VOLUME IV ISSUE I

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FEATURING:

EVAN MATTEL

ALEXIS ZERON

BROOKE SAUSE

WITH COMMENTARIES BY:

AUSTIN C. VINING, PHD, ESQ.

MADDIE SALAMONE, ESQ.

BOBBY BRAMHALL, ESQ.

AND SPOTLIGHTING:

BRYAN BLAIR, ESQ.

SHANNON STRAUGHN, ESQ.

FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

VOLUME IV **2024–2025**

FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

LETTER FROM THE EDITOR

MICHAEL J. PORTER
EDITOR IN CHIEF

The Florida Entertainment and Sports Law Review is proud to present the first issue of its fourth volume.

In this issue, young lawyers bring fresh perspectives to long-standing legal issues. While drawing from traditional legal frameworks, our contributors tackle modern challenges in sports, entertainment, and intellectual property law, integrating both technological advances and contemporary concerns into their analyses.

Our Career Spotlights feature Bryan Blair, who made history as the nation's youngest FBS Director of Athletics, and Elizabeth Straughn, whose practice protects athletes' rights and navigates complex contractual and compliance issues in professional and collegiate sports.

Our Commentary Interviews cover a wide range of evolving legal issues. Austin C. Vining examines the complexities of defamation law in the digital age, particularly as online platforms continue to reshape reputational harm. Maddie Salamone and Bobby Bramhall discuss critical shifts in collegiate sports and minor league baseball collective bargaining, analyzing the changing legal landscape for athletes.

We next feature one Article and two Notes. In *Fighting for Their Livelihood: UFC Fighters Can Improve Conditions Without a Union*, Evan Mattel explores the challenges surrounding UFC fighter compensation, analyzing employee classification, alternatives to unionization, and the broader implications for fighter rights. He also considers the physical and mental toll of the sport, emphasizing the need for stronger protections. In *Dormant Commerce Clause: Claiming the Future of Horse Racing*, Alexis Zeron examines the constitutional implications of claiming jail practices in Thoroughbred racing, focusing on potential due process concerns and the broader regulatory landscape of the industry. Finally, in *The Melodic Maze of Generative AI: Navigating Copyright and Publicity Protections*, Brooke Sause analyzes the legal challenges posed by AI-generated music, arguing that data training implicates both copyright infringement and the right of publicity, raising significant questions for the future of entertainment and intellectual property law.

We would like to extend our gratitude to all of our authors for their valuable contributions. We also thank our Faculty Advisor, Professor Rachel Arnow-Richman, and our Publication Manager, Lisa Caldwell, for their unwavering support.

Finally, a special thank you to our staff, senior editors, directors, and the executive board for their continued dedication and hard work, without which this publication would not have been possible.

Michael J. Porter
Editor in Chief

FLORIDA ENTERTAINMENTAND SPORTS LAW REVIEW

VOLUME IV **February 2025** **ISSUE I**

CAREER SPOTLIGHTS

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CAREER SPOTLIGHT: BRYAN BLAIR, ESQ.

Bryan Blair is the Vice President and Director of Athletics at the University of Toledo, a position he has held since 2022. Since Blair has joined the Rockets, Toledo has won the Mid-American Conference's Cartwright Award for its overall excellence in academics, athletics and citizenship in each of the past three years during Blair's tenure. Toledo also won the Reese Trophy as the top men's athletic program in the MAC in each of the last three seasons, and added the Jacoby Trophy as the top women's program in 2023–2024. Blair was named to Sports Business Journal's 2024 "Forty Under 40" class.

In his previous role as deputy director of athletics and chief operating officer at Washington State University, Blair led a team of sport administrators responsible for varsity sports programs, managed the university's Nike contract, served as the lead on NIL initiatives, and oversaw the development and execution of WSU's athletic strategic plan. Prior to Washington State University, Blair was the Senior Associate Director of Athletics at Rice University from 2014–2018, which was his second stint at that institution, having previously worked there from 2011–2012. Blair also worked at the University of South Carolina from 2012–2014 and at the NCAA Offices in Indianapolis from 2010–2011. Blair holds a law degree from the University of South Carolina and earned his undergraduate degree from Wofford College. He played four seasons as a nose tackle for the Wofford football team from 2003–2006.

QUESTIONS & ANSWERS

1. Please briefly explain your career path and what led you to your current position.

While in law school, I interned at Wofford College and with the South Carolina Gamecocks. These experiences showed me what it was like to work in an area where you had a passion versus showing up for a paycheck. I had done previous legal and judicial clerkships, but the excitement for showing up to work in athletics was palpable. I believe if you work in something you're passionate about, you have a chance to be the best at it, and it will lead to a life of happiness and fulfillment.

After law school, I pursued one of the sports industry's preeminent entry-level positions: the NCAA postgraduate internship. This internship is full of students fresh out of law school or master's programs, and the program now has alumni at the highest levels of sports.

After an amazing internship, I held positions at Rice, South Carolina, Rice again, Washington State, and now Toledo. I've been incredibly blessed along my journey with tremendous mentors who poured into me at every step.

2. Coming out of a college athletics career, what drove you to law school? Is your athletic career the reason why you pursued jobs in college athletics after law school?

After playing football at Wofford College, I attended law school. I did so mainly for two reasons. First, I knew a law degree would allow me to pursue unlimited career paths in politics, business, and sports. Secondly, I had an inclination that I may want to work in sports, so I sought schools that would allow me to focus on that while knowing that my worst-case scenario would be pursuing a traditional legal path, which made for a pretty successful backup plan.

The opportunity to combine my love for sports, passion for higher education, and law degree is the ultimate dream. College athletics is incredibly special to me as I come from a family of educators. Providing access to college while competing at a high level and unifying campus communities is what drives me, and I feel blessed to serve in this leadership capacity.

3. Why was a compliance role the right fit for you shortly after graduating from law school? Has being a member of the compliance department allowed you to advance more easily within college athletic departments on your path to athletic director?

I honestly didn't plan it that way. I knew I wanted to be a Team President, Commissioner, or Division I Athletics Director early on. It just so happened that when I reached out to get my foot in the door in college athletics, I was pointed to compliance at every turn.

Starting my career in compliance has been very beneficial. In compliance, you interact with every stakeholder of an athletics department. From high-powered head coaches to donors to your marketing staff and community, you touch it all. You get a broad view of everyone's role in a college athletics department and how they all work together. You also learn to problem-solve, manage expectations, and tell powerful individuals "no." These are all skills that I rely on to this day.

Secondly, and unknowingly, in today's climate of NIL, *House* settlement, ongoing litigation, and employment/licensing contracts, it's never been a better time to start in a regulatory position before advancing to leadership. The skills learned in law school—contract writing/negotiation, analytical skills, legal reading/writing, problem-solving, conflict resolution, etc.—all serve industry leaders more than ever.

4. When you became the University of Toledo's athletic director, you were the youngest FBS AD in the nation. Has your goal always been to become an AD, and how did you elevate to this title so quickly?

While I set out to be an AD after law school, I certainly didn't know it would happen so quickly. I believe two factors allowed for that to happen:

A. **Quality Mentors:** You learn quickly in the sports industry that relationships matter. I've been blessed to have amazing bosses and mentors. Early in my career, this was sheer luck. I had bosses who saw more in me than I saw in myself. They also pushed me to meet others and learn the value of networking. Later in my career, I became incredibly strategic about who I chose to work with and for. I sought out those who would pour into me, even if it wasn't ultimately best for themselves or the organization they led.

B. **Curiosity**: One of my five core values is curiosity. We live in a world with more information at our fingertips than ever, yet we often ask fewer questions than ever. Questions like "Why do we do it like that?", "Have we ever tried something different?", and "What if we did this?" are incredibly powerful for learning, growth, and innovation. I've gotten more out of my experiences by asking these questions and learning as much as possible, even when the topic was outside my day-to-day role and responsibility.

5. Group of five schools often have to get creative to be competitive at the FBS level. With your unique background, what unique approaches are you embracing in building Toledo's athletic department?

I'm blessed to be at one of the most successful Group of Five programs in the country. For instance, over the last few years, we've won more Football & Basketball conference games than any institution in the country, our WBB team perennially ranks among the nation's best in attendance, and our football program has the second longest bowl streak in the Group of Five.[1]

That said, what drew me to Toledo was the fact that our ceiling is much higher. Our unique value proposition is that we are located in a major metro area with a robust business community and no major professional league teams. We've championed the phrase Team Toledo, encompassing our city, university, and athletics program. As all three lock arms and empower each other's success, we all win. When a new

1. *See generally* THE UNIVERSITY OF TOLEDO, https://www.utoledo.edu/features/athletics// [https://perma.cc/2D57-ZQME].

business opens downtown, it boosts the economy for all of us. When enrollment increases, the city and broader northwest Ohio community benefit from the increased access to talent and economic benefits. Likewise, when we play a big-time game on ESPN, we offer a platform to showcase our amazing campus and community to a new audience. We continue to lean in on what makes Toledo unique and believe it will lead to breaking glass ceilings in the Glass City.

6. Aside from your increased focus on building a successful NIL program, the Nancy and James Lapp Creative Studio, and other similar initiatives, what are your current goals that you hope to implement in support of student-athletes at the University of Toledo?

In Fall 2023, we unveiled a strategic plan alongside a facility master plan and five-year financial projections.[2] We continue to work on that plan modeled after the framework outlined in the great business book, "Good to Great."[3] Our top priority of the flywheel in that plan is to "recruit, retain, and develop" the very best coaches, staff, and student-athletes. To that effect, we're working to improve some of our student-athlete support areas to allow us to develop them wholistically and athletically. We're also focused on NIL and NIL licensing under the proposed House settlement[4] and any additional avenues to recruit and retain top talent.

Strategy is as much about what you won't do as it is about what you will. To enhance our success, we will remain narrowly focused on these priorities moving forward.

7. College athletics has experienced many changes in the past few years, and many of the NCAA's most significant changes still seem ahead of the organization. How are you staying current with the new trends and changes in college athletics?

I mentioned earlier about the value of relationships and networking. When I advocate for networking, I often tell people to do so from the standpoint of networking for knowledge, not because they want the next job. I've never been the most intelligent person in the room, but I try to keep many brilliant people within reach. I lean on my network often to navigate the changes facing our industry. I also think my relative youth

2. *See* Meghan Cunningham, *UToledo Adopts New Strategic Plan to Guide Next Five Years*, UTODAY (Feb. 8, 2023), https://news.utoledo.edu/index.php/02_08_2023/utoledo-adopts-new-strategic-plan-to-guide-next-five-years [https://perma.cc/RL8F-K336].

3. *See generally* JIM COLLINS, GOOD TO GREAT (1st ed. 2001).

4. *See* Jerry Kutz, *House-NCAA settlement could clean up wild west of NIL*, THE OSCEOLA (Nov. 21, 2024), https://floridastate.rivals.com/news/house-ncaa-settlement-could-clean-up-wild-west-of-nil [https://perma.cc/8MAS-B5MX].

is a huge benefit as I'm not bound as much by "what was" and can envision strategies to thrive in this ever-changing landscape.

8. Many law students don't realize a college athletics job is possible when they graduate. What advice would you give to a law student who wants to work in collegiate sports?

Get started. Since I began, the competition to enter the sports industry has been at an all-time high. There are also hundreds of avenues to get involved. My advice is to get your foot in the door, begin experiencing what the various roles look and feel like, and start building relationships. It is much easier to navigate this industry once you've started. I get countless emails from lawyers looking to get started during the end of their 3L year, or once they're at a firm. While nothing is impossible, they're often at a disadvantage to those who begin in their 1L/2L year and are pivoting inside an organization.

9. What advice would you give a law student considering taking an untraditional route like yours after law school?

My advice would be never take no for an answer. I received countless rejection letters from jobs I applied for and even more non-responses as I reached out to potential mentors and professionals as I sought advice. I remember going to career services and realizing there weren't very many examples of law school graduates doing what I wanted to do. Stay the course, and don't be discouraged. I believe anything worth having is on the other side of adversity.

CAREER SPOTLIGHT: SHANNON STRAUGHAN, ESQ.

Shannon Straughan is an accomplished attorney specializing in intellectual property law, commercial contracts, and brand protection. With a deep passion for sports and wellness, Shannon leverages years of legal expertise to empower content creators, athletes, and businesses to achieve sustainable growth and protect their assets in a competitive landscape. Shannon offers comprehensive outside general counsel services tailored to content creators, athletes, and businesses seeking proactive legal support. She provides strategic advice to help clients navigate the complexities of their industries. Whether drafting agreements, resolving disputes, or guiding brand development, she delivers personalized solutions that empower clients to grow their ventures with confidence and peace of mind. As a retired powerlifter and bodybuilder, Shannon brings a unique perspective to her practice, fostering trust and relatability with athlete clients. Her hands-on approach and dedication to integrity have earned her a reputation as a trusted advisor in the sports and entertainment industries. Beyond the legal field, Shannon is committed to fostering opportunities for the next generation of athletes and creators, blending professional expertise with a genuine desire to see clients thrive on and off the field.

QUESTIONS & ANSWERS

1. Please briefly explain your career path and what led you to your current position.

To make a long story short, I wanted to be a sports agent, which is why I went to law school in the first place. While in law school, I worked with sports-related entities, not law firms. When I graduated from law school and attempted to get a job in the sports world, everyone wanted me to keep working for free. Which, unfortunately, was not realistic for me at the time. I took my first job at a law firm practicing in bankruptcy and foreclosures. Fast forward five years, I had worked at a few different firms doing a variety of things, and I realized that there was a huge market of content creators that needed legal help. I decided to start my law firm in 2018, working with health and fitness creators in a way that somewhat resembled being an agent.

2. As a bodybuilder and fitness enthusiast, you bring a unique perspective to your work with health and wellness brands. How has your athletic background influenced how you connect with clients and shape your legal practice?

My athletic background is probably the main reason I have the practice that I have today. I used to document my bodybuilding and

powerlifting endeavors on Instagram, which is how many of my clients found me. Content creators and brands knew I spoke their language, so they came to me when they needed legal help protecting their brand or negotiating a commercial agreement. I think there is an understanding of what kind of person you are if you undertake a bodybuilding prep, so my clients and potential clients in the health and wellness space trust that I am focused and determined; they know my work product will reflect that.

3. Have you always embraced your passions in your practice? If not, what influenced you to connect with your passions in your career?

No. In the beginning, because I could not find a traditional position in the sports world like I hoped I would, I had to find a legal job doing whatever I could find at the time. I hadn't come to the realization that I could blend my passions with the practice of law. During those first five years of practice, I was working in areas of the law that I had almost no interest in for clients that I did not necessarily relate to. I was lucky enough to have a supportive firm that allowed me to explore areas of the law outside of what they hired me to do, which was great. I also knew it was important to gain real-world experience not only doing the work but also managing clients and learning business development. It was not until my Instagram started to gain a little bit of traction that I realized I could blend my passion for health and fitness with my practice of law by working with individuals and brands in that space.

4. You seem to market your services to clients by differentiating yourself from others. What makes you and your practice different from the traditional attorney?

I laugh at this because I have said, "I am not like other attorneys; I am a cool attorney," in meetings before, and if you don't know that reference, I am much older than I care to admit. What makes me different from more traditional attorneys is that I am always 100% myself, and I have no problem showing up online as my true self. I don't try to project an image of perfection, and my definition of professionalism might be slightly different from that of others. I am also not afraid to use social media to connect with clients or potential clients, and I know many attorneys still struggle with the idea of doing that. I work hard to humanize this profession. If I had a dollar for every time I spoke with someone who had a bad experience with an attorney or was afraid of attorneys, I probably could have retired by now. It's my mission to be seen as approachable, friendly, and human. Of course, I ensure that I provide top-notch service to my clients, but I think it's just as important to connect with the client

on their level and gain their trust by being yourself. I am human first, lawyer second.

5. During the summer after your second year of law school, you interned with CAA Sports, one of the premier agencies for American professional athletes. What did you learn during that experience, and how did it influence you?

I love this question! I learned so much. Everything you have ever heard about professional athletes is true, the good and the bad. But, most importantly, I learned how important relationships are. The agent I worked under while with CAA had extremely close relationships with all of his athletes. He also had a really great team around him to support each athlete. He wanted to be the person his clients came to for anything and everything. Even if it wasn't his "job" as the agent to handle, he would help find the person the athlete needed to solve whatever the problem was. I have taken that approach with my clients in my practice because I want to build that same strong relationship with the people I am working with. I may not be able to solve all of my client's legal problems, but I will be the one to help them find the right person that can.

6. Now that college athletes can monetize their name, image, and likeness (NIL), many opportunities are available for young athletes to earn money from their personal brands. How would you advise these athletes on how to protect their NIL?

The answer to this question is probably too long for this interview. But I will give a few high-level tips that will hopefully be helpful. There are two distinct types of NIL deals happening right now. One is more traditional marketing/endorsement deals, and the other is schools directly paying players. These tips speak to both types of NIL opportunities but primarily to the traditional deals. First and foremost, every athlete can benefit from their NIL. Even if you feel like your social media presence doesn't quite match other athletes or your sport isn't a high-profile sport. Do not hesitate to look for opportunities to connect with brands both locally and nationally and advocate for yourself. Second, build a team around you that you trust. Have a lawyer, a CPA, and an agent that you know has your best interest at heart. I understand some deals are smaller and may not warrant professional help, but if you are signing a contract of any kind, you should have it reviewed by a lawyer to ensure you aren't signing your NIL rights away long-term. At the very least, have a trusted lawyer you can go to. As the NIL landscape evolves and deals become more complicated, legal involvement is likely non-negotiable. Third, the

rules around NIL change almost daily, so if anyone tells you they are an "expert" and can guarantee a certain outcome, they probably aren't and probably can't so be weary. Fourth and finally, the goal of building and protecting your brand while in school should be to set you up for success in the future. I have helped content creators scale from posting brand deals to owning seven-figure businesses. You can do the same thing.

7. Brand protection has a long history, but some issues your clients face, like digital content ownership, are relatively new. How do you adapt traditional brand protection principles to these modern, rapidly evolving concerns? How do you believe your background has enabled you to stay current with these changes?

Traditional principles of brand protection, such as safeguarding trademarks, enforcing copyrights, and preventing unfair competition, stay relevant. Still, they must be tailored to address the unique challenges posed by digital content ownership and the fast-paced evolution of online platforms. For example, traditional trademark strategies must evolve. I advise clients to register trademarks not just for physical goods but also for virtual assets and digital services. Monitoring for infringement has also shifted from brick-and-mortar competitors to global digital marketplaces, requiring advanced tools like AI-driven brand monitoring software. Much of my clients' bread and butter is digital content. That can present unique ownership challenges. I ensure my clients understand the importance of copyright registrations and help enforce their rights across digital platforms through the Digital Millennium Copyright Act (DMCA) takedowns and partnership programs with social media networks. I help draft contracts that explicitly define ownership of digital content created by my clients to minimize disputes over intellectual property. Each platform my clients operate on has intellectual property policies. I must stay on top of these policies to help clients navigate them effectively and prevent unauthorized use of their brand or content. I think my "figure it out as I go" background has positioned me to tackle these emerging issues. My ongoing commitment to staying informed ensures that I can adapt to the rapidly changing legal landscape and provide effective, cutting-edge counsel to my clients.

8. With influencers and health brands pushing the boundaries of marketing and branding, what changes or innovations do you hope to see in the law to support the unique needs of your clients?

Content creators often face ambiguity around partnership structures, such as profit-sharing agreements or licensing deals for their likeness. I

hope to see legal innovation that standardizes these agreements, providing influencers and brands with equitable, enforceable terms. This legal innovation could involve creating model contracts for influencer partnerships, making negotiating and enforcing terms easier. My clients increasingly create unique digital content (e.g., NFTs, branded AR/VR experiences), so I hope to see streamlined processes for protecting and enforcing intellectual property rights in these new mediums. One way to address this could include international frameworks for handling cross-border IP disputes, which are becoming more common in the digital age. Finally, my clients often rely on personalized marketing fueled by consumer data. The patchwork of privacy laws nationwide and globally is often difficult for clients to address, especially start-ups. I would love to see stronger, unified global standards that address the emerging issues in data privacy, such as biometric data collection and AI-driven profiling.

9. What advice would you give law students considering a non-traditional path in specialized field, especially combining personal passions with professional pursuits?

Don't ever settle in your career. If you have a personal passion that you never stop thinking about, there is a way to blend that into your professional world. Your interests are not distractions; they are assets. Whether your passion is sports, art, technology, or wellness, these areas can guide you toward a niche that combines legal expertise with personal fulfillment. Almost everyone needs legal help, so the easiest point of entry to blending the two is serving clients in your field of interest like I do. You can seek out pro bono work in your area of interest to help build hands-on experience in the beginning. You can work in-house for a company that fits your passion, or you can take the skills you develop in law school and do something outside of the practice of law that aligns with your passions. Connect with like-minded people and grow your personal and professional network. Join organizations and attend events that bring together professionals in your area of interest. Networking with others who have followed non-traditional paths can provide valuable insights and open doors. For me, joining associations like the Florida Sports Lawyers Association and the Texas Entertainment and Sports Law Section allowed me to connect with mentors and peers who supported my career development. Be patient with yourself. Building a career takes time, and building a non-traditional legal career might take longer. Success often comes through small, consistent steps—whether that's developing a personal brand, gaining niche experience, or gradually transitioning into your ideal role. Finally, be yourself and pursue the things you truly enjoy. The most successful lawyers I know are the ones

who are unapologetically themselves, doing work they feel strongly about.

DURABILITY AND DEFAMATION: HOW DEFAMATION LAW CONTINUES TO ADAPT IN THE 21ST CENTURY

*Austin C. Vining**

Colton Teal: Defamation and politics have long been intertwined. Defamation in American politics even predates the founding of the United States itself, with instances such as the trial of John Peter Zenger for statements made against the Colonial Governor of New York, William Cosby, in the mid-1730s. With that said, please tell us more about the history and how defamation law has adapted over time.

Austin C. Vining:

Defamation law has its origins in common law. Despite the First Amendment's guarantee of freedom of speech and of the press, these protections were not imbued into defamation law for centuries. It wasn't until 1964 that *New York Times Co. v. Sullivan* added a constitutional overlay to the existing framework.[1] Prior to this, many states applied strict liability to defamation cases, and in many common law jurisdictions, that is still the case.

New York Times v. Sullivan created the actual malice standard, requiring public officials to prove that defamatory statements were made with knowledge of falsity or reckless disregard for the truth.[2] The Court opined that "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive."[3] In other words, to engage in significant public debate, speakers must have the ability to make mistakes, assuming such mistakes aren't reckless.

Despite a slow beginning, defamation law has evolved rapidly in the last half-century. In 1967, the Court extended the actual malice standard to public figures, not just public officials.[4] In 1974, the Court held opinions statements as non-actionable.[5] In 1988, the Court excluded parody from defamation's reach.[6]

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1. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
2. *See id* at 280.
3. *Id.* at 271–72 (citing NAACP v. Button, 371 U.S. 415, 433 (1963)).
4. *See generally* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).
5. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).
6. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 54–56 (1988).

At this point, much of defamation law seems to be generally settled, with the exception of some members of the Court voicing concerns about the actual malice standard. However, those justices, at least for now, remain in the minority, and the actual malice standard remains the rule of law. With a changing society and new technologies, there will always need to be adaptations to the law, but fundamentally, the core principles are generally broad enough to encompass a variety of new facts and circumstances.

Colton Teal: The jury in the abovementioned trial of John Peter Zenger found that truth is a defense against defamation. Today, in American politics, determining what is the truth and what is not can be a difficult task, as misinformation is on the rise. What role does determining the underlying facts and the truth play in political defamation?

Austin C. Vining:

Falsity is an element of defamation. In other words, if an at-issue statement is true, and there are no underlying implications or context that could lead to a false interpretation, a defamation claim cannot survive. In many cases involving political speech, plaintiffs are public-officials or public figures such as candidates for office. Not only do public officials and public figures have to prove actual malice, they must also prove that the statement is actually false.[7] Likewise, in private-plaintiff cases, the plaintiff typically must prove falsity, especially in cases where the statements are of public concern and the defendant is a member of the media.[8]

However, determining what is or is not a true statement has several nuances, both legally and factually. For a statement to be false, it must be a statement of fact rather than a statement of opinion. These terms can be confusing because they don't mean exactly what people may think. A statement of fact is something that is verifiable.[9] It is not enough to simply label something an opinion. For example, if one were to say, "in my opinion, the mayor stole $100,000 from the city," this would be a statement of fact rather than a statement of opinion. Why? Because it is verifiable. However, many statements, especially in the political arena,

7. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69 (1986); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) ("[A] public official [is] allowed the civil [defamation] remedy only if he establishes that the utterance was false."); Herbert v. Lando, 441 U.S. 153, 179 (1979) ("[T]he plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability.").

8. *See generally* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

9. Milkovich v. Lorain J. Co., 497 U.S. 1, 21–22 (1990).

are statements of opinion. Calling someone a "racist" or "misogynist" typically are not actionable because, again, they are not verifiable.

Substantial truth can also serve as a defense. Courts typically consider the "gist" or the "sting" of the alleged defamatory statement, which may include falsities, as compared to the actual truth. The Second Circuit explained this concept, noting that if "the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done."[10] Thus, a successful defamation claim typically needs more than minor inaccuracies or omissions.

Ultimately, whether a statement is false is a question for the finder of fact, which is usually a jury. There are evidentiary safeguards in place to prevent the impact of misinformation on juries, which were around long before the modern-day scrutiny placed on misinformation. Jurors are asked to consider only the facts presented at trial, and a variety of evidence may not be introduced due to concerns regarding reliability.

Colton Teal: Traditionally, defamation suits centered around individual reputations or business interests. Defamation is now common in matters involving broad public interests and social issues. What do you think has driven this shift, and how does it impact the way defamation matters are handled?

Austin C. Vining:

Recently, defamation cases are on the rise, including political cases and otherwise.[11] Many high-profile cases have ended with massive damages awards. In the past few years, eight- and nine-figure verdicts have been handed down against Alex Jones ($1.44 billion), Fox News ($787 million), Rudy Guiliani ($148 million), and Donald Trump ($83 million).

This can be attributed to a few different things. First, in today's world, reputations are increasingly monetized and valuable. When a reputation is injured, particularly when there is a public figure or a business plaintiff, courts recognize that those reputations are valuable. Second, the rise of

10. Guccione v. Hustler Mag., Inc., 800 F.2d 298, 303 (2d Cir. 1986) (quoting Cafferty v. S. Tier Publ'g Co., 123 N.E. 76, 78 (1919)); *see also* Tannerite Sports, LLC v. NBCUniversal News Grp., 864 F.3d 236, 242–43 (2d Cir. 2017) ("New York law recognizes that an alleged libel is not actionable if the published statement could have produced no worse an effect on the mind of a reader than the truth pertinent to the allegation.").

11. Sean O'Driscoll, *Defamation Lawsuits Are on the Rise*, NEWSWEEK (Aug. 23, 2024), https://www.newsweek.com/donald-trump-rudy-giuliani-johnny-depp-defamation-libel-cases-mike-lindell-alex-jones-1941397#:~:text=Other%20recent%20defamation%20cases%20include,defamation%20verdicts%20and%20settlements%20recently.%22 [https://perma.cc/B9JQ-VAKJ].

social media and the internet has made it much easier for messages to be transmitted rapidly and to a wide audience, which can lead to increased harm. Traditionally, unless one had access to a mass medium, speech was filtered through journalists or publishers and reach was often still limited by network or circulation. Finally, there has been a significant increase in punitive damages. Courts and juries are sending a message about spreading misinformation. These large verdicts command headlines, so presumably, the punitive damages are sending a message of deterrence.

The rise in political cases is attributable to a few different factors as well. First, the political climate is ripe for these cases. They have been tested and often proven successful. Second, a number of interest groups and nonprofit legal organizations have developed legal strategies to send messages to their political adversaries, namely that lying has consequences, including, in some cases, bankruptcy. Finally, it goes without saying that there is an increasingly large financial incentive to bring defamation claims, especially against the right plaintiff. These final points can also intertwine, where a plaintiff may receive financial backing through pro bono legal services while potentially receiving a large payout via settlement or successful litigation.

Colton Teal: With the rise of "fake news," how do you see defamation law shaping accountability in media and addressing issues of factual versus opinion reporting?

Austin C. Vining:

While broad, defamation law cannot subsume all fake news. For fake news to be defamatory, it must not only be false but also be capable of defamatory meaning, meaning it tends to disgrace or lower public opinion of a person or to harm a person's reputation. Therein lies the problem: much of what we consider "fake news" does not target an individual. For example, there may be rumors about vaccines, abortions, or guns, but until these statements impact an individual's reputation, they are not actionable.

Where the Venn diagram of fake news and defamation intersect, much remains the same. If you think about it, fake news with a tendency to injure one's reputation has been around longer than defamation law itself. Some things are changing, though. The rise in litigation detailed above does suggest more people are being held accountable, and the large verdicts awarded serve as a caution to would-be defamers. Also, it is important for individuals and companies to understand that simply labeling something as "opinion" does not automatically alleviate liability. A fact is a fact, regardless of how it is presented.

As for the rest of fake news, we need a definition to adequately consider how to handle it. I have narrowly defined fake news elsewhere as "articles that suggest, by both their appearance and content the conveyance of real news, and that knowingly include at least one material factual assertion that is empirically verifiable as false and that is not otherwise protected by the fair report privilege."[12] Under this definition, any law banning fake news would likely run afoul of the First Amendment's freedom of speech. Moreover, if fake news was banned, that would inherently require some sort of Orwellian Ministry of Truth, whereby the government determines what is and is not true, and thus what speech citizens may receive.

At the end of the day, the First Amendment protects robust and open debate, and inherently within that, falsehoods must be allowed. Rather than an arbiter of truth, the government's role should be educational and not censorial. Improving media literacy is vital to help combat fake news. Individuals are likewise not defenseless and should engage in counter speech. Companies have begun to self-regulate by implementing fact-checks and allowing users to label content as false, but more is needed in terms of what algorithms reward.

Colton Teal: Many states passed "Anti-SLAPP" (Anti-Strategic Lawsuits Against Public Participation) statutes in the 2010s, which require the plaintiff to prove they are likely to prevail on the defamation claim or the claim will be dismissed. How has introducing these statutes changed the defamation defense environment?

Austin C. Vining:

As of July 2024, thirty-four states and the District of Colombia have passed Anti-SLAPP lawsuits.[13] The exact specifics vary state by state, and no federal Anti-SLAPP law exists. Depending on the jurisdiction, these laws have more or less teeth, but the general benefits of a strong Anti-SLAPP statute are the ability for defendants to secure a quick dismissal, automatically stay the case once an Anti-SLAPP motion has been filed, immediately appeal a denial of an Anti-SLAPP motion, and obtain an award of attorneys' fees for prevailing defendants.

Anti-SLAPP statutes are largely beneficial for defendants as they offer an additional mechanism for dismissing cases where a plaintiff is unlikely to prevail. This falls in line with the intended purpose of the statute, to prevent strategic lawsuits against public participation. In other

12. Clay Calvert et al., *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 U. CIN. L. REV. 99, 103–04 (2018).

13. *Anti-SLAPP Legal Guide*, REPORTERS COMMITTEE FOR FREEDOM OF PRESS, https://www.rcfp.org/anti-slapp-legal-guide/ [https://perma.cc/C3KM-ZX3B].

words, without these statutes, it was easier for well-funded plaintiffs to threaten or pursue litigation against speech they disagreed with, forcing defendants who lacked resources to choose between censoring their speech or racking up hefty legal expenses.

One of the key benefits is that Anti-SLAPP motions are typically filed early on in lawsuits, before significant time and expense is incurred. Many statutes also provide for an automatic stay on discovery, which can be one of the most expensive parts of a lawsuit. This framework promotes speech by making it easier and cheaper for defendants to defend against lawsuits over protected speech.

Finally, many jurisdictions allow for an award of attorneys' fees for prevailing defendants. This not only reduces the financial burden even more for defendants, but it also serves as a deterrent for plaintiffs. If a plaintiff brings a lawsuit that is thrown out by an Anti-SLAPP motion, they could be on the hook for their own legal fees as well as the defendants'.

These attorneys' fee shifting provisions vary, however. While in some jurisdictions they are mandatory, others make the awards permissive or do not provide for them at all. Even more troubling, some jurisdictions provide for attorneys' fees for the prevailing party on an Anti-SLAPP motion. Therefore, defendants in those jurisdictions may be less likely to file an Anti-SLAPP motion in the first place due to the risk of the court denying the motion and awarding attorneys' fees to the plaintiff.

Anti-SLAPP statutes have been, overall, positive for the defamation defense bar. However, the varying language of the statutes means protections and implications are different depending on the jurisdiction. This has likely led to an increase in venue shopping when plaintiffs are determining where to bring an action challenging speech. In the future, hopefully more states will adopt or amend strong Anti-SLAPP litigation to provide more robust free speech protections and prevent venue shopping.

Colton Teal: Over the past decade, there have been a variety of First Amendment controversies related to the usage of "hate speech." How does the law distinguish between protected speech and this "hate speech," and what impact does that play in today's political realm?

Austin C. Vining:

I love this question, and it's one that comes up in my class every semester. To understand the answer to this question, it's important to understand First Amendment framework. The First Amendment protects freedom of speech, full stop. However, over the years, the Supreme Court

has carved out a number of categories of speech that receive less protection or no protection.

Hate speech, specifically, has never been excluded from First Amendment protection. Still, there are some limitations on hate speech. What we consider "hate speech" can fall into categories of unprotected speech, such as defamation, fighting words, incitement to imminent lawless action, or true threats, *inter alia*.

Barring hate speech coinciding with a carved-out exemption, it is protected. Indeed, the Supreme Court has time and time again reaffirmed Justice Oliver Wendell Holmes' understanding of the First Amendment as a broad guarantee of "freedom for the thought that we hate." In 2011, Chief Justice John Roberts opined that:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[14]

Justice Robert's explanation flows from the Meiklejohnian theory, which posits that the First Amendment's purpose is to facilitate self-government.[15] The theory places extreme importance on the promotion of political discourse, and it is also the basis for the actual malice standard in defamation law.

Another less common theory, the pressure valve theory, explains why hate speech should be permitted.[16] Essentially, this theory suggests that opinions, even controversial ones, should be permitted to prevent the potential violence or unrest that would ensue if those opinions were suppressed. In other words, let people vent (safety valve) instead of forcing them to bottle up their feelings, potentially leading to an explosion.

Plus, in the words of one of my mentors, "Don't you want to know who the [jerks] are?"[17]

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14. Snyder v. Phelps, 562 U.S. 443, 460–61 (2011).

15. *See generally* Paul G. Kauper, *Meiklejohn: Political Freedom*, 58 MICH. L. REV. 619 (1960), https://repository.law.umich.edu/mlr/vol58/iss4/18 [https://perma.cc/P3YQ-LNN6].

16. *See generally* Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation Symposium: Critical Race Theory: Essays on Hate Speech*, 82 CAL L. REV. 871 (1994), https://scholarship.law.ua.edu/fac_essays/194 [https://perma.cc/QXV9-6HLF].

17. Quote modified for decorum.

Colton Teal: Defamation law requires public figures to prove "actual malice." Given the rise of "political influencers" and other politically active individuals on social media, how is the law adapting its definition of "public figures," and what challenges arise from this adaptation?

Austin C. Vining:

Since 1974, public figure plaintiffs must prove actual malice to succeed in a defamation claim. In *Gertz v. Robert Welch, Inc.*, the Supreme Court explained that public figures "have assumed roles of special prominence in the affairs of society" and have "assume[d] special prominence in the resolution of public questions."[18] The Court additionally reasoned, that public figures had greater access to an audience to dispel falsehoods.[19]

Depending on the degree of fame achieved by political influencers, they may be considered all-purposed public figures. One definition of all-purpose public figures is someone who is "immediately recognized by a large percentage of the relevant population, whose activities are followed by that group with interest, and whose opinions or conduct by virtue of these facts, can reasonably be expected to be known and considered by that group in the course of their own individual decision-making."[20] In this scenario, the plaintiff must prove actual malice regardless of the topic of the defamatory statement.

Alternatively, a plaintiff may be a vortex or limited-purpose public figure. In these scenarios, the plaintiff need only prove actual malice for defamatory statements related to the plaintiff's involvement in a public dispute. Otherwise, the plaintiff need only prove negligence. The Court of Appeals for the District of Columbia created an often-cited test for determining whether a plaintiff is a limited-purpose public figure:

(1) Is there a public controversy?
(2) Has the plaintiff played a sufficiently central role in the controversy? and
(3) Is the alleged defamatory statement germane to the plaintiff's participation in the controversy?[21]

18. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 351 (1974).

19. *Id.* at 344.

20. Harris v. Tomczak, 94 F.R.D. 689, 702 (E.D. Cal. 1982); *see also* Coleman v. Grand, 523 F. Supp. 3d 244, 256 (E.D.N.Y. 2021) ("[T]he [c]ourt requires a 'clear showing' of [the plaintiff's] fame, asking whether he is a 'well-known celebrity' whose name is a 'household word.'" (citations omitted)).

21. Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1296–98 (D.C. Cir. 1980).

Under this definition, a relatively unknown political influencer could still be required to prove actual malice.[22]

The question then becomes, should the law change? Given the rise of social media, individuals can insert themselves into a public controversy within a few keystrokes and without much thought. In doing so, has one availed themselves of private-figure status in certain contexts? Of course, everything is a matter of degree. In the near future, more courts will likely face these challenges and help flesh out the contours of limited-purpose public figure status.

Colton Teal: With the rise in new technology like the internet and social media, in what other ways has defamation law adapted to keep up?

Austin C. Vining:

Though fundamental principles remain the same, defamation law has had to adapt to some technological advances. For example, consider republication, which is especially relevant when considering statutes of limitation for bringing defamation suits. In the pre-internet era, republication was simple. An article may be reprinted, or a broadcast may be aired again. However, the internet brought additional challenges due to its permanently accessible nature and its ability to be edited over time.

Some have floated the idea that an online publication is a "continuing tort," meaning that the statute of limitations would constantly be reset. Not so. Courts have repeatedly found that the date of publication starts the timer for the statute of limitations.[23] Likewise, editing an online publication does not restart the timer unless there has been substantial and material change impacting the relevance to the defamatory material.[24]

Some courts have held that sharing or reposting defamatory statements on social media may not count as a republication so long as the intended nor actually reached audience is not new and the statement

22. *See generally* Grass v. News Grp. Publ'ns, Inc., 570 F. Supp. 178 (S.D.N.Y. 1983).

23. *See generally* Nat'l Police Ass'n v. Gannett Co., 81 F.4th 719 (7th Cir. 2023) (applying Indiana law and rejecting "novel interpretation" of Restatement § 577(2) that would have created a duty of post-publication removal of website content); Timothy L. Ashford, PC LLO v. Roses, 984 N.W. 2d 596 (2023) (holding that online posts are covered by Nebraska's statutory single publication rule and reasoning that a single internet posting is akin to a single issue of a newspaper for purposes of the rule); Arthaud v. Fuglie, 987 N.W.2d 379 (2023) (holding in a case involving an allegedly defamatory blog post that the Uniform Single Publication Act, as adopted by the North Dakota legislature, "prevents application of the discovery rule to remarks made to the public regardless of the media used for publication of the statement"); Musto v. Bell S. Telecomms. Corp., 748 So. 2d 296, 298 (Fla. Ct. App. 1999); Pendergrass v. ChoicePoint, Inc., No. 08-188, 2008 WL 5188782, at *4 (E.D. Pa. Dec. 10, 2008) (quoting Musto and collecting cases).

24. *See, e.g.*, Atkinson v. McLaughlin, 462 F. Supp. 2d 1038, 1054–55 (D.N.D. 2006).

has not been materially altered.[25] Section 230 of the Communications Decency Act of 1996 provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information provider."[26] This act provides broad immunity to internet service providers and potentially users, so long as they do not materially contribute to the publication at issue.

Another interesting development comes from the advent of hyperlinking. Courts largely agree that hyperlinking does not result in republication. Hyperlinking serves merely as a "reference," making it "the twenty-first century equivalent of the footnote."[27] As the Third Circuit explained,

> [U]nder traditional principles of republication, a mere reference to an article, regardless how favorable it is as long as it does not restate the defamatory material, does not republish the material. These traditional principles are as applicable to Internet publication as traditional publication, if not more so. Publishing a favorable reference with a link on the Internet is significantly easier. Taken together, though a link and reference may bring readers' attention to the existence of an article, they do not republish the article.

Colton Teal: Social media platforms have made it easier for defamatory statements to spread rapidly. However, not every social media user who has expressed their political views online and gone viral expected a broad audience when they clicked post. How could a plaintiff's expectation of social media audience size play as a defense in a defamation case like this?

Austin C. Vining:

In short, a speaker's expectation of audience size ultimately differing from the actual audience size is not a defense to defamation. Defamation generally requires "publication," which is a term of art that means communication to a third party. In other words, this element is established when a plaintiff proves the defendant communicated the defamatory statement to at least one individual other than the plaintiff. Audience size, and expectation of audience size, cannot provide a complete defense to defamation unless the audience is zero.

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25. *See, e.g.*, Martin v. Daily News L.P., 990 N.Y.S.2d 473, 483 (N.Y. Sup. Ct. 2014); Firth v. State, 98 N.Y.2d 365, 371 (N.Y. 2002).

26. 47 U.S.C. § 230 (2018).

27. Lindberg v. Dow Jones & Co., No. 20-CV-8231, 2021 WL 3605621, at *5–6 (S.D.N.Y. Aug. 11, 2021) (quoting Adelson v. Harris, 973 F. Supp. 2d 467, 484 (S.D.N.Y. 2013)).

However, the expected audience size could play an impact in damages. Various mitigating and aggravating factors can be considered when determining damages, including defendant's motivation and retraction. Depending on the facts, the defendant's motivation could temper a damages award where the defendant did not intend for a defamatory publication to achieve broad circulation. Likewise, if this were the case, the defendant may issue a retraction, bolstering the claims of mitigating motivation and potentially further reducing damages.

There are other implications surrounding audience size, although expectation of audience size is less salient. First, as defamation seeks to repair reputational harm, the size of the audience, and who is in the audience, plays a role in determining the degree of reputational harm and therefore damages.

Additionally, in many jurisdictions, proof of injury to reputation is required for recovery in defamation per quod actions. Depending on the audience who sees the social media post and the evidence the plaintiff can establish, a small audience may prove difficult to overcome in showing that plaintiff's reputation suffered harm. However, in defamation per se actions, reputational harm is generally presumed. Defamation per se encompasses several types of defamatory speech, including accusations about the plaintiff's alleged criminal behavior, the plaintiff having a loathsome disease, or negative statements about the plaintiff's work or business.

In sum, social media posters should be wary of expecting that a small social media reach will alleviate liability for defamation. Many platforms offer the ability for other uses to share posts and have algorithms that promote posts that receive more engagement. Content intended for a small audience may end up shared widely, and the legal recourse for such is limited.

Colton Teal: On July 1, 2024, the Supreme Court issued a decision in *Moody v. Netchoice, LLC.*, a case that implicated social media users' supposed First Amendment rights against the First Amendment rights of social media corporations. The court stated that if a social media platform exercises editorial discretion in selecting and presenting third-party content, it is engaged in a protected speech activity. This ruling seemingly gives broad powers to social media platforms to restrict content posted on the platform. What implications do you anticipate this ruling will have on political content moderation?

Austin C. Vining:

What we are seeing with the rise in popularity and influence of social media is common phenomenon attached to a new medium. Technopanics, a subgenre of moral panics, occur when there is an "intense public, political, and academic response to the emergence or use of media, or technologies, especially by the young."[28] Unfortunately, as in *Moody*,[29] technopanics can lead to far-reaching laws meant to protect the status quo. However, in reality, legislation can actually "stifle free speech, limit the free flow of ideas, and retard social and economic innovation."[30]

Again, this is not a new phenomenon. Technopanics associated with the advent of photography, radio, movies, and video games captured the attention of the public in the nineteenth and twentieth centuries, leading to varying results. For example, laws censoring broadcast television and radio have been upheld. Alternatively, the comic book industry beat legislators to the punch. Upon being investigated by the United States Senate for the impact comic books had on children, the industry created a commission responsible for self-censorship.

Many times, though, free speech considerations have carried the day, and attempts at censorship have failed. *Brown v. Entertainment Merchants Association* is illustrative.[31] In this case, California sought to enforce a law requiring restrictions and labeling requirements on the sale or rental of "violent video games" to minors. The Supreme Court was unconvinced, and held that video games "[l]ike the books, plays, and movies that proceeded them" are entitled to First Amendment protection."[32]

The lessons from *Brown* proved instructive in *Moody* as well. In her majority opinion, Justice Kagan quoted *Brown*, explaining that "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles' of the First Amendment 'do not vary.'"[33] That is to say, the basic framework for protecting freedom of speech is malleable enough to withstand the new ways speech is presented.

In *Moody*, the consolidated cases were ultimately remanded back to the lower courts for further proceedings.[34] Given the Court's opinions, the states face a high—though not insurmountable—burden to avoid the facial challenges to the respective laws. If the laws are stricken, it remains

28. Adam Thierer, *Technopanics, Threat Inflation, and the Danger of an Information Technology Precautionary Principle*, 14 MINN. J.L. SCI. & TECH. 309, 317 (2013).

29. Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2406–07 (2024).

30. *See* Thierer, *supra* note 28, at 352.

31. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011).

32. *Id.*

33. Moody, 144 S. Ct. at 2390 (citing Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011)).

34. *See* Moody, 144 S. Ct. at 2406–07.

to be seen how social media companies and the states will react. The states may pass new, more narrowly tailored legislation that could survive scrutiny, or perhaps social media companies will take a page from the comic book industry and attempt to self-regulate and provide more transparency around their algorithms.

Colton Teal: What advice would you give young professionals interested in defamation law, particularly in the entertainment industry? How would you advise these individuals to stay informed on the evolving trends and nuances in the field?

Austin C. Vining:

To be frank, young professionals need to have a resume that shows a demonstrated interest in entertainment/media law and network as much as possible. It's unlikely that a job in this field will fall into someone's lap, and it's important to set yourself up for success.

As far as resume building, law students should take classes like First Amendment Law, Media Law, Entertainment Law, Privacy Law, and Internet Law. It helps when employers know that a candidate already has the base level of understanding required to work in this field. Law students should also look to join relevant journals, moot court competitions, and clinics to get additional hands-on experience and show a track record of demonstrated interest.

Students can gain additional experience using their summers to intern at media law-focused organizations. I spent my 1L summer at Reporters Committee for Freedom of the Press, and I highly recommend this opportunity. There are many other non-profits and think tanks doing similar work that take on law students every summer.

For a young professional trying to break into defamation law, a judicial clerkship or fellowship can help tip the scales. Again, many non-profits and think tanks offer one-to-two-year post-grad fellowships focused on defamation law, and increasingly, more and more law schools are opening First Amendment clinics and posting fellowship positions.

The best opportunities for networking include attending conferences and local bar association events. While there are a few different conferences available, the American Bar Association Forum on Communications Law is a wonderful community of defamation law titans who are generous when it comes to helping young lawyers. Also, some cities have local media law bar associations, which are a great resource for meeting attorneys.

The best way to stay up to date on the latest in defamation law is to follow current practitioners on LinkedIn and X. Look at what they're doing, and how they got to where they are. Reach out for an informational

interview when you find someone whose career path you'd like to have. Another great resource for developments and trends is Lexis' newsletters. There are newsletters on media law and defamation law.

THE *HOUSE* BUILT BY FIRE: HOW LITIGATION HAS SPARKED IMPENDING CHANGES TO THE NCAA

Maddie Salamone[*]

Colton Teal: For decades, the NCAA's "amateurism" model was untouched. However, this model has recently come under fire as many lawsuits have forced the NCAA to change its rules and regulations. Please tell us about the current state of the NCAA's legal challenges.

Maddie Salamone:

The NCAA Amateurism model was largely untouched for decades due to dicta from a 1984 Supreme Court case that the NCAA lost, *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*,[1] which held that the NCAA had violated antitrust law by limiting the number of football games schools were allowed to televise. The NCAA successfully argued that *Board of Regents* stood for the proposition that the NCAA rules were to be presumed valid in order for the NCAA to preserve "the revered tradition of amateurism" and that the NCAA was to be given "ample latitude" to do so.[2] The Supreme Court in *NCAA v. Alston* definitively held that the language in that case upon which the NCAA had relied is merely dicta and is therefore not binding or dispositive. And even if it wasn't dicta, the market realities in college sports have changed dramatically since 1984, which changes the legal analysis.[3] The irony is that the changes to the market are largely due to the increased television revenue the *Board of Regents* made possible. The *Alston* Court went on to make it very clear that NCAA rules are subject to the same level of scrutiny under antitrust law as any other entity.[4]

At present, the NCAA faces legal challenges from virtually every angle and the proposed settlement in *House*[5] does not (and cannot) address the remaining legal issues. In fact, if the settlement receives final approval, there will almost certainly be litigation stemming from the

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1. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 102, 104 (1984).

2. *Id.*

3. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 108–09 (2021).

4. *Id.* at 109–10.

5. *See* Amended Stipulation and Settlement Agreement, House v. Nat'l Collegiate Athletic Ass'n, 545 F. Supp. 3d 804, 808 (N.D. Cal. 2021) [hereinafter House settlement agreement] (filed Sept. 26, 2024).

terms of the settlement. There is also another ongoing antitrust case in Colorado, *Fontenot v. NCAA*, which challenges NCAA rules prohibiting compensation for athletes beyond NIL (making it broader than the *House* case).[6]

One of the biggest issues is the question of athlete employment status. The NCAA faces legal challenges on the question of employment status for athletes under the National Labor Relations Act (NLRA), with two current matters involving unfair labor practice claims filed with the National Labor Relations Board (NLRB),[7] and under the Fair Labor Standards Act (FLSA) in *Johnson v. NCAA*, which could determine athletes are employees entitled to minimum wage and overtime.[8] An appeal is pending on the initial regional determination by the NLRB that Dartmouth men's basketball players are employees who may unionize. The NLRB could also determine that men's and women's basketball players and football players at USC are employees under the NLRA. The NCAA also faces ongoing challenges to its eligibility and transfer rules,[9] its recruiting rules and regulation of collectives,[10] ongoing Title IX concerns, athlete abuse issues, and visa issues for international athletes.

The only real solutions for the NCAA to avoid never-ending litigation over its rules would be to either engage in collective bargaining with its athletes, or Congress will have to enact legislation granting some sort of antitrust immunity to the NCAA. The NCAA has been heavily lobbying for the latter, and there is the possibility that the newly-elected Congress may be more willing and able to enact legislation than the prior one.

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6. *See* Complaint, Fontenot v. Nat'l Collegiate Athletic Ass'n, No. 23-cv-03076 (D. Colo. Nov. 20, 2023), https://www.classaction.org/media/fontenot-v-national-collegiate-athletic-association-et-al.pdf [https://perma.cc/W28G-BA6H].

7. *See* RC Petition, Trs. Dartmouth Coll., No. 01-RC-325633 (NLRB Sept. 13, 2023), https://www.nlrb.gov/case/01-RC-325633 [https://perma.cc/TU7T-F9DP]; *see* Complaint and Notice of Hearing at 5, Univ. of S. Cal., No. 31-CA-290326 (NLRB May 18, 2023), https://www.nlrb.gov/case/31-CA-290326 [https://perma.cc/U4A4-S54Z].

8. *See* Johnson v. Nat'l Collegiate Athletic Ass'n, 556 F. Supp. 3d 491, 501, 512 (E.D. Pa. 2021).

9. *See* Ohio v. Nat'l Collegiate Athletic Ass'n, 1:23-cv-00100-JPB, (M.D. W.Va.) (Dkt. No. 79) (Jan. 18, 2024).

10. Tennessee v. Nat'l Collegiate Athletic Ass'n, 718 F. Supp. 3d. 756, 759 (E.D. Tenn. Feb. 23, 2024).

Colton Teal: Why did the NCAA's model withstand so long without challenge? In particular, how has antitrust law interpretation forced the NCAA to change its ways?

Maddie Salamone:

I wouldn't say that the NCAA's model existed completely without challenge over the years. As discussed above, I would say that the NCAA was given a tremendous amount of deference by the courts for a very long time.

Even though the *NCAA v. Alston* decision was limited to education-related expenses, the Court completely obliterated the arguments the NCAA had made for years in defense of all its rules limiting athlete compensation and signaled strongly how the Court might rule if the NCAA's other rules were at issue.[11] As a result, the NCAA took the path of least resistance and has refrained from enforcing many of its rules for fear of further litigation. Courts have also enjoined the NCAA from enforcing a number of its other rules. The irony is that the NCAA was the one to appeal the Ninth Circuit's fairly innocuous decision in *Alston* to the Supreme Court. Had the NCAA let the Ninth Circuit decision stand, it would not have been detrimental to the NCAA, similar to *O'Bannon v. NCAA*.[12]

Colton Teal: Out of all the legal challenges against the NCAA, the most promising suit in terms of change for college athletics seems to be *House v. NCAA*. Tell us about the *House* lawsuit, including its current status.

Maddie Salamone:

For starters, I would characterize *House v. NCAA*[13] slightly differently. This case will certainly be more consequential than any case that has come before it. It will change college athletics for the better and also for the worse in many respects. Schools are already preparing for the changes contemplated by the proposed *House* settlement. Given that schools will likely be able to share revenue with athletes beginning in the 2025–2026 school year, schools must budget accordingly and explore additional revenue streams. Regardless of what happens with the settlement, revenue sharing is inevitable. A number of states have already passed legislation that would allow athletic departments to make direct

11. *See generally* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021).

12. *See generally* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

13. House v. Nat'l Collegiate Athletic Ass'n, 545 F. Supp. 3d 804, 808 (N.D. Cal. 2021).

payments to athletes, and we can probably expect more to follow suit, just like with NIL legislation.

Plaintiffs in *House* seek compensation for lost NIL broadcast revenue, lost NIL video game revenue, and lost NIL opportunities from June 15, 2016 until prior to the NCAA's NIL rules that were lifted July 1, 2021.[14] The *House* settlement also includes *Carter v. NCAA* (compensation limits) and *Hubbard v. NCAA* (Alston awards), for purposes of the settlement agreement.[15]

Class members include (a) Division I athletes who were eligible for competition between June 15, 2016 and September 15, 2024 and athletes who will compete on a Division I athletic team any time from the fall of 2025 and ten years thereafter under *House v. NCAA*; and (b) *Hubbard v. NCAA* class action members, including Division I athletes who were eligible for competition between April 1, 2019 and September 15, 2024 who would have met the requirements for receiving an Academic Achievement Award under the criteria established by their schools for qualifying for such an award.[16]

A revised settlement agreement has been preliminarily approved by Judge Wilken in the Northern District Court of California.[17] Judge Wilken expressed significant concerns (that are shared by many) on a wide variety of issues with the proposed settlement agreement during the hearing on the Motion for Preliminary approval on September 5, 2024.[18] A few weeks later, the parties submitted a revised settlement agreement at Judge Wilken's instruction addressing a few areas. Despite the fact that she told them to "go back to the drawing board" and "come up with something better…that's workable…that makes sense and that's understandable and fair," Judge Wilken determined the revisions were sufficient to grant preliminary approval.[19]

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14. *Id.*

15. Michelle Brutlag Hosick, *Settlement Documents Filed in College Athletics Class-Action Lawsuits*, NCAA (July 26, 2024, 5:04 PM), https://www.ncaa.org/news/2024/7/26/media-center-settlement-documents-filed-in-college-athletics-class-action-lawsuits.aspx [https://perma.cc/U7GA-BVAL].

16. *See* Plaintiffs' Notice of Motion and Motion for Preliminary Settlement Approval, House v. Nat'l Collegiate Athletic Ass'n, 545 F. Supp. 3d 804, 808 (N.D. Cal. 2021).

17. Associated Press, *Judge Gives Preliminary Approval to $2.78 Billion Settlement Designed to Pay College Athletes*, CBS SPORTS (Oct. 7, 2024), https://www.nbcsports.com/college-football/news/judge-gives-preliminary-approval-to-2-78-billion-settlement-designed-to-pay-college-athletes [https://perma.cc/X5T3-7XRH].

18. *Id.*

19. *See* Justin Williams, *House v. NCAA Settlement on Hold as Judge Sends Parties 'Back to the Drawing Board'*, THE ATHLETIC (Sept. 5, 2024), https://www.nytimes.com/athletic/5749342/2024/09/05/house-ncaa-settlement-college-sports-nil-boosters/ [https://perma.cc/7LWE-EV7K]; Michael McCann, *Revised NCAA Athlete Pay Plan Slammed by O'Bannon Attorneys*, SPORTICO (Sept. 26, 2024), https://www.sportico.com/law/analysis/2024/ncaa-house-settlement-objections-1234799721/ [https://perma.cc/DY9V-JPBL].

Class members are now considering their options and affected parties are beginning to raise objections to the settlement. The final approval hearing is set for April 7, 2025 (the date of the NCAA Men's Basketball Championship), during which objectors will have the opportunity to appear in person or submit written statements. Class members have been notified by postcard and have until January 31, 2025, to opt out of the settlement, submit a claim as a settlement class member, or file an objection. If enough class members opt out, the settlement will fail. That threshold number has been redacted from court documents.[20] The motion for final approval and response to objections must be filed by March 3, 2025.[21]

Colton Teal: The *House* settlement agreement would implement several monumental changes to the NCAA's structure. What are the highlights of this settlement agreement?

Maddie Salamone:

There are three main components of the proposed *House* settlement: (1) back damages of about 2.8 billion dollars to former athletes relating to NIL, academic awards, and other benefits (minus attorneys' fees); (2) the forward-looking future revenue sharing from institutions to athletes, including additional NIL opportunities directly with the institution; and (3) elimination of scholarship limits in favor or expanded, full roster eligibility and roster limits.[22]

Some of the highlights of the proposed settlement agreement include:

- **Staggered Payments:** The settlement payments will not be shared equally amongst class members. The anticipated distributions of the annual payments are: 75% to football players, 15% to men's basketball players, 5% to women's basketball players, and 5% to all other athletes.
- **Revenue-Sharing Model**: Settlement allows schools to provide up to 22% of the average annual athletic department revenue to athletes, beginning in the 2025–2026 school year. Non-power schools that choose to opt in are subject to the rest of the settlement agreement as well.
- **Clearinghouse Database**: Athletes must report any third-party NIL deals worth $600 or more, and the clearinghouse will review to

20. Erica L. Han, *NCAA Proposed Settlement Receives Preliminary Approval*, ROPES & GRAY (Nov. 13, 2024), https://www.ropesgray.com/en/insights/alerts/2024/11/ncaa-proposed-settlement-receives-preliminary-approval [https://perma.cc/R429-AFF2].

21. *Id.*

22. Ben Portnoy, *Proposed Settlement in House v. NCAA Includes $2.8 Billion in Back Damages*, SPORTS BUS. J. (Oct. 7, 2024), https://www.sportsbusinessjournal.com/Articles/2024/10/07/ncaa-house-settlement [https://perma.cc/N7CS-F7TK].

ensure fair market value and that NIL deals are "true NIL" and not "pay-for-play" deals or inducements, which will be denied or amended. An athlete that ignores these directives will face penalties.

- **Neutral Arbitration**: Settlement creates an expedited arbitration process to resolve disputes related to enforcement.
- **Elimination of Scholarship Limits in Favor of Roster Limits**: Schools may now provide full or partial scholarships to all athletes on the roster; football roster and scholarship limits will increase from 85 to 105. This effectively makes all sports equivalency sports. The increase in scholarships in certain sports could result in a decrease or elimination of scholarships in others.
- "**Associated Entities and Individuals"**: The term "Booster" has been replaced with "Associated Entities or Individuals" and has been more clearly defined.[23]

Colton Teal: The NCAA seems to be instilling a salary cap for schools to abide by in paying their student-athletes. Does the *House* settlement agreement instill a similar system to any other athletic league with a salary cap?

Maddie Salamone:

The House settlement salary cap does have similarities to caps used in professional sports leagues. That is the reason many schools are looking to those with experience in professional sports leagues to assist with establishing systems for implementing these changes in their athletic departments. The difference here is that this cap was not established through a collective bargaining agreement (CBA) and was not negotiated by athletes. This cap was negotiated by lawyers. Athletes did not have the opportunity to negotiate the cap or any other part of the proposed settlement agreement, but they will potentially be bound by its terms. College athletes are currently not classified as employees and therefore cannot collectively bargain.

23. *See* the House settlement agreement, *supra* note 5.

Colton Teal: We can expect to see the maximum amount schools can pay their student-athletes to change during the term the *House* settlement agreement is in place. How is this maximum calculated? How much change can we expect in the maximum from the start of the settlement's implementation to its end?

Maddie Salamone:

The cap is calculated based upon the average annual athletic department revenue from the power conference school from media rights sales, ticket sales, and sponsorship revenue. The maximum total direct revenue share to athletes will start at 22% (around $21 million) and it is expected to potentially increase to 30% ($20 million) over the next ten years.[24]

Each institution may decide whether and how much of any benefit to provide up to the cap (also called the "Pool"). The following benefits count toward the cap: any newly permitted amounts or benefits provided directly by the school; Alston awards (academic and graduation incentive awards capped—the amount that counts against the schools is capped at $2.5 million per year); new athletic scholarships (above the number currently permitted for each sport); and institutional NIL payments.[25] Third party NIL deals and payments, and NCAA payments and benefits shall not count against the Pool.[26]

Colton Teal: At a minimum, the *House* agreement seemingly complicates the compliance department's job at many universities. What new responsibilities does the *House* agreement give universities? What new roles will the *House* agreement create at universities?

Maddie Salamone:

Complicated is putting this lightly. What you are already seeing at many schools is that they are beginning to structure themselves like a professional sports team in anticipation of the changes under the *House* settlement. Schools will now be responsible for negotiating revenue-sharing contracts, which look strikingly similar to employment agreements. Many schools have already hired general managers to handle contract negotiations with athletes. Some schools are outsourcing this work or plan to hire independent contractors to handle negotiations and oversight. We can expect to see very similar roles to those within professional sports organizations moving forward.

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24. *See* the House settlement agreement, *supra* note 5.
25. *Id.*
26. *Id.*

Schools will now have additional reporting requirements and may be subject to auditing by Class Counsel or another appointed individual or entity.[27] Schools will also be responsible for enforcing new roster limits, somehow ensuring Title IX compliance, monitoring NIL deals and payments, and tracking spending categories that count towards revenue sharing cap. They may also soon be responsible for ensuring compliance with labor and employment laws as well.

Colton Teal: To what extent are schools sharing the revenue they make from their athletic programs with their athletes under the *House* settlement agreement? How prevalent will revenue-sharing between the university and athlete be now?

Maddie Salamone:

We can expect to see many non-power schools, especially those without football, opt out of the settlement agreement due to the new roster limitations. Unlike many of the power conferences (which typically have higher enrollment), each roster spot on a non-power school team represents a tuition-paying student that would not otherwise enroll at the school. Reducing roster sizes could therefore be very costly for non-power schools. This also coincides with a projected drop in overall enrollment for the next decade as the population of college-aged students drops due to a decline in birthrate.

Even amongst the power schools, there may be many who choose not to provide the full additional benefits up to the cap. Many schools are already weighing whether it's worth the tradeoffs to try to fully compete with the wealthier schools. Such tradeoffs include budget cuts, layoffs, and defunding or even cutting entire programs. Most schools are frantically increasing their fundraising efforts with alumni and fans. Some are getting creative with corporate sponsorships, including naming rights, and coming up with other new and creative ways to generate revenue. Many others are increasing the cost of their tickets and concessions by implementing a "talent fee." There is tremendous pressure for schools to fully compete with those who will provide the full amount allowable under the settlement agreement, but some athletic directors are considering whether it makes more sense for their individual schools to participate at a lower amount.

27. *See* the House settlement agreement, *supra* note 5.

Colton Teal: The *House* settlement does open several economic opportunities for schools and student-athletes. Still, it also can be read to legitimize several NCAA restrictions on deals between student-athletes and certain entities. Please tell us about the rules the NCAA is attempting to concretely implement for their portion of the bargain in the agreement.

Maddie Salamone:

The NCAA was most concerned with distinguishing "true NIL" from inducements and "pay-for-play" disguised as NIL deals and regulating with third party NIL activity, particularly with respect to Booster. The NCAA's attorney expressed that these were non-negotiables during the preliminary approval hearing.

In the revised house settlement, the NCAA compromised slightly by agreeing to eliminate the term "Booster" and replace it with "Associated Entity or Individual" and provided a more concrete and slightly narrower definition than what was previously included in the broad concept of "Booster," which was never well-defined.[28] The NCAA and/or Conference may then "prohibit NIL payments by Associated Entities or Individuals . . . unless the license/payment is for a valid business purpose related to the promotion or endorsement of goods or services provided to the general public for profit, with compensation at rates and terms commensurate with compensation paid to similarly situated individuals with comparable NIL value who are not current or prospective student-athletes at the Member Institution."[29] In other words, the NCAA will attempt to regulate fair market value by comparing the market value of athletes to that of non-athletes (which seems an inappropriate comparison). There is also a prohibition on schools authorizing payments for the right to use an athlete's NIL for a broadcast of any collegiate athletic game or competitive athletic event.

The NCAA will also require athletes to report all NIL payments valued at $600 or more to a designated clearinghouse.[30] The clearinghouse will then monitor for fair market value and "pay-for-play" disguised as NIL.[31] The settlement agreement also proposes an arbitration process to allow a neutral arbitrator to decide whether a NIL deal serves

28. *See* Eddie Pells, *Attorneys Tweak $2.78B College Settlement, Remove the Word 'Booster' from NIL Language*, THE ASSOCIATED PRESS (Sept. 26, 2024), https://apnews.com/article/college-nil-lawsuit-settlement-booster-4812f2f48dfae4b9f6dfd536e652dc5a [https://perma.cc/LL38-8KG5].

29. House settlement agreement, *supra* note 5, at 20.

30. House settlement agreement, *supra* note 5, at 58.

31. *See generally* House settlement agreement, *supra* note 5, at 58.

a "valid business purpose" or constitutes "pay-for-play."[32] This is intended as a check on the NCAA's power to enforce NIL rules.

Colton Teal: Do you believe the *House* agreement will be effective throughout its current proposed term? Will another legal challenge potentially alter the business of college athletics?

Maddie Salamone:

It depends what you mean by effective. The House settlement agreement will not and cannot accomplish one of the main goals of the NCAA and its member institutions—that is to insulate the NCAA from pending and future lawsuits. I believe the settlement agreement will be challenged on numerous grounds, as discussed.

Additionally, the proposed settlement is already having a detrimental effect on sports other than football and basketball. As schools look for ways to tighten their budgets, they are deciding what sports to prioritize and where to make potential cuts. Some have begun revoking scholarship offers to recruits.

It's possible and perhaps even likely that athletes will be deemed employees before the end of the ten-year period. If athletes are deemed employees, that will have a much larger impact than the *House* settlement. If athletes were to successfully unionize and engage in collective bargaining, it would override the terms of the *House* settlement.[33] Getting to that point is much easier said than done, but there is a greater appetite for some form of collective bargaining for college athletes than ever before. Schools are already moving toward a professional model which will allow them to more seamlessly transition from where we are now to a world where they negotiate revenue sharing and/or employment contracts with athletes and monitor the cap. Many schools are hiring General Managers to that end.

32. House Settlement Agreement, *supra* note 5, at 58.

33. *See* the House settlement agreement, *supra* note 5, at 78–79.

Colton Teal: The parties overcame a major hurdle in the settlement process with Judge Wilken granting preliminary approval of the agreement. However, the settlement agreement still faces significant challenges before it is finalized, such as handling objections like that of Houston Christian University. What's your prediction on the obstacles the *House* agreement faces moving forward?

Maddie Salamone:

While there is precedent from a recent case involving UFC fighters for a judge denying preliminary approval of a class action settlement agreement,[34] it is pretty rare. The reason it seemed like a real possibility with the *House* settlement is that Judge Wilken expressed significant concerns (that are shared by many) on a wide variety of issues with the proposed settlement agreement during the preliminary approval hearing, many of which remain unaddressed in the revised settlement agreement.

As a threshold matter, class members have until January 31, 2025, to opt out (if they do nothing, they remain in the settlement class). By opting out, class members relinquish the right to compensation from the settlement, but they would preserve their rights to sue the NCAA and power 5 conferences under antitrust. Even if they remain in the settlement class, athletes retain the right to make claims under other areas of the law, including Title IX, labor, and employment laws.[35] If a certain number of class members opt out (the exact number was redacted from the settlement agreement), the settlement may be terminated, and the parties will have to go back to the drawing board or proceed to trial.

Objections have already been raised by former plaintiffs of the *O'Bannon v. NCAA* case, claiming *inter alia* the settlement amount is too low.[36] Houston Christian University (HCU) previously filed a motion to intervene, which was denied. HCU's concerns are shared by officials from other non-power conferences who take issue with the fact that they are likely to be forced to absorb around sixty percent of the cost of the damages in the House Settlement (should they remain in the NCAA), even though (1) they are not parties to the case, (2) they were not involved in the Settlement negotiations, (3) no part of the Settlement was presented to full membership for a vote, (4) the Power schools "reaped the greatest benefit" from the rules and are "responsible for the vast majority of the

34. *See* Brett Okamoto, *Judge Denies Preliminary UFC Antitrust Settlement*, ESPN (July 31, 2024), https://www.espn.com/mma/story/_/id/40690791/judge-denies-preliminary-ufc-antitrust-settlement [https://perma.cc/9L6Q-U3TH].

35. House settlement agreement, *supra* note 5, at 11–15.

36. Han, *supra* note 20.

damages," and (5) the bulk of the damages will be paid out to Power conference athletes (and their lawyers).[37]

Additionally, the Attorney General for the State of South Dakota and the SD Board of Regents have already sued the NCAA in state court, arguing that the NCAA's proposed payment plan for damages forces smaller schools to cover a disproportionate amount of settlement cost, the settlement effectively amends NCAA's Constitution without following proper procedure (requiring two-thirds vote of delegates present & voting at NCAA's annual Convention), and the settlement disbursement plan creates Title IX issues.[38] There are a number of other lawsuits that have been filed by former athletes claiming rules that have since been struck down preventing athletes from receiving certain benefits violated antitrust.

There are also concerns over the fee arrangements for Class Counsel, who seek about $500 million in attorneys' fees & costs out of the damages settlement pool to be paid out over ten years. Class Counsel may also apply for a $20 million "upfront injunctive fee," plus they have the right to seek a percentage of the total amount spent by Division I schools on athletes each year of the ten-year term, which would then be deducted from the funds available for athletes the following year.

Even if Judge Wilken grants final approval, the terms of the settlement agreement can still be appealed to the U.S. Court of Appeals for the Ninth Circuit and potentially all the way to the U.S. Supreme Court.

Colton Teal: What advice would you give to a law student who wants to pursue a career associated with college athletics?

Maddie Salamone:

I would say to take advantage of all the internships available, whether it's working within a college athletics department, working for a collective, working with a company that is doing NIL deals with athletes, working for an agency, and the list goes on. There have never been so many opportunities for law students wanting a career associated with college athletics. Get as many experiences as you can, learn from each one, and know that sometimes it's just as valuable to figure out what you don't want to do as you navigate through your career. And never stop learning.

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37. *See* Michael McAnn, *HCU Blasts NCAA, Attorneys Over Pending Antitrust Settlements*, SPORTICO (July 15, 2024), https://www.sportico.com/law/analysis/2024/ncaa-settlement-houston-christian-university-1234789343/ [https://perma.cc/3YSL-JFGF].

38. *See* Daniel Libit, *South Dakota Attorney General Sues NCAA Over House Settlement*, SPORTICO (Sept. 10, 2024), https://www.sportico.com/leagues/college-sports/2024/south-dakota-attorney-general-ncaa-house-settlement-1234796742/ [https://perma.cc/F2SL-XACK].

BARGAINING AND BALLPLAYERS: THE PRACTICAL IMPLICATIONS OF MINOR LEAGUE BASEBALL'S CBA AND WHAT IT MEANS FOR THE NCAA

*Bobby Bramhall**

Colton Teal: The lifestyle of a Minor League Baseball (MiLB) player isn't exactly known to be glamorous. What workplace struggles have MiLB players previously faced, and which did you experience firsthand?

Bobby Bramhall:

Prior to representation by the Major League Baseball Players Association and Minor League Collective Bargaining Agreement in 2023,[1] which have drastically changed working and lifestyle conditions, minor leaguers, professionally paid baseball players, were unable to unionize and assert many rights under federal labor standards that other similarly situation professionals could because they were not classified as employees. MLB promulgated and exploited an illegal industry aided by the congressional antitrust exemption it enjoyed for 100 years,[2] which stifled opportunities to negotiate market-based compensation and receive fair treatment. Minor leaguers faced many struggles directly as well as numerous secondary effects from the lifestyle forced upon them that will never be forgotten. Some examples include:

1) imbalance of power and lack of respect or dignity in the relationship with the employer organization;
2) insufficient compensation for basic needs as a result of $2.43 per hour pay;
3) 12 off days in an entire 7-month, 144-game season, which were often used for travel. For perspective, there were no weekends off. That's 12 total off days from February to mid-September;

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1. *See Minor League Baseball Players*, MAJOR LEAGUE BASEBALL PLAYERS, https://www.mlbplayers.com/milb-players#:~:text=MiLB%20%7C%20mlbpa&text=As%20of%20August%202022%2C%20the,A%2C%20and%20Complex%20League%20levels.&text=As%20union%20members%2C%20Minor%20League,alike%20for%20decades%20to%20come [https://perma.cc/A9XP-2Z2S].

2. *See* Carl W. Hittinger & Tyson Y. Herrold, *Baseball's Antitrust Exemption Marks Its 100th Anniversary with a New Challenge*, THE TEMPLE, https://www2.law.temple.edu/10q/baseballs-antitrust-exemption-marks-its-100th-anniversary-with-a-new-challenge/#:~:text=The%20U.S.%20Department%20of%20Justice,Supreme%20Cour%20in%20Toolson%20v.-o [https://perma.cc/54EV-C94H]

4) bare minimum living conditions, such as multiple adult men sleeping in a room full of air mattresses;
5) lack of transportation to and from work; and
6) poor nutrition and assistance off the field.

In retrospect, some of my hardships tell a light-hearted comical story, such as the lack of clean towels for the team to shower, times when I drove my Latino teammates to and from work each day, or occasions when I ate peanut butter and banana sandwiches for days on end as it was the cheapest pre-game meal available with no access to grocery stores. However, some were more profound and affected more than just my playing career; they affected my future, which took me nearly ten years to rebuild after baseball. Some examples of these effects include the inability to choose my surgeon or receive a second opinion after an injury, loss of meaningful personal relationships, and lack of compensation for off-season living expenses, training, or nutrition. Hardships have the beautiful effect of cultivating new strengths and instilling fortitude and grit, but sometimes, the detriment for an extended period of years creates a disadvantage too steep to overcome within the time allowed.

Colton Teal: Why were such poor conditions allowed to exist and persist for MiLB players? How did Major League Baseball (MLB) capitalize on legalities in creating cheap conditions for Minor League players?

Bobby Bramhall:

There were a few reasons the unacceptable conditions for these professional athletes persisted for so long. First, sports require grit and toughness at any level, and no teammate wants to be the "whistleblower." MLB exploited these positive character traits to foster a system that made it challenging and taboo for a player to request better treatment or attempt to keep up with the status quo for the treatment of athletes among other professional sports. "Don't like it? Play better," was a common phrase used by the administrative staff. Second, MLB uses the minor leagues to prepare prospects for the big-league level and see which players outperform the competition. Thus, organizations injected very few resources into their minor league systems, providing only the bare necessities for a professional athlete to develop despite this being at the highest level of competition. Finally, the baseball antitrust exemption[3]

3. *See* Karen M. Lent & Anthony J. Dreyer, *The Current State of Major League Baseball's Antitrust Exemption*, REUTERS (July 20, 2023, 10:43 AM), https://www.reuters.com/legal/legalindustry/current-state-major-league-baseballs-antitrust-exemption-2023-07-20/ [https://perma.cc/9PU8-YNGU].

prevented minor leaguers from asserting claims under the Fair Labor Standards Act,[4] eliminated minor leaguers' leverage in negotiating a collective bargaining agreement and shielded the MLB from liability associated with wages or other working conditions. For context, adjusted for inflation, the salary equivalents went unchanged ($3,300–$10,750 annually) from 1950 to 2022 in an industry that grew by $9B since the late 1990s.[5]

Colton Teal: How did poor employment conditions for Minor League Baseball players influence the idea of collective bargaining with the League? Why were players able to break through and receive a collective bargaining relationship with the League?

Bobby Bramhall:

With the rise of social media, employee rights in other professions, public conversation around optimizing human performance, and sports leagues' success, athletes' rights became a priority. Most notably, a class action lawsuit was filed by former minor league players.[6] The plaintiff's attorney, Garrett Broshuis, was well-positioned to the lead as a former collegiate All-American and professional baseball player.[7]

In this case, *Senne v. MLB*, the players accused MLB of violating federal and state minimum wage and overtime wage laws.[8] In addition to defending the lawsuit, MLB unsurprisingly spent $2.6M lobbying Congress in the Save America's Pastime Act to keep the antitrust exemption in place during this time.[9] This act quashed the federal remedies that might have become available and required the class to pursue state law claims.[10] These efforts eventually led to a $185M settlement with MLB that allowed a broader conversation beyond back wages and overtime pay for the future of minor league professionals.

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4. *See* Lucas J. Carney, *Major League Baseball's 'Foul Ball': Why Minor League Baseball Players Are Not Exempt Employees Under the Fair Labor Standards Act*, 41 IOWA J. CORP. L. 284, 295 (2015).

5. *See generally* Complaint, at 4, 16, Senne v. Office of the Comm'r of Baseball, No. 3:14CV00608, 2014 WL 545501 (N.D. Cal. Feb. 7, 2014).

6. *See* Senne v. Kansas City Royals Baseball Corp., 591 F. Supp. 3d 453, 466 (N.D. Cal. 2022).

7. *See* KOREIN TILLERY, https://www.koreintillery.com/garrett-broshuis [https://perma.cc/3WNM-H35R].

8. Senne, 591 F. Supp. 3d at 466 (N.D. Cal. 2022).

9. *See* Emily C. Waldon, *Waldon: Minor-league Ballplayers Open up About the Realities of Their Pay, and Its Impact on Their Lives*, THE ATHLETIC (Mar. 15, 2019), https://sabr.org/latest/waldon-minor-league-ballplayers-open-up-about-the-realities-of-their-pay-and-its-impact-on-their-lives/ [https://perma.cc/2WD3-DJ57].

10. Nathaniel Grow, *The Save America's Pastime Act: Special-Interest Legislation Epitomized*, 90 U. COLO. L. REV. 1014, 1039 (2019).

Following this settlement, the MLBPA, which was established in 1966, elected to invite minor league baseball players to join the union fifty-seven years after its founding. Additionally, in 2023, minor league players and the MLB ratified the first collective bargaining agreement in history between the two parties.

Garrett Broshuis and Aaron Senne are heroes and have made an incredible impact on the future of professional baseball and labor law.

Colton Teal: Since Minor League Baseball players have enjoyed a collective bargaining agreement, what improvements do you see in the working conditions of these players? How has the CBA incentivized players to stay in the Minor League system?

Bobby Bramhall:

Some of the working condition improvements Minor Leaguers received from the CBA include a living wage (a 67–80% salary increase), full control of name, image, and likeness rights (the right of publicity), offseason pay, nutritious meals before and after games, laundry service for uniforms, housing arrangements, stipends, transportation, medical insurance for dependents, life insurance, and 401(k) plan contributions.[11] In the past, athletes had to get their pennies together to pay a staff member to wash their uniforms and provide a meal late at night after the game. Unfortunately, in the short term, these improvements came at the cost of eliminating teams from each organization and "cutting the fat" to reorganize the farm systems and reduce expenses.[12] In the long run, this will likely improve the overall product, league efficiency, and experience for the athletes.

The CBA is incentivizing players in several ways. First, players who would have otherwise retired due to a lifelong dedication to provide for their families can now make ends meet and continue to compete rather than working as a MiLB player only to lose money and sacrifice legitimate career opportunities. Offseason stipends allow for offseason dedication to players' professions rather than the previous setup, which was quite desperate. With no place to live, athletes would attempt to land a four-month job to make ends meet while training to compete against current big leaguers who were making millions of dollars, then return to full-season competition in the spring. Second, there is more security for

11. *See generally* Major League Baseball, 2022–2026 Basic Agreement, https://www.mlbplayers.com/_files/ugd/4d23dc_d6dfc2344d2042de973e37de62484da5.pdf [https://perma.cc/7U99-JTMA].

12. *See* Associated Press, *MLB Down to 120 Farm Teams After 40 Cities Dropped as Affiliates*, ESPN (Dec. 9, 2020), https://www.espn.com/mlb/story/_/id/30486689/mlb-120-farm-teams-40-cities-dropped-affiliates [https://perma.cc/42ED-SN5W].

athletes who sign with an organization out of high school or leave college early to compete as a professional. The lifestyle is manageable to cover costs and learn the trade, similar to a first job in another industry.

Third, with basic needs met, the gap between the highest-paid prospects and other team members is less noticeable from day to day. This refocuses efforts toward playing baseball rather than "surviving" for the love of the game and a chance to receive fair pay in the future.

Finally, and most importantly, representation. Members of a union have many protections and benefits. Issues may be reported and mediated, and both parties are more likely to respect the professional boundaries of the trade with an agreement of rights and responsibilities and a representative body in place.

Colton Teal: Collective bargaining seems like it could soon make it into another athletic league. The National Collegiate Athletic Association (NCAA) has recently seen its first union with the Dartmouth men's basketball team and even its first unfair labor practice charges. How is this opposed to the NCAA's traditional model, and what does this mean for college athletics?

Bobby Bramhall:

The NCAA has long asserted the circular argument that its athletes are amateurs, which is why they don't get paid.[13] There is no legitimate reason to continue this ideology but for the argument that the economic success of the product depends on amateurism. It turns out that this version of amateurism is a class of adults who work and pursue an education full-time and devote their lives to a university without compensation in an industry that generates billions in revenue annually.[14] Now that there is public awareness about the multi-billion-dollar college sports industry created on the backs of free labor, it only makes sense to move to collective bargaining to fairly represent and establish expectations for all parties involved.

There are many benefits for the employer in a CBA, including an opportunity to negotiate strategically rather than endlessly defending expensive lawsuits and lobbying for immunity from antitrust violations. Further, the parties can create mutually agreed expectations, rights, and responsibilities. Most importantly, the parties can design a business

13. *See generally* Robert Litan, *The NCAA's "Amatuerism" Rules Whats in a Name?*, MILKEN INST. REV. (Oct. 28, 2019), https://www.milkenreview.org/articles/the-ncaas-amateurism-rules [https://perma.cc/52MF-RW7Q].

14. *See* Associated Press, *NCAA generates nearly $1.3 billion in revenue for 2022-23*, ESPN (Feb. 1, 2024), https://www.espn.com/college-sports/story/_/id/39439274/ncaa-generates-nearly-13-billion-revenue-2022-23 [https://perma.cc/VJ6F-H5E3].

model that addresses the league's need to profit to survive while also compensating the athletes fairly. Consider the unexpected and continuous surprises the NCAA faces under the current climate: a CBA provides a favorable result for the future of college sports for whichever entity ultimately collectively bargains with the athletes.

Colton Teal: Do you believe we will see widescale adoption of collective bargaining between student-athletes and their respective universities? If there is widespread collective bargaining, what should the NCAA and its conferences do to maintain existence under this model?

Bobby Bramhall:

I believe collective bargaining is the only way forward, but it is unclear at this moment whether the entity will be a university, an evolved version of the NCAA, or a new business venture altogether to avoid Title IX concerns.[15] Time will also tell us whether there are congressional limitations to what benefits may be collectively bargained, such as wages or revenue shares.

With widespread collective bargaining, there will be many key negotiation points, such as salary caps, transfer rules, revenue sharing, coaching salaries, and improvement spending. Under a CBA, the parties can contract around would-be antitrust violations and come together to solve issues that promote the existence of the league in the same way that professional sports depend on the cooperation of administrations with on-the-field labor.

Colton Teal: What overlap and differences do you see between Minor League Baseball's fight to unionize and the potentiality of collective bargaining in the NCAA?

Bobby Bramhall:

They are similar because athletes in both sectors have been exploited and largely dedicated their time and talents for the love of the game rather than fair compensation. While minor leaguers are more fairly compensated now, college athletes remain uncompensated for the fruits of their labor aside from in-kind benefits and profiting from their inherent right of publicity from third parties. Employees continue to receive better working conditions and more rights in other industries as well, so it may also be a signal of a change in a new generation of leadership.

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15. *See* Leeden Rukstalis, *Changing the Game: The Emergence of NIL Contracts in Collegiate Athletics and the Continued Efficacy of Title IX*, 29 WASH. & LEE J. C.R. & SOC. JUST., 275 (2023).

Colton Teal: What advice would you give to a law student who wants to break into working with collective bargaining, particularly in athletics?

Bobby Bramhall:

The best advice for this question is what I received from current NLRB Board Member and former MLBPA General Counsel, Dave Prouty. I asked him a similar question in 2014 regarding my desire to work with the MLBPA as a former pro athlete and soon-to-be lawyer. He said, "grab 20 years of labor and employment law experience, and then you'll be ready. Your sports knowledge or experience as a player is not helpful in this situation." Labor and employment work is not necessarily athletics-related in the traditional sense, but it is more about the employees who just happen to be in an athletics profession. The best advice, then, is to enter a field and law firm that creates exposure to labor and employment law and work toward opportunities where the clients are athletes, athlete unions, or sports organizations.

FIGHTING FOR THEIR LIVELIHOOD: UFC FIGHTERS CAN IMPROVE CONDITIONS WITHOUT A UNION

Evan Mattel[*]

Abstract

This Article explores the compensation structure and current benefits afforded to UFC fighters, emphasizing the unique challenges and disparities faced in the absence of a collective bargaining agreement. Despite the Ultimate Fighting Championship's (UFC's) popularity and revenue, fighter pay still remains a contentious issue as many of the bonuses received by fighters are based on their experience, popularity, and fight performance. This leaves little room for consistent earnings and easy mobility within the organization's rankings. This Article analyzes the current pay model and investigates the potential impacts of attempting to unionize fighters. By evaluating the current landscape of the UFC as well as its history with labor relations, this Article aims to identify feasible pathways for improving fighter compensation and benefits, including healthcare and retirement plans, within the existing framework. The findings underscore the necessity for change within the UFC to ensure fair remuneration for these athletes while preserving their relationship with the organization.

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INTRODUCTION

The Ultimate Fighting Championship (UFC) is one of the premiere professional sports organizations in America. The UFC has grown substantially as a brand in the past decade, grossing over $1 billion in revenue in 2021.[1]

The UFC is notoriously tight-lipped about the contracts it maintains with its athletes. However, a recent antitrust lawsuit lifted the veil of the UFC's business arrangements with its fighters.[2] The lawsuit was filed in 2021 by two ex-UFC fighters, C.B. Dollaway and Kajan Johnson, against the UFC and its primary owner, Endeavor Group Holdings, as a follow-on suit to *Le et al v. Zuffa LLC*.[3] The complaint alleged that the UFC and Endeavor were "suppressing fighter compensation" and that the UFC had engaged in anti-competitive conduct in violation of the Sherman Antitrust Act.[4] The plaintiff alleged that the UFC and Endeavor had: (1) locked fighters into exclusive long-term contracts which prevented fighters from competing outside the organization, (2) used its dominance over the mixed martial arts (MMA) market to coerce fighters into re-signing with the company, and (3) "acquir[ed] and then clos[ed] down other MMA promoters that threatened the UFC's dominance."[5] As a result, the UFC was alleged to be acting as a monopoly and monopsony.[6]

The lawsuit seeks to prevent the aforementioned conduct, as well as provide monetary compensation for all fighters "who competed in bouts between June 30, 2017, and the present," according to lead attorney Eric L. Cramer.[7] The Johnson case revealed that the UFC pays fighters around

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1. *See* Jelani Scott, *New Report Shows that UFC Makes Over $1 Billion per Year*, SPORTS ILLUSTRATED (June 10, 2022), https://www.si.com/mma/2022/06/10/report-ufc-makes-over-1-billion-per-year [https://perma.cc/R4KU-3TBV].

2. *See* Paul Gift, *UFC Wants Follow-On Antitrust Lawsuit Dismissed*, FORBES (Jan. 20, 2022), https://www.forbes.com/sites/paulgift/2022/01/20/ufc-wants-follow-on-antitrust-lawsuit-dismissed/?sh=21c528786485 [https://perma.cc/8GKN-6BRH].

3. *Id.*

4. *Id.*; *see generally* 15 U.S.C. §§ 1–38.

5. Damon Martin, *Ex-UFC Fighters C.B. Dollaway, Kajan Johnson File New Lawsuit Against UFC and Endeavor*, MMAFIGHTING (June 24, 2021), https://www.mmafighting.com/2021/6/24/22548841/ex-ufc-fighters-c-b-dollaway-kajan-johnson-file-new-lawsuit-against-ufc-and-endeavor [https://perma.cc/9UKM-6LC7].

6. *Id.*; A monopsony is a market in which there is only one buyer. *See Monopsony Definition,* BRITANNICA, https://www.britannica.com/topic/monopsony [https://perma.cc/2XPL-BNC2] (defining a monopsony as a market in which there is only one buyer).

7. *See* Martin, *supra* note 5.

20% of its revenue.[8] The lawsuit also brought to light hard data on how much of the UFC's revenues were paid to fighters each year as compensation over a period of six and a half years.[9] "The results were remarkably stable for a growing promotion . . . . The annual wage shares all came in around 19–20%."[10] Dollaway was quoted as saying, "[t]he UFC should have to pay us competitive compensation for our services, just like professional athletes in other sports get paid based on competitive markets."[11] The primary issue discussed in this Article is the absence of adequate benefits and compensation for UFC fighters. This Article will find that fighter wages and benefits can be improved without the need for unionization, which the UFC has firmly opposed.

Section I of this Article will provide an overview of the UFC's model for compensating its fighters. Section II will discuss the history of labor law with respect to how courts classify workers as either independent contractors or employees. Section II will also discuss new interpretations of worker classification rules, including the ten-factor common law agency test, and how these changes apply to UFC fighters. Section III of this Article will discuss the issue of waiting for legislation or a new interpretation by the National Labor Relations Board (NLRB) to change the definition of independent contractor and how the UFC is taking steps to prevent relevant legislation from advancing through the political process. Section III will also highlight the urgency of finding a solution for fighters to obtain benefits, as the physical nature of the sport can lead to long-term health consequences.[12] Finally, Section IV proposes solutions for each aspect of fighter compensation and benefits.

I. BACKGROUND

A. *The UFC's Current Compensation Model*

Although the UFC exercises control over its fighters that would normally constitute an employer-employee relationship, such as mandating specific sponsorships, outfitting policies, drug testing, and participation in advertising, publicity, and the promotion of fights, it has been able to maintain independent contractor, rather than employee,

8. *See* Marc Raimondi, *UFC President Dana White Not Planning Fighter Raises: 'These Guys Get Paid What They're Supposed to Get Paid'*, ESPN (Aug. 12, 2022), https://www.espn.com/mma/story/_/id/34389555/ufc-president-dana-white-not-planning-fighter-raises-guys-get-paid-supposed-get-paid [https://perma.cc/SKX4-85B2].

9. Paul Gift, *UFC Fighter 'Wage Share' Held Steady at 19-20% for 11 Straight Years*, FORBES (Apr. 19, 2022), https://www.forbes.com/sites/paulgift/2022/04/19/ufc-fighter-wage-share-held-steady-at-19-20-for-11-straight-years [https://perma.cc/CVU8-RK59].

10. *Id.*

11. Martin, *supra* note 5.

12. *See id.*

status for its fighters.[13] The UFC has sufficient leverage to force this classification during negotiations because it is far and away the most popular and profitable MMA organization and contracts with 85% of fighters in the top 10 of all weight classes.[14] The UFC has been able to quietly keep this classification, seemingly due to its substantial revenue, lobbying efforts, and outspoken president, Dana White.[15] UFC fighters are also receiving a disproportionately low amount of that substantial revenue when compared to other large sports organizations like the National Football League (NFL), Major League Baseball (MLB), and National Basketball Association (NBA). In 2021, NFL players received 48% of total revenue with plans to grow above that number with a new media rights deal.[16] NBA players received around 50% of total revenue,[17] and the MLB spent 42% of total revenue on player salary.[18] These figures reveal a 22–30% difference between these other sports leagues and the UFC's annual wage share, making it apparent that UFC fighters are receiving a disproportionately low share of the total revenue.

Since the fighters are classified as independent contractors rather than employees, the UFC is able to keep its fighters at such a low share of revenue.[19] Independent contractors are individuals who either (1) have agreed to act on behalf of a principal (in this case, the UFC) but are not subject to the control of the principal, or (2) operate independently and enter into arm's length transactions with others.[20] Some common factors for identifying an independent contractor are (1) the extent of control by

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13. *See* Vincent Salminen, *UFC Fighters Are Taking a Beating Because They Are Misclassified as Independent Contractors. An Employee Classification Would Change the Fight Game for the UFC, Its Fighters, and MMA*, 7 PACE INTELL. PROP. SPORTS & ENT. L.F. 193, 198–201 (2017).

14. *See* Jake Wiegand, *The UFC's Market Dominance*, CONDUCT DETRIMENTAL (July 13, 2021), https://www.conductdetrimental.com/post/the-ufc-s-market-dominance [https://perma.cc/U6A7-728R].

15. Raimondi, *supra* note 8.

16. JC Tretter, *NFL Economics 101*, NFLPA (Oct. 27, 2021), https://nflpa.com/posts/nfl-economics-101 [https://perma.cc/EAX7-TLQ8].

17. Christina Gough, *Share of League Revenue Received by Players in the NBA and WNBA in 2019/2020*, STATISTA (Oct. 14, 2021), https://www.statista.com/statistics/1120689/annual-salaries-nba-wnba-league-revenue [https://perma.cc/F5GZ-ZRS5].

18. *See* Maury Brown, *2021 MLB Final Player Payrolls Show $168 Million Drop from Last Full Season: Here's Every Team's Number*, FORBES (Dec. 22, 2021), https://www.forbes.com/sites/maurybrown/2021/12/22/2021-mlb-final-player-payrolls-show-168m-drop-from-last-full-season-heres-every-team [https://perma.cc/NKF7-DGVX]; *Major League Baseball: Hitting it Out of the Park*, TIFOSY CAP. & ADVISORY, https://www.tifosy.com/en/insights/major-league-baseball-hitting-it-out-of-the-park-3593 [https://perma.cc/M9MJ-JN5D].

19. *See UFC Fighters Deprived of Benefits Provided to Other Professional Sports Organizations*, PRO ATHLETE LAW GRP., http://proathletelawgroup.com/ufc-fighters-deprived-of-benefits-provided-to-other-professional-sports-organizations/#: [https://perma.cc/68F3-L7YZ].

20. *See* STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS, CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, LLCS, AND CORPORATIONS 46 (11th ed. 2021).

the employer, (2) whether the individual is engaged in a distinct business, (3) whether the work is done under the direction of the employer, (4) the skill required to perform the work, (5) if the employer supplies the tools and place of work, (6) the length of employment, (7) the method of payment, and (8) whether the work is part of the regular business of the employer.[21] Independent contractors are generally not covered by labor and employment laws and are usually given contracts that end on a specific date when the job is complete.[22] Additionally, there are no minimum wage protections afforded to independent contractors.[23]

By classifying its fighters as independent contractors, the UFC does not have to provide benefits afforded under labor and employment law, including health insurance, retirement benefits, and workers' compensation.[24] The independent contractor status also decreases the wage stability for UFC fighters as they are paid on a per-fight basis.[25] This means that missing a fight due to injury or weight can deprive a fighter of a percentage of their wages.[26] However, the fighters' classification as independent contractors comes with some benefits, such as the ability to accept or reject certain fights.[27] This allows fighters to decide what fights they want to participate in based on their health, personal circumstances, the skill level of the opponent, and the compensation.[28] UFC fighters are offered three fights per year on average, giving them significantly more flexibility in their work schedule than an employee would have.[29]

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21. Atlanta Opera Inc., 372 N.L.R.B. No. 95, at 2 (June 13, 2023).

22. *See What's the Difference Between an Independent Contractor and an Employee*, OFF. OF CHILD SUPPORT ENF'T (Oct. 23, 2018), https://www.acf.hhs.gov/css/training-technical-assistance/whats-difference-between-independent-contractor-and-employee [https://perma.cc/VMS2-7XM6].

23. *Misclassification of Employees as Independent Contractors Under the Fair Labor Standards Act*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/flsa/misclassification [https://perma.cc/8KZ4-JQNC].

24. *See UFC Fighters Deprived of Benefits Provided to Other Professional Sports Organizations*, *supra* note 19.

25. Kevin Iole, *Amid Pay Controversy, Wisest Course of Action for UFC Fighters is to Share Salary Information*, YAHOO SPORTS (Aug. 18, 2022), https://sports.yahoo.com/amid-pay-controversy-wisest-course-of-action-for-ufc-fighters-is-to-share-salary-information-173602069.html [https://perma.cc/ZFM2-KEUX]

26. Andreas Hale, *What Happens if a UFC Fighter Misses Weight? Breaking Down Allowances, Replacement Opponents, Fines & More*, THE SPORTING NEWS (Sept. 9, 2022, 6:21 PM), https://www.sportingnews.com/us/mma/news/ufc-fighter-misses-weight-replacement-fines/o47f9ks40pxuytoxjme6jz9a [https://perma.cc/Q7HV-HZRJ].

27. *See Can UFC Fighters Pick and Choose Who They Fight?*, MMA CHANNEL, https://mmachannel.com/can-ufc-fighters-pick-and-choose-who-they-fight-faq/ [https://perma.cc/CHB8-M37P].

28. *See id.*

29. *See id.*

The recent lawsuits brought by UFC fighters against the UFC have highlighted some of the structural issues within the organization. The Zuffa class action suit recently settled for $375 million with another antitrust suit led by former UFC fighter Kajan Johnson still pending.[30] While these antitrust suits can help make progress by limiting the UFC's power over its fighters, it does not address the issue of healthcare benefits, nor does it address long term financial stability for fighters currently or formerly in the UFC.[31]

B. *The Pay Disparity in the UFC*

In general, the UFC breaks down its earnings into three tiers: low tier for new fighters in the UFC which ranges from $10,000–$30,000; middle tier for experienced fighters or fighters who are winning consecutive fights which ranges from $80,000–$250,000; and the highest tier, which is reserved for champions and fighters with a large fanbase, which ranges from $500,000–$3,000,000.[32] The UFC determines these figures through factors such as winning, fight of the night, performance, and in some cases, pay-per-view bonuses.[33]

UFC wages are very top heavy. In 2021, the highest paid UFC fighter was Conor McGregor, who was making $10,022,000.[34] Meanwhile 116 fighters (19% of all UFC fighters) made less than the average U.S. income, which was $25,000 at the time.[35] While some of the fighters are paid lucratively, the rise to the top is one plagued by hardship, injury, and instability. A new fighter who does not receive any bonuses can walk away with as little as $10,000 from a fight, which is especially concerning given that UFC fighters will only fight two to three times per year.[36] This is assuming the fighter can even make it to the fight. On the way, they must overcome numerous obstacles, such as avoiding injury in training, staying under the weight limit for the division they are competing in, and then compete well enough to be given another fight.

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30. Andreas Hale, *UFC Reaches $375M Settlement in Le. v. Zuffa Antitrust Lawsuit*, ESPN (Sept. 26, 2024), https://www.espn.com/mma/story/_/id/41455273/ufc-reaches-375m-settlement-le-vs-zuffa-antitrust-lawsuit [https://perma.cc/94PZ-8ARX].

31. *See generally* Cung Le v. Zuffa, LLC, 321 F.R.D. 636 (D. Nev. 2017).

32. Vladimir Vladisavljevic, *How Much Do UFC Fighters Get Paid? (2021 Earnings Revealed!)*, WAY OF MARTIAL ARTS (July 19, 2022), https://wayofmartialarts.com/how-much-money-do-mma-fighters-in-the-ufc-make/ [https://perma.cc/6F3K-9T9Z].

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; s*ee How Often Do UFC Fighters Fight?*, WAY OF MARTIAL ARTS (Apr. 13, 2021), https://wayofmartialarts.com/how-often-do-ufc-fighters-fight [https://perma.cc/RWE8-2SWU].

Furthermore, the UFC restricts fighters' ability to generate outside revenue.[37] In 2015, the UFC made a deal with Reebok which prohibited fighters from having companies sponsor them or place advertisements on their athletic apparel.[38] Prior to this deal, UFC fighters were permitted to find sponsorships of their own and sign endorsement deals.[39] The endorsements (which could be multiple at a time) would usually consist of patches on the fighter's in-ring apparel, and could also generally be seen during press conferences and post-fight interviews.[40] With the Reebok and the more recent Venum deal, fighters were no longer allowed to display any independent sponsorships on their fight apparel and were required to wear specific branded clothing provided by the UFC's official sponsor.[41] With the change in sponsorships also came a change in pay structure as both the Reebok and Venum deals adopted a tiered payment system that paid a fixed amount based on a fighter's number of fights or their title status.[42] The breakdown of the value and experience requirements of the Reebok and Venum deals can be seen below:[43]

Tier	Reebok	Venum
Champions	$40,000	$42,000
Title challengers	$30,000	$32,000
Over 20 UFC fights	$20,000	$21,000
16-20 UFC fights	$15,000	$16,000
11-15 UFC fights	$10,000	$11,000
6-10 UFC fights	$5,000	$6,000
4 or 5 UFC fights	$4,000	$4,500
1-3 UFC fights	$3,500	$4,000

37. *See* Paul Gift, *Moving the Needle in MMA: On the Marginal Revenue Product of UFC Fighters*, 21 J. OF SPORTS ECON. 176, 177 (2020).

38. *See* Steven Rondina, *UFC-Reebok Deal: Who Wins, Who Loses on UFC's New Uniform Policy?*, BLEACHER REPORT (May 11, 2015), https://bleacherreport.com/articles/2456159-ufc-reebok-deal-who-wins-who-loses-on-ufcs-new-uniform-deal [https://perma.cc/2HU5-7S86].

39. *See id.*

40. *See* Chad Dundas, *Fire, Ice and A Glorious Sweater: The 20 Most Iconic Looks in MMA History*, THE ATHLETIC (Apr. 29, 2020), https://theathletic.com/1783507/2020/04/29/top-20-most-iconic-looks-uniforms-shorts-mma-history/ [https://perma.cc/BZ55-VH3G].

41. *See UFC and Venum Deal: The Most Interesting Facts*, WAY OF MARTIAL ARTS (July 25, 2021), https://wayofmartialarts.com/ufc-venum-deal/ [https://perma.cc/FHK3-QH8K].

42. *Id.*

43. *Id.*

These figures may seem to be a nice bonus for fighters; however, compared to the previous financial figures UFC fighters were able to obtain through multiple sponsorships, these numbers were a drastic reduction.[44] One former UFC fighter, Brendan Schaub, claimed that he took more than a 90% reduction in pay due to a total of six sponsorships being taken away as a result of the new deal.[45] This resulted in him going from earning over $100,000 to $10,000 per fight.[46] Multiple other fighters, including top-10 ranked talent Matt Mitrione, voiced their displeasure with the change as it drastically reduced their ability to generate personal revenue.[47] This change impacted the middle and lower-level talent the most. Even fighters who may not have ascended to contender or championship status but still drew main card fights and had recognizable, marketable names struggled to capitalize on that marketability under the new deal.[48] UFC President Dana White was less than sympathetic when this problem was brought to his attention, stating: "How sponsorship works out for a guy is not my problem. That is not my problem."[49]

Another notable distinction between employees and independent contractors is that independent contractors are subject to a self-employment tax of 15.3% in addition to state and federal income tax.[50] This tax rate is twice as high as the rate paid by employees, and unlike employees, who can rely on their employers to deduct and process their share of the tax, independent contractors must file and pay the self-employment tax themselves.[51] This means that UFC fighters are not only

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44. *See* Rondina, *supra* note 38.

45. *See* Guilherme Cruz, *Brendan Schaub: I Lost Six Sponsorships for UFC 181 Because of the Reebok Deal*, MMA FIGHTING (Dec. 9, 2014), https://www.mmafighting.com/2014/12/9/7360485/brendan-schaub-i-lost-six-sponsors-for-ufc-181-because-of-the-reebok [https://perma.cc/4WBF-XYXV]; Rondina, *supra* note 38.

46. Rondina, *supra* note 38.

47. *See* Rondina, *supra* note 38.

48. *See* Rondina, *supra* note 38; Luke Dalton, *Understanding the Significance of the Main Card in Boxing Events*, SPORTSBOOM (Apr. 4, 2024), https://www.sportsboom.com/mma/what-does-main-card-mean-in-boxing/ [https://perma.cc/D2BN-4268] (explaining that "main card" fights receive the most media attention and promotional effort, and that these events typically carry the highest stakes because they tend to involve championship titles or contender eliminations).

49. Jesse Holland, *Dana White Tells Fighters Struggling to Attract UFC Sponsorships: 'It's Not My F---ing Problem'*, SB NATION (Feb. 21, 2014), https://www.mmamania.com/2014/2/21/5433178/dana-white-message-fighters-struggling-ufc-sponsorships-mma [https://perma.cc/2JTF-7VN4].

50. *See* Patricia E. Dilley, *Breaking the Glass Slipper - Reflections on the Self-Employment Tax*, 54 TAX L. 65, 79 (2000).

51. *See* Binita Gajjar, *Independent Contractor Vs. Self Employed – Are There Any Differences?*, MULTIPLIER (Mar. 9, 2023), https://www.usemultiplier.com/blog/independent-contractor-vs-self-employed [https://perma.cc/E59Y-PLFL]; *Self-Employment Tax (Social Security and Medicare Taxes)*, IRS, https://www.irs.gov/businesses/small-businesses-self-

being taxed more than a standard employee, but they also must learn how to file this tax or hire someone to file it for them.

C. *The UFC's Treatment of Injuries*

Due to the inherent physical and violent nature of MMA, UFC fighters are more prone to injury than those in other professional sports and therefore the importance of long-term benefits such as healthcare and retirement is of utmost importance to the fighters' wellbeing.[52] Between January 2016 and July 2018, 291 injuries were recorded in 285 fights across nine different weight divisions.[53] A similar study found that out of 408 UFC fights recorded, 35% ended with a fighter suffering a head injury, and in 16%, a traumatic brain injury occurred.[54] Compare this head injury rate to the concussion rate of the NFL, another notoriously violent professional sport with considerable press about the rate of concussions which culminated in 2015 with a movie titled "Concussion."[55] The NFL plays a total of 49 preseason games[56] and 272 regular-season games,[57] with 92 active players per game;[58] during the full 2021 season, a total of 187 concussions were suffered by players.[59] The total number of concussions, 187, divided by the total number of games, 321, multiplied by the number of active players per game, 92, produces a 0.6% concussion rate per player, a miniscule figure compared to the 17.5% concussion rate per UFC fighter per fight. Yet, the NFL has been in the limelight of the media when it comes to player protection and the

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employed/self-employment-tax-social-security-and-medicare-taxes [https://perma.cc/G3V6-LPUQ]; *Topic no. 751, Social Security and Medicare Withholding Rates*, IRS, https://www.irs.gov/taxtopics/tc751 [https://perma.cc/V5MR-BHUC].

52. *See* Mohamad Y. Fares et al., *Musculoskeletal and Head Injuries in the Ultimate Fighting Championship (UFC)*, 47 THE PHYSICIAN AND SPORTSMEDICINE 205 (Nov. 14, 2018), https://doi.org/10.1080/00913847.2018.1546108 [https://perma.cc/853X-T6GG].

53. *Id.* at 206.

54. *See* Mohamad Y. Fares et al., *Craniofacial and Traumatic Brain Injuries in Mixed Martial Arts*, 49 THE PHYSICIAN AND SPORTSMEDICINE 420 (Dec. 3, 2020), https://doi.org/10.1080/00913847.2020.1847623 [https://perma.cc/6QPP-XV22].

55. *See* Tim Ott, *Bennet Omalu*, BIOGRAPHY (May 17, 2021), https://www.biography.com/scientists/bennet-omalu [https://perma.cc/7URE-6755].

56. Jeff Kerr, *2021 NFL Preseason Schedule: Dates and Times for Every Game in Week 2 and 3*, CBS (Aug. 22, 2021), https://www.cbssports.com/nfl/news/2021-nfl-preseason-schedule-dates-and-times-for-every-game-in-week-2-and-3 [https://perma.cc/4Y4D-Q3SG].

57. Sunni Upai, *How Many Games in an NFL Season?*, THE U.S. SUN (Aug. 30, 2022), https://www.the-sun.com/sport/nfl/6110639/how-many-games-in-an-nfl-season [https://perma.cc/4LAY-7WK9].

58. Marc Lillibridge, *The Anatomy of a 53-Man Roster in the NFL*, BLEACHER REP. (May 16, 2013), https://bleacherreport.com/articles/1640782 [https://perma.cc/L5L7-2WEH].

59. *Injury Data Since 2015*, NFL (Oct. 4, 2024), https://www.nfl.com/playerhealthandsafety/health-and-wellness/injury-data/injury-data [https://perma.cc/VK6Y-U9FC].

UFC has remained under the radar despite a significantly higher rate of injury.[60]

The rate of injury is significant, but the health and retirement benefits offered by the UFC are the true issue at hand. The NFL has a significant Player Insurance Plan, which includes life insurance, accidental death and dismemberment insurance, medical coverage, dental coverage, vision coverage, and work/life resources.[61] The UFC has a much different and more loosely constructed healthcare process.

Firstly, ringside doctors will look at fighters after the fight has ended, and then UFC's staff physicians will examine the fighters backstage.[62] These initial screenings are really only checking a fighter's vital signs and "for signs of a brain malady like a subdural hematoma or internal bleeding elsewhere."[63] If the UFC staff notices that a fighter has a significant injury, they do not have assigned organizational doctors that will treat them (unlike other sports organizations such as the MLB).[64] Instead, they send the fighters to the emergency room or refer them back to their own personal doctors.[65]

Dr. Beau Hightower, director of sports medicine for the Jackson-Winkeljohn MMA team, stated that, in general, fighters do not notice some of their injuries until two weeks after a fight.[66] This initial screening and recognition of injuries is of utmost importance since "the UFC only pays for medical procedures on injuries that occur within 30 days of a fight."[67] While fighters receive medical suspensions to prevent them from training until their injuries heal, recovery is different for each fighter and each fight, making these suspensions effective only when their duration is equal to or longer than the specific fighter's recovery period.[68]

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60. *See* Ken Belson, *N.F.L.'s Concussion Protocol Under Scrutiny After Tagovailoa Is Hit Hard Again*, N.Y. TIMES (Sept. 30, 2022), https://www.nytimes.com/2022/09/30/sports/tua-tagavailoa-nfl-concussion-protocol.html [https://perma.cc/C5GQ-FVLV]; *see* Mike Freeman, *For NFL Fans, 'Concussion' Movie Will Be Heartbreaking, Enlightening, Disturbing*, BLEACHER REP. (Nov. 11, 2015), https://bleacherreport.com/articles/2588458-for-nfl-fans-concussion-movie-will-be-heartbreaking-enlightening-disturbing [https://perma.cc/HV56-9GR5].

61. *See Player Insurance Plan*, NFLPA (Nov. 2020), https://nflpaweb.blob.core.windows.net/website/Departments/Benefits/NFL-PIP-SPD-Final-15.pdf [https://perma.cc/JA5Z-JRQW].

62. Chad Dundas, *MMA the Morning After: The Reality of Recovering from Fight Night*, BLEACHER REP. (Sept. 21, 2018), https://bleacherreport.com/articles/2776401 [https://perma.cc/6ACD-GSTM].

63. *Id.*

64. *Id.*; Michael Hattery, *Major League Baseball Players, Big Data, and the Right to Know: The Duty of Major League Baseball Teams to Disclose Health Modeling Analysis to Their Players*, 28 MARQ. SPORTS L. REV. 257, 274 (2017).

65. Dundas, *supra* note 62.

66. *See id.*

67. *Id.*

68. *See id.*

The UFC has paid for fighters' injuries sustained in the octagon, and in rare, life-threatening cases, outside the octagon as well.[69] However, the 30-day rule is the standard policy.[70] Additionally, the policy does not cover injuries sustained in training or in day-to-day activities, and the UFC has discretion in choosing whose injuries to pay for.[71] This can lead to the UFC choosing to pay popular, high-revenue earning fighters to cover their health expenses while leaving the lower-revenue fighters, who may need assistance more, to solve health problems on their own.[72]

II. WORKER CLASSIFICATION

A. *The History of The NLRA & The NLRB*

The National Labor Relations Act (NLRA), which passed in 1935, was the first act of Congress passed to protect the rights of employees who wanted to form unions and ensure effective negotiations between employers and unions.[73] The act encouraged "collective bargaining by protecting workers' full freedom of association" and "protects workplace democracy by providing employees at private-sector workplaces the fundamental right to seek better working conditions and designation of representation without fear of retaliation."[74]

The NLRA also created the National Labor Relations Board (NLRB) (the Board), an independent federal agency tasked with enforcing the NLRA.[75] The Board was created in order to conduct elections, investigate labor rights charges, facilitate settlements, decide cases, enforce orders, and engage in ongoing rulemaking to further the purpose of the NLRA.[76] The Board is made up of five board members and a General Counsel, appointed by the President of the United States by and with the advice and consent of the Senate.[77] The board members can only be removed by the President "upon notice and hearing, for neglect of duty or malfeasance in office."[78]

The NLRA states "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer unless the [NLRA] explicitly states otherwise . . . but shall not include . . . any

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69. *See* Jake Rossen, *Fighters and Health Insurance*, ESPN (Aug. 4, 2010), https://www.espn.com/blog/mma/post/_/id/57 [https://perma.cc/3SKL-7WH6].

70. *See* Dundas, *supra* note 62.

71. *See* Rossen, *supra* note 69.

72. *See id.*

73. *National Labor Relations Act*, NLRB, https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act [https://perma.cc/E9WM-FYLN].

74. *See id.*

75. National Labor Relations Act, 29 U.S.C. § 153.

76. National Labor Relations Act, 29 U.S.C. §§ 159–61.

77. National Labor Relations Act, 29 U.S.C. § 153.

78. *Id.*

individual having the status of an independent contractor . . . ."[79] The status of "employee" grants a worker a plethora of rights under the NLRA. These rights include:

> [T]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .[80]

The most recent amendment proposed to the NLRA is H.R. 842: The Protecting the Right to Organize (PRO) Act of 2021.[81] The amendment was proposed February 4, 2021, and passed the House of Representatives on March 9, 2021, but never made it out of the Senate.[82] The bill was reintroduced in the House in 2023, but never advanced.[83] If passed, this bill would expand "various labor protections related to employees' rights to organize and collectively bargain in the workplace. Among other things, it [would revise] the definitions of *employee*, *supervisor*, and *employer* to broaden the scope of individuals covered by the fair labor standards . . . ."[84] This bill proposed an expansion of the definition of an employee to:

> An individual performing any service shall be considered an employee . . . and not an independent contractor unless — (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact; (B) the service is performed outside the usual course of the business of the employer; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.[85]

The PRO Act would also expand the kinds of behaviors that constitute an unfair labor practice.[86] The NLRA already provides an extensive list

79. National Labor Relations Act, 29 U.S.C. § 152.

80. National Labor Relations Act, 29 U.S.C. § 157.

81. H.R. 842, 117th Cong. (2021).

82. *See Summary: H.R. 842 – 117th Congress (2021-2022)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/842 [https://perma.cc/7X79-C8CA].

83. H.R. 20, 118th Cong. (2023).

84. H.R. 842, 117th Cong. (2021).

85. *Id.*

86. *Id.*

of what is considered an unfair labor practice, including: interfering with an employer's exercise of their rights, interfering with the formation of any labor organization, discriminating against employees who participate in labor organizations, discharging an employee who has filed charges or given testimony under the NLRA, and refusing to bargain collectively with representatives of his employees, among many others.[87] The PRO Act would extend this list to include "prohibitions against replacement of, or discrimination against, workers who participate in strikes."[88] It is important to note this proposed addition as it would prevent the UFC management from suspending, firing, or restricting opportunities from fighters who protest labor conditions or salary. Given that 80% of UFC fighters have stated that they would be in favor of creating a union that is similar to other professional sports unions such as the MLB, NBA, or NFL Player Associations, the protections offered by the proposed addition may be necessary to prevent the fighters from facing retaliation for their efforts.[89]

The ability to collectively bargain is common practice among employers and is a crucial tool in securing employee rights.[90] A collective bargaining agreement (CBA) is also a standard tool used in many sports leagues including the MLB, NBA, and NFL.[91] A CBA is considered the "'supreme governing authority' concerning employment in professional sports leagues" and has the power to override the opinion or desires of a sports league's president or commissioner.[92] CBAs are created through a negotiation process and must include certain fundamental topics of employment, such as wages, hours, working conditions, disciplinary measures, and grievance procedures.[93]

The NLRA defines the collective bargaining process as:

> [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to

87. National Labor Relations Act, 29 U.S.C. § 158.

88. H.R. 842, 117th Cong. (2021).

89. Chad Dundas, *MMA Fighters Overwhelmingly Support Unionization, Despite No Clear Path Forward*, THE ATHLETIC (June 3, 2020), https://theathletic.com/1850784/2020/06/03/mma-fighters-support-association-unionization-no-clear-path/ [https://perma.cc/6KTW-8RBK].

90. *See* Charles O. Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 WASH. U. L. Q. 1, 11 (1949).

91. *See Collective Bargaining Agreements in Sports Leagues*, JUSTIA, https://www.justia.com/sports-law/collective-bargaining-agreements-in-sports-leagues/ [https://perma.cc/9VDY-8Y7A].

92. Matthew J. Parlow, *Professional Sports League Commissioners' Authority and Collective Bargaining*, 11 TEX. REV. ENT. & SPORTS L. 179, 196 (2010) (quoting Michael Mahone, *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy*, 11 VAND. J. ENT. TECH. L. 181, 192 (2008)).

93. *Id.* at 197–98.

> wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .[94]

An unfair labor practice is defined as any action taken by employers or unions that violates the provisions of the NLRA, such as discrimination, retaliation, or bargaining in bad faith.[95] The NLRA also states that it is an unfair labor practice to refuse to bargain collectively.[96] Without a CBA, UFC fighters are left without certain personal and financial securities that are afforded to other athletes in the United States. The Board came to the conclusion that the NLRA and traditional national labor law should apply to sports leagues once they have determined that there is an employee-employer relationship.[97] If UFC fighters were reclassified as employees, their employers would have a legal duty to bargain in good faith under the NLRA.[98]

B. *Guiding Case Law*

The NLRB previously determined the distinction between an employee and an independent contractor through a number of cases, the first of which being *FedEx Home Delivery v. NLRB*.[99] In 2006, Local Union 25 filed two petitions with the Board requesting representation elections.[100] After winning both elections, the union became the certified collective bargaining representative at the Jewel Drive and Ballardvale Street terminals in Wilmington, Massachusetts.[101] However, FedEx refused to bargain with the union on the grounds that its drivers should not be defined as "employees" as defined in Section 2 of the NLRA 29 U.S.C. § 152(3).[102] The Board concluded that this refusal to bargain with the union violated 29 U.S.C. §§ 158(a)(1) and (5) of the NLRA.[103] FedEx

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94. National Labor Relations Act, 29 U.S.C. § 158(d).

95. *Unfair Labor Practices Under the Law*, JUSTIA, https://www.justia.com/employment/unions/unfair-labor-practices/ [https://perma.cc/7LYE-P4WU].

96. National Labor Relations Act, 29 U.S.C. § 158(b)(3).

97. Am. League of Pro. Baseball Clubs v. Ass'n of Nat'l Baseball League Umpires, 180 N.L.R.B. 190, 192 (1969).

98. *See* National Labor Relations Act, 29 U.S.C. § 158(d).

99. FedEx Home Delivery, 351 N.L.R.B. No. 16 (Sept. 28, 2007).

100. FedEx Home Delivery v. NLRB, 563 F.3d 492, 495 (D.C. Cir. 2009).

101. *Id.*

102. *Id.*

103. *Id.*

filed a petition for review in federal court and the NLRB filed a cross-application supported by the union for enforcement of its ruling.[104]

The court in *FedEx* stated that classifying a worker as an employee or an independent contractor is not a bright-line rule.[105] The ten-factor common-law agency test can be applied by the Board and the federal courts, but the relationship must be assessed and weighed according to the context surrounding the situation and no factor can automatically classify the worker one way or the other.[106] The ten factors are:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.[107]

While these factors are necessary parts of the test for the court to use, they are not determinative or exclusive.[108] All of the components of the relationship and scenario must be evaluated and weighed without any one factor being decisive.[109] This approach is flexible, but has produced problematic uncertainty that the court attempted to resolve by revisiting its prior decisions.[110] The court first looked at *C.C. Eastern Inc. v. NLRB* and its analysis of "control" in an attempt to articulate the core of what these factors define as an employee.[111] Although, the court struggled to define exactly what "control" meant in *C.C. Eastern*, it concluded that, for the purposes of determining whether a worker was an employee, the

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104. *Id.*

105. FedEx Home Delivery v. NLRB, 563 F.3d at 496.

106. *Id.*

107. RESTATEMENT (SECOND) OF AGENCY § 220.

108. FedEx Home Delivery v. NLRB, 563 F.3d at 496; NLRB v. United Ins. Co., 390 U.S. 254, 258 (1968).

109. FedEx Home Delivery v. NLRB, 563 F.3d at 496; NLRB v. United Ins. Co., 390 U.S. at 258.

110. FedEx Home Delivery v. NLRB, 563 F.3d at 496–98.

111. FedEx Home Delivery v. NLRB, 563 F.3d at 496–97; C.C. Eastern Inc. v. NLRB, 60 F.3d 855, 858 (D.C. Circ 1995).

term "control" only included control exercised by an employer "over the means by and manner in which [workers] perform their work."[112] The analysis in *C.C. Eastern* also emphasized that some forms of control were more significant than others.[113] What relationship the factors actually define as employer-employee was further clarified in *Corporate Express Delivery Systems*, when the court firmly shifted emphasis away from control over the means and manner of the work and towards whether the workers have "significant entrepreneurial opportunity for gain or loss."[114]

From this review, the court in *FedEx* concluded that while all factors must be considered, the significance of each may be tempered by "whether the position presents the opportunities and risks inherent in entrepreneurialism."[115] With this in mind, the court held that the FedEx drivers were indeed independent contractors based on their ability to drive multiple routes, hire additional drivers or substitutes, sell their driving routes without permission of FedEx, and the intent stated in the parties' contracts.[116] Each of these provisions gave the drivers increased flexibility in their job that provided an opportunity for gain or loss. The other contextual facts favoring employee status, including a required uniform and specific truck that must be driven, were outweighed by the totality of the others.[117]

The Board revisited this issue in 2014 with *FedEx Home Delivery*, which was aptly labeled "*FedEx II*."[118] *FedEx II* again shifted the independent contractor or employee analysis back to the common law factors rather than a focus on specifically "entrepreneurial opportunity."[119] Instead, entrepreneurial opportunity became only one factor among the others to be considered in the analysis.[120] The Board, after noting that there had been some uncertainty as to the actual importance of entrepreneurial activity as a factor, stated "we make clear that entrepreneurial opportunity represents one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*." (emphasis in original).[121] The Board reasoned that this analysis

112. C.C. Eastern Inc. v. NLRB, 60 F.3d at 859.

113. FedEx Home Delivery v. NLRB, 563 F.3d at 497; *See* C.C. Eastern Inc. v. NLRB, 60 F.3d at 858–61.

114. FedEx Home Delivery v. NLRB, 563 F.3d at 497; Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Circ. 2002).

115. *See* FedEx Home Delivery v. NLRB, 563 F.3d. at 497.

116. *Id.* at 504.

117. *Id.* at 500–04.

118. FedEx Home Delivery, 361 N.L.R.B. 610 (2014).

119. *Id.*

120. *Id.* at 612.

121. *Id.* at 621.

"synthesize[s] the full constellation of considerations that the Board has addressed under the rubric of entrepreneurialism."[122]

The issue of how to define an independent contractor was then reassessed in the NLRB case, *SuperShuttle DFW Inc. and Amalgamated Transit Union Local 1338*.[123] The plaintiff in this case, Amalgamated Transit Union Local 1338 (hereinafter Union 1338), wanted to unionize a group of workers who were driving airport shuttles for the defendant, SuperShuttle DFW (hereinafter SuperShuttle).[124] The workers paid an initial franchise fee as well as a weekly fee for the right to use SuperShuttle's brand and proprietary reservation and dispatch system.[125] Each driver supplied their own vans, set their own schedules, and kept all of the fares they received from customers.[126] While all of these factors lent to the drivers being classified as independent contractors, the issue arose when the franchise agreement between SuperShuttle and the drivers stated that the drivers could not work for any competitors.[127]

The Acting Regional Director of the Board applied the common-law agency test noting that specifically in cases regarding the taxicab industry, the Board gives significant weight to "the lack of any relationship between the company's compensation and the amount of fares collected [and] the company's lack of control over the manner and means by which the drivers conduct business after leaving the [company's] garage."[128] SuperShuttle added on stating that the franchisees had entrepreneurial freedom based on the fact that the drivers had control over which bids to take, setting hours, and the type of the work they performed.[129] SuperShuttle also did not provide benefits for the drivers or withhold taxes from them.[130] The director found that the workers were independent contractors and Union 1338 petitioned the Board for review.[131]

In its review, the Board employed the ten-factor common-law test to determine whether the drivers were employees or independent contractors.[132] The Board stated that rather than following the precedent set by *FedEx II*, it would not consider entrepreneurial opportunity as a separate common-law factor; instead, entrepreneurial opportunity, like

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122. *Id.*

123. SuperShuttle DFW Inc., 367 N.L.R.B. No. 75, at 7 (Jan. 25, 2019).

124. *Id.* at 1.

125. *Id.* at 5–6.

126. *Id.* at 4–6.

127. *See id.* at 7, 25.

128. SuperShuttle DFW Inc., 367 N.L.R.B. No. 75, at 7 (Jan. 25, 2019) (quoting AAA Cab Servs., 341 N.L.R.B. 462, 465 (2004) (internal citations omitted)).

129. *Id.*

130. *Id.*

131. *Id.* at 1.

132. *Id.*

employer control, would be treated as "a principle by which to evaluate the overall effect of the common-law factors on a [worker's] independence to pursue economic gain."[133] In *FedEx*, this means of review was referred to as the "right to control" test.[134] The more entrepreneurial opportunity that a worker has, the less control the employer has and vice-versa.[135]

Additionally, in taxicab cases, the Board has consistently paid close attention to the company's control and manner over the drivers, as well as the relationship between compensation and fares collected by the drivers.[136] Since the shared-ride industry, the industry that SuperShuttle operated in, is an extension of the taxicab industry, the Board found that significant weight should be given to the amount of control exercised over the manner and means by which the drivers conduct their business.[137] The Board found that the drivers had a tangible argument that the common-law factors supported their classification as employees since driving is not a distinct occupation, does not require specialist skills, and the drivers relied on the SuperShuttle system in order to get work.[138] However, this argument was outweighed by the fact that both SuperShuttle and the drivers believed that they were independent contractors, the drivers had control over their schedule and working conditions, the fee paid to SuperShuttle was unrelated to the fares the drivers collected, and the drivers had ownership and control over their vehicles.[139] These factors gave the drivers enough entrepreneurial opportunity and control for the Board to conclude that they were independent contractors and therefore not subject to the NLRA.[140]

However, the standard articulated in *SuperShuttle* was short-lived.[141] In *Atlanta Opera Inc. and Make-Up Artists and Hair Stylists Union, Local 798*, the Board rejected the understanding of employment in *SuperShuttle* and reinstated its approach from *FedEx II* while considering whether makeup artists and hair stylists who detail singers' looks before they go on stage should be classified as independent contractors or employees who can bargain for regular wages and benefits.[142] The Board decided to again focus the determination of employment on the articulated factors with no factor weighing more than the other.[143] The

133. *Id.*at 9.
134. FedEx Home Delivery v. NLRB, 563 F.3d 492, 507 (D.C. Cir. 2009).
135. SuperShuttle DFW Inc., 367 N.L.R.B. No. 75, at 9 (Jan. 25, 2019).
136. *Id.* at 7.
137. *Id.*
138. *Id.* at 7, 14.
139. *See id.* at 14.
140. *Id.*
141. Atlanta Opera Inc., 372 N.L.R.B. No. 95, at 2 (June 13, 2023).
142. *Id.* at 1–2, 8.
143. *Id.* at 13–15.

Board explained that entrepreneurial opportunity represented only one aspect of one factor—whether or not the one employed is engaged in a distinct occupation or business.[144] The Board further noted that it would only give weight to actual entrepreneurial opportunity and would consider whether the evidence shows that a worker is "in fact, rendering services as part of an independent business."[145]

Notably, the Board's decision in this case was not unanimous.[146] In his dissent, Member Marvin Kaplan explained that he did not believe that the majority's return to the *FedEx II* standard would survive judicial review.[147] He also argued that (1) the *FedEx II* decision "mischaracterized" the analysis of entrepreneurial opportunity in *FedEx I* by claiming that entrepreneurial opportunities were treated as an "overriding consideration" or a "super-factor";[148] (2) that *SuperShuttle*'s approach to treating entrepreneurial opportunity as a principle for evaluating the overall effect of the common law factors on the worker-classification determination was consistent with Board precedent;[149] and that (3) *SuperShuttle*'s approach was consistent with common law agency principals.[150] Although he ultimately reached the same conclusion—that the makeup artists and hair stylists in this case should have been classified as employees under the NLRA—Member Kaplan's dissent highlights the uncertain future of *Atlanta Opera*'s return to *FedEx II*.[151]

C. *Application of Case Law to UFC Fighters*

This subsection will go through the ten factors mentioned in the previous section that were established in the Restatement Second of Agency § 220, *FedEx,* and the additional precedent case law to analyze how each factor applies to UFC fighters. It is important to reiterate that although the Restatement factors are a guide towards classification, the overall focus should be on the level of control of the principal over the agent.[152] The recent decision in *Atlanta Opera* has returned this analysis to the independent contractor test articulated in *FedEx II*; however, this Article will analyze the *FedEx* factors individually and also provide analysis through the *SuperShuttle* "right to control" test. As *Atlanta Opera* is still a recent decision, it is pertinent to still analyze the factors

144. *Id.* at 12.
145. *Id.*
146. *Id.* at 22.
147. Atlanta Opera Inc., 372 N.L.R.B. No. 95, at 33–34 (June 13, 2023).
148. *Id.* at 27–28.
149. *Id.* at 28–32.
150. *Id.* at 32–33.
151. *Id.* at 15, 22.
152. SuperShuttle DFW Inc., 367 N.L.R.B. No. 75, at 9 (Jan. 25, 2019).

through the old, stricter standard in case the decision is challenged and/or reversed at any point in the near future.

a. The extent of control which, by the agreement, the master may exercise over the details of the work.

In this case, the "work" is the fight itself and the UFC has complete control over most, if not all, of the details involved in a fighter's process leading up to and during a fight.[153] Some of the details that the UFC exercises control over include the date and location of their fight, choosing to separate fighters based on their weight class, the apparel and equipment the fighters are permitted to wear in the octagon, a list of impermissible substances including performance-enhancing drugs, medical requirements and exams needed before being cleared to fight, and a long list of impermissible actions and strikes during the fight that can lead to disqualification.[154] On the other hand, the UFC does not exercise complete control over how a fighter chooses to approach the fight while in the octagon and fighters are free to craft and implement different strategies within the rules on a fight-to-fight basis.[155] Additionally, the UFC does not control the fighter's training camp in the months leading up to a fight, allowing a fighter more freedom to dictate when, where, and how hard to train.[156] While the UFC does not control every detail of a fighter's process, there is enough control for this factor to lean towards an employer-employee relationship.

b. Whether or not the one employed is engaged in a distinct occupation or business.

This factor focuses on whether the worker offered the alleged employer a personal or business service and, as a result, whether the claimant was engaged in a distinct occupation.[157] The UFC's core business is broadcasting MMA fights and generating revenue through pay-per-view buys, ticket sales, merchandising, sponsorship, and licensing.[158] As such, the core of the business centers around the fighters displaying their prowess in various martial arts for the entertainment of

153. *Unified Rules of Mixed Martial Arts*, UFC (2009), https://www.ufc.com/unified-rules-mixed-martial-arts [https://perma.cc/QVL5-SC36].

154. *Id.*

155. *Introduction to MMA*, UFC (Apr. 20, 2021), https://www.ufc.com/intro-to-mma [https://perma.cc/QV4M-JA7J].

156. William V. Massey et al., *Toward a Grounded Theory of Self-Regulation in Mixed Martial Arts*, 14 J. PSYCH. SPORT & EXERCISE 12, 18 (2013).

157. Steinrock v. Cook, No. 2010-CA-001136-WC, 2010 Ky. App. LEXIS 229, at *7 (Ky. Ct. App. Dec. 10, 2010).

158. Benny Cole, *Fighting for Every Dollar: UFC Uncaged*, HARV. TECH. & OPERATIONS MGMT. (Dec. 7, 2015), https://d3.harvard.edu/platform-rctom/submission/ fighting-for-every-dollar-ufc-uncaged/ [https://perma.cc/X5GR-CJTR].

those watching.[159] Accordingly, the fighters are not offering a personal or business service; rather, they are the primary assets of the UFC. Therefore, this factor lends itself towards the employee-employer classification rather than the independent contractor status.

c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.

Fighters are, for the most part, unsupervised during their training camps and are responsible for hiring their own staff to prepare them for the fight, including, but not limited to, cutmen, nutritionists, personal trainers, coaches, and sparring partners.[160] Fighters are supervised by referees and UFC doctors during their press conferences and fights,[161] but the substantial amount of time they are afforded outside of the octagon would lend itself toward independent contractor status rather than employee status.

d. The skill required in the particular occupation.

The more the skill is specialized to the occupation, the more likely the classification would lend itself toward independent contractor. For example, sweeping or picking up garbage are common skills for a layperson and, therefore, it would be more likely that a worker performing these tasks would be classified as an employee.[162] MMA, especially at such a high level, is a very specialized skill usually requiring 5–6 years of outside experience in other combat sports and a knowledge in multiple martial art forms.[163] Therefore, this factor would lend UFC fighters towards the independent contractor classification.

e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

Generally, use of an alleged employer's tools or instrumentalities, "especially if they are of substantial value," by a worker would indicate that there is an employee-employer relationship.[164] The UFC supplies all

159. *See id.*

160. *See* Michael Conklin, *Two Classifications Enter, One Classification Leaves: Are UFC Fighters Employees or Independent Contractors?*, 29 S. CAL. INTERDISC. L.J. 227, 240 (2020).

161. *See* Kathleen Fulton, *Can UFC Referees Be Sued for Negligence*, PACE INTELL. PROP. SPORTS & ENT. L. F. (Nov. 12, 2016), https://pipself.blogs.pace.edu/2016/11/12/can-ufc-referees-be-sued-for-negligence/ [https://perma.cc/F7CZ-ZUAM]; Dundas, *supra* note 62.

162. Clifford v. Mark Five Servs., No. 20STCV12616, 2022 Cal. Super. LEXIS 56281, at *11–12 (Cal. Super. Ct. 2022).

163. *See 101 Guide to Become UFC Fighter*, ELITE SPORTS (Jan. 31, 2023), https://www.elitesports.com/blogs/news/101-guide-to-become-ufc-fighter/ [https://perma.cc/4YGY-L7GT].

164. Walker v. United States, 758 F. Supp. 2d 753, 760 (S.D. Ind. 2010).

fighters with a fight night product kit that includes gloves, shorts, walk-out apparel, underwear (including sports bras for female fighters), socks, and shoes, all of which are used during the fighter's introduction and actual fight.[165] Furthermore, UFC fighters are not allowed to use other equipment even if they wanted to; they are required to use the provided equipment.[166] Additionally, UFC fighters are free to train wherever they like, including outside of the United States, but the UFC supplies the fighters' actual place of work: the designated arenas where UFC fights take place.[167] The most famous and frequent of these arenas are in Las Vegas, Nevada.[168] The freedom to choose where to train would indicate an independent contractor status; however, the level of control the UFC exhibits over the fighters' apparel and where the actual fights occur would sway this factor towards employee status.

f. The length of time for which the person is employed.

When analyzing this factor, one must look to whether the person hired worked on a regular or "as needed" basis, whether the person worked for the employer exclusively, and whether the job they were hired for had a standard length of time.[169] The standard length of time factor considers whether the relationship is a permanent or long-term relationship, even if the relationship is defined by several short-term contracts.[170] UFC contracts and their duration vary from fighter to fighter, but they generally tend to be on the shorter side.[171] 82.5% of UFC contracts span two years or less with the most common contract spanning only 20 months.[172] This would seem to lean towards employee classification by means of the standard length of time through multiple contracts, but this

165. *See UFC Outfitting Frequently Asked Questions*, UFC (Dec. 1, 2012), https://www.ufc.com/news/ufc-outfitting-frequently-asked-questions/ [https://perma.cc/66EF-TWQP].

166. *See id.*

167. David Wray, *What are the Most Iconic Locations to Have Hosted a UFC Event?*, LOW KICK MMA (Apr. 3, 2022), https://www.lowkickmma.com/what-are-the-most-iconic-locations-to-have-hosted-a-ufc-event/ [https://perma.cc/4LGP-YGWG]; *Inside the UDC's plan to Expand Its Global Stronghold*, ESPN, https://www.espn.com/espn/feature/story/_/ id/31027599/ufc-265-ufc-plans-expand-global-stronghold [https://perma.cc/PL2B-WTZH].

168. David Wray, *What are the Most Iconic Locations to Have Hosted a UFC Event?*, LOW KICK MMA (Apr. 3, 2022), https://www.lowkickmma.com/what-are-the-most-iconic-locations-to-have-hosted-a-ufc-event/ [https://perma.cc/9HAV-H73R].

169. Martinez v. Miami-Dade Cty., 32 F. Supp. 3d 1232, 1238 (S.D. Fla. 2014).

170. Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Red. 1168, 1192 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

171. *See* Paul Gift, *How Long Are UFC Exclusive Contracts? Witness In Antitrust Suit Sheds Rare Light On MMA's Business Side*, FORBES (Nov. 10, 2020), https://www.forbes.com/sites/paulgift/2020/11/10/how-long-are-ufc-exclusive-contracts/?sh=6719d3683cd8 [https://perma.cc/24N7-Y58C].

172. *See id.*

factor does not have a bright-line standard and is up to interpretation by the court.[173] Additionally, the fact that UFC fighters generally only fight two to three times per year would favor a finding that the fighters work on an "as needed basis," and, thus, should have independent contractor status.[174]

All of the contracts that the UFC makes with its fighters also include exclusivity provisions.[175] The UFC's exclusivity provision allows the UFC to match any offers that a fighter may receive from any other MMA leagues or promotions.[176] This provision extends even beyond the fighter's UFC contract, meaning even if a fighter is not technically on the UFC roster anymore, the UFC still holds the privilege to match an offer by another organization for one whole year.[177] This goes well beyond the standard of simply working exclusively with an employer as the exclusivity extends a year beyond the contract period and thus would heavily indicate an employee status.

g. The method of payment, whether by the time or by the job.

Payment "by the time" worked would support employee classification while payment "by the job" would support independent contractor status.[178] Because UFC contracts can span a certain number of fights, a certain number of months, or a combination of the two, this factor may seem difficult to analyze.[179] However, UFC fighters are paid based on their appearance to the fight, the outcome of the fight, and any bonuses they may earn through their performance.[180] This payment structure would be more aptly classified as "payment by the job" and thus would favor independent contractor status.

h. Whether or not the work is part of the regular business of the employer.

Regular business is defined as activities that are:

> (1) routinely done; (2) on a regular and frequent schedule; (3) contemplated in a contract or agreement between the

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173. Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Red. 1168, 1192 (Jan. 7, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

174. *See Can UFC Fighters Pick and Choose Who They Fight?*, *supra* note 27.

175. Michael McCann, *Antitrust Lawsuit, if Successful, Could Unravel the UFC*, SPORTS ILLUSTRATED (Dec. 16, 2014), https://www.si.com/mma/2014/12/17/ufc-antitrust-lawsuit-cung-le [https://perma.cc/9FZV-QRR7].

176. *Id.*

177. *Id.*; Gift, *supra* note 171.

178. *See* Villalpando v. Exel Direct Inc., 303 F.R.D. 588, 603 (N.D. Cal. 2014).

179. *See* Robert Watts, *How Do UFC Contracts Work? (Are They Against Fighters*), GROUNDED MMA (Dec. 17, 2022), https://groundedmma.com/how-do-ufc-contracts-work/ [https://perma.cc/TR66-U6E7].

180. *See id.*

> contractor and the alleged statutory employer which will be repeated over a short span of time; and (4) performance of which without the contract would require the statutory employer to hire permanent employees . . . . 'Whether a particular sort of work is within a party's usual course of business is a fact-driven inquiry' . . . . This definition is designed to exclude from the definition of statutory employee 'specialized and episodic work that is essential to the employer but not within the employer's usual business as performed by its employees.'[181]

As previously mentioned, fighters usually fight two to three times per year. While some of the higher-tier fighters in the UFC can pick and choose which fights to accept, a majority of the fighters must accept fights when offered, which is usually every four to six months.[182] The work could be considered routinely done as the fights are consistent in their scheduling despite the amount of time between them. However, it would be difficult to conclude that two to three fights per year would be considered a regular and frequent schedule.

The terms of a UFC deal with a fighter inherently contemplate the work to be performed given that UFC fighters are signed primarily to perform fights.[183] Any other responsibilities, including those related to promotional materials and training, are so that fighters may compete to the best of their abilities during those fights.[184] The "short span of time" language is open to court interpretation, but precedent has noted that a contract of one year does fall under that definition.[185] The average length of twenty months is arguably under that short span definition as well, but that would be determined on a case-by-case basis.[186] In regard to the fourth element, if the fighters did not fight under these contracts, the UFC would be required to hire permanent employees to fill the essential role of performing in the octagon. As a final note, UFC fighters do not fall under the exception for work conducted outside the alleged employer's usual business because fighters performing in professional MMA fights is the core of the business.[187]

There is a fair amount of interpretation left up to courts in this factor, and without precedent that closely relates to the structure of the UFC, this factor is unlikely to point strongly toward one classification or the other. However, courts have stated that if the person under contract is being

181. *See* Barger v. Kan. City Power & Light Co., 548 S.W.3d 424, 428 (Mo. Ct. App. 2018) (citation omitted).

182. *See* Watts, *supra* note 179.

183. Watts, *supra* note 179.

184. *See id.*

185. *See* Sebacher v. Midland Paper Co., 610 S.W.3d 402, 405 (Mo. Ct. App. 2020).

186. *See* Gift, *supra* note 171.

187. *See* Cole, *supra* note 158.

used to further the business of the employer, the factor would weigh in favor of the employee classification.[188]

i. Whether or not the parties believe they are creating the relation of master and servant.

The creation of a relationship between master and servant is based on if the master, in this case the employer, controls the result of the work as well as the means and manner of the performance of the work.[189] Courts have consistently ruled that the relationship of master and servant is not created unless there is control and direction related to the physical conduct of the contractor in the performance and details of his or her work.[190] It is important to note that even explicit language providing that a worker is an employee or independent contractor within a contract is not controlling under this factor.[191] The parties' beliefs are not completely determinative of the relationship, but they are relevant when looking at the assumption of the master's control and the servant's acceptance of that control.[192] The UFC does not dictate the outcome of the fights, meaning it does not control the result.[193] In regard to the means and manner of the performance of the work, UFC fighters are afforded the freedom to approach each fight with their own mentality and strategy, but they must abide by UFC rules, including those governing in-ring conduct, press conference behavior, use of performance-enhancing drugs, exclusive use of equipment provided by the UFC, and the venues for each event.[194] This level of control would indicate that there is a master-servant relationship between the UFC and its fighters, which would favor employee-employer classification regardless of whether the UFC includes contractual language stating that the fighters are independent contractors.

j. Whether the principal is or is not in business.

If the principal is in business, this factor will weigh in favor of the employee classification.[195] The UFC is part of a publicly traded company on the New York Stock Exchange (NYSE) under the Endeavor Group

188. Pfadt v. Wheels Assured Delivery Sys., 200 N.E.3d 961, 977 (Ind. Ct. App. 2022).

189. *See* Draper v. ConAgra Foods, Inc., 212 S.W. 3d 61, 67 (Ark. Ct. App. 2005).

190. *See* Blankenship v. Overholt, 786 S.W.2d 814, 816 (Ark. Sup. Ct. 1990).

191. *See* WaveDivision Holdings, LLC v. Highland Cap. Mgmt., L.P., 49 A.3d 1168, 1177 (Del. 2012).

192. Snell v. C.J. Jenkins Enters., 881 N.E.2d 1088, 1093 (Ind. Ct. App. 2008).

193. *See Is UFC Fixing Fights?*, WAY OF MARTIAL ARTS (Mar. 25, 2021), https://wayofmartialarts.com/is-ufc-fixing-fights/ [https://perma.cc/SNW3-F97A].

194. *See UFC Outfitting Frequently Asked Questions*, *supra* note 165; *see* Wray, *supra* note 168.

195. Pfadt v. Wheels Assured Delivery Sys., 200 N.E.3d 961, 978 (Ind. Ct. App. 2022).

Holdings Conglomerate.[196] It is fairly obvious that the UFC is in business as one of the largest sports and entertainment organizations in the world,[197] and, therefore, this factor would weigh heavily toward employee classification.

III. THE FEASIBILITY OF RECLASSIFYING UFC FIGHTERS

The NLRB or the courts reclassifying UFC fighters as employees rather than independent contractors would be a substantial victory for the fighters.[198] This reclassification would guarantee UFC fighters certain benefits such as healthcare, a set salary, and the ability to create a fighters' union to collectively bargain with the UFC.[199] The issue is that the process for this reclassification must come through either legislation or a decision by the Board, which can produce significant delays.[200] Even with the recent change in *Atlanta Opera*, there are still significant roadblocks for UFC fighters, the most apparent of which is the significant market share and power of the UFC. The process of reclassification and subsequent collective bargaining could take years before fighters see any sort of benefit.

During the Biden Administration, the Department of Labor moved to change worker classification under the Fair Labor Standards Act by broadening the scope of the employee status.[201] Their proposal provided to change the test to a multi-factor test based on economic reality and return to the "totality-of-the-circumstances" analysis.[202] It also gave additional analysis to the control factor when looking at how "scheduling, supervision, price setting, and the ability to work for others" impacts the

196. *UFC is Now Part of a Publicly Traded Company*, YAHOO (Apr. 29, 2021), https://www.yahoo.com/video/ufc-now-part-publicly-traded-174043145.html [https://perma.cc/72UQ-KBKG].

197. *Ultimate Fighting Championship (UFC) – Statistics and Facts*, STATISTA (Aug. 29, 2019), https://www.statista.com/topics/3376/ultimate-fighting-championship-ufc/#topic Overview [https://perma.cc/WP54-5TLT].

198. Salminen, *supra* note 13, at 228–32.

199. *Id.*; *UFC Fighters Deprived of Benefits Provided to Other Professional Sports Organizations*, *supra* note 19.

200. *See About the Rulemaking Process*, U.S. COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process [https://perma.cc/VFU9-L75K]; Office of Public Affairs, *Board Modifies Independent Contractor Standard under National Labor Relations Act*, NLRB (June 13, 2023), https://www.nlrb.gov/news-outreach/news-story/board-modifies-independent-contractor-standard-under-national-labor [https://perma.cc/58R3-ULZ7].

201. *See* Rebecca Rainey, *Labor Department Moves to Change Worker Classification Rule (3)*, BLOOMBERG L. (Oct. 11, 2022), https://news.bloomberglaw.com/daily-labor-report/biden-administration-issues-proposed-independent-contractor-redo [https://perma.cc/E3V3-SKXH].

202. *Id.*

degree of control a principal has over a worker.[203] This rule was published and became effective on March 11, 2024.[204]

The proposed Protecting the Right to Organize Act (PRO Act) is another potentially effective pathway towards reclassifying UFC fighters as employees, but it could also take a substantial amount of time to be enacted, if implemented at all. The PRO Act has been introduced and passed through the House three times but has yet to receive a vote in the full senate.[205] As of October 2024, the PRO Act of 2023 had one independent and forty-seven Democratic cosponsors in the Senate,[206] but even if the bill were to get enough cosponsors, it is possible that Republican Senators would use a filibuster to delay the process further.

Additionally, the UFC has already spent hundreds of thousands of dollars on lobbying in order to prevent legislation that would reclassify fighters and break up the monopoly from passing through the Senate.[207] It would take a perfect totality of circumstances including the passing of the appropriate bills, survival through the filibuster, and for MMA fighters to be re-classified as employees.

The release of *Atlanta Opera* provides another avenue for a potential remedy. *Atlanta Opera* overturned *SuperShuttle* and established a more worker-friendly test.[208] However, as mentioned previously, relying on *Atlanta Opera* might prove to be a risky endeavor considering the consistent standard changes implemented by the NLRB. Relying on this decision to organize against an entity as large and powerful as the UFC will no doubt lead to a challenge in federal court and months, if not years, of litigation. Time is of the essence for fighters due to the nature and duration of their careers and a prolonged litigation battle could be a detriment to many in the short-term.

Even more so than other professional athletes, UFC fighters need to be classified as employees and not independent contractors due to the violent nature of the sport and the short time period in which one can have a career in mixed martial arts.[209] On average, a UFC fighter's career will only last between one to two years and as previously mentioned, there is no guarantee for a fighter that they will have their contract renewed or be

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203. *Id.*

204. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795).

205. *Big News for the Rights to Organize: The Latest PRO Act Status Update*, LABORSOFT (Oct. 20, 2023), https://www.laborsoft.com/blog/big-news-for-the-right-to-organize-the-latest-pro-act-status-update [https://perma.cc/2VGE-SSY8].

206. S.567, 118th Cong. (2023).

207. *See* Raimondi, *supra* note 8; *see also Client Profile: Ultimate Fighting Championship*, OPENSECRETS, https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2008&id=D000057886 [https://perma.cc/KS3B-4YVY].

208. Atlanta Opera Inc., 372 N.L.R.B. No. 95, at 1–2 (June 13, 2023).

209. *See* Conklin, *supra* note 160, at 241; Fares, *supra* note 54.

provided increased opportunities to participate in higher profile fights and receive increased compensation.[210] As detailed in Section I, the UFC's healthcare plan is not extensive and often leaves fighters on their own to deal with injuries that occur during training or long-term health problems.

Additionally, the UFC does not have a 401(k) plan nor a pension fund in place for their fighters to secure post-employment financial benefits.[211] In 2021, UFC President Dana White publicly stated that fighter healthcare and pension were coming "soon," but at the time of publication of this Article, no significant changes had been made.[212] Recently, former UFC heavyweight champion, Francis Ngannou, had a fallout with UFC President Dana White regarding his contract after Ngannou demanded that the UFC provide free health insurance for all fighters in the organization, as well as allow him to have his own sponsors and have a fighter representative at UFC board meetings.[213] According to Ngannou, the UFC shot down all three talking points.[214] Ngannou also stated "[i]n that contract, I'm not free, I'm not an independent contractor . . . I hand over all power to [the UFC], and I've seen in the past how you hold that power over me. I don't want that again."[215] Ngannou walking away from the UFC as a reigning champion could set a precedent for other fighters who believe that the UFC is exercising the control of an employer while maintaining fighters' statuses as independent contractors.

IV. PROPOSED SOLUTIONS

This next section will conclude with proposed solutions for each aspect of fighter compensation and benefits. This section will be broken down into (A) a fighter pension fund, (B) 401(k) education, (C) returning to the old structure of generating revenue for fighters through endorsements, (D) an increased revenue sharing plan, and (E) an improved healthcare plan modeled after NFL's extensive structure which aims to preserve the athlete's long-term health.

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210. *See* Conklin, *supra* note 160, at 241.

211. Sayan Nag, *Are UFC Fighters Entitled to a Pension Fund?*, SPORTSKEEDA (May 5, 2021), https://www.sportskeeda.com/mma/news-are-ufc-fighters-entitled-pension-fund [https://perma.cc/2TXB-2PMB]; Brian Heffernan, *Does the UFC Have 401(k) Benefits?*, SPORTSKEEDA (July 7, 2022), https://www.sportskeeda.com/mma/news-does-ufc-401-k-benefits [https://perma.cc/JLD4-HRYU].

212. *See* Nolan King, *Dana White Hints Long-Term Health Benefits for UFC Fighters Coming 'Soon'*, MMAJUNKIE (June 1, 2021), https://mmajunkie.usatoday.com/2021/06/ufc-news-dana-white-fighter-pension-health-benefits-coming-soon [https://perma.cc/278U-X9T3].

213. *See* Shakiel Mahjouri, *Francis Ngannou Says Money Was Not Primary Reason for UFC Departure: 'I Was Slapped in the Face with Money'*, CBS SPORTS (Jan. 17, 2023), https://www.cbssports.com/mma/news/francis-ngannou-says-money-was-not-primary-reason-for-ufc-departure-i-was-slapped-in-the-face-with-money/ [https://perma.cc/6HGZ-QU4L].

214. *Id.*

215. *Id.*

A. *Fighter Pension Fund*

Waiting for the executive branch or the NLRB to make favorable decisions regarding what constitutes an employee is generally unrealistic and could cost current and future fighters substantial pay and benefits depending on who is in charge. In order for effective change to be achieved, the outcome of these rulings would have to be in favor of reclassification and also apply to the UFC. One positive step taken is that the California State Assembly passed Assembly Bill 1136 to establish an MMA Fund for participating martial artists to receive retirement and death benefits for their beneficiaries.[216] The California State Athletic Commission (CSAC) already had a state pension program for retired boxers.[217] Currently, boxers are eligible for this pension after they turn 50 and have scheduled 75 total fight rounds in the state.[218] The pension currently distributes money to boxers from an account that is funded by an $0.88 tax on each ticket sold for events (capped at $4,600 per event).[219] The fund is currently valued at $5.3 million and while it is not life-changing money when distributed, it provides a steady cash flow for retired fighters who have been through a significant amount of fighting time.[220]

The MMA fund requires that the individual be a "martial artist," which is defined as a "licensed professional mixed martial artist, licensed professional kickboxer, licensed professional Muay Thai fighter, or athlete licensed by the commission other than a boxer."[221] The fund also requires the marital artist to participate in a Commission-sanctioned contest in California either on or after January 1, 2024, and complete 39 scheduled rounds.[222] Eligible martial artist participants can receive these benefits once they are 50 years old, but the Commission may award early

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216. *See* Maytak Chin & Casey H. Yang, *California Passes Law to Establish a Public Pension Fund for Mixed Martial Art Professionals*, REEDSMITH (Oct. 13, 2023), https://www.reedsmith.com/en/perspectives/2023/10/california-passes-law-establish-public-pension-fund-mixed-martial [https://perma.cc/Z223-N9SF].

217. Steven Marrocco, *CSAC Moving Forward on Adding MMA Fighters to Pension Fund,* MMAFIGHTING (June 28, 2022), https://www.mmafighting.com/2022/6/28/23187454/csac-moving-forward-on-adding-mma-fighters-to-pension-fund [https://perma.cc/6V5P-LQ8E].

218. *Id.*

219. *Id.*

220. California State Athletic Commission, *Professional Boxer's Pension Plan Brochure – Boxers: Do You Have Money Coming?*, CAL. DEP'T OF CONSUMER AFFS., https://www.dca.ca.gov/csac/forms_pubs/publications/pension_plan.pdf [https://perma.cc/K84W-P9CE]; Peter Fournier, *California State Athletic Commission Seeks Boxer's Pension Claimants Former Boxers Encouraged to Check if They Have a Pension Waiting to be Claimed*, CAL. DEP'T OF CONSUMER AFFS., https://www.dca.ca.gov/csac/forms_pubs/publications/23-387-csac_tranlat_boxers_english_fliers_web.pdf [https://perma.cc/UVJ5-ZWJ8].

221. CAL. BUS. & PROF. § 18888.1(b).

222. CAL. BUS. & PROF. § 1888.1(e); CAL. BUS. & PROF. § 18888.6(b).

retirement benefits at its discretion for "vocational, education, training, or medical need."[223] Finally, the fund also provides benefits for any eligible martial artist's beneficiaries if the participant passes away.[224] The fund will be financed based on a $1–$2 assessment per ticket sold for professional MMA contests held in California, sales revenue from Commission-branded items, and contributions by martial artists, managers, and/or promoters.[225] This fund not only shows that it is possible to extend benefits to fighters, but provides a framework for the UFC to adopt across its organization.

B. *401(k) Education*

In addition to the pension fund, the UFC should educate and encourage fighters to create and fund a self-employed 401(k) plan. While the UFC cannot implement a traditional employer 401(k) due to the current status of the working relationship between itself and the fighters, it can provide guidance on fighters creating a self-employed 401(k) which does not require an employer.[226] Due to the nature of a solo 401(k) plan, the process and fees are much lower compared to a traditional 401(k).[227] The UFC would not only be able to maintain its non-employer status, but it would be taking positive steps towards securing the long-term well-being of its fighters and showing a willingness to be more active in their health and financial security.

C. *Fighter Endorsements*

Allowing fighters to procure and represent their own endorsement deals would likely be in the interest of both the UFC and its fighters. This change would modify the current UFC policy that requires fighters to wear a certain brand, but this may be in the UFC's favor.[228] The UFC's new partnership with Venum was a step in the right direction given that it provided a slight increase in overall pay for fighters ranging from an extra $500 to $2,000 depending on the level of the fighter and their tenure in the UFC.[229] But as previously explained, one of the core factors when analyzing a relationship between master and servant is "the extent of control which, by the agreement, the master may exercise over the details

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223. CAL. BUS. & PROF. § 18888.5(a); CAL. BUS. & PROF. § 18888.5(b)(1).

224. CAL. BUS. & PROF. § 18888.6(e)(1).

225. CAL. BUS. & PROF. § 18888.2(b)(2).

226. *See Understanding the Self-Employer 401(k)*, FIDELITY, https://www.fidelity.com/learning-center/personal-finance/retirement/self-employed-401k [https://perma.cc/79D2-P75V].

227. *Id.*

228. *See* Marc Raimondi, *UFC's New Venum Uniform Deal Gives Fighters Slight Pay Bump*, ESPN (Apr. 1, 2021), https://www.espn.com/mma/story/_/id/31176357/ufc-new-venum-uniform-deal-gives-fighters-slight-pay-bump [https://perma.cc/5WAA-B73A].

229. *See id.*

of the work."[230] Accordingly, the level of control exhibited over fighters' ability to wear certain brands could be a detriment to the UFC if a suit was brought challenging the fighters' status as independent contractors. Certain uniform mandates are necessary because they keep the rules of mixed martial arts consistent and fair,[231] but the restriction on the branding a fighter is able to wear while performing their job in the ring could result in that factor being weighed towards the UFC being an employer.

It would be mutually beneficial for the fighters and the UFC to allow fighters to choose which sponsorships they choose to represent in the octagon. The fighters would be able to market themselves with more freedom and, as a result, find one or more sponsorships that would increase their overall revenue during fights. Additionally, the UFC would ease its control over its fighters and at least mitigate one of the factors found in *FedEx* if a case were brought arguing against the fighter's independent contractor status.[232]

D. *Revenue Sharing*

The UFC was reported to have generated approximately $1 billion in revenue between April 1, 2021, and March 31, 2022.[233] The lawsuit brought by former fighters revealed that the UFC pays its fighters around 20% of its revenue, which Endeavor CFO Jason Lubin stated was comparable to other individual sports such as the PGA Tour, F1, NASCAR, and ATP.[234] While Lubin was correct to compare UFC revenue sharing to other sports organizations using the independent contractor model, his statement that the percentage of total revenue spent on the salary of its fighters is comparable to these other organizations is inaccurate. The PGA Tour gave 55% of its total revenue back to its players in 2022,[235] and F1 split its revenue 50/50 between the F1 racing teams and its shareholders.[236]

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230. RESTATEMENT (SECOND) OF AGENCY § 220.

231. *See Unified Rules of Mixed Martial Arts*, *supra* note 153.

232. *See* FedEx Home Delivery v. NLRB, 563 F.3d 492, 496 (D.C. Cir. 2009).

233. Scott, *supra* note 1.

234. *Id.*; Gift, *supra* note 9.

235. Eamon Lynch, *Golfweek.com Report: PGA Tour Increases FedEx Cup Bonus Money to $75 Million, Winner to Get $18 Million*, FLORIDA TIMES (Nov. 22, 2021), https://www.jacksonville.com/story/sports/golf/2021/11/22/golfweek-com-report-pga-tour-increases-fedex-cup-bonus-money-75-million/8727199002/#:~:text=The%20Tour's%20most%20lucrative%20cash,champion%20will%20receive%20%2418%20million [https://perma.cc/Y3FC-LCH8].

236. Janmeyjay Shukla, *How Much Did the Drivers and Teams Earn After the Conclusion of a Thrilling 2021 Season?*, THE SPORTS RUSH (Dec. 13, 2021), https://thesportsrush.com/f1-news-how-much-did-the-drivers-and-teams-earn-after-the-conclusion-of-a-thrilling-2021-season/ [https://perma.cc/AF4K-TS9H].

While it is not expected that the UFC would meet the revenue share of other sports organizations that have a player union and a CBA, the fact that other organizations that classify their players as independent contractors have a substantially higher percentage of revenue going toward their players indicates that the UFC must increase this percentage to keep pace. Due to the adamancy from the Endeavor administration as well as UFC President Dana White when it comes to fighter pay, it is unlikely that the UFC would more than double its revenue sharing percentage to match the PGA Tour and F1. However, a middle ground of 35% seems like a reasonable increase that would gain the UFC favor with the media and the public while appeasing its fighters who are becoming increasingly disgruntled with the current salary structure of the organization. The UFC could also allocate these percentages towards a fighter's positioning within their weight class rankings and incentivize a fighter to take more challenging fights in order to earn a higher percentage of the revenue and subsequently increase their total salary.

E. *Health Insurance*

Finally, and perhaps most importantly, the UFC should offer fighters within the organization a health care plan. The current UFC health care plan is not nearly extensive enough and leaves fighters vulnerable to long-term effects of injury and mental health. The health care plan for fighters while they are under contract by the UFC should include at least all injuries that occur in relation to their job as a fighter. This would include injuries sustained during a fight, during training, during travel, or as a result of the lifestyle of a fighter. Additionally, the UFC could model the structure of its committee for this after the NFL, which has a detailed and thorough model for an Accountability and Care Committee that is aimed at providing "advice and guidance regarding the provision of preventive, medical, surgical, and rehabilitative care for players."[237]

The health care plan should also include a behavioral health program focused on fighter's mental health and wellness during the time as a fighter and after they have retired. Fighting in the UFC can lead to various negative mental health effects on fighters including mental strain during the post-injury recovery process, fear of reinjury, negative impact on one's self-perceived image, emotional trauma following a loss on a big stage, anxiety leading up to and directly before a fight, and the lasting effects of anxiety on the fighter during and after their athletic prime.[238]

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237. *See* NFLPA, *Collective Bargaining Agreement*, NFL, (2020), at 217–19, https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf [https://perma.cc/K93V-4BTF].

238. *See* James MacDonald, *MMA Psychology: The Psychological Impact of Injury*, BLEACHER REP. (Oct. 21, 2014), https://bleacherreport.com/articles/2239779-mma-psychology-the-psychological-impact-of-injury [https://perma.cc/QM2T-Q7PA].

The behavioral health program should also include prevention efforts and the monitoring of fighters' cognitive function, especially those with a prolonged career in the sport. After studying 135 MRI scans of MMA fighters, a connection was found between the duration of a fighter's career and significant degradation of areas in the brain.[239] Fighters with fifteen years of experience were found to have 10% less brain volume in an area critical to learning and memory compared to those fighting for five years or less.[240] Again, the UFC can model this program after the NFL's current behavioral health program which includes educational programs for players regarding mental health, programs for families of players to ensure they are aware of mental health concerns, and collaboration with local and national mental health organizations to promote prevention and awareness and reduce the stigma related to mental health.[241]

CONCLUSION

MMA is an inherently very violent sport and often results in injuries to the fighters and shorter careers. The UFC has become the face of professional MMA and has dominated the industry in terms of viewership, revenue, and fighter quality for years. As the UFC has grown in revenue and popularity, so too has the discussion over its fighters and the level of control that the UFC holds over them. UFC had always exercised a fair bit of control over its fighters, but the tipping point for the fighters came with the implementation of the Reebok deal and the subsequent banning of all other sponsorships for fighters during UFC events. Now staring down lawsuits from former fighters, threats of antitrust suits, and policy that would force significant change, it is time for the UFC to extend an olive branch to fighters, for its own sake as well as its fighters. On the fighters' side, if they want to remedy some of the issues they have faced due to the UFC's control over their careers, waiting for meaningful and lasting policy change could take years, if it ever happens at all. Fighters do not currently have the right to formally strike as they are still under the independent contractor classification, but they can apply pressure on the UFC to make change through various avenues, including holding out from the sport and taking or threatening legal action against the UFC.

There are fighters in the UFC that leave the sport wealthy and satisfied with their careers, but the majority of fighters are pushing their body and minds to the limit to make a livable wage within professional MMA.

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239. Scott Harris, *New Research Shows MMA Fighters Have Higher Risk of Brain Damage*, BLEACHER REP. (Mar. 26, 2013), https://bleacherreport.com/articles/1582096-new-research-shows-mma-fighters-have-higher-risk-of-brain-%20damage [https://perma.cc/KQ5E-LH6A].

240. *Id.*

241. *See* NFLPA, *supra* note 237, at 215, 230.

Providing a more extensive healthcare program to fighters would be a positive stride on multiple levels for both fighters and the organization as the UFC can display that it is receptive and attentive to its fighters' physical and mental issues, in addition to extending the duration of its fighters' careers by maintaining their health. On the fighter side, they will most importantly gain the obvious benefit of maintaining their personal health while also being able to subtract a cost from their personal financial overhead to stay a fighter. They will also be able to share in the benefit of an extended career which will lead to more revenue generating opportunities for both the fighters and the UFC. Providing other benefits such as a 401(k) education and a fighter pension fund would go a long way in establishing a better relationship between fighters and the ownership.

Finally, allowing fighters to find endorsement deals that they may wear during UFC events would not only appease the fighters, but it would actually help the UFC maintain its fighters' independent contractor status since it will have relinquished some of the control it had over the fighters and the equipment they must wear to perform their job. The UFC can still maintain a primary sponsorship with Venum, or whomever it chooses to do business within the future, and require Venum-branded fight gear, but amend its deal to allow fighters to bring back the patches on their fight equipment that provided them with additional revenue opportunities.

The UFC and its fighters are beginning to reach an impasse on their relationship with major events in the process, including multiple recently filed lawsuits, the pending Protecting the Right to Organize Act, and the unprecedented walk-out of UFC champion Francis Ngannou. Whether the UFC or its fighters want to wait and see if the lawsuit or act is successful in changing the classification of fighters, it is obvious that there is a major discussion that is currently going on in sports and politics about the current structure of the UFC. Ultimately, the UFC has a majority of the power in this situation and has the ability to quiet a lot of the discourse surrounding its organization by implementing changes that appease the fighters and loosen its control over them.

DORMANT COMMERCE CLAUSE: CLAIMING THE FUTURE OF HORSE RACING

Alexis Zeron[*]

Abstract

The Supreme Court described the principles of the dormant Commerce Clause first in *Gibbons v. Ogden* (1824), coined the doctrine's name in *Willson v. Black-Bird Creek Marsh Co.* (1829), and revisited the doctrine after a lengthy period of "dormancy" in *National Pork Producers Council v. Ross* (2023). Over the nearly two centuries that the Supreme Court has handled dormant Commerce Clause matters, one aspect that stands out is the unique nature of the industries that give rise to claims. Thoroughbred horse racing, a sport older than the United States itself, is one such example. The Supreme Court previously denied certiorari on the question of whether state-imposed restrictions that prevent horses purchased in claiming races from competing outside the state for a specified period are constitutional. The constitutional question of the "claiming jail" depends upon a series of suits filed by long-time Thoroughbred owner Jerry Jamgotchian against several state horse racing governing bodies. Kentucky, the state renowned for Thoroughbred breeding and racing, stands contrary to California and Indiana, where similar claiming jail provisions have been struck down by the courts as unconstitutional under the dormant Commerce Clause. Additionally, there is a peculiar absence of legal challenges to "claiming jail" provisions in Florida, another state integral to horse racing. This Note highlights the divergence of state court rulings and silence from Florida courts. Furthermore, this Note argues why Florida's renowned Gulfstream Park has evaded litigation and analyzes whether it will continue to do so in the future. In doing so, this Note contributes to the ongoing debate over state regulations and their intersection with interstate commerce in the horse racing industry.

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INTRODUCTION

Two staples of American history, horse racing and the Constitution, are now at odds with one another. The United States hosted over 33,000 races in 2022 alone, spanning from the East to West Coast, creating an endless stream of commerce as horses are bred, trained, and raced in numerous states throughout their lifetimes.[1] The rising constitutional issue stems from a daily occurrence in the racing industry: claiming races. Claiming races occur across the United States and compose nearly two-thirds of the races offered.[2] Claiming races earn such a name because the entries may be "claimed" or purchased for the price specified in the condition book determined prior to entry. Once a successful and valid

1. Equibase Co. LLC., *Fact Book: Trends in US Races, Purses, and Foal Crop*, THE JOCKEY CLUB (2022), https://www.jockeyclub.com/default.asp?section=FB&area=12 [https://perma.cc/5862-2PNQ].

2. Stuart S. Janney & Sal Sinatra, *Time to Change the Claiming System*, THE JOCKEY CLUB, https://www.jockeyclub.com/default.asp?section=RT&year=2020&area=4 [https://perma.cc/E5WW-QUJP].

claim is placed, the title "shall be vested in the successful claimant from the time the horse is a starter."[3]

Despite the endless venues a horse may travel and compete at, states and their respective racetracks place a restrictive burden on any horse purchased in a claiming race. This restriction, colloquially known as "claiming jail," prohibits a horse purchased in a claiming race from being either sold or raced at other tracks for a set period that varies based on location, but is generally between thirty and sixty days or until the end of the track's "meet."[4] Prominent Thoroughbred owner Jerry Jamgotchian began a legal crusade, arguing that such a restriction violates the dormant Commerce Clause.[5] Jamgotchian has brought claims in California, Indiana, Kentucky, and Pennsylvania.[6]

The constitutionality of "claiming jail" has been met with varying responses from the federal courts and has created a circuit split. With Florida's well-established stake in the economic offerings of the racing world, the question of "claiming jail" will likely emerge in the near future. Part I of this Note will consider the history behind "claiming jail" and why Kentucky, the epicenter for Thoroughbred racing, considers the restriction constitutional and necessary. Part II will examine the line of reasoning from the Indiana Southern District Court and how its decision could influence the Supreme Court into granting certiorari. Finally, Part III will examine Florida's Administrative Code governing horse racing and its use of "claiming jail" and what the future of horse racing may look like if the Supreme Court makes a ruling on the issue.

I. BACKGROUND: LEAVING TRADITIONS BEHIND

While the enumerated powers expressly grant Congress the ability to regulate commerce between states through the Commerce Clause,[7] Congress's true power comes not from any express provision of the Constitution but rather from a long-standing implied provision known as

3. 810 KY. ADMIN. REGS. 4:050 § 1(12)(b) (2024).

4. Natalie Voss, *Claimers: The Rules Governing the Game*, PAULICK REP. (Dec. 17, 2017), https://paulickreport.com/nl-art-1/claimers-rules-governing-game#:~:text=Jail%20rules%20regarding%20location%20prevent,days%20according%20to%20some%20statutes [https://perma.cc/K3PY-JBA9].

5. Jamgotchian v. Ind. Horse Racing Comm'n, No. 1:16-cv-2344-WTL-TAB, 2017 WL 4168488 at *2 (S.D. Ind., Sept. 20, 2017).

6. Paulick Report Staff, *District Court Rules Indiana Claiming Jail Rule Unconstitutional*, PAULICK REP. (Sept. 21, 2017), https://paulickreport.com/nl-art-1/district-court-rules-indiana-claiming-jail-rule-unconstitutional [https://perma.cc/ZN3Q-YB9M].

7. U.S. CONST. art. I, § 8, cl. 3.

the dormant Commerce Clause.[8] This provision, which was developed by judicial interpretation, is wielded to invalidate state laws that dissuade or restrict commercial relations between states in favor of intrastate commerce.[9] The dormant Commerce Clause addresses the concern that if Congress cannot place limitations on state authority, then Congress cannot effectively exercise its power and the United States economic system will disconnect into isolated islands of economic protectionism.[10]

The challenge of the dormant Commerce Clause is that some economic protectionism is allowed to survive if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[11] Kentucky Horse Racing Commission (KHRC) argued that any burden claiming races places on interstate commerce is minimal, whereas the benefit is substantially greater given that Kentucky's lifeblood is Thoroughbred racing.[12] It comes as no surprise then that Kentucky's Supreme Court granted summary judgment in favor of KHRC, as horse racing is one of the most crucial industries in the state and will prove to be a difficult battleground when questioning traditions of horse racing.[13]

In late 2016, following the Kentucky Supreme Court ruling, Jamgotchian petitioned for a writ of certiorari.[14] Unfortunately, the Supreme Court denied hearing the issue.[15] However, following the decision, Jamgotchian filed suit in other states, including Indiana.[16] In 2017, the Indiana court analyzed the challenge on the same basis of advancing "legitimate local purpose" and found that the restriction imposed by claiming races contravened the dormant Commerce Clause.[17]

Indiana's ruling that "claiming jail" was unconstitutional created a circuit split on the issue. Additionally, in light of a pending lawsuit with

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8. Gibbons v. Ogden, 22 U.S. 1, 197–98 (1824); Hughes v. Oklahoma, 441 U.S. 322, 338–39 (1979).

9. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994).

10. *See, e.g.*, Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.").

11. Or. Waste Sys., Inc. v. Dep't of Env't Quality of State of Or., 511 U.S. 93, 101 (1994) (quoting New Energy Co. v. Limback, 486 U.S. 269, 278 (1988)).

12. Brief in Opposition at *12, Jamgotchian v. Ky. Horse Racing Comm'n, No. 16-171 (Oct. 14, 2016), 2016 WL 6092571.

13. Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d 594, 609, 621 (Ky. 2016).

14. Petition for Writ of Certiorari, Jamgotchian v. Ky. Horse Racing Comm'n, 580 U.S. 998 (2016) (No. 16–171).

15. *Id.*

16. Jamgotchian v. Ind. Horse Racing Comm'n, No. 1:16-cv-2344-WTL-TAB, 2017 WL 4168488, at *2 (S.D. Ind., Sept. 20, 2017).

17. *Id.* at *2–3.

Jamgotchian, California waived its sixty-day restriction on horses purchased from claiming races and amended its legislation.[18] Under these circumstances, the Supreme Court may be more inclined to address and harmonize how the thirty-eight states that allow horse racing should move forward with the regulations relating to claiming races.[19]

The "claiming jail" issue is not a one-shot, obscured issue that a single Thoroughbred owner in one state faces. The issue is not precluded even to Thoroughbreds. In fact, a new suit was filed by a standardbred owner in Delaware which raised the same constitutional issue against harness racing.[20] States where the issue remains unaddressed, such as Florida, are prolonging the inevitable and smaller states that depend on racing influence are placing themselves at a disadvantage by clinging to outdated and unconstitutional traditions.

II. ANALYSIS

A. *First Assessment*

On May 21, 2011, Jamgotchian claimed Rochitta, a 2008 mare from Churchill Downs in Louisville, Kentucky, for the price of $40,000, along with an additional $2,400 paid in taxes.[21] The claim was subject to "Article 6" of the Kentucky Administrative Regulations (KAR), which stated a horse claimed "shall not be sold or transferred, wholly or in part, within thirty (30) days after the day it was claimed . . ." and "shall not race elsewhere until the close of entries of the meeting at which it was claimed."[22] Despite the imposed restrictions, Jamgotchian entered Rochitta at Hollywood Casino at Penn National Race Course (Penn) in Pennsylvania.[23] Penn's Vice President, Christopher McErlean, accepted the entry but warned Jamgotchian "that enforcement of the claiming rule is up to Kentucky."[24]

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18. Ron Mitchell, *Judge Upholds Kentucky Claiming Restriction*, BLOODHORSE (Nov. 30, 2012), https://www.bloodhorse.com/horse-racing/articles/124500/judge-upholds-kentucky-claiming-restrictions [https://perma.cc/D8GZ-K3RW].

19. Brief in Opposition at *1, Jamgotchian v. Ky. Horse Racing Comm'n, No. 16-171 (Oct. 12, 2016), 2016 WL 6092571.

20. *See* Deluna v. Del. Harness Racing Comm'n, C.A. No. 19-1788 (MN), 2019 U.S. Dist. LEXIS 175250 (D. Del. Oct. 9, 2019).

21. Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d 594, 597 (Ky. 2016).

22. 810 KY. ADMIN. REGS. 4:050 (2024).

23. Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d at 600.

24. Ron Mitchell, *Jamgotchian Puts Claiming Rule to Test*, BLOODHORSE (June 17, 2011), https://www.bloodhorse.com/horse-racing/articles/135691/jamgotchian-puts-claiming-rule-to-the-test [https://perma.cc/UA2E-JXF9].

Jamgotchian's pursuit to race Rochitta at Penn was motivated by two factors. First, Penn is considered a less competitive racetrack, and second, Jamgotchian had hoped for Rochitta to break her maiden (win her first race), which would substantially increase her value.[25] Thus, Kentucky's interference with Jamgotchian's ability to race effectively reduced the commercial value the racehorse offered and produced the burden of maintaining a racehorse who could not race for thirty days. KHRC argues that such limitations have a minimal effect on commerce, stating that "a racehorse never stops generating commerce. The horse will always need a trainer, a groom, an exercise rider, and a veterinarian . . . ."[26] While the list of necessary parties to a successful racehorse are listed off, each represents a cost to the owner and a benefit to a third party. If KHRC supports third parties profiting off of claimed horses, then what obstructs Kentucky from allowing owners to freely move claimed horses to outside tracks?

1. Kentucky's History of Regulating Horse Racing

Three main factors appear to heavily influence why Kentucky stands firm in maintaining restrictions on horses that compete in claiming races. These factors are traditionalism, current control of the market, and protection of the competitive nature of the sport.

The history and cultural significance of horse racing in Kentucky leads to an old-fashioned adherence to how past generations have conducted themselves. Despite California updating its legislation to remove "claiming jail" two years prior to the filing of the suit against KHRC, KHRC has remained absolute in its position, citing twenty-four other states with similar claiming rules.[27] KHRC has also emphasized that Jamgotchian is the only individual in Thoroughbred racing to have ever challenged the existence of such claiming rules.[28]

The second influence is Kentucky's unbridled control over the Thoroughbred market. Most of the prestige and decision-making power in Thoroughbred racing exists in excess in Kentucky. The state is responsible for standing the premier stallions for breeding and in 2022,

25. Ray Paulick, *Who Says You Can't Make Money in Horse Racing?*, PAULICK REP. (Dec. 7, 2012), https://paulickreport.com/news/who-says-you-can-t-make-money-in-horse-racing [https://perma.cc/7K7B-JU42].

26. Brief in Opposition at *5, Jamgotchian v. Ky. Horse Racing Comm'n, No. 16-171 (Oct. 12, 2016), 2016 WL 6092571.

27. *Id.* at *9 n.5.

28. *Id.*

produced forty-one percent of foals born in North America.[29] It is also home to the world-famous Kentucky Derby. Thus, Kentucky holds unfathomable power to influence and control the industry, as KHRC has shown in its relentless battle to maintain the status quo.

Finally, KHRC stated that the regulations exist for "racing integrity reasons" and work to "deter aggressive practices that undercut the claiming rule's primary, competition-furthering purpose."[30] However, recent actions of the KHRC allude that protection of the integrity of the sport, such as protecting horse welfare, is far from the true goal of claiming restrictions. The KHRC passed a new rule that prohibits horses claimed in Kentucky from racing in another state for thirty days after the end of the meet where the horse was claimed.[31] The new rule passed unanimously along with other changes, including that any owner who wishes to claim must have raced a horse in Kentucky within the thirty days preceding the race.[32] Blatant favoritism to owners domiciled in Kentucky creates an unjustified burden on the flow of interstate commerce as it alienates new and out-of-state owners and hinders the value of horses claimed as they cannot race for a month following the end of the meet. Such rules only benefit the few in-state participants.

KHRC claims that to maintain public confidence in the industry, races must be "fair and genuinely competitive."[33] The competitive aspect comes from placing horses of similar ability against one another.[34] However, restricting interstate commerce by halting any exchange of racehorses cannot achieve this goal. Highly competitive tracks cannot maintain an image of fair competition when horses of lesser quality cannot race elsewhere. Additionally, this manner of restriction will inherently devalue horses that are not of the highest claiming caliber because the costs associated with the "jail" time following a claim severely limit their ability to have success at smaller tracks.

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29. *Kentucky State Facts Book*, THE JOCKEY CLUB (2024), https://www.jockeyclub.com/default.asp?section=Resources&area=12 [https://perma.cc/EY5U-KPY6].

30. Brief in Opposition at *5, Jamgotchian v. Ky. Horse Racing Comm'n, No. 16-171 (Oct. 12, 2016), 2016 WL 6092571.

31. Matt Stahl, *Kentucky Commission Passes Rule to Keep Claimers in State*, HORSE RACING NATION (Feb. 15, 2022, 4:38 PM), https://www.horseracingnation.com/news/Kentucky_commission_passes_rule_to_keep_claimers_in_state_123 [https://perma.cc/W7VV-W6K3].

32. *Id.*

33. Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d 594, 612 (Ky. 2016).

34. *Id.*

2. The Supreme Court of Kentucky's Analysis of the Dormant Commerce Clause

Jamgotchian's claims regarding the constitutionality of the claiming jail terms were soon presented to the Kentucky Supreme Court, which cited the *Pike v. Bruce Church* balancing test when addressing the difficulty of rule application in Commerce Clause problems.[35] The significant obstacle presented by the dormant Commerce Clause is the vast array of circumstances to which each court must apply its flexible approach while attempting to wrangle each new fact pattern.[36] The nature of horse racing, old in tradition and highly specialized from its culture to the verbiage used in its rules, made this case no different. The originalist argument of history and tradition likely loomed over the court as it faced something as deeply rooted in our nation as the Second Amendment's right to bear arms. The first official racetrack in the United States was established in 1665, over 100 years before the United States gained its independence and 124 years before the first United States Supreme Court.[37] The difficulty of calling out state protectionism in a sport older than the highest court in the United States is no easy task, especially in the heart of Thoroughbred country, Kentucky.

Using the *Pike v. Bruce Church* test, the Court was tasked with determining whether KHRC's claiming jail rule was facially discriminatory and whether the burden was excessive in relation to the local benefit of the rule.[38] Under this balancing test, the Kentucky Supreme Court held that the claiming jail regulation was not facially discriminatory and that no alternative method would benefit the local purpose as well without discriminating against interstate commerce.[39]

The Kentucky Supreme Court's finding that the rule was not facially discriminatory comes from its interpretation that such a rule applies equally both to in-state and out-of-state participants.[40] Kentucky-based Thoroughbred owners are not limited to racing in their state, as many owners have horses racing all over the United States. In fact, it is not unusual for a single Thoroughbred to race in multiple states and even countries throughout its career. For example, Rochitta, throughout her

35. *Id.* at 605–06.

36. *Id.*

37. *New York Horse Racing*, HORSERACING, https://www.horseracing-info.com/new-york.html [https://perma.cc/A72R-C2P4]; *The Court as an Institution*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/institution.aspx [https://perma.cc/BC24-ECDW].

38. Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d at 606.

39. *Id.* at 611.

40. *Id.*

short career, raced at eight tracks in four different states (Kentucky, Pennsylvania, West Virginia, and Florida).[41]

Article 6 from the Kentucky statute regulating claiming races reads: "unless the Stewards grant permission for a claimed horse to enter and start at an overlapping or conflicting meeting in Kentucky, a horse shall not race elsewhere until the close of the meeting at which it was claimed."[42] The express approval to race the newly purchased horse is only extended if the owner races the horse at the track where it was claimed; such approval is not extended to all of the racetracks in the Commonwealth.[43] Steward approval remains a requirement if the owner wishes to race at any other track, in or out of Kentucky.[44]

If Jamgotchian could demonstrate that such exemptions by the stewards were handed out with a bias towards racetracks within Kentucky, a separate constitutional issue of Equal Protections could have been raised; however, this issue was not presented to the Kentucky Supreme Court and was not further explored.[45] Thus, regarding the Article 6 restriction, the Court likened it to an evolved contract term and not an economic protectionism attempt by KHRC.[46] With contract terms come rights and responsibilities. The advantageous method of sale through a claiming race is a trade-off for the burden that the owner shall keep the purchased horse at the racetrack where it was sold for a limited and predetermined time period.[47] Such conditions of the sale were not hidden, new, or deceptive.[48] Therefore, the Kentucky Supreme Court held that on the face of Article 6, it was not an act of state protectionism, but rather a standard contract term that racetracks across the United States use.[49]

Once the Kentucky Supreme Court determined that Article 6 was not facially discriminatory, the Court was tasked with weighing whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[50] The primary argument KHRC made was that Article 6 protects the competitive nature and welfare of the local

41. *Horse Profile Rochitta (USA)*, SKY SPORTS, https://www.skysports.com/ racing/form-profiles/horse/536894/rochitta-usa [https://perma.cc/24UG-CBHH].

42. 810 KY. ADMIN. REGS. 4:050.

43. *Id.*

44. *Id.*

45. Brief of Appellees Kentucky Horse Racing Commission at *6, n. 4, Jamgotchian v. Ky. Horse Racing Comm'n, No. 2014-SC-000108 (Ky. 2015), 2015 KY S. CT. BRIEFS LEXIS 49.

46. Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d 594, 599 (Ky. 2016).

47. *Id.* at 598–99, 618.

48. *Id.* at 598.

49. *Id.* at 610–11.

50. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

Thoroughbreds through the least restrictive means possible.[51] KHRC provided that, under *Department of Revenue Kentucky v. Davis*, "states are permitted to enact laws, such as the Regulation, to carry out traditional government functions."[52] Article 6 is considered an essential component of the regulatory scheme as it serves to maintain an adequate number of horses to fill the races.[53] KHRC pointed to several races Rochitta was entered into in Pennsylvania, all of which failed to attract enough horses to fill the field and thus were scratched from the racecard.[54] A secondary component KHRC pointed to were the increased tax revenues generated by keeping claimed horses within the Commonwealth, where the proceeds support Kentucky's use of its police powers.[55] Under the holding of *Davis*, the court found Kentucky's tax structure non-discriminatory, and KHRC asked for such an exception to be applied to the case in hand.[56]

The Kentucky Supreme Court rejected the notion that regulations and tax provisions that favor the government's own functions are subject to less scrutiny under the Commerce Clause than any other action in which local private enterprise is favored over intrastate commerce.[57] Additionally, the Court found that the precedents KHRC relied upon, *United Hauler* and *Davis*, were not controlling.[58] While municipal waste processing and municipal bonds issuance held direct connections to governmental functions, the Court declined to extend the line of reasoning to Thoroughbred horse racing and concluded that it was not within traditional governmental functions.[59] Still, KHRC pushed back, suggesting that while horse racing in and of itself is not a governmental function, the longstanding tradition of regulating the sport and its vitality to the economy of Kentucky makes it a "quasi-public" enterprise.[60]

The Court pointed to the appeal of this argument and claimed it would have given pause to it if it were not for the fact that the Supreme Court

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51. Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d at 615.

52. Brief of Appellees Kentucky Horse Racing Commission at *7, Jamgotchian v. Ky. Horse Racing Comm'n, No. 2014-SC-000108 (Ky. 2015), 2015 KY S. CT. BRIEFS LEXIS 49 (citing Dep't of Revenue of Ky. V. Davis, 553 U.S. 328 (2008)).

53. Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d at 601.

54. Brief of Appellees Kentucky Horse Racing Commission at *7, Jamgotchian v. Ky. Horse Racing Comm'n, No. 2014-SC-000108 (Ky. 2015), 2015 KY S. CT. BRIEFS LEXIS 49.

55. *Id.* at *13–14.

56. Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d at 608–09 (citing Dep't of Revenue of Ky. V. Davis, 553 U.S. 328 (2008)).

57. *Id.* at 608.

58. *Id.*

59. *Id.*

60. *Id.* at 609.

had already rejected it in an equivalent case, *C & A Carbone*.[61] Justice Souter's dissent in *C & A Carbone* argued that a waste processing facility, regardless of being privately owned, was operating in a manner similar to that of a municipality and, accordingly, the court should treat it as a "quasi-public" enterprise.[62] Only two other members of the Supreme Court signed onto this line of reasoning: Justice Rehnquist and Justice Blackman.[63] These three Supreme Court Justices were no longer members of the Court when the Kentucky Supreme Court gave its ruling in 2016; therefore, it is not shocking to see reluctance to take up the torch for the dissenting opinion when several justices who represented the majority opinion still sat on the Supreme Court.

When KHRC's abstract arguments fell to the side, what was left was a claim that claiming races were the only way that the health and welfare of the sport could be preserved.[64] The Court accepted this claim, reasoning that attempts were made to limit the effects to the select few horses claimed from the meet, and that the burden of claiming jail is not excessive when weighed against the benefits of protecting the welfare and competitive nature of horse racing within the limited scope of claiming races.[65]

3. Striking Back Against the Constitutional Factors

KHRC relied on three factors to argue the constitutionality of Article 6 restrictions before the Kentucky Supreme Court. First, the temporary nature of "claiming jail."[66] Second, owners are on notice of the restrictions attached to claiming and still purposely avail themselves.[67] Third, owners may acquire horses through auction, private sale, or breeding and, thus, do not have to subject themselves to the rules of claiming.[68]

The argument that the restrictions of "claiming jail" are fleeting becomes increasingly absurd as Kentucky continues to alter and extend its rules. The Kentucky Horse Racing Commission Rules Committee

61. *Id.*

62. Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d at 609 (citing C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (Souter, J., dissenting)).

63. *Id.*

64. *Id.* at 609–11.

65. *Id.* at 615–21.

66. *Id.* at 620.

67. *Id.* at 621.

68. Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d at 621.

voted in February 2022 to extend the restriction of claiming jail.[69] The new rule requires that connections (owners and trainers) who claim a horse in Kentucky must wait thirty days from the last day of the meet before the horse is eligible to race in any other state.[70] If the primary goal is to protect the welfare and competitive nature of claiming races at each track, then what argument could Kentucky concoct that such a rule would preserve the ability of the track to fill claiming races if the meet has already ended? It is here that the smoke and mirrors begin to falter, and the true intent of protectionism rears its ugly head. California Attorney General Derry L. Knight would agree and has opined that restrictions after the close of the "meet" violate the Commerce Clause.[71]

Voluntary availment also has its own shortcomings as it strikes against the heart of KHRC's argument: welfare for the Thoroughbred. While it is true that any prospective owner has the capability of purchasing a racehorse through various avenues, such as private purchase or auction, these two methods subvert the racetrack's control over the transaction. The watchful eye that sets standards and records the trading of hands becomes blind when horses are sold privately on the backstretch. With claiming comes inherent transparency, as the horse's value, health, racing capabilities, and sales history are presented to the purchaser and, to some extent, the public. This promotes accountability for the welfare of these horses. Claiming rules in Kentucky promise owners the ability to void the claim if the track veterinarian determines that the horse will be placed on the Veterinarian's List as medically compromised, unsound, or lame, and delivers trainer's notes, which include the horse's records for the past sixty days.[72] Generally, a horse placed on the Veterinarian's List is considered unfit to race and will remain on the List until the commission veterinarian releases an opinion that the horse no longer belongs on such list.[73] Accordingly, if an owner were to purchase the horse privately, a valuable safeguard towards the welfare of racehorses would not be available.

Transparency is one of the unique benefits of claiming races. Each horse that is claimed is not only recorded and published for the public to

69. Joe Perez, *Churchill Downs Amends Claiming Rules*, BLOODHORSE (Sept. 14, 2023), https://www.bloodhorse.com/horse-racing/articles/271865/churchill-downs-amends-claiming-rules [https://perma.cc/W49U-KP4V].

70. *Id.*

71. Jamgotchian v. Ky. Horse Racing Comm'n, 488 S.W.3d at n.13.

72. Horseracing and Integrity and Safety Authority, *Rule 2000 Series Racetrack Safety Rules*, HORSERACING AND INTEGRITY AND SAFETY AUTHORITY (2023), at 83–85, https://bphisaweb.wpengine.com/wp-content/uploads/2024/06/Racetrack-Safety-Rules-6.14.2024.pdf [https://perma.cc/ZA2D-WVJE].

73. 810 KY. ADMIN. REGS. 8:010.

see monthly on each track's website, but the commonly used Equibase, an online source of horse racing statistics, keeps records of each race's chart and shows if the horse was claimed and whose ownership the horse passed between.[74]

If accountability and welfare are best served through claiming races, then why does KHRC strive to dissuade owners from using this method? One of the new rules, which was passed unanimously by the commission, was that owners were not allowed to claim a horse in Kentucky unless they had run a horse in the state in the previous thirty days.[75] This rule would successfully chill any claims from out-of-state owners as the hurdles to access a horse become far too tedious and costly, and far outweigh the benefits claiming races offer. Additionally, this form of protectionism extends beyond just interstate commerce; it also protects the good ol' boys club that does not want new owners to break into the racing industry.

Regardless of the alleged voluntary availment of the purchaser, claiming rules are still invalid if economic protectionism influenced the legislation that established them.[76] In the wake of Jamgotchian's loss in the Kentucky Supreme Court, KHRC used its momentum to bolster its stronghold on the racing industry and advocate for additional claiming rules. KHRC, knowing a thumb remained on the scale when it came to the racing industry in Kentucky, flexed its muscles and challenged the state to see how far it could bend the rules to its liking. Without this deep-rooted history, the Kentucky Supreme Court would have likely adopted the line of analysis and conclusion drawn in both California and Indiana.

B. *Another Look at "Claiming Jail"*

1. Distinguishing Indiana from Kentucky

Indiana approached the issue by applying the *Maine v. Taylor* standard, which provides that if a state law shows discrimination against interstate commerce either at face value or by effect, the burden shifts.[77] In order to overcome this burden, the State has to "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could

74. *See, e.g.*, *Tampa Bay Downs Charts*, EQUIBASE (Jan. 11, 2012), https://www.equibase.com/premium/chartEmb.cfm?track=TAM&raceDate=01/11/2012&cy=USA&rn=9 [https://perma.cc/M3MF-T6TC].

75. Matt Stahl, *Kentucky Commission Passes Rule to Keep Claimers in State*, HORSE RACING NATION (Feb. 15, 2022, 4:38 PM), https://www.horseracingnation.com/news/Kentucky_commission_passes_rule_to_keep_claimers_in_state_123 [https://perma.cc/W7VV-W6K3].

76. Reply Brief for Petitioner at *5–6, Jamgotchian v. Ky. Horse Racing Comm'n, No. 16-171 (U.S. Oct. 12, 2016), 2016 WL 6441230.

77. Maine v. Taylor, 477 U.S. 131 (1986).

not be served as well by available nondiscriminatory means."[78] Indiana held that on its face, Section 4(h), which highlights the limitations of claimed horses, provided for differential treatment of in-state and out-of-state commerce with beneficial treatment given to in-state horses as they could continue racing in Indiana.[79]

Indiana distinguished its analysis from Kentucky by finding "claiming jail" unconstitutional on the basis that no caselaw draws a distinction between temporary and permanent restrictions.[80] Restriction in any manner that creates an undue burden on interstate commerce is unconstitutional; the only exemption is for a legitimate local purpose.[81] The court rejected the Indiana Horse Racing Commission's claim that restrictions were necessary to have a sufficient number of racehorses to fill the race card and reduce the danger of claiming races becoming "purse-bidding" wars.[82] The same fears Kentucky harbored were heard and rejected here.[83] Without the long history of horse racing, the same half-baked arguments presented in Kentucky were found lackluster in Indiana, resulting in the Indiana Supreme Court finding that the dormant Commerce Clause had been violated.[84]

2. Leg To Stand on with the Supreme Court

The ruling in Indiana, which favored Jamgotchian, created a circuit split that did not exist when Jamgotchian's petition for a writ of certiorari was denied in 2016.[85] The United States Supreme Court serves as the final voice, creating cohesion when the states have developed their own conflicting interpretations of the Constitution. While it is arguable that California's decision to amend the "claiming jail" rules and the Kentucky Supreme Court's decision to rule it constitutional should have provided a sufficient basis for the Supreme Court to take this case up, there was no true court split because California settled outside of court. However, with Indiana's ruling, these differing approaches raise the constitutional questions of whether claiming jail violates the Commerce Clause and whether the scope of each state's delegated police powers allows them to grant racetracks the ability to limit the mobility of claimed horses.

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78. *Id.*

79. Jamgotchian v. Ind. Horse Racing Commission, No. 1:16-cv-2344-WTL-TAB, 2017 WL 4168488, at *2–3 (S.D. Ind. Sept. 20, 2017).

80. *Id.* at *3.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at *4.

85. Petition for Writ of Certiorari, Jamgotchian v. Ky. Horse Racing Comm'n, 137 S. Ct. 493 (2016) (No. 16–171).

Because the Supreme Court does not publish its certiorari votes nor provide an explanation for the petitions it denies, speculation and the guidance of political scientists will serve as a north star for discovering why this case failed to appeal to the Supreme Court.[86]

Looking at the history of the Supreme Court, an evident trend since the enactment of the Judiciary Act of 1925 demonstrates that the Justices have utilized their discretionary control over their docket to limit the number of cases they address.[87] The Supreme Court claims that it receives, on average, more than 7,000 cases and accepts between 100 and 150 of those.[88] Thus, the average acceptance rate is between 1.4% and 2.1%. In recent years, the Supreme Court has fallen short of the 100 to 150 number, averaging only 77 cases per year between 2007 and 2018 for a total of 850 cases with released opinions.[89] Furthermore, of the few cases that have made it before the Supreme Court, cases from the state courts have hovered around 10% to 20% of the total cases heard.[90] Without consideration of whether the Supreme Court is struck with the need to answer the controversy caused by Kentucky's "claiming jail" rule, this case had an uphill battle to fit within the paradigm of Supreme Court favored cases.

Justice Brennan emphasized that the screening function of the Supreme Court is vital to defining the "rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal system."[91] If the so-called golden ticket to the Supreme Court boils down to merely affecting the rights guaranteed by the Constitution and maintaining the balance of power in the United States, why did a dormant Commerce Clause case fail to receive a writ of certiorari? Edward Hartnett, a professor and legal scholar, argued that case selection choice by the Supreme Court is decided with the primary intention of increasing the political salience of

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86. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389, 390–91 (2004).

87. *Id.* at 392–93.

88. *Supreme Court Procedures*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1#:~:text=In%20fact%2C%20the%20Court%20accepts,court%20decided%20a%20Constitutional%20issue) [https://perma.cc/9B2N-LJGZ].

89. *Supreme Court Cases, October Term 2018-2019*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_cases,_October_term_2018-2019 [https://perma.cc/M5DW-CS8A].

90. Adam Fieldman, *Empirical SCOTUS: The Importance of State Court Cases Before the Supreme Court*, SCOTUSBLOG (Sept. 4, 2020, 10:11 AM), https://www.scotusblog.com/2020/09/empirical-scotus-the-importance-of-state-court-cases-before-scotus/ [https://perma.cc/5L8C-HPAC].

91. Cordray & Cordray, *supra* note 86, at 394.

the issue, regardless of whether the Court decides the issue or not.[92] While Thoroughbred racing occurs in thirty-two states[93] and contributes billions of dollars annually to the U.S. economy,[94] it is not far-fetched to say horse racing is not a political talking point for most American citizens. This is especially true when considering the political climate of 2016, where the presidential election was "unfolding against a backdrop of intense partisan division and animosity," and feelings of fear, anger, and frustration were at an all-time high for both Democratic and Republican voters.[95] In addition to the presidential race, Justice Scalia's passing in February of 2016 left the Supreme Court short-handed, waiting for the vacancy to be filled by the new president as President Obama's selection was blocked by Senate Republicans.[96] Instead of taking up the political hot topics, legal scholar Adam Feldman suggested that the Supreme Court seemed to shy away from its traditional selection process, which Professor Hartnett argued fuels the cogs of the court, and instead, picked cases where the remaining eight justices could reach a united front.[97] Totaled up at the end of the year, the theme appeared to be cases surrounding clarifying the law rather than settling highly contentious issues.[98] These cases included the "business-related" cases of *Microsoft Inc. v. Baker*, *Sandoz v. Amgen*, and *Impression Products v. Lexmark International*;[99] *United States v. Texas*, which halted immigration reform plans; and *Welch v. United States*, which placed limits on three strike rules.[100]

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92. Edward A. Hartnett, Q*uestioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1717 (2000).

93. *Off to the Horse Races in the USA!*, USA, https://www.visittheusa.com/experience/horse-races-usa [https://perma.cc/RB5D-JP8M].

94. Alastair Bull, *Horses: $122 Billion Annually to the US Economy*, TWINSPIRES (Apr. 1, 2024), https://www.twinspires.com/edge/racing/horses-dollar122-billion-annually-to-the-us-economoy/ [https://perma.cc/QH4Y-M2HX].

95. *Partisanship and Political Animosity in 2016*, PEW RSCH. CTR. (June 22, 2016), https://www.pewresearch.org/politics/2016/06/22/partisanship-and-political-animosity-in-2016/ [https://perma.cc/JG8A-4MA3].

96. J. Scott Applewhite, *The Supreme Court Term: No Big Blockbusters, but Plenty of Work*, U.S. NEWS (June 19, 2017, 4:55 PM), https://www.usnews.com/news/national-news/articles/2017-06-19/what-did-the-supreme-court-do-in-2016-2017 [https://perma.cc/LVE5-RXC2].

97. *Id.*

98. *Id.*

99. *Id.*

100. Casey C. Sullivan, *6 Most Important Supreme Court Decisions of 2016*, FINDLAW (Mar. 21, 2019), https://www.findlaw.com/legalblogs/supreme-court/6-most-important-supreme-court-decisions-of-2016-1/ [https://perma.cc/ER8L-WXVD].

So where does the dormant Commerce Clause and "claiming jail" stand in all this? Did it truly not match the landscape of the United States Supreme Court 2016 term?

While the niche nature of "claiming jail" may fail to stir up the political discourse Professor Harnett argued fuels the docket, that very nature should have given the issue an unusual charm in 2016. Feldman's observations indicated that the Supreme Court was hesitant to rock the boat that year, which should have made this issue a safe option when filling the docket. However, due to the unique nature of dormant Commerce Clause cases, there is a good argument that Jamgotchian's case was perhaps not as docile as it appears at first glance. The major issue that most lower courts are frustrated over is the difficulty associated with applying dormant Commerce Clause precedents, as they generally relate to niche fields of commerce, such as selling minnows[101] or buying wood from Alaska.[102] By taking up Jamgotchian's case, the Supreme Court would have effectively created another prima facie case under the endless subcategories of the dormant Commerce Clause umbrella. Alternatively, the Court was perhaps not prepared to come forward as a united front for another dormant Commerce Clause case that would later return to them as a sword against protectionism in an industry the Court was unfamiliar with, and which has a rich history older than the Supreme Court itself.

3. Is the Dormant Commerce Clause Dead?

In 1987, Professor Martin H. Redish, in a Duke Law Journal article, argued that "[t]raditionally, the dormant [C]ommerce [C]lause was considered an arcane aspect of American constitutional law."[103] However, academics argue that the dormant Commerce Clause is entering into a new era and reawakening as a "sexy" and hot topic.[104] The Supreme Court sensed the lower courts' growing disregard for the dormant Commerce Clause, as evidenced by the United States Court of Appeals for the Ninth Circuit's observation in 2021 that "[w]hile the dormant Commerce Clause is not yet a dead letter, it is moving in that

101. *See* Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

102. *See* South-Central Timber Dev. Co., Inc. v. Wunnicke, 467 U.S. 82, 86 (1984).

103. Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 570 (1987).

104. Micheal H. Sampson, *From Trailers to Marijuana — or, How the Dormant Commerce Clause Became Sexy*, PITTSBURGH JEWISH CHRONICLE (July 13, 2023, 3:51 PM), https://jewishchronicle.timesofisrael.com/from-trailers-to-marijuana-or-how-the-dormant-commerce-clause-became-sexy/ [https://perma.cc/U2FL-3N7N].

direction."[105] Accordingly, the Supreme Court responded with a swift revival of the issue in *National Pork Producers*, where Justice Neil M. Gorsuch wrote that "[a]ssuredly, under this Court's dormant Commerce Clause decisions, no State may use its laws to discriminate purposefully against out-of-state economic interests."[106] This decision signaled that the doctrine was far from the grave.

4. Does *National Pork Producers* Change Anything?

While academics debate whether the dormant Commerce Clause has arisen from the ashes, the real question is whether *National Pork Producers v. Ross* changed anything.[107] Arguably, the Court has returned to the question, not to alter the *Pike* test, but rather, to define what could be considered within the orbits of economic protectionism that occur with facially neutral state laws. At the core of the orbits, or as Justice Sotomayor wrote, at the "heart of our dormant Commerce Clause jurisprudence," is the goal of "warding off state discrimination against interstate commerce."[108] The core speaks to the presence of latent economic protectionism that the balancing test unveils through the incidental consequences of the regulatory scheme.[109] Moving out from the core and into the first orbit is the line of cases from *Pike* that have been invalidated despite genuinely appearing as non-discriminatory because the state law imposed burdens on the "arteries of commerce," such as "trucks, trains, and the like."[110] The outermost orbit is *Pike* claims that neither allege discrimination nor a burden on the "arteries of commerce."[111] However, as Justice Sotomayor explained in her concurrence, "the Court today does not shut the door on all such *Pike* claims."[112] Even when a petitioner fails to allege discrimination or an impact on the instrumentalities of commerce, the claim is not doomed; instead, Justice Sotomayor defined the threshold requirement for a plaintiff as an allegation of substantial burden on interstate commerce.[113]

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105. *Id.*; Nat'l Pork Producers Council v. Ross, 6 F.4th 1021, 1033 (9th Cir. 2021), *aff'd*, 598 U.S. 356 (2023).

106. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 364 (2023).

107. *Id.*

108. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 391–93 (2023) (Sotomayor, J. and Barrett, J., concurring).

109. Pike v. Bruce Church, 397 U.S. 137, 146 (1970).

110. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 392 (2023) (quoting Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298, n.12, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997)).

111. *Id.* at 392.

112. *Id.*

113. *Id.* at 393.

The petitioners in *National Pork Producers* failed to allege a substantial burden and thus failed to state a *Pike* claim.[114] The National Pork Producer Council's argument for substantial burden was that Proposition 12 required (1) "significant restructuring of an entire national, $26-billion industry"; (2) "out-of-state farmers to adopt housing that they believe endangers their herds, employees, and livelihoods"; (3) "California-compliant housing for sows regardless of whether their offspring are sold in California or elsewhere"; and that Proposition 12 would (4) "result in consolidation of the industry and put sow farmers out of business."[115] Justice Gorsuch, joined by Justices Thomas, Sotomayor, and Kagan, concluded that the dormant Commerce Clause does not protect a "particular structure or metho[d] of operation," and found that the facts in this case merely alleged harm to a favored "method of operation."[116] Effectively, the dissent reasoned that out-of-state competitors could enhance their own profits by modifying their existing operations.[117]

Now, coming full circle to the question, did *National Pork Producers* change anything? Regarding the constitutionality of claiming jail, the answer is likely no. The Supreme Court's decision suggests that *National Pork Producers* serves as a paradigm shift as claims of the national regulatory scheme become less compelling than they once were. Economic protectionism, where state regulation results in an undue burden on interstate commerce, is the north star of the dormant Commerce Clause. Thus, it is no incident that the service provided by *National Pork Producers* is clarifying the necessary elements to trigger the *Pike* test. The plurality opinion, drafted by Justice Gorsuch, concluded that the allegations must demonstrate a substantial burden on interstate commerce *before* the *Pike* test may be applied and a court may assess a law's competing benefits.[118]

Since *National Pork Producers* was decided nearly a decade after Jamgotchian brought suits against the racing commissions in California, Kentucky, and Indiana, the better question is whether the clarification would have altered the outcomes. First off the table is Indiana, as the court applied the *Maine v. Taylor* test, which instead placed the burden on the state to demonstrate a legitimate local purpose that could not be

114. *Id.*

115. Yue Wendy & Wentao Yang, *National Pork Producers Council v. Ross*, LEGAL INFO. INST., https://www.law.cornell.edu/supct/cert/21-468 [https://perma.cc/VDZ2-KRZU].

116. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 384–85 (2023).

117. *Id.*

118. *Id.* at 356–57.

met by alternative and non-discriminatory means.[119] While keeping in mind that California amended the "claiming jail" legislature in light of pending litigation, the allegations were sufficient for Derry Knight, Deputy Attorney General for the state of California, to advise the California Racing Commission that claiming jail would be found invalid as a violation of the Commerce Clause.[120] Knight stated it was undeniable that California's claiming jail rule would have the effect of controlling commercial activity occurring wholly outside the boundary of the state and that "the restriction is plainly proposed only for economic reasons, as an effort to keep more horses from leaving the state."[121] The proposed sixty-day post-race meeting prohibition for California claimed horses substantially burdens interstate commerce by hindering horses from racing anywhere else in the country for two months following the end of the meet.[122] The sixty-day post-race meeting prohibition also reaches farther than it appears on the surface. For example, a popular California racetrack, Santa Anita Park, holds its winter/spring meet starting on December 26 and ending on June 16.[123] Thus, a horse claimed at the beginning of the meet faces the possibility of being unable to race outside of California for eight months following the claim. While Knight never cited *Pike v. Bruce Church* in his response to the California Horse Racing Board's question on the constitutionality of claiming jail, the allegations would have met the threshold of a substantial burden on interstate commerce to trigger the *Pike* test.

The holding of the Kentucky Supreme Court would not have changed if *National Pork Producers* predated its decision on Jamgotchian's claiming jail allegations. *National Pork Producers* clarified the threshold to trigger the *Pike* balancing test, but it did not alter the test itself. Since the Kentucky Supreme Court agreed that Jamgotchian's allegations reached such a threshold, the test was applied, and the court found that "it passe[d] the Pike balancing test for reasonableness."[124] While the

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119. Maine v. Taylor, 477 U.S. 131, 138 (1986) (quoting Hughes v. Oklahoma, 441 U.S. 322, 99 S. Ct. 1727 (1979)).

120. Petition for Writ of Certiorari at App. E 104–05, Jamgotchian v. Ky. Horse Racing Comm'n, No. 16-171 (U.S. Aug. 2, 2016), 2016 WL 4191745.

121. *Id.* at 104.

122. *Id.* at 103.

123. *Santa Anita Concludes Winter-Spring Season With 99.97% Safety Record*, THOROUGHBRED DAILY NEWS (June 17, 2024, 2:30 PM), https://www.thoroughbreddailynews.com/santa-anita-concludes-winter-spring-season-with-near-perfect-safety-record/#:~:text= 29%2C%202023%2C%20through%20the%20Closing,main%20track%20and%20turf%20course [https://perma.cc/W428-QV8S].

124. Petition for Writ of Certiorari at App. A 1, 29, Jamgotchian v. Ky. Horse Racing Comm'n, No. 16-171 (U.S. Aug. 2, 2016), 2016 WL 4191745.

Kentucky Supreme Court reached a conclusion arguably unsupported by precedent, the Supreme Court's holding in *National Pork Producers* could not have saved horse racing from this unconstitutional finding.

C. *Why Should Florida Care*

1. Where Does Florida Stand?

Following closely behind Kentucky, Florida is one of the largest players in the Thoroughbred industry. In 2021, Florida produced the second-largest foal crop, outranking California, New York, Pennsylvania, and Indiana.[125] Additionally, the horses born in Florida rank only second to Kentucky based on number of starters and number of wins.[126] Such data provides a clear insight that the breeding, raising, and racing of Thoroughbreds makes Florida quintessential to the racing industry. While many people think of Kentucky when they picture the famous first jewel of the triple crown, with closer inspection, the Kentucky Derby field is dependent on Florida. In 2023, thirteen of the eighteen horses who ran in the Kentucky Derby had direct connections to Florida.[127] The two states are deeply intertwined as Kentucky is the heart of horse racing and breeding and Florida is the nurturing instrument that births and trains the foals.

Gulfstream Park, located in Hallandale Beach, Florida, is one of the premier racing locations in the United States.[128] While no case has been raised against them as of 2023, Gulfstream is not inherently safe from legal action. While Gulfstream Park's owner is known for his progressive rules and adaptations to the shortcomings of the industry, the laundry list of rules turns "claiming jail" into a high-security Alcatraz-like claiming prison.[129]

Gulfstream Park's claiming rule in relation to trainers reads as follows:

> Requirements for trainer to claim a horse during the Gulfstream Park Championship which begins Friday, December 1, 2023. The trainer must have been allotted

125. *Distribution of Registered U.S. Foal Crop by State*, THE JOCKEY CLUB, https://www.jockeyclub.com/default.asp?section=FB&area=4 [https://perma.cc/VKW2-JKMY].

126. *Id.*

127. *2023 Kentucky Derby Ocala Connections*, SHOWCASE PROPERTIES OF CENTRAL FLORIDA (May 4, 2023), https://www.showcaseocala.com/2023-kentucky-derby-ocala-connections/ [https://perma.cc/9JPJ-9HP2].

128. Teresa Genaro, *PETA-Stronach Alliance Spurs Question, Concerns*, THE RACING BIZ (Apr. 9, 2019), https://www.theracingbiz.com/2019/04/09/peta-stronach-alliance-spurs-questions-concern/ [https://perma.cc/5JK8-DE3P].

129. *Id.*

> stall(s) for the Championship meet, must have a horse(s) stabled at Gulfstream Park or Palm Meadows, and must have started a horse at Gulfstream Park within 45 days of claim. A trainer may claim a maximum of one (1) horse per race providing they have run a horse within forty-five (45) days prior to submitting a claim . . . . Any horse claimed must race for the same claiming price or higher for a period of 30 days. The horse is eligible to race for less on the 31st day.[130]

The strict regulations applied to owners, like Jamgotchian, are:

> Any owner will be eligible to claim if they have a valid current Florida Pari-Mutuel license and an account set up with the Horsemen's Bookkeeper . . . **ANY HORSE CLAIMED AT GULFSTREAM PARK WILL BE IN JAIL FOR 90 DAYS. The only exception will be for one stake race which needs to be approved by the Stewards. If a horse is claimed, it shall not be sold or transferred to another Owner or trainer wholly or in part, except in a claiming race, for a period of thirty (30) days from the date of claim, nor shall it, unless reclaimed, remain in the same stable or under the control of the management of its former owner or trainer for the same period unless mitigating circumstances require Stewards' discretionary action.**[131]

The language above not only parallels that of the claiming jail rules litigated in Kentucky and Indiana but, in some instances, takes the limitations of what the trainer and owner can do with a claimed horse one step further. What purpose do these seemingly arbitrary requirements placed on the trainers serve? It takes a mental leap to connect the purpose of promoting "horse welfare" with contingencies like requiring trainers to have stalls for the race meet, have horses at either the Gulfstream or Palm Meadows (a training center owned by the Stronach Group, which also owns Gulfstream),[132] and have had another horse start at Gulfstream in the last forty-five days.[133] On the face of these requirements, an evident protectionist tone is easily detectable as the rules serve to keep horses not only in the state of Florida but also at facilities that would best serve the Stronach Group. When further analyzed, the owners' limitations are no

130. Bille Badgett et al., *Gulfstream Park Condition Book Rules*, GULFSTREAM PARK RACING ASS'N, INC. 1, 28 (2024), https://www.gulfstreampark.com/assets/71tzd15sgbj0/17nb6s0nPIdsWZJTw7PhlY/612770e926fdb9c3d27a45f3d84b6938/CB_GSP_CONDITION_BOOK_RULES-12-15-24.pdf [https://perma.cc/Z7QR-ZL75].

131. *Id.* at 28–29.

132. *Id.* at 28.

133. *Id.*

less arbitrary than those of trainers. Limitations such as barring claimed horses from "remain[ing] in the same stable or under the control of the management of its former owner or trainer . . ." do not lend themselves to suggesting that the concern for animal welfare is the driving factor; otherwise, why would Gulfstream find issue with allowing new owners to keep their horses within a training program and environment that best knows the animal already?[134] Compared to the bolded and capitalized lettering of "**ANY HORSE CLAIMED AT GULFSTREAM PARK WILL BE IN JAIL FOR 90 DAYS**," the surrounding rules are just as powerful of tools for protectionism.[135] At the end of the day, the rules require that any trainer who an owner sends their newly claimed horse to be one that has stalls and is currently racing at Gulfstream Park. Thus, the track retains its pool of horses. So, if all roads lead back to protectionism and Florida continues to push the envelope on how far it can go, then why was it not a target of litigation?

2. Why has Florida Not Been a Target of Litigation?

Hesitancy to take on Gulfstream Park may stem from its owner: the Stronach Group.[136] In addition to Gulfstream Park, the Stronach Group owns four other racetracks, a training center, and a pari-mutuel action service that broadcasts and conducts wagering on horse races.[137] While the Stronach Group is a behemoth within the horse racing industry, they have not been entirely outside the purview of potential litigation. Two of its tracks, Santa Anita Park and Golden Gate Fields, are in California, where California's Jockey Club agreed that claiming jail is unconstitutional and removed the claiming jail terms.[138] If the Stronach Group's ownership is not the source of hesitancy, how should the strategy of raising litigation in California, Kentucky, and Indiana instead of Florida be understood? At first, the gut reaction would be jurisdiction. However, that thought process crumbles when looking at the backdrop of the people of California's sympathetic tone towards animal welfare. California's Proposition 12, which established new minimum regulations relating to confinement of certain livestock, was met with nearly two-thirds approval from the state's voters, demonstrating that the citizens of California are deeply motivated by legislation that reads as beneficial to animals, regardless of the associated economic factors or effects of the

134. *Id.* at 29.

135. *Id.*

136. *About Gulfstream*, GULFSTREAM PARK, https://www.gulfstreampark.com/ discover/# [https://perma.cc/N8UD-XNGR].

137. *About Us*, 1/ST, https://1st.com/ [https://perma.cc/6QNM-ZZDU].

138. Mitchell, *supra* note 18.

industry.[139] It was not until the National Pork Producers Council sued the state of California for violating the dormant Commerce Clause that the question of whether Proposition 12 was for anything other than animal welfare was considered.[140] The narrow 5-4 decision in favor of Provision 12 rejected the ambitious theory of "extraterritoriality doctrine," which would have invalidated laws that affected anything outside of the state regardless of whether it was discriminatory.[141] Instead, Justice Gorsuch, writing for the majority, stated that the dormant Commerce Clause addressed the concern of "preventing purposeful discrimination against out-of-state economic interests."[142] This is a much higher standard to reach as purposeful discrimination in many ways overlooks any consequences on commerce if they are incidental to a good-willed purpose, such as increasing animal welfare by prohibiting the sale of food products from inhumanely kept animals.[143] This begs the question, if out-of-state voices were required to raise the issue, as evidenced by the dominance of non-California residents in National Pork Producers Council's leadership,[144] and the animal welfare case made it through the scrutiny of the Supreme Court, what made the California Horse Racing Commission fold when pressed with the concern of claiming jail?

Following the emergency amendment, the California Horse Racing Board's rules and regulations regarding claimed horses read, "[n]o horse claimed out of a claiming race shall be sold or transferred to any person for **racing purposes** within 30 days exclusive of the day such horse was claimed."[145] Perhaps California believed that the animal welfare argument only reached so far. Thus, animals unsuited for continued

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139. *Proposition 12 Fully Implemented*, THE HUMANE SOC'Y OF THE UNITED STATES (Dec. 12, 2023), https://www.humanesociety.org/news/proposition-12-fully-implemented#:~:text=This%20makes%20both%20them%20and,two%20thirds%20of%20California%20voters [https://perma.cc/G6WL-NYP3].

140. *Supreme Court Decides Important Dormant Commerce Clause Case*, NLC (June 15, 2023), https://www.nlc.org/article/2023/06/15/supreme-court-decides-important-dormant-commerce-clause-case/#:~:text=This%20case%20involves%20California's%20Proposition,pigs%20cannot%20lie%20down%2C%20stand [https://perma.cc/VD9S-JUK2].

141. *Id.*

142. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 371.

143. *Proposition 12 Fully Implemented*, *supra* note 139.

144. *Board of Directors*, NAT'L PORK PRODUCERS COUNCIL, https://nppc.org/about-nppc/board-of-directors/ [https://perma.cc/4YW7-KL4X].

145. *Query Rules & Regulations Results: Sale or Transfer of Claimed Horse, Rule No. 1662*, CAL. HORSE RACING BD., https://www.chrb.ca.gov/query_rules_and_regulations_database.asp?form_query_action=display_rule&form_query_rule_number=1662&form_query_rule_title=Sale+or+Transfer+of+Claimed+Horse%2E&form_query_article=Sale+or+Transfer+of+Claimed+Horse%2E&form_query_article_index=1662&form_query_argument=1662 [https://perma.cc/388J-N2EV] (emphasis added).

racing should not find themselves subject to bans of transfer if it was for reproductive or second-career purposes. It is easy to find the logical argument that such a ban goes against the welfare argument, as horses unfit for racing purposes should not remain at racetracks awaiting their sentence to expire in the ticking "claiming jail."

If the prestige of the Stronach Group and jurisdiction are not the factors keeping Florida out of the hot seat, why has Florida escaped litigation? The ultimate answer may stem from Jamgotchian's preferences. During the height of litigation in Kentucky and Indiana, Jamgotchian raced eighty-three times in 2016, but only raced three times in Florida, with the stake races occurring over a two-day time span.[146] In 2017, he raced eighty-nine times, but never competed in Florida.[147] Accordingly, Florida may have escaped the hot seat purely because Jamgotchian, the flagbearer for the dormant Commerce Clause, did not have a personal interest in racing in Florida. Even reaching as far back as 2011, the year Jamgotchian claimed Rochitta and started his legal journey, Jamgotchian's horses raced 251 times and less than ten percent of those races were in Florida.[148]

CONCLUSION

The issue of claiming jail remains unanswered, divided, and in a place of limbo. If litigation is raised in another quintessential state, such as Florida, a resurgence of the question of whether claiming jail violates the dormant Commerce Clause could make its way up through the court system and see itself on the docket of the United States Supreme Court. The 5-4 divide in *National Pork Producers* leaves enough suggestion that the Supreme Court itself is not settled on the topic, and if the dynamic of the court were to change or if concern for the dormant Commerce Clause were to go, the circuit split and nature of "claiming jail" could serve as a talking head for the question at hand.[149] While the question sits patiently on standby, the overly burdensome discrimination against out-of-state trainers and owners is done with only one purpose: protectionism. As the Thoroughbred Owners of California's article titled *Claiming Jail* stated, "the rule is designed to keep horses in [the state]"; the article also bolstered its point by quoting Tom Robbins, Vice President of Racing at Del Mar, who stated "[w]e don't want people coming in raiding our

146. *Owner Profile: Jerry Jamgotchian*, EQUIBASE, https://www.equibase.com/profiles/Results.cfm?type=People&searchType=O&eID=1256701 [https://perma.cc/D6NG-7JT6].

147. *Id.*

148. *Id.*

149. *Supreme Court Decides Important Dormant Commerce Clause Case*, *supra* note 140; Sampson, *supra* note 104.

horses."[150] Accordingly, the question is no longer if, but rather when, the Supreme Court will finally make its findings on the protectionist legislation promulgated by the states.

150. Tracy Granz, *Claiming Jail*, THOROUGHBRED OWNERS OF CAL., https://toconline.com/publication/claiming-jail/#:~:text=With%20apologies%20to%20the%20game,or%20less%20for%2025%20days [https://perma.cc/6JT3-72DE].

THE MELODIC MAZE OF GENERATIVE AI: NAVIGATING COPYRIGHT AND PUBLICITY PROTECTIONS

Brooke Sause[*]

Abstract

The rapid advancement of Artificial Intelligence (AI) in recent years has fundamentally altered the landscape of creative expression. Specifically, generative AI technology has revolutionized how we interact with information, art, and entertainment, blurring the lines between human creativity and machine-generated content. As AI-generated works proliferate across various domains, from visual arts to music composition, profound legal questions and ethical dilemmas have emerged. We currently find ourselves navigating a landscape filled with legal gray areas regarding protections and guidance for creators. As we grapple with whether existing laws can adequately address these revolutionary AI-driven innovations or if entirely new legal frameworks are needed, the complexities surrounding AI-generated content continue to grow. Ultimately, this Note contends that the use of data training to emulate specific artists in AI-generated music should be deemed not only as copyright infringement but also as a violation of individuals' rights of publicity. This Note also aims to contribute to the ongoing discourse surrounding AI-generated content and to advocate for a more equitable and transparent framework that balances innovation with ethical considerations and respect for creative and personal rights.

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INTRODUCTION

There's a common phrase in the English language, "to wear one's heart on their sleeve," meaning "to be open and vulnerable," but what does that really mean when it is said by one with no heart at all, but rather, Artificial Intelligence? In April 2023, a song titled "Heart on My Sleeve" was released, utilizing the voices of Drake and The Weeknd. However, debate quickly arose when fans realized that the song was not the work of the world-famous artists but rather a product of Artificial Intelligence. Soon, the world knew that the AI-generated piece was uploaded by a creator known as "Ghostwriter."[1]

After the release of "Heart on My Sleeve," the track quickly went viral on music platforms such as Spotify and Apple Music, and gained further traction on social media sites like TikTok.[2] The track featured original lyrics and music composed by Ghostwriter but incorporated AI-generated voices which sounded almost identical to Drake and The Weeknd.[3] The usage of the famous artists' voices, along with the sheer shock of something new, resulted in the song gaining immense popularity, racking up millions of streams across various platforms.[4]

However, Universal Music Group (UMG), a premiere label that houses Drake and The Weeknd, promptly reported this content to its streaming partners for intellectual property concerns, resulting in the song being taken down.[5] Many speculate that UMG's ability to get the song taken down was due to Ghostwriter's sampling of Metro Boomin's

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1. Jordan Pearson, *A Viral AI-Generated Drake Song by 'Ghostwriter' Has Millions of Listens*, VICE (Apr. 17, 2023, 11:19 AM), https://www.vice.com/en/article/wxj5gw/heart-on-my-sleeve-ai-ghostwriter-drake [https://perma.cc/X9NM-EYNG].

2. *Id.*

3. Melissa Ruggieri, *The AI-Generated Song Mimicking Drake and The Weeknd's Voices Was Submitted for Grammys*, USA TODAY (Sept. 6, 2023, 4:48 PM), https://www.usatoday.com/story/entertainment/music/2023/09/06/ghostwriter-drake-the-weeknd-song-submitted-grammy-awards/70779575007/#:~:text=The%20AI%2Dgenerated%20song%20using,on%20My%20Sleeve%22%20went%20viral [https://perma.cc/A7HH-P8FC].

4. Pearson, *supra* note 1.

5. Joe Coscarelli, *An A.I. Hit of Fake 'Drake' and 'The Weeknd' Rattles the Music World*, N.Y. TIMES (Apr. 24, 2023), https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html [https://perma.cc/JG62-J8JM].

producer tag in the beginning, which was a violation of copyright laws.[6] Experts acknowledged that the song's use of AI fell into an expanding legal gray area—homemade tracks that use generative AI technologies to conjure familiar sounds that can be passed up as authentic.[7] If the producer tag had not been included in the song, it is unclear what UMG could have legally claimed to get the song removed.

In a statement issued by UMG, the company raised concerns about the training of generative AI using artists' music.[8] The statement questioned which side of history stakeholders in the music ecosystem wished to be on—one that supports artists, fans, and human creative expression or one that promotes deep fakes, fraud, and the denial of artists' rightful compensation.[9] The statement emphasized the critical legal and ethical responsibility of platforms to prevent their services from being used in ways that harm artists.[10] For many artists and businesses that own their work, the utilization of AI poses a formidable challenge. For creative processes, there is now a complex intersection between AI-generated content, the right of publicity, and copyright law, such as that exemplified in Ghostwriter's case, a poignant example of AI utilization in creative work. This Note will navigate the complex terrain of AI-generated content and will often refer to the Ghostwriter situation as a useful example for analysis; however, it is not a current reflection upon this area of uncertain law.

This Note will primarily focus on the use of AI-generated content within the music industry, specifically the intricate intersections of copyright law and the right of publicity. By delving into these legal frameworks, examining pertinent cases in these areas, and drawing parallels between ongoing legal battles and established copyright precedents, this Note seeks to unravel the implications of utilizing AI to produce content that emulates specific artists and how AI-generated content will challenge traditional notions of intellectual property rights and personal identity.

First, this Note will provide an overview of copyright law and its relevance in the context of AI-generated music, emphasizing the concept of data training and its implications for creative ownership. Second, this Note will delve into the right of publicity, analyzing its significance in

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6. *Id.*

7. Joe Coscarelli, *Ghostwriter Returns with an A.I. Travis Scott Song, and Industry Allies*, N.Y. TIMES (Sept. 5, 2023), https://www.nytimes.com/2023/09/05/arts/music/ghostwriter-whiplash-travis-scott-21-savage.html [https://perma.cc/7NUS-8BRU].

8. Archie Brydon, *Heart on My Sleeve – AI-Generated Drake and Weeknd Track Taken Down After Copyright Claim from Universal Music Group*, WHY NOW (Apr. 18, 2023), https://whynow.co.uk/read/heart-on-my-sleeve-ai-generated-drake-and-weeknd-track-taken-down-after-copyright-claim-from-universal-music-group [https://perma.cc/3N2A-X9BU].

9. *Id.*

10. *Id.*

safeguarding individuals' identities and likenesses from unauthorized exploitation. This Note will also discuss existing legal instruments such as the NO FAKES Act and Section 230 of the Communications Decency Act and evaluate their efficacy in addressing the unique challenges posed by AI-generated content. Ultimately, this Note will propose considerations for legislative action, which highlight the need for comprehensive reforms that uphold the integrity of intellectual property rights and protect individuals' rights to control their own likeness in the digital age.

I. COPYRIGHT LAW

A. *Data Training: What Is It? How Does it Relate to Copyright Law?*

Current events have left the general population asking how it is possible for AI technology to create art that is nearly identical to artists; the answer is data training. Data training refers to the process by which Artificial Intelligence systems are "trained" to craft literary, visual, and various artist creations through exposure to copious amounts of data, including text, images, and other content downloaded from the Internet.[11] This training process involves making digital copies of existing works.[12] For example, OpenAI, an artificial intelligence organization, trains its programs on "large, publicly available datasets that include copyrighted works" and has acknowledged that its process "involves first making copies of the data to be analyzed."[13] Once the AI has made copies and analyzed the public work, the systems are able to learn from and mimic human behavior, utilizing copyrighted works as inputs to create new, "original" outputs.[14]

This data training process has raised the question of whether the use of copyrighted materials by AI systems constitutes copyright infringement, or whether it is protected under the Fair Use Doctrine. There are many exclusive statutory rights for the owner of a copyright under 17 U.S.C. § 106, which provides protection to owners who have original works of authorship fixed in a tangible form of expression.[15] These include, but are not limited to, the reproduction of the copyrighted work in copies or phonorecords, preparation of derivative works based upon the copyrighted work, and distribution of copies or phonorecords of

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11. CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB10922, GENERATIVE ARTIFICIAL INTELLIGENCE AND COPYRIGHT LAW (2023).

12. *Id.*

13. *Id.*

14. Dunlap Bennett & Ludwig PLLC, *AI Art & Copyright Part 2: Artificial Intelligence or Artfully Infringing?*, DUNLAP BENNETT & LUDWIG PLLC (Apr. 7, 2023), https://www.dbllawyers.com/ai-generated-copyrighted-material/ [https://perma.cc/A4KH-U89X].

15. 17 U.S.C. § 106.

the copyrighted work to the public sale or other transfer of ownership.[16] However, there are limitations on these exclusive rights, such as works that would be considered "fair use" under 17 U.S.C. § 107.[17]

In determining whether the use of a copyrighted material is fair use, there are four factors to take into account: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[18]

The first factor—purpose and character of the use—is also known as the "transformative factor."[19] Here, one must look at how the material is being used, whether the material has been used to create something new or merely copied verbatim into another work.[20] Copyright law attempts to promote scholarship, research, education, and commentary; therefore, a court is more likely to find fair use when the defendant's use of the copyrighted work is noncommercial, educational, or scientific.[21]

Under the second factor—the nature of the work—a court will look at whether the copied work is informative or for purposes of entertainment.[22] This factor centers on the work being used, and the law allows for a wider or narrower scope of fair use depending on the characteristics of the work.[23] Courts tend to give greater protection to creative works, like art, music, poetry, film, as compared to nonfiction works.[24]

Regarding the third factor—the amount or substantiality of the portion used—the general rule is "the more you use, the less likely you are within fair use."[25] However, sometimes "even a small amount of work can be too much if it can be considered the heart of the work"; other times, substantial portions can be used, as long as a recognized exception

16. *Id.*

17. *Id.*; 17 U.S.C. § 107.

18. Rich Stim, *Measuring Fair Use: The Four Factors*, STANFORD LIBRARIES, https://fairuse.stanford.edu/overview/fair-use/four-factors/#:~:text=The%20Transformative %20Factor%3A%20The%20Purpose,copied%20verbatim%20into%20another%20work [https://perma.cc/NG73-KXK9].

19. *Id.*

20. *Id.*

21. Richard Stim, *Fair Use: The 4 Factors Courts Consider in a Copyright Infringement*, NOLO (June 20, 2023), https://www.nolo.com/legal-encyclopedia/fair-use-the-four-factors.html [https://perma.cc/GGQ2-ANL3].

22. Stim, *supra* note 18.

23. Stim, *supra* note 18.

24. *Fair Use*, COLUM. UNIV. LIBRS., https://copyright.columbia.edu/basics/fair-use.html [https://perma.cc/K2MF-E4CN].

25. *Id.*

applies.[26] For example, in a landmark fair use case, the United States Supreme Court applied the fair use analysis to parody when reviewing 2 Live Crew's commercial parody of Roy Orbison's song, "Oh, Pretty Woman."[27] The Court concluded that parody, like any other use of an original work, must be judged on a case-by-case basis under the fair use factors.[28] The Court further explained that for a work to be considered parody under copyright law, it must noticeably mimic the original work and comment, at least in part, on the substance of the mimicked material.[29]

The fourth and final factor—the effect of the use on the potential market for or value of the work—is the most complicated.[30] This factor looks at whether the use may deprive the copyright owner of income or undermine a new or potential market for the copyrighted work.[31] It also considers whether one could have purchased or licensed the copyrighted work; if one is able to, this weighs against a finding of fair use.[32]

Proponents of AI-generated content argue that utilizing AI and their training process constitutes fair use under the above factors and does not infringe on copyright.[33] For instance, OpenAI maintains that AI-generated content qualifies as "transformative" rather than "expressive" because the process creates a "useful generative AI system."[34] Open AI also argues that usage of AI qualifies as fair use because the copies themselves are not being made available to the public.[35] To support their argument, Open AI relies on *The Authors Guild, Inc. v. Google, Inc.*, in which the U.S. Court of Appeals for the Second Circuit determined that "Google's unauthorized digitizing of copyright-protected works, creation of a search functionality, and display of snippets from those works" constituted fair use because (1) the purpose was "transformative"; (2) the public display of the copyrighted text was limited; and (3) the snippets publicly shared by Google did not provide a "significant market substitute" for the original.[36] Another example comes from the AI company, Stability AI, which suggests that there is no infringement when using AI because a properly trained model does not store the works;

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26. *Fair Use*, PURDUE UNIV., https://www.lib.purdue.edu/uco/fair-use#:~:text=The%20third%20factor%20looks%20at,in%20favor%20of%20requesting%20permission [https://perma.cc/4FRK-VB23].
27. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572–74 (1994).
28. *Id.* at 581.
29. *Id.* at 580–81.
30. *Fair Use*, *supra* note 24.
31. Stim, *supra* note 18.
32. *Fair Use*, *supra* note 24.
33. ZIRPOLI, *supra* note 11.
34. ZIRPOLI, *supra* note 11.
35. ZIRPOLI, *supra* note 11.
36. *Id.*; Authors Guild v. Google, Inc., 804 F.3d 202, 229 (2d Cir. 2015).

rather, the result of the training process is software that has acquired specific behaviors.[37]

B. *Applying Copyright Precedent: Andy Warhol*

One of the most notable cases that demonstrates the concept of fair use in copyright law is the 2023 Supreme Court Case *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith.*[38] In 1984, Lynn Goldsmith, a photographer, licensed *Vanity Fair* magazine to use a photo that she had taken of Prince as an artist reference on the condition that it was for a one-time use only.[39] The artist hired by the magazine, Andy Warhol, made a silkscreen portrait of Prince based on the licensed photograph, which was published alongside an article in *Vanity Fair*.[40] Although Warhol was authorized to use the photograph only once, he created fifteen other works based on the photograph called the "Prince Series," which the Andy Warhol Foundation (AWF) later licensed to others.[41] Goldsmith did not know about the works until 2016.[42] AWF contended that the lower court's decision should be overturned because the Prince Series works were "transformative" as they conveyed a different meaning or message than the original photograph.[43] However, the Supreme Court noted that although new expression is relevant, it must be weighed against other considerations like commercialism.[44] The Court held in favor of Goldsmith because although a new expression was added, Warhol's use of the photo for his other art pieces shared substantially the same purpose as the original photo.[45]

The court in *Warhol* emphasized in their analysis of fair use that one must look to whether the use is of a commercial nature.[46] This involves looking at the reason for and nature of the new work.[47] The central question is whether the new work serves the same purpose, and could potentially "substitute for" the original, or if it serves a different purpose than the original, thus, contributing to education and art.[48] The Court also emphasized that the work must be "transformative" in nature, and the

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37. Ben Brooks, *Statement to the U.S. Senate AI Insight Forum on Transparency, Explainability, and Copyright*, STABILITY.AI (Nov. 29, 2023), https://stability.ai/news/copyright-us-senate-open-ai-transparency [https://perma.cc/K96A-CNAS].

38. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 520 (2023).

39. *Id.* at 515.

40. *Id.*

41. *Id.*

42. *Id.* at 518.

43. *See id.* at 522.

44. Warhol, 598 U.S. at 525.

45. *Id.* at 550.

46. *Id.* at 532–33.

47. *Id.* at 528.

48. *Id.*

alleged fair use must not interfere with a copyright owner's exclusive rights to prepare derivative works.[49]

The *Warhol* decision will likely be applicable to modern-day generative AI issues. Advocates of AI-generated art, like Ghostwriter, might argue that AI-generated outputs, particularly those crafting original songs with unique lyrics and melodies, should unequivocally be classified as "transformative," unlike the Prince Series, which had a clear resemblance to the original photograph.[50] The crux of their argument would lie in the contention that these AI systems create compositions that significantly deviate in purpose and meaning from the original works on which they were trained. Proponents may emphasize the unique nature of computer-generated content, contending that it safeguards against substituting the original, human-created song.

In contrast, those against AI-generated music may argue that data training would fail the elements of fair use for several reasons. For instance, it can be argued that although the output of AI systems creates music changed beyond recognition from the original source, the process of data training is not fair use. The data training is done with entire catalogs and the process arguably enables the creation of market substitutes for the copyrighted work it appropriates—either by creating actual replicas that can be swapped out for originals or more broad musical content like soundalikes and lyrics.[51] Further, opponents may assert that the use of music for training is in conflict with the exclusive right to produce derivative works of the music community.[52] Artists routinely reinvent their own songs, and publishers license their songs to be used in other compositions.[53] Using this content to produce derivative works without consent may be the equivalent of taking away the opportunity for artists or licensors to make that choice themselves.[54]

C. *Ongoing Cases Regarding Data Training and Copyright*

Given the rapid and widespread use of AI-generated art combined with there being practically no regulations in place, nor precedent that would be directly on point, it is no surprise that there are already several ongoing cases highlighting the challenges and potential outcomes that may potentially emerge in music-related lawsuits. For instance, Getty Images filed a lawsuit alleging that Stability AI used an extensive

49. *See id*. at 541.

50. *See* Warhol, 598 U.S. at 550.

51. Universal Music Group, *Comment Letter on Artificial Intelligence and Copyright*, UNITED STATES COPYRIGHT OFFICE (2023), at 45, https://www.musicbusinessworldwide.com/files/2023/11/Universal-submission.pdf [https://perma.cc/U5CJ-GSKS].

52. *Id.*

53. *Id.* at 45–46.

54. *Id.* at 46.

collection of over twelve million photographs, along with the associated captions and metadata, without license from Getty Images or any compensation being given to them.[55] Within its copyright infringement claim, Getty Images explained that, under limited circumstances, it has licensed the use of its visual assets and data for the development of machine learning tools.[56] Despite this, Stability AI chose to copy at least twelve million copyrighted images in order to train its AI model, showing callous disregard for Getty Images' rights.[57] Furthermore, Getty Images also argued that Stability AI engaged in this infringement for their own commercial benefit.[58] Getty Images claimed they were entitled to recover actual damages and any profits obtained by Stability AI.[59] To safeguard against the potential for ongoing harm, Getty Images also requested that the court permanently enjoin Stability AI from these acts of infringement.[60]

Another notable lawsuit was filed by UMG in a Nashville District Court against Anthropic, an AI company.[61] UMG essentially argued that in the process of data training, Anthropic was violating copyright laws.[62] Like Getty Images, UMG also argued that AI companies should not be data training using copyrighted materials without a license or authorization from copyright owners:

> Indeed, there is an existing market through which Publishers license their copyrighted lyrics, ensuring that the creators of musical compositions are compensated and credited for such uses. By refusing to license the content it is copying and distributing, Anthropic is depriving Publishers and their songwriters of control over their copyrighted works and the hard-earned benefits of their creative endeavors, it is competing unfairly against those website developers that respect the copyright law and pay for licenses, and it is undermining existing and future licensing markets in untold ways.[63]

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55. Complaint at 1, Getty Images, Inc. v. Stability AI, Inc., No. 1:23-cv-00135-UNA, (D. Del. Feb. 3, 2023), https://fingfx.thomsonreuters.com/gfx/legaldocs/byvrlkmwnve/GETTY%20IMAGES%20AI%20LAWSUIT%20complaint.pdf [https://perma.cc/2EKC-6CFZ].

56. *Id.* at 2.

57. *Id.* at 3.

58. *Id.* at 23.

59. *Id.* at 26.

60. *Id.* at 24.

61. Complaint at 1–2, Concord Music Grp. Inc., et. al. v. Anthropic PBC, No. 3:23-cv-01092 (M.D. Tenn. Oct. 18, 2023), https://storage.courtlistener.com/recap/gov.uscourts.cand.431519/gov.uscourts.cand.431519.1.0.pdf [https://perma.cc/K3EN-EQPE].

62. *Id.* at 3.

63. *Id.* at 13–14.

In essence, UMG argues that the AI company's non-compliance undermines existing and future licensing markets in various ways.[64] UMG, like other labels that sign artists, owns or controls exclusive rights for the numerous works created by their artists, as well as the copyright licenses associated with the works.[65] UMG exercises care and strategy to determine how these works are experienced, released, and marketed.[66] Those, like UMG, who are opposed to AI-generated art argue that the process robs the artists, songwriters, and creative community of that control by appropriating this material on a massive scale without a license.[67]

However, UMG's broad claim that data training itself is always a violation of copyright laws may not be a successful argument. In a recent California case, *Kadrey v. Meta Platforms*, *Inc.*, the plaintiffs argued that the unauthorized use of their books in data training for a new AI model constituted copyright infringement.[68] The plaintiffs also alleged that every output created by the AI model constituted infringement of derivative work and that because third-party users initiated each output, every output constituted an independent act of vicarious copyright infringement.[69] The court rejected these notions, holding that the plaintiffs "offered no allegation of the contents of any output, let alone of one that could be understood as recasting, transforming, or adapting the plaintiffs' books."[70] For the plaintiffs to prevail in this case, they would have needed to prove that the model's outputs incorporated at least a portion of their books.[71]

II. THE RIGHT OF PUBLICITY

A. *The Right of Publicity: What Is It? How Does it Relate to AI-Generated Content?*

Data training systems train by inputting vast amounts of data to create outputs of new work that can sound or look nearly identical to a particular person. The incident revolving around Drake and The Weeknd with "Heart on My Sleeve" is not a single occurrence; rather, it has become a widespread trend on social media. For instance, people can direct an AI

64. *See id.* at 5–6.

65. *See id.* at 13.

66. *Id.* at 12.

67. Complaint at 15, Concord Music Grp. Inc., et. al. v. Anthropic PBC, No. 3:23-cv-01092 (M.D. Tenn. Oct. 18, 2023), https://storage.courtlistener.com/recap/gov.uscourts.cand.431519/gov.uscourts.cand.431519.1.0.pdf [https://perma.cc/29VN-RJMY].

68. Kadrey v. Meta Platforms, Inc., 23-cv-03417-VC, 2023 U.S. Dist. LEXIS 207683, at *1 (N.D. Cal. Nov. 20, 2023).

69. *Id.*

70. *Id.*

71. *Id.*

system to sound like the British pop singer Harry Styles but use his voice to "sing" a song by Taylor Swift.[72] These videos can accumulate hundreds of thousands of views, which brings forth the following question: is it fair that someone else is potentially profiting off of this celebrity's sound and popularity when that celebrity did not consent to it? Thus, the issue of AI-generated music not only raises concerns about copyright law but also includes issues under the right of publicity. While the discourse surrounding generative AI has primarily focused on the role of copyright, many proprietors believe that the right of publicity may be more helpful in determining whether these systems violate artists' rights.[73]

The right of publicity is generally defined as a state law tort that is aimed at preventing the unauthorized use of a person's identity.[74] Currently, there is no federal cause of action for the right of publicity; however, about two-thirds of states recognize some form of the claim.[75] Therefore, while protections under the right of publicity vary depending on the jurisdiction, they typically protect the right to "a personality's name, image, voice, signature, and likeness."[76] Generally, in order to establish a viable claim for a publicity violation, a claimant must establish the validity of their claimed right of publicity and that the defendant has infringed on this right.[77] The Third Restatement of Unfair Competition also provides specific guidelines for this claim, explaining that, to succeed on their claim, a claimant must demonstrate that the defendant, without authorization, used some aspect of the claimant's identity or persona in a way that clearly identifies the claimant in the defendant's work and that the defendant's work is likely to diminish the commercial value of the claimant's persona.[78]

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72. Usersxvwx08f21 (@usersxvwx08f21), TIKTOK (Jan. 1, 2024), https://www.tiktok.com/@usersxvwx08f21/photo/7319094939206339873 [https://perma.cc/5L C2-J3GV].

73. Douglas L. Johnson & Daniel D. Lifschitz, *Generative AI Must Account for Artists' Rights of Publicity*, DAILY J. (Oct. 30, 2023), https://www.dailyjournal.com/articles/375433-generative-ai-must-account-for-artists-rights-of-publicity [https://perma.cc/TU9C-PHCA].

74. Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 89 (Oct. 2020), https://www.yalelawjournal.org/article/the-first-amendment-and-the-rights-of-publicity#_ftnref1 [https://perma.cc/6S95-2S9N].

75. Emily Alexandra Poler, *What's Real, What's Fake: The Right of Publicity and Generative AI*, ABA (Aug. 7, 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-august/whats-real-whats-fake-the-right-of-publicity/ [https://perma.cc/CJQ3-Y92V].

76. Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, ABA (Sept. 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/ (last visited Feb. 13, 2025).

77. *Id.*

78. *Id.*

B. *Applying Right of Publicity Cases to AI-Contexts*

To gather an understanding of the protections that come from the right of publicity, it is helpful to examine precedent to see how the court applies these rules. One of the most notable and illustrative cases that focuses on the right of publicity is *Midler v. Ford Motor Co.*[79] In this case, Ford and its advertising agency aimed to get notable singers from the 1970s to sing in certain commercials, including Bette Midler.[80] When Midler's team was contacted, they declined the opportunity, stating she was uninterested.[81] Subsequently, Ford sought out Ula Hedwig, who was a former backup singer for Midler, to sing in the commercial, asking her to "sound as much as possible like the Bette Midler record."[82] After the commercial was aired, many told Hedwig that it sounded exactly like Midler.[83] While the defendants did have a license from the copyright holder to use the song, the issue in this case was the protection of Midler's voice.[84] The Ninth Circuit Court of Appeals held that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs . . . ."[85] The court went on to state that summary judgment for Ford was inappropriate in this case because Midler had shown that the defendants appropriated part of her identity for purposes of profit.[86] Further, the court noted that a voice is as distinctive and personal as a face and that "the human voice is one of the most palpable ways identity is manifested."[87]

Midler demonstrated that the right of publicity extends beyond physical likeness, allowing future plaintiffs leeway when defendants use characteristics or sounds to evoke a celebrity's likeness.[88] If a song imitates a celebrity without their permission, it raises concerns akin to *Midler*, especially if the imitation is for commercial gain. While *Midler*, which was decided in 1988, did not involve the use of AI and data training, it is possible that courts may apply its holding to generative AI cases due to the similarity between Ford seeking out a soundalike voice for monetary gain and the deliberate imitation of world-renowned voices for fame and fortune, as seen in the new AI cases.

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79. *See* Milder v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).
80. *Id.* at 461.
81. *Id.*
82. *Id.*
83. *Id.* at 461–62.
84. *Id.* at 462.
85. Milder, 849 F.2d at 463.
86. *Id.* at 463–64.
87. *Id.* at 463.
88. *Id.*

Another notable case, *Abdul-Jabbar v. General Motors Corp.*, illustrated how a celebrity may successfully argue that a company's use of their identity causes confusion about the celebrity's participation or sponsorship.[89] In this case, a famous basketball player, Abdul-Jabbar, brought a right of publicity claim against General Motors for using his birth name in an advertisement for Oldsmobile Cars.[90] Abdul-Jabbar complained that the viewers of the commercial may believe that he agreed to have his name in the advertisement and endorsed Oldsmobile cars.[91] He argued that "the right of publicity protects not only a celebrity's 'sole right to exploit' his identity . . . but also his decision not to use his name or identity for commercial purposes"; the court agreed.[92]

This is particularly relevant because it demonstrates an additional reason that a celebrity or public figure might evoke protections under the right of publicity, beyond concerns of commercial exploitation. For instance, if a social media user encounters content resembling the style of a well-known artist, such as Drake, that is accompanied by an image or text proclaiming "Drake singing . . ." a potential issue may arise. Users might be misled into believing that Drake is the performer on the track, that the song is a collaboration, or that Drake endorses the specific song and the message it conveys. This not only induces a risk of associating celebrities with certain songs or music but also poses a threat of diluting or lessening the existing market value.[93]

A parallel example is *Carson v. Here's Johnny Portable Toilets*, *Inc.*, which highlights the significance of protecting a celebrity's identity for this reason.[94] In this case, appellant, John W. Carson, the host of "The Tonight Show," which began in 1962, coined the phrase "Here's Johnny" as a method of introduction on the show and was generally associated with it.[95] When a company called "Here's Johnny Portable Toilets, Inc.," emerged, the Sixth Circuit Court of Appeals concluded that the appellants were entitled to judgment because the appellee appropriated the appellant's identity in connection with its corporate name and its product.[96] The court was concerned that the defendant's offending use could potentially tarnish the value of Carson's brand by associating him with porta-potties and that the proliferation of unauthorized uses might

89. Post & Rothman, *supra* note 74, at 110; Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407 (9th Cir. 1996).

90. Abdul-Jabbar, 85 F.3d at 409.

91. *Id.* at 409–10.

92. *Id.* at 415.

93. Post & Rothman, *supra* note 74, at 26.

94. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983).

95. *Id.* at 832–33.

96. *Id.* at 837.

diminish the value of Carson's brand when it came to obtaining compensation for sanctioned endorsements.[97]

The outcome of this case may be applicable to AI-generated music scenarios like "Heart on My Sleeve," in which Ghostwriter used AI software to generate voices emulating Drake and the Weeknd. In both *Carson* and the Heart on My Sleeve scenario, the unauthorized use of these personas goes beyond expression, potentially extending into the realm of commercial exploitation or unjust enrichment. Modern commentators argue that everyone has a legitimate interest in defining themselves, and that oftentimes, an individual's character is shaped by the messages conveyed by and through their associations.[98] Accordingly, if an individual's identity is used without authorization by a third party, and a particular association is attached to them through this use, this may put an individual's autonomy at risk.[99]

Similarly, another case that touches on a celebrity's "sole right to exploit" is the 1977 United States Supreme Court case, *Zacchini v. Scripps-Howard Broadcasting Co.*[100] Here, the plaintiff Zacchini, objected when a news station recorded his performance and subsequently broadcasted the footage on nightly news.[101] The Supreme Court observed that the broadcast of the petitioner's entire performance posed a significant risk to its economic value, as much of that value stems from having exclusive control over the publicity of the act.[102] Essentially, the court reasoned that if people can watch performances for free on television, they will be less inclined to pay to see it live at the fair.[103]

Applying the same logic, this case serves as a poignant precedent for AI-generated music. Without regulations governing the use of a celebrities' likeness, a tangible threat emerges to the economic value of that artist's work. Consider, for example, AI using Drake's voice to create an abundance of songs available for free. This scenario may disincentivize fans from purchasing records or streaming songs. It may even cause a shortage of fans attending performances by the real artist, especially if those fans like or even prefer the AI songs that will never be performed by the artist. Analogous to the news broadcasting Zacchini's act, the widespread availability of AI-generated content could diminish the audience's willingness to engage with genuine artistic expression, impacting the artist's economic standing.

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97. *Id.*
98. Post & Rothman, *supra* note 74, at 119.
99. Post & Rothman, *supra* note 74, at 119.
100. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977).
101. *Id.* at 563–65.
102. *Id.* at 575.
103. *Id.*

III. CONSIDERATIONS FOR CONGRESS

Despite AI-generated art and the data training process presenting significant potential**,** there are also substantial risks, especially for artists who are copyright holders. However, these risks can be managed if Congress analyzes the issues and creates innovative solutions that balance the rights of the proponents of AI, and the copyright holders who may be opposed to AI. This Note proposes a few suggestions to consider in creating this solution.

A. *Copyright Considerations*

Extensive research must be done before Congress makes any bright-line rules amending copyright law to address the idea that data training violates copyright law. However, many suggestions have been circulating within the discussion of what Congress should do about copyright law to protect artists' work and prevent data training that violates that artist's rights. Some of these ideas include requiring disclosure, requiring a license before the data can be trained with, and an amendment to section 106 of the Copyright Act.

Mandating businesses to disclose their use of copyrighted materials could enhance transparency in the development of AI.[104] These disclosures would help consumers, stakeholders and the public become fully informed about the origins of the new material they are taking in.[105] Additionally, these disclosures could include information that properly recognizes the original creators.[106]

Obtaining a license from the copyright owner prior to data training has also been suggested. A music license is created when a copyright holder (the artist) permits a purchaser to use their work publicly and, in exchange, receives compensation through fees or royalties, as outlined in a contractual agreement.[107] These licenses may be temporary or perpetual, and are sometimes even available for outright purchase from the copyright owner.[108] For instance, big record labels license all of their

104. Irina Tarsis et al., *Comment Letter from the Center for Art Law on Artificial Intelligence and Copyright*, CTR. FOR ART L. (2023), https://www.google.com/url?sa=i&url=https%3A%2F%2Fdownloads.regulations.gov%2FCOLC-2023-0006-8315%2Fattachment_1.pdf&psig=AOvVaw0sT8gN8TZvTquY_TL-kNim&ust=1729124688153000&source=images&cd=vfe&opi=89978449&ved=0CAYQrpoMahcKEwjAlfHH0ZGJAxUAAAAAHQAAAAAQBA [https://perma.cc/AUG5-3NJT].

105. *Id.* at 6.

106. *Id.*

107. *How Does Music Licensing Work?*, INDIE MUSIC ACADEMY, https://www.indiemusicacademy.com/blog/music-licensing-overview [https://perma.cc/P4MQ-VAQJ].

108. *Id.*

content to major streaming services, including Apple and Spotify.[109] Licensing also occurs when a creator wishes to use a sample from a copyrighted work.[110] UMG in particular, has claimed to be open to exploring licensing content to generative AI companies to build a fair and lawful business model.[111]

Another proposed idea is an amendment to section 106 of the Copyright Act that would explicitly state that "the use of copyrighted works for training of generative AI is an exclusive right of the copyright owner."[112] This amendment could be introduced to section 106 as a new right or added as an explicit violation of the reproduction right.[113] Such a modification would offer content owners and AI developers a more defined guideline that would minimize ambiguity and excess litigation.[114]

However, given that AI training occurs in varied circumstances and for a variety of purposes in the United States, some believe that until we learn more about generative AI, the best solution going forward may be to review each case on a fact-by-fact basis, rather than create a bright line rule or amendment. For instance, fair use law may serve to protect situations in which data training would satisfy the purpose of furthering public education and providing social utility because these uses align with the rationale embedded in copyright law.

On the contrary, if the generative AI is created for purposes of imitating an artist, resulting in commercial exploitation, perhaps it should be considered infringement. Given the recent emergence of generative AI content and the relatively slow pace of legal and governmental systems, the trajectory of development pertaining to new copyright legislation or an amendment regarding Artificial Intelligence may be premature. Nevertheless, it is imperative that artists are protected against potential exploitation, and only time will tell what protections they will be given.

B. *Right of Publicity Considerations: Federal Right of Publicity & The NO FAKES Act*

One of the key concerns surrounding the right of publicity challenges revolves around the extent of First Amendment rights afforded to defendants. Courts currently grapple with inconsistent tests when resolving conflicts between First Amendment and right of publicity claims. For instance, in *Cardtoons, L.C. v. Major League Baseball*

109. Universal Music Group, *Comment Letter on Artificial Intelligence and Copyright*, U.S. COPYRIGHT OFF. (2023), at 63, https://www.musicbusinessworldwide.com/files/2023/11/Universal-submission.pdf [https://perma.cc/5JPV-8PHK].

110. *Id.* at 64.

111. *Id.* at 65.

112. *Id.* at 21.

113. *Id.*

114. *Id.*

Players Association, a federal district court held that trading cards featuring caricatures of Major League Baseball Players were contrary to Oklahoma's right of publicity statute on its face.[115] However, the issue in the case was whether an exception for parodies was necessary to align the statute with the First Amendment.[116] The court balanced the interplay between copyright and publicity rights, and ultimately found that the trading cards, which constituted commercial parody, were protected under the First Amendment.[117] Furthermore, in *Winter v. DC Comics*, the Supreme Court of California determined that the use of characters in a comic book that evoked Johnny and Edgar Autumn did not violate their right of publicity because the plaintiffs were depicted using significant transformative components—in fact, they were depicted as half human, half worm.[118]

Given that right of publicity laws vary by state, many commentators have called for federal right of publicity legislation in order to provide more predictable right of publicity protections in the United States.[119] Others rely on federalism principles, arguing that it is a matter that should be left to the states.[120] If Congress ultimately considers legislation protecting the right of publicity, it will need to determine how broad or narrow to make the protection, for instance, which aspects are protected and who can make the claim.[121] Congress will also need to consider whether a federal right of publicity law would preempt state right of publicity laws or leave existing laws in place.[122] Some commentators advocate for federal preemption as a means of achieving greater uniformity, while others suggest that Congress should only establish a minimum level of protection.[123]

In an effort to combat these issues, a group of senators proposed new legislation to protect the voice and visual likeness of all individuals from unauthorized recreations by generative AI; this legislation is titled the "Nurture Originals, Foster Art and Keep Entertainment Safe Act" of 2024, or the "NO FAKES Act."[124] If passed, this legislation would create

115. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 868 F. Supp 1266, 1269 (1994).

116. *Id.*

117. *Id.* at 1271–75.

118. Winter v. DC Comics, 69 P.3d 473, 479 (Cal. 2003).

119. CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB11052, ARTIFICIAL INTELLIGENCE PROMPTS RENEWED CONSIDERATION OF A FEDERAL RIGHT OF PUBLICITY, CONGRESSIONAL RESEARCH SERVICE (2023).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. S. 4875, 118th Cong. (2024).

a uniform, federal right of publicity with respect to images, voices, and visual likeness in sound recordings.[125]

Similar to defenses under state law based on First Amendment grounds, the NO FAKES Act would not extend to digital replicas that are: (i) used in news, public affairs, or sports report; (ii) included in documentaries or historical works where the digital replica portrays the actual individual; (iii) used for commentary, criticism, scholarship, satire, or parody; (iv) featured in advertisements or commercial announcements related the purposes listed above; or (v) deemed de minimis or incidental.[126] As technology and AI-generated content continue to be created and utilize the names, images, and likenesses of non-consenting individuals, the push for a uniform federal regulation, like the NO FAKES Act will become more pronounced.

C. *Section 230 of the Communications Decency Act*

Another consideration that Congress should strongly consider is amending or repealing Section 230 of the Communications Decency Act to impose liability in circumstances where generative AI violates a person's right of publicity or copyright. Under Section 230, users and providers of interactive computer services are granted limited federal immunity, such that they cannot be held liable for information provided by another person.[127] This statute has permitted social media platforms "to grow into the massive online marketplaces they are today."[128] However, many argue that it has resulted in an imbalance of power, giving those wronged on these platforms no relief.

For instance, in *O'Kroley v. Fastcase*, a federal appeals court affirmed that Section 230 barred a defamation lawsuit challenging the way that Google presented its search results.[129] The plaintiff claimed Google was defaming him because a Google entry listed his name next to the phrase "indecency with a child."[130] The court held that although Google performed automated editorial acts on the content, these alterations did

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125. *Id.*

126. Brianne Polito & Matthew Savare, *The No Fakes Act and the Right of Publicity in the Age of Generative AI*, ANA (Dec. 15, 2023), https://www.ana.net/miccontent/show/id/ii-2023-12-fake-act-ai#:~:text=Much%20like%20the%20affirmative%20defenses,individual%20is%20used%20as%20a [https://perma.cc/C8H2-8PR6].

127. VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW, CONGRESSIONAL RESEARCH SERVICE (Jan. 4, 2024).

128. Avi Weitzman & Jackson Herndon, *Generative AI: The Next Frontier for Section 230 of the Communications Decency Act*, N.Y.L.J. (June 26, 2023), https://assets.ctfassets.net/t0ydv1wnf2mi/4LqDaZLG1NvNeWhAoGLxRq/f0f003214772a4c67369de054a9870b8/NYLJ706202344999Paul.pdf [https://perma.cc/SMP5-G9NK].

129. O'Kroley v. Fastcase, 831 F.3d 352, 356 (6th Cir. 2016).

130. *Id.* at 354.

not materially contribute to the alleged unlawfulness of the content.[131] Accordingly, Google was protected by Section 230 and could not be held liable for the allegedly defamatory content.[132]

Another relevant case is *Twitter, Inc. v. Taamneh*, in which the United States Supreme Court held that Twitter was not responsible for deaths resulting from a 2017 ISIS terrorist attack on a nightclub in Turkey.[133] The plaintiffs claimed that Twitter contributed significantly to the attack by knowingly allowing ISIS and its supporters to upload content and utilize Twitter's recommendation algorithms for recruitment and fundraising purposes.[134] However, the Supreme Court held in favor of Twitter, stating that the evidence was too far removed to prove that Twitter consciously and culpably participated in the tort, and that mere knowledge that the group used its platform to promote terrorist activities was not enough to hold Twitter liable.[135]

The Court further explained that the plaintiffs in *Taamneh* failed to identify any duty that would require communication-providers, like Twitter, to terminate customers who are found to be illicitly using its platform.[136] However, even if a duty had been identified, the Court explained that Twitter would not have been liable for aiding and abetting ISIS because there was no allegation that Twitter was doing anything more than transmitting mass amounts of information.[137] Twitter was engaged in an "arm's length, passive, and largely indifferent" relationship with all of its users, and accordingly, could not be held liable when bad actors used the platform to transmit illicit information.[138] The Court reasoned that "a contrary holding would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them."[139] Ultimately, the Court concluded that when the relationship between a communication provider and its user is attenuated, plaintiffs must prove that a communication provider substantially furthered its user's tort by rendering "intentional" or "pervasive and systematic" aid.[140]

Hence, under the current applications of Section 230, these communication providers are essentially untouchable when a user posts illicit content on their platform. Given the potential of generative AI to

131. *Id.* at 355.
132. *Id.* at 354.
133. Twitter, Inc. v. Taamneh, 598 U.S. 471, 477 (2023).
134. *Id.* at 481.
135. *Id.* at 497–99.
136. *Id.* at 501.
137. *Id.* at 502–03.
138. *Id.* at 500.
139. Twitter, 598 U.S. at 503.
140. *Id.* at 506.

spread false information, copyright-infringing materials, and right of publicity materials, it is becoming increasingly important for Congress to carve out an exception related to AI-generated output that would help to protect artists' rights and identities. Additionally, these communication providers should be held accountable for permitting their users, like Ghostwriter, to post AI-generated music that violates the rights of third parties. Threatening to hold the platforms directly liable would provide a stronger incentive for these platforms to promptly remove these illicit materials. These policies would also decrease incentives on behalf of users who choose to post this content.

CONCLUSION

The rise of AI-generated content in music presents complex legal challenges, particularly at the intersection of copyright law and the right of publicity. This Note has explored these challenges, advocating for the protection of an individual's intellectual property rights and control over their likeness. Moving forward, a nuanced approach to addressing the challenges posed by AI-generated conduct is essential. Industries impacted by these challenges must advocate for comprehensive reforms that will uphold the integrity of these intellectual property rights. Furthermore, Congress must take steps to balance the rights of AI proponents with the rights of copyright holders.

FEBRUARY 2025

VOLUME IV

ISSUE I

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