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# NARROWING THE PLAYING FIELD ON NIL COLLECTIVES

KATHRYN KISSKA-SCHULZE\*

## INTRODUCTION

In 2021, the U.S. Supreme Court called into question the National Collegiate Athletic Association's (NCAA) prohibition on collegiate student-athlete compensation from a federal antitrust perspective, thus opening the door for student-athletes to financially capitalize off the use of their name, image, and likeness (NIL).<sup>1</sup> Although *NCAA v. Alston* was centered on collegiate student-athletes being allowed unlimited in-kind educational benefits from their schools—rather than NIL allowances—the Court's holding helped spur a movement of state and university-specific policies that ultimately overtook any attempt by the NCAA to establish standardized NIL parameters.<sup>2</sup> As Congress continues tinkering with federal legislative consideration in this area,<sup>3</sup> today's "wild west" of college sports has obliterated any semblance of NIL uniformity.<sup>4</sup>

Even amidst this evolving and chaotic landscape, student-athletes can now reap the financial benefits of their fame. The current NIL market is estimated between \$750 million - \$1 billion, with market growth anticipated to increase to \$3 billion to \$5 billion over the next five years.<sup>5</sup> As of December 2023, over 450,000 non-professional student-athletes have entertained NIL endorsement

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<sup>1</sup> See *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (finding that institutions of higher education impose unreasonable limits on student-athlete compensation for educational benefits).

<sup>2</sup> See Sam C. Ehrlich & 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, 48 (2021).

<sup>3</sup> See Tan T. Boston, *NIL Data Transparency*, 83 LA. L. REV. 905, 922-23 (2023) (noting that at present, there does not appear to be a consensus in Congress to legislate in the area of NIL).

<sup>4</sup> Kathryn Kisska-Schulze, *NIL: The Title IV Financial Aid Enigma*, 76 OKLA. L. REV. 1, 145 (2023).

<sup>5</sup> Sean Labar, *Top 10 NIL Earners Include Bryce Young, Olivia Dunne and Three High School Ballers Making Absurd Money*, OUTKICK, <https://www.outkick.com/10-most-valuable-nil-athletes-bryce-young-livvy-dunne-bronny-james/> (Jan. 6, 2023, 6:03 AM).

deals,<sup>6</sup> with the largest single contract agreement amounting to up to \$8 million.<sup>7</sup> While global companies like BMW,<sup>8</sup> World Wrestling Entertainment,<sup>9</sup> Nike,<sup>10</sup> and Under Armour<sup>11</sup> are directly contracting with elite college athletes and recruits, a novel form of funding has emerged that expanded the ability of student-athletes to capitalize off their fame; that of the NIL collective.

Wholly independent of colleges or universities, NIL collectives are institutionally-affiliated, donor-driven programs that rely on pooled funds from boosters and outside supporters to pay student-athletes who play for their affiliated schools.<sup>12</sup> As of December 2023, there are over 200 NIL collectives nation-wide,<sup>13</sup> of which about eighty claimed Internal Revenue Code (IRC) section 501(c)(3) tax-exempt status.<sup>14</sup> Section 501(c)(3) provides a tax exemption for nonprofit organizations that are considered public charities, or private foundations.<sup>15</sup> A distinctive feature of section 501(c)(3) organizations is the tax deductibility of donations made to them, meaning that persons who donate money to section 501(c)(3) NIL collectives can receive a tax deduction

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<sup>6</sup> Paul Rudder, *Who is the Highest Paid College Athlete? NIL Endorsement Deal Money in NCAA Sports*, AS, <https://en.as.com/ncaa/how-much-money-can-college-athletes-make-with-nil-marketing-endorsement-deals-n-2/> (Dec. 30, 2023, 3:14 PM).

<sup>7</sup> See Mike Chiari, *2023 5-Star CFB Recruit Reportedly Signs Historic NIL Deal Worth up to \$8M*, BLEACHER REP. (Mar. 12, 2022), <https://bleacherreport.com/articles/10029537-2023-5-star-cfb-recruit-reportedly-signs-historic-nil-deal-worth-up-to-8m>.

<sup>8</sup> Tony Tsoukalas, *Alabama QB Bryce Young Nets NIL Deal with BMW of Tuscaloosa*, SPORTS ILLUSTRATED FANNATION: BAMACENTRAL (Mar. 5, 2022, 11:28 PM), <https://www.si.com/college/alabama/bamacentral/alabama-qb-bryce-young-nets-nil-deal-with-bmw-of-tuscaloosa>.

<sup>9</sup> Bret Behems, *Luke Ford Signs NIL Deal with WWE*, WCIA, <https://www.wcia.com/sports/your-illination/luke-ford-signs-nil-deal-with-wwe/> (June 13, 2022, 6:42 PM).

<sup>10</sup> Darian Kelly, *Just Do It: Nike Signs Five Basketball Players to NIL Deals*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/name-image-likeness/just-do-it-nike-signs-five-basketball-players-to-nil-deals/> (July 21, 2023).

<sup>11</sup> Pete Nakos, *2024 Four-Star Recruit Vycorius Miller Signs NIL Deal with Under Armour*, ON3NIL (Feb. 15, 2023), <https://www.on3.com/nil/news/vycorius-miller-under-armour-sneaker-nil-deal-2024-four-star-recruit-master-p/>.

<sup>12</sup> Joseph Blake, *NIL Collectives: How the Biggest Thing in NIL has Exposed the NCAA's Rulemaking*, 60 HOUS. LAW., Sept.–Oct. 2022, at 10, 11.

<sup>13</sup> See Eric Prisbell, *Under NCAA Proposal, Some NIL Collectives Could be Rendered Obsolete, Others Redefined*, ON3NIL (Dec. 7, 2023), <https://www.on3.com/nil/news/ncaa-proposal-some-nil-collectives-rendered-obsolete-others-redefined/>.

<sup>14</sup> Pete Nakos, *IRS Memo: Nonprofit NIL Collectives are not Tax Exempt*, ON3NIL (June 9, 2023), <https://www.on3.com/nil/news/nonprofit-nil-collectives-irs-memo-not-tax-exempt-ncaa-internal-revenue-service/>.

<sup>15</sup> See Terry W. Knoepfle, *The Pension Protection Act of 2006: A Misguided Attack on Donor-Advised Funds and Supporting Organizations*, 9 FLA. TAX REV. 221, 223 (2009) (noting that an I.R.C. § 501(c)(3) organization is classified under I.R.C. § 509 as either a public charity, or a private foundation, depending on its purpose, operation, or financial support).

for their contributions.<sup>16</sup> However, the IRS recently indicated that things are about to change in that regard.

On March 23, 2023, the IRS released an Office of Chief Counsel legal memorandum (IRS Memo) stating that in many circumstances, organizations established for the purpose of initiating opportunities for collegiate student-athletes to profit off their NIL do not further any tax-exempt purpose under section 501(c)(3),<sup>17</sup> thus negating the tax-exempt status of certain NIL collectives. Such pronouncement comes on the heels of U.S. Senators John Thune (R-SD) and Ben Cardin (D-MD) introducing legislation that would deny charitable tax deductions for individuals making contributions that are used to compensate student-athletes for their NIL.<sup>18</sup> These pointed attacks stem from skepticism that the primary purpose of NIL collectives is not to serve charitable needs, but to instead serve the private interests of student-athletes.<sup>19</sup>

Changes to the tax classification of certain NIL collectives could undoubtedly impact the broader NIL collective landscape, potentially transforming *all* collectives into for-profit entities, thereby eliminating the ability of donors to make tax deductible donations. While the literature examining NIL collectives within the greater college sports industry is growing,<sup>20</sup> this article examines the effect of section 501(c)(3) status on NIL collectives, and the IRS' recent memorandum to revoke such status. To better understand this rapidly evolving landscape, Part I of this article provides a brief history of the evolution of NIL in college sports. Part II discusses the rise of NIL collectives. Part III examines the impact of IRC section 501(c)(3) on NIL collectives, and the potential impact of the recent IRS Memo. Finally, Part IV offers concluding remarks.

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<sup>16</sup> See I.R.C. § 170 (providing a federal tax deduction to donors who make charitable contributions to most types of I.R.C. section 501(c)(3) organizations); see also Sarah Bierman & Elizabeth Manchester, Partridge Snow & Hahn LLP, *Donations Made to Nonprofit Name Image Likeness Collectives are not Tax Exempt*, JDSUPRA (June 21, 2023), <https://www.jdsupra.com/legalnews/donations-made-to-nonprofit-name-image-4773502/>.

<sup>17</sup> See LYNN A. CAMILLO, I.R.S. OFF. OF THE CHIEF COUNS., AM 2023-004, WHETHER OPERATION OF AN NIL COLLECTIVE FURTHERS AN EXEMPT PURPOSE UNDER SECTION 501(C)(3), at 10 (MAY 23, 2023), <https://www.irs.gov/pub/lanoa/am-2023-004-508v.pdf>.

<sup>18</sup> Athlete Opportunity and Taxpayer Integrity Act, S. 4969, 117th Cong. (2021-2022).

<sup>19</sup> See CAMILLO, *supra* note 17, at 2 (“An organization that develops paid NIL opportunities for student-athletes will, in many cases, be operating for a substantial nonexempt purpose—serving the private interest of student-athletes—which is more than incidental to any exempt purpose furthered by the activity”).

<sup>20</sup> See, e.g., Blake, *supra* note 12, at 11 (discussing the creation of, and controversy over, NIL collectives).

## I. A BRIEF HISTORY OF NIL IN COLLEGE SPORTS

The college sports industry is working through the single most impactful evolution in its entire history – that of paying student-athletes. Since the birth of the NCAA in 1906, when President Theodore Roosevelt sanctioned its establishment to protect student-athletes from exploitation,<sup>21</sup> the greatest feat that student-athletes have had to overcome is the notion of amateurism.<sup>22</sup> While the NCAA’s bedrock principle that student-athletes must retain their amateur status to participate in college sports perhaps garnered reasonable legitimacy one hundred years ago when rivalries, traditions, and love of the game drove competition,<sup>23</sup> the increased commercialization of college sports in recent decades has invoked strong dissent on the issue.<sup>24</sup>

The growing discord over how best to re-envision the amateur vs. employment status of college athletes is unsurprising, given that coaching salaries have become insatiably high,<sup>25</sup> hundreds of millions of dollars are spent on athletic facilities,<sup>26</sup> the billion dollar sports betting industry is now legal in over half of all states,<sup>27</sup> and the NCAA – which itself remains a nonprofit entity

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<sup>21</sup> Kathryn Kisska-Schulze & Adam Epstein, *Changing the Face of College Sports One Tax Return at a Time*, 76 OKLA. L. REV. 457, 467 (2021).

<sup>22</sup> See, e.g., NAT’L COLLEGIATE ATHLETIC ASS’N, 2022-2023 NCAA DIVISION I MANUAL xiii (2022) [hereinafter NCAA MANUAL] (“The Commitment to Amateurism . . . maintaining a line of demarcation between student-athletes who participate in the Collegiate Model and athletes competing in the professional model”).

<sup>23</sup> Kathryn Kisska-Schulze, *This is our House! - The Tax Man Comes to College Sports*, 29 MARQ. SPORTS L. REV. 347, 350 (2019).

<sup>24</sup> See, e.g., Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 496 (2008) (arguing that amateurism within college sports is gone due to the industry’s heavy commercialization); Casey E. Faucon, *Assessing Amateurism in College Sports*, 79 WASH. & LEE L. REV. 3, 4 (2022) (urging that student-athletes be paid to play college sports); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 74 (2006) (suggesting that the student-athlete characteristic is a farce); Robert John Givens, Comment, “*Capitamateurism*”: *An Examination of the Economic Exploitation of Student-Athletes by the National Collegiate Athletic Association*, 82 UMKC L. REV. 205, 207 (2013) (urging for NCAA amateurism reform amidst commercialized exploitation of student-athletes); Thomas A. Baker III et al., *Debunking the NCAA’s Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 665 (2018) (offering that amateurism in college sports is gone); and Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN L. & POL’Y REV. 181, 183 (2017) (proposing that the NCAA abandon its amateurism model so student-athletes can commercially exploit themselves).

<sup>25</sup> See John T. Holden & Kathryn Kisska-Schulze, *Taxing Sports*, 71 AM. U. L. REV. 845, 880 (2022).

<sup>26</sup> Dave Wilson, Note, *Massachusetts at the Forefront: How to Protect the Most Vulnerable Group in a Post-Legal Sports Betting World – NCAA Student-Athletes*, 15 U. MASS. L. REV. 124, 148 (2020).

<sup>27</sup> See Brian Pempus, *States Where Sports Betting is Legal*, FORBES: FORBES BETTING, <https://www.forbes.com/betting/guide/states-where-sports-betting-is-legal/> (Jan. 2, 2024, 12:00 PM).

– enjoys annual revenue of more than \$1.1 billion.<sup>28</sup> In fact, until historic changes began unfolding in 2021, college athletes were the only parties to the game *not* enjoying a piece of the revenue sharing pie.<sup>29</sup>

For decades leading up to the NCAA's release of a uniform interim policy that suspended NIL rights restrictions for college athletes in June 2021, numerous lawsuits had been filed by student-athletes seeking workers' compensation benefits,<sup>30</sup> Fair Labor Standards Act protections,<sup>31</sup> unionization and collective bargaining agreements,<sup>32</sup> and equitable pay,<sup>33</sup> all in efforts to bridge the economic gap. However, it is the most recent of these endeavors—equitable pay—that has gained maximum momentum and changed the trajectory of college sports forever.

In 2009, two separate lawsuits (which eventually merged) were filed by former student-athletes Ed O'Bannon and Sam Keller centered on whether student-athletes should be paid for the commercialized use of their likenesses from a right of publicity angle.<sup>34</sup> In a separate action, O'Bannon filed suit against the NCAA from a different vantage point, arguing that the NCAA's restrictions on student-athletes earning compensation for the use of their NIL

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<sup>28</sup> Matt Johnson, *NCAA Revenue Topped \$1.1 Billion in 2022*, SPORTSNAUT (Jan. 29, 2023), <https://sportsnaut.com/ncaa-revenue-2022/>.

<sup>29</sup> Kisska-Schulze & Epstein, *supra* note 21, at 488.

<sup>30</sup> *See, e.g.*, *Univ. of Denver v. Nemeth*, 257 P.2d 423, 430 (Colo. 1953) (en banc) (finding that a college football player, who was also employed by their university, qualified for workers' compensation resulting from an injury suffered during football practice); *State Comp. Ins. Fund v. Indus. Comm'n of Colo.*, 314 P.2d 288, 289-90 (Colo. 1957) (en banc) (denying a workers' compensation claim filed by a college football player's widow following his death during a football game); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 225-28 (Mich. Ct. App. 1983) (per curiam) (holding that a student-athlete was not an employee of a university, thus denying any eligibility for workers' compensation).

<sup>31</sup> *See, e.g.*, *Berger v. NCAA*, 162 F. Supp. 3d 845, 856-57 (S.D. Ind. 2016) (holding that from a Fair Labor Standards Act premise, NCAA student-athletes are not employees), *aff'd*, 843 F.3d 285 (7th Cir. 2016).

<sup>32</sup> *See, e.g.*, *Nw. Univ. Emp. & Coll. Athletes Players Ass'n*, 198 L.R.R.M. (BNA) 1837 (N.L.R.B. Mar. 26, 2014), 2014-15 NLRB Dec. ¶ 15781, 2014 WL 1246914, *review dismissed*, *Nw. Univ. & Coll. Athletes Players Ass'n (CAPA)*, 362 NLRB 1350, 1350, 1352 (Aug. 17, 2015) (declining jurisdiction on the issue of whether Northwestern University football players can unionize and bargain collectively).

<sup>33</sup> *See, e.g.*, *Waldrep v. Tex. Emps. Ins. Ass'n*, 21 S.W.3d 692, 699, 702 (Tex. App. 2000) (finding no employer-employee relationship between a university and its student-athlete); *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170, 1173-75 (Ind. 1983) (finding no employment relationship between a university and its student-athlete); *O'Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015) (holding that NCAA compensation rules violate federal antitrust laws); *NCAA v. Alston*, 141 S. Ct. 2141, 2166 (2021) (unanimously holding that NCAA rules restricting certain education-related benefits for student-athletes violate Section 1 of the Sherman Act).

<sup>34</sup> *See Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 U.S. Dist. LEXIS 10719 (N.D. Cal. Feb. 8, 2010); *O'Bannon v. NCAA*, No. C 09-3329 CW, 2009 U.S. Dist. LEXIS 122205 (N.D. Cal. Dec. 11, 2009); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

violated antitrust law.<sup>35</sup> In 2015, the Ninth Circuit Court of Appeals found that such NCAA restrictions were, indeed, subject to antitrust laws,<sup>36</sup> but disagreed with the lower court's finding that NCAA members should pay student-athletes \$5,000 per year in deferred compensation.<sup>37</sup>

As the *O'Bannon* case worked its way through the judicial process, another case emerged that set the stage for meaningful change in college sports. In 2014, Shawne Alston and other Division-I student-athletes sued the NCAA, claiming that antitrust violations restricted any ability to earn compensation for their services.<sup>38</sup> On June 21, 2021, the U.S. Supreme Court unanimously held that NCAA rules restricting certain education-related benefits for student-athletes are violative of Section 1 of the Sherman Act.<sup>39</sup> Of course, all was not otherwise quiet on the college front during the seven years it took *Alston* to maneuver its way up to the highest court. On September 30, 2019, California became the first state to legislatively permit student-athletes to be compensated for the use of their NIL.<sup>40</sup> Almost immediately after California's Fair Pay to Play Act (FPTPA) was signed into law, the NCAA repudiated it as "unconstitutional."<sup>41</sup> However, as more states began introducing similar FPTPA laws,<sup>42</sup> the NCAA Board of Governors quickly changed course on the issue, evidencing surprising support for NIL opportunities.<sup>43</sup>

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<sup>35</sup> See *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

<sup>36</sup> See *O'Bannon*, 802 F.3d at 1079.

<sup>37</sup> *Id.* at 1076-79 ("In our judgment, however, the district court clearly erred in finding it a viable alter[n]ative to allow students to receive NIL cash payments untethered to their education expenses . . . [b]oth we and the district court agree that the NCAA's amateurism rule has procompetitive benefits. But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs* . . . [w]e thus vacate that portion of the district court's decision and the portion of its injunction requiring the NCAA to allow its member schools to pay this deferred compensation").

<sup>38</sup> See *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1110 (N.D. Cal. 2019) (holding that limits on educational-related benefits for student-athletes are an unlawful restraint on trade under the Sherman Act); *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1265-66 (9th Cir. 2020) (affirming the lower court's decision).

<sup>39</sup> See *Alston*, 141 S. Ct. at 2159, 2166.

<sup>40</sup> See Fair Pay to Play Act, CAL. EDUC. CODE § 67456 (2020); see also Kisska-Schulze & Epstein, *supra* note 21, at 457.

<sup>41</sup> David Cruikshank, Comment, *The Fair Pay to Play Act: Likely Unconstitutional, Yet Necessary to Protect Athletes*, 81 OHIO ST. L.J. ONLINE 253, 255 (2020).

<sup>42</sup> Kisska-Schulze & Epstein, *supra* note 21, at 473.

<sup>43</sup> See *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019, 1:08 PM), <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities> ("In the Association's continuing efforts to support college athletes, the NCAA's top governing board voted unanimously to permit students participating in

In April 2020, the NCAA Board of Governors issued a Final Report, recommending that NCAA divisional rules be “modernized” to account for NIL.<sup>44</sup> However, pressure ensued when Florida Governor Ron DeSantis signed S.B. 646 into law on June 12, 2020, allowing student-athletes to be compensated for their NIL as early as July 2021.<sup>45</sup> Soon after, the NCAA asked Congress to consider passing federal uniform NIL legislation.<sup>46</sup> Amidst such commotion, the U.S. Supreme Court issued its ruling in *Alston*, thus prompting the NCAA to adopt a uniform interim policy at the tail-end of June 2021 that suspended its NIL rules for all three member divisions.<sup>47</sup> In December 2023, NCAA President Charlie Baker indicated that the NCAA is considering allowing Division I schools, “at their choice, to enter into name, image and likeness licensing opportunities with their student-athletes.”<sup>48</sup>

Today, over 25 states have passed some form of NIL legislation, with 15 others having introduced similar legislation.<sup>49</sup> Almost a dozen federal laws have been introduced to unify and solidify student-athletes’ NIL rights, but thus far none have passed.<sup>50</sup> As recently as July 2023, two Democrat and one

athletics the opportunity to benefit from the use of their name, image and likeness in a manner consistent with the collegiate model. The Board of Governors’ action directs each of the NCAA’s three divisions to immediately consider updates to relevant bylaws and policies for the 21st century, said Michael V. Drake, chair of the board and president of The Ohio State University”).

<sup>44</sup> *Report of the NCAA Board of Governors*, NCAA (Apr. 28, 2020), [https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec\\_boardgov/APR2020BOG\\_REPORT.pdf](https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/APR2020BOG_REPORT.pdf); see also Tricia Duffy & Amy Piccola, Saul Ewing LLP, *What the NCAA’s Legislation Working Group’s Final Report and Recommendations on Name, Image, and Likeness Mean for Student-Athletes, Colleges and Universities*, JDSUPRA (May 19, 2020), <https://www.jdsupra.com/legalnews/what-the-ncaa-s-legislation-working-97758/>.

<sup>45</sup> See S.B. 646, 2020 Leg., Reg. Sess. (Fla. 2020); see also Tan Boston, *As California Goes, so Goes the Nation: A Title IX Analysis of the Fair Pay to Play Act*, 17 STAN. J. C.R. & C.L. 1, 14 (2021) (Florida’s statute would have been effective eighteen months sooner than any other state NIL laws allowed for).

<sup>46</sup> See Ross Dellenger, *Mark Emmert to Ask Senate to Grant NCAA Antitrust Protection in Name, Image, Likeness Hearing*, SPORTS ILLUSTRATED (July 22, 2020), <https://www.si.com/college/2020/07/22/mark-emmert-senate-hearing-antitrust-protection-name-image-likeness>.

<sup>47</sup> See John T. Holden et al., *A Short Treatise on College-Athlete Name, Image, And Likeness Rights: How America Regulates College Sports’ New Economic Frontier*, 57 GA. L. REV. 1, 6-7 (2022).

<sup>48</sup> See *A Letter to Student-Athletes from Charlie Baker*, NCAA (Dec. 19, 2023), <https://www.ncaa.org/news/2023/12/19/media-center-a-letter-to-student-athletes-from-charlie-baker.aspx>.

<sup>49</sup> Kiskka-Schulze, *supra* note 4, at 153-156.

<sup>50</sup> See H.R. 1804, 116th Cong. (2019-2020) (modifying I.R.C. § 501(j)(2) to ensure a tax-exempt “qualified amateur sports organization . . . ‘not include an organization that substantially restricts a student athlete from using, or being reasonably compensated for the third party use of, the name, image, or likeness of such student athlete’”); H.R. 3630, 118th Cong. (2023-2024) (restricting institutions and athletic organizations “from [prohibit]ing a student athlete from participating in intercollegiate athletes” due to a signed endorsement deal); S. 5003, 116th Cong. (2019-2020) (preserving student athletes’ NIL rights, and establishing “an independent entity for intercollegiate athletics [to develop rules with respect to NIL], and for other purposes”); H.R. 9033, 116th Cong. (2019-2020) (prohibiting institutions, intercollegiate athletic associations, or conferences from

Republican led bills have been introduced into Congress in efforts to unify collegiate athlete compensation allowances.<sup>51</sup> Even high school athletes across a number of states can now financially benefit from the use of their NIL.<sup>52</sup>

Not long after the *Alston* decision was released, donors began to pooling significant financial resources together to provide even greater NIL opportunities—and for a broader array of student-athletes—in the form of NIL collectives.<sup>53</sup> Given that thousands of dollars are being distributed to a multitude of student-athletes through university-affiliated NIL collectives,<sup>54</sup> these novel organizations have now opened the door to a wider array of earnings potential. As the next Part details, the rise of NIL collectives has taken the collegiate sports arena by storm.

While the multitude of opportunities available to student-athletes is proving lucrative, NIL rights are not a panacea for all of college sports' ills. In January 2024, the NCAA imposed sanctions on the Florida State University (FSU) football team for allegedly violating NCAA rules when an assistant coach introduced a potential transfer student to a booster who offered them \$15,000 a

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restricting student-athletes' NIL rights); S. 5062, 116th Cong. (2019-2020) (offering the same protections afforded under H.R. 9033); S. 414, 117th Cong. (2021-2022) (establishing NIL uniform standards and protections); and S. 238, 117th Cong. (2021-2022) (establishing federal NIL rights). In addition, three bills and one bipartisan discussion draft have been introduced during the 1st Session of the 118th Congress, to include S. 2495, 118th Cong. (2023-2024) (“To protect student athletes, ensure fair competition and compensation, and preserve intercollegiate athletes, for other purposes”); S. 2554, 118th Cong. (2023-2024) (“To establish name, image, and likeness rights for college athletes at institutions of higher education, and for other purposes”); and H.R. 4948, 118th Cong. (2023-2024) (“To establish name, image, and likeness rights for college athletes at institutions of higher education, and for other purposes”); *see also* Kristi Dosh, *4 New Federal NIL Bills Have Been Introduced in Congress*, FORBES (July 29, 2023, 9:31 AM), <https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/?sh=6a0600554d46> (further discussing the bipartisan discussion draft introduced by Senators Booker, Blumenthal, and Moran).

<sup>51</sup> *See* Javon Edmonds, *Senators Propose Bipartisan Bill for College Sports, Including NIL Guidelines*, THE MESSENGER, <https://themessenger.com/sports/senators-propose-bipartisan-bill-for-college-sports-including-nil-guidelines> (July 20, 2023, 3:58 PM).

<sup>52</sup> *See* Adam Epstein, Nathaniel Grow, and Kathryn Kisska-Schulze, *An Evolving Landscape: High School Athletics & Name, Image, and Likeness Rights* (forthcoming, 77 VANDERBILT L. REV. 3 (2024)).

<sup>53</sup> *See* Amanda Christovich, *One Year of NIL: Controversial Collectives Aren't Going Away*, FRONT OFF. SPORTS, <https://frontofficesports.com/collectives-arent-going-away/> (June 28, 2022, 10:44 AM).

<sup>54</sup> *See* Ross Dellenger, *The Other Side of the NIL Collective, College Sports' Fast-Rising Game Changer*, SPORTS ILLUSTRATED (Aug. 10, 2022), <https://www.si.com/college/2022/08/10/nil-collectives-boosters-football-tennessee-daily-cover> (providing that the Matador Club, the NIL collective affiliated with Texas Tech, is giving \$25,000 to each member of the University's football and women's basketball teams while the Boulevard Collective, the NIL collective affiliated with Southern Methodist University, is paying football and men's basketball players \$36,000 each).

month in NIL compensation.<sup>55</sup> Soon after, the NCAA initiated an investigation into NIL violations at the University of Tennessee.<sup>56</sup> The state of Tennessee and the Commonwealth of Virginia quickly struck back, filing a lawsuit against the NCAA for violating antitrust laws by restricting institutions from using NIL opportunities as recruitment incentives.<sup>57</sup> On February 23, 2024, Federal District Judge Clifton Corker enjoined the NCAA from enforcing policies and bylaws that prohibit “student-athletes from negotiating compensation for NIL with any third-party entity . . . .”<sup>58</sup> Immediately thereafter, the NCAA paused all investigations into NIL collectives’ recruiting efforts.<sup>59</sup> In the midst of this fracas, on February 5, 2024 Region 1 of the National Labor Relations Board (NLRB) held that college basketball players at Dartmouth University are employees under the National Labor Relations Act (NLRA), and can unionize.<sup>60</sup> The Regional NLRB Director’s decision hinged on the extent of control Dartmouth has over its student-athletes, to include requiring that they abide by Ivy League and NCAA NIL rules.<sup>61</sup> Immediately after, the Dartmouth Basketball Team voted 13-2 in favor of unionizing, prompting Dartmouth to appeal the Region 1 decision.<sup>62</sup>

Many harbor concerns that NIL endorsement deals—across a patchwork of nonuniform state laws<sup>63</sup>— have “spun out of control.”<sup>64</sup> Congress may decide

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<sup>55</sup> See Dan Murphy, *NCAA Penalizes FSU Football; Assistant gets 3-Game Ban for Violations*, ESPN (Jan. 11, 2024), [https://www.espn.com/college-football/story/\\_/id/39289391/ncaa-penalizes-florida-state-football-nil-rule-violations](https://www.espn.com/college-football/story/_/id/39289391/ncaa-penalizes-florida-state-football-nil-rule-violations).

<sup>56</sup> See Pete Thamel, *Sources: NCAA investigation Tennessee for NIL violations*, ESPN (Jan. 30, 2024), [https://www.espn.com/college-football/story/\\_/id/39423331/sources-ncaa-investigating-tennessee-nil-violations](https://www.espn.com/college-football/story/_/id/39423331/sources-ncaa-investigating-tennessee-nil-violations).

<sup>57</sup> See *State of Tennessee and Commonwealth of Virginia v. NCAA*, No. 3:24-cv-33 (E.D. Tenn. Jan. 31, 2024). In another recent case filed, *In re College Athlete NIL Litigation*, former student-athletes seek damages for past NIL benefits they were unable to receive due to historic prohibitions against any form of pay-to-play. See *Content Details 20-3919 - In re College Athlete NIL Litigation*, GOVINFO, [https://www.govinfo.gov/app/details/USCOURTS-cand-4\\_20-cv-03919/summary](https://www.govinfo.gov/app/details/USCOURTS-cand-4_20-cv-03919/summary) (last visited Mar. 8, 2024).

<sup>58</sup> *State of Tennessee and Commonwealth of Virginia v. NCAA*, No. 3:24-CV-00033-DCLC-DCP, at 13 (E.D. Tenn. Feb. 23, 2024), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2024/pr25-18.pdf>.

<sup>59</sup> Jessee Dougherty, *An NCAA Policy Change on NIL Could Have a Major Impact on Recruiting*, WASH. POST (Mar. 1, 2024), <https://www.washingtonpost.com/sports/2024/03/01/ncaa-nil-collectives/>.

<sup>60</sup> Karen Weaver, *NLRB Grants Permission for Dartmouth Men’s Basketball Players to Vote on Union*, FORBES (Feb. 5, 2024), <https://www.forbes.com/sites/karenweaver/2024/02/05/nlrbs-grants-permission-for-dartmouth-mens-basketball-players-to-vote-on-union/?sh=1d5d191b3b5e>.

<sup>61</sup> *Id.*

<sup>62</sup> See Michael McCann & Daniel Libit, *Dartmouth Basketball Team Votes to Unionize In College Sports First*, SPORTICO (Mar. 5, 2024), <https://www.sportico.com/law/analysis/2024/dartmouth-basketball-players-unionize-1234769201/>.

<sup>63</sup> Ehrlich & Ternes, *supra* note 2, at 48-49.

<sup>64</sup> Michael H. LeRoy, *Do College Athletes Get NIL? Unreasonable Restraints on Player Access to Sports Branding Markets*, 2023 U. ILL. L. REV. 53, 56 (2023).

not to move forward on any form of federal legislation in this arena,<sup>65</sup> thus leaving intact the current wild west of college sports.<sup>66</sup> Certainly, the mental health and well-being of student-athletes are being closely monitored amidst athletes' new role as brand manager of their professional lives, while continuing to juggle academic, athletic, and personal lives.<sup>67</sup> Still, as the next Part details, the rise of NIL collectives has taken the collegiate sports arena by storm.

## II. THE RISE OF NIL COLLECTIVES

College athletes continue to be prohibited from receiving money in direct exchange for playing sports at their institutions.<sup>68</sup> However, many argue that universities and boosters have actually been paying student-athletes “under-the-table” for years.<sup>69</sup> The recent and rapid emergence of NIL collectives perhaps spawned from institutional supporters' efforts to turn what had been historically “illegal” into something “legal.”<sup>70</sup> In contrast to third-party businesses directly contracting with players to promote goods or services (like Nike signing five basketball players in the fall of 2022 to NIL deals),<sup>71</sup> currently NIL collectives

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<sup>65</sup> See Mykal Mceldowney, *Baker Continues to Push for Federal NIL Legislation*, SPORTS BUS. J. (Feb. 25, 2024), <https://www.sportsbusinessjournal.com/Articles/2024/02/25/charlie-baker-ncaa>.

<sup>66</sup> Josh Lens, *NIL Compliance*, 103 B.Y.U. L. REV. ONLINE 69, 74 (2023).

<sup>67</sup> See Hailey Harris et al., *Hidden Consequences: Examining the Impact of NIL on Athlete Well-Being*, 13 J. OF APPLIED SPORT MGMT. 29, 30 (2021).

<sup>68</sup> See NCAA MANUAL, *supra* note 22, § 12.01.01, at 39 (noting that “[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport”), § 12.02.11, at 41 (defining “Professional Athlete” as “one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association”).

<sup>69</sup> See, e.g., Jennifer A. Shults, *If at First You Don't Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for “Employee” Status*, 56 COLUM. J.L. & SOC. PROBS. 451, 459 (2023) (“Many college stars were suspected of ‘parading in false college colors’—that is, taking money under the table while masquerading as amateurs”); Jordan Allen, Comment, *Is the End Just the Beginning? NIL Changes and the New World of Intercollegiate Athletics*, 10 LINCOLN MEM’L U. L. REV. 53, 57 (2023) (noting that even as far back as 1929, universities were paying student-athletes “under the table”); Erick S. Lee, *A Perception of Impropriety: The Use of Packaging Deals in College Basketball Recruiting*, 17 JEFFREY S. MOORAD SPORTS L.J. 59, 59 (2010) (noting that educational institutions historically recruited elite athletes with the help of “university boosters, coaches, and agents who shower recruits with sums of cash, gifts of vehicles, and other illegal benefits in an effort to sway the recruits' college selection to the providing institution”); Ryan Young, *The Case for Paying College Athletes*, AM. INST. FOR ECON. RSCH. (Apr. 9, 2022), <https://www.aier.org/article/the-case-for-paying-college-athletes/> (“Boosters have long paid star athletes under the table”).

<sup>70</sup> Alex Kirshner, *‘Everything’s on Fire’: NIL Collectives are the Latest Patchwork Solution for College Athlete Pay*, GLOB. SPORT MATTERS (Jan. 17, 2023), <https://globalsportmatters.com/business/2023/01/17/nil-collectives-latest-patchwork-solution-college-athlete-pay/> (“Universities have always needed a conduit to get money into players' hands. Historically, the groups that did it were informal and loosely organized. Filling the vacuum in an over-the-table world now are third-party ‘collectives[.]’”).

<sup>71</sup> Kelly, *supra* note 10.

are established as “structurally independent”,<sup>72</sup> institutionally-affiliated programs that rely on pooled funds from boosters, alumni, and other supporters to pay student-athletes for the use of their NIL.<sup>73</sup> Although unique in structure and mission, NIL collectives generally share one similar goal: to attract high-level student-athletes to commit and play sports for their affiliated institutions.<sup>74</sup>

At present, there exist at least 200 NIL collectives.<sup>75</sup> All fourteen schools in the Southeastern Conference (SEC), and 92% of the Power Five schools, have affiliations with at least one NIL collective.<sup>76</sup> A number of large universities, where athletics play a front-and-center role, have more than one affiliation.<sup>77</sup> For example, Pennsylvania State University (Penn State) enjoys the relational benefit of two NIL collectives,<sup>78</sup> while the University of Texas-Austin, University of Florida, and Indiana University each boast three.<sup>79</sup>

NIL collectives generally come in one of three forms: marketplace, donor-driven, and dual.<sup>80</sup> Marketplace collectives act as intermediaries, enabling student-athletes and third party businesses to connect at established meeting places to help fuel NIL opportunities.<sup>81</sup> In addition, marketplace collectives can serve as the representative agents for student-athletes.<sup>82</sup> Donor-driven collectives—the most common type of NIL collective—pool funding together from outside resources, and then direct such funding to student-athletes in exchange for sponsorship or endorsement agreements that could include activities that student-athletes must participate in as part of their contractual

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<sup>72</sup> *Name, Image, and Likeness (NIL) Collectives*, TAXPAYER ADVOC. SERV., <https://www.taxpayeradvocate.irs.gov/get-help/general/nil/nil-collectives/> (Jan. 4, 2024).

<sup>73</sup> See Blake, *supra* note 12, at 11. It should be noted, however, that in January 2024 the NCAA released a proposal that would allow institutions to directly contract student-athletes for NIL deals. See *A Letter to Student-Athletes From Charlie Baker*, *supra* note 48 (“The rules should allow for any Division I school, at their choice, to enter into name, image and likeness licensing opportunities with their student-athletes.”).

<sup>74</sup> *Understanding How NIL Collectives Work*, ROOTNOTE (June 30, 2023), <https://rootnote.co/understanding-how-nil-collectives-work/>.

<sup>75</sup> Lens, *supra* note 66, at 87.

<sup>76</sup> Owen Roche, *NIL Collectives: What are They and How are They Impacting College Athletics?*, 2ADAYS: BE SUCCESSFUL, <https://www.2adays.com/blog/nil-collectives-what-are-they-and-how-are-they-impacting-college-athletics/> (June 27, 2023).

<sup>77</sup> *Id.*

<sup>78</sup> See *Tracker: University-Specific NIL Collectives*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/tracker-university-specific-nil-collectives/> (Oct. 4, 2023).

<sup>79</sup> *Id.*

<sup>80</sup> *Name, Image, and Likeness (NIL) Collectives*, *supra* note 72.

<sup>81</sup> Pete Nakos, *What are NIL Collectives and How Do They Operate?*, ON3NIL (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/>; see also Joe Lizcano, Comment, *The New Game Plan for Student-Athlete Success In the Name, Image, and Likeness Era: The Individual Student-Athlete Retirement Account*, 15 TEX. TECH. EST. PLAN. COM. PROP. L.J. 409, 421 (2023).

<sup>82</sup> Nakos, *supra* note 81.

agreements.<sup>83</sup> Donor-driven collectives have come under increased scrutiny because their model seemingly blurs the line between paying student-athletes for the use of their NIL, versus paying them directly for their athletic ability—the latter of which remains prohibited under NCAA rules.<sup>84</sup> Finally, dual collectives offer a hybrid approach, providing both a marketplace from which student-athletes and outside ventures can conduct NIL business, while likewise offering donors the opportunity to make donations directly to the hosting NIL collective.<sup>85</sup>

No matter the type of NIL collective established, each fosters unique objectives.<sup>86</sup> While most are formed as profit-seeking entities, some have established themselves as nonprofit organizations.<sup>87</sup> The distinguishing factor between the two is whether a collective has obtained section 501(c)(3) tax-exempt status by the IRS, which enables donors to claim a tax deduction for their contributions.<sup>88</sup> Tax-exempt collectives generally engage donors to fund student-athletes, who in turn agree to further the collectives' charitable missions.<sup>89</sup> For example, Hoosiers For Good, a section 501(c)(3) Indiana University-affiliate collective, partners "local charities with community-minded Hoosier student athletes who choose to use their platform and influence to amplify the philanthropic work . . . ."<sup>90</sup> However, questions have emerged as to whether these tax-exempt entities truly satisfy the tax law requirements for charitable organizations.<sup>91</sup> As the next Part details, such concerns have led the IRS to recently renege its previous support of section 501(c)(3) status to NIL collectives.

### III. NIL COLLECTIVES AND IRC SECTION 501(C)(3)

Since the emergence of NIL collectives in 2021, some have questioned whether those that have been granted section 501(c)(3) status are indeed

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<sup>83</sup> *How Do Collegiate NIL Collectives Work?*, CROWN LLP, <https://crownllp.com/blog/how-do-collegiate-nil-collectives-work/> (last visited Jan. 8, 2024).

<sup>84</sup> Lizcano, *supra* note 81, at 423.

<sup>85</sup> Nakos, *supra* note 81.

<sup>86</sup> *Name, Image, and Likeness (NIL) Collectives*, *supra* note 72 (noting that collectives are either established as for-profit, or nonprofit, entities).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*; *see also* Lizcano, *supra* note 81, at 420.

<sup>89</sup> *Name, Image, and Likeness (NIL) Collectives*, *supra* note 72.

<sup>90</sup> *See About Hoosiers for Good*, HOOSIERS FOR GOOD, <https://hoosiersforgood.org/about/> (last visited Jan. 8, 2024).

<sup>91</sup> *See* Todd Kesterson & Alyssa Razook Wan, *Tax Law Considerations for Charitable NIL Collectives in College Sports*, KAUFMAN ROSSIN (Nov. 22, 2022), <https://kaufmanrossin.com/news/tax-law-considerations-for-charitable-nil-collectives-in-college-sports/>.

charitable in nature.<sup>92</sup> To qualify for section 501(c)(3) status, an entity must be organized and operated for a tax-exempt purpose, to include charitable, scientific, or educational reasoning.<sup>93</sup> In addition, the entity must establish that its indicated purpose is not to serve private interests.<sup>94</sup> Specifically, the Treasury Regulations specify that an organization is deemed to operate exclusively for one or more tax-exempt purposes only if it engages primarily, and not insubstantially, in activities that accomplish one or more of the exempt purposes specified in section 501(c)(3).<sup>95</sup> The Treasury Regulations further stipulate that an organization will *not* be regarded as a section 501(c)(3) organization “if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.”<sup>96</sup> It is this issue that has garnered the greatest speculation within the realm of college sports; whether the private benefits afforded to student-athletes by tax-exempt NIL collectives are incidental to the tax-exempt purpose otherwise furthered by the collectives’ charitable activities.<sup>97</sup>

Some argue that the lines between private benefits versus charitable interests in this regard are hazy. As Jason Belzer, CEO of Student Athlete NIL has stated, “Many of these [NIL] collectives that have popped up with a mission of 501(c)(3)s are simply looking for a way to launder money.”<sup>98</sup> Recently, the IRS seemed to agree with such sentiment, releasing a Memorandum indicating that nonprofit NIL collectives “are not tax exempt[,]”<sup>99</sup> thus leaving numerous NIL collectives that have already received section 501(c)(3) status in limbo. To better understand such conundrum, subpart (a) provides a brief primer on the IRC requirements for section 501(c)(3) charitable organizations, subpart (b) examines the IRS’ recent stance on the relationship between section 501(c)(3)

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<sup>92</sup> See Nakos, *supra* note 14; see also Jon Blau, *Clemson NIL Collective’s Tax-Exempt Status in Doubt After IRS Memo*, POST AND COURIER (June 18, 2023), [https://www.postandcourier.com/sports/clemson/clemson-nil-collectives-tax-exempt-status-in-doubt-after-irs-memo/article\\_fe6ac208-0b9e-11ee-814a-c75d596f3194.html](https://www.postandcourier.com/sports/clemson/clemson-nil-collectives-tax-exempt-status-in-doubt-after-irs-memo/article_fe6ac208-0b9e-11ee-814a-c75d596f3194.html) (quoting University of Pittsburg professor Phil Hackney as stating, “I’m pretty comfortable in stating these NIL collectives are being formed to pay athletes and that’s not a charitable purpose.”); see also Jeremy Crabtree, *Why are U.S. Senators Introducing Bill Targeting 501(c)(3) NIL Collectives?*, ON3NIL (Sept. 29, 2022), <https://www.on3.com/nil/news/why-are-u-s-senators-introducing-bill-targeting-501c3-nil-collectives/> (noting that U.S. Senators John Thune (R-SD) and Ben Cardin (D-MD) introduced legislation in 2022 that would prohibit NIL collectives from using the charitable tax deduction for contributions to pay student-athletes).

<sup>93</sup> I.R.C. § 501(c)(3).

<sup>94</sup> Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii).

<sup>95</sup> Treas. Reg. § 1.501(c)(3)-1(c)(1).

<sup>96</sup> *Id.*

<sup>97</sup> See CAMILLO, *supra* note 17, at 11-12.

<sup>98</sup> Crabtree, *supra* note 92.

<sup>99</sup> See CAMILLO, *supra* note 17, at 12.

status and NIL collectives, and subpart (c) offers thoughtful recommendations moving forward.

*A. A Brief Primer on IRC Section 501(c)(3)*

IRC section 501 offers a broad array of tax exemptions for select organizations and trusts.<sup>100</sup> Of the numerous categories that qualify for exemption under section 501(c), it is section 501(c)(3) that garners the most interest.<sup>101</sup> First codified into section 501(c) in the 1954 Tax Code (and since amended), section 501(c)(3) provides tax-exemptions for organizations that are “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes,”<sup>102</sup> as well as those that “foster national or international amateur sports competition”<sup>103</sup> and prevent “cruelty to children or animals.”<sup>104</sup> The accompanying Treasury Regulation section 1.501(c)(3)-1 stipulates more detailed requirements that apply to section 501(c)(3) organizations.<sup>105</sup>

As charitable nonprofits, section 501(c)(3) organizations are exempt from having to pay federal income tax on income related to their exempt purposes.<sup>106</sup> In addition, the paramount benefit associated with section 501(c)(3) organizations is that any contributions made to them are generally tax-deductible to their donors under the purview of IRC section 170<sup>107</sup>—an advantage that other types of business organizations outside the spectrum of section 501(c)(3) cannot generally offer.<sup>108</sup>

Two tests are used to determine whether an organization fulfills its tax-exempt purpose under section 501(c)(3): an organizational test, and an operational test.<sup>109</sup> To qualify for tax-exempt status, organizations must meet

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<sup>100</sup> See I.R.C. § 501.

<sup>101</sup> See I.R.C. § 501(c)(3); see also Lynn D. Lu, *Flunking the Methodology Test: A Flawed Tax-Exemption Standard for Educational Organizations That “Advocate a Particular Position or Viewpoint”*, 29 N.Y.U. REV. L. & SOC. CHANGE 377, 383-85 (2004).

<sup>102</sup> I.R.C. § 501(c)(3).

<sup>103</sup> *Id.*; see also Lu, *supra* note 101, at 385 n.47 (providing that the language “or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment)” was added to the Code in 1976).

<sup>104</sup> I.R.C. § 501(c)(3).

<sup>105</sup> See Treas. Reg. § 1.501(c)(3)-1; see also Lu, *supra* note 101, at 386.

<sup>106</sup> See I.R.C. § 501(a).

<sup>107</sup> See I.R.C. §§ 170(a), (c)(2).

<sup>108</sup> See I.R.C. § 170(c)(2); see also Nicholas A. Mirkay, *Is it “Charitable” to Discriminate?: The Necessary Transformation of Section 501(c)(3) into the Gold Standard for Charities*, 2007 WIS. L. REV. 45, 53-54 (2007).

<sup>109</sup> See I.R.C. § 501(c)(3); see also Treas. Reg. § 1.501(c)(3)-1(a)(1).

both.<sup>110</sup> In simplest terms, the organizational test requires that a business be formed for a listed section 501(c)(3) charitable purpose, that its governing documents do not expressly empower it to engage in noncharitable activities (unless they are an insubstantial part of its activities), and that the business permanently dedicates its assets to its charitable purpose(s).<sup>111</sup>

The operational test requires that a business “operate exclusively” for an exempt purpose as listed in section 501(c)(3).<sup>112</sup> So long as a business can show that its activities further the organization’s purpose and reason for tax-exemption, it should meet this test.<sup>113</sup> However, an organization will not be regarded as an exempt entity if it is found to operate as an “action organization[,]”<sup>114</sup> distribute its net earnings “in whole or in part to the benefit of private shareholders or individuals[,]” or operate in a way that otherwise fails to further its charitable purpose under section 501(c)(3).<sup>115</sup>

To qualify for charitable organization designation by the IRS, businesses must file a Form 1023, *Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*.<sup>116</sup> If determined by the IRS that the organization and operation of the business qualifies for tax exemption, donors can deduct contributions made to that business per IRC section 170, and the IRS will grant a tax-exempt classification to the business: either as a public charity, or private foundation.<sup>117</sup> All section 501(c)(3) organizations are deemed to be private foundations by default,<sup>118</sup> unless it can be shown that the business entity otherwise qualifies as a public charity. Public charities include churches, hospitals, and qualified medical research institutions affiliated with hospitals, schools, colleges, and universities that have active fundraising programs and receive contributions from numerous sources, including the general public, to

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<sup>110</sup> See Treas. Reg. § 1.501(c)(3)-1(a)(1).

<sup>111</sup> See Treas. Reg. § 1.501(c)(3)-1(b)(1).

<sup>112</sup> Treas. Reg. § 1.501(c)(3)-1(c)(1); see also Courtney Seams, *How Name, Image, and Likeness Reforms are Eroding Amateurism in the NCAA and How that Will Affect the NCAA’s Tax-Exempt Status*, 5 BUS. & FIN. L. REV. 28, 46 (2022).

<sup>113</sup> Seams, *supra* note 112.

<sup>114</sup> See Treas. Reg. § 1.501-1(c)(3) (an organization is an “action organization” if it intervenes in political campaigning).

<sup>115</sup> Seams, *supra* note 112, at 48; see also Treas. Reg. § 1.501(c)(3)-1(c).

<sup>116</sup> See Form 1023: *Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*, IRS, <https://www.irs.gov/pub/irs-pdf/f1023.pdf> (last visited Jan. 8, 2024).

<sup>117</sup> See Edward A. Zelinsky, *Why the Buffett-Gates Giving Pledge Requires Limitation of the Estate Tax Charitable Deduction*, 16 FLA. TAX REV. 393, 400 (2014).

<sup>118</sup> See *id.* at 402 (noting that private foundations are generally controlled by family members or a small group of individuals, and derive the majority of their support from investment income); see also L.R.C. § 509(a); see also Treas. Reg. § 1.509(a)-1.

further their exempt purpose(s).<sup>119</sup> Other organizations, like homeless shelters, food banks, legal services operations, and advocacy groups can likewise garner public charity designation, so long as they can show the IRS that they receive adequate public support.<sup>120</sup>

While contributions made to both private foundations and public charities are tax deductible, taxpayers enjoy higher tax-deductible giving limitations on contributions made to public charities,<sup>121</sup> as compared to private foundations where cash donations are generally limited to thirty percent of a taxpayer's adjusted gross income.<sup>122</sup> Given these distinctions, it is therefore unsurprising that every NIL collective that has thus far been granted section 501(c)(3) status by the IRS has been designated as a public charity.<sup>123</sup> However, as the next subpart details, the recently issued IRS Memo seems to indicate that things are about to change.

### *B. The IRS's Recent Take on the Relationship Between NIL Collectives and IRC Section 501(c)(3)*

As previously discussed, a creative way that some NIL collectives began operating so as to invite more donor interest was to establish themselves as section 501(c)(3) entities.<sup>124</sup> By gaining tax-exempt status, these collectives opened the door to a broader array of alumni and donors who might contribute to their efforts, given the tax deductibility benefit associated with their contributions.<sup>125</sup> Certainly, every NIL collective that has already successfully received section 501(c)(3) status would have had to show that they were organized, and operate exclusively for, an established charitable mission when

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<sup>119</sup> Atinuke O. Adediran, *Disclosures for Equity*, 122 COLUM. L. REV. 865, 893 (2022).

<sup>120</sup> *Id.* (providing that a positive indication of sufficient (adequate) public support includes: (1) an organization receiving 33.3% of its support from the government or direct/indirect contributions from the general public; (2) a facts and circumstances test that requires an organization to receive at least 10% support from the government and general public, and for the organization to “represent the broad interests of the public”; or (3) the organization receives at least one third of its support from the general public, government, and gross receipts from its exempt-purpose activities, and no more than one third support from investments and unrelated business income).

<sup>121</sup> See *Publication 526 (2022), Charitable Contributions*, IRS, <https://www.irs.gov/publications/p526> (last visited Jan. 8, 2024) (noting that taxpayers can generally deduct up to 60% of their AGI for charitable contributions made).

<sup>122</sup> See *Charitable Contribution Deductions*, IRS, <https://www.irs.gov/charities-non-profits/charitable-organizations/charitable-contribution-deductions> (last visited Jan. 8, 2024).

<sup>123</sup> Crabtree, *supra* note 92.

<sup>124</sup> Larry Mohr, *The Tax-Exempt Entity: NIL Collectives are Getting Creative in Pursuing College Athletes*, BAKER TILLY (June 27, 2022), <https://www.bakertilly.com/insights/the-tax-exempt-entity-nil-collectives>.

<sup>125</sup> *Id.*

filing their IRS Form 1032.<sup>126</sup> Subsequently, using donor gifted funding, these NIL collectives pay student-athletes—who serve as independent contractors—for the use of their NIL while participating in select activities that may include attending charitable events, signing autographs, etc.,<sup>127</sup> that help support these organizations’ mission(s).<sup>128</sup>

It did not take long for questions to emerge about the true charitable mission of many of these section 501(c)(3) NIL collectives. On September 28, 2022, U.S. Senators Ben Cardin and John Thune—both members of the Subcommittee on Taxation and IRS Oversight—introduced the *Athlete Opportunity and Taxpayer Integrity Act*, that would prohibit tax deductions for contributions made to compensate student-athletes for the use of their NIL.<sup>129</sup> Cardin and Thune urged that student-athletes maintain the ability to capitalize off their NIL, while charitable deductions “be reserved for charitable activities”, ultimately proposing that “[p]urposefully blurring the line between private expenses and charitable contributions dilutes both these efforts.”<sup>130</sup> Not long after, the media entered the discussion, with Forbes Magazine titling a January 2023 piece, *Looking For a Tax Break? Buy Your Alma Mater Its Next Football Star*,<sup>131</sup> which raised a host of questions to include whether nonprofit collectives are indeed doing charitable work to serve the public good, or whether paying student-athletes to fundraise serves the overall charitable mission of the tax-exempt collective.<sup>132</sup>

While Senators Cardin and Thune’s bill did not garner further action during the 2021-2022 Congressional session, Senator Thune singularly introduced the *Athlete Opportunity and Taxpayer Integrity Act* again in May 2023.<sup>133</sup> Like its predecessor, the more recent bill has not gained further traction, however, on May 23, 2023, the IRS issued a twelve page memorandum, which subsequently

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<sup>126</sup> See *supra* text accompanying notes 100-106.

<sup>127</sup> See Kesterson & Wan, *supra* note 91.

<sup>128</sup> Brandon Kochkodin, *Looking for a Tax Break? Buy your Alma Mater its Next Football Star*, FORBES (Jan. 28, 2023, 6:30 AM), <https://www.forbes.com/sites/brandonkochkodin/2023/01/28/looking-for-a-tax-break-buy-your-alma-mater-its-next-football-star/?sh=24664c21a5e5> (“Donations to the nonprofit collective are said to be a gift to a charitable organization (which may or may not be directly affiliated with the collective itself). But rather than, you know, give the money to the charity to do its good deeds, the money is earmarked to pay players to, at least on paper, serve as fundraisers”).

<sup>129</sup> See S. 4969, 117th Cong. (2022).

<sup>130</sup> Press Release, John Thune, Thune, Cardin Introduce Bill to Prohibit Name, Image, and Likeness Tax Write-Offs for College Sports (Sept. 28, 2022), <https://www.thune.senate.gov/public/index.cfm?p=press-releases&id=19BFBFFD-D2EA-4B44-8337-244D02605345>.

<sup>131</sup> Kochkodin, *supra* note 128.

<sup>132</sup> *Id.*

<sup>133</sup> See S. 1454, 118th Cong. (2023).

garnered support from NCAA President Charlie Baker,<sup>134</sup> that could significantly impact the landscape of NIL collectives moving forward.<sup>135</sup>

Specifically, the IRS found that NIL collectives are generally operated for substantially nonexempt purposes that serve the private interests of student-athletes, rather than the collectives' specified section 501(c)(3) charitable purposes, which it identified as "more than incidental to any exempt purpose furthered by the activity."<sup>136</sup> In addition, the IRS found that the private benefits afforded to student-athletes are both qualitatively and quantitatively more incidental, thus resulting in its finding that most NIL collectives are not operating with the primary goal of furthering an exempt purpose.<sup>137</sup>

"To be qualitatively incidental, the private benefit must be a byproduct of the exempt activity or a necessary concomitant to the accomplishment of the exempt purpose."<sup>138</sup> To be deemed quantitatively incidental, the Memo directs that "the private benefit must be insubstantial in amount when compared to the overall public benefit conferred by the activity."<sup>139</sup> In this case, the IRS held that the private benefits afforded to student-athletes are not byproducts of NIL collectives' missions, but instead encompass a "fundamental part" of tax-exempt NIL collectives.<sup>140</sup>

The IRS also noted that NIL collectives often provide benefits to student-athletes beyond mere compensation, to include exercising deals with partner charities, and providing various services to student-athletes like financial planning, tax assistance, legal advice, and personal brand management.<sup>141</sup> Such benefits directed at student-athletes, who the IRS identifies as falling outside

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<sup>134</sup> See Ross Dellenger, *NCAA President Sides With IRS on 'Ruling' About NIL Collectives*, SPORTS ILLUSTRATED (June 14, 2023), <https://www.si.com/college/2023/06/14/ncaa-president-nil-collective-tax-deductible-donations-irs-ruling>.

<sup>135</sup> See CAMILLO, *supra* note 17, at 1; see also Martha Waggoner & Jacob T. Crowley, *IRS Addresses Whether College NIL Collectives Further an Exempt Purpose*, J. OF ACCOUNTANCY (June 14, 2023), <https://www.journalofaccountancy.com/news/2023/jun/irs-addresses-whether-college-nil-collectives-further-exempt-purpose.html>.

<sup>136</sup> See CAMILLO, *supra* note 17, at 2.

<sup>137</sup> *Id.* at 11.

<sup>138</sup> *Id.* at 7 (citing to Rev. Rul. 70-186, 1970-1 C.B. 128 where the IRS found that the de minimis private interests afforded to lakefront owners—due to their proximity to the waterfront—was qualitatively incidental to the formation of an organization that had an overriding mission of preserving the lake as a public recreation facility).

<sup>139</sup> *Id.* at 8 (citing to Rev. Rul. 76-152, 1976-1 C.B. 151 where the IRS found that an organization formed to promote community art understanding, and which turned over ninety percent of art sales proceeds to individual artists, was not quantitatively incidental to the organization's purpose given the significant proceeds directed toward the artists, rather than the organization's purposes and activities).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 9.

the scope of any “recognized charitable class[,]” were found *not* to be qualitatively incidental to accomplishing NIL collectives’ exempt purposes.<sup>142</sup>

The IRS further compared tax-exempt NIL collectives’ activities to an organization formed with the intent to operate a nurses’ registry.<sup>143</sup> In that case, the organization did not qualify as a section 501(c)(3) organization, because its primary purpose was to increase employment opportunities to members of its organization, which was found to serve a private, rather than public, interest.<sup>144</sup> Similarly, the IRS identified NIL collectives’ activities as primarily focused on increasing NIL opportunities for a limited number of student-athletes, thus furthering a narrow class of private interests that the IRS identified as being more than incidental to the collectives’ charitable missions.<sup>145</sup> In addition, the IRS noted that NIL collectives—whether established as for-profit or nonprofit entities—are used to retain and recruit student-athletes at their affiliated institutions, thus “suggesting that the primary purpose of a nonprofit NIL collective is to compensate student-athletes[,]”<sup>146</sup> some to the tune of eighty to one hundred percent of all financial contributions made.<sup>147</sup> Ultimately, the IRS held that the private benefits afforded to student-athletes by way of tax-exempt NIL collectives are substantial in nature, and not merely incidental, thus falling outside the purview of section 501(c)(3).<sup>148</sup>

It is important to note that the IRS did not go so far as to state that *all* NIL collectives that have thus far been granted section 501(c)(3) status will have their tax-exempt status removed. However, many may find themselves at risk.<sup>149</sup> Such threat could ultimately impact the broader NIL movement, as potential donors find themselves in a position of having to choose whether to make future contributions to NIL collectives without the added benefit of tax-deductibility. To address this issue, the next subpart offers thoughts and recommendations.

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<sup>142</sup> CAMILLO, *supra* note 17, at 9 (emphasis added).

<sup>143</sup> *Id.* at 10 (citing to Rev. Rul. 61-170, 1961-2 C.B. 112).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 11.

<sup>147</sup> CAMILLO, *supra* note 17, at 12.

<sup>148</sup> *Id.*

<sup>149</sup> Elinor Ramey & Shree Sharma, *IRS Says ‘NIL Tax-Exempt Status’ for Many Student-Athlete NIL Collectives*, STEPTOE (June 14, 2023), <https://www.stepto.com/en/news-publications/irs-says-nil-tax-exempt-status-for-many-student-athlete-nil-collectives.html>.

*C. NIL Collectives & Section 501(c)(3) – Moving Forward*

The above discussed IRS Memo is not an official IRS ruling. Instead, it is considered a general legal advice memorandum (GLAM), serving as a nonbinding authority, and therefore not to be used as precedent.<sup>150</sup> However, the IRS Memo does provide an important reflection of the IRS' viewpoint on NIL collective activity, as well as the IRS' potential tax treatment of such moving forward—to include possibly revoking the tax-exempt status of certain NIL collectives that have already garnered section 501(c)(3) status, while denying others' pending applications.<sup>151</sup> In addition, the IRS Memo could impact NIL collective donors who will lose their charitable tax deduction benefits afforded under section 170 on donations made to NIL collectives that have their tax-exemption revoked.<sup>152</sup> Alas, questions remain as to what NIL collectives that have already received section 501(c)(3) status should do next.

First, NIL collectives hoping to maintain their tax-exempt status should critically reevaluate their organizational and operational procedures to ensure they are in compliance with section 501(c)(3).<sup>153</sup> NIL collectives functioning as charitable organizations must ensure they are organized and operating for the broader public benefit, rather than the private benefit of select student-athletes.<sup>154</sup> In this regard, the net earnings of a tax-exempt NIL collective cannot inure to the private benefit of student-athletes.<sup>155</sup> Instead, NIL collectives must ensure that the private interests afforded to student-athletes who agree to further their charitable efforts are qualitatively incidental to the overriding purpose and mission of the NIL collective.<sup>156</sup>

Effectively, NIL collectives must assess whether the private benefits afforded to student-athletes are inseparably linked to the public benefit, or instead merely an incidental consequence of the exempt activity.<sup>157</sup> This may be difficult for most tax-exempt NIL collectives to untangle, given that the main role of NIL collectives is to attract high-level student-athletes to commit and

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<sup>150</sup> CAMILLO, *supra* note 17, at 1.

<sup>151</sup> See *IRS GLAM Asserts That Many Nonprofit Organizations That Develop NIL Collectives for Student-Athletes are not Tax Exempt*, ERNST & YOUNG LLP (June 19, 2023), <https://taxnews.ey.com/news/2023-1093-irs-glam-asserts-that-many-nonprofit-organizations-that-develop-nil-collectives-for-student-athletes-are-not-tax-exempt/>.

<sup>152</sup> *Id.*

<sup>153</sup> See *supra* text accompanying notes 100-106.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> See CAMILLO, *supra* note 17, at 11.

play sports for their affiliated institutions.<sup>158</sup> One way to potentially overcome this issue is to ensure that the private benefits afforded student-athletes—including revenue paid to them for the use of their NIL—is not substantial as compared to the funding being directed toward the NIL collective’s overriding charitable mission(s). In effect, significantly more of the charitable funding generated by NIL collectives wanting to remain tax-exempt should go to their charitable missions, rather than into the pockets of student-athletes helping to support those missions.<sup>159</sup>

Second, tax-exempt NIL collectives must ensure that they are not operating in such a way that substantially furthers a commercialized for-profit purpose, rather than a charitable purpose.<sup>160</sup> The onset of NIL opportunities in 2021 stemmed from student-athletes seeking to profit off their fame.<sup>161</sup> However, not every student-athlete taking advantage of NIL opportunities is wholly motivated by revenue. For example, FSU football player Dillan Gibbons has made clear that he wants to use his NIL notoriety to help others.<sup>162</sup> Likewise, football players Nick Evers (University of Wisconsin), Casey Thompson (University of Nebraska), Blake Corum (University of Michigan), and Keegan and Kris Murray (University of Iowa) have all contributed part of their NIL earnings to charitable missions.<sup>163</sup> NIL collectives wanting to maintain section 501(c)(3) status should seek to engage with student-athletes who are open to working with charitable-driven collectives, and who are likewise motivated to pursue NIL opportunities that offer them a chance to give back to the public at large.

Third, NIL collectives wanting to retain section 501(c)(3) status may want to consider expanding the private group with which they work. The IRS Memo specified that student-athletes are not “a recognized charitable class.”<sup>164</sup> However, the Memo also provided a sample blueprint from which NIL collectives can consider using in an effort to dilute the private benefits afforded to select student-athletes under current NIL collective models.<sup>165</sup> Specifically,

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<sup>158</sup> *Understanding how NIL Collectives Work*, *supra* note 74.

<sup>159</sup> *See* Rev. Rul. 70-186, 1970-1 C.B. 128.

<sup>160</sup> *See* *Est. of Hawaii v. Comm’r*, 71 T.C. 1067, 1079 (1979) (finding that an organization that furthers commercial, private purposes that substantially benefit for-profit entities does not qualify for section 501(c)(3) status).

<sup>161</sup> *See supra* Part I.

<sup>162</sup> *See* Allison Torres Burtka, *College Athletes are Using NIL as a Way to Give Back*, GLOB. SPORT MATTERS (Dec. 7, 2021), <https://globalsportmatters.com/culture/2021/12/07/kenny-pickett-college-athletes-nil-give-back/>.

<sup>163</sup> *The Power of NIL: How Black Student Athletes are Giving Back*, NAVIGATE (Feb. 21, 2023), <https://nvgt.com/blog/the-power-of-nil-how-black-student-athletes-are-giving-back/>.

<sup>164</sup> CAMILLO, *supra* note 17, at 9.

<sup>165</sup> *See generally id.*

the IRS proposed that section 501(c)(3) NIL collectives consider changing their models by identifying, working with, and utilizing the NIL of student-athletes who are identified as being financially need-based, so that the collectives' activities more strategically align to help "the poor or distressed," thereby serving a broader public interest.<sup>166</sup>

Fourth, NIL collectives that have been granted section 501(c)(3) status, or which are awaiting such determination, should be prepared to mitigate (to the extent possible) the impending tax consequences of their historic donors. The IRS Memo denotes that NIL collectives that have already applied for and received a favorable tax-exempt outcome, but later have that exemption revoked, may seek to have such revocation only apply forward, rather than retroactively, under IRC section 7805(b), which discusses retroactivity of regulations.<sup>167</sup> However, section 7805(b) likewise alerts that protection from retroactive activity may not be available when there is evidence of "abuse."<sup>168</sup> It is therefore to the benefit of already-established section 501(c)(3) NIL collectives to ensure that its organization and operational activities clearly align with whatever they indicated when initially filing their IRS Form 1032 to request (and ultimately receive) tax-exemption status. Otherwise, they could put historic donors in jeopardy of losing tax-deductibility for contributions previously made.

Finally, it is perhaps prudent to draw comparisons between the effect (or, non-effect) of donors' charitable interests for purposes of NIL collectives, and charitable donor interests following the passage of the Tax Cuts and Jobs Act (TCJA) in 2017.<sup>169</sup> Prior to the TCJA being signed into law, the college sports industry enjoyed significant and favorable tax treatment.<sup>170</sup> In particular, pre-TCJA, taxpayers were allowed an eighty percent charitable deduction when making donations to educational institutions that included a right to purchase athletic event preferred seating.<sup>171</sup> Between 1998 and 2003, athletic department donations significantly increased because of such benefit.<sup>172</sup>

However, in 2017 the TCJA eliminated this so-called "80/20 rule" on athletic seating rights, while also eliminating the fifty percent deduction that had been previously allowed for corporate business entertainment expenses that

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<sup>166</sup> *Id.* at 10.

<sup>167</sup> *Id.* at 12 n.36; *see also* I.R.C. § 7805(b).

<sup>168</sup> I.R.C. § 7805(b)(3).

<sup>169</sup> *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 [hereinafter TCJA].

<sup>170</sup> Holden & Kisska-Schulze, *supra* note 25, at 857.

<sup>171</sup> *Id.* at 871; *see also* I.R.C. §§ 170(a)(1), (2); *see also* Rev. Rul. 86-63, 1986-1 C.B. 88.

<sup>172</sup> Holden & Kisska-Schulze, *supra* note 25, at 871.

included the price of sports tickets and stadium suites,<sup>173</sup> adding a “21 [percent] excise tax on executive compensation, [and a] 1.4 [percent] excise tax . . . on private institution endowments.”<sup>174</sup> In addition, the TCJA substantially increased the standard deduction, resulting in significantly fewer taxpayers choosing to itemize their deductions.<sup>175</sup> Such changes raised immediate red flags across higher education over concerns that alumni and boosters might be less incentivized to charitably give without the added tax benefit of deductibility.<sup>176</sup>

Five years later, data shows that such is not the case. In fact, alumni, philanthropists, supporters and billionaires have not stopped donating to higher education, or their affiliated athletic departments, simply because of the change in law.<sup>177</sup> For example, in 2020, Binghamton University received a record sixty million dollar gift to fund a new baseball stadium complex.<sup>178</sup> During Bucknell University Athletics’ 2022-2023 “Drive for Five” fundraiser, the Bison Club raised a record-breaking three million dollars-plus in donations.<sup>179</sup> In 2023, the University of St. Thomas announced a record-breaking seventy-five million dollar gift toward a new hockey and basketball arena.<sup>180</sup> On July 18, 2023, Syracuse University announced it had raised a record-breaking forty-five million dollars during the 2022-2023 school year to support student-athletes.<sup>181</sup> Two days later, on July 20, 2023 Clemson announced that 2023 marked “record-

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<sup>173</sup> *Id.* at 883; *see also* TCJA § 13304, 131 Stat. at 2124 (codified at 26 U.S.C. § 274(a)).

<sup>174</sup> Holden & Kisska-Schulze, *supra* note 25, at 883; *see also* TCJA § 13704, 131 Stat. 2054, 2169 (codified at 26 U.S.C. § 170(l)); *see also* I.R.C. § 170(b)(1)(A)(ii).

<sup>175</sup> *See* TCJA § 11021(a), 131 Stat. at 2072 (codified at 26 U.S.C. § 63(c)(7)(A)(ii)).

<sup>176</sup> Holden & Kisska-Schulze, *supra* note 25, at 885-86.

<sup>177</sup> *See* Evan Castillo, *These are the Largest Donations to U.S. Colleges and Universities*, BESTCOLLEGES, <https://www.bestcolleges.com/news/largest-donations-to-colleges-universities/> (Jan. 19, 2024).

<sup>178</sup> *See* Greg Delviscio, *Binghamton University \$60 Million Gift – Largest in University History*, BINGHAMTON UNIVERSITY: BINGUNews (Feb. 10, 2020), <https://www.binghamton.edu/news/story/2262/binghamton-university-60-million-gift-largest-in-universithistory>.

<sup>179</sup> *See* *Bison Club Tops \$3 Million in Donations for First Time During 2022-23 Fiscal Year*, BUCKNELL BISON ATHLETICS (July 20, 2023, 10:03 AM), <https://bucknellbison.com/news/2023/7/20/bison-club-tops-3-million-in-donations-for-first-time-during-2022-23-fiscal-year.aspx>.

<sup>180</sup> The Newsroom, *St. Thomas Announces Record-Breaking, \$75 Million Gift for Multiuse Arena*, UNIV. OF ST. THOMAS (Jan. 17, 2023), <https://news.stthomas.edu/jan-17-2023-announcement/>.

<sup>181</sup> News Staff, *'Cuse Athletics Fund Raises Record-Breaking \$45M in 2022-23 to Support Syracuse Student-Athletes*, SYRACUSE UNIV.: CAMPUS & COMMUNITY (July 18, 2023), <https://news.syr.edu/blog/2023/07/18/cuse-athletics-fund-raises-record-breaking-45m-in-2022-23-to-support-syracuse-student-athletes/>.

breaking levels of philanthropic generosity in academics and athletics[,]” and of the total \$216,909,099 raised, \$135 million was directed toward athletics.<sup>182</sup>

People want to give. Although the TCJA (and subsequent coronavirus pandemic) generated fears that charitable giving would decline, data appears to support quite the opposite.<sup>183</sup> In 2018, individual giving amounts were actually higher than they were prior to the TCJA going into effect.<sup>184</sup> Also in 2018, a record \$46.7 billion was donated to colleges and universities across the U.S.<sup>185</sup> Removing the charitable tax benefit may impact some donors’ gifting decisions, but university athletic programs have not seemed to suffer the early doomsayer predictions of donors choosing *not* to charitably give following the passage of the TCJA, merely because the tax laws changed their tax deductibility allowances. Instead, many athletic programs seem to be enjoying record donations. As such, it is perhaps realistic to suggest that something similar may occur with regard to NIL collectives that lose their section 501(c)(3) status. If alumni, boosters, and other third-party supporters have an interest in supporting their school-affiliated student-athletes in order to help recruit and retain elite student-athletes, they may very well continue to do so with or without the hanging carrot of tax deductibility. It may therefore be in the best interest of NIL collectives to simply reevaluate whether their mission is truly charitable, and if not, move forward robustly with for-profit intentions in mind.

#### IV. CONCLUSION

The world of college sports is rapidly evolving. While many across the U.S. identify the current and virtually unregulated landscape as being chaotic, one thing is clear: student-athletes can now reap the financial benefits of their fame.<sup>186</sup> Although college athletes continue to be prohibited from receiving any form of direct payment in exchange for playing sports at their institutions, they can now contract directly with outside businesses to pursue lucrative opportunities that allow them to showcase and be compensated for the use of their NIL.<sup>187</sup>

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<sup>182</sup> Paula Powers, *Clemson University Shatters Fundraising Record with Unprecedented Philanthropic Support*, CLEMSON NEWS (July 20, 2023), <https://news.clemson.edu/clemson-university-shatters-fundraising-record-with-unprecedented-philanthropic-support/>.

<sup>183</sup> Scott Hodge, *Would Americans Make Charitable Donations Without Tax Incentives?*, TAX FOUND. (Dec. 20, 2022), <https://taxfoundation.org/charitable-deduction-tax-incentives/>.

<sup>184</sup> *Id.*

<sup>185</sup> Jeré Longman, *A Welcome Funding Source for College Athletics: Women Investing in Women’s Sports*, N.Y. TIMES (Dec. 3, 2019), <https://www.nytimes.com/2019/12/03/sports/women-donations-college-athletics.html>.

<sup>186</sup> See *supra* text accompanying notes 5-11.

<sup>187</sup> See *supra* Part I.

In addition, beginning in 2021, NIL collectives emerged to further expand the ability of student-athletes to generate fame-driven revenue.<sup>188</sup> Although unique in how they operate, NIL collectives seek to attract student-athletes to commit and play sports for their affiliated institutions. Of the 200 NIL collectives currently in operation, about 80 have been granted IRC section 501(c)(3) tax-exempt status by the IRS.<sup>189</sup> However, in March 2023 the IRS released an Office of Chief Counsel legal memorandum that indicated that certain NIL collectives do not appear to further any tax-exempt purpose under section 501(c)(3), thus putting them in jeopardy of losing their tax-exempt status.<sup>190</sup>

While not an official IRS ruling, the IRS Memo offers critical insight into the IRS' view of recent NIL collective activities, and the potential tax treatment of such collectives moving forward.<sup>191</sup> It is therefore vital that NIL collectives wanting to retain their section 501(c)(3) status take action, to include: (1) reevaluate their organizational and operational procedures to ensure they are in compliance with section 501(c)(3); (2) not operate in such a way that substantially furthers a commercialized for-profit purpose, rather than a charitable purpose; (3) consider expanding the private and narrow student-athlete group with which they currently work; and (4) be prepared to mitigate the impending tax consequences of their historic donors. For those NIL collectives that have garnered section 501(c)(3) status, but realistically fall outside the spectrum of charitable qualification, recent data indicates that supporters, donors, and alumni still want to give to, and support, college athletics—even without the benefit of tax deductibility—so fundraise away.

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<sup>188</sup> See *supra* Part II.

<sup>189</sup> See *supra* text accompanying notes 13-14; see also *supra* Part III (A).

<sup>190</sup> See *supra* Part III (B).

<sup>191</sup> See *supra* Part IV.