

THE END OF AN ERROR: NO MORE MISCLASSIFYING
UNIVERSITY EMPLOYEES AS MERE STUDENT-ATHLETES

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Abstract

Intercollegiate athletics is big business. The National Collegiate Athletic Association (NCAA), its member universities, and athletic administrators are well compensated for their efforts in making sure that the business runs smoothly. Historically, the athletes on the field, pitch, diamond, or hardwood have been left out of the discussion regarding how to divvy up the eleven-figure fruits of their labor. However, as college student-athletes being dubbed employees appears to be imminent, so too is their opportunity to finally be paid their fair share.

This Note analyzes the ramifications of college athletes achieving employee status. It discusses federal labor law and how it would likely govern the future relationship between athletes and their respective schools. Finally, this Note weighs the positive and negative aspects of college athletes being employees under the law and, ultimately, finds the NCAA’s amateurism model in its death throes of relevancy.

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INTRODUCTION

On September 29, 2021, the National Labor Relations Board’s (NLRB or the Board) General Counsel, Jennifer Abruzzo, issued a memorandum (the Memo) that served as both an invitation and a warning.¹ Abruzzo opened by denouncing the term “student-athlete” and, instead, she declared that classifying these “Players at Academic Institutions” (Players) as “employees” is not only more accurate, but legally correct.² The Memo reads as an invitation to current and future Players—and plaintiff’s attorneys—to challenge the denial of workplace protections by universities and the National Collegiate Athletic Association (NCAA) going forward. Additionally, Abruzzo provided a thinly veiled warning to the NCAA and its member schools that the Players’ “employee” classification is supported by the statutory language of the National Labor Relations Act (NLRA or the Act).³

The Board’s legal position concerning Players as employees is rooted in the definition of “employee” that the Supreme Court of the United States (Supreme Court) has interpreted as following the common law rule of agency.⁴ Under the common law, an employee is “one who performs services for another, under the other’s control or right of control, and does so in return for payment.”⁵ The Board’s attribution of this foundational definition to Players has been bolstered by recent victories at the Supreme Court, a growing distrust in the ideal of amateurism in college sports, and the NCAA’s hands-off approach to Name, Image, and Likeness (NIL) guideline enforcement.⁶ As of December 2022, the NLRB’s Los Angeles Region had plans to pursue “unfair labor practice charges against [the University of Southern California], the [Pacific-12 Conference] and the NCAA as single and joint employers of [NCAA Division I Football Bowl

1. *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, NAT’L LAB. RELS. BD. (Sept. 29, 2021), <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of> [https://perma.cc/DCA7-T94A].

2. Memorandum from Jennifer A. Abruzzo, Gen. Couns., Nat’l Lab. Rel. Bd. To All Regional Directors, Officers-in-Charge, and Resident Officers (Sept. 20, 2021), <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of> [https://perma.cc/DCA7-T94A].

3. *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, *supra* note 1.

4. *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94 (1995).

5. Joseph Peluso, Note, *Caught in the Wave of Change: Why Scholarship Student-Athletes Should Be Allowed to Unionize*, 17 DUQ. BUS. L.J. 259, 262 (2015).

6. *See, e.g., O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 580 U.S. 815, 815 (2016); *NCAA v. Alston*, 141 S. Ct. 2141, 2141–69 (2021); Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NAT’L COLLEGIATE ATHLETIC ASS’N (Oct. 26, 2022, 1:21 PM), <https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx> [https://perma.cc/X7T6-KMUP].

Subdivision] players and Division I men’s and women’s basketball players.”⁷ These past triumphs and upstarted court battles are compounded by the seemingly endless cession of control by the NCAA to Power Five conferences as their autonomy increases with the ballooning values of media rights deals.⁸

In *NCAA v. Alston*—which dealt with the NCAA limiting education-related benefits for student-athletes—Justice Kavanaugh, in his concurrence, admonished the NCAA for acting outside the bounds of antitrust law when he concluded that, “[t]he NCAA is not above the law.”⁹ By all accounts, the NLRB, the Supreme Court, and Players across the country appear to be in favor of college athletes being dubbed “employees.” As this pay-for-play model of college athletics comes to fruition, there must be some discussion on what the legal ramifications are for the Players, the NCAA, and the partner universities, including: (1) Players’ ability to collectively bargain or unionize under Sections 7 and 8 of the NLRA;¹⁰ (2) compliance with equality requirements under Title IX of the Education Amendments of 1972 (Title IX);¹¹ and (3) the continued existence or future need for amateurism and the NCAA.¹²

I. THE HISTORICAL BACKGROUND OF UNIONIZATION ATTEMPTS IN COLLEGE ATHLETICS

Critics of the NCAA claim that it created the term “student-athlete” in the 1950s with the primary purposed of depriving Players of workplace protections.¹³ To this day, the NCAA maintains that the participation of Players in collegiate athletics is all a part of the overall educational experience of attending college and should not be treated as the driving

7. Ross Dellenger, *Significant NLRB Move Will Aid Pursuit of College Athletes Becoming Employees*, SPORTS ILLUSTRATED (Dec. 15, 2022), <https://www.si.com/college/2022/12/15/nlr-college-athletes-employees-pursuit> [<https://perma.cc/C73N-9RTJ>].

8. *Here’s a Look at All the Current Conference TV Deals*, ON3 (Aug. 2, 2021), <https://www.on3.com/news/conference-tv-deals-current-status-college-football/> [<https://perma.cc/7UBY-8NRF>].

9. *NCAA v. Alston*, 141 S. Ct. 2141, 2167–69 (2021) (Kavanaugh, J., concurring).

10. *Requirements Under Title IX of the Education Amendments of 1972*, U.S. DEP’T OF EDUC. OFF. FOR CIVIL RTS. (Jan. 10, 2020), [https://www2.ed.gov/about/offices/list/ocr/docs/interath.html#:~:text=Title%20IX%20of%20the%20Education%20Amendments%20of%201972%20\(20%20U.S.C.,therefore%20covered%20by%20this%20law](https://www2.ed.gov/about/offices/list/ocr/docs/interath.html#:~:text=Title%20IX%20of%20the%20Education%20Amendments%20of%201972%20(20%20U.S.C.,therefore%20covered%20by%20this%20law) [<https://perma.cc/7VGB-Q5XC>].

11. *Interfering with Employee Rights (Section 7 & 8(a)(1))*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1> [<https://perma.cc/KLT4-9WPZ>].

12. *Payment From Sports Team*, NAT’L COLLEGIATE ATHLETIC ASS’N, http://fs.ncaa.org/Docs/eligibility_center/ECMIP/Amateurism_Certification/Payment_from_team.pdf [<https://perma.cc/N4GY-X3FG>] (Apr. 2019).

13. *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, *supra* note 1.

force for doing so.¹⁴ Counterintuitively, the NCAA allows for high school athletes to be compensated by club or travel teams before their matriculation to the college ranks, but forbids these athletes from gaining any monetary benefit from their participation on athletic teams at the college level.¹⁵ Admittedly, the NCAA is not in an enviable position. The NCAA is charged with the creation, promulgation, oversight, and enforcement of rules governing over 1,000 member universities and nearly half a million Players across Division I, II, and III athletics—a tall task for which they are handsomely rewarded.¹⁶ The President of the NCAA, Mark Emmert, was reportedly paid a total of \$2.99 million in 2020, while the organization simultaneously burned over \$52 million in legal fees defending, and losing, the aforementioned *Alston* case at the Supreme Court.¹⁷ The good news for the NCAA is that, as a 501(c)(3) “charitable organization,” it is provided tax exempt status, meaning it does not have to share any of its total reported \$1.1 billion revenue with Players or the federal government.¹⁸

In early 2014—nearly eight years before Abruzzo published the Memo denouncing the term “student-athlete” and calling for a proper classification of collegiate athletes as employees—the Northwestern University (Northwestern) football team made a valiant, albeit failed, attempt at unionization.¹⁹ The players rallied around the team’s then starting quarterback and team captain, Kain Colter, whose primary objective for achieving unionization was to provide access to long-term healthcare for college athletes.²⁰ Northwestern, as a private university, fell under the legal framework of the NLRB as opposed to state law

14. Anthony W. Miller, *NCAA Division I Athletics: Amateurism and Exploitation*, THE SPORT J. (Jan. 3, 2012), <https://thesportjournal.org/article/ncaa-division-i-athletics-amateurism-and-exploitation/> [https://perma.cc/M5FC-QVH4].

15. *Payment From Sports Team*, supra note 12.

16. *The Differences Between NCAA Divisions*, NCSA COLL. RECRUITING, <https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions> [https://perma.cc/CB2A-VGP7].

17. Amanda Christovitch, *Tax Returns Reveal Mark Emmert, Coach K Paydays and NCAA Legal Fees*, FRONT OFFICE SPORTS (May 17, 2022, 4:33 PM), <https://frontofficesports.com/tax-returns-reveal-mark-emmert-coach-k-paydays-and-ncaa-legal-fees/#:~:text=The%20NCAA%20reported%20%242.99%20million,%2452%20million%20in%20legal%20fees> [https://perma.cc/7794-VELN].

18. *Id.*; John D. Colombo, *The NCAA, Tax Exemption and College Athletics*, 210 U. ILL. L. REV. 109, 112 (2010).

19. Joe Nocera and Ben Strauss, *Fate of the Union: How Northwestern Football Union Nearly Came to Be*, SPORTS ILLUSTRATED (Feb. 24, 2016), <https://www.si.com/college/2016/02/24/northwestern-union-case-book-indentured> [https://perma.cc/9A7X-HU5A].

20. *Id.*

concerning labor disputes.²¹ Following the establishment of a partnership with the United Steelworkers Political Action Committee, which agreed to handle all legal disputes on behalf of the Players, Colter obtained signed union cards from thirty percent of the team.²² Then, Colter made his case to the NLRB regional office in Chicago.²³ This NLRB office ultimately found for the players after considering the total number of hours players spent on football-related activities, which far exceeded any academic studies.²⁴ Northwestern would go on to appeal the decision of the regional board to the full NLRB in Washington D.C. In August 2015, the five-member board unanimously decided not to exercise jurisdiction over the issue of Players as employees. Thus, “[t]he status quo reigned,”²⁵ ending the first significant attempt by Players to form a union within the confines of the NCAA and college athletics.

In July 2022, another Big Ten Conference (Big Ten) football program looked to continue the work that Northwestern had started years before. Bolstered by the new college athletics landscape that allowed Players to financially benefit from the monetization of their individual NIL, the Pennsylvania State University (Penn State) football team held a secret meeting.²⁶ The meeting was called by then starting quarterback Sean Clifford, during which, he planned to introduce Jason Stahl, the man behind the newly formed pro-player group called the College Football Player Association.²⁷ Clifford “smuggled” Stahl into the team facility to speak with players about the benefits of forcing Big Ten leadership to discuss collectively bargained rights and benefits that Stahl felt players should be afforded.²⁸ Unfortunately, an assistant strength and conditioning coach of the Nittany Lions stumbled upon the meeting in its waning minutes and shared what he saw with the athletic department’s top brass, which created some backlash for Clifford.²⁹ Despite the legal foundation that the players stood upon, they quickly distanced themselves from any mention of unionization or collective bargaining, likely in an

21. *Id.* (Below we discuss the difficulty of unionizing across the NCAA member schools, some of which are public universities and others that are private, and how this legal landscape differs based on which law governs).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Dennis Dodd, *College Football Players Group Presentation at Penn State Included Unionization Adoption, Document Shows*, CBS SPORTS (July 25, 2022, 3:57 PM), <https://www.cbssports.com/college-football/news/college-football-players-group-presentation-at-penn-state-included-unionization-option-document-shows/> [https://perma.cc/2LSU-L3T4].

27. *Id.*

28. *Id.*

29. *Id.*

attempt to save their collegiate playing careers.³⁰ While the Penn State football team's attempt at self-organization was short-lived—having failed to reach near the level of national significance that Northwestern's had in 2014—the possibility of Players receiving some form of compensation beyond scholarship funding felt closer to a reality.

Should the successful establishment of a collegiate players association with bargaining powers come to pass, the dollars paid out through broadcasting and media rights agreements would comprise the largest pile of money to be divvied up as part of this additional compensation. In August 2022, the Big Ten announced its newest broadcasting and media rights deal, cementing it as the highest-earning sports conference across college athletics.³¹ The landmark agreement married the Big Ten to Fox/FS1, CBS, NBC, and The Big Ten Network through the 2029–30 academic year.³² The seven-year contract term is reportedly worth more than \$8 billion to the Big Ten and its fourteen member schools.³³ This total will be divided amongst sixteen schools once the University of Southern California (USC) and University of California, Los Angeles join the Big Ten ranks in 2024.³⁴ Each of the other Power Five athletic conferences are similarly situated. The Southeastern Conference (SEC) recently signed a 10-year \$3 billion exclusive broadcasting deal with Disney and the Entertainment and Sports Programming Network (ESPN).³⁵ The Big 12 Conference's (Big 12) media rights are worth \$2.28 billion across a six-year agreement with ESPN and Fox Sports.³⁶ The Pacific-12 Conference (Pac-12) is nearing the end of a 12-year deal with Fox and ESPN that has earned the conference about \$21 million annually.³⁷ Finally, the Atlantic Coast Conference (ACC) currently holds a 20-year deal with ESPN that earns each of its fourteen member schools \$17 million annually.³⁸ Clearly, college athletics is big business. Unfortunately, the athletes on the field, hardwood, or pitch—the driving forces behind the value of these media rights deals that make them so

30. *Id.*

31. Nicole Auerbach, *Big Ten Announces TV Rights Deals Totaling Over \$8 Billion with Fox, CBS, and NBC*, THE ATHLETIC (Aug. 18, 2022), <https://theathletic.com/3518414/2022/08/18/big-ten-tv-deal-details-rights/> [<https://perma.cc/SMT7-M8WR>].

32. *Id.*

33. *Id.*

34. *Id.*

35. *SEC Reaches \$3 Billion Deal with Disney, Drawing CBS Ties Towards an End*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/sports/ncaafotball/sec-disney-deal.html> [<https://perma.cc/AMW8-N8BA>].

36. Michael Smith and John Ourand, *Big 12 Scores Big Win by Renewing Media Rights Deal with ESPN, Fox*, SPORTS BUS. J. (Oct. 30, 2022), <https://www.sportsbusinessjournal.com/SB-Blogs/Breaking-News/2022/10/Big-12-renews-media-deal-ESPN-Fox.aspx> [<https://perma.cc/RP9M-SREN>].

37. *Here's a Look at All the Current Conference TV Deals*, *supra* note 8.

38. *Id.*

lucrative to universities and sought after by broadcasters—receive none of it. But is dubbing Players “employees” the right answer, or do the negative results outweigh the benefits?

II. “EMPLOYEE” STATUS IMPLEMENTATION AND ITS RAMIFICATIONS

A. *Unionization and Collective Bargaining*

The NCAA was deliberate and calculated when they introduced the idea and legal framework of the “student-athlete.”³⁹ Their goal was avoidance—the avoidance of workplace protections allowed under the NLRA.⁴⁰ Section 7 of the Act guarantees employees “the 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.”⁴¹ Section 8(a)(1) of the Act reinforces these rights by prohibiting an employer from “interfere[ing] with, restrain[ing], or coerce[ing] employees in the exercise of the rights guaranteed in Section 7.”⁴² Additionally, students and interns have historically been excluded from coverage under the Fair Labor and Standards Act (FLSA), but following their classification as employees of the university, Players would be afforded the right to bargain for FLSA benefits as well.⁴³ This coverage, combined with the Players’ rights under the NLRA, would allow them to collectively bargain for overtime premiums, wage and hour limitations, and off-the-clock work payment.⁴⁴

While the unionization effort of Players is now imminently possible, a major hurdle arises concerning the practicality of such a decision. As mentioned above, in the case of Northwestern, the fact that some colleges and universities are private entities while others exist as public state institutions poses a difficulty in maintaining uniformity in rulings.⁴⁵ In order to circumvent this apparent blockade on the potential protections provided by the NLRA to all Players, the Memo contains an important message in its final footnote.⁴⁶ In Footnote 34, Abruzzo wrote, “[b]ecause [Players] perform services for, and subject to the control of the NCAA

39. See *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, *supra* note 1.

40. *Id.*

41. National Labor Relations Act § 7, 29 U.S.C. § 157.

42. National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1).

43. *Benjamin v. B & H Educ., Inc.*, 877 F.3d 1139, 1141–42 (9th Cir. 2017).

44. *Id.*

45. Nocera and Strauss, *supra* note 19 (describing how a university’s private or public designation dictates the body of law that the university operates under, with private universities operating under the National Labor Relations Board and public universities operating under the applicable state law).

46. Memorandum from Jennifer A. Abruzzo, *supra* note 2.

and their athletic conference, in addition to their college or university, in appropriate circumstances I will consider pursuing a joint employer theory of liability.”⁴⁷ The idea and application of joint employer coverage in professional sports is not new, as it is recognized across professional American sports leagues including the National Football League (NFL), the National Basketball Association (NBA), Major League Baseball (MLB), and the National Hockey League (NHL).⁴⁸ Courts have developed a number of tests that aid in determining the presence of a joint employer relationship that often rely heavily on the element of control.⁴⁹ The federal law that outlines a joint employment relationship, 29 CFR § 825.106(a), reads as follows:

Where the employee performs work which simultaneously benefits two or more employers . . . a joint employment relationship generally will be considered to exist in situations such as: . . . (3) Where the employers are not completely disassociated with respect to the employee’s employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.⁵⁰

With this framework in mind, it is not farfetched to imagine a court or a regional office of the NLRB finding that a college athlete provides simultaneous benefit to the NCAA, the member university to which he/she attends, and the athletic conference to which that university belongs.

The joint employer theory was given new life in December 2022, when the NLRB’s Los Angeles Region agreed that a suit brought by the National College Players Association (NCPA) and its Executive Director, Ramogi Huma, on behalf of football and basketball athletes at USC, had merit.⁵¹ The NCPA filed suit against USC, the Pac-12, and the NCAA, claiming unfair labor practices arguing that Players are employees of not only USC, but also that the Pac-12 and the NCAA should also be

47. *Id.*

48. Marc Edelman, *The Future of College Athlete Player Unions Lies in an NLRB Memo Footnote*, FORBES (Oct. 4, 2021, 9:00 AM), <https://www.forbes.com/sites/marcedelman/2021/10/04/the-future-of-college-athlete-players-unions-lies-in-an-nlr-b-memo-footnote/?sh=445cc4b818ce> [https://perma.cc/542V-NSCX].

49. MARION G. CARIN ET AL., WORK LAW: CASES AND MATERIALS 712 (4th ed. 2020).

50. 29 CFR § 825.106(a)(3).

51. Tom Schad, *Are College Athletes Employees? Case Against USC, Pac-12 and NCAA to Move Forward at NLRB*, USA TODAY (Dec. 15, 2022, 7:09 PM), <https://www.usatoday.com/story/sports/college/2022/12/15/national-labor-relations-board-ncaa-pac-12-usc-athletes/10905458002/> [https://perma.cc/X3ZK-974B].

considered “joint employers.”⁵² The importance of such a consideration, as briefly mentioned above, allows for athletes attending public colleges or universities to be covered by the NLRA and the NLRA’s employee protections by way of the affiliated conference.⁵³ On May 18, 2023, the NLRB issued an official complaint against USC, the Pac-12, and the NCAA, alleging unfair labor practices under a joint employer theory.⁵⁴ This specific complaint applies only to football and basketball players and, if successful, could find these athletes to be designated employees under the NLRA.⁵⁵ Hearings regarding pretrial motions and subpoena issues took place on November 7–9, 2023, with testimony to be heard December 18–20, 2023, when college athletes can possibly clear their final hurdle towards employee status en route to unionization.⁵⁶

The recently successful unionization efforts of MLB’s minor league players provide a quality blueprint for college athletes.⁵⁷ The second-class treatment of minor league baseball players has long been an issue for player advocates. For example, the 2022 Minor League Housing Policy addressed seemingly basic living conditions for these professional athletes. The Policy mandated the provision of housing options “located at a reasonable, commutable distance from the ballpark,” and that bedrooms now “must contain a single bed per player” with “no more than two players per bedroom.”⁵⁸ Up until September 2022, minor league baseball players were essentially barred from collectively bargaining on their own behalf while minor league hockey, basketball, and soccer players each had union representation, thus giving them a seat at the table amongst their top-tier professional counterparts.⁵⁹ The decision by MLB

52. *College Athletes Closer to Being ‘Joint Employees’: NLRB Moves Case Against USC, Pac-12, and NCAA* (Dec. 20, 2022), <https://www.natlawreview.com/article/college-athletes-closer-to-being-joint-employees-nlr-moves-case-against-usc-pac-12> [https://perma.cc/79UD-FDVW].

53. *Id.*

54. Dan Murphy, *National Labor Relations Board Files Complaint for Unfair Labor Practices vs. NCAA, Pac-12, USC, ESPN* (May 18, 2023, 8:46 PM), https://www.espn.com/college-sports/story/_/id/37680838/national-labor-relations-complaint-ncaa-pac-12-usc-unfair-labor-practices [https://perma.cc/994S-YD57].

55. *Id.*

56. *Id.*

57. *Minor Leaguers are Joining the MLBPA: Here’s What the Unionization Means*, ESPN (Sept. 14, 2022, 5:20 PM), https://www.espn.com/mlb/story/_/id/34586802/minor-leaguers-joining-mlbpa-here-unionization-means [https://perma.cc/3HLF-2Z4V].

58. Major League Baseball, *MLB to Provide Minor League Player Housing* (Nov. 18, 2021), <https://www.milb.com/news/mlb-owners-to-provide-housing-to-minor-league-players-beginning-in-2022> [https://perma.cc/HCY4-DWJ4].

59. See Advocates for Minor Leaguers, *So What’s the Problem?*, ADVOCATES FOR MINOR LEAGUERS, <https://www.advocatesforminorleaguers.com/theproblem> [https://perma.cc/N6S5-LY4V].

owners to finally relent regarding unionization of their minor league affiliates follows a significant win by minor leaguers in *Senne v. MLB*.⁶⁰

In *Senne*, a California federal court approved a \$185 million settlement for former Miami Marlins player Aaron Senne and fellow retired minor leaguers.⁶¹ The settlement followed an eight-year battle between the opposing sides in a suit that alleged MLB teams violated federal and state minimum-wage and overtime laws in the operations of their minor league affiliates.⁶² Prior to this major win for minor leagues, MLB argued that minor league players were seasonal employees which would exempt them from coverage under the FLSA.⁶³ This outcome provides college athletes with precedent to protect them against similar arguments made by the NCAA or their respective universities. Despite college athletes' newfound ability to unionize, these athletes should consider the tradeoffs associated with entering into a collectively bargained agreement with the NCAA and their universities.

Following their recent victory in *Alston v. NCAA*, Players may not wish to unionize, as it would force them to surrender antitrust rights based on the non-statutory labor exemption under antitrust law.⁶⁴ The non-statutory exemption in antitrust law exempts “agreements between and among employers and unions from antitrust liability.”⁶⁵ Naturally, Player representatives would advocate for a carve out of this exemption regarding agreements made between parties during collective bargaining periods. Should the exemption remain in place, the artificial dampening or capping of compensation and benefits would ultimately fall outside of antitrust law jurisdiction and would diminish the efforts of collective

60. Jeff Passan, *MLB to Pay \$185 Million in Settlement with Minor League Players Over Minimum-Wage and Overtime Allegations*, ESPN (July 15, 2022, 7:02 PM), https://www.espn.com/mlb/story/_/id/34249632/mlb-pay-185-million-settlement-minor-league-players-minimum-wage-allegations [<https://perma.cc/YT95-LRSW>]. See generally Joint Stipulation of Class Settlement and Release, *Senne v. Off. of the Comm’r of Baseball* (N.D. Cal. 2022), <https://www.baseballplayerwagecase.com/admin/api/connectedapps.cms.extensions/asset?id=59c90752-f520-43f6-9c68-4d534b79f151&languageId=1033&inline=true> [<https://perma.cc/J62V-K5UC>].

61. *Id.*

62. *Id.*

63. *Id.*; see also Fair Labor Standards Act § 13(a)(3), 29 C.F.R. 553.32(e) (providing FLSA exemption “for any employee employed by an amusement or recreational establishment if (1) it does not operate for more than 7 months in any calendar year or (2) during the preceding calendar year, its average receipts for any 6 months of such year were not more than 33 1/3 percent of its average receipts for the other 6 months of such year”).

64. Edelman, *supra* note 48.

65. *What are the Statutory and Non-Statutory Labor Exemptions to Antitrust Liability?*, BONA LAW (Mar. 10, 2020), <https://www.bonalaw.com/insights/legal-resources/what-are-the-statutory-and-non-statutory-labor-exemptions-to-antitrust-liability#:~:text=The%20Non%2DStatutory%20Labor%20Exemption&text=This%20exemption%20flows%20naturally%20from,a nd%20unions%20from%20antitrust%20liability> [<https://perma.cc/C72F-BYE4>].

bargaining. However, the Sherman Act, which prohibits “every contract, combination, or conspiracy in restraint of trade,” is not uniformly applied to every restraint on trade—only those restraints deemed unreasonable.⁶⁶ The Supreme Court carves out reasonableness in restraint of trade, which supports the efforts of the collective bargaining process and provides freedom for parties to contract.⁶⁷

In *Brown v. Pro Football*, the Supreme Court discussed the issue of whether, following an impasse in collective bargaining between the NFL, its professional clubs, and the NFL Players Association, the NFL and its team owners were exempt from antitrust liability because they negotiated in good faith.⁶⁸ During negotiations, following the expiration of the League’s collective-bargaining agreement in 1987, both parties agreed that each club was permitted to establish a “developmental squad.”⁶⁹ The squad was made up of first-year players who failed to secure a regular season roster spot but would practice with the team and substitute injured players throughout the year.⁷⁰ The team owners agreed to pay these developmental squad players \$1,000 per week—an offer that was unacceptable to the NFL Players Association.⁷¹ Ultimately, after failing to come to an agreed amount, the owners unilaterally set the salary for developmental players at \$1,000, and the Players Association filed this suit claiming that the cap was a violation of the Sherman Act and was an unreasonable restraint on trade.⁷² The Court disagreed.⁷³ They considered the fact that the conduct occurred “during and immediately after” the negotiations and that the decision “grew out of, and was directly related to, the lawful operation of the bargaining process.”⁷⁴ Additionally, the amount at issue concerned only the parties to the collective-bargaining relationship and “involved a matter that the parties were required to negotiate collectively.”⁷⁵ The Court held that the non-statutory antitrust exemption applied to the NFL and the team owners as joint employers in this case.⁷⁶

In *NCAA v. Alston*, a similar antitrust suit was leveled against the NCAA and certain member institutions for capping Players’ athletic

66. *The Antitrust Laws: Guide to Antitrust*, FED. TRADE COMM’N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> [https://perma.cc/X3BX-NH39].

67. *Id.*

68. *Brown v. Pro Football*, 518 U.S. 231, 233–34 (1996).

69. *Id.* at 234.

70. *Id.*

71. *Id.*

72. *Id.* at 235.

73. *Id.*

74. *Id.* at 250.

75. *Id.*

76. *Id.*

scholarship amounts and placing limitations on “education-related benefits” for “student-athletes.”⁷⁷ Without touching the issue of compensation Players are afforded through athletic scholarships, the Court struck down limitations on “education-related benefits” that could be provided by schools.⁷⁸ Importantly, the NCAA argued that due to the “special characteristics of [its] particular industry,” it was properly entitled to a similar antitrust exemption as afforded to MLB and the NFL regarding collective bargaining.⁷⁹ The Court disagreed.⁸⁰ While it provided the opportunity for Congress to make such a concession for the NCAA in the future, the Court held that, as it currently stood, the only law it had been asked to enforce was the Sherman Act.⁸¹

Brown and *Alston* provide an important framework for current Players. These cases highlight how important a decision to unionize would be amongst college athletes. Armed with their victory in *Alston*—despite the Court not going as far as classifying Players as employees—and the Memo published by the NLRB, Players are in a much better position to allow the free market to determine their earning potential. Should the Players unionize, the Court would likely treat the NCAA and its member institutions as joint employers of the Players and provide them with protections against Sherman antitrust liability under the non-statutory antitrust exemption used in *Brown*.

B. Title IX Equity and Future University Financing

1. Title IX Concerns and Likely Outcomes

A free market system for the compensation of Players as employees of the NCAA and its member institutions—historically known as a pay-for-play model—would pose a host of additional challenges. Chief among them is Title IX.⁸² Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.”⁸³ Collegiate athletic opportunities are an “integral part” of a college or

77. *NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021).

78. *Id.*

79. *Id.* at 2160; *see generally* *Flood v. Kuhn*, 407 U.S. 258 (1972) (explaining the special economic characteristics of the NCAA as a nonprofit organization in relation to the Court previously characterizing the MLB as not engaging in commonly accepted trade or commerce since its business is to provide baseball games for the public).

80. *Alston*, 141 S. Ct. at 2160; *see generally* *Flood v. Kuhn*, 407 U.S. 258 (1972).

81. *Alston*, at 2160; *see generally* *Flood*, 407 U.S. at 258.

82. *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 10.

83. 20 U.S.C. § 1681(a).

university's educational program and, therefore, are covered by Title IX provisions.⁸⁴

To meet the requirements outlined in the law, scholastic institutions are required to conduct an analysis across three major areas: (1) student interests and abilities; (2) athletic benefits and opportunities; and (3) financial assistance.⁸⁵ The implementation of a pay scale for college athletes will affect and disturb each of the three factors the NCAA and its member institutions are required to weigh in creating athletic opportunities on their respective campuses. Immediately, issues arise in compliance and enforcement of such strict federal guidelines when the schools are forced to create equal opportunities for paid employees across sports, which, in most situations, are financial losers for universities.⁸⁶ As they now operate, collegiate athletic departments across the country are losing millions of dollars each year—and this is before having to sign paychecks to their incoming recruits and current stars.⁸⁷

The first victim is Title IX's student interests and abilities prong, which mandates that institutions must ensure that both male and female students' interests and abilities be "equally and effectively accommodated."⁸⁸ To ensure compliance with this first prong, a governing body must assess a school based on (1) a determination of the athletic interests and abilities of its students; (2) the selection of the sports that are offered; and (3) the levels of competition, including opportunity for team competition.⁸⁹ Here, factors to consider are the performance records of both male and female teams, a substantial proportionality of athletic participants per number of males and females enrolled, and a particularity of sport offerings across the sexes.⁹⁰ Because Title IX is a federal law that public colleges and universities must abide by, the likely outcome is a major decrease in opportunities for athletic participation. Despite federal funding being poured into NCAA member institution athletic programs, several departments continue to lose money.⁹¹ Likely, the inevitable results of abiding by both Title IX equality requirements and a free market pay-for-play model are continued losses and mass "layoffs."

84. *Requirements Under Title IX of the Education Amendments 3 of 1972*, *supra* note 10.

85. *Id.*

86. Mike Herndon, *NCAA Study Finds All But 20 FBS Schools Lose Money on Athletics*, AL.COM (Aug. 20, 2014, 9:29 PM), https://www.al.com/sports/2014/08/ncaa_study_finds_all_but_20_fb.html [<https://perma.cc/W8YS-GZQZ>].

87. *Id.*

88. *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 10.

89. *Id.*

90. *Id.*

91. *See NCAA Finances: Revenue and Expenses by School*, USA TODAY (June 13, 2023, 8:51 PM), <https://sports.usatoday.com/ncaa/finances> [<https://perma.cc/X6UP-M6T5>].

This inevitable downsizing would negatively influence findings regarding the second prong of a Title IX analysis by diminishing the schools' ability to offer robust athletic benefits and opportunities to athletes. Additionally, the reduction in total offerings would put member universities in violation of the NCAA Division I 14-sport minimum rule. Under this rule, Football Championship Subdivision (FCS) and "nonfootball" schools must sponsor a minimum of 14 sports—a number that is increased to 16 for FBS schools—to be a member of the Division I rank and maintain eligibility for postseason events.⁹² Several NCAA administrators are already citing this rule that requires mandatory adherence to this seemingly arbitrary minimum as an argument for their case against sharing revenue with current college athletes.⁹³ It would follow that something closer to a free market system in paying college athletes would require that the NCAA loosen the reins and drop the floor on this sport minimum, or do away with the rule all together. Some argue that the rule violates antitrust laws by barring university presidents and administrators from making decisions about athletic offerings in the best interest of their respective schools.⁹⁴ Regardless, a pay-for-play model affecting the 14-sport minimum rule would absolutely disturb the equality in "opportunity for team competition" under a Title IX analysis.

The third major area analyzed for Title IX considerations is the equality in financial assistance provided by an NCAA member university receiving any sort of government funding.⁹⁵ To satisfy this final prong of the Title IX analysis, universities are not required to show that the number of athletic scholarships offered or the value of those individual scholarships remain equal across sexes.⁹⁶ However, the statute does require that "the total amount of assistance awarded to men and women must be substantially proportionate to their participation rates in athletic programs."⁹⁷ This factor of Title IX adherence would likely survive a pay-for-play and college-athletes-as-employees system due to the enforcement of two other federal laws; Title VII and the Equal Pay Act

92. *Our Division I Members*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx> [https://perma.cc/ZTU2-G5E5].

93. Marc Edelman, *NCAA Division I's 14-Sport Minimum Rule is Ripe for Antitrust Challenge*, FORBES (Dec. 12, 2022, 11:07 AM), <https://www.forbes.com/sites/marcedelman/2022/12/12/ncaa-division-is-14-sport-minimum-rule-is-ripe-for-antitrust-challenge/?sh=4938443028eb> [https://perma.cc/WP5J-2JTT].

94. *Id.*

95. *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 10.

96. *Id.*

97. *Id.*

(EPA), which both contemplate the wage gap and pay discrimination on the basis of sex.⁹⁸

Under the EPA, in a case brought by an employee against an employer, the plaintiff is required to show that: (1) he/she was doing “substantially equal” work on the job, the performance of which required “substantially equal” skill, effort, and responsibility as the jobs held by the members of the opposite sex; (2) the job was performed under similar working conditions; and (3) he/she was paid at a lower wage than members of the opposite sex.⁹⁹ Once the plaintiff is able to establish these three factors, the burden is shifted to the employer, who is afforded four affirmative defenses: (1) a bona fide seniority system; (2) a merit system; (3) a system which measures earnings quantity or quality of production; and (4) a differential based on any factor other than sex.¹⁰⁰ Title VII captures a wider variety of employment discrimination claims when compared to violations under the EPA, and, therefore, a plaintiff succeeding in an EPA lawsuit could also have a valid claim under Title VII.¹⁰¹ There are some procedural differences in the filings of either claim, which are discussed in the case below.

In *Wiler v. Kent State University*, Coach Kathleen Wiler sued her former employer, Kent State University, alleging pay discrimination on the basis of sex under both the EPA and Title VII.¹⁰² The court compared the base pay of Wiler against that of Kent State’s wrestling team coach, Andrassy, minus any incentive bonuses paid or additional compensation gained through the hosting of sports camps on campus.¹⁰³ Wiler sued for post resignation back pay and front pay for alleged misconduct, and also claimed that she was constructively discharged.¹⁰⁴ The timing of the filing of the suit was a point of contention concerning the allowance of back pay start dates. Because the EPA does not require a claimant to bring a claim to the Equal Employment Opportunity Commission before bringing the same claim in federal court, the court decided that a calculation of potential damages only extended back as far as the filing of the claim in federal court.¹⁰⁵ Alternatively, Title VII claims that allege the same or similar discriminatory practices on the basis of sex are

98. *The Interplay Between Title VII and the Equal Pay Act and Why it Matters in Your Pay Discrimination Claim*, THE NAT’L L. REV. (Nov. 13, 2017), <https://www.natlawreview.com/article/interplay-between-title-vii-and-equal-pay-act-and-why-it-matters-your-pay> [https://perma.cc/ZF74-559U].

99. *Id.*

100. 29 U.S.C. § 206(d)(1).

101. *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 10.

102. *Wiler v. Kent State University*, 2022 U.S. Dist. LEXIS 197045* (2022).

103. *Id.* at *25.

104. *Id.* at *10.

105. *Id.* at *14.

allowed back pay dating two years before the timely filing of a claim.¹⁰⁶ The court ultimately denied the defendant's motion for summary judgment, in part due to the substantial similarities between the work done by the coaches and the parity in pay.¹⁰⁷ The court came to this conclusion despite the defendant's arguments that it used a bona fide seniority system and that the differential was based on factors other than sex.¹⁰⁸

The difference in base pay between the coaches analyzed in *Wiler* was only a few thousand dollars, yet the court in that case allowed for the case to proceed and decided that fact finding was in order. How difficult would it be to have a similar fact-finding analysis that pitted college athletes of opposite sexes, and who played vastly different sports, against one another? Is the work of the starting quarterback of a Power Five conference school the same or similar to that of the libero on the women's volleyball team? Does the top female golfer at an Ivy league university have a "substantially equal" skillset or effort level as that required by a member of the wrestling team? Are high-tech or novelty locker room décor captured under the "working conditions" of a college athlete? Under the current Title IX enforcement model, some of these questions are easily answered as violations due to lack of opportunity or financial assistance. But should the college athletics model be governed by EPA and Title VII employment laws? The line of equality between male and female athletes is harder to define. Alternatively, this shift could provide the NCAA with a new guiding light in its role as a governing body for college athletics. With a mind towards the future, the NCAA could focus less on policy enforcement and more on employment equality for athletes or even serve as a de facto Player Association. This sort of pivot could be the best-case scenario for the NCAA, as it moves closer to irrelevance and being treated as a mere event management group.

2. Future University Financing for College Athletics

In an on-campus struggle to decide which sports would remain following the shift to an athletes-as-employees model in college athletics, the bargaining power would be monopolized by a select few priority sports. In the above example, discussing the NCPA and its efforts to empower college athletes in collective bargaining, the groups admitted goal was to affirm employee status for only Division I men and women basketball players and Football Bowl Subdivision (FBS) football

106. *Id.* at *34.

107. *Id.* at *41.

108. *Id.* at *28–33.

players.¹⁰⁹ Should universities opt to maintain a number of traditionally non-priority or non-revenue generating sports—sometimes referred to as Olympic sports—there may exist a situation where the high tides of collectively-bargained-for salaries of some athletes lifts the boats of those with less power. The non-unionized and non-priority sports teams may receive some of the tangential benefits of comparison in pay across gender gaps that are collectively bargained for by the more powerful programs. Additionally, if Title IX goes by the wayside, would traditional federal funding associated with the law cease to flow into universities calling on major leagues to then subsidize their previously free developmental and farm leagues?

It is unlikely that the federal government would cease to provide funding to public universities following the fall of Title IX in relation to athletic equality. However, less of that funding may be allotted to athletic departments who are now cash-strapped and legally obligated to pay their newly dubbed employees. In 2020, the 160 minor league baseball teams then in business lost approximately \$800 million, averaging nearly a \$5 million loss per team.¹¹⁰ Following such an abysmal year for both professional and semi-professional sports—especially with the impacts of COVID-19—40 of those minor league baseball teams went permanently out of business.¹¹¹ While college sports fans are often more engaged and invested in the college product than they are in traditional minor league clubs, the fact that most college sports teams are financial losers does not bode well if federal subsidies slow or stop completely.

C. *The End of Amateurism and the NCAA*

This Note is not a discussion on the current NIL landscape in college athletics. However, the NCAA's botched handling of NIL guideline implementation and enforcement is a telling sign of what can be expected from the member-led organization in the future, should it have one. Though NIL benefits and opportunities were not the focus of *Alston*, many NCAA member-schools—and the states in which they preside—took the scathing concurrence authored by Justice Kavanaugh to be a sign of the changing of the times regarding the almighty power of the

109. Dellenger, *supra* note 7; Alicia de Artola, *What Does FBS Stand for in College Football?*, FANSIDED (Oct. 16, 2021), <https://fansided.com/2021/10/16/fbs-college-football-meaning-explained/> [<https://perma.cc/9QDT-BERS>] (explaining that FBS refers to the top half teams of Division I college football who are eligible to play in the postseason bowl games).

110. Barry M. Bloom, *Minor Leagues Seek Distressed Oaktree Loans to Meet New MLB Terms*, SPORTICO: THE BUS. J. (Mar. 17, 2021, 5:55 AM), <https://www.sportico.com/leagues/baseball/2021/minor-league-baseball-lost-800-million-last-season-cant-stop-those-losses-1234624968/> [<https://perma.cc/3YG2-9AE8>].

111. *Id.*

NCAA.¹¹² The NCAA had a golden opportunity in 2019 when California became the first state to enact an NIL law, titled the “Fair Pay for Play Act.” The California Act was not set to go into effect until January 1, 2023, which provided the NCAA plenty of lead time to make a pivot or, at least, prepare for this new reality.¹¹³ The NCAA is routinely, and appropriately, treated as the whipping boy for its own follies, and the mishandling of the coming NIL era was another prime example of why. Considering its phobia of sharing revenue with, or outright paying athletes, the NCAA was perfectly positioned to give the imminent NIL legislation the thumbs up, and not only provide approval, but support.

The then-proposed NIL framework created a system in which the NCAA and its member schools were out zero dollars. Instead, players would be paid by third party businesses or collectives during participation in college athletics. There is an understandable argument for why the NCAA wanted to stay as far away from any sort of additional compensation for athletes; specifically, to avoid obvious comparisons to an employment relationship. But the NCAA could have championed the NIL cause and created sound and enforceable rules before any state laws went into effect. Instead, they punted. Then they waited and watched, likely hoping that college athletics would implode now that a handful of players were making substantial money, and the NCAA could say, “I told you so.” The downfall of college athletics never came to pass, and now, current and former college athletes—armed with lawyers—are raging even harder against the NCAA machine that had an opportunity to be an ally to these athletes, but the NCAA fumbled.¹¹⁴

Maintaining and regulating amateurism has become the primary purpose of the NCAA. Understanding the NCAA’s definition of amateurism requires a lesson in circular reasoning. The NCAA defines amateurism as a prohibition on the receipt of any payment or compensation for one’s participation in athletics (i.e., not professional), and to participate in college athletics one must be an amateur.¹¹⁵ Therefore, to participate in college athletics, an athlete must not receive or accept any form of payment or compensation. Staunch advocates of amateurism—who are often critics of new NIL legislation and any consideration that college athletes may be employees—use words like “purity” to describe their ideal and draconian model of a collegiate

112. See *NCAA v. Alston*, 141 S. Ct. 2141, 2166–69 (2021) (Kavanaugh, J., concurring).

113. Michael McCann, *What’s Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12> [<https://perma.cc/4DD6-6EDH>].

114. See generally *Johnson v. NCAA* 2021 U.S. Dist. LEXIS 246324* (E.D. Pa. 2021) (oral arguments held Feb. 16, 2023); *Dawson v. NCAA*, 32 F.3d 905 (9th Cir. 2019); *Berger v. NCAA*, 843 F.3d 285, 288 (7th Cir. 2016).

115. *Amateurism*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://www.ncaa.org/sports/2014/10/6/amateurism.aspx> [<https://perma.cc/4EL8-HQNK>].

sport.¹¹⁶ This notion feels disingenuous because while the NCAA is requiring that athletes abstain from taking payments, the governing body's Eligibility Center is charging prospective college athletes a \$70 registration fee to open an "Amateurism-Only account."¹¹⁷ To be sure, the NCAA has historically made significant contributions to the marketing and growth of college athletics, but just last year, the organization was positioned to receive \$870 million during its three week basketball tournament called March Madness.¹¹⁸ Estimations that take into account the escalating values of TV broadcasting rights put the number over the \$1 billion mark within the next five years.¹¹⁹ Many athlete advocates believe amateurism is a façade, conjured up and maintained by the NCAA and its member institutions, to avoid sharing revenue with Players. The following cases highlight the past seven years of relevant legal challenges to the NCAA's outdated and allegedly illegal amateur structure.

In *Berger v. NCAA*, former athletes of the University of Pennsylvania (Penn) sued Penn, the NCAA, and over 120 other Division I colleges and universities, alleging that the institutions violated FLSA concerning a failure to pay the athletes minimum wage.¹²⁰ The district court granted the defendant colleges and universities' motion to dismiss on two grounds and held that Berger (1) lacked standing to sue any parties other than Penn and (2) failed to state a claim against Penn because "student athletes are not employees under FLSA."¹²¹ On appeal, the 7th Circuit declined to use the multifactor *Glatt* test¹²² to analyze the economic realities of the situation regarding the "work" relationship between Berger and Penn, claiming that the test failed to take into account the "tradition of

116. Mechelle Voepel, *College Athletes are Already Getting Paid*, ESPN (July 18, 2011, 3:00 AM), https://www.espn.com/college-sports/columns/story?columnist=voepel_mechelle&id=6739971 [<https://perma.cc/C6WH-D7VN>].

117. *Payment From Sports Team*, *supra* note 12.

118. Eben Novy-Williams, *March Madness Daily: The NCAA's Billion-Dollar Cash Cow*, SPORTICO: THE BUS. OF SPORTS (Mar. 26, 2022, 9:00 AM), <https://www.sportico.com/leagues/college-sports/2022/march-madness-daily-the-ncaas-billion-dollar-cash-cow-1234668823/> [<https://perma.cc/ALM3-4WYY>].

119. *Id.*

120. *Berger v. NCAA*, 843 F.3d 285, 288 (7th Cir. 2016).

121. *Id.* at 289.

122. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 534 (2d Cir. 2016). The factors are the extent to which the internship (1) includes an understanding there will be no compensation; (2) "provides training that would be similar to that which would be given in an educational environment"; (3) "is tied to the intern's formal education"; (4) "accommodates the intern's academic commitments by corresponding to the academic calendar"; (5) has a duration "limited to the period in which the internship provides the intern with beneficial learning"; (6) is composed of work that "complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern"; and (7) includes an understanding that the intern is not entitled "to a paid job at the conclusion of the internship."

amateurism” in college athletics.¹²³ The court’s decision to give such deference to “tradition” in a collegiate landscape that, by 2016, was already receiving hundreds of millions of dollars from the efforts of athletes, seemed taboo. Ultimately, the court held that “student-athletic ‘play’ is not ‘work’” and that, “*as a matter of law*, student athletes are not employees and are not entitled to minimum wage under the FLSA.”¹²⁴ The court decided that the analysis was not so fact intensive that it should defeat the motion to dismiss. But, in a concurrence, one judge commented on the economic realities of non-revenue generating sports—for example, women’s track and field—and that despite the “sometimes frayed tradition of amateurism” a finding of dismissal should stand.¹²⁵

In 2018, a similar suit was brought by a former Villanova University football player against his alma mater and the NCAA, alleging minimum wage provision violations under the FLSA.¹²⁶ However, the court in *Livers v. NCAA* denied the defendant’s motion to dismiss, finding that the “plaintiff [had] alleged sufficient facts to plausibly state his entitlement to relief under the FLSA.”¹²⁷ In a different approach to that of the plaintiffs in *Berger*, the plaintiff in *Livers* alleged, and attempted to prove, a willful violation by the university and the NCAA.¹²⁸ The court also held that upon defeating the motion to dismiss and conditioned on a clearer establishment of the willfulness of the violation, the claim would remain viable, and “subject to fact discovery.”¹²⁹ It is important to remember that while football is generally considered a revenue-generating sport, Villanova competes in the Division I FCS, placing it outside of the most competitive and lucrative tier of college athletics.

In 2019, the 9th Circuit decided *Dawson v. NCAA* along the same analytical lines as the 7th Circuit employed in *Berger*.¹³⁰ In *Dawson*, a former Division I FBS football player at USC sued the NCAA and the PAC-12 Conference as joint employers in violation of the FLSA concerning minimum wage and overtime pay.¹³¹ The court in *Dawson* used the economic realities test to assess the employee and employer relationship, namely, three relevant circumstances: (1) the expectation of compensation; (2) the power to hire and fire; and (3) evidence that an arrangement was “conceived or carried out” to evade the law.¹³² The court refused to address the merits under the first prong of the test—

123. *Berger*, at 290–91.

124. *Id.* at 293 (emphasis added).

125. *Id.* at 294.

126. *Livers v. NCAA*, 2018 U.S. Dist. LEXIS 124780, *1.

127. *Id.* at *17.

128. *Id.*

129. *Id.*

130. *Dawson v. NCAA/PAC-12 Conf.*, 932 F.3d 905, 907 (9th Cir. 2019).

131. *Id.* at 907–08.

132. *Id.* at 909.

asking whether or not Dawson’s scholarship engendered an expectation of compensation—because Dawson had not received an athletic scholarship to play at USC.¹³³ Additionally, without the PAC-12 or the NCAA having any control over which players were selected for a given university roster, the control that the individual university program had over the players was not attributable to the defendants, and, therefore, the plaintiff was unable to show the power of either defendant to hire or fire him.¹³⁴ Finally, the court found that there was no scheme or arrangement being carried out to evade the law, despite the greatly altered economic reality of college athletics, decades after the test was first implemented.¹³⁵ In what seemed like a step backward for athlete advocates, the court affirmed the district court’s decision to dismiss the case for failure to state a claim against the NCAA and PAC-12.¹³⁶ Importantly, the court made sure to mention that the holding was restricted to the issue of joint employment and chose not to express an opinion regarding athlete’s “employment status” in any context.¹³⁷

On February 15, 2023, during oral arguments of *Johnson v. NCAA*, the 3rd Circuit judges admonished the finding in *Berger* by asking if the rationale behind it was simply, “[s]o they’re amateurs because we call them amateurs?”¹³⁸ This summation made it appear as though the 3rd Circuit saw the *Berger* holding as a classic case of a parent telling his or her child, “because I said so.” The 3rd Circuit has yet to author an opinion in *Johnson*, though the oral arguments seemed relatively one sided and not in favor of the NCAA. On what appears to be the verge of a circuit split, *Johnson* considers whether college athletes can be categorized as employees of their respective universities, for purposes of the FLSA, based solely on participation in college athletics.¹³⁹ The plaintiffs argue that, just like other university students engaged in work study programs, athletes should be paid for the time they spend in NCAA Division I interscholastic athletics.¹⁴⁰ The defendants filed a motion to dismiss claiming student-athletes were not employees for three primary reasons: (1) student athletes are amateurs; (2) the Department of Labor has determined that student athletes are not employees for purposes of the FLSA; and (3) the plaintiffs failed to satisfy the economic realities test to determine their status as employees.¹⁴¹ The motion was originally denied,

133. *Id.*

134. *Id.* at 910.

135. *Id.*

136. *Id.* at 913.

137. *Id.* at 913–14.

138. *Johnson v. NCAA*, 2021 U.S. Dist. LEXIS 246324* (oral arguments held Feb. 16, 2023).

139. *Id.* at *2–3.

140. *Id.* at *3.

141. *Id.* at *4.

but the defendants are now asking the appellate court to certify the dismissal on interlocutory appeal. Should the athletes prevail in *Johnson*, a finding of employee status could completely defeat the core principle and purpose for the NCAA's existence as the governing body in gatekeeping the name of amateurism.

CONCLUSION

In March 2023, the NCAA appointed former Harvard college athlete and Governor of the Commonwealth of Massachusetts, Charlie Baker, as its new president.¹⁴² Around this same time, the University of Miami women's basketball program was sanctioned for having "facilitated impermissible contact between two prospects and a booster."¹⁴³ Despite the appearance of a run-of-the-mill recruiting violation, headlines latched onto the NCAA's dubbing this conduct as "NIL-adjacent."¹⁴⁴ The timing does not appear to be coincidental. Some speculate that the hiring of a prominent politician to the role is a nod to the NCAA's goal of pushing national NIL legislation that will help the organization maintain control in its fight for relevance. Additionally, the simultaneous enforcement action taken against the University of Miami was a message to member institutions and their booster collectives about the future intentions of the new regime.

The NCAA made a grave error. The organization has been beating back a myriad of unionization attempts, efforts to achieve employee status, and pay-for-play legislation for decades, but punted its opportunity to change course in support of college athletes. The NCAA should have thrown its whole support and the resources of its offices behind imminent NIL laws that provided the NCAA with plenty of lead time for planning, but instead, it watched and waited. Ultimately, the onslaught of litigation continued, universities adapted, and athletic programs bolstered their front offices to account for this new era of college athletics. Today's college athletes can earn compensation for their participation using the long overdue legal rights to their own name, image, and likeness. The universities are benefiting from increased booster spending through collectives. The NCAA inches closer to obsolescence as Players charge towards employee status that would provide them with protections under Title VII, the EPA, the FLSA, and the NLRA. Under the economic

142. *NCAA Announces Governor Charlie Baker to be Next President*, NAT'L COLLEGIATE ATHLETIC ASS'N (Dec. 15, 2022), <https://www.ncaa.com/news/ncaa/article/2022-12-15/ncaa-announces-governor-charlie-baker-be-next-president> [<https://perma.cc/7VX7-BTKG>].

143. Meghan Durham, *Recruiting Violations Occurred in Miami (Florida) Women's Basketball Program*, NAT'L COLLEGIATE ATHLETIC ASS'N (Feb. 24, 2023, 12:00 PM), <https://www.ncaa.org/news/2023/2/24/media-center-recruiting-violations-occurred-in-miami-florida-womens-basketball-program.aspx> [<https://perma.cc/C578-ZZL4>].

144. *Id.*

realities test that considers the control that universities have over the lives and schedules of college athletes, achieving employee status seems forthcoming. After assigning member universities and conferences the title of joint employers, the path to unionization is also cleared for college athletes at both private and public institutions. Should these predictions come to pass, conferences' power and influence will increase, the universities will adapt to the changing landscape, and the juggernaut that is college athletics will carry on, leaving amateurism and the NCAA behind.