

NOTES

IMPROVING THE NCAA THROUGH TAX—OR LACK THEREOF: AN EXAMINATION OF THE NCAA AND ITS 501(C)(3) STATUS AFTER RULE CHANGES FOR NAME, IMAGE, AND LIKENESS

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Elliot DiGioia *

INTRODUCTION

The National Collegiate Athletic Association (NCAA) generates roughly one billion dollars each year from its “March Madness” basketball tournament.¹ The College Football Playoff, a subset of Division I college football, is currently exploring an expansion that would raise revenues from television rights by an

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¹ Tim Parker, *How Much Does the NCAA Make Off March Madness?*, INVESTOPEDIA (Apr. 28, 2022), <https://www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp> [<https://perma.cc/56Q5-4PHN>].

estimated \$1.9 billion.² Arguably, the media prominence in Division I college football and basketball is transforming the NCAA into a media conglomerate and marketing juggernaut more akin to a professional sports league rather than a tax-exempt nonprofit organization under Section 501(c)(3) of the Internal Revenue Code.³

The NCAA has been under scrutiny for earning substantial revenues while restricting student-athletes ability to earn compensation outside of their athletic scholarships.⁴ Additionally, the NCAA has faced criticism for inaction pertaining to inequities within member universities' athletic programs—particularly in terms of racial and gender disparities.⁵ Despite growing scrutiny regarding its financial motives, the NCAA maintains its nonprofit mission to “equip[] student-athletes to succeed on the playing field, in the classroom and throughout life.”⁶

The Internal Revenue Service (IRS) continues to recognize the NCAA as a tax-exempt organization under Internal Revenue Code (IRC) Section 501(c)(3)⁷

² Ralph D. Russo, *CFP Expansion Could Increase Annual Revenue to \$2 Billion*, ASSOCIATED PRESS (June 11, 2021), <https://apnews.com/article/college-sports-football-business-entertainment-college-football-e2e2beb24fac0b8782b96e841cfb9b40> [<https://perma.cc/FLD2-AS9U>].

³ Katrina VanHuss & Otis Fulton, *The NCAA—America's Worst Nonprofit?*, NONPROFIT PRO (June 30, 2021), <https://www.nonprofitpro.com/post/the-ncaa-americas-worst-nonprofit> [<https://perma.cc/P4KC-896Q>] (“[T]his organization compensates oft-injured entertainers with far less than minimum wage while, at the same time, pulling in billions of dollars from ticket sales, sponsors and collateral sales. . . . Today, the NCAA resembles an enormous marketing machine for high-end workout gear.”).

⁴ See Melissa Quinn, *NCAA and College Athletes Face Off at Supreme Court in High-Stakes Matchup*, CBS NEWS (Mar. 31, 2021), <https://www.cbsnews.com/news/ncaa-supreme-court-case-athletes-compensation/> [<https://perma.cc/Y8E3-X4QJ>] (statement of Samuel Alito) (“The briefs that are submitted in support of the respondents paint a pretty stark picture, and they argue that colleges with powerhouse football and basketball programs are really exploiting the students that they recruit.”).

⁵ For instance, in the 2021 March Madness basketball tournament, videos surfaced of an extravagant training facility for male athletes; female athletes, on the other hand, were given woefully inadequate facilities. Madeline Coleman, *NCAA Acknowledges Unequal Accommodations at Women's Tournament*, SPORTS ILLUSTRATED (Mar. 18, 2021), <https://www.si.com/college/2021/03/19/ncaa-acknowledges-unequal-accommodations-at-womens-tournament> [<https://perma.cc/ZH5R-3ZP>] (“While the men's tournament has a full weight room, the women's programs have access to six sets of dumbbells, yoga mats and a single stationary bike until the Sweet 16 . . .”).

⁶ *Finances*, NCAA, <https://www.ncaa.org/sports/2021/5/4/finances.aspx> [<https://perma.cc/EFZ4-6T62>] (last visited Oct. 1, 2022).

⁷ NCAA, *Form 990: Return of Organization Exempt from Income Tax*, PROPUBLICA (July 15, 2021) [hereinafter *Form 990*], <https://projects.propublica.org/nonprofits/organizations/440567264/202141969349302369/full> [<https://perma.cc/G6H2-ASF2>] (claiming exemption under section 501(c)(3)).

presumably because the NCAA fosters “amateur sports competition”⁸ even though the NCAA has faced criticism as to whether it is indeed adhering to this exempt purpose.⁹ In 2006, Congress questioned the NCAA’s tax-exempt status under Section 501(c)(3) but ultimately did not change the law.¹⁰ Recently, in *NCAA v. Alston*,¹¹ the Supreme Court decided that certain NCAA restrictions on student-athlete compensation amounted to antitrust violations under the Sherman Act. The NCAA then changed its rules to allow student-athletes to gain pecuniary compensation for their names, images, and likenesses (NIL).¹² Prior to this rule change, athletes who received NIL compensation would be forced to forfeit their amateur status and thus, their NCAA eligibility requirement.¹³ But now, under the new NCAA rule, many collegiate football and basketball players receive substantial paychecks and the true “amateur” status of these athletes and their respective leagues, along with the NCAA’s federal tax exemption, seem even more questionable. However, a close examination of the underlying tax law indicates that the new policy should not affect the NCAA’s tax-exempt status. The question then becomes, as a matter of sound tax policy, should the NCAA be tax-exempt under Section 501(c)(3), and if so, how can the law ensure the NCAA is truly serving the public, as Section 501(c)(3) organizations should?

⁸ I.R.C. § 501(c)(3).

⁹ See Ronald Katz, *Ending the NCAA’s Tax Exemption Should Be a Slam Dunk*, THE NATION (Mar. 27, 2019), <https://www.thenation.com/article/archive/march-madness-tax-exemption-inequality/> [https://perma.cc/AM5Z-XEED].

¹⁰ *Brand to Congress: NCAA Deserves Tax-Exempt Status*, ESPN (Nov. 15, 2006), <https://www.espn.com/college-sports/news/story?id=2662739> [https://perma.cc/7P9L-KNGV] (Congressmen Bill Thomas “questioned whether the NCAA should retain its tax-exempt status given the amount of money it receives from TV contracts and championship events. He also questioned whether the federal government should subsidize college athletics when money helps pay for escalating coaching salaries, some of which reach seven figures.”).

¹¹ The 2021 decision ruled that the NCAA was violating antitrust law by limiting education-related benefits to student-athletes. *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141 (2021). Although the holding did not address name, image, and likeness, Justice Kavanaugh issued a concurring opinion calling into question the NCAA’s other compensation rules. *Id.* at 2167 (Kavanaugh, J., concurring).

¹² Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [https://perma.cc/Z559-V6F9].

¹³ See Robert Litan, *The NCAA’s “Amateurism” Rules: What’s in a Name?*, MILKEN INST. REV. (Oct. 28, 2019), <https://www.milkenreview.org/articles/the-ncaas-amateurism-rules#:~:text=Under%20the%20NCAA’s%20convoluted%20rules,another%20sport%20as%20a%20pro> [https://perma.cc/PC6W-VL58].

The purpose of this Note is to explore the NCAA, its internal structure, and its continuing status as a tax-exempt nonprofit under Section 501(c)(3). As this Note will highlight, the NCAA is in the driver's seat of a billion-dollar enterprise with ballooning commercial appeal, highly compensated athletes, coaches, and more. Although the new NIL policy gives many athletes compensation they arguably deserve, the NCAA still leaves much to be desired in serving student-athletes and member universities. This Note will demonstrate that under the current laws—even with the new name, image, and likeness policy—the NCAA will be able to maintain its exemption from federal income taxes. Congress, however, should amend the law to ensure the NCAA provides more for all college athletes and member universities.

First, this Note will provide background information on the NCAA, its history, purpose, rules, spending, inequitable structure, and how it benefits many schools, student-athletes, and communities. Next, this Note will provide insight into the inner workings of the Section 501(c)(3) federal income tax exemption and how the structure of the NCAA applies to current tax laws. This will explain why the NCAA is able to keep its tax exemption despite many athletes seemingly no longer qualifying as amateurs.¹⁴ Lastly, this Note will argue that despite growing concerns of commercialization and substantial athlete compensation, the NCAA should retain its exemption to preserve college athletics. However, Congress should tailor the NCAA's tax exemption to provide more equity for all student-athletes and their member universities.

I. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

The NCAA began in 1906 as the Intercollegiate Athletic Association, an organization which arose from concerns mostly related to college football.¹⁵ Across the country, college football players were *dying* while playing football, so President Roosevelt called upon educators and collegiate officials to meet at the White House to find a way to better regulate the game.¹⁶ In 1910, the organization changed its name to the National Collegiate Athletic Association and expanded its focus beyond college football.¹⁷ In its early years, the organization maintained little authority and

¹⁴ Although similar issues may be raised under applicable state nonprofit law, the scope of this note is limited to federal law regarding tax-exempt organizations under Section 501(c)(3).

¹⁵ Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

¹⁶ *Id.*

¹⁷ *Id.*

governance over college athletics.¹⁸ After World War II, however, public interest and commercialization exploded in college athletics.¹⁹ These issues, along with several gambling scandals, caused the NCAA to substantially expand its governance authority.²⁰

Today, the NCAA governs roughly 1,100 member schools and over 500,000 student-athletes.²¹ According to its own website, the focus of the NCAA's mission is to cultivate an environment that "emphasizes academics, fairness, and well-being" for student-athletes.²² This governance structure consists primarily of volunteers from member schools who serve on committees that manage various issues like rules, health and safety, and diversity and inclusion.²³ The highest governing body consists of the Board of Governors, who resolve the largest issues and make strategic plans for the organization.²⁴ The NCAA's Form 990, the federal information return filed with the IRS by most exempt organizations, indicates that the sixteen highest paid employees (mostly board members) of the NCAA earned nearly \$12 million in compensation, with President Mark Emmert topping the scale at \$2,836,793.²⁵

For the purpose of this Note, a central part of the NCAA's policy is its rules regarding amateurism. The NCAA's amateurism policy and purpose begin with Bylaw 12.01.1, which states: "Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport."²⁶ Several other bylaws describe and define the rules of amateurism, but most importantly, Bylaw 12.1.2(a) states that an individual loses amateur status for using "athletic[] skill (directly or

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 14.

²⁰ *Id.*

²¹ *Overview*, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> [<https://perma.cc/7CS6-XX54>] (last visited Oct. 1, 2022).

²² *Mission and Priorities*, NCAA, <https://www.ncaa.org/sports/2021/6/28/mission-and-priorities.aspx> [<https://perma.cc/ZS9R-HA99>] (last visited Oct. 1, 2022).

²³ *Governance*, NCAA, <https://www.ncaa.org/sports/2021/2/9/governance.aspx> [<https://perma.cc/HTA2-SNB7>] (last visited Oct. 1, 2022).

²⁴ *Id.*

²⁵ *Form 990*, *supra* note 7, Part VII § A.

²⁶ NCAA, 2022–23 NCAA DIVISION I MANUAL 39 (2022), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/Z7F5-FAZP>].

indirectly) for pay,”²⁷ although the Bylaws further provide for a number of exceptions to this general rule.²⁸ In the past, any form of NIL compensation a player received would result in an ensuing penalty from the NCAA.²⁹ However, in 2021, the NCAA adopted an interim policy allowing a player to be paid (with restrictions) for their name, image, and likeness.³⁰ A cursory examination of the new policy seems to indicate that the NCAA’s historical amateurism purpose and policy have now been contradicted and flipped upside down after the new NIL rules.

As previously noted, the NCAA’s new NIL policy comes after the Supreme Court’s decision in *NCAA v. Alston*, as well as a number of new state laws allowing student-athletes to be compensated for their names, images, and likenesses.³¹ In a concurring opinion in *Alston*, Justice Brett Kavanaugh wrote that although the Court’s holding was narrow to the issue presented in the case, which did not pertain to NIL compensation, “the NCAA’s remaining compensation rules also raise serious questions under the antitrust laws.”³² Although Justice Kavanaugh’s statement against the NCAA essentially amounts to dictum, it seems likely to have played a role in the NCAA’s change of course regarding amateurism.

Since the interim NIL policy was adopted, a number of incredible player compensation stories have emerged—with deals ranging from several thousand

²⁷ *Id.* at 45.

²⁸ *Id.* There are numerous exceptions—for example, Bylaw 12.1.2(d) states an individual loses amateur status if they receive “directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, *except as permitted by NCAA rules and regulations.*” *Id.* (emphasis added). Bylaw 12.1.2.1.4.1.3 also provides an exception for international students participating in the Olympics. *Id.* at 46 (“An international prospective student athlete or international student-athlete may accept funds from a country’s national Olympic and/or Paralympic governing body (equivalent to the U.S. Olympic and Paralympic Committee) based on place finish in one event per year that is designated as the highest level of international competition for the year by the governing body.”).

²⁹ See, e.g., Ryan Fagan, *Ohio State’s Tattoo Gate, Alabama’s T-Town and Other Scandals That Would be Legal Under New NIL Rules*, THE SPORTING NEWS (Apr. 30, 2020), <https://www.sportingnews.com/us/ncaa-football/news/ncaa-nil-rules-scandals-ohio-state-tattoo-gate-alabama-t-town/1aq3iu8fem9nm1x1kuds68mre> [<https://perma.cc/383J-N6G7>] (describing situations that resulted in athletes being suspended for actions that are now allowed).

³⁰ Hosick, *supra* note 12.

³¹ *NCAA Approves Interim NIL Policy for College Athletes*, THE ATHLETIC (July 1, 2021, 1:27 PM), <https://theathletic.com/news/ncaa-approves-interim-nil-policy-for-college-athletes/HSSJIy9wkRMg> [<https://perma.cc/6EMR-SW5Y>].

³² Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

dollars to more than one million dollars.³³ For example, former Pittsburgh Steelers quarterback Charlie Batch recently offered star quarterback Caleb Williams \$1 million to transfer to Batch's alma mater, Eastern Michigan University.³⁴

The NCAA is currently attempting to work with Congress to provide more clarity on NIL rules at a national level.³⁵ The Student-Athlete Equity Act was introduced in the House of Representatives in March of 2019—before *NCAA v. Alston* was decided—and, if passed, would likely destroy the NCAA's exemption under Section 501(c)(3) if the NCAA “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.”³⁶ The final part of this Note will further discuss this bill.³⁷

Another essential component in the analysis of whether the NCAA should be reformed to better serve its purpose as a Section 501(c)(3) organization is the way the NCAA distributes its profits. The NCAA claims to distribute over half a billion dollars annually to its member universities and conferences through several different programs; these distributions support academics, student-athlete's essential needs, and scholarships.³⁸ While there appears to be a substantial sum of money flowing back to the athletes and their schools, lurking behind the cash flow is a questionable distribution scheme. The NCAA distributes the majority of its revenues back to Division I member schools and conferences, and most of the remaining funds are spent primarily on administering large commercial athletic events and other

³³ See David Kenyon, *The Biggest and Most Notable NIL Deals in College Football So Far*, BLEACHER REP. (July 26, 2021), <https://bleacherreport.com/articles/2946352-the-biggest-and-most-notable-nil-deals-in-college-football-so-far> [https://perma.cc/298V-78XF].

³⁴ Michael Shapiro, *Former NFL QB Charlie Batch Offers Caleb Williams \$1 Million to Play at Eastern Michigan*, SPORTS ILLUSTRATED (Jan. 6, 2022), <https://www.si.com/college/2022/01/06/charlie-batch-caleb-williams-transfer-eastern-michigan-nil-deal> [https://perma.cc/E4E8-EE7A].

³⁵ Hosick, *supra* note 12. For more information on why national standards are needed and how they may be achieved, see Campbell Flaherty, Note, *Playing for Keeps: The Need for Name, Image, and Likeness Legislation to Ensure Representation for College Athletes*, 1 U.N.H. SPORTS L. REV. 52 (2022).

³⁶ Student-Athlete Equity Act, H.R. 1804, 116th Congress (2019), <https://www.congress.gov/bill/116th-congress/house-bill/1804/text?r=1&s=1> [https://perma.cc/NHW8-R5TR].

³⁷ See *infra* Section III.

³⁸ *Where Does the Money Go?*, NCAA, <https://www.ncaa.org/sports/2016/5/13/where-does-the-money-go.aspx> [https://perma.cc/G349-WMT6] (last visited Oct. 2, 2022).

administrative costs.³⁹ For reference, Division II and III universities received less than \$100 million of over \$1 billion in revenue from the 2018–2019 fiscal year.⁴⁰

While the NCAA dictates how some funds are used, other distributions give the schools and conferences substantial discretion on spending.⁴¹ According to the Knight Commission, an organization that provides recommendations to the NCAA on organizational reform, 76% (equating to \$448 million) of distributions from March Madness were unrestricted—meaning the school could use the funds however they wanted.⁴² Distributions from the College Football Playoff, which generated \$468 million, also did not include restrictions on the funds.⁴³ The obvious problem with so many of the distributions being unrestricted is that the NCAA cannot ensure that the funds are being used in a manner that comports with its mission, or as the Knight Commission suggests, furthers academics and other important goals.⁴⁴ The Knight Commission suggests the lack of transparency in the way funds are being used by universities is problematic and public disclosure should be required.⁴⁵ The Commission also suggests that the distribution scheme does not promote gender

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *Distributions*, NCAA, <https://web.archive.org/web/20221219151927/https://www.ncaa.org/sports/2013/11/22/distributions.aspx> [<https://perma.cc/6QR8-6BE5>] (last visited Oct. 2, 2022) (“In general Division I members have discretion within the guidelines set forth in the Division I Revenue Distribution Plan to allocate the money they receive as they see fit.”).

⁴² *Transforming the NCAA D-I Model*, KNIGHT COMM’N 17 (Sept. 30, 2020, 1:00 PM), <https://www.knightcommission.org/wp-content/uploads/2020/09/kcia-transforming-the-ncaa-d-i-model-session-2-slide-deck-093020-01.pdf> [<https://perma.cc/M7B8-3YS5>].

⁴³ *Id.* Furthering the problem with the College Football Playoff is that nearly 80% of the distributions are going only to schools in the “Power Five” conferences. *Id.* at 16.

⁴⁴ See *Connecting Athletics Revenues with the Educational Model of College Sports*, KNIGHT COMM’N 2 (Mar. 29, 2022), <https://www.knightcommission.org/wp-content/uploads/2021/09/CAREModel.pdf> [<https://perma.cc/U9WU-KQAF>] (“Systemic change, not incremental reform, is necessary to alter spending patterns and to more effectively allocate billions of dollars of athletics revenues towards education-centric priorities not directly associated with seeking competitive advantages. In other words, requirements or mandates are needed to ensure that distributed athletics revenues are spent to support an educational model for college sports, specifically advancing priorities such as college athlete education, health, safety, well-being, gender and racial equity, broad-based sports participation, and university academics.”).

⁴⁵ *Id.* at 4. (“Public disclosure of both distributed revenue allocations and the uses (i.e., spending) of such distributions should be required. Division I institutions also should be required to publicly disclose gender and ethnicity demographics of athletics program athletes and staff.”).

equality.⁴⁶ For example, certain restricted distributions, like the “Basketball Performance Fund,” provide monetary rewards to men’s basketball teams that have success in the NCAA tournament but do nothing for women’s basketball teams.⁴⁷ Finally, the Knight Commission suggests that the current distribution scheme should be altered to promote broad-based sports opportunities rather than simply boosting sports that generate the most money.⁴⁸

Despite the glaring inequities that plague the NCAA, the benefits provided by the NCAA through collegiate athletics for its member universities and their respective students and communities cannot be completely discounted. Being a student-athlete certainly has some substantial perks—ranging from full “cost-of-tuition” scholarships⁴⁹ to the NCAA’s boasted 99% graduation rate for Division I athletes.⁵⁰ Many also feel that collegiate athletic programs provide a substantial academic benefit to the school—although some academic debate exists on this topic.⁵¹ The economic benefits realized by local communities with Division I

⁴⁶ *Id.* at 5.

⁴⁷ *Id.* (“Revenue distribution policies should be equitable with regard to gender. For example, if a distribution entity governs men’s and women’s sports, it cannot distribute any portion of revenues on the basis of athletics success in a men’s sport only—as is currently the case in the NCAA revenue distribution formula, which rewards tournament success only for men’s basketball teams in its ‘Basketball Performance Fund.’”).

⁴⁸ *Id.* (“Nationally generated revenues should be utilized to benefit all sports and athletes and not disproportionately support those sports that generated the revenue. The benefits of intercollegiate athletic activities are universal, regardless of the sport, and increasing athletic opportunities is educationally valuable for colleges and universities. As a minimum standard, any incentive pool to reward team athletics performance, such as those currently awarded by the NCAA for men’s basketball performance and by the CFP for football team performance, should be altered to provide an equal incentive pool to reward schools for offering more teams than the minimum required for the Division I membership classification of the institution.”).

⁴⁹ See generally Kevin Allen, *Here Are Some Benefits NCAA Athletes Already Are Eligible for That You Might Not Know About*, USA TODAY (Oct. 1, 2019, 4:06 PM), <https://www.usatoday.com/story/sports/college/2019/10/01/ncaa-football-basketball-benefits-college-athletes-now-can-receive/2439120001/> [<https://perma.cc/5VTG-L5J2>] (“Effective Aug. 1, 2015[,] the definition of a full scholarship was changed to reflect the ‘full cost of attendance.’ The traditional value (based on the cost of room, board, books, fees and tuition) has been increased to provide money for transportation, supplies and other expenses related to attending the school. The money can be spent in any way an athlete chooses.”).

⁵⁰ *Your Journey*, NCAA, <https://www.ncaa.org/sports/2021/7/9/your-journey.aspx> [<https://perma.cc/68HS-3R3W>] (last visited Oct. 3, 2022) (“[T]he likelihood of an NCAA athlete earning a college degree is significantly greater; graduation rates are 90% in Division I, 74% in Division II and 87% in Division III, according to data released in 2020.”).

⁵¹ See generally Eric T. Over & Michael M. DeBowes, *The Impact of Intercollegiate Athletics in Higher Education*, 1 HIGHER EDUC. POL. & ECON. 29 (2016) (“The relationship between academics and college

universities should also not be taken lightly. Several prominent college towns boast that their schools' football stadiums seat more people than their respective towns' local populations.⁵² The COVID-19 pandemic, which partially cancelled or restricted much of the 2020 college football and basketball seasons, empirically demonstrated the economic impact of college sports in many college towns.⁵³

Nonetheless, the benefits provided by college sports and the NCAA to student-athletes, universities, and communities do not obviate the need for reform. The NCAA could—and should—be doing more for its student-athletes and member universities to fulfill its mission of “cultivating an environment that emphasizes academics, fairness and well-being across college sports.”⁵⁴ Clearly, the NCAA certainly has the financial means to provide more. Accordingly, the focus then turns to analyzing the NCAA's federal tax exemption through the lens of Section 501(c)(3), which could be used by Congress as a point of leverage for reforming the NCAA and collegiate athletics.

II. THE SECTION 501(C)(3) TAX EXEMPTION

Before discussing the technical aspects of tax-exempt status under Section 501(c)(3), the purpose of the statute should be explored because it is impossible to analyze whether the NCAA should remain tax-exempt without understanding why the government justifies an exemption from federal income tax in the first place. Several theories have been advanced to explain why our government grants a tax

athletics has traditionally been a point of contention in higher education. Some have argued that intercollegiate athletics complements and supports the academic missions of higher education. Others have suggested that the commercialization, exploitation, and distractions that have grown out of intercollegiate athletics are detrimental to higher education. Recent research, however, has suggested the inclusion of college athletics benefits the academic missions of higher education institutions.”).

⁵² Andrew Lawrence, *16,000 People, 81,000-Seat Stadium: What Happens When College Football Dominates a Town*, THE GUARDIAN (Sept. 16, 2021, 5:00 PM), <https://www.theguardian.com/sport/2021/sep/16/clemson-tigers-stadium-economics-covid-college-football> [<https://perma.cc/BR3M-W39V>].

⁵³ See Chauncey Alcorn, *College Towns Face a Potentially Devastating Economic Blow This Fall: No Football*, CNN BUS. (Aug. 14, 2020, 12:49 PM), <https://www.cnn.com/2020/08/14/business/college-football-economic-impact/index.html> [<https://perma.cc/NZ62-FCF9>] (Penn State business owner estimates that roughly 8–9% of local business comes from college football. The CEO of Columbus, OH Chamber of Commerce estimated that college football cancelation would cost business owners hundreds of millions. “In Madison, Wisconsin, Badgers football games generate \$114 million for the state each year and employ more than 1,000 people . . .”).

⁵⁴ *Mission and Priorities*, *supra* note 22.

exemption to organizations under Section 501(c)(3).⁵⁵ One such theory, advanced by some federal courts, is that the exemption for organizations under Section 501(c)(3) functions as a government subsidy for organizations that provide public benefits.⁵⁶ Without the exemption, the government would otherwise be entitled to tax revenues from these organizations. The caveat of availing itself of this subsidy is that the organization must conform with the standards set by the federal government.⁵⁷

Section 501(c)(3) grants an exemption from federal income tax for several specific purposes listed in the statute, but these organizations are commonly generalized as “charitable organizations,” which comports with the subsidy theory described above.⁵⁸ Additionally, Treasury regulations provide that an organization described in Section 501(c)(3) must meet an “organizational test.”⁵⁹ The organizational test sets forth several procedural requirements.⁶⁰ Organizations generally must explicitly state their purposes are Section 501(c)(3) exempt purposes, be organized under state nonprofit law, include certain dissolution provisions, and limit their activities to charitable endeavors.⁶¹

In addition to the organizational test, the regulations also require Section 501(c)(3) organizations to meet an “operational test,” which is where the real fun begins for lawyers and Section 501(c)(3) organizations.⁶² This test requires that Section 501(c)(3) organizations engage “primarily in activities which accomplish one or more of such exempt purposes specified in Section 501(c)(3).”⁶³ The regulation further provides that an organization will not be exempt if “more than an

⁵⁵ For a detailed discussion on these theories, see Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STETSON L. REV. 395 (1997).

⁵⁶ See generally *Regan v. Tax'n with Representation*, 461 U.S. 540, 544 (1983) (“The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally . . .”).

⁵⁷ For a general overview of the constraints on Section 501(c)(3) organizations see *Exemption Requirements—501(c)(3) Organizations*, IRS (Feb. 17, 2022), <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations> [https://perma.cc/A85F-A8WM].

⁵⁸ *Id.* (“Organizations described in Section 501(c)(3) are commonly referred to as charitable organizations.”).

⁵⁹ Treas. Reg. § 1.501(c)(3)-1(a)-1(b).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Treas. Reg. § 1.501(c)(3)-1(c)(1).

⁶³ *Id.*

insubstantial part of its activities is not in furtherance of an exempt purpose.”⁶⁴ Further, in *Better Business Bureau v. United States*, the Supreme Court held that “the presence of a single [nonexempt] purpose, if substantial in nature, will destroy the exemption.”⁶⁵ Academics and lawyers in the tax-exempt field often refer to this as the “commerciality doctrine,”⁶⁶ meaning that, under the Treasury regulations, a Section 501(c)(3) organization risks losing its exemption if it runs too much commercial business.⁶⁷

An organization may also lose its exemption for several other reasons. First, the Code explicitly requires that “no part of the net earnings of [a Section 501(c)(3) organization] inures to the benefit of any private shareholder or individual.”⁶⁸ This “private inurement” proscription often applies to salaries of exempt organization employees that are considered “unreasonable” or well above market rate for the employee.⁶⁹ Similarly, the IRS may revoke an organization’s exemption if its activities confer an excessive benefit to parties outside of the charitable class the organization works to benefit.⁷⁰ The United States Tax Court has clarified the definition of private benefit to be “nonincidental benefits conferred on disinterested persons that serve private interests.”⁷¹

Section 501(c)(3) organizations may also be taxed on “unrelated business income” without losing tax-exempt status.⁷² Under the unrelated business income

⁶⁴ *Id.*

⁶⁵ *Better Bus. Bureau v. United States*, 326 U.S. 279, 283 (1945). This decision predates the enactment of Section 501(c)(3) but dealt with a precursor of Section 501(c)(3) that provided exemption from Social Security tax.

⁶⁶ See, e.g., John D. Colombo, *Commercial Activity and Charitable Tax Exemption*, 44 WM. & MARY L. REV. 487, 491 (2002) (“Commentators in the tax-exemption field generally refer to this issue as the ‘commerciality’ doctrine, which holds that charities engaged in commercial business enterprises can risk their tax-exempt status if their business activities grow too large in relation to their charitable activities.”).

⁶⁷ *Id.*; Treas. Reg. § 1.501(c)(3)-1(a)(1)-1(c)(1).

⁶⁸ I.R.C. § 501(c)(3).

⁶⁹ See John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 119–22 (2010). Although it is tempting to attack the NCAA’s exemption on the basis of some its board members high salaries, this argument likely carries little weight because these members have strong credentials and thus, the market rate for their services is also high. *Id.*

⁷⁰ *Am. Campaign Acad. v. Comm’r*, 92 T.C. 1053, 1069 (1989).

⁷¹ *Id.*

⁷² I.R.C. § 501(b).

tax, any income generated from a regularly carried on trade or business, not “substantially related” to the organization’s exempt purpose, will generally be taxed at the ordinary corporate rate.⁷³ Treasury regulations define “substantially related” activity as activity that has a “causal relationship” to the achievement of the exempt purpose.⁷⁴ Thus, many organizations receive Section 501(c)(3) tax-exempt status but still pay taxes on some portion of their revenue. Congress created this provision in the 1950s because of a general perception that exempt organizations were gaining an unfair advantage over taxable entities.⁷⁵

After gaining a basic understanding of how the NCAA operates and how the Section 501(c)(3) tax exemption works, it is easier to see why some question its status under Section 501(c)(3).⁷⁶ As noted, although Section 501(c)(3) organizations are often called charities, the statute lists a number of specific purposes that may qualify an organization, one being an organization that “foster[s] national or international amateur sports competition.”⁷⁷ Presumably, this is the exempt purpose of the NCAA. And for less commercialized collegiate sports, the NCAA fulfills this exempt purpose. However, as commercialization and student-athlete compensation has grown, Division I football and basketball competitions no longer seem like amateur sports under the plain meaning of the term,⁷⁸ particularly because some athletes receive huge endorsement deals resembling that of professionals. Nonetheless, what commentators and critics think of amateurism means little in the eyes of the law. Thus, the focus of the inquiry with regard to amateurism and the NCAA’s Section 501(c)(3) status hinges on how the IRS and tax court have defined the concept.

The IRS has never provided a clear-cut definition of amateurism, but research from IRS guidance and cases indicates that the definition encompasses five components: skill, pay and benefits, classification, commercialization and public

⁷³ I.R.C. §§ 512–513.

⁷⁴ Treas. Reg. § 1.513-1(d)(2).

⁷⁵ For information on the history of the unrelated business income tax, see Michael S. Knoll, *The UBIT: Leveling an Uneven Playing Field or Tilting a Level One*, 76 FORDHAM L. REV. 857, 860–64 (2007).

⁷⁶ Katz, *supra* note 9.

⁷⁷ I.R.C. § 501(c)(3).

⁷⁸ Although the NCAA does not define amateurism according to the dictionary, many people likely think of the word in a similar way as defined by Merriam-Webster, or “one who engages in a pursuit, study, science, or sport as a pastime rather than as a profession.” *Amateur*, MERRIAM-WEBSTER (Sept. 30, 2022), <https://www.merriam-webster.com/dictionary/amateur> [https://perma.cc/X6WC-3YZP].

benefit, and legal interpretation.⁷⁹ First, regarding the skill component, the IRS does not associate amateurism with a lower skill level than professionals, but, there is an expectation of some particular skill requirement for an amateur league.⁸⁰ Second, regarding athlete pay and benefits, payment of amateur athletes is not necessarily prohibited.⁸¹ The only form of compensation expressly prohibited by the IRS for amateurs is salaries and schemes that share ticket sales with athletes.⁸² Third, regarding classification, the organization's name or description does not matter.⁸³ This simply means that an organization may call itself semiprofessional or even professional but still be considered amateur for tax purposes.⁸⁴

Fourth, regarding commercialization and public benefit, the IRS, through a 2008 Private Letter Ruling,⁸⁵ indicates that the broadcasting and commercialization of amateur sports does not tarnish a tax exemption because it “fosters public interest”

⁷⁹ See Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 578 (2010).

⁸⁰ See *Media Sports League, Inc. v. Comm'r*, 52 T.C.M. (CCH) 1093, 1093 (1986) (distinguishing the non-exempt petitioner from an exempt amateur sports league on the grounds that the petitioner “provides no formal or ongoing instruction to its members, has no skill requirements for eligibility to play in its leagues and does not require members to participate in any of its activities”).

⁸¹ It does not appear that the IRS has ever directly addressed this issue, although it was recognized in the 1990s by the National Office. See INTERNAL REVENUE SERV., 1993 EO CPE TEXT, SPORTS ORGANIZATIONS-CURRENT ISSUES (1993), <https://www.irs.gov/pub/irs-tege/eotopic93.pdf> [<https://perma.cc/S4RH-B7U7>] (“The National Office is currently considering several issues involving compensation of athletes and private benefit in amateur athletic organizations. Given that final decisions have not been reached on the issues presented, extended discussion of the facts of particular cases would be inappropriate. However, in general terms, the issues under consideration include: (1) To what extent may professional athletes be involved in amateur athletic organizations, consistent with the exempt status of those organizations? (2) To what extent and in what form may benefits be provided to designated private parties (athletes and others) in connection with the operation of amateur athletic organizations?”).

⁸² See *Rev. Rul. 55-516*, 1955-2 C.B. 260 (holding that a semiprofessional baseball league, which distributed 95% of net gate receipts among players, was not exempt under Section 501(c)(4)).

⁸³ *Hutchinson Baseball Enters. v. Comm'r*, 73 T.C. 144, 154 (1979), *aff'd*, 696 F.2d 757 (10th Cir. 1982) (“Tax law does not rely on labels to determine taxability.”).

⁸⁴ *Id.*

⁸⁵ Private Letter Rulings are not precedential and cannot be relied upon by any taxpayer other than the party who requested the ruling. See I.R.C. § 6110(k)(3) (“Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent. The preceding sentence shall not apply to change the precedential status (if any) of written determinations with regard to taxes imposed by Subtitle D of this title.”). However, many courts find Private Letter Rulings to be persuasive authority, nonetheless. *Amergen Energy Co. v. United States*, 94 Fed. Cl. 413, 418 (2010).

in sports and “encourages public participation.”⁸⁶ Additionally, the revenues from commercialization and broadcasting are not required to be nominal.⁸⁷ This makes the NCAA difficult to attack based on the private benefit it provides to media outlets and advertisers. Although there is clear, significant private benefit to media outlets and advertisers from college sports, the IRS’s tentative view is that the public benefit of commercialization outweighs the private benefit.⁸⁸

Fifth, regarding legal interpretation, the IRS appears to view the meaning of amateurism in light of the Amateur Sports Act, which defines amateurism based on the definition of the governing body of the particular sport.⁸⁹ This deference from the IRS may allow the NCAA to create its own definition of amateurism for purposes of its Section 501(c)(3) tax-exempt status.⁹⁰ With a clearer picture of how the IRS views amateurism, the NCAA’s ongoing retention of its Section 501(c)(3) status is more sensible.

Another plausible argument is that the NCAA should at least be taxed on unrelated business income correlated to Division I football and basketball.⁹¹ Recall that the unrelated business income tax does not destroy an organization’s exemption; rather, the organization will pay a tax on the portion of its revenues not substantially

⁸⁶ I.R.S. Priv. Ltr. Rul. 200832034 (May 14, 2008) (citing Rev. Rul. 80-295, 1980-2 C.B. 194) (“[The] sale of broadcasting rights and the resulting broadcasting of its athletic events contributes importantly to the accomplishment of its exempt purposes.”).

⁸⁷ Rev. Rul. 80-295, 1980-2 C.B. 194.

⁸⁸ See generally Rev. Rul. 80-295, 1980-2 C.B. 194 (stating that in order to be considered “substantially related” under § 513(a), the income must “contribute importantly” to accomplish the purposes for which exemption is granted).

⁸⁹ IRM 7.25.26.7 (May 24, 2002) (“Some organizations provide financial support for athletes who are in the organization’s athletic training programs. The forms of support may include stipends, payment of living expenses, housing, and scholarships. Aside from the question of inurement or private benefit under IRC 501(c)(3), whenever the national governing body of the sport involved does not consider the type of support paid to the athletes as destroying the athletes’ eligibility to participate in competitions as amateurs, the Service will also recognize such athletes as amateurs in the application of IRC 501(j). Such an organization fits the definition of an ‘amateur sports organization’ within the ambit of the Amateur Sports Act of 1978, which establishes the United States Olympic Committee and regulates the United States’ participation in the Olympic Games.”). However, this provision does not exist in the current Internal Revenue Manual.

⁹⁰ See Fitt, *supra* note 79, at 584 (“The IRS permissiveness suggests that the tax code intends amateurism to be defined broadly for bona fide amateur organizations.”).

⁹¹ For a detailed discussion on unrelated business income and college sports, see Richard L. Kaplan, *Intercollegiate Athletics and the Unrelated Business Income Tax*, 80 COLUM. L. REV. 1430, 1430–73 (1980).

related to its exempt purpose.⁹² With regards to the NCAA, one could argue that inking billion-dollar media deals is hardly related to the NCAA's exempt purpose of fostering amateur sports. However, because the NCAA is diverting most of its revenues back to its member schools, the NCAA has a strong argument that its revenues are furthering its exempt purpose by bolstering the member universities and athletic programs.

Additionally, even if the NCAA gets taxed on unrelated business income for Division I football and basketball revenue, it may ultimately pay little or nothing to the IRS. Because the NCAA distributes most of its profits to its member schools, it may be able to deduct these payments as business expenses.⁹³ This means that it would likely pay little to no actual tax because its revenues would largely be offset by the payments to member schools.⁹⁴ In general, Section 501(c)(3) organizations are often able to avoid paying their unrelated business income.⁹⁵ In 2004, Section 501(c)(3) organizations subject to the unrelated business income tax paid only \$192 million in tax on over \$5.5 billion in eligible revenues.⁹⁶

Finally, the legislative history of the unrelated business income test presents another challenge for the IRS in attacking the NCAA's exemption. The House Ways and Means Committee stated that a university "would not be taxable on income derived from a basketball tournament sponsored by it, even where the teams were composed of students of other schools."⁹⁷ Later, the same report noted "income of an educational organization from charges for admissions to football games would not be deemed to be income from an unrelated business since its athletic activities are substantially related to its educational program."⁹⁸ Although this statement is only legislative history and applies to universities rather than the NCAA, an analogous argument to the NCAA's revenue would likely apply and serve to disincentivize the IRS from taxing the NCAA.

⁹² I.R.C. § 501(b).

⁹³ Colombo, *supra* note 69, at 142.

⁹⁴ *Id.*

⁹⁵ *Id.* at 144.

⁹⁶ *Id.* (citing Margaret Riley, *Unrelated Business Income Tax Returns, 2004*, IRS STAT. INCOME BULL., Winter 2008, at 76, 96).

⁹⁷ H.R. REP. NO. 2319, 81st Cong., 2d Sess. 37 (1950).

⁹⁸ *Id.*

III. CURBING THE NCAA WITH THE STUDENT-ATHLETE EQUITY ACT

Under the above analysis, the NCAA's new name, image, and likeness policy likely will not affect its tax-exempt status. Congress could, however, amend Section 501 to provide specific provisions for the NCAA. If done correctly, these amendments could have the effect of substantially improving the inequities in college sports, which the NCAA has thus far proven incapable of resolving on its own. This could also have the effect of ensuring that the NCAA truly maintains its exempt purpose in a more acceptable way to the public.

As previously noted, the Student-Athlete Equity Act was introduced in the House of Representatives.⁹⁹ The proposed legislation would amend the tax code to essentially create a nationwide name, image, and likeness law for college sports.¹⁰⁰ Specifically, this Act would make the NCAA's tax exemption contingent on it allowing athletes to earn indirect compensation from its respective sports, but does nothing to otherwise impact the behavior of the NCAA.¹⁰¹ Given that the NCAA amended its NIL rules after this legislation was proposed, the proposed legislation seems moot and likely is permanently stalled. Nonetheless, the Student-Athlete Equity Act represents a potent solution: forcing the NCAA to improve by making its tax-exempt status contingent on its behavior.

Unfortunately, comprehensive legislation appears unlikely to occur anytime soon. Congress is notoriously slow to act, and a comprehensive reform would likely take years to pass, if at all. One solution to this problem could be to establish an oversight committee for the NCAA. This committee would be tasked with ensuring that the NCAA's policies serve student-athletes first. Additionally, Congress could give this committee teeth by giving it the power to enforce tax penalties on the NCAA if they cannot meet certain proposed goals. The focal point of improvement for the NCAA should be equity and academic success for student-athletes. Much like the Student-Athlete Equity Act, Congress could make the NCAA's tax-exempt status contingent on the NCAA following the decisions of this proposed committee.

As noted previously, the NCAA's distribution scheme has created several substantial inequities for student athletes and many member universities. The Knight

⁹⁹ Student-Athlete Equity Act, H.R. 1804, 116th Congress (2019), <https://www.congress.gov/bill/116th-congress/house-bill/1804/text?r=1&s=1> [<https://perma.cc/N3JN-ZG7G>].

¹⁰⁰ *Id.*

¹⁰¹ *Id.* Essentially this Act forces the NCAA to retain some form of its new NIL policy.

Commission has provided several suggestions to the NCAA about how it could create a better distribution scheme.¹⁰² The potential committee proposed above could require, at least to some extent, that the NCAA provide equal funding from distributions for athletic facilities for male and female athletes in the same level of competition. Additionally, the committee could require that reward programs do not provide benefits for only one gender of a sport.¹⁰³ This would serve to avoid the numerous disparities noted in the 2021 March Madness tournament between men and women.¹⁰⁴

Congress could also require the NCAA to provide a threshold level of funding to other sports and lower athletic divisions from its Division I football and basketball revenues. This way, there would be little question as to whether the commercialization of college athletics furthers the exempt purpose of the NCAA, as more funds would be directed toward sports that earn the organization less money. Additional funds supporting athletes in sports outside of Division I football and basketball would vastly improve both educational and athletic outcomes for thousands of student athletes.

Another problem noted above is that the NCAA seems to be straying further and further from academics. Current statistics show that fewer than 2% of college athletes go on to play professionally in their respective sports.¹⁰⁵ Thus, a much greater emphasis should be placed on academics. Accordingly, a larger threshold of NCAA distributions should be required to be spent on academic programs for athletes.

Improving racial inequities should also be a goal for this proposed committee. The Knight Commission has proposed several different ways the NCAA could

¹⁰² See generally *supra* notes 41–48 and accompanying text.

¹⁰³ This would act to destroy the “Basketball Success Fund” mentioned previously. Obviously, some sports like football do not have men’s and women’s divisions and that disparity would need to be accounted for.

¹⁰⁴ Alan Blinder, *Report: N.C.A.A. Prioritized Men’s Basketball ‘Over Everything Else,’* N.Y. TIMES (Aug. 3, 2021), <https://www.nytimes.com/2021/08/03/sports/ncaabasketball/ncaa-gender-equity-investigation.html> [<https://perma.cc/5A3F-7TJA>].

¹⁰⁵ NCAA, *NCAA Recruiting Facts*, NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS (Aug. 2014), <https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf> [<https://perma.cc/NYE6-PKDN>].

improve racial disparities in college athletics.¹⁰⁶ For one, providing more funding directly to programs designed to help close racial gaps would be a significant step in the right direction.¹⁰⁷ Additionally, the NCAA could implement measures to hold institutions accountable for racial disparities in athlete recruitment and in staffing athletic departments.¹⁰⁸

Ultimately, it would be on the NCAA to reform *itself* under this proposed regime. The committee simply serves to ensure that the NCAA can no longer treat athletes as a second priority and to rid the NCAA of its complacency and lack of urgency regarding reform. All of this, however, must start with legislation from Congress.

IV. CONCLUSION

In the wake of the ballooning commercialization of college sports, the NCAA leaves much to be desired as the organization in charge. The new name, image, and likeness policy is a step in the right direction, but this shift only came after immense public scrutiny and an unfavorable decision from the Supreme Court. Furthermore, many other additional inequities exist apart from athlete compensation that need addressed by the NCAA. The new NIL policy does not change the tax-exempt status of the NCAA. Nevertheless, it is time for Congress to reexamine the NCAA's exemption—as the exemption is the best way for Congress to improve outcomes for student-athletes.

¹⁰⁶ *It's Time for a Racial Reckoning in College Sports: Knight Commission Releases Plan to Create Racial Equity For Black College Athletes*, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS (May 12, 2021), <https://www.knightcommission.org/2021/05/racial-equity/> [https://perma.cc/7S69-VDXN].

¹⁰⁷ *Id.* (“Schools and conferences should be establishing a network of Black alumni and faculty to serve as mentors and providing a dedicated stream of funding for summer bridge programs for incoming Black college athletes.”).

¹⁰⁸ *Id.* (“The Russell Rule requires each institution to include a member of a traditionally underrepresented community in the pool of final candidates for athletics leadership positions, including athletic director and head coach. Each conference school and the conference office would file an annual report card on the demographics of athletic leadership searches and hiring.”).

