

N.I.L. as Charity? Anticipating the Legal Battle Regarding Tax- Exempt Collectives in College Athletics

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The Supreme Court’s decision in NCAA v. Alston sparked a seismic shift in college athletics, ushering in a new era of Name, Image, and Likeness (NIL) opportunities. Finally, student-athletes can profit off their own likeness. The primary vehicle through which student-athletes receive their NIL compensation is through legal entities called “collectives.” Although their operations vary, all collectives function as intermediaries between NIL compensation and student-athletes. Donors or alumni looking to donate funds to particular college teams will give their funds to these collectives who will then pass these funds off to student-athletes. What is problematic is that some of these collectives have ventured beyond the legal sideline.

Shockingly, a significant number of these collectives have secured 501(c)(3) non-profit status from the IRS because they are supposedly operating for a “charitable purpose.” Paying student-athletes to complete negligible community service, however, is not a recognized charitable purpose under the tax code.

Therefore, the IRS should—and likely will—revoke the tax-exempt status of these non-profit collectives. Once this happens, a legal battle is likely to ensue, pitting the IRS against non-profit collectives fighting to maintain their non-profit status. The IRS will argue that funneling money to college athletes via collectives should not be tax-exempt. Non-profit collectives, on the other hand, will contend their activities further a legitimate charitable purpose and therefore deserve to be tax-exempt. Despite non-profit collectives’ “Hail Mary” argument, the IRS should prevail. Consequently, NIL collectives will be required to operate as for-profit entities, preserving the true meaning of charity and discouraging tax evasion

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I. INTRODUCTION

Before the days of million-dollar NIL brand deals, free Dodge Ram trucks, and college quarterbacks appearing in Wendy’s and Dr. Pepper commercials, student-athletes were struggling to find a meal.¹ In 2014, former University of Connecticut point guard Shabazz Napier revealed this harsh reality. Just a week before leading his team to win the NCAA’s most lucrative event of March Madness,² he shared that there were often nights when he went to bed starving because he could not afford a meal.³ Napier also voiced his opinion on not being able to profit off his own jersey sales by saying, “[w]hen you see your jersey

¹ Kalan Hooks, *Utah Football Players Receive Trucks from NIL Partnership*, ESPN (Oct. 5, 2023), https://www.espn.com/college-sports/story/_/id/38575432/utah-utes-football-receive-trucks-nil-partnership [<https://perma.cc/G9U6-8CTZ>]; David The Classic TV Guy, *Wendy’s Commercial Late August 2023 “Two Quarterbacks” Featuring Caleb Williams*, YOUTUBE (Sept. 2, 2023), https://www.youtube.com/watch?v=_joX0OPTcGI; *Fansville: Superstitious Featuring Caleb Williams*, iSPOT.TV (Oct. 16, 2023), <https://www.ispot.tv/ad/5SaM/dr-pepper-fansville-superstitious-featuring-caleb-williams>.

² Jonathan Berr, *March Madness: Follow the Money*, CBS (Mar. 20, 2015), <https://www.cbsnews.com/news/march-madness-follow-the-money/> [<https://perma.cc/9MY4-BPCB>].

³ Soraya Nadia McDonald, *National Champ U-Conn. ’s Napier Says He Goes to Bed Starving*, WASH. POST (Apr. 8, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/04/08/national-champ-uconns-napier-says-he-goes-to-bed-starving/>.

getting [sold], it may not have your last name on it . . . but you want something in return.”⁴

For the past two decades, the advocacy for compensating student-athletes focused primarily on alleviating poverty and securing the rights to jersey sales.⁵ Many people agreed with these efforts.⁶ Indeed, Napier himself seemed to share this sentiment when he stated in that same interview that “we’re definitely blessed to get a scholarship to our universities but at the end of the day, that doesn’t cover everything.”⁷ Interestingly, Napier later qualified his support of allowing student-athletes to profit off their likeness in saying, “I don’t think you should stretch it out to hundreds of thousands of dollars.”⁸

Now, contrary to Napier’s reservations, student-athletes are paid as high as \$4.5 million a year and the average starter for a big-name college football program makes about \$103,000 per year.⁹ After the Supreme Court’s decision in *NCAA v. Alston* prompted the National Collegiate Athletic Association (NCAA) to adopt an Interim NIL Policy,¹⁰ the floodgates opened for student-athletes to get paid,¹¹ and concerns over student-athlete poverty and rights to

⁴ *Id.*

⁵ See RAMOGI HUMA & ELLEN J. STAUROWSKY, *THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORTS* 3–4 (2011), <https://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf> [<https://perma.cc/4JRK-TTKK>]; see also Mark Schlabach, *NCAA Puts End to Jersey Sales*, ESPN (Aug. 8, 2013), https://www.espn.com/college-sports/story/_/id/9551518/ncaa-shuts-site-jersey-sales-says-hypocritical [<https://perma.cc/6LJ6-7369>]; MICHAEL A. BONGIOVANNI, *COMPENSATION FOR THE PLAYERS: AN ANALYSIS OF THE COMPENSATION FOR AN NCAA ATHLETE* 1–2 (2020), <https://research.library.fordham.edu/cgi/viewcontent.cgi?article=1005&context=fulr-online-blog> [<https://perma.cc/K8SF-QRQ3>].

⁶ See, e.g., Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

⁷ See McDonald, *supra* note 3.

⁸ *Id.*

⁹ Nick Cottongim, *Top 20 College Athletes with the Highest NIL Valuations*, THE FAN (Sept. 15, 2023),

<https://1075thefan.com/playlist/top-20-college-athletes-with-the-highest-nil-valuations/item/1> [<https://perma.cc/N369-G3SV>]; David A. Fahrenthold & Billy Witz, *How Rich Donors and Loose Rules Are Transforming College Sports*, N.Y. TIMES (Oct. 21, 2023), <https://www.nytimes.com/2023/10/21/us/college-athletes-donor-collectives.html>.

¹⁰ See generally Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. 69 (2021); Anthony M. Dalimonte, *NIL Timeline: The Events That Transformed College Sports*, FOSTER SWIFT (Apr. 21, 2023), <https://www.fosterswift.com/communications-timeline-NIL-cases-transform-college-sports.html#:~:text=This%20ruling%20opened%20the%20floodgates,without%20fear%20of%20NCAA%20penalty> [<https://perma.cc/AF44-NEVG>].

¹¹ Dalimonte, *supra* note 10; *How Do Collegiate NIL Collectives Work?*, CROWN, <https://crownllp.com/blog/how-do-collegiate-nil-collectives-work/#:~:text=The%20most%20common%20form%20is,the%20athletes%20are%20to%20undertake> [<https://perma.cc/5QA6-AXMM>]; see Tim Tucker, *NIL Timeline: How We Got Here and What’s Next*, ATLANTA J. CONST. (Mar. 18, 2022), <https://www.ajc.com/sports/georgia->

jersey sales have been supplanted by donors' fervent desire to help college teams win championships.¹²

Most are fine with this dramatic shift in college sports because student-athletes are finally getting to share in the enormous profits that NCAA sports generate.¹³ It seems reasonable that those responsible for making college sports what they are—the players—should receive a share of those profits, especially considering the seven-figure salaries of college coaches, conference executives, and NCAA commissioners.¹⁴ However, while student-athletes are finally getting paid, many unanswered questions and issues remain in this newfangled NIL landscape.¹⁵ One such issue is the questionable use of “non-profit collectives” as a vehicle to provide student-athletes with NIL money.

bulldogs/nil-timeline-how-we-got-here-and-whats-next/
EOL7R3CSSNHK5DKMAF6STQ6KZ4/ [https://perma.cc/ZRU2-C3D6].

¹² See Thalia Beaty & Glenn Gamboa, *NIL Nonprofits Can't Lose in College Football Playoff Championship*, AP (Jan. 8, 2024), <https://apnews.com/article/michigan-wolverines-washington-huskies-nil-collective-66852a1dbce3bd6675a801e432e0cec5> (mentioning an influx of donations, including \$2 million from a single donor to the University of Michigan's collective after the Wolverine's 2024 Rose Bowl win).

¹³ See David Ubben & Max Olson, *Seven Major Collectives Forming Association to 'Shape the Development' of NIL Market*, ATHLETIC (July 12, 2023), https://theathletic.com/4684892/2023/07/12/collective-association-nil-ncaa/?redirected=1&access_token=14904012; Brendon Kleen, *American Public Supports NIL Rights for College Athletes but Is Unsure of How They Should Work in Practice*, GLOB. SPORTS MATTERS (Dec. 6, 2021), <https://globalsportmatters.com/research/2021/12/06/american-public-supports-nil-rights-college-athletes-poll-results/> [https://perma.cc/C3Z7-FYBD] (showing that 63 percent of those who called themselves college sports fans said they supported NIL efforts).

¹⁴ Ben Bolch, Ryan Kartje & Thuc Nhi Nguyen, *Expensive Instructors: The Salaries of Every Power Five College Football Coach*, L.A. TIMES (Sept. 17, 2020) <https://www.latimes.com/sports/story/2020-09-17/ncaa-college-football-coaches-salaries-athletic-department-revenues> [https://perma.cc/65XY-5UEA]; Steve Berkowitz, *NCAA's Power Five Conferences Are Cash Cows. Here's How Much Schools Made in Fiscal 2022.*, USA TODAY (May 19, 2023), <https://www.usatoday.com/story/sports/college/2023/05/19/power-5-conferences-earnings-billions-2022/70235450007/> [https://perma.cc/2ZUR-Z2YG]; Anne Paddock, *Executive Compensation at the NCAA (2021)*, PADDOCK POST (Aug. 27, 2023), <https://paddockpost.com/2023/08/27/executive-compensation-at-the-ncaa-2021/> [https://perma.cc/WA5C-N4K4].

¹⁵ See, e.g., Abigail Oliphant, Note, *NIL Collectives and Title IX: A Proactive Consideration of Title IX's Application To Donor-Drive NIL Collectives*, 57 IND. L. REV. 531, 546–56 (2023) (outlining the potential Title IX issues raised by the rise of collectives in college sports); Marc Edelman, *Closing the “Free Speech” Loophole: The Case for Protecting College Athletes' Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 553, 567 (2014) (although from 2014, this article's discussion of how commercial video games of college sports violate the publicity rights of college football players is especially relevant today given the resurgence of EA Sports' NCAA football video game series); NIL College Rules, On3NIL, <https://www.on3.com/nil/laws/college/> [https://perma.cc/6U82-7KME] (providing an overview of the varying state laws regarding NIL); Jimmy Golen & Ralph D. Russo, *US Labor Official Says Dartmouth Basketball Players are School Employees, Sets Stage for Union Vote*, AP (Feb 6, 2024), <https://apnews.com/article/dartmouth-basketball-union-ncaa-employees-19839a9afb5c8048a015cbcb86c0e25b>;

This Note explains why the IRS should permanently revoke these non-profit collectives' tax-exempt status and outlines the inevitable legal battle that will follow. Part II of this Note provides more background on the illegal operation of these non-profit collectives. Part III outlines the operative tax provisions that allowed these non-profit collectives to achieve tax exempt status. Part IV explains the likely arguments from both the IRS and non-profit collectives regarding the tax-exempt status of non-profit collectives. Part V will provide a proposal as to how courts should resolve this dispute in favor of the IRS. Part VI will conclude this Note while also providing suggestions for how we can move forward.

II. BACKGROUND: THE ISSUE WITH NON-PROFIT COLLECTIVES

The NCAA has come a long way from its strict amateurism policies to now allowing student-athletes to profit off their name, image, and likeness.¹⁶ Now, under the NCAA's cursory NIL policies,¹⁷ there are two primary ways student-athletes can earn money from the novel \$1 billion NIL market: brand deals

Nicole Auerbach, *Federal Judge Blocks NCAA from Enforcing NIL Rules*, ATHLETIC (Feb. 23, 2024), <https://theathletic.com/5295907/2024/02/23/tennessee-ncaa-nil-lawsuit-injunction/> (injunctions banning NCAA from enforcing its NIL policies).

¹⁶ Despite the NCAA's long-standing prohibition against student-athletes receiving pay for their play, under-the-table payments to student-athletes were commonplace and in fact, stretch all the way back to 1905. See Robert Read, *Reggie Bush-NCAA Timeline: Why Did Former USC Star Lose His Heisman?*, NEWSWEEK (Aug. 23, 2023), <https://www.newsweek.com/reggie-bush-ncaa-timeline-why-did-former-usc-star-lose-his-heisman-1821992> [<https://perma.cc/U6G5-BKAG>] (describing Reggie Bush's NCAA monetary violations); PETER A. CARFAGNA, REPRESENTING THE PROFESSIONAL ATHLETE 3–5 (3d ed. 2018) (outlining Reggie Bush's receipt of \$300,000, and explaining how Nevin Shapiro, an incarcerated ex-booster of the University of Miami provided football players with cash, prostitutes, entertainment on his yacht, trips to nightclubs, bounties for injuring opposing players, and, on one occasion, an abortion.); Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 989 n.23 (1987) (James Hogan, an offensive tackle for Yale from 1901 to 1904, received free meals at the university club, cash, and a 10-day vacation to Cuba).

¹⁷ On July 1, 2021, without changing any of its bylaws, the NCAA issued a one-page NIL Policy that allows student-athletes to get paid. See *Interim NIL Policy*, NCAA (July 1, 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [<https://perma.cc/6LJN-AQCP>] [hereinafter, *Interim NIL Policy*]. Under this policy, student-athletes are still prohibited from receiving direct compensation for participation in their sport (i.e., pay-for-play prohibition). *Id.* Interestingly, in separate guidance, the NCAA extended this pay-for-play prohibition to non-profit collectives. *NIL Update Memo*, NCAA (June 27, 2023), <https://www.ncaa.org/sports/2021/2/8/about-taking-action.aspx> [<https://perma.cc/7XFE-UKQ5>] [hereinafter, *NIL Update Memo*]. With the NCAA unable to monitor the operation of non-profit collectives, other entities like the IRS are thus tasked with wrangling in the abuse of this newfangled NIL space.

and/or collectives.¹⁸ The former method is rather straightforward and constitutes only 20% of earnings in NIL.¹⁹ Brand deals involve companies paying student-athletes to promote their brand much like a professional athlete would.²⁰ For example, Olivia Dunne, a gymnast at Louisiana State University, derives a majority of her \$3.3 million in NIL earnings from brand deals with companies like American Eagle and Forever 21.²¹ Similarly, Shedeur Sanders, quarterback for the University of Colorado Boulder and son of former NFL and MLB player Deon Sanders, received a large chunk of his \$1.4 million in NIL earnings from brand deals with Beats by Dre and Tom Brady's clothing line.²² Other big names like Bronny James and Arch Manning have similar deals.²³

If for some reason a student-athlete is not the offspring of a former professional athlete or is not able to land a brand deal with an international corporation, there are still substantial amounts of NIL compensation available via the latter method—collectives. A collective is essentially a pool of funds often provided by alumni and donors that is distributed to student-athletes of one university.²⁴ Although collectives' main purpose is to act as a portal to

¹⁸ Dan Whateley & Margaret Fleming, *How NIL Deals and Brand Sponsorships Are Helping College Athletes Make Money*, BUS. INSIDER (Sept. 19, 2023), <https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals#:~:text=College%20athletes%20make%20money%20by,or%20a%20social%20media%20campaign.>

¹⁹ *Id.*

²⁰ For example, some of the most ambitious NIL brand deals have come from the billionaire tycoon and attorney John Ruiz through his LifeWallet business. See Pete Nakos, *Report: Federal prosecutors investigating Miami booster John Ruiz, Life Wallet*, ON3NIL (July 7, 2023), <https://www.on3.com/nil/news/john-ruiz-miami-hurricanes-football-nil-booster-lifewallet-sec-investigation-federal-prosecutors/> [<https://perma.cc/8KMU-CCRT>]. LifeWallet paid former Kansas State guard Nijel Pack \$800,000 to come play basketball for the University of Miami. *Id.*

²¹ *Olivia Dunne's Net Worth in 2023 Is Already Flippin' Stellar*, PARADE (Nov. 28, 2023), <https://parade.com/celebrities/olivia-dunne-net-worth#:~:text=How%20does%20Olivia%20Dunne%20make,WME%20Sports%20agency%2C%20told%20Forbes> [<https://perma.cc/AB2A-LN83>].

²² Kayode Akinwumi, *Shedeur Sanders Net Worth: How Much Does Coach Prime's Son Make? NIL Profile, Brand Deals, and More*, SPORTSKEEDA (July 24, 2023), <https://www.sportskeeda.com/college-football/shedeur-sanders-net-worth-how-much-coach-prime-s-son-make-nil-profile-brand-deals#:~:text=Shedeur%20Sanders%20has%20signed%20several,with%20Tom%20Brady's%20clothing%20line> [<https://perma.cc/TE6L-DBJD>].

²³ Jon Heath, *Arch Manning Has the 2nd-Highest NIL Valuation in 2023*, BRONCOSWIRE (Feb. 17, 2023), <https://brancoswire.usatoday.com/2023/02/17/highest-paid-nil-athletes-arch-manning-bronny-james/> [<https://perma.cc/WU73-HH6S>].

²⁴ 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/> [<https://perma.cc/N2H6-8GR5>] (interestingly, some of these collectives have paid subscribers who donate on a regular basis); *What Are NIL Collectives and What Do They Do?*, ICONSOURCE <https://iconsource.com/blog/nil-collectives/> [<https://perma.cc/BQL3-WP7E>].

paying student-athletes, they also often assist student-athletes with personal brand development, financial planning, tax compliance, and even legal advice.²⁵ There are currently more than 200 collectives across college sports, which account for roughly 80% of NIL earnings.²⁶ While mostly geared toward football and men's and women's basketball,²⁷ collectives have begun to support student-athletes in a variety of sports.²⁸

Although collectives vary greatly,²⁹ they are required to operate independently from the universities of the student-athletes they support.³⁰ For example, the Sun Angel Collective, which gives NIL money to support Arizona State University athletes, does not, or at least should not, communicate with Arizona State University or its athletic department.³¹ This separation, though not always clear-cut, conforms to the piecemeal NIL landscape developed by the NCAA.³² And while this system is definitely not in its purest form,³³ it suffices until comprehensive legislation is passed.

What is problematic, however, is that numerous collectives are structured as 501(c)(3) non-profit organizations.³⁴ As of writing this article, roughly 80 collectives have been awarded 501(c)(3) non-profit status from the IRS, with

²⁵ See James Beavers, *Most NIL Collectives Do Not Further a Sec. 501(c)(3) Exempt Purpose*, TAX ADVISER (Sept. 1, 2023), <https://www.thetaxadviser.com/issues/2023/sep/most-nil-collectives-do-not-further-a-sec-501c3-exempt-purpose.html> [<https://perma.cc/SR63-DPCD>].

²⁶ See Fahrenthold & Witz, *supra* note 9; Whateley & Fleming, *supra* note 18; OPENDORSE, *NIL AT TWO 17* (2023), <https://biz.opendorse.com/wp-content/uploads/2023/06/NILatTwo.pdf> [<https://perma.cc/72QR-UGJU>].

²⁷ See OPENDORSE, *supra* note 26, at 18.

²⁸ See, e.g., the Royal Blue NIL collective, associated with Brigham Young University, recently committed \$700,000 to the school's women's volleyball team. Mitch Harper, *BYU's NIL Collective Launches Team-Wide Deal for Women's Volleyball Program*, KSL Sports (Sept. 22, 2023), <https://kslsports.com/505133/byu-womens-volleyball-nil-collective-the-royal-blue/> [<https://perma.cc/D9TL-VHZV>]; OPENDORSE, *supra* note 26, at 17 (mentioning collectives that are associated with several HBCUs and some NCAA Division II/III schools).

²⁹ See Oliphant, *supra* note 15, at 537–39 (discussing three different categorizations of collectives); OPENDORSE, *supra* note 26, at 18 (explaining five different forms of NIL collectives).

³⁰ See *NIL Update Memo*, *supra* note 17; *On3's Top Most Ambitious NIL Collectives*, ON3NIL (Aug. 4, 2022), <https://www.on3.com/nil/news/on3s-top-20-most-ambitious-nil-collectives/> [<https://perma.cc/N6F5-D2ZY>]; Ubben & Olson, *supra* note 13.

³¹ See SUN ANGEL COLLECTIVE, <https://sunangels.org/> [<https://perma.cc/J8NY-BTB5>].

³² *The NCAA's New NIL Guidance: How the NCAA Has Loosened Restrictions on Collectives*, BURR & FORMAN (Nov. 17, 2022), <https://www.burr.com/newsroom/articles/the-ncaas-new-nil-guidance-how-the-ncaaa-has> [<https://perma.cc/G3PL-7954>].

³³ See *McCormack v. Nat'l Collegiate Athletic Ass'n.*, 845 F.2d 1338, 1345 (5th Cir. 1988) (discussing how the NCAA's amateurism policy in 1988 had not been distilled to its purest form).

³⁴ See, e.g., MATADOR CLUB, <https://www.matadorclub.org/about> [<https://perma.cc/FG36-5WW4>]; see also OPENDORSE, *supra* note 26, at 18.

more applications pending.³⁵ A major reason for this choice to be a non-profit rather than a for-profit entity is the tax benefits 501(c)(3)s provide, most notably the capacity to provide tax deductions to donors.³⁶ The opportunity to reduce their taxable income while simultaneously supporting their favorite college has inevitably attracted numerous alumni and donors to contribute to these non-profit collectives. Indeed, at a fundraising event held on a yacht off the New Jersey coast for a collective providing funds to Penn State University student-athletes, one donor expressed that if the collective was not a 501(c)(3) organization he would not donate to it.³⁷

One common feature among these non-profit collectives is the minimal charity work that student-athletes must complete to receive funds from the collective. For example, the Matador Club is a non-profit collective that works independently of Texas Tech University to woo student-athletes to play for the red and black.³⁸ In July 2022, the board of directors for the Matador Club announced that 85 scholarship and 15 walk-on football players for Texas Tech would be awarded one-year \$25,000 contracts that are renewable annually.³⁹ Under the terms of these contracts, players will receive thousands of dollars and advice in acquiring additional NIL opportunities in exchange for negligible community service such as posting on social media for local charities.⁴⁰ Cody Campell, an oil and gas executive who is a member of the board of directors for the Matador Club, refers to these contracts for Raiders football players as “salaries” and hopes to extend these salaries to all athletes at Texas Tech.⁴¹

The Boilermaker Alliance provides another example of the negligible charitable work student-athletes perform to get paid from non-profit collectives. In addition to paying Purdue University student-athletes, this 501(c)(3), non-profit collective claims to “assist charitable organizations, both in Indiana and

³⁵ See OPENDORSE, *supra* note 26, at 18; *Some Nonprofit NIL Collectives May Not Qualify as Tax-exempt*, AP (June 30, 2024), https://www.espn.com/college-sports/story/_/id/37939005/some-nonprofit-nil-collectives-not-qualify-tax-exempt/ [https://perma.cc/FXE3-LVRU].

³⁶ See I.R.C. § 170.

³⁷ Fahrenthold & Witz, *supra* note 9 (“If it’s not a 501(c)(3), I’m not going to give money to [the collective].”).

³⁸ SportsDay Staff, *Nonprofit Matador Club Signs Entire Texas Tech Football Team to One-Year, \$25K Contracts*, DALLAS NEWS (July 18, 2022), <https://www.dallasnews.com/sports/texas-tech-red-raiders/2022/07/18/nonprofit-matador-club-signs-entire-texas-tech-football-team-to-one-year-25k-contracts/>.

³⁹ *Id.*; Dave Wilson, *Texas Tech Red Raiders Football Players to Receive 1-year, \$25K NIL Contracts from the Matador Club*, ESPN (July 18, 2022), https://www.espn.com/college-football/story/_/id/34264551/texas-tech-red-raiders-football-players-receive-1-year-25k-nil-contracts-matador-club [https://perma.cc/SAY5-SRNX].

⁴⁰ See Wilson, *supra* note 39; see also *About the Matador Club*, MATADOR CLUB, <https://www.matadorclub.org/about> [https://perma.cc/546L-D7QB]. The requirements for this “charity work” and “community service” are, in some cases, laughable. Fahrenthold & Witz, *supra* note 9 (describing the charity requirement for Michigan State’s NIL agreement for football players is one social media post a month).

⁴¹ See Wilson, *supra* note 39.

in the communities in which [] Purdue student-athletes live.”⁴² Under the terms of their agreement with Purdue student-athletes, to get paid student-athletes will have the “*option*[] [to participate in] special appearances, autograph signings, social media promotions, camps and clinics, *charity events*, and more.”⁴³ Shockingly, this discretion afforded to Purdue student-athletes means charity work is not even required to receive NIL compensation from this non-profit collective. Furthermore, the charitable acts they do decide to participate in appear to be minimal in both quantity and substance. For instance, Purdue basketball players have mentioned that they once read books to kids and took families shopping during the holiday season.⁴⁴ Moreover, it is evident that the primary purpose of the Boilermaker Alliance, like most other non-profit collectives, is not to support local charities but to compensate college athletes, attract new recruits, and hopefully help win championships.

The operation of non-profit collectives, like the Matador Club and the Boilermaker Alliance, as official 501(c)(3) non-profit organizations is questionable to say the least, especially considering the amount of funds these players are receiving compared to the collectives’ charitable impact. The image of college students driving Lamborghinis is also hardly synonymous with the typical impact one associates with non-profit organizations.⁴⁵ Furthermore, it seems as though non-profit collectives are merely riding the coattails of other valid 501(c)(3)s by having their student-athletes nominally support other valid charities.⁴⁶

Despite this obvious abuse of a tax loophole to gain tax exemption, no one seems to care. The NCAA is taking a hands-off approach,⁴⁷ Congress has only

⁴² *FAQs*, THE BOILERMAKER ALL., <https://www.boilermakeralliance.com> [<https://perma.cc/CG9R-2GE6>].

⁴³ *Id.* (emphasis added).

⁴⁴ *Id.*

⁴⁵ See Madison Williams, *Texas RB Bijan Robinson Lands Lamborghini NIL Deal*, SPORTS ILLUSTRATED (May 5, 2022), <https://www.si.com/extra-mustard/2022/05/05/texas-running-back-bijan-robinson-nil-deal-lamborghini-austin> [<https://perma.cc/33HH-7EDT>]; Dan Lyons, *Georgia QB Carson Beck Reportedly Bought Lamborghini That Sells for Over \$270k*, SPORTS ILLUSTRATED (Feb. 6, 2024), <https://www.si.com/college/2024/02/06/georgia-bulldogs-qb-carson-beck-lamborghini-urus-performante> [<https://perma.cc/BH8H-SE74>].

⁴⁶ For example, one of Ohio State University’s collectives, THE Foundation Fund, has the following stated purpose in its articles of incorporation filed with the Ohio Secretary of State: “[t]he corporation is organized exclusively for charitable . . . purposes, *including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code.*” (emphasis added). THE Foundation Fund, OHIO SEC’Y OF STATE (Jan. 17, 2022), <https://bizimage.ohiosos.gov/api/image/pdf/202201702130> [<https://perma.cc/24CQ-TWU6>].

⁴⁷ Despite its knowledge of the operations of these non-profit collectives, the NCAA has stated that it “will continue its normal regulatory operations but will *not* monitor for compliance with state law.” *Interim NIL Policy*, *supra* note 17 (emphasis added).

faintly expressed concern,⁴⁸ and perhaps most shockingly, the IRS has taken a soft stance against the operation of these collectives despite having initially granted these collectives their non-profit status.⁴⁹ Without revoking their 501(c)(3) non-profit statuses, the IRS in a legal memorandum explained that they believed most of these non-profit collectives are not operating for a legally tax-exempt purpose.⁵⁰ Highlighting the memo's lack of impact, Patrick Smith, president of a University of Texas affiliated non-profit collective, responded to its release saying “[a]ll we can do is continue to perform the mission of our [nonprofit].”⁵¹

Corrective action must be taken to close this legal loophole. The IRS should—and likely will⁵²—permanently revoke the tax-exempt status of these collectives thereby forcing them to operate as for-profit entities.⁵³ Once this happens, a legal battle will ensue with non-profit collectives like the Matador Club and Boilermaker Alliance fighting to maintain their non-profit status. The hyper-competitive nature of college sports, the rise of the transfer portal, the unprecedented desire by recruits for NIL money, and alumni's fervent desire for their schools to win games have created an enormous demand for donor funds.⁵⁴ And without non-profit status, these collectives will likely see a significant drop in donations as donors are more inclined to give to a collective that offers tax

⁴⁸ Senators John Thune and Ben Cardin introduced the Athlete Opportunity and Taxpayer Integrity Act, which would amend section 170 of the Internal Revenue Code to specifically disallow taxable deductions to student-athletes. Athlete Opportunity and Taxpayer Integrity Act, S. 1454, 118th Cong. (2023). After being introduced to the Senate on May 5, 2023, the bill failed to gain any traction.

⁴⁹ See C.A.M. 2023-04 (May 23, 2023).

⁵⁰ *Id.* at 12

⁵¹ Jim Vertuno, *IRS Throws a Chill Into Collectives Paying College Athletes While Claiming Nonprofit Status*, AP (June 30, 2023), <https://apnews.com/article/nil-athlete-endorsements-ncaa-irs-9d006bdb429f76adaa3d108196fd2c8c> [https://perma.cc/9P6P-KRUX].

⁵² See Ross Dellenger, *IRS Says Donations Made to Nonprofit NIL Collectives Are Not Tax Exempt*, SPORTS ILLUSTRATED (June 9, 2023), <https://www.si.com/college/2023/06/10/irs-name-image-likeness-collectives-not-tax-exempt> [https://perma.cc/6X2A-K26Q] (“[M]any within the college industry have warned for more than a year now that the government entity would eventually investigate and likely put a stop to tax deductions for NIL-related donations.”)

⁵³ Dellenger, *supra* note 52. This will likely be done by the IRS issuing a CP120A Notice to these non-profit collectives. See *How do I Know if My Organization Has Lost Its Tax Exempt Status?*, HOMESCHOOLCPA (June 13, 2014), <https://homeschoolcpa.com/how-do-i-know-if-my-organization-has-lost-its-tax-exempt-status/> [https://perma.cc/KY65-7JGM].

⁵⁴ See Ryan Morik, *Recently Retired Nick Saban Rips NIL: ‘What We Have Now is Not College Football’*, FOX NEWS (Feb. 23, 2024), <https://www.msn.com/en-us/sports/other/recently-retired-nick-saban-rips-nil-what-we-have-now-is-not-college-football/ar-BB1iLoDj?ocid=msedgntp&pc=HCTS&cvid=9dab570893434764a34db01ff49c4373&ei=23> [https://perma.cc/49WU-J3ZA] (outlining Nick Saban's belief that salary caps on NIL need to be put into place much like the NFL in order to make things equal amongst schools).

deductions rather than a for-profit one that does not.⁵⁵ Additionally, these collectives need donations to fund ancillary services provided to student-athletes, such as financial and legal advice.⁵⁶ Consequently, after the IRS issues its corrective action, an inevitable legal battle looms pitting non-profit collectives against the IRS over the tax-exempt status of these non-profit collectives.

III. THE TAX CODE PLAYBOOK

“The hardest thing in the world to understand is the income tax.”⁵⁷ Most people would agree with Albert Einstein that the tax code has been and still is confusing.⁵⁸ For organizations committed to charitable, educational, religious, or scientific endeavors, the tax code offers the promise of several benefits that can alleviate some of the challenges they face in advancing their mission,⁵⁹ provided they can successfully navigate the complexities and nuances it presents. This Part will briefly explain how to maneuver through the tax code to arrive at a non-profit 501(c)(3) status. In doing so, this will provide insight into both the steps the non-profit collectives like the Matador Club and Boilermaker Alliance took to achieve their non-profit status and the laws governing the legal showdown between the IRS and non-profit collectives.

A. *The Statute*

Section 501(a) of the Internal Revenue Code begins with the statement that the organizations described in subsection (c) shall be exempt from taxation.⁶⁰ Subsection (c) then goes on to list organizations that qualify as tax-exempt organizations. From this list, supplemented by Treasury Regulations, a three-pronged test has emerged to achieve 501(c)(3), tax-exempt status: (1) an exempt organization must be organized and operated exclusively for one or more exempt purposes; (2) no part of the net earnings may inure to the benefit of any private shareholder or individual; and (3) no lobbying or electioneering is permitted.⁶¹ Prong three is not relevant to the issue of non-profit collectives’

⁵⁵ See Beavers, *supra* note 25 (“[T]he lack of a tax deduction for donations could put a crimp on a collective’s fundraising abilities.”).

⁵⁶ See *id.*

⁵⁷ Robert W. Wood, *20 Inspirational Quotes...About Taxes*, FORBES (Sept. 20, 2013), <https://www.forbes.com/sites/robertwood/2013/09/20/20-inspirational-quotes-about-taxes/?sh=53920b4734d1>.

⁵⁸ Wood, *supra* note 57; see also Howard Gleckman, *What Do People Think About Taxes? They Are Partisan, Dazed, and Confused*, FORBES (Sept. 11, 2020), <https://www.forbes.com/sites/howardgleckman/2020/09/11/what-do-people-think-about-taxes-they-are-partisan-dazed-and-confused/?sh=26b389886217>.

⁵⁹ E.g., I.R.C. §§ 501(c)(3); 170(c) (no federal income tax and tax-deductible donations).

⁶⁰ I.R.C. § 501(a).

⁶¹ See I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1; I.R.C. Rev. Rul. 69-545.

tax-exempt status and is therefore disregarded for the purposes of this Note. Prongs one and two are discussed more fully below.

B. *Organizational and Operational Tests*

The “organized” and “operated” language under the first prong of the 501(c)(3) analysis signals two separate tests that must be satisfied to form a 501(c)(3) organization: the organizational test and the operational test.⁶² The organizational test asks whether, at the organization’s formation, its primary objective is geared toward an exempt purpose as defined in the statute.⁶³ This test is relatively straightforward and can be easily satisfied by an organization simply stating in its articles of incorporation or bylaws that it intends to function primarily for one or more exempt purposes.⁶⁴ Additionally, and perhaps problematically, organizations are given extensive freedom to define the purposes they are pursuing.⁶⁵ Moreover, given the functional nature of the organizational test, it ordinarily does not raise any issues.⁶⁶

The operational test, on the other hand, is more controversial and is where the majority of organizations fail to meet the first prong of the 501(c)(3) analysis.⁶⁷ Unlike the organizational test which examines the organization’s corporate filings, the operational test examines the *activities* of the

⁶² ROBERT J. DESIDERIO & SCOTT TAYLOR, PLANNING TAX-EXEMPT ORGANIZATIONS § 6.01 (1984).

⁶³ See Desiderio & Taylor, *supra* note 62, at § 6.03. The organizational test requires “an organization’s assets [to] be permanently dedicated to an exempt purpose...mean[ing] that if an organization dissolves, its assets must be distributed for an exempt purpose, to the federal government, or to a state or local government for a public purpose.” *Organizational Test Internal Revenue Code Section 501(c)(3)*, I.R.S. (Aug. 20, 2024), <https://www.irs.gov/charities-non-profits/charitable-organizations/organizational-test-internal-revenue-code-section-501c3> [<https://perma.cc/26DP-KNK3>]; see also Treas. Reg. § 1.501(c)(3)-1(b)(4).

⁶⁴ Desiderio & Taylor, *supra* note 62, at § 6.03; *The Operational Test*, DIG. MEDIA L. PROJECT (Sept. 11, 2023), <https://www.dmlp.org/irs/organizational-test#FN2> [<https://perma.cc/TN2P-KW6V>].

⁶⁵ “In meeting the organizational test, the organization’s purposes, as stated in its articles, *may be as broad as*, or more specific than, the purposes stated in section 501(c)(3) . . . [if] the articles state that the organization is formed for charitable purposes, such articles ordinarily shall be sufficient for purposes of the organizational test” Treas. Reg. § 1.501(c)(3)-1(b)(1)(ii). (emphasis added).

⁶⁶ See Desiderio & Taylor, *supra* note 62, at § 6.03; but see Terri Lynn Helge, *Rejecting Charity: Why the IRS Denies Tax Exemption to 501(c)(3) Applicants*, 14 PITT. TAX R. 1, 38 (analyzing over 603 denial letters from the IRS and concluding that the primary reason for organizations failing the organizational test was their substantial commercial business activities and the potential to unfairly leveraging the tax exemption for an unfair competitive advantage in the market); Eric F. Amarante, *States as Laboratories for Charitable Compliance: An Empirical Study*, 90 GEORGE WASH. L.R. 445, 470 (2020) (detailing possible changes to IRS’ procedure in granting organizations 501(c)(3) status at the organizational test stage after incorrectly awarding a number of “charities” tax-exempt status).

⁶⁷ Desiderio & Taylor, *supra* note 62, at § 6.01.

organization.⁶⁸ Given the factual nature of this test, the IRS will “undertake a comprehensive review of the manner in which an organization functions to see whether it fits within the legal definition of one or more exempt purposes.”⁶⁹

To pass the operational test, an organization must engage exclusively in activities that accomplish one or more of the exempt purposes listed in Section 501(c)(3).⁷⁰ However, two aspects of this test make it subject to abuse: the ambiguity surrounding what constitutes an exempt purpose, and the interpretation of the term “exclusively.”

The tax code provides several examples of what it deems “exempt purposes.” These typically include charitable, educational, religious, scientific, and other purposes.⁷¹ Among these purposes, non-profit collectives claim they are operating for a “charitable” purpose. But, what is a “charitable” purpose? According to the regulations, “[t]he term charitable is used in section 501(c)(3) in its *generally accepted legal sense* and is, therefore, not to be construed as limited by the separate enumerations in section 501(c)(3) of other tax-exempt purposes which may fall within the *broad outlines of charity* as developed by judicial decisions.”⁷² The regulations then go on to provide several safe harbors for charitable purposes.⁷³ This broad definition and vague guidance provide more questions than answers leaving it up to the IRS and ultimately the courts to decide what “charitable” truly means.⁷⁴

The term “exclusively,” as used in the operational test, does not carry its usual meaning.⁷⁵ Instead, courts have interpreted exclusively to mean “primarily.”⁷⁶ This interpretation provides non-profit organizations with a wider

⁶⁸ *What are the Organizational and Operational Tests?*, NGOSOURCE (Jan. 19, 2022), <https://www.ngosource.org/what-are-the-organizational-and-operational-tests-1> [https://perma.cc/A9HM-3X9Y].

⁶⁹ *The Operational Test*, *supra* note 64.

⁷⁰ Treas. Reg. § 1.501(c)(3)-1(c)(1).

⁷¹ Other exempt purposes include “testing for public safety, litera[tur]e, foster[ing] national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), [] the prevention of cruelty to children or animals.” I.R.C. § 501(c)(3). Perhaps not obvious, it would be very difficult for collectives to claim they are operating under the exempt status of “foster[ing] national or international amateur sports competition.” *See id.* This exemption has typically been reserved for the promotion of Olympic competition. *See* Desiderio & Taylor, *supra* note 62, at § 11.03.

⁷² Treas. Reg. § 1.501(c)(3)-1(d)(2) (emphasis added).

⁷³ “Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; . . . lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.” *Id.*

⁷⁴ *See* Alex Zhang, *Antidiscrimination and Tax Exemption*, 107 CORNELL L. REV. 1381, 1392 (2022).

⁷⁵ *See* Treas. Reg. § 1.501(c)(3)-1(c)(1).

⁷⁶ *Id.*

scope to operate, as not all of their activities must directly advance an exempt purpose. And as long as an organization's activities that further a non-exempt purpose are *insubstantial*, it will not jeopardize its 501(c)(3) tax-exempt status.⁷⁷

C. Private Inurement Provision

The second prong of the legal test for a 501(c)(3) organization, deemed the private inurement provision, is relatively straightforward.⁷⁸ In short, the private inurement provision prevents private gain.⁷⁹ The original intention of this provision was to prevent those *within* a non-profit organization, such as a shareholder or employee, from receiving any profits or extra benefits.⁸⁰ However, it has been extended to apply to those *outside* a non-profit organization.⁸¹ And while separate tests have emerged over these distinctions between outsiders and insiders, the only significant distinction is in the amount of benefit or profits that may be provided to each of these groups.⁸²

For insiders of a non-profit organization, any benefit or profit received will violate the private inurement provision.⁸³ For outsiders, there is more leeway. As long as the benefit or profit conferred to an outside private individual is *insubstantial*, the private inurement provision is not violated.⁸⁴ To be *insubstantial*, or "incidental" as courts refer to it, a benefit must be both qualitatively and quantitatively incidental.⁸⁵ Incidental in the quantitative sense is largely determined by the facts and circumstances of each case.⁸⁶ Incidental in a qualitative manner means that the activity in question is a "necessary

⁷⁷ See *Better Business Bureau v. United States*, 326 U.S. 279, 283 (1945) (applying this standard, the Court concluded that although the Better Business Bureau of Washington D.C. performed educational functions, its commercial efforts to form profitable business community were substantial and non-exempt resulting in the loss of its non-profit status).

⁷⁸ See Daniel M. Ford, *Insiders & Inurement: The Seventh Circuit's Reversal of the Tax Court*, in *United Cancer Council v. Commissioner*, 50 CASE W. RES. L. REV. 909, 917 (2000).

⁷⁹ See Ford, *supra* note 78, at 917; Desiderio & Taylor, *supra* note 62, at § 12.04.

⁸⁰ See Desiderio & Taylor, *supra* note 62, at § 12.02. Additionally, this is not to say that non-profit organizations cannot pay their employees. Rather, it means that after paying all costs of operations such as salaries, all net profits of the organization are to go towards charitable purposes. *See id.*

⁸¹ *See id.* at § 12.03.

⁸² *Id.*

⁸³ Desiderio & Taylor, *supra* note 62, at § 12.04; *see also* Treas. Reg. § 1.501(c)(3)-1(c)(1).

⁸⁴ Desiderio & Taylor, *supra* note 62, at § 12.04.

⁸⁵ Gene Takagi, *Nonprofit Joint Ventures: Basics*, NEO L. GRP.: NONPROFIT L. BLOG (Aug. 9, 2020), <https://nonprofitlawblog.com/nonprofit-joint-ventures-basics/#:~:text=A%20benefit%20is%20qualitatively%20incidental%20only%20if%20it,be%20achieved%20without%20necessarily%20benefiting%20certain%20private%20individuals.%E2%80%9D> [https://perma.cc/6EWQ-D4VF].

⁸⁶ *See id.*

concomitant of the activity which benefits the public at large,” that is, “the benefit to the public cannot be achieved without necessarily benefiting certain private individuals.”⁸⁷ The question, as it relates to non-profit collectives, then becomes whether the act of compensating student-athletes (i.e. outsiders) is necessary for the fulfillment of a charitable purpose.

IV. THE 501(C)(3) SHOWDOWN: NON-PROFIT COLLECTIVES V. COMMISSIONER

The initial spark igniting this legal dispute is likely to arise when the IRS issues a CP120A Notice, commonly referred to as a Revocation Letter, thereby stripping these non-profit collectives of their tax-exempt status for the failure of the operational test.⁸⁸ The IRS, known for its routine enforcement, is unlikely to hesitate as it has taken similar actions on numerous occasions in the past.⁸⁹ After the IRS follows through with this corrective action, a legal battle will likely ensue with non-profit collectives seeking to preserve their non-profit status because of the incentives it provides to donors. Below, I will highlight the likely arguments for both the IRS and non-profit collectives over non-profit collectives’ tax-exempt status.

A. IRS’ *Offensive Strategy*

This cat-and-mouse game of tax evasion is nothing new for the IRS.⁹⁰ In this ensuing legal challenge brought by non-profit collectives seeking to maintain their tax-exempt status, the IRS is likely to present the following arguments.⁹¹ The IRS’ main argument is that in most cases these non-profit

⁸⁷ *Id.*

⁸⁸ See *Understanding Your CP120A Notice*, I.R.S. (May 25, 2023), <https://www.irs.gov/individuals/understanding-your-cp120a-notice> [<https://perma.cc/YP45-H934>].

⁸⁹ “Each year, the IRS revokes the tax-exempt status of more than 100 501(c)(3) organizations.” *How to Lose Your 501(c)(3) Tax Exempt Status (Without Really Trying)*, NONPROFIT RISK MGMT. CTR., <https://nonprofitrisk.org/resources/articles/how-to-lose-your-501c3-tax-exempt-status-without-really-trying/>#:~:text=Each%20year%2C%20the%20IRS%20revokes%20the%20tax-exempt%20status,of%20more%20than%20100%20501%20%28c%29%20%283%29%20organizations [<https://perma.cc/4PCS-ZD8C>]; see *IRS Declines or Revokes Tax-Exempt Status in Four Recent Rulings*, ERNST & YOUNG (June 7, 2023) <https://taxnews.ey.com/news/2023-1019-irs-declines-or-revokes-tax-exempt-status-in-four-recent-rulings> [<https://perma.cc/N79P-YDUL>] (explaining four recent Revocation Letters released after the COVID-19 pandemic).

⁹⁰ See Ben Nussbaum, *The Cat and Mouse Game in Tax Filings*, GRAPHGRID (Dec. 22, 2022), <https://graphgrid.com/blog/the-cat-and-mouse-game-in-tax-filings/> [<https://perma.cc/Z2WH-ZT5R>].

⁹¹ These arguments largely reflect what the IRS released on June 9, 2023, in a legal memorandum on this issue. See generally C.A.M. 2023-04 (May 23, 2023).

collectives fail the 501(c)(3) test outlined above.⁹² Specifically, the IRS will claim that these non-profit collectives, “in many cases, [are] operating for a substantial nonexempt purpose—serving the private interests of student-athletes—which is more than incidental to any exempt purpose furthered by the activity.”⁹³ By avoiding the thorny issue of what the meaning of charity is and leaning on both the operational test and private inurement provisions, the IRS will have a solid case as explained more fully below.

The IRS will first argue that non-profit collectives fail to serve an exempt purpose. The fundamental purpose of these non-profit collectives is to provide compensation and other services directly to student-athletes.⁹⁴ However, student-athletes are not a recognized charitable class.⁹⁵ Even though the IRS has recognized certain organizations that benefit student-athletes in other scenarios, those rulings were based on a determination that the activities of the organizations advanced education.⁹⁶ Here, non-profit collectives are not supporting student-athletes’ education. Instead, they are supporting student-athletes’ ability to profit off their name, image, and likeness which is not a tax-exempt purpose. Additionally, the thousands of dollars provided to student-athletes from these non-profit collectives can hardly be classified as insubstantial.⁹⁷

Next, the IRS will likely argue that non-profit collectives are not operating exclusively for a tax-exempt purpose by pointing to statements made by the collectives and their representatives. Most non-profit collectives focus on the compensation of athletes rather than charitable purposes in their mission statements.⁹⁸ They also inform donors that a majority or all of the funds donated go directly to student-athletes.⁹⁹ Additionally, many college football head coaches and athletic directors have underscored the importance of supporting

⁹² *See id.* at 12.

⁹³ *Id.* at 2.

⁹⁴ *Id.* at 8–9.

⁹⁵ *Id.* at 9.

⁹⁶ *Id.* at 9–10.

⁹⁷ *See* Treas. Reg. § 1.501(c)(3)-1(c)(1).

⁹⁸ *See, e.g.,* WE WILL COLLECTIVE, <https://www.wewillcollective.com/about> [<https://perma.cc/247S-RKMF>] (The We Will Collective, associated with Iowa State University, has the following mission: “to support student-athletes that share our passion for the Cyclones and encourage them to be community-minded.”)

⁹⁹ *See* RISING SPEAR, <https://risingspear.com/> [<https://perma.cc/AGW4-TBQ5>] (stating in bold letters on its homepage that “100% OF YOUR DONATIONS GO TO SUPPORTING OUR STUDENT ATHLETES”); *What Percentage of Membership Revenue Goes to NIL Deals?*, GARNET TRUST, <https://www.garnettrust.com/> [<https://perma.cc/FP3L-JYFS>] (“At least 90% of membership revenue—after credit card fees—goes directly to student-athletes. The percentage fluctuates monthly based on operating expenses as well as costs related to fulfilling NIL deals”); *How it Works*, TEXAS ONE FUND, <https://www.texasonefund.org/resources> [<https://perma.cc/8RT8-2E2Y>] (stating that in addition to “compensat[ing] athletes for their work with nonprofit partners . . . operating costs are kept to a minimum, and include things like compliance and donor software, marketing, events, content creation, legal, accounting, programming, and more”).

collectives because of their ability to help attract athletes and remain competitive with other schools.¹⁰⁰ These statements show that the primary purpose of these non-profit collectives is to recruit athletes, not exclusively support charitable purposes.

Lastly, under the private inurement provision, the IRS will likely argue that payments to student-athletes (i.e., outsiders) from non-profit collectives are not quantitatively or qualitatively incidental to their supposed charitable purpose. There is little doubt that the money received by student-athletes is not quantitatively incidental.¹⁰¹ As mentioned above, student-athletes are being paid thousands of dollars for negligible charitable work or no work at all.¹⁰² Therefore, the benefit to private individuals is clearly not quantitatively incidental.

Non-profit collectives' payments to student-athletes are also not qualitatively incidental because they are not a "necessary concomitant" to accomplishing any exempt purpose.¹⁰³ In other words, the collectives could achieve their supposed charitable purposes without paying student-athletes. While paying popular student-athletes to promote charitable causes may boost charitable support, it is not the only way to achieve this outcome.¹⁰⁴ It can be done simply by donating directly to the charitable cause or hiring a celebrity or professional athlete instead of student-athletes to post about the charitable organization on social media. Indeed, a non-profit collective would have difficulty establishing that compensating athletes is essential to promote charitable causes.¹⁰⁵

Thus, given the range of facts showing that non-profit collectives are not operating exclusively for an exempt purpose and providing more than an

¹⁰⁰ Amanda Christovich, *Before Signing Day, ADs Asked Donors to Contribute to NIL Collectives*, FRONT OFF. SPORTS (Dec. 21, 2022), <https://frontofficesports.com/ads-asked-contribute-to-nil-collectives/>.

¹⁰¹ See, e.g., Rev. Rul. 76-152, 1976-1 C.B. 152. An organization dedicated to promoting understanding of modern art retained only 10% of sales proceeds, giving 90% to individual artists. *Id.* The IRS found this arrangement provided a substantial private benefit, which could not be dismissed as merely incidental to the organization's exempt purposes. *Id.* Additionally, the added services provided to student-athletes like financial planning, brand management, and legal advice exceed what is needed to enable athletes to participate in charitable acts. See Ashley Alford, *Understanding NIL Collectives: A Guide for College Athletes*, BASEPATH (Aug. 29, 2023), <https://basepath.com/understanding-nil-collectives-a-guide-for-college-athletes/> [<https://perma.cc/6WFZ-EF7D>].

¹⁰² See *supra* note 40 and accompanying text.

¹⁰³ See *supra* note 87 and accompanying text.

¹⁰⁴ See Erica E. Harris & Julie A. Ruth, *Analysis of the Value of Celebrity Affiliation to Nonprofit Contributions*, NONPROFIT VOLUNTARY SECTOR Q. 1, 19 (2014) (conducting a statistical study to conclude that celebrity-backed nonprofit organizations lead to increased donations).

¹⁰⁵ See, e.g., Rev. Rul. 70-186, 1970-1 C.B. 128. The private benefit of increased home value to lakeside homeowners was deemed qualitatively incidental because there was no other way for an environmental organization to restore the lake without benefiting the nearby homeowners. See *id.*

incidental private benefit, both qualitatively and quantitatively, the IRS will conclude that the exemption under 501(c)(3) will be precluded for many non-profit collectives as currently structured.

B. *Collectives' Defense: The Hail Mary*

Non-profit collectives have their work cut out for them. Given the distaste for how collectives are currently operating,¹⁰⁶ their initial burden of proof at trial,¹⁰⁷ and the IRS's strong arguments outlined above,¹⁰⁸ non-profit collectives' future as non-profit entities are indeed wavering. Yet, there are potential arguments that offer a glimmer of hope for the future of non-profit collectives' tax-exempt status.

The first obstacle that non-profit collectives will have to overcome is their initial burden of proof, which should not be problematic. Any determination that the IRS makes, such as a revocation of a non-profit collective's tax-exempt status, carries a presumption of correctness.¹⁰⁹ The taxpayer, in this case the non-profit collectives, generally bears the burden of proving the IRS incorrect.¹¹⁰ This burden also includes substantiation.¹¹¹ However, if non-profit collectives are able to produce credible evidence as to the satisfaction of the three-pronged test of 501(c)(3)s, the burden will shift back to the IRS.¹¹² Non-profit collectives could meet this mushy standard of credible evidence and flip the burden in a variety of ways.¹¹³ For example, they could simply provide evidence of student-athletes doing charitable work, most of which is already publicly available,¹¹⁴ to show they meet the operational test under prong one. Therefore, this hurdle, although minor and potentially irrelevant,¹¹⁵ can likely be overcome by non-profit collectives.

The next set of obstacles non-profit collectives would need to overcome in this legal battle are the IRS' strong arguments against non-profit collectives

¹⁰⁶ See *supra* notes 47–**Error! Bookmark not defined.** (NCAA and Congress).

¹⁰⁷ See I.R.C. § 7491; T.C. R. 142(a)(1); *INDOPCO, Inc. v. Comm'r*, 503 U.S. 79, 84 (1992); *Senior Citizens Stores, Inc. v. United States*, 602 F.2d 711, 713 (1979).

¹⁰⁸ See *supra* Part V.A.

¹⁰⁹ See *Holland v. United States*, 348 U.S. 121, 126 (1954).

¹¹⁰ See *supra* note 107.

¹¹¹ I.R.C. § 6001.

¹¹² I.R.C. § 7491(a)(1).

¹¹³ See *Higbee v. Comm'r*, 116 T.C. 438, 442 (2001) (explaining the lack of statutory clarity).

¹¹⁴ See, e.g., Justin Holbrock, *Ohio State All-American J.T. Tuimoloau Hosts Free Youth Football Camp*, NBC4 (June 9, 2023) <https://www.nbc4i.com/sports/ohio-state-all-american-j-t-tuimoloau-hosts-free-youth-football-camp/> [<https://perma.cc/7K5Z-W5CY>].

¹¹⁵ Depending on the tax court that hears this dispute, the tax court may rule that this burden-shifting is beside the point: “[i]n a case where the standard of proof is preponderance of the evidence and the preponderance of the evidence favors one party, we may decide the case on the weight of the evidence and not on an allocation of burden of proof.” *Knudsen v. Comm'r*, 131 T.C. 185, 189 (2008).

satisfying the 501(c)(3) test. In essence, the IRS' arguments depend on the fact that student-athletes are not a recognized charitable class. Because of this, they are not *exclusively* promoting a charitable class, and the payments made to these private individuals fail the private inurement provision.

To overcome this obstacle, non-profit collectives need to make a bold, last-ditch effort—akin to a quarterback's Hail Mary pass—by arguing that student-athletes should be recognized as a charitable class. As discussed earlier, the definition of charity under Section 501(c)(3) is broad,¹¹⁶ and includes certain safe harbor classifications that qualify as charitable purposes, such as “relief of the poor,” “eliminat[ing] prejudice and discrimination,” and “advancement of education.”¹¹⁷ If non-profit collectives can successfully categorize student-athletes within one of these safe harbors, it may be their best, and perhaps only, chance to maintain their 501(c)(3) status.

1. *Relief of Poor*

The first safe harbor purpose non-profit collectives could argue, or may already be arguing,¹¹⁸ is that they are operating exclusively for the “[r]elief of the poor, the distressed, or the underprivileged.”¹¹⁹ Student-athletes, like Shabazz Napier, often struggle to make ends meet.¹²⁰ Without a sustainable stream of income and food insecurity, student-athletes seem to fit the bill for those living in poverty. To bolster this argument, non-profit collectives can rely on the following sources.

One case that could help non-profit collectives fit student-athletes into this safe harbor category of poverty is *Aid to Artisans*. In this case, an organization helped promote the artwork of disadvantaged artisans in countries around the world.¹²¹ Similar to NIL collectives, the organization would market the artisans' artwork for sale in museums and even provide professional advice on technical and design improvement.¹²² The court determined that this disadvantaged group of artisans, who lived in communities that struggled to provide the basic necessities of life, fit within the poverty classification under the definition of charity.¹²³ And since the organization only provided these services to truly

¹¹⁶ See *supra* note 72–73 and accompanying text.

¹¹⁷ Treas. Reg. § 1.501(c)(3)-(1)(d)(2).

¹¹⁸ See Our Mission, MATADOR CLUB, <https://www.matadorclub.org/our-mission> [<https://perma.cc/M9SK-UV6A>].

¹¹⁹ *Id.*; I.R.S. Pub. 557 (Rev. Jan. 2024), at 28.

¹²⁰ See Jerilyn Klein Bier, *Most College Student Go Broke at Least One Semester*, FIN. ADVISOR (Mar. 22, 2016), <https://www.fa-mag.com/news/most-college-students-go-broke-at-least-one-semester-25838.html> [<https://perma.cc/M6SV-349U>]; Shannon Orr, *The Ramen Noodle Diaries: The Reality of Campus Food Insecurity*, MEDIUM (May 20, 2022), <https://medium.com/the-faculty/the-ramen-noodle-diaries-the-reality-of-campus-food-insecurity-2f57d2c0bd63>.

¹²¹ *Aid to Artisans, Inc. v. Comm'r*, 71 T.C. 202, 204 (1978).

¹²² *Id.*

¹²³ *Id.* at 212.

disadvantaged artisans based on objective standards,¹²⁴ the organization operated exclusively for an exempt purpose and was therefore awarded 501(c)(3) status.¹²⁵

In addition to drawing on similarities from *Aid to Artisans*, non-profit collectives could rely on other materials released by the IRS to make the case that they are exclusively operating for the relief of poor student-athletes. First, the mention of serving “indigent persons” in the tax code and in IRS revenue rulings could be a persuasive source of evidence.¹²⁶ In the health care context, hospitals across the country have been awarded tax-exempt status by the IRS for admitting patients unable to pay their medical bills (i.e. indigent) to their emergency rooms.¹²⁷ Non-profit collectives, like hospitals, are arguably serving those who cannot make ends meet.

Second, in a separate revenue ruling, the IRS has referred to impoverished individuals as those who are hungry, low-income, and/or lacking resources.¹²⁸ Considering the staggering statistics of student-athlete poverty,¹²⁹ a non-profit collective could make a decent argument that in directly paying student-athletes, they are working to relieve the heavy burdens of poverty that student-athletes face.

2. Eliminating Prejudice or Discrimination

Another safe harbor charitable purpose that non-profit collectives could argue they are operating under is the promotion of social welfare by organizations designed “to eliminate prejudice and discrimination.”¹³⁰ According to the most recent statistics from the NCAA, 35% of all Division 1 student-athletes are members of a minority racial group and 47% are women.¹³¹ Therefore, by directing financial resources to groups historically subject to prejudice and discrimination, an argument can be made that non-profit collectives are working to eliminate prejudice and discrimination by providing opportunities to those who have been historically discriminated against.

¹²⁴ *Id.* at 206, 213.

¹²⁵ *Id.* at 216.

¹²⁶ Treas. Reg. § 1.501(c)(3)-1(d)(2).

¹²⁷ Rev. Rul. 69-545, 1969-2 C.B. 117; see MICHAEL A. LIVINGSTON & DAVID GAMAGE, TAXATION: LAW, PLANNING, AND POLICY, 299 (3d ed. 2019).

¹²⁸ I.R.S. Pub. 5781 (Rev. Feb. 2024), at 6.

¹²⁹ See Huma & Staurowsky, *supra* note 5 (85% of student athletes on full scholarship live in poverty).

¹³⁰ Treas. Reg. § 1.501(c)(3) (1)(d)(2).

¹³¹ NCAA Demographics Database, NCAA (Oct. 2024), <https://www.ncaa.org/sports/2018/12/13/ncaa-demographics-database.aspx> [<https://perma.cc/6PYM-TUJL>].

3. Educational Benefits

A final statutory safe harbor that non-profit collectives could argue they are operating under is the charitable purpose of the “advancement of education.”¹³² Former college football player and coach Paul Dietzel once said, “[y]ou learn more lessons on character at the two-yard line in football than anywhere else in the world.”¹³³ It is hard to deny the truly transformative experience that sports can provide, especially at the collegiate level. Invaluable life skills such as time management, working in a team environment, mental toughness, and accountability are just some of the many lessons that collegiate sports teach student-athletes.¹³⁴ As such, non-profit collectives could argue that they are supporting the “educational” benefits that student-athletes receive via their athletic experience.

V. POST-GAME ANALYSIS: VICTORY FOR THE IRS

“Here we go, here’s your ball game folks, as Flutie takes the snap, he drops straight back, has some time, now scrambles away from one hit, looks, corks a deep one for the endzone, and [it’s dropped].”¹³⁵ Unlike former Heisman trophy winner Doug Flutie and the underdog Boston College Eagles in the 1984 Cotton Bowl, non-profit collectives are likely to fall short of victory.¹³⁶ Due to non-profit collectives’ failure to meet the legal standard for 501(c)(3) status and relevant policy considerations, a court is likely to rule that the era of non-profit collectives operating as non-profit organizations is over.

A. Legal Conclusion

A court would likely rule that non-profit collectives fail to meet the requirements for 501(c)(3) status because of their inability to satisfy the operational test and private inurement provisions. Additionally, a court would not buy non-profit collectives’ Hail Mary argument that student-athletes fit within the statutory safe harbors of charity.

¹³² Treas. Reg. § 1.501(c)(3)-(1)(d)(2).

¹³³ *15 Inspirational Quotes About Success from College Football Legends*, POWER OF POSITIVITY, (Oct. 31, 2019), <https://www.powerofpositivity.com/15-inspirational-quotes-about-success-from-college-football-legends/> [<https://perma.cc/MW2H-XHW2>].

¹³⁴ See JP Murrieta, *Life Lessons Sports Teaches Us*, N.M. ACTIVITIES ASSOC. (Dec. 24, 2020), <https://www.nmact.org/2020/12/life-lessons-sports-teaches-us/> [<https://perma.cc/J77G-UEBZ>].

¹³⁵ Chris Menn, *Flutie Hail Mary—full radio audio*, YOUTUBE (Sept. 28, 2011), <https://www.youtube.com/watch?v=ZeExa2R2nf0>.

¹³⁶ See Brett R., *The “Hail Flutie” Touchdown Pass Delivered an Iconic Moment*, FANBUZZ (Dec. 27, 2021), <https://fanbuzz.com/college-football/doug-flutie-hail-mary/> [<https://perma.cc/V4TU-8X2P>].

Non-profit collectives likely fail the operational test of qualifying as a 501(c)(3) for the following two reasons. First, and most importantly, providing funds to student-athletes is not a charitable purpose. In similar instances considering charitable purposes under the operational test, courts have relied on the purpose of the activity, not the nature of the activity.¹³⁷ The overarching purpose of these non-profit collectives is to provide student-athletes with money. Indeed, Tom Dieters, a Michigan State University alumnus, succinctly stated how and why he donates to his alumni's collective by saying, "I'll just call my friends, and we'll get a bunch of money and pay football players" to keep them happy.¹³⁸ Even if student-athletes read to children during a story hour, volunteer at a food bank, or run sports camps for children in exchange for funds,¹³⁹ non-profit collectives cannot piggyback off other legitimate nonprofit organizations' 501(c)(3) status to provide donors with tax deductions. This is especially true considering the minimal contributions student-athletes provide to these other non-profit organizations.¹⁴⁰

The second reason that collectives fail the operational test is because collectives are not acting exclusively, or even primarily, for charitable purposes. According to the NCAA, division one student-athletes spend approximately 68 hours a week dedicating their time to academics and athletics.¹⁴¹ Due to their lack of availability, student-athletes are only able to contribute minimally to charitable activities such as posting on social media to support certain local charities or coaching a kids' football camp for a few hours.¹⁴² In other cases, organizations dedicating much more time than collectives to charitable purposes have been stripped of their non-profit status.¹⁴³ Additionally damning is the fact that a majority of these collectives offer financial and legal advice to student-athletes.¹⁴⁴ Offering such services to a non-charitable group undermines the

¹³⁷ "The purpose of the activity, not the nature of the activity itself, is determinative." *GameHearts v. Comm'r*, T.C. Memo 2015-218, 10.

¹³⁸ *Fahrenthold & Witz*, *supra* note 9.

¹³⁹ *See, e.g., How It Works: FAQs*, TEXAS ONE FUND, <https://www.texasonefund.org/resources> [<https://perma.cc/5M6A-XD7U>].

¹⁴⁰ *Id.*

¹⁴¹ *Time Management*, NCAA ELIGIBILITY CTR. (Aug. 2023), http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/Time_Management_DI_DII_DIII.pdf#:~:text=During%20a%20typical%20day%20of%20competition%2C%20Division%20I,from%20four%20to%20nine%20hours%20on%20their%20sport [<https://perma.cc/Q58T-UADD>].

¹⁴² *See Fahrenthold & Witz*, *supra* note 9; *Holbrock*, *supra* note 114.

¹⁴³ *See, e.g., Nationalist Movement v. Comm'r*, 37 F.3d 216, 220 (1994) (denying First Amendment lawyers of 501(c)(3) status due to the following breakdown of their activities by percentage of time expended: social service (25%), legal (First Amendment) work (20%), TV broadcasting (20%), administrative tasks (10%), publishing (10%), public forums and speeches (5%), classes and training (5%), and miscellaneous activities (5%).

¹⁴⁴ *See Alford*, *supra* note 101.

argument that these collectives are exclusively pursuing charitable goals.¹⁴⁵ Therefore, because of the lack of time non-profit collectives dedicate to charitable activities and the services collectives provide to student-athletes, collectives are not acting primarily for a charitable purpose.

In addition to failing the operational test, collectives also likely fail the private inurement provision. Initially, it is not entirely clear whether student-athletes would be considered insiders or outsiders of the collectives they are partnering with. On the one hand, they could be considered employees (i.e., insiders) carrying out the collective's "charitable" purpose. On the other hand, they could be classified as outsiders receiving the benefit of the collective's activities. Notwithstanding this confusion over classification, the benefit student-athletes receive is substantial. A court would be hard-pressed to find that the thousands of dollars student-athletes are receiving for their minimal charity work is insubstantial. Therefore, because student-athletes are private individuals receiving substantial benefits, collectives likely fail the private inurement provision.

Furthermore, the attempt by non-profit collectives to fit the transfer of funds to student-athletes into three different statutory safe harbors of charity will be unsuccessful. First, the statutory safe harbor of relief of the poor should not include student-athletes. Although student-athletes struggle financially and could be deemed indigent,¹⁴⁶ courts in other cases have reasoned that financial need alone does not necessarily qualify an individual as a proper recipient of charity.¹⁴⁷ Additionally, courts have interpreted poverty as a charitable purpose in 501(c)(3) disputes rather narrowly.¹⁴⁸ Obvious distinctions can also be made between student-athletes and traditionally impoverished individuals like those in *Aid to Artisans* living in third-world countries.¹⁴⁹ Therefore, unless non-profit collectives are able to prove they select recipients of funds based on need,¹⁵⁰ which it appears they are not, student-athletes cannot fit into the charitable statutory safe harbor of "relief of the poor."

¹⁴⁵ The practice of non-profit collectives offering free financial and legal advice also raises anti-competitive issues. See *GameHearts v. Comm'r*, 110 T.C.M. (CCH) 454, 2015 Tax Ct. Memo LEXIS 228 (finding a non-profit organization failed to prove it was not in competition with other for-profit organizations, which weighed heavily against the organization maintaining its non-profit status).

¹⁴⁶ See *Indigent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁴⁷ See, e.g., *Solution Plus, Inc. v. Comm'r*, 2008 T.C.M. (CCH), Tax Ct. Memo LEXIS 21, *23–24 n.2 (quoting Rev. Rul. 69-441, 1969-2 C.B. 115).

¹⁴⁸ See *Blood Sys. v. State Dep't of Revenue*, 1998 SD 82, 15–22 (ruling that in the medical context, a corporation that collected, tested, and distributed blood at little to no cost to those who could not afford it was awarded tax-exempt status); *Ohio Disability Ass'n v. Comm'r*, 2009 T.C.M. (CCH), Tax Ct. Memo LEXIS 265, *5, *14 (acknowledging that a corporation formed to "assist the poor and needy, as defined by Medicaid standards, that is, a person who has one thousand five hundred dollars or less in countable assets" were members of a charitable class).

¹⁴⁹ See *supra* notes 121–125 and accompanying text.

¹⁵⁰ See C.A.M 2023-04 (May 23, 2023), at 12.

Second, non-profit collectives' attempts to fit payments to student-athletes into the statutory safe harbor of eliminating discrimination or prejudice will also be unsuccessful. Aside from a potential violation of the organizational test,¹⁵¹ this proposal is not how this statutory safe harbor has traditionally functioned. Most non-profit organizations operating under this statutory safe harbor of eliminating discrimination work on the *defensive*. For example, most of these organizations act as educators about potential discrimination or investigators into discriminatory actions against certain minority or underprivileged groups.¹⁵² Here, non-profit collectives are working on the *offensive* position. By putting funds directly in the pockets of minority groups, these efforts to combat discrimination and prejudice seem to run counter to how courts have interpreted this safe harbor.¹⁵³

Third, payments to student-athletes do not fit within the statutory safe harbor of the advancement of education. Although the charitable purpose of education captures a broad swath of activities,¹⁵⁴ including certain sectors of sports,¹⁵⁵ donating funds directly to student-athletes to support the educational benefits they receive from the sport is likely too attenuated. Traditionally, actions that qualify as "educational" include public discussion groups, providing course instructions via television or radio, museums, and zoos.¹⁵⁶ Furthermore, the soft skills gained from participation in athletics differ significantly from the

¹⁵¹ Unless non-profit collectives could reserve their donations strictly for minoritized racial groups or women, then this proposal seems to lack merit. However, certain funds have already been reserved solely for women's teams. See Tyler Komis, *Grove Collective Now Supporting Over 200 Ole Miss Student-Athletes, Following Third Full-Team NIL Signing*, 247 SPORTS (Mar. 13, 2024), <https://247sports.com/college/ole-miss/article/grove-collective-now-supporting-over-200-ole-miss-student-athletes-following-third-full-team-nil-signing--228562618/> [<https://perma.cc/S9CA-V9BA>] (providing funds solely for the Ole Miss softball team).

¹⁵² See, e.g., Rev. Rul. 75-285, 1975-2 C.B. 203 (educating public about discrimination towards minorities in construction trades); Rev. Rul. 72-228, 1972-1 C.B. 148 (investigating discrimination towards women in employment); Rev. Rul. 68-438, 1968-2 C.B. 209 (investigating discrimination towards minority groups in housing); Rev. Rul. 67-250, 1967-2 C.B. 182 (educating the public on discriminatory practices in housing).

¹⁵³ In *Bob Jones University v. United States*, the Supreme Court held that a religious university could be stripped of its tax exemption for discriminatory application practices towards Black students. 461 U.S. 574, 604 (1983). However, the IRS and courts have failed to use the precedent set in *Bob Jones* to combat discriminatory practices and have instead interpreted discrimination issues in the tax context very narrowly. See Zhang, *supra* note 74, at 1382-83. Additionally, courts have primarily focused on addressing specific instances of discrimination, rather than trying to relieve the burdens of discrimination for large groups of people as proposed here. See, e.g., *Bob Jones*, 461 U.S. at 595-96.

¹⁵⁴ See Greg McRay, *How the IRS Defines Charitable Purpose*, FOUND. GRP. (May 9, 2022), <https://www.501c3.org/how-the-irs-defines-charitable-purpose/#:~:text=Examples%20are%20numerous%20and%20may%20include%3A%201%20A,zoo%2C%20planetarium%2C%20symphony%20orchestra%2C%20or%20other%20similar%20organization> [<https://perma.cc/QH7F-ZHWY>].

¹⁵⁵ *Id.* (children's sports leagues)

¹⁵⁶ *Id.*

academic skills acquired through traditional university education, a distinction a court is likely to acknowledge.

B. Policy Considerations

Aside from the fact that collectives likely fail the legal test for 501(c)(3) status, policy considerations also weigh in favor of stripping collectives of their non-profit status. Charity plays a vital role in American society. At the societal level, charity has been the source of numerous accomplishments such as disaster relief,¹⁵⁷ health care initiatives,¹⁵⁸ poverty alleviation,¹⁵⁹ educational support,¹⁶⁰ veterans support,¹⁶¹ and environmental conservation.¹⁶² Indeed, activities of the non-profit sector amounted to 5.5% of U.S. GDP in 2019.¹⁶³ On a personal level, charity promotes social cohesion and altruism. Recognizing these immensely positive effects of charitable giving, Congress, in using its broad taxing powers,¹⁶⁴ has decided to incentivize charitable contributions through the tax code. Unfortunately, however, much of the tax code is ambiguous and therefore often subject to abuse.¹⁶⁵

¹⁵⁷ See Josh Maxwell, *Corpus Christi Agencies Sending Help to Those Impacted by Panhandle Wildfires*, 3NEWS (Feb. 28, 2024), <https://www.kiiitv.com/article/news/local/corpus-christi-sending-help-to-panhandle-fires/503-3480a572-4f70-4763-82f9-cb4b8d00ee6e> [<https://perma.cc/A2HQ-54QW>].

¹⁵⁸ See *Mission Statement*, AM. CANCER SOC'Y, <https://www.cancer.org/about-us/who-we-are/mission-statements.html> [<https://perma.cc/73ZR-WWKZ>].

¹⁵⁹ See *About Us*, FEEDING AM., <https://www.feedingamerica.org/about-us> [<https://perma.cc/SM7F-TYMY>].

¹⁶⁰ See *Our Work*, TEACH AM., <https://www.teachforamerica.org/what-we-do/our-work> [<https://perma.cc/D949-ZVUD>].

¹⁶¹ See *Who We Are*, WOUNDED WARRIOR PROJECT, <https://www.woundedwarriorproject.org/mission> [<https://perma.cc/MS34-QAC4>].

¹⁶² See *How We Work*, THE NATURE CONSERVANCY, <https://www.nature.org/en-us/about-us/who-we-are/how-we-work/> [<https://perma.cc/6UY7-59DJ>].

¹⁶³ See OECD, TAXATION AND PHILANTHROPY POLICY BRIEF 1 (2020), <https://www.oecd.org/tax/tax-policy/policy-brief-taxation-and-philanthropy.pdf#:~:text=There%20is%20no%20single%20generally%20accepted%20rationale%20for,are%20positive%20externalities%20associated%20with%20the%20philanthropic%20activity> [<https://perma.cc/Y8F9-FW9A>] (discussing how favorable tax provisions for the non-profit sector amounted to 5.5% of US GDP in 2019).

¹⁶⁴ Congress was originally granted the power to tax in Article I of the Constitution, and its powers expanded with the 16th Amendment: “[t]he Congress shall have power to lay and collect taxes on incomes, *from whatever source derived*” U.S. CONST. amend. XVI (emphasis added); U.S. CONST. art. I, § 8, cl. 1.

¹⁶⁵ See, e.g., Dan Hinkel, *Man Who Turned Mansion Into Church Alleges Bias After Losing Tax Break*, DESERT NEWS (Aug. 13, 2010), <https://www.deseret.com/2010/8/13/20134270/man-who-turned-mansion-into-church-alleges-bias-after-losing-tax-break/> [<https://perma.cc/DE7T-QQ88>] (man declares his house a church and receives 501(c)(3) status); Matt Ferner, *Indiana’s Church of Marijuana Granted Tax-Exempt Status From IRS*, HUFFPOST (June 2, 2015), https://www.huffpost.com/entry/indianas-church-of-marijuana_

Granting non-profit status to collectives would only exacerbate this abuse, undermine the purpose of charitable tax exemptions, and divert resources away from causes that genuinely serve the public good. Non-profits exist to address societal needs, not to enhance the competitive advantage of college sports programs. By allowing collectives to claim tax-exempt status, the tax code would essentially subsidize private interests under the guise of charity, creating a loophole that prioritizes entertainment and self-promotion over true community benefit. This not only erodes public trust in the charitable sector but also reduces funds available for legitimate charities that tackle urgent social issues. For the tax system to maintain its integrity and ensure charitable dollars are used effectively, NIL collectives should not qualify as non-profit organizations.

VI. THE OFFSEASON PLAYBOOK

In conclusion, a court should and likely will see through the façade that non-profit collectives present, acting as mere conduits between donors and student-athletes, and strip them of their tax-exempt status.¹⁶⁶ Despite the colorful arguments put forth by non-profit collectives to conform to the ambiguous tax code, such a charade cannot be tolerated. While student-athletes finally getting paid their due should be celebrated, this abuse of the tax system must end.

Moving forward, it is imperative to implement measures to prevent similar abuses. On the front end, one potential solution lies in enhancing oversight during the 501(c)(3) application process, demanding greater specificity regarding an organization's purpose and its intended methods of achieving it.¹⁶⁷ On the back end, the IRS could require more exacting details as to 501(c)(3)s' charitable activities as indicated in their required Form 990 annual filing. For example, the Matador Club's 2022 Form 990 indicated that they spent \$1,814,780 on "community development, hospital and wellness support, mentoring and youth development, education, and poverty relief."¹⁶⁸ Indeed, this description is so vague it might as well say they are saving the world one mystery project at a time.

n_7496084 [https://perma.cc/G25R-QAR2] (church in Indiana named the Church of Marijuana granted 501(c)(3) status).

¹⁶⁶ See *New World Infrastructure Org. v. Comm'r*, 122 T.C.M. (CCH) 88, T.C.M. (RIA) 2021-091.

¹⁶⁷ See *supra* note 65 and accompanying text.

¹⁶⁸ WEST TEXAS MATADOR CLUB, INC. FORM 990, I.R.S. (2022), https://www.causeiq.com/organizations/view_990/874126411/6b0e3e436a5e394b4d3469d7ced5c8d9.