for an additional $1.6 billion in spending for the first year and $19.4 billion for the total ten-year period.[125] Additionally, the settlement eliminates the NCAA's previously imposed limit on scholarships awarded to athletes that varied in each sport and now instead imposes a limit on each sport's player roster.[126] The monetary value of these scholarships is included in the 22% cap.[127] The monetary caps and percentages imposed by the settlement focus on Power Five conference teams, as they are the only NCAA member schools who are parties to this litigation;[128] however, all 363 Division One schools may also participate in the revenue-distribution plan created by the settlement.[129]

Initially, the student-athlete's motion for preliminary approval of the settlement agreement was denied by Judge Wilken because of her concern with newly imposed restrictions on NIL payments.[130] Under the settlement, college athletes will now be required to report all third-party NIL agreements

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https://www.nytimes.com/athletic/5506457/2024/05/20/ncaa-settlement-house-lawsuit-college-sports/ [https://perma.cc/M94W-ZLGD].

122. Plaintiffs' Settlement Motion, *supra* note 118, at 8.

123. *Id*. at 9.

124. *Id*. at 1.

125. *See id*. at 2.

126. Amended Stipulation and Settlement Agreement, Appendix A: Amended Injunctive Relief Settlement, at 19, *In re* Coll. Athlete NIL Litig., No. 4:20-CV-03919-CW (N.D. Cal. Sept. 26, 2024) [hereinafter Appendix A] (filed as Exhibit 1 of Declaration of Steve W. Berman in Support of Plaintiffs' Supplemental Brief in Support of Motion for Preliminary Settlement Approval), ECF No. 535-1.

127. *See id*. at 10.

128. *See* Amended Stipulation and Settlement Agreement, at 5–6, *In re* Coll. Athlete NIL Litig., No. 4:20-CV-03919 (N.D. Cal. Sept. 26, 2024) (filed as Exhibit 1 of Declaration of Steve W. Berman in Support of Plaintiffs' Supplemental Brief in Support of Motion for Preliminary Settlement Approval), ECF No. 535-1.

129. *See id*. at 8.

130. Justin Williams, *House v. NCAA Settlement on Hold as Judge Sends Parties 'Back to the Drawing Board'*, N.Y. TIMES: THE ATHLETIC (Sept. 5, 2024), https://www.nytimes.com/athletic/5749342/2024/09/05/house-ncaa-settlement-college-sports-nil-boosters/ [https://perma.cc/7F3P-2KS5].

worth $600 or more to a clearinghouse agency.[131] The settlement further empowers the Power Five conference defendants to seek guidance from "Designated Enforcement Entities" to investigate whether NIL deals are truly fair market value payments for a player's NIL, and not booster driven payments for the athletes play alone.[132] Specifically, Judge Wilken was mostly concerned with the broad definition of the term "booster" and that the new restrictions would extend to unintended parties because of this broad definition.[133] The student-athletes' subsequently filed a revised agreement and specified in their accompanied brief that instead of using the broad term "booster," they intend for the settlement to enforce the pre-existing probation on "faux" NIL payments from entities and individuals closely affiliated with the schools directly.[134] Satisfied with these changes, Judge Wilken granted preliminary approval of the settlement agreement on October 7, 2024.[135] Subject to a final approval hearing in April, the settlement terms are expected to go into effect in July 2025.[136]

III. NIL TRANSFERS AS GIFTS

This Part argues that transfers of cash from fans to college athletes generally constitute and should be treated, for U.S. federal income tax purposes, as nontaxable gifts. To make this argument, first, this Note will identify the judicial standard for transfers that qualify as a gift. Next, this Note will identify two competing policy considerations for whether gifts should be excluded from a taxpayer's gross income altogether. This Note will then apply the judicial standard for gift characterization to different transfers of NIL payments to college athletes and establish that transfers of cash from fans to college athletes satisfy the judicial gift standard and conform with the policy principles for excluding gifts from gross income. For example, Darius Rucker—a devoted South Carolina Gamecock fan—who transferred the proceeds of his concert to a Gamecock NIL collective, is like any other fan transferring cash to college athletes and thus the transfer of these proceeds constitutes a de facto nontaxable gift to recipient athletes.

131. *Id*.; *see* Appendix A, *supra* note 126, at 7.

132. Appendix A, *supra* note 126, at 21.

133. Williams, *supra* note 130.

134. *See* Justin Williams, *House v. NCAA Settlement Granted Preliminary Approval, Bringing New Financial Model Closer*, N.Y. TIMES: THE ATHLETIC (Oct. 7, 2024), https://www.nytimes.com/athletic/5826004/2024/10/07/house-ncaa-settlement-approval-claudia-wilken/ [https://perma.cc/52EL-UD9H].

135. *See id*.

136. *Id*.

A. What is a Gift?

Section 102(a) of the Internal Revenue Code ("I.R.C.") provides that "gross income does not include the value of property acquired by gift."[137] However, Congress does not define the term "gift" in the Code.[138] The lack of clarity from Congress left this issue to be resolved by the courts. Following a circuit split on the issue of what constitutes a "gift," the Supreme Court of the United States answered this question in the foundational 1960 case, *Commissioner v. Duberstein*.[139]

There, Duberstein, the president of a metal company, referred potential customers to a fellow business associate.[140] Although Duberstein protested that he had not intended to be compensated for sharing the customers, the business associate insisted on giving Duberstein a Cadillac automobile in exchange for his actions.[141] Believing that he was gifted this property, Duberstein did not include the benefit of the Cadillac as gross income when completing his tax return.[142] Consequentially, the Commissioner asserted a deficiency for the car's value against Duberstein, which was later affirmed by the United States Tax Court.[143] On appeal, the United States Court of Appeals for the Sixth Circuit reversed the Tax Court's decision.[144] Soon after, the United States Court of Appeals for the Second Circuit in *Stanton v. United States*[145] reversed the district court's finding that a $20,000 payment by one's employer was a gift.[146] The Supreme Court granted certiorari in both cases because of the importance of this question in the administration of the income tax laws.[147]

In *Duberstein*, the Government proposed that the Court adopt a test to serve as the standard for determining what constitutes a gift for tax

137. I.R.C. § 102(a).

138. *See id*.

139. *See generally* 363 U.S. 278 (1960) (defining "gift" as one that "proceeds from a detached and disinterested generosity, out of affection, respect, admiration, charity or like impulses," which turns on the transferor's intent).

140. *Id*. at 280.

141. *Id*. at 280–81.

142. *Id*. at 281.

143. *Id*.

144. *Id*.

145. In *Stanton*, the taxpayer, who was the comptroller of a church corporation and the president of its wholly owned real estate company, was given $20,000 by the church's directors as a "gratuity" after resigning from both positions. The director's explained that the "gratuity" was based on Stanton being liked personally by all the directors. The taxpayer excluded this "gratuity" from gross income and the Commissioner asserted a deficiency against for the value the $20,000 payment. *Id.* at 278, 281–83 (citing Stanton v. United States, 268 F.2d 727 (2d Cir. 1959)).

146. *Id*. at 283.

147. *Id*. at 284.

purposes.[148] The Court, however, rejected this test on the grounds that the statute excluding gifts from gross income is necessarily general and accordingly is primarily a factually intense inquiry.[149] This determination led the Court to conclude that the Tax Court's findings were not clearly erroneous[150] and thus the Court held in accordance with its finding that Duberstein did not receive a gift.[151] In its discussion, the Court laid out what is often cited as the *Duberstein* standard,[152] stating that a gift "proceeds from a 'detached and disinterested generosity,' 'out of affection, respect, admiration, charity or like impulses.'"[153] Further, the Court indicated that the "most critical consideration" in this regard is the transferor's intention.[154]

Although the Court in *Duberstein* indicated that the transferor's intention is most important when determining whether transferred property constitutes a gift, the United States Court of Appeals for the Ninth Circuit's decision in *Olk v. United States* suggests that the circumstances underlying the nature in which the transferee receives property are also relevant.[155] In *Olk*, the taxpayer was a craps dealer employed at two Las Vegas casinos and excluded "tokes"—money given to dealers in the course of serving patrons—from gross income on the grounds that they were gifts.[156] In these casinos, it was common for the dealers to combine all their earned tokes and split them evenly amongst all other dealers at the end of their shifts.[157] The district court found that receiving tokes constituted a nontaxable gift because patrons had no obligation to pay dealers and dealers did not perform any service which a patron would normally find compensable.[158] Specifically, the district court

148. *Id.* at 284 n.6 ("The Government's proposed test is stated: 'Gifts should be defined as transfers of property made for personal as distinguished from business reasons.'").

149. *Id*. at 288–90 ("The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact.").

150. *See generally* FED. R. CIV. P. 52(a)(6) (stating appellate review is bound to the facts found at trial unless they are "clearly erroneous").

151. *Duberstein*, 363 U.S. at 291–92.

152. *See, e.g.*, Friend v. H. A. Friend & Co., 416 F.2d 526, 530 (9th Cir. 1969) ("Against appellant's testimony we weigh, and find convincing, under the *Duberstein* standard, the evidence produced by appellee."); Kroner v. Comm'r, T.C. Memo. 2020-73, at *9 (2020) ("Viewing the *Duberstein* standard through the prism of the relevant burdens of proof in this case . . . .").

153. *Duberstein*, 363 U.S. at 285 (quoting Comm'r v. LoBue, 351 U.S. 243, 246 (1956) and Robertson v. United States, 343 U.S. 711, 714 (1952)).

154. *Id*. (quoting Bogardus v. Comm'r, 302 U.S. 34, 43 (1937)).

155. *See* Olk v. United States, 536 F.2d 876, 878 (9th Cir. 1976).

156. *See id*. at 876.

157. *Id*. at 877.

158. *Id*. at 876–77.

found that "[t]he tokes were given to dealers as a result of impulsive generosity or superstition on the part of players, and not as a form of compensation for services" and that "[t]okes are the result of detached and disinterested generosity on the part of a small number of patrons."[159] Despite these findings seemingly conforming to the *Duberstein* standard, and the requirement that appellate review be restricted to determining whether a district court's findings were clearly erroneous, the Ninth Circuit held that the tokes were not a gift and therefore should've been included in the taxpayer's gross income.[160] The court determined that because "detached and disinterested generosity" are the operative words from *Duberstein* that define a gift, the district court's finding that the patrons tokes resulted from a detached and disinterested generosity constituted a finding of law rather than fact.[161] Thus, the court avoided the "clearly erroneous" standard requirement and held that the patron's motives failed the *Duberstein* standard because their transfers of tokes were not gifts but instead "[t]ribute[s] to the gods of fortune" in which they hoped would be "returned bounteously" and therefore were "involved and intensely interested."[162] Regardless of whether this holding actually represents the court's reasoning or was merely a method of working around the analytical constraints created by the district court's finding of fact, the court also importantly noted the relevance of facts pertaining to the transferee dealer.[163] In its discussion, the court acknowledged that "the regularity of the flow, the equal division of the receipts, and the daily amount received" indicated that the tokes were comparable to wages as a form of compensation for services rendered.[164] Thus, analogizing tokes to wages, the court in *Olk* suggests that, while the transferor's intention is important, the commercial nature of the transferee's receipt of property is also relevant when considering if transferred property is a gift under I.R.C. § 102(a).

Ultimately, to be characterized as a nontaxable gift, a transfer of property must satisfy the *Duberstein* standard—proceed from a detached and disinterested generosity—while also considering the factual circumstances underlying the nature of the transfer.

B. The Policy Justifying the Exclusion of Gifts from Gross Income

In determining whether a transfer of property should qualify as a gift, it is necessary to identify the policy arguments for and against the gift exclusion

159. *Id.* at 877.
160. *See id*. at 878.
161. *Id.*
162. *Id*.
163. *See id*.
164. *Id*.

to assess whether a transfer conforms with the justification of excluding it from gross income. Although I.R.C. § 102(a) excludes gifts from gross income, scholars disagree on whether Congress should allow this exclusion.[165] Ironically, both the justifications for and against the exclusion of gifts derive from Henry C. Simons's concept of income, commonly referred to as the "Haig-Simons definition."[166] The definition provides that income is equal to (1) a taxpayer's consumption plus (2) their accumulation of wealth.[167] While deeply rooted in economic theory, this definition has not been adopted in the Internal Revenue Code or regulations.[168] Nonetheless, it is a widely used among academics and has served as a foundation for tax policy argumentation.[169]

Of those who support Congress's decision to exclude gifts from gross income, perhaps the most notable are Professor Douglas A. Kahn and Professor Jeffrey H. Kahn.[170] In multiple different publications, Kahn and Kahn, both as co-authors and individually, assert that the decision of whether to exclude gifts from gross income rests on the balancing of two competing principles.[171] According to Kahn and Kahn, the principle that justifies the exclusion of gifts is that "[an] individual who has been taxed on income should have a virtually unrestricted range of choices as to how that income will be used to purchased consumption."[172] Conversely, the competing

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165. *See, e.g.*, Douglas A. Kahn & Jeffrey H. Kahn, *Gifts, Gafts, and Gefts: The Income Tax Definition and Treatment of Private and Charitable 'Gifts' and a Principled Policy Justification for the Exclusion of Gifts from Income*, 78 NOTRE DAME L. REV. 441 (2003) [hereinafter Kahn & Kahn, *Gifts, Gafts, and Gefts*]; HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 56–58 (1938); Joseph M. Dodge, *Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income*, 91 HARV. L. REV. 1177, 1177 (1978); William A. Klein, *An Enigma in the Federal Income Tax: The Meaning of the Word "Gift"*, 48 MINN. L. REV. 215, 215 (1963); Majorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 CONN. L. REV. 1, 28–38 (1992); Lawrence Zelenak, *Commentary: The Reasons for a Consumption Tax and the Tax Treatment of Gifts and Bequests*, 51 TAX L. REV. 601, 602–03 (1996).

166. Douglas A. Kahn, *The Taxation of a Gift or Inheritance From an Employer*, 64 TAX LAW. 273, 274 (2011) [hereinafter D. Kahn, *Employer*].

167. Jeffrey Kahn, *GoTaxMe: Crowdfunding and Gifts*, 22 FLA. TAX REV. 180, 187 (2018) [hereinafter J. Kahn, *GoTaxMe*].

168. *See* Kahn & Kahn, *Gifts, Gafts, and Gefts*, *supra* note 165, at 457 ("The Haig-Simons definition is regarded as an expression of an ideal to which the tax system should aspire.").

169. J. Kahn, *GoTaxMe*, *supra* note 167, at 187; D. Kahn, *Employer*, *supra* note 166, at 274 n.8 ("Even if one accepts that characterization, there can be competing policies that warrant departing from it. The tax law is a pragmatic enterprise that does not operated in isolation of societal and economic events and needs.").

170. *See, e.g.*, Kahn & Kahn, *Gifts, Gafts, and Gefts*, *supra* note 165, at 525–26; J. Kahn, *GoTaxMe*, *supra* note 167, at 198–99; D. Kahn, *Employer*, *supra* note 166, at 274.

171. Kahn & Kahn, *Gifts, Gafts, and Gefts*, *supra* note 165, at 467–68; Kahn, *GoTaxMe*, *supra* note 167, at 190; D. Kahn, *Employer*, *supra* note 166, at 278.

172. Kahn & Kahn, *Gifts, Gafts, and Gefts*, *supra* note 165, at 467–68.

principle is that "an individual's taxable income should include all his receipts so as to reflect accurately his ability to share the costs of government."[173] To understand the basis of these principles, it is necessary to examine Kahn and Kahn's interpretation of the Haig-Simons definition of income and its connection to the current federal income tax system.

As previously mentioned, the Haig-Simons definition of income is consumption plus accumulation to wealth. Kahn and Kahn interpret "consumption" in this definition as Professor Alvin Warren's definition of the term—"the ultimate use or destruction of economic resources."[174] They also incorporate this definition of "consumption" with Simons's use of the term "personal consumption"—consumption for the personal purposes of a consumer.[175] By determining this meaning of consumption, Kahn and Kahn interpret the first half of the Haig-Simons definition to refer to "current consumption"[176]—consumption of income acquired within the same year it is earned—and the other half, accumulation of wealth,[177] to depict "future consumption"—consumption of income that is incurred now but consumed in a later year.[178] Importantly, Kahn and Kahn discuss that, unlike a consumption tax, which does not tax income until it is consumed, an income tax taxes both current consumption and future consumption in the same year.[179] This is important because by taxing accumulated wealth, it is assumed that the accumulated wealth will be consumed at some time in the future, and thus, it does not matter whether it will be consumed by the taxpayer or by someone else.[180] According to Kahn and Kahn, this suggests that the taxpayer should be entitled to either consume his or her accumulated income or allow someone else to consume it, without incurring any additional income tax.[181] In other words, because the taxpayer has already been taxed on his accumulated wealth, he or she should be able to transfer that wealth to another without the transferee having to pay an additional tax on such transfer.[182] Thus, based on their interpretation of the terms "consumption" and "accumulated wealth" in

173. *Id*. at 468.

174. *Id*. at 453; Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081, 1084 (1980).

175. Kahn & Kahn, *Gifts, Gafts, and Gefts*, *supra* note 165, at 453.

176. *See id.* at 454 (discussing the justification for taxing current consumption).

177. *See id.* at 455 (discussing the justification for taxing accumulated wealth).

178. *Id.* at 453–54.

179. *Id.*

180. *Id.* at 454; *see also* D. Kahn, *Employer*, *supra* note 166, at 276.

181. *See* Kahn & Kahn, *Gifts, Gafts and Gefts*, *supra* note 165, at 457 ("A principle of income taxation must be that an individual, having paid an income tax on accumulated income, has the privilege to use that income for consumption without thereby incurring an additional income tax."); *see also* D. Kahn, *Employer*, *supra* note 166, at 276.

182. *See* J. Kahn, *GoTaxMe*, *supra* note 167, at 189 ("[O]ne tax, one personal consumption.").

the Haig-Simons definition of income, and how the current federal income tax system taxes accumulated wealth—i.e. "future consumption"—Kahn and Kahn argue that the first principle[183] that justifies excluding gifts from gross income outweighs its competing principle.[184]

On the other hand, scholars like Henry Simons himself argue that gifts should be included in gross income.[185] In the same publication that Simons defined income, he also argued that the accumulation of wealth should be taxed regardless of how it was obtained.[186] Simons contends that instead of focusing on how wealth is obtained, income tax law should focus on an individual's capacity to consume, and if an individual increases their receipts and accordingly increases their capacity to consume, they should be taxed on such increases.[187] This view is essentially the second competing principle that is laid out by Kahn and Kahn. Although many scholars have supported Simons's contention,[188] Congress has continuously sided with the first principle and retained the provision excluding gifts from gross income.[189]

So, when does one principle outweigh the other? According to a recent article by Professor Jeffrey Kahn, because deciding whether to exclude a gift is a balancing act between the two principles, "there is no exact science to this consideration."[190] In this article, Professor Kahn subdivides the first principle into two separate principles that each require their own inquiry.[191] The first, the "optimum utility of consumption" principle, is a narrowed version of the overarching principle for excluding gifts.[192] The "optimum utility of consumption" principle is that a taxpayer should be allowed to optimize his or her utility of consumption by having the vicarious pleasure of having it consumed by someone else.[193] The second, the "single tax unit" holds that the transferor and transferee are essentially a single tax unit, and the transferor is taxed on the income used to make the gift while the transferee enjoys the

183. "The taxpayer should be given the widest latitude to obtain maximum utility from the consumption of his accumulated wealth." D. Kahn, *Employer*, *supra* note 166, at 276.

184. Kahn & Kahn, *Gifts, Gafts and Gefts*, *supra* note 165, at 468 ("Congress chose to give priority to the principle of providing the taxpayer with a wider range of choices for consumption.").

185. *Id.* at 458.

186. *Id.*; *see* SIMONS, *supra* note 165, at 128.

187. Kahn & Kahn, *Gifts, Gafts and Gefts*, *supra* note 165, at 458.

188. *See generally*, *e.g.*, Klein, *supra* note 165; Dodge, *supra* note 165; Zelenak, *supra* note 165.

189. I.R.C. § 102(a); Kahn & Kahn, *Gifts, Gafts and Gefts*, *supra* note 165, at 442 (stating gifts have been excluded from income since The Revenue Act of 1913).

190. *See* J. Kahn, *GoTaxMe*, *supra* note 167, at 194.

191. *Id.* at 190.

192. *Id.*

193. *Id.*

consumption of the income without paying an additional income tax.[194] This concept is only applicable when there is a relationship between the parties.[195] Professor Kahn separates the two for the purposes of analysis. According to Kahn, the optimum utility of consumption and single tax unit principles are separate inquiries and are to be weighed against the competing principle that all a taxpayer's receipts should be taxable.[196] Again, because the analysis is heavily factual, these inquiries should not be operated as a definitive test.

C. NIL Transfers as De Facto Gifts

So, how is transferred property declared as a gift for tax purposes? In *Duberstein*, the Court rejected the adoption of a definitive test proposed by the Government by acknowledging that I.R.C. § 102(a) is necessarily general due to the importance of factual consideration.[197] Thus, the inquiry cannot be limited to only the *Duberstein* standard. The determination of transfers qualifying as gifts should therefore be assessed by applying the *Duberstein* standard, viewing the nature of the transfer like in *Olk*, and weighing the two competing policy principles proposed by Kahn and Kahn.

Before discussing the NIL transfers that would qualify as de facto gifts, it is worth mentioning that most NIL transfers fail to meet the *Duberstein* standard. For instance, many transfers include players entering into deals with large corporate brands where they either agree to promote the brand on their social media account or appear in the brand's commercials.[198] Here, it cannot be said that the brands transferring cash to college athletes proceeds from detached or disinterested generosity because these transfers constitute an exchange of money for a rendered service—the popular college athlete exposes a brand to the athlete's massive audience of fans. Additionally, when fans purchase apparel and merchandise featuring a college athlete's unique logo or signed autograph, these payments also fail the *Duberstein* standard, as they are no different than any other business entity that creates and sells merchandise. Thus, fans and other purchasers cannot be said to be transferring money to athletes proceeding from a detached and disinterested generosity because they are transferring cash in exchange for an autograph or merchandise. In summary, these transfers of property fail the *Duberstein*

194. *Id.* at 185–86.

195. *See id.* at 186 ("In some cases, such as when the two parties are strangers, the relationship does not comport with the single tax unit concept, which therefore should not apply.").

196. *See id.* at 194.

197. Comm'r v. Duberstein, 363 U.S. 278, 284–85 (1960).

198. *See supra* notes 105-107 and accompanying text; *see e.g.*, *infra* note 212 and accompanying text.

standard because they proceed from an exchange or involve a quid pro quo arrangement.

In some instances, however, transfers to athletes from NIL collectives do qualify as gifts. As mentioned previously, NIL collectives serve as a pool of funds from boosters, business, and fans that are then distributed to athletes as an NIL payment.[199] Thus, by having a large pool of cash arising from many different transferors, whose intent should be assessed for determining whether these transfers proceeded from a detached and disinterested generosity? This is an important question to ask because a booster's intent when transferring cash to an NIL collective will likely fail the *Duberstein* standard, whereas a fan like Darius Rucker who simply wants to support the school he loves will satisfy such standard.

Boosters frequently use NIL payment opportunities through NIL collectives to induce both high school athletes and athletes in the transfer portal for recruiting purposes.[200] Because boosters promise to pay recruits millions of dollars to commit to their school and usually condition these offers on the athlete's commitment, these payments are quid pro quo arrangements and therefore fail the *Duberstein* standard. This arrangement is technically a violation of NCAA rules, but it still happens frequently.[201] On the other hand, fans who simply donate cash to an NIL collective do not expect anything in return. Rather, transfers from fans satisfy the *Duberstein* standard because by making a cash donation out of the love for their school, their team, or their favorite player, fans do not expect anything in return for such transfers, nor are they making the transfer because of something done previously. In *Duberstein*, the transfer of a Cadillac was not a gift because, although Duberstein did not expect anything in return for his customer referrals, his business associate gave him the Cadillac because of Duberstein's courteous gesture.[202] Here, college sports fans have not received anything from college athletes directly, and thus their transfers differ from the one in *Duberstein* because they are not performed to satisfy a debt or return a favor. Thus, there

199. *See supra* note 107 and accompanying text.

200. Pratik Thakur, *Money Talks: Athletic Program Boosters Impact Recruiting Using NIL Deals*, DAILY TROJAN (Aug. 31, 2022), https://dailytrojan.com/2022/08/31/athletic-program-boosters-impact-recruiting-using-nil-deals/ [https://perma.cc/7JW7-MWER] ("Furthermore, boosters have not only been using the transfer portal for their NIL deals, as high school recruits have been influenced by them also in their decision-making.").

201. *See, e.g.*, John Talty, *The NCAA Went After Tennessee and Nico Iamaleava; It Backfired with Earthshaking Consequences*, CBS SPORTS (Dec. 18, 2024, 5:17 PM), https://www.cbssports.com/college-football/news/the-ncaa-went-after-tnessee-and-nico-iamaleava-it-backfired-with-earthshaking-consequences/ [https://perma.cc/8BRY-9A3P] ("NCAA rules prohibited using NIL money as a recruiting inducement, but 'pay to play,' as commonly referred to, was rampant throughout college football.").

202. *Duberstein*, 363 U.S. at 280–81, 291–92 (1960).

is truly no quid pro quo from these transfers and therefore they proceed from a detached and disinterested generosity.

While fan transfers satisfy the *Duberstein* standard, the nature of the transfer must also be analyzed. In *Olk*, the court determined that because the craps dealer taxpayer received tokes regularly, divided them equally amongst other dealers, and received a significant amount of tokes daily, the transfer of tokes from patrons to the taxpayer was akin to compensation for services rendered and therefore could not be considered a gift.[203] While booster led payments fail the *Duberstein* standard because those payments are negotiated amongst players and coaches, conditioned upon commitment to the school, and total in amounts similar to a de facto salary, those payments, like in *Olk*, are so commercial in nature that they too would fail as gift under *Olk*. Unlike booster transfers, transfers from fans are never negotiated and can be substantial or minimal in value. Moreover, because boosters use payments to induce recruiting, the amount offered to a recruit must be competitive compared to offers from boosters associated with other schools. Fans, however, do not compete with fans from other schools when determining how much to donate to athletes and instead are free to transfer at their own will for no other reason but to support the athletes of their school. Moreover, unlike in *Olk* where the taxpayer performed his job with the expectation of receiving tokes, college athletes do not play their sport for the purpose of receiving payments from fans. College athletes have worked their whole life to play at the collegiate level and historically have done so only pursuing a free education and a chance to play their sport professionally after college. It is not until recently that college athletes have been permitted to receive any transfers of property while still playing for their school. Thus, because college athletes have been playing without the expectation of incurring cash for decades, donations from fans are merely the icing on the cake. Therefore, because the circumstances of transfers from fans to college athletes are not commercial in nature nor analogous to compensation for services, such transfers may qualify as de facto gifts.

Now that it is established that transfers of property from fans to college athletes constitute de facto gifts, it is necessary to ask if excluding the receipt of such property from a college athlete's gross income conforms with Congress's purpose for doing so. To recall, the exclusion of gifts from income rests on the balancing of two competing principles: (1) an "individual who has been taxed on income should have a virtually unrestricted range of choices as to how the income will be used to purchase consumption;" and (2) "an individual's taxable income should include all his receipts. . . so as to reflect accurately his ability to share the costs of government."[204] The first may be

203. Olk v. United States, 536 F.2d 876, 879 (9th Cir. 1976).

204. Kahn & Kahn, *Gifts, Gafts and Gefts*, *supra* note 165, at 467–68.

broken up as the optimum utility of consumption principle and the single tax unit principle.[205] Despite fan cash transfers qualifying as a gift under *Duberstein* and *Olk*, because fans and college athletes are usually strangers, the relationship between fans to players likely fails to qualify as a single tax unit. Nonetheless, fans still conform to the optimum utility principle. After earning income and paying income tax on such income, fans should be able to enjoy this income however they please. For many, the most enjoyable use of income is to let someone else consume it. For a college football fan, giving taxed income to their favorite school's athletes to consume may certainly be considered an optimal way for their income to be utilized. Thus, because these transfers conform with the optimum utility principle, such transfers outweigh the other competing principle and should therefore be excluded from a college athlete's income as gifts.[206]

As previously mentioned, most NIL payment arrangements will not qualify as gifts.[207] To clearly establish how the transfer of proceeds from Darius Rucker's concert does qualify as a gift, it is best to differentiate this transfer to other taxable NIL property transfers. This is shown in the following table:

205. J. Kahn, *GoTaxMe*, *supra* note 167, at 189.

206. For an analogous example, see *id.* at 194–95 ("Fred greatly admired the athletic skills of Herbert, the quarterback for an NFL football team, but Fred had never met Herbert. To show his appreciation, Fred sent Herbert a lifetime membership in a dining club in Herbert's home city. The value of the membership was $5,000. The gift was made out of detached and disinterested generosity and so satisfies the *Duberstein* standard. The relationship between Fred and Herbert is not one that satisfies the single-taxable-unit concept. However, the gift should be excluded from Herbert's income because it conforms to the optimum-utility-of-consumption principle.").

207. *See supra* Part III.C.

Examples of NIL Deals	*Duberstein* Standard	Nature of Transfer	Policy Scale
Darius Rucker hosts a concert transferring the proceeds to USC Gamecock Athletes[208]	This transfer satisfies the *Duberstein* standard because Rucker does not ask for anything in return for this transfer, and the athletes or athletic department has not previously benefited Rucker in such a way to encourage this payment as a recompense. Thus, because there is no quid pro quo present in this transfer, Rucker's donation of concert proceeds satisfies the *Duberstein* standard.	Rucker is USC alum born in Charleston, South Carolina.[209] The concert proceeds benefit players of USC's sports teams, which Rucker is a passionate fan of. Thus, the nature of this transfer is more sentimental than it is commercial and is more akin to a fan donating money to an athlete or athletic program than it is other NIL deals.	Rucker normally earns a percentage of his concert proceeds. However, rather than using the proceeds for his own consumption, he likely feels that the proceeds may be optimally utilized by USC athletes. Thus, because these proceeds may be best consumed by another, this transfer conforms with Congress's justification for excluding gifts from gross income.
Gatorade enters into an endorsement deal with University of Colorado quarterback Shedeur Sanders[210]	This transfer fails the *Duberstein* standard because Sanders entered into a multi-year partnership agreement with Gatorade to endorse Gatorade's brand in exchange for cash.[211] Thus, Gatorade's transfer of cash to Sanders is not disinterested, but rather compensation for promotional services.	This partnership is highly commercial in nature, as it is for the promotion of Gatorade products for the purpose of increasing Gatorade's sales. Thus, this deal is no different than the many endorsement deals that Gatorade has executed with hundreds of professional athletes and will not qualify as a gift transfer.[212]	The payments received by Sanders in exchange for promoting Gatorade's brand are less likely to be viewed as an optimum utility of Gatorade's consumption, but, because these payments are made in exchange for Sanders's services, rather, these payments are likely more appropriately viewed as a measure to of Sanders's ability to pay for the cost of government.
Martin McKinley, general manager at Fred Caldwell Chevrolet in Clover, S.C., assigns Clemson University quarterback, Cade Klubnik, a Chevrolet Silverado ZR2.[213]	This transfer fails the *Duberstein* standard because McKinley's purpose for assigning his automobiles to Clemson athletes is to promote his dealership through their social media presence and provoke customers to purchase his vehicles.[214] Thus, because McKinley is only transferring these rights to Klubnik in exchange for exposure to Klubnik's high-following social media platform, McKinley's transfer cannot be said to have proceeded from a detached and disinterested generosity.	This nature of this deal is also highly commercial. Because McKinley approaches recognizable Clemson athletes with popular social media accounts to market his vehicles, the formation of these transfers is based on business promotion and is created for the purpose of increasing McKinley's vehicle sales. Thus, the commercial nature of this deal does not allow the vehicle transfer to qualify as a gift.	Although Klubnik may not use his new Silverado to pay for the cost of government directly, possessing the new vehicle does provide him with the benefit of not having to pay a monthly car payment. Because this means more money is Klubnik's pocket, being compensated with the new vehicle accurately represent his ability to pay for the cost of government and thus it should not be excluded from his gross income.

208. *See An Exclusive Night with Darius Rucker*, *supra* note 4.

209. Biography.Com Editors, *Darius Rucker*, BIOGRAPHY, https://www.biography.com/musicians/darius-rucker [https://perma.cc/3FR5-W7Q] (Nov. 7, 2023, 1:12 PM).

210. Kyle T. Mosley, *Shedeur Sanders Signs Historic NIL With Gatorade*, SPORTS ILLUSTRATED (Jan. 27, 2022), https://www.si.com/college/hbcu/football/shedeur-sanders-gatorade-nil [https://perma.cc/P2B5-YJU2] ("Finally, Sanders noted, 'they [Gatorade] work with legendary athletes, and just being a part of that, it speaks volumes. So, I'm just really excited just to be a part of them.'").

211. *Id.*

212. *Id.*

Indeed, Rucker's transfer meets the judicial standard to qualify as a gift and aligns with Congress's justification for excluding gifts from gross income. However, to comply with the NCAA's quid pro quo NIL requirement, USC athletes were forced to provide minimal services in exchange for receiving the concert proceeds as an NIL payment.[215] Accordingly, the performance of these services likely debunks the possibility of this transfer being considered a gift. Thus, despite what otherwise should be considered a de facto nontaxable gift, because of current NCAA rules, USC athletes will have to unnecessarily recognize this transfer as taxable income.

D. The NCAA Should Eliminate the Quid Pro Quo Requirement

The quid pro quo requirement imposed by NCAA NIL rules rids college athletes of receiving nontaxable gifts from generous fans. Without such a requirement, passionate fans like Darius Rucker would be able to optimally utilize their income by having such income be consumed by another without additional taxation. To better understand why the quid pro quo requirement should be removed, it is necessary to discuss its purpose.

Current NCAA NIL policy provides that NIL arrangements without quid pro quo are prohibited.[216] The policy further provides that student-athletes may only be compensated with NIL deliverables for work actually performed.[217] The quid pro quo requirement is followed by other rules that prohibit NIL compensation that is contingent on enrollment at a particular school and compensation for particular athletic performance.[218] Thus, because the neighboring rules essentially prohibit direct compensation for on the field play, the juxtaposition of the quid pro quo rules suggest that these rules collectively and this quid pro quo rule individually exists to prohibit "pay-for-play" compensation[219]—a model that the NCAA has continuously fought to prevent while advocating that "amateurism" is principle of college sports.[220]

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213. *See* Christopher Kamrani & Brian Hamilton, *Thanks to NIL, Local Car Dealers Are Out of the Shadows and Landing Star College Athletes*, THE ATHLETIC (June 10, 2024), https://www.nytimes.com/athletic/5550463/2024/06/10/nil-car-dealers-college-athletes-ncaa/ [https://perma.cc/2TBR-KJ75].

214. *Id.*

215. *See supra* note 9 and accompanying text.

216. *Name, Image and Likeness Policy Questions and Answer*, NCAA, *supra* note 8.

217. *Id.*

218. *Id.*

219. *See* Greg Daugherty, *NIL and the NCAA: What Are the Rules?*, INVESTOPEDIA, https://www.investopedia.com/nil-and-the-ncaa-8599762/ [https://perma.cc/NPM3-87QM] (Mar. 8, 2025).

220. *See supra* note 86 and accompanying text.

Even after the NCAA's losses in *O'Bannon* in 2015, and *Alston* in 2021, the disallowance of "pay-for-play" has withstood NCAA rule changes that have increased college athlete compensation opportunities.[221] However, pending the settlement approval of *In re College Athlete NIL Litigation*, college athletic programs may soon be able to directly compensate its players through a revenue distribution model.[222] Thus, a "pay-for-play" model may soon no longer be disallowed. Because the NCAA has recently conceded to allowing "pay-for-play" models in this settlement agreement, the concern of non-quid pro quo NIL arrangements cannot be as significant as when the current NIL rules were implemented. Therefore, because this purpose of the quid pro quo NIL requirement is no longer a concern, the quid pro quo requirement should be eliminated, and donors should be entitled to provide athletes with nontaxable gifts without such transfers being contingent upon an exchange of services.

Further, notwithstanding the potential allowance of a "pay-for-play" compensation model, the allowance of nontaxable gifts to college athletes does not frustrate the purpose of the quid pro quo requirement because of what makes up the judicial standard required to make such gifts. For a transferor to make a nontaxable gift, he or she must comply with the *Duberstein* standard.[223] This requires that the purpose for which the transferor is making the gift to be such that the transferor does not expect anything in return and that the transferor is not transferring because of something previously performed by the transferee.[224] Thus, for a transferor to satisfy the judicial standard for making a gift, the transfer cannot be made in exchange for an athlete's "play." Therefore, because the judicial standard for making a gift inherently disallows exchanges, allowing individuals to make gifts to college athletes does not give rise to a "pay-for-play" arrangement and, accordingly, does not frustrate the purpose for NIL rules requiring that they be quid pro quo arrangements.

Ultimately, the quid pro quo requirement of NIL deals unnecessarily prohibits college athletes from receiving nontaxable gifts, which imposes an otherwise avoidable tax burden on these athletes as taxpayers. By eliminating this requirement, these athletes can be relieved of such burden without contradicting the purpose of the requirement, and, given the potential future of college athlete compensation, the purpose of the quid pro quo requirement may nevertheless become null and void altogether.

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221. *See, e.g.*, Hosick, *supra* note 78.
222. *See* Plaintiffs' Settlement Approval Motion, *supra* note 118, at 8.
223. *See supra* Part III.A.
224. *See supra* notes 153-154 and the accompanying text.

IV. GIFT AND ESTATE TAX CONSEQUENCES

Deviating from an income tax discussion, the allowance of gift transfers to college athletes inescapably calls for an inquiry into gift and estate tax consequences. Although gifts are not included in gross income for a recipient taxpayer,[225] a gift tax may be imposed on the donor for certain gift transfers, which in turn may affect the donor's estate tax liability.

A. Federal Gift Tax

Under I.R.C. § 2501, a tax is imposed on the transfer of property by gift, payable to the donor.[226] However, under § 2503(b), with respect to each gift transferred to a donee, $10,000 (adjusted for inflation) may be excluded from being subject to such tax.[227] This adjusted amount is determined annually and announced by the Internal Revenue Service ("I.R.S.") through the issuance of a Revenue Procedure.[228] For calendar year 2024, the gift exclusion amount was $18,000.[229] Thus, in 2024 a donor may gift up to $18,000 to a single individual during one calendar year with no tax consequence, but the amounts that exceed the exclusion will be subject to the § 2501 gift tax as "taxable gifts."[230]

B. Federal Estate Tax

I.R.C. § 2001 provides that a tax is imposed on the transfer of a decedent's taxable estate, payable to the executor of such estate.[231] However, under § 2010, $5,000,000 (which is adjusted for inflation) of the decedent's estate is excluded from such tax.[232] Like the gift tax exclusion, this adjusted amount is announced by Revenue Procedure, and for calendar year 2024, the estate tax exclusion amount was $13.61 million for an individual.[233] Thus, the executor of a decedent's estate will have no estate tax consequence for transferred amounts less than or equal to $13.61 million. Importantly, estate tax rates are high,[234] and savvy tax planners will minimize their executor's

225. I.R.C. § 102(a).
226. I.R.C. § 2501.
227. I.R.C. § 2503.
228. *See, e.g.*, Rev. Proc. 2023-34, 2023-48 I.R.B. 1288.
229. *Id.* at 1294.
230. *See* I.R.C. § 2503 (defining "taxable gifts").
231. *See* I.R.C § 2001.
232. I.R.C. § 2010.
233. Rev. Proc. 2023-34, 2023-48 I.R.B. 1294.
234. *See* I.R.C. § 2001(c) (stating the marginal rate for amounts exceeding $1,000,000 is 40%).

estate tax liability by strategically refraining their estate from exceeding the applicable exclusion amount.

Gifts, however, affect a decedent's estate tax liability.[235] The I.R.C. § 2001 estate tax is imposed on an amount equal to the amount of a decedent's taxable estate plus the amount of § 2503 taxable gifts made by a donor during his or her lifetime.[236] Accordingly, because the issuance of taxable gifts will count against a donor's ability to prevent his or her estate from exceeding the exclusion amount of $13.61 million, a savvy donor will be reluctant to issue gifts exceeding $18,000 to a single individual.

C. Gift and Estate Tax Considerations of Darius Rucker's NIL Concert and Other NIL Gift Transfers

As previously established, absent the quid pro quo requirement, Darius Rucker's transfer of concert proceeds to USC athletes would constitute a nontaxable gift transfer.[237] Thus, it is important to consider how this transfer would affect Rucker's gift tax consequence and the effects on his future estate tax liability.

For the purposes of analysis, let's assume that Rucker's concert grossed $1,000,000 in revenue. Let's further assume that these proceeds were equally distributed to fifty USC athletes. Accordingly, Rucker would have made fifty $20,000 gift transfers to fifty individual donees. Thus, because the gift exclusion amount for 2024 is $18,000 per person, Rucker would have exceeded the exclusion amount by $2,000 for each gift, resulting in $100,000 ($20,000 x 50) of taxable gifts under § 2503. This $100,000 would then be subject to federal gift tax under § 2501 and additionally be added to Rucker's taxable estate when determining whether his estate exceeds the § 2010 estate tax exclusion amount.

Indeed, these considerations will drive donor's approach when determining whether to provide college athletes with gifts, how much to give, and to whom donors will gift to. Although these parameters limit gift opportunities for college athletes, proficient tax planning can aid donors in maneuvering around these limitations and providing considerable benefits to both themselves and the athletes.

V. CONCLUSION

Although many NIL transfers do not satisfy the *Duberstein* standard for gift characterization, transfers from passionate fans, like Darius Rucker, to the

235. *See* I.R.C. § 2001(b)(1)(B).
236. I.R.C. § 2001(b)(1).
237. *See supra* Part III.C.

athletes of the university they love, do satisfy this standard. However, the current quid pro quo requirement present in NCAA NIL rules forces college athletes to provide services in exchange for property received through NIL arrangements. Thus, this requirement nullifies transfers that would otherwise constitute a nontaxable gift and requires athletes to unnecessarily include de facto gift transfers in gross income and ultimately increase their tax liability.

Because of this, the NCAA should eliminate the quid pro quo requirement of NIL arrangements. Removing this requirement and permitting gift transfers to college athletes would not frustrate the purpose of this requirement and would relieve these athletes of an unnecessary tax burden. Accordingly, without the quid pro quo requirement, generous donors like Darius Rucker would then be able to host concerts like *Southern State of Mind* and benefit USC athletes without an attached consequence of additional income tax liability.