DELAY OF GAIN: HOW NORTH CAROLINA'S NAME, IMAGE, AND LIKENESS LAW UNCONSTITUTIONALLY RESTRICTS STUDENT-ATHLETES' COMMERCIAL SPEECH RIGHTS

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INTRODUCTION

In 2021, the U.S. Supreme Court unanimously decided *National Collegiate Athletic Association v. Alston*, a landmark case that dramatically changed the landscape of college athletics. Writing for the majority, Justice Gorsuch ruled that the NCAA's longstanding ban on compensation for college athletes related to their name, image, and likeness constituted a violation of antitrust law and was illegal. Importantly, the *Alston* Court did not mandate a particular scheme for how that compensation should proceed. What followed was a patchwork of state legislation providing for name, image, and likeness (NIL) compensation for student-athletes at universities across the country. While these laws overwhelmingly benefitted college athletes and have created a new scheme for college athletics, perhaps because of their novelty and the haste with which they were fashioned, they do not all pass constitutional muster. Specifically, limits imposed on the types and sources of compensation for college athletes constitute overbroad infringements on commercial speech that violate the First Amendment. North Carolina's law is no different, and this paper will explore the provisions that infringe upon the free speech rights of North Carolina college athletes.

This paper will proceed in four parts. Part I will outline the NIL landscape as a whole, including the case law and circumstances that precipitated this stage of NIL evolution, with a focus on *Alston* and the related cases that preceded it. Part II will analyze North Carolina's NIL law in particular and will examine its critical provisions and how they affect athletes in the state. Part III will place the law in the context of the constitutional doctrines of overbreadth and commercial speech and will explore how its critical provisions are overbroad in restricting athletes' commercial speech. Finally, Part IV will propose a better solution to the novel issue of NIL in North Carolina by analyzing similar statutes enacted in other states.

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I. WHAT IS NIL ANYWAY?

Name, image, and likeness is a general term for the new regulatory scheme that allows college athletes to profit off of the rights to their name, appearance, and branding.[1] In the wake of the legal advent of NIL, college athletes can now partner with businesses for endorsements and advertisements in exchange for cash.[2] Athletes may make money in a variety of other ways as well, including selling merchandise, starting their own sports camps, selling their memorabilia, making paid appearances, and charging money for autographs.[3] While the rights to profit from those activities might sound inherent, until July 2021, they were unavailable for the thousands of National Collegiate Athletic Association (NCAA) athletes across the country.[4]

At the center of those restrictions was the idea of amateurism. For more than a century and beginning at the NCAA's inception in the early 1900's, amateurism has been at the heart of college athletics.[5] By 1956, the NCAA had codified those amateurism rules into a scheme by which student-athletes could receive athletic scholarships to attend universities but could not receive any other financial compensation related to their athletic status.[6]

Under that structure, universities were not allowed to provide, and athletes were not allowed to receive, compensation related to athletic participation.[7] In addition, the NCAA required student-athletes to sign a form waiving their right to use their name, image, or likeness for commercial gain.[8] Instead, the NCAA and its member institutions (universities) retained the right to use or sell a student-athlete's rights to a third party for financial gain *without* compensating the athlete whatsoever;[9] all

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[1] James Parks, *What is NIL in College Football? Here's What You Need to Know*, SPORTS ILLUSTRATED (March 23, 2023, 2:20 PM), https://www.si.com/fannation/college/cfb-hq/ncaa-football/college-football-nil-rule-changes-what-you-need-to-know.
[2] *Id.*
[3] *Id.*
[4] Tim Tucker, *NIL Timeline: How We Got Here and What's Next*, ATLANTA J. CONST. (Mar. 18, 2022), https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/.
[5] *See* Audrey C. Sheetz, Note, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 869–70 (2016).
[6] *Id.* at 870–71.
[7] Parks, *supra* note 1.
[8] Sheetz, *supra* note 5, at 873.
[9] *Id.* at 873–74.

profits were returned either to the NCAA or the university.[10] By the mid-2010's, the college sports industry was worth $11 billion, with no portion of that revenue being returned to the athletes who powered it.[11]

Dissatisfied with this structure, college athletes fought back by suing the NCAA in the case of *O'Bannon v. NCAA*.[12] That suit began when Ed O'Bannon, a former college basketball player at the University of California, Los Angeles (UCLA), sued the NCAA on behalf of student-athletes, seeking an injunction preventing the NCAA from enforcing restrictions on athletes' ability to receive compensation for their name, image, and likenesses.[13] O'Bannon initiated the suit after seeing a player bearing his likeness and wearing his UCLA jersey in an EA Sports video game.[14] O'Bannon had not consented to appear in the game, nor had he received compensation for his "appearance."[15] The class action suit alleged more fundamental criticisms of the NCAA as well.[16] Specifically, O'Bannon alleged that the NCAA's amateurism rules constituted an illegal restraint on trade under the Sherman Act because they prevented student-athletes from profiting from their name, image, and likenesses.[17]

The U.S. District Court for the Northern District of California found in favor of O'Bannon, ruling that the NCAA's amateurism rules *did* constitute a restraint on trade and thus violated the Sherman Act.[18] The Ninth Circuit affirmed the district court's ruling that the NCAA was subject to antitrust scrutiny, but it emphasized the limited scope of its decision.[19] The Court held that the NCAA's restrictions had been more "restrictive than necessary to maintain its tradition of amateurism."[20] Finally, the Court concluded that the "Rule of Reason"[21] required that the NCAA permit its member institutions to provide compensation up to the cost of attendance

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[10] *Id.*
[11] *Id.* at 866.
[12] *Id.*
[13] *Id.* at 866–67.
[14] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1055 (9th Cir. 2015).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 1056 (citing O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014)).
[19] *Id.* at 1079.
[20] *Id.*
[21] The Rule of Reason analysis is "'a fact-specific assessment of market power and market structure' aimed at assessing the challenged restraint's 'actual effect on competition.'" Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

for its student-athletes, but the Court went no further in addressing additional compensation for college athletes.[22]

The *O'Bannon* decision set the stage for the seminal case regarding student-athlete compensation: *National Collegiate Athletic Association v. Alston*. In 2019, current and former college athletes once again brought suit in the Northern District of California against the NCAA and eleven athletic conferences, alleging antitrust violations related to the NCAA's rules limiting their compensation for their athletic services.[23] Following a bench trial, the district court entered an injunction that limited the NCAA's ability to restrict compensation related to education but still allowed the NCAA to continue to fix compensation unrelated to education.[24] As a result, the NCAA retained the right to regulate athletic scholarships because they were considered unrelated to education.[25] Both sides appealed to the Ninth Circuit.[26] The Plaintiffs argued that the court should have enjoined all of the NCAA's compensation limits, including those that were unrelated to education, like "athletic scholarships and cash awards."[27] Conversely, the NCAA argued that the District Court should not have limited its power to restrict compensation at all.[28] The Ninth Circuit affirmed in full, holding that the District Court had struck a balance that both prevented anticompetitive harm to student-athletes and preserved the popularity of college sports.[29]

The Supreme Court unanimously affirmed the Ninth Circuit's ruling but went no further in addressing compensation or NIL.[30] On appeal to the Supreme Court, the student-athletes did not renew their challenges to the NCAA's across-the-board compensation restrictions.[31] As a result, the Court failed to go so far as to limit the NCAA's ability to restrict student-athletes from receiving compensation unrelated to education, the bedrock of NIL.[32] In short, the Court found that the NCAA's amateurism-centric business model violated anti-trust law, but in light of the

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[22] *Id.*
[23] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2151 (2021).
[24] *Id.* at 2153.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 2154.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 2166.
[31] *Id.* at 2154.
[32] *See generally id.*

very narrow issue of education-related compensation before it, it took only modest steps to restrict that model.[33]

Nonetheless, certain aspects of the Court's analysis belied a broader skepticism of the NCAA's business model and foreshadowed trouble for the NCAA in similar future litigation. In deciding *Alston*, the Supreme Court upheld the lower court's determination that the NCAA's compensation restraints are subject to the "Rule of Reason" analysis.[34] By using the Rule of Reason analysis, the district court required the NCAA to prove that its restraints on education-related benefits were not anticompetitive.[35] Applying that rule, the district court found that the NCAA's restrictions on compensation were in fact anticompetitive.[36] The Supreme Court, though only considering the issue of restrictions on education-related benefits, agreed.[37] In affirming the lower court's decision, the Supreme Court held that the NCAA itself is not exempt from the Rule of Reason[38] and thus hinted that future antitrust litigation against the NCAA would subject the NCAA's restrictions to the same Rule of Reason scrutiny.

In addition, Justice Kavanaugh's concurring opinion was the strongest evidence of the Court's broader concerns about the NCAA's business model. In his concurrence, Kavanaugh stressed that, although the Court addressed only the narrow issue of education-related benefits in *Alston*, he had serious concerns about the rest of the NCAA's compensation restrictions.[39] Specifically, Kavanaugh opined that

> there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification.[40]

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[33] *See generally id.*
[34] *Id.* at 2156.
[35] *See id.* at 2151.
[36] *Id.* at 2152.
[37] *Id.* at 2166.
[38] *Id.* at 2156 ("Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review.").
[39] *Id.* at 2167 (Kavanaugh, J. concurring).
[40] *Id.*

Essentially, although the Court did not consider the NCAA's restrictions on compensation wholesale in *Alston*, the NCAA would still have to provide procompetitive reasons to support their suppression of student-athlete compensation in order to satisfy Rule of Reason scrutiny in any future antitrust litigation.[41] Given that much of the NCAA's argument on appeal in *Alston* focused on attempting to invalidate the use of Rule of Reason analysis rather than actual procompetitive justifications for their restrictions, those justifications may simply not exist.

More strikingly, in his concurrence Kavanaugh also explicitly and comprehensively echoed the principal criticism of the NCAA from *O'Bannon* and elsewhere: "The bottom line is that the NCAA and its member colleges are suppressing the pay of student-athletes who collectively generate billions of dollars in revenues for colleges every year."[42] Kavanaugh's concurrence thus added a practical lens through which to view the Court's complex legal decision. In addition to the Court's unanimous view that the NCAA's structure is anticompetitive, and at least partly in violation of anti-trust law, Kavanaugh's concurrence also laid out a more basic argument that that entire structure is inherently unfair.[43] In doing so, Kavanaugh espoused the basic argument that student-athletes had been making against the NCAA since *O'Bannon* and before. That a sitting Supreme Court Justice so clearly disagreed with the basic premise of the NCAA's business model foreshadowed major difficulties for the NCAA's maintenance of its traditional amateurism model in college sports moving forward.

Indeed, though *Alston* did not legally invalidate the NCAA's broad compensation restrictions, in practice, it had that effect.[44] Following its sound defeat before the Supreme Court, the NCAA effectively surrendered its control of student-athlete compensation to schools, conferences, and states.[45] Thus, in the wake of *Alston*, the college athletics landscape changed essentially overnight.[46]

However, due to the nature of *Alston* and the lack of federal NIL legislation, those changes took place on a state-by-

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[41] *Id.*
[42] *Id.* at 2168.
[43] *Id.*
[44] Andrew Brandt, *Business of Football: Supreme Court Sends a Message to NCAA*, SPORTS ILLUSTRATED (June 29, 2021), https://www.si.com/nfl/2021/06/29/business-of-football-supreme-court-unanimous-ruling.
[45] *Id.*
[46] Richard Johnson, *Year 1 of NIL Brought Curveballs, Collectives and Chaos. Now What?* SPORTS ILLUSTRATED (July 12, 2022), https://www.si.com/college/2022/07/12/nil-name-image-likeness-collectives-one-year.

state basis.[47] Neither the Supreme Court nor the NCAA proscribed a methodology for administering NIL. In fact, neither even explicitly allowed NIL at all. Similarly, despite several proposed bills, the United States Congress has yet to pass federal legislation outlining any guardrails for NIL administration.[48] As a result, the development of NIL law has taken place solely at the state level.[49] Following *Alston*, once it became clear that the NCAA would no longer restrict student-athlete compensation, states rushed to enact NIL legislation to avoid college athletic recruiting imbalances that might be created by their inaction.[50] As it were, in anticipation of the *Alston* decision, six states already had laws set to go into effect on July 1, 2021.[51] As of July 2022, 29 states had passed some form of legislation addressing NIL, whether by legislation or executive order.[52]

II. NORTH CAROLINA'S NIL LAW

North Carolina was at the front of the race to authorize NIL.[53] On July 2, 2021, North Carolina, like many other states, passed a law governing NIL in the immediate wake of *Alston*.[54] Unlike some other states, the law came in the form of an executive order from Governor Roy Cooper.[55] North Carolina Executive Order 223 gave North Carolina college athletes the right to profit from their name, image, and likeness in a way they never had been able to before.[56] Specifically, the order dictated that

> Student Athletes enrolled in a postsecondary institution located in the State of North Carolina are allowed by the laws of this state to earn compensation and obtain related representation, for use of their name, image, and likeness while enrolled at the institution and such compensation and representation for their name, image, and

[47] Ezzat Nsouli & Andrew King, *How US Federal and State Legislatures Have Addressed NIL*, SQUIRE PATTON BOGGS (July 13, 2022), https://www.sports.legal/2022/07/how-us-federal-and-state-legislatures-have-addressed-nil/.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *See id.*
[52] *Id.*
[53] Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2, 2021).
[54] *Id.*
[55] *See e.g.*, TENN. CODE ANN. § 49-7-2802 (2022); N.C. EXEC. ORDER 223.
[56] Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2, 2021).

> likeness shall not affect a student-athlete's scholarship eligibility.[57]

In short, student-athletes were finally allowed to profit from their name, image, and likeness without being suspended from competition or disciplined. However, the law did not give student-athletes the *complete* ability to sign whatever deals that they wanted. Instead, the law also allows restrictions on the kinds of brand deals student-athletes can make, including signing contracts that conflict with existing contracts of the university and signing deals with university organizations.[58]

The most problematic of these restrictions is the last one, outlined in Section 1(B)(iii). That section reads:

> An institution may impose reasonable limitations or exclusions on the categories of products and brands that a student-athlete may receive compensation for endorsing or otherwise enter into agreements or contracts for use of their name, image, and likeness to the extent that the institution *reasonably determines that a product or brand is antithetical to the values of the institution or that association with the product or brand may negatively impact the image of the institution*.[59]

At its core, this provision gives individual universities broad control over the kinds of deals student-athletes can make, regardless of whether those deals create a legitimate contractual conflict or conflict of interest. Presumably, that provision is in place to prevent student-athletes from signing deals and advertising with less-than-desirable business partners. The provision is not unique among state NIL provisions; many states enact "vice provisions" that prevent athletes from advertising for specific categories of businesses, such as tobacco, adult entertainment, cannabis, or gambling.[60] Section 1(B)(iii) is North Carolina's version of a vice provision, and it is likely intended to prevent athletes from entering into partnerships that might have the potential to embarrass North Carolina universities.[61] While

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[57] *Id.*
[58] *Id.* § 1(B)(i).
[59] *Id.* § 1(B)(iii) (emphasis added).
[60] Sam C. Ehlrich & Neal C. Ternes, *Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech*, 45 COLUM. J. L. & ARTS 47, 56–57 (2021).
[61] Exec. Order No. 223 § 1(B)(iii), 36 N.C. Reg. 152, 153 (July 2, 2021).

that cause may be understandable, the poor execution of that goal in Executive Order 223 has constitutional consequences.

Section 1(B)(iii) is most troubling because of its vagueness and the breadth of activity and speech it encompasses. Perhaps because it is an executive order rather than a statute, and thus merely lacks the space to do so, the provision makes no attempt to define what any of its material language means. "[R]easonably determines," "antithetical to the values of the institution," and "negatively impact the image of the institution" are all left undefined.[62] Failing to define those elements renders the provision unfathomably broad. Ostensibly, that language could encompass any number of brand deals that athletes might sign. As a result, the state has given universities near unilateral control over the kinds of contracts their student-athletes can sign and the brands with which they can partner. These restrictions violate North Carolina student-athletes' traditionally protected rights to commercial speech. In addition, these restrictions violate the well-established constitutional doctrine of overbreadth.

A. State Action

In order to constitute a violation of the Constitution, a restriction must include some form of state action. As a result, in order to analyze Executive Order 223 in the context of constitutional viability, one must analyze its state action component. Specifically, the analysis must focus on the issue of whether the NIL law is unconstitutional as applied by all North Carolina universities, whether public or private, or whether it is merely unconstitutional as applied by North Carolina public universities.

It is a bedrock constitutional principle that the guarantee of free speech is a guarantee only against abridgment by the government.[63] While it is well-established that public universities are state actors, the same cannot be said of private institutions.[64] As a result, the state actor analysis for private universities is somewhat more complicated. The Constitution itself thus does not provide protection against abridgment of free speech by individuals or private entities.[65] However, in some circumstances, private action can be converted into government action if that action is compelled by a state or federal law. In

[62] *See generally* Exec. Order No. 223, 36 N.C. Reg. 152, 153 (July 2, 2021).
[63] Hudgens v. NLRB, 424 U.S. 507, 513 (1976).
[64] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988).
[65] *Id.* at 191.

Flagg Bros., Inc. v. Brooks, the Supreme Court pointed out "that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act."[66]

Some state NIL laws do indeed compel even private institutions to act in accordance with the legislation.[67] In those cases, the statutory language affirmatively prohibits certain behavior by student-athletes regarding NIL compensation.[68] For example, Mississippi's NIL law reads, "No student-athlete shall enter into a name, image, and likeness agreement or receive compensation from a third-party licensee for the endorsement or promotion of gambling . . . ."[69] Similarly, Arkansas' NIL law mandates that "a student-athlete participating in varsity intercollegiate athletics is prohibited from earning compensation as a result of the commercial use of the student-athlete's publicity rights in connection with any person or entity related to . . . adult entertainment . . . ."[70] Rather than merely give universities permission to regulate student-athlete speech, these statutes compel the universities to do so and make no distinction between private universities and public ones. As a result, these statutes almost certainly satisfy the state action requirement laid out in *Brooks*. Thus, because those statutes include a state *compelling* institutions to restrict free speech, such regulations are almost certainly unconstitutional as applied by all universities—even private ones—in those states.

Conversely, some state NIL laws only permit universities to enact certain restrictions on student-athlete commercial speech. The *Brooks* Court further held that when a state law "permits but does not compel" private action, the state action requirement for a constitutional violation is not satisfied.[71] North Carolina's law falls into this category. The language in the executive order that "[a]n institution *may* impose reasonable limitations"[72] is indicative of legislation that is permissive, not compulsive. As a result, private institutions in North Carolina enacting NIL restrictions likely are not subject to the same constitutional scrutiny that either the state itself or its public institutions would be. A litigant challenging the constitutionality of private universities' NIL restrictions would likely have a

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[66] 436 U.S. 149, 164 (1978) (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970)).
[67] Ehlrich & Ternes, *supra* note 60, at 60–61.
[68] *Id.*
[69] S. 2690, 2021 Leg., Reg. Sess. § 3(13) (Miss. 2021).
[70] H.R. 1671, 93 Gen. Assemb., Reg. Sess. § 1 (Ark. 2021).
[71] *See Brooks*, 436 U.S. at 165–66.
[72] Exec. Order No. 223, 36 N.C. Reg. 152, 1 (July 2, 2021).

difficult time proving the state action requirement, and as a result, those private institutions are not subject to the same liability as the state's public institutions.

Put simply, a private university enforcing restrictions on its student-athletes' NIL deals does not violate the Constitution, while a state university doing the same likely does. As a result, the following analysis applies only to NIL restrictions undertaken by North Carolina's public universities. Nonetheless, because Executive Order 223 still applies to thousands of student-athletes at North Carolina's public universities, it is worthy of scrutiny.

III. EXECUTIVE ORDER 223'S CONSTITUTIONAL DEFECTS

A. North Carolina's NIL law fails the Central Hudson *test for the protection of commercial speech rights.*

North Carolina's NIL law represents an unconstitutional restriction on student-athletes' commercial speech rights. To analyze the constitutional defects with Executive Order 223, one must begin with an understanding of commercial speech. Commercial speech is speech or expression which is "related solely to the economic interests of the speaker and the audience."[73] Under the Supreme Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, commercial speech is still subject to constitutional protection, albeit at a lesser level than noncommercial speech.[74] According to *Central Hudson*, "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[75]

Commercial speech was first recognized by the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[76] There, the Court found that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another."[77] In the case of NIL law, the speech at issue pertains to advertisements and other forms of speech that relate to the financial interests of college athletes. Much of the existing NIL

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[73] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980) (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976)).
[74] *See id.* at 563.
[75] *Id.*
[76] *See* 425 U.S. 748, 761 (1976).
[77] *Id.*

ecosystem centers around brand deals for advertisements, where a company pays a student to promote that company or its products in one way or another.[78] Some college athletes appear as spokesmen in commercials,[79] while others simply make social media posts promoting brands in exchange for money or free merchandise.[80]

In both cases, the activity at issue constitutes commercial speech as outlined in both *Virginia State Board of Pharmacy* and *Central Hudson.* Under *Virginia State Board of Pharmacy*, the speech should be protected even though it comes in the form of a paid advertisement. At their core, NIL deals are paid advertisements in which student-athletes speak on behalf of brands in exchange for monetary compensation. However, Supreme Court precedent dictates that that speech does not lose its constitutional protection merely because it involves the exchange of money.[81] Similarly, under *Central Hudson*, the speech constitutes commercial speech because it relates solely to the economic interests of the speaker and the audience.[82] In the case of NIL promotions, the speakers (the athletes) are promoting brands solely because they receive money to do so. In addition, the speech they promote is intended to advertise the sale of consumer goods and services to the audience. Thus, in both instances, the speech relates only to the economic interests of the speaker and the audience and satisfies the definition of commercial speech laid out in *Central Hudson*. However, commercial speech is not unilaterally protected by the First Amendment in the same way most other speech is, and further analysis is necessary to determine whether the speech deserves First Amendment protection.[83]

In order to determine whether commercial speech is protected under the First Amendment, the Court in *Central Hudson* developed a four-part test.[84] The first prong of the *Central Hudson* test asks whether the speech at issue is protected by the

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[78] Dan Whateley & Colin Salao, *How College Athletes Are Getting Paid from Brand Sponsorships as NIL Marketing Takes Off*, BUSINESS INSIDER (Dec. 19, 2022, 10:58 AM), https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals-2021-12.

[79] *See, e.g.*, Max Escarpio, *College Football's Most Unique NIL Deals in 2022*, BLEACHER REPORT (Aug. 16, 2022), https://bleacherreport.com/articles/10045014-college-footballs-most-unique-nil-deals-in-2022.

[80] Johnson, *supra* note 46.

[81] *Va. State Bd. of Pharmacy*, 425 U.S. at 761.

[82] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

[83] *See id.* at 563.

[84] *Id.* at 566.

First Amendment generally.[85] In order to be protected by the First Amendment, the speech must simply concern lawful activity and cannot be misleading.[86] If the speech is both lawful and not misleading, then the court must ask whether the government has an interest and, if so, whether the asserted interest is substantial.[87] Finally, if the answer to each inquiry is yes, the court must discern whether the regulation directly advances the asserted government interest and whether it is more extensive than necessary to achieve its stated purpose.[88] If the asserted interest is protected under the First Amendment and the government regulation is more extensive than necessary to advance the government interest, then the regulation fails the test and is unconstitutional.[89]

Given that Executive Order 223 involves commercial speech, we can apply the *Central Hudson* test to determine whether the law is too restrictive. Section 1(B)(iii) applies to all speech "that the institution reasonably determines that a product or brand is antithetical to the values of the institution or that association with the product or brand may negatively impact the image of the institution."[90] Though North Carolina's NIL law does not outline explicit categories of brand deals that are prohibited, many other states' NIL laws do.[91] Those laws routinely restrict athletes from signing deals with alcohol, tobacco, gambling, firearms, pornography, and other morally ambiguous companies.[92]

For the sake of illustration, this paper will assume those types of brand deals are what the Governor intended to allow universities to prohibit. Thus, I will use a student-athlete's hypothetical endorsement deal with an alcohol brand as an example of an agreement that Executive Order 223's language might allow a university to restrict. Under the existing language, the institution might argue that the alcohol brand is antithetical to the values of the institution, and it could argue that allowing one of its student-athletes to advertise for an alcohol brand might reflect negatively on the institution. The institution might argue

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[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *See id.*
[90] Exec. Order No. 223 § 1(B)(iii), 36 N.C. Reg. 152, 1 (July 2, 2021).
[91] *Laws for College Athlete Name, Image, and Likeness Rights: 50-State Survey*, JUSTIA, https://www.justia.com/sports-law/college-athlete-name-image-and-likeness-rights-50-state-survey (last visited Mar. 23, 2023).
[92] *Id.*

that North Carolina is a traditionalist, southern state, and that many North Carolinians would be upset by one of their universities allowing its student-athletes to advertise for an alcohol brand. Finally, it might also argue that allowing student-athletes to advertise for alcohol brands may promote underage drinking. As a result, student-athletes might be banned from signing endorsement deals to promote alcohol brands and would lose out on any profits they might have made from those deals.

However, using the *Central Hudson* test, this type of restriction would likely be unconstitutional. An athlete's deal with an alcohol brand would satisfy its first prong because it is not illegal or misleading. Assuming the advertisement has no misleading information and that the student is of age, the speech would normally be protected under the First Amendment. As a result, the speech would satisfy the first prong of the test, and the inquiry would proceed to whether the government has a substantial interest in regulating the speech.

The government might assert that it has an interest in protecting the image of its institutions of higher education and that allowing a college student to advertise for an alcohol brand damages the reputation of a state institution. Nonetheless, this prong of the analysis is where the Executive Order is most susceptible to scrutiny. In 2019, the North Carolina legislature allowed the University of North Carolina (UNC) and North Carolina State University (NC State) to sell alcohol at football games for the first time.[93] Later that year at UNC, vendors began selling beer, wine, hard seltzers, and ciders throughout the stadium during UNC home games.[94] In its first three games where alcohol sales were allowed, UNC set records by raking in over one million dollars in concessions sales.[95] In total, UNC sold more than 43,000 units of alcohol in those first three games alone.[96] In short, alcohol sales were, and presumably continue to be, quite profitable for schools like UNC.[97]

Given that a public university like UNC or NC State derives hundreds of thousands of dollars in revenue from alcohol

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[93] Kate Murphy, *UNC and NC State Got the OK to Sell Alcohol in Stadiums. Now, How Do They Make It Work?*, NEWS & OBSERVER (July 3, 2019), https://www.newsobserver.com/news/local/article232189502.html.

[94] Kate Murphy, *Beer and Wine Will Be for Sale at Saturday's UNC Football Game. What You Need to Know*, NEWS & OBSERVER (Sept. 5, 2019), https://www.newsobserver.com/news/local/education/article234701977.html.

[95] Hayley Fowler, *Alcohol Boosts Concession Sales to Over $1M at UNC's First 3 Home Games, Reports Say*, CHARLOTTE OBSERVER (Oct. 12, 2019, 2:59 AM), https://www.charlotteobserver.com/sports/college/football/article236055453.html.

[96] *Id.*

[97] *See id.*

sales at football games, one struggles to imagine how a student-athlete advertising for an alcohol brand would tarnish the university's image. More specifically, alcohol is clearly not "antithetical to the values of the institution . . . ."[98] Not only do public universities condone the consumption of alcohol, they collect significant revenue from it.[99] Nonetheless, Executive Order 223 presumably allows those same universities to restrict athletes from signing brand deals and advertising for the same sorts of products from sales of which it collects a hefty profit.[100] From that perspective, it is difficult to imagine a scenario in which the state maintains an interest in ostensibly regulating student-athletes' compensation from brands that it sells at its flagship universities' football games.

If, for the sake of analysis, one assumes there is a government interest, the next prong of the analysis is whether that interest is substantial. It is reasonable to assume that the government does have a substantial interest in higher education and in protecting the reputation of its colleges and universities. Providing education is a critical function of government, and maintaining a state with prestigious institutions of higher learning could arguably constitute a substantial interest. Allowing student-athletes to advertise with less-than-desirable brands and industries could ostensibly infringe upon that interest. The government might also have a substantial interest in preventing underage drinking, and it could make a colorable argument that allowing student-athletes to advertise for alcohol brands infringes on that interest as well.

However, even assuming that prong of the analysis is satisfied, the law violates the final prong of the test. First, the regulation does not directly advance the state interests. The relationship between a college athlete advertising for an alcohol brand and any negative effect on a university or its academic reputation is too attenuated to survive scrutiny under *Central Hudson*. In applying the *Central Hudson* test to advertising, the Supreme Court in *Lorillard Tobacco Co. v. Reilly* held that "a regulation cannot be sustained if it 'provides only ineffective or remote support for the government's purpose.'"[101] There, the Court found that advertising restrictions on tobacco products

[98] Exec. Order No. 223 § 1(B)(iii), 36 N.C. Reg. 152, 152 (July 2021).
[99] Fowler, *supra* note 95.
[100] *See generally* Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2021).
[101] 533 U.S. 525, 566 (2001) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980)).

were too remote to serve a legitimate government purpose in prohibiting tobacco sales to minors and were thus invalid.[102] Specifically, the restrictions prohibited tobacco companies from placing advertisements less than five feet from the floor in an effort to limit youth exposure to tobacco products.[103] The Court held that a restriction is invalid "if there is 'little chance' that the restriction will advance the State's goal."[104]

In this case, Executive Order 223 provides only remote support for any perceived state interest and has little chance of advancing the state's goal.[105] The restriction at issue in the executive order presupposes that a student-athlete advertising for an "unfavorable" brand will be recognized by consumers and associated with the university to such an extent that public sentiment toward the university will change.[106] Such a possibility is simply too remote to justify a restriction on commercial speech. There is little chance that preventing student-athletes from advertising with alcohol or any other vice brands will have any appreciable effect on the reputation or prestige of a state university. The same can be said about the support for the state interest of preventing underage drinking. Preventing student-athletes from advertising for alcohol brands may well have some effect on preventing underage drinking. However, whatever that effect is, it is not significant enough to justify infringing on commercial speech rights. The restrictions simply do not provide sufficient support for the state's interests.

In addition to only providing remote support for the government's asserted interests, the law is more extensive than necessary to achieve the desired purpose. While there is undoubtedly commercial speech related to NIL deals that the state has a substantial interest in regulating—including deals with companies engaged in illegal activities like gambling or consuming marijuana—it most certainly does not have an interest in regulating all commercial speech.

Thus, the law fails the *Central Hudson* test. However, in order to understand another constitutional deficiency with the law, one must understand the constitutional concept of overbreadth.

B. North Carolina's NIL law is unconstitutional because it is overbroad.

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[102] *Id.* at 567.
[103] *Id.* at 566.
[104] *Id.* (quoting Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 193 (1999)).
[105] *See* Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2, 2021).
[106] *See id.*

North Carolina's NIL law is also constitutionally deficient because it is overbroad. The overbreadth doctrine allows courts to invalidate laws that promote a legitimate state interest but also restrict or inhibit significant portions of protected speech.[107] The Supreme Court has held that a law is overbroad if it prohibits a substantial amount of protected speech.[108] The Court first recognized the overbreadth doctrine in the 1940 case of *Thornhill v. Alabama*.[109] There, the Court found that an Alabama statute was overbroad because it outlawed both peaceful and truthful discussions of labor issues as well as violent actions.[110]

The Court also addressed overbreadth that same year in the case of *Cantwell v. Connecticut*.[111] In that case, the Court found that a "breach of the peace" statute improperly restricted protected speech as well as speech that could be regulated.[112] Specifically, the Court pointed out that, "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[113] In determining whether a state action is overbroad, the Court has held that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[114]

Executive Order 223 is overbroad because it encompasses both speech that might be subject to regulation *and* speech that is protected under the First Amendment. Notwithstanding this law, student-athletes would be able to exert their right to commercial speech with alcohol vendors, tobacco vendors, and other similar industries. Commercial speech related to those industries would very likely be protected under *Central Hudson*. Outside of those industries, there are countless other examples of speech that could potentially be inhibited by Executive Order 223. The vagueness of the Order's language means that any number of brand deals could be restricted by virtue of being "antithetical to the values of the institution." As a result,

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[107] Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 31 (2003).
[108] United States v. Williams, 553 U.S. 285, 292 (2008).
[109] 310 U.S. 88, 106 (1940).
[110] *See id.*
[111] *See generally* 310 U.S. 296 (1940).
[112] *Id.* at 300, 311.
[113] *Id.* at 304.
[114] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

Executive Order 223 is unconstitutionally overbroad because it restricts too much speech that would otherwise be protected.

To conclude that Executive Order 223 is overbroad is not to say that the law does not encompass some speech that is worthy of being regulated. As briefly mentioned above, the law was likely intended to prevent athletes from signing deals with marijuana brands, sports betting companies, and other enterprises which are illegal in North Carolina. Those kinds of deals would fail the *Central Hudson* test because they involve illegal activity and would thus be subject to government regulation.[115] Similarly, there is other speech concerning legal enterprises that could also be subject to regulation under *Central Hudson*, provided that there is a substantial government interest and the legislation directly supports that interest.[116] In addition, there are various other legal industries for which allowing student-athletes to advertise could legitimately harm the reputation of the athletes' universities. For example, pornography and firearms would likely fall into this category.

However, this distinction highlights Executive Order 223's deficiency: rather than name these industries individually, it confers public universities broad regulatory power over student-athlete advertising for even innocuous brands and industries. It makes no attempt to distinguish between speech the state has a substantial government interest in regulating and speech it does not. As a result, the law is unconstitutional as a restriction on commercial speech.

C. North Carolina's NIL law also does not fall under the public school speech exceptions under Morse *and* Hazelwood.

Some might argue that Executive Order 223 might survive constitutional scrutiny because of the doctrines outlined by the U.S. Supreme Court in *Hazelwood School District v. Kuhlmeier*[117] and *Morse v. Frederick*,[118] particularly given that the law applies only to public universities. However, this argument is invalid on a number of grounds.

Morse and *Hazelwood* are two of the more recent public school speech decisions by the Supreme Court. In *Hazelwood*, Robert Eugene Reynolds, the principal of a Missouri public high school, censored two articles students sought to publish in their

[115] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980).
[116] *Id.* at 564.
[117] 484 U.S. 260 (1988).
[118] 551 U.S. 393 (2007).

school-sponsored newspaper, called *Spectrum*.[119] The articles were about students' experiences with pregnancy and divorce respectively, and Reynolds believed their content was inappropriate for publication in a school-sponsored high school newspaper.[120] In addition, he believed that students at the school might be able to identify the subjects of the articles, despite the newspaper's attempts at anonymity.[121] As a result, Reynolds, with his superiors' approval, directed the students not to publish the two articles.[122] The students sued the school district in Federal Court, seeking monetary damages and an injunction allowing them to publish the articles and a declaration that their First Amendment rights had been violated, in addition to monetary damages.[123] On appeal to the Supreme Court, a six justice majority found in favor of the school district and ruled that Reynolds did not violate the First Amendment by removing the two articles from publication.[124] In its majority opinion, the Court articulated a new standard for evaluating a public school's restriction on school-sponsored speech. Specifically, the Court held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[125] In this context, the Court recognized "school-sponsored expressive activities" as those that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[126]

In *Morse*, the principal of Juneau-Douglas High School in Alaska suspended Joseph Frederick, a student at the school, for unfurling a large banner that read "Bong Hits 4 Jesus" during a school-sanctioned event to watch the Olympic Torch relay pass through Juneau.[127] After the school superintendent upheld Frederick's suspension, Frederick brought suit, alleging that the school board and Principal Morse had violated his First Amendment right to free speech.[128] On appeal to the U.S.

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[119] *Hazelwood*, 484 U.S. at 262–63.
[120] *Id.* at 263.
[121] *Id.*
[122] *Id.* at 264.
[123] *Id.*
[124] *Id.* at 274.
[125] *Id.* at 273.
[126] *Id.* at 271.
[127] Morse v. Frederick, 551 U.S. 393, 397–98 (2007).
[128] *Id.* at 399.

Supreme Court, the majority found for Morse.[129] In the majority opinion, the Court cited a number of public school cases that indicate limited constitutional protections for students in public schools given the important nature of public education.[130] In addition, the Court found that the banner could reasonably be regarded as promoting illegal drug use and held that schools can take steps to safeguard their students from such messaging.[131] More broadly, the Court held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[132] However, the Court indicated that were the restricted speech made by a student *outside* of school, it would be protected.[133]

Though *Morse* and *Hazelwood* expand public school officials' ability to limit student speech, they are not applicable to Executive Order 223 for several reasons. First, those cases arose from speech in the public *high school* context, while Executive Order 223 applies only to students at postsecondary institutions.[134] This difference is critical because the holdings of those cases are presumably limited to the public high school context. Much of the language in *Morse* and *Hazelwood* that allows the restriction of speech is contingent on the context in which it occurred, rather than the speech's content. For example, the *Hazelwood* court referenced "adolescent subjects and readers" as a justification for allowing the restriction of potentially controversial speech in a high school newspaper.[135] Similarly, the *Morse* Court recognized that deterring drug use in "schoolchildren" is a vital government interest that is worthy of protection.[136]

Clearly, the restrictions in Executive Order 223 are distinguishable from those which were acceptable in *Morse* and *Hazelwood*. The restricted speech would be targeted to the public at large primarily through advertising, not pointed at adolescents or schoolchildren in the high school context. Colleges have long been bastions of free speech and the exploration of new ideas. This setting is vastly different than high schools, where teachers and administrators must protect the interests of adolescent

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[129] *Id.* at 410.
[130] *See id.* at 406.
[131] *Id.* at 396.
[132] *Id.* at 404–05 (citing Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).
[133] *See id.* at 405.
[134] *See* Exec. Order No. 223, 36 N.C. Reg. 152, 1 (July 2, 2021).
[135] Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988).
[136] *Morse*, 551 U.S. at 407, 410.

students at a crucial time in their development. As a result, in the college setting, the justifications for allowing the speech in *Morse* and *Hazelwood* (i.e., protecting adolescent students from sensitive topics) disappear. In addition, substantively all of the athletes promoting the speech would be adults given they are college students. Thus, *Hazelwood* and *Morse* flatly do not apply in this context.

In addition, *Hazelwood* is inapplicable because the restricted speech at issue here would not take place in a school-sponsored forum. The speech in *Hazelwood* was problematic in large part because it was to be published in a high school newspaper that bore the school's name and was inappropriate for an audience comprised mostly of high schoolers.[137] Specifically, the Court held that

> Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[138]

Here, there are no such concerns about the speech being sponsored by athletes' universities or the public construing it as such. The speech would not take place in a forum analogous to a high school newspaper, and it is unlikely that the views of the individual speaker would be erroneously attributed to the athlete's university. For example, an athlete's deal with a local coffee shop cannot reasonably be perceived to bear the imprimatur of a university in the same way a school-funded high school newspaper would. Support for this assertion can actually be found in the *Morse* Court's discussion of *Hazelwood*.[139] The Court held that the student's speech in *Morse* did not reasonably bear the imprimatur of his school, despite the fact that he was a student at the school and made the speech at a school event.[140] Therefore, simply being a student at a university and making speech in a commercial context cannot reasonably be attributed

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[137] *See generally Hazelwood*, 484 U.S. at 271.
[138] *Id.*
[139] *Morse*, 551 U.S. at 405.
[140] *Id.*

to that university either. In sum, the content of a brand deal is wholly different than content published in a high school newspaper, and the concerns of the *Hazelwood* Court are simply not present here.

Finally, *Hazelwood* and *Morse* are inapplicable because there are no legitimate pedagogical or moral concerns with student-athlete commercial speech at the college level. In *Hazelwood*, the Court's articulated standard for allowing limitations on student speech was that "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[141] Similarly, in *Morse*, the Court held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."[142] Thus, the ability to limit speech by public high school officials is founded on an interest in shielding students from topics that are too sensitive or mature for them and in promoting learning. As discussed briefly above, those concerns are not present for college students, who learn in a vastly different way in a wholly different setting than high school students do. Even if the athlete's speech at issue here was made in a school-sponsored forum, such as a college newspaper, college administrators do not have the same interests in protecting college students from those topics that high school administrators do. Thus, while *Morse* and *Hazelwood* expanded high school educators' ability to limit the speech of their students, those restrictions have not, and should not, be expanded to the university context. As a result, those cases do not apply in the context of student-athlete commercial speech, and they do not save the constitutionality of Executive Order 223.

IV. THE NORTH CAROLINA GENERAL ASSEMBLY MUST CODIFY A STATUTE THAT BRINGS NORTH CAROLINA'S NIL LAW INTO CONSTITUTIONAL COMPLIANCE.

In sum, North Carolina's NIL law does not pass constitutional muster because it is an overbroad infringement on commercial speech. While North Carolina was on the cutting edge of the NIL landscape at the outset, its current system must be modified in order to better protect the rights of North Carolina college athletes. There are several ways that North Carolina can

[141] *Hazelwood*, 484 U.S at 261.
[142] *Morse*, 551 U.S. at 397.

address these shortcomings while still passing legislation that is beneficial to the state, its universities, and its student-athletes.

The first step in addressing the law's constitutional deficiencies is for the North Carolina General Assembly to codify an NIL law into statute. One of the major problems with the law in its current form is that, even over a year after its inception, it still exists only in an executive order issued the day after *Alston* was decided.[143] More specifically, the current law is only three pages long, and it simply lacks the depth to fully define and explain many of the intricacies associated with NIL legislation.[144] For example, the current law gives no procedures, definitions, or examples of the key concepts it purports to govern.[145] If the legislature were to codify NIL into a statute, it could better address some of these deficiencies. Terms like "antithetical to the values of the institution"[146] could be defined in a way that prevents universities from having carte blanche to restrict any deals that they disagree with. A legislative bill would likely be much more specific than the Executive Order currently is.

To be most effective, the legislature could simply outline specific, appropriate vice industries with whom student-athletes are prevented from signing deals. Such language would stand a much better chance at succeeding under the *Central Hudson* test because the state could more easily prove both a legitimate government interest in regulating the speech and because the restriction would be more likely to directly advance the government's purpose.

Other states have codified statutes that address NIL and its restrictions in a number of ways.[147] While some state NIL statutes raise similar constitutional issues to Executive Order 223, others more appropriately address NIL without violating the Constitution.[148] Generally, there are three categories of restrictions on vice industries in existing NIL statutes.

First, some restrictions, like Executive Order 223, broadly prohibit student-athlete compensation from industries that

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[143] Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2, 2021).
[144] *Id.*
[145] *See id.*
[146] *Id.* § 1(B)(iii).
[147] *E.g.*, KY. REV. STAT. ANN. §164.6945(4) (West 2022); *see also* ARIZ. REV. STAT. ANN. § 15-1892(D) (2021).
[148] *E.g.*, KY. REV. STAT. ANN. §164.6945(4) (West 2022); *see also* ARIZ. REV. STAT. ANN. § 15-1892(D) (2021).

infringe on the values of the institution.[149] Tennessee's NIL law falls into this category.[150] Tennessee's NIL statute outlines the framework of NIL compensation for Tennessee student-athletes.[151] Section (g) of that statute includes restrictions on the kinds of compensation those student-athletes can receive.[152] One of those restrictions reads, "[a]n institution may prohibit an intercollegiate athlete's involvement in name, image, and likeness activities that are reasonably considered to be in conflict with the values of the institution."[153] That restriction is very similar to the language used in North Carolina's executive order and it too prohibits a significant amount of otherwise protected speech. Like the Executive Order, Tennessee's statute gives broad authority to universities to prohibit any speech they deem antithetical to their values. Thus, that statute would also fail the *Central Hudson* test for restrictions on commercial speech and is likely unconstitutional. As a result, similar language in a North Carolina statute would make little progress toward passing constitutional muster.

Another category of vice industry restrictions in NIL statutes are statutes that outline specific—often already illegal—industries that are off-limits for student-athlete compensation.[154] Kentucky's NIL law falls into this category.[155] Section 164.6945(4) restricts student-athletes from signing certain NIL deals, but unlike Tennessee's statute or North Carolina's executive order, it enumerates the types of deals that are prohibited.[156] Specifically, that section indicates that:

> A student-athlete shall not enter into an NIL agreement to receive compensation from a third party relating to the endorsement or promotion of: (a) Sports betting; (b) A controlled substance; (c) A substance the student-athlete's intercollegiate athletic association forbids the athlete from using; (d) Adult entertainment; or (e) Products or services that would be illegal for the student-athlete to possess or receive.[157]

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[149] *E.g.*, TENN. CODE ANN. § 49-7-2802(g)(1) (2022).
[150] *Id.*
[151] *Id.* § 49-7-2802.
[152] *Id.* § 49-7-2802(g)(1).
[153] *Id.*
[154] *E.g.*, KY. REV. STAT. ANN §164.6945(4) (2022).
[155] *Id.*
[156] *Id.*
[157] *Id.*

This section is significantly more explicit about what deals are prohibited than North Carolina's law is, and as a result, it is much more likely to be considered constitutional.[158] It specifically outlines the classes of deals that a student-athlete is restricted from signing, rather than offering a blanket prohibition grounded in ambiguous language.[159] As a result, this sort of law has a much greater chance of surviving scrutiny under the *Central Hudson* test. Additionally, much of the prohibited speech is prohibited because the activity underlying it is illegal. Further, the restrictions relating to speech that is not illegal (adult entertainment, for example) are narrowly tailored and no more extensive than necessary to achieve the government's purpose, which is ostensibly to maintain the image of Kentucky's universities. Thus, this statute is almost certainly constitutional. As a result, North Carolina could adopt a similar NIL statute to avoid running afoul of the Constitution.

Finally, the last category of vice restrictions in existing state legislation consists of statutes with no vice restrictions at all.[160] Arizona's NIL law is a good example of this type of legislation.[161] Its law outlines student-athlete restrictions on NIL deals.[162] However, unlike North Carolina, Tennessee, or Kentucky's laws, this law's restrictions are limited only to deals that violate intellectual property laws or existing university contracts and make no mention at all of vice industries or moral restrictions.[163] Specifically, that section reads,

> This section does not authorize student athletes to enter into a contract providing compensation for the use of the student athlete's name, image or likeness if doing so either: 1. Violates the intellectual property rights of any person, including the student athlete's postsecondary education institution. [or] 2. Conflicts with the student athlete's team contract.[164]

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[158] *Compare id.*, *with* Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2, 2021).
[159] *Compare* KY. REV. STAT. ANN §164.6945(4) (West 2022), *with* Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2, 2021).
[160] *E.g.*, ARIZ. REV. STAT. ANN. § 15-1892(D) (2021).
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*

By avoiding vice restrictions altogether, Arizona's NIL law ensures that it does not violate the Constitution at all. Instead, it gives Arizona student-athletes the ability to sign a wide variety of deals with a wide variety of companies. This category of NIL law is another option for the North Carolina Legislature. In addition to avoiding the constitutional issues involved with vice restrictions, a law like this one might also be attractive to student-athletes deciding where to attend college, since they would have access to a wider variety of NIL deals than in other states. Given that North Carolina Governor Roy Cooper issued the Executive Order with the goal of preventing the state's universities from falling behind in athletic recruiting compared to other states, this consideration might be one that is attractive. Regardless, an NIL statute similar to Arizona's is significantly more protective of commercial speech rights than North Carolina's current law.

CONCLUSION

North Carolina's NIL law was issued with a noble purpose. It sought to allow North Carolina's college athletes to finally profit from their name, image, and likeness in the way they had long deserved, while maintaining what seemed like common-sense protections for universities. However, the rush to authorize NIL in North Carolina had unintentional constitutional repercussions that are borne out in Executive Order 223's restrictive § 1(B)(iii). Specifically, the law infringes on the commercial speech rights of student-athletes. Executive Order 223 has served its purpose. Now, to properly protect North Carolina's student-athletes' commercial speech rights, NIL must be codified into a statute that includes all the constitutional protections those athletes are entitled to enjoy.

As outlined above, there are numerous options the North Carolina General Assembly can choose from when deciding how to draft that statute. Though lawmakers might be enticed to simply codify North Carolina's existing law, they would be better served by following the model set forth by states like Kentucky or Arizona. Otherwise, the state would likely still be in violation of the commercial speech rights of its college athletes. However they choose to do it, the North Carolina General Assembly must draft an NIL statute that at once serves the interests of state universities, student-athletes, and the state at large, all while complying with the Constitution and free speech rights. That reality does not currently exist in North Carolina, and statutory reform is needed to bring North Carolina's NIL law into compliance with the U.S. Constitution.

Thus, until the legislature drafts an appropriate statute, North Carolina's NIL law remains an overbroad violation of college student-athletes' commercial speech rights.