WILL THE PROFESSIONALIZATION OF STUDENT-ATHLETES KILL THE NCAA?

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"[A]ny favor, however small, that tends to assist an athlete financially, if it is done because he is an athlete, marks the beginning of professionalism."

—The 1929 Carnegie Report on "American College Athletics"[1]

ABSTRACT

National Collegiate Athletics Association ("NCAA") sports stand on the precipice of professionalization. Following the monumental shift of allowing name, image, and likeness ("NIL")-related compensation for student-athletes in 2021, the NCAA finds itself fending off multiple student-athlete attacks founded on antitrust, labor, and minimum wage laws that could apply if student-athletes are deemed employees of their universities. Commentators that once glorified the concept of the amateur athlete now openly predict the end of amateur sports as we have known them. This Article addresses the Sherman Act and the possibility of an antitrust exemption that could allow the NCAA to implement many of the cost controls it would prefer to maintain as a semblance of amateurism, and it also looks at many of the other legal consequences likely to flow from the potential professionalization of college sports. This Article covers the latest effort by student-athletes to unionize, and the National Labor Relations Board's ("NLRB's") apparent receptiveness on that point. This Article also addresses the effect of Title IX on college athletics if student-athletes are considered employees; the pivotal case currently before the Third Circuit regarding employee classification and minimum wage laws; workers' compensation issues for universities; and tax-related concerns for the student-athletes themselves. The Article is also the first to address immigration-related consequences for international student-athletes if they are considered employees, and the impact on both the international athlete and host university. The college sports landscape has undergone radical change in the past decade,

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[1] HOWARD J. SAVAGE, HAROLD W. BENTLEY, JOHN T. MCGOVERN & DEAN F. SMILEY, AMERICAN COLLEGE ATHLETICS 265 (1929).

and even greater change is likely on the horizon, especially without congressional intervention.

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INTRODUCTION

Money continues to surge into college sports. On August 18, 2022, the Big Ten conference announced it had secured a $7 to $8 billion multimedia megadeal.[2] Roughly a year earlier, the National Collegiate Athletics Association ("NCAA") amended longstanding rules to allow college athletes to earn money from their name, image, and likeness ("NIL").[3] On June 26, 2022, it was reported that University of Miami football recruit Jaden Rashada inked a $9.5 million NIL deal—and that he did not even choose the most valuable offer.[4] Meanwhile, the average head football coach in the Southeastern Conference ("SEC") in 2022 earned roughly $6.9 million per year.[5] Yet even amidst the billions of dollars at stake, the refrain in the media is constant: "The NCAA Looks Like a Dead Organization Walking,"[6] "NCAA Is Dying, But the Pac-12 Goes Down First,"[7] and "Amateurism Is Dead . . . [in] College Football."[8]

Today, the NCAA and universities face an interesting conundrum. Far from shunning the professionalization of the college game, audiences have never tuned in more. If anything, college sports are more popular and more available for public consumption than ever before.[9] In 2021, College GameDay averaged just under two million viewers—an increase of thirty-nine percent from the

[2] Sam Connon, *Big Ten Signs $7 Billion Media Deal, UCLA Included Amid Roadblocks*, SPORTS ILLUSTRATED: FANNATION (Aug. 18, 2022, 3:09 PM), https://www.si.com/college/ucla/news/big-ten-signs-7-billion-media-deal-ucla-included-amid-roadblocks.

[3] *See Interim NIL Policy*, NCAA (June 30, 2021), http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [https://perma.cc/5PDF-A8G2] [hereinafter *NCAA Interim NIL Policy*].

[4] *See* Jeremy Crabtree, *Jaden Rashada Turned Down Millions, Will Still Have Highest Known NIL Deal for Recruits*, ON3 (June 26, 2022), https://www.on3.com/nil/news/jaden-rashada-turned-down-millions-will-still-have-highest-known-nil-deal-for-recruits/ [https://perma.cc/7PMR-RGHF] (reporting Jaden Rashada committed to University of Miami after turning down another offer for $11 million).

[5] John Riker, *College Football Coaching Salaries: SEC*, BUS. OF COLL. SPORTS (Nov. 29, 2022), https://businessofcollegesports.com/coaches/college-football-coaching-salaries-sec/ [https://perma.cc/7KZC-K5QW].

[6] Will Leitch, *The NCAA Looks Like a Dead Organization Walking*, INTELLIGENCER (June 21, 2021), https://nymag.com/intelligencer/2021/06/ncaa-looks-like-dead-organization-after-supreme-court-ruling.html.

[7] Ed Stein, *NCAA Is Dying but the Pac-12 Goes Down First*, PAC. NW. SPORTS (May 14, 2022), https://pacificnwsports.com/ncaa-dying-pac-12-goes-down-first/ [https://perma.cc/LU8K-NMJ6].

[8] Lance Dawe, *Amateurism Is Dead: How the Past 16 Months Have Permanently Shaped College Football*, USA TODAY: AUBURN WIRE (July 24, 2021, 9:22 AM), https://auburnwire.usatoday.com/2021/07/24/amateurism-is-dead-how-the-past-16-months-have-permanently-shaped-college-football/ [https://perma.cc/7JEN-P7RE].

[9] *See, e.g.*, Ralph D. Russo & The Associated Press, *Big Ten Signs Historic TV Deal for College Football and Basketball, Raking in $1 Billion a Year*, FORTUNE (Aug. 18, 2022, 12:40 PM), https://fortune.com/2022/08/18/big-ten-historic-tv-deal-college-football-basketball-1-billion-a-year/ [https://perma.cc/82DD-2A2A] (reporting Fox, CBS, and NBC will air Big Ten's football games during prime-time slots on their main and online channel).

previous year.[10] This data contradicts the NCAA's long-standing position that the popularity of college athletics is due to the distinct nature of the competition as amateur rather than professional.[11]

However, the NCAA's fears of rampant recruiting incentives, the free transfer of college athletes, and the loss of amateurism's purity have all come to pass.[12] In this type of world, is there still a role for the NCAA? The NCAA, universities, and coaches have publicly stated they see a need for "guardrails"[13] to curtail money to student-athletes,[14] or "salary caps" to limit the costs involved (though curiously the caps called for are to curtail student income, not coach income).[15]

[10] *See* Amanda Brooks, *ESPN Networks Deliver Multi-Year College Football Viewership Growth in 2021 – and the Most-Streamed CFB Season Ever*, ESPN PRESS ROOM (Dec. 13, 2021), https://espnpressroom.com/us/press-releases/2021/12/espn-networks-deliver-multi-year-college-football-viewership-growth-in-2021-and-the-most-streamed-cfb-season-ever/ [https://perma.cc/UK3L-P2ED].

[11] *See* Kristin R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 260-62 (2003) (illustrating NCAA's emphasis on amateur status of college athletes who play for intrinsic values rather than commercial interests); Robert Litan, *The NCAA's "Amateurism" Rules*, MILKEN INST. REV. (Oct. 28, 2019), https://www.milkenreview.org/articles/the-ncaas-amateurism-rules [https://perma.cc/QS5X-4F54] (explaining NCAA's rationales behind prohibiting compensation for college athletes, such as maintaining amateur status and encouraging "fan interest").

[12] *See* Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows To Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting (noting higher-ranked college football teams receive unprecedented offers and struggle with "high rate of player movement").

[13] *See* Hayleigh Colombo, *Ohio State President Kristina Johnson Wants National 'Guardrails' Around Name, Image and Likeness*, BIZWOMEN (Aug. 18, 2022, 4:17 AM), https://www.bizjournals.com/phoenix/bizwomen/news/latest-news/2022/08/kristina-johnson-nil-guardrails.html [https://perma.cc/CPC9-F47E]; *see, e.g.*, Alan Blinder, *College Athletes May Earn Money from Their Fame, N.C.A.A. Rules*, N.Y. TIMES (Sept. 29, 2021), https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html; Jeremy Crabtree, *Enforcement Is Key to Solving NIL 'Pay-for-Play' Concerns on Recruiting Trail*, ON3 (Dec. 22, 2022), https://www.on3.com/nil/news/ncaa-enforcement-is-key-to-solving-nil-pay-for-play-concerns-on-college-football-recruiting-trial/ [https://perma.cc/H44J-N75J].

[14] Throughout this paper, the authors will, when consistent with case law, state statutes, and federal bill proposals, use the term "student-athlete" when discussing college athletes, and no legal distinction is intended when the authors otherwise refer to them as college athletes. The authors recognize that the term "student-athlete" was coined intentionally by the NCAA as a legal stratagem to defend universities from workers' compensation claims made by their athletes. *See* Warren K. Zola, *College Athletics: The Growing Tension Between Amateurism and Commercialism*, *in* THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW, 369, 379 (Michael McCann ed., 2018); *see also infra* notes 179-80 and accompanying text (explaining General Counsel's decision not to use term "student-athlete" due to concerns about workers' right protections for such students).

[15] *See* Chandler Vessels, *SEC Announces Salary Cap for New Era of College Sports*, ON3 (Sept. 23, 2021), https://www.on3.com/news/sec-announces-salary-cap-new-era-college-sports-alabama-georgia-florida-lsu-arkansas-kentucky/ [https://perma.cc/53UQ-QUY7]

What these parties know—as most of us suspect—is that if spending is not constrained somehow (from facilities to coaching to athletes), the college sports landscape will look extremely different in a few short years. Division I college football is already migrating to an alignment of "haves" and "have-nots."[16] The Big Ten and SEC are absorbing elite-level (rich) programs,[17] coaches,[18] and athletes,[19] regardless of historical rivalries, geographic boundaries, or shared educational values. As the rich get richer, the poor will inevitably get poorer and be unable to meaningfully compete against those more privileged teams.[20]

The problem for the NCAA in particular, but also for the conferences and schools, is that there is not currently an appropriate legal framework to allow the NCAA, the conferences, or the schools to implement financial controls or

(reporting SEC's announcement to cap financial support to student-athletes at $5,980); Matthew Washington, *Kiffin Wants Changes to NIL Rules, Likens Them to Salary Caps*, THESCORE, https://www.thescore.com/ncaaf/news/2289905 [https://perma.cc/HCP2-2UU5] (last visited Sept. 29, 2023) (noting college football coaches' concern about NIL compensation, one of whom suggested implementing caps on NIL payments); Jeff Faraudo, *Once Again, College Football Coaching Salaries Are Hard To Wrap Your Head Around*, SPORTS ILLUSTRATED (Oct. 15, 2021, 3:22 PM), https://www.si.com/college/cal/news/2021-coaching-salaries (illustrating high salaries of college football coaches, of whom the top fifty earn more than three million dollars on average).

[16] Paula Lavigne, *Rich Get Richer in College Sports as Poorer Schools Struggle To Keep Up*, ABC NEWS (Sept. 4, 2016, 9:20 AM), https://abcnews.go.com/Sports/rich-richer-college-sports-poorer-schools-struggle/story?id=41857422 [https://perma.cc/SXU8-XZAD] (reporting growing gap between schools rich with sports resources, especially between those in Division I and smaller conference schools).

[17] *See* Ralph D. Russo, *Column: It's Not Conference Realignment. It's Consolidation and No One Is Safe in the Dash for Cash,* AP NEWS (Aug. 7, 2023, 12:35 PM), https://apnews.com/article/big-ten-big12-realignment-pac12-2ab096bb273425903f3f0bf9a1b5a852 [https://perma.cc/U2ZE-ZBUU] (commenting on turmoil facing the former Pac-12 and expansion of the Big 10, SEC, and ACC); Christopher Walsh, *All Things CW: In Which Direction Could SEC Expansion Go Next?*, SPORTS ILLUSTRATED (July 3, 2022, 2:00 PM), https://www.si.com/college/alabama/bamacentral/all-things-cw-which-direction-sec-expansion-go.

[18] *See* Aaron Torres, *Has the Big Ten Surpassed the SEC Thanks to Better Coaching?*, FOX SPORTS (Nov. 15, 2016, 3:26 PM), https://www.foxsports.com/stories/college-football/has-the-big-ten-surpassed-the-sec-thanks-to-better-coaching [https://perma.cc/5AX5-FCMX] (attributing successful performance of Big Ten football programs to their recruitment of well-known coaches).

[19] *See* Nick Kosko, *Big Ten Football Players Generating Most Buzz Ahead of 2022 Season*, 247SPORTS (Aug. 24, 2022, 5:22 PM), https://247sports.com/LongFormArticle/Big-Ten-football-players-generating-most-buzz-ahead-of-2022-season-192025732/#192025732_1 [https://perma.cc/QHL5-M7KY]; *SEC-Only Draft Filled with Talent and Strategy. Could Our Writers' Teams Take the AFC South?*, ATHLETIC (Aug. 29, 2022), https://theathletic.com/3542672/2022/08/29/sec-draft-athletic-writers/ (noting high number of SEC players recruited by the NFL).

[20] *See* Lavigne, *supra* note 16 (explaining some schools drop out of college football competitions, such as Football Bowl Subdivision, due to financial constraints).

guardrails without violating antitrust laws.[21] Over the last forty years, the NCAA has suffered setback after setback in the courts as it tried to defend various cost controls against antitrust challenges.[22] There are only three realistic, potential solutions that could allow the NCAA to continue in a role similar to the one it has occupied since the 1950s. The first is one that has been bandied about for some time: the professionalization of college sports.[23] If universities employed student-athletes, then the universities and student-athletes could engage in collective bargaining that would allow for common market control tools like a salary cap.[24] The second approach is not one that can be adopted under our current legal framework.[25] However, providing college sports with a statutory antitrust exemption akin to that enjoyed by Major League Baseball ("MLB") would allow the NCAA to implement the types of controls they desire without crossing the Rubicon of direct athlete employment by the universities.[26] The final potential approach is also one that is often debated publicly: moving to a Division III or club sport model in which athletes do not receive athletic scholarships for non-revenue-generating sports.[27] These options present different legal challenges and implications, and a very different path from the one the NCAA has walked for the past half century.

Part I of this article traces the history of the NCAA's current predicament of unsuccessfully attempting to enforce an amorphous concept of amateurism under the framework of antitrust law. In connection with the NCAA's more recent losses in court,[28] its move to allow student-athlete compensation for NIL-related activity threatens to undermine its reason for existence: hosting amateur sporting competitions.[29] With limited rules and enforcement activity, the NCAA is struggling to find a way to constrain proliferating "pay-for-play" arrangements

[21] *See* discussion *infra* Part I.D (noting limits on NIL-related payments would likely lead to antitrust defense).

[22] *See infra* notes 96-119 and accompanying text (providing overview of antitrust claims against NCAA alleging NCAA's restriction on costs such as broadcast price, scholarships, and incidental expenses violated the Sherman Act).

[23] *But see* discussion *infra* Part II (explaining although adopting employment framework could provide exemptions to antitrust laws, such course of action would create several legal complexities).

[24] *See* Washington, *supra* note 15.

[25] *See* discussion *infra* Part I.B.2 (discussing other sports benefitting from antitrust exemptions).

[26] *See* discussion *infra* Part I.B (illustrating "anomalous" success of baseball to receive exemption from antitrust law).

[27] *See infra* notes 250-53 and accompanying discussion (explaining employment framework would not apply to athletes participating in non-revenue-generating sports).

[28] *See, e.g.*, NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021) (affirming NCAA's cap on student-athlete's compensation for their athletic services violates antitrust law).

[29] *See infra* notes 32-35 (providing sources illustrating NCAA's emphasis on distinguishing between amateur student-athletes and professional sports).

entered into under the guise of NIL-sanctioned activity.[30] As the NCAA realized it was legally boxed in, member schools adopted a new constitution in 2022 to grant schools and conferences greater autonomy, and to streamline the definition of amateur student-athlete.[31] Without a change in antitrust law, or a movement to professional status, the NCAA's ability to constrain pay-for-play will remain precarious.

Part II examines the myriad of legal ramifications of member schools (and by extension the NCAA) opting for the professionalization of (at least some, if not all) college athletics. This Part will examine previous and current attempts by student-athletes to unionize under the National Labor Relations Act ("NLRA") as the parties look for a viable legal position that allows college sports to thrive and college athletes to receive fair compensation, and the National Labor Relations Board's ("NLRB's") position in December 2022 that student-athletes should be classified as employees. This Part examines many of the yet unresolved consequences of the professionalization of college sports. As student-athletes, they will be covered by Title IX protections, and as employees, they will be covered by Title VII protections, requiring universities to comply with both. Athlete-employees will be protected by minimum wage laws and workers' compensation laws; many of them will be employed by state universities making them eligible for benefits. Foreign student-athletes will need to ensure their visas allow for this type of employment. Student-athletes injured in the course of performance may be eligible for workers' compensation if treated as employees. Finally, direct compensation from the universities would be taxable income for the student-athletes and potentially increase tax liability in several jurisdictions (wherever games are played).

Part III opines on a path forward that both fairly compensates student-athletes and provides a viable legal and financial footing for member schools, the NCAA, and college athletics.

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[30] *See infra* notes 47-48 and accompanying text (explaining NCAA struggles to justify compensation limitations due to ambiguity between amateur and professional athletes, leading to difficulty preventing "pay-for-play").

[31] *See infra* notes 36-39 and accompanying text (providing specific provisions from new constitution illustrating NCAA's ambiguity on amateurism). Previously, the NCAA defined amateurs as those who pursued athletics as an avocation rather than a vocation. *See* NCAA, 2019-20 NCAA DIVISION I MANUAL 4 (2019) [hereinafter 2019-20 NCAA DIVISION I MANUAL] (stating student-athletes should be amateurs who participate in sports for their "physical, mental and social benefits" as "avocation"). However, the lack of a clear definition of amateurism has hamstrung the NCAA's legal arguments in recent cases as it sought, unsuccessfully, to prove its product satisfied the "rule of reason" test, or that they should be exempt from it. *See Alston*, 141 S. Ct. at 2157-62 (holding NCAA's compensation restriction should still be subject to "rule of reason" test despite Supreme Court's previous acknowledgement of NCAA's role in maintaining "tradition of amateurism," partly due to significantly changed market conditions).

I. ANTITRUST AND SPORTS—FROM HUMBLE BEGINNINGS TO BILLIONAIRES' PLAYGROUNDS

A. *The Romantic Idea of Amateurism*

The newly adopted 2022 NCAA constitution ostensibly maintains the commitment to amateurism espoused in previous versions.[32] Bylaw 12.01.1 stipulates "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport,"[33] and Bylaw 12.01.2 reiterates two key concepts for the NCAA: (1) intercollegiate athletic programs are supposed to complement the primarily educational endeavor of the institution, and (2) student-athletes are integral members of the student body thus providing the "clear line of demarcation between college athletics and professional sports."[34] These bylaws echo previous versions of the NCAA manual that described member institutions' "[c]ommitment to [a]mateurism," which "maintain[ed] a line of demarcation between student-athletes who participate in the Collegiate Model and athletes competing in the professional model."[35]

However, in a break from the past, the new version of the NCAA Constitution discarded Principle 2.9, "The Principle of Amateurism,"[36] and replaced it with Principle B—"The Collegiate Student-Athlete Model."[37] Whereas Principle 2.9 explicitly sought to protect student-athletes "from exploitation by professional and commercial enterprises," and exhorted student-athletes to participate in athletics primarily for educational, health, and social benefits,[38] Principle B simply states that member institutions may not compensate student-athletes for participating in a sport.[39] The previous NCAA Constitution's elaboration on student-athlete participation in athletics as a "recreational pursuit" was likewise eliminated.[40]

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[32] *See* NCAA, 2022-23 NCAA DIVISION I MANUAL, at xiii (2022) [hereinafter 2022-23 NCAA DIVISION I MANUAL]; *see also* 2019-20 NCAA DIVISION I MANUAL, *supra* note 31, at xii.

[33] 2022-23 NCAA DIVISION I MANUAL, *supra* note 32, at 39.

[34] *Id.*

[35] *See, e.g.*, 2019-20 NCAA DIVISION I MANUAL, *supra* note 31, at xii.

[36] *Id.* at 4. Principle 2.9 reads "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." *Id.*

[37] 2022-23 NCAA DIVISION I MANUAL, *supra* note 32, at 2.

[38] 2019-20 NCAA DIVISION I MANUAL, *supra* note 31, at 4.

[39] 2022-23 NCAA DIVISION I MANUAL, *supra* note 32, at 2.

[40] *Compare* 2019-20 NCAA DIVISION I MANUAL, *supra* note 31, at 1 (stating purpose of NCAA is, among others, to develop athletic programs as "recreational pursuit" for students), *with* 2022-23 NCAA DIVISION I MANUAL, *supra* note 32, at 2-3 (providing duties and principles of NCAA, none of which include promoting athletic participation as recreational endeavor).

In a time when the NCAA is highly concerned about enforcing rules against pay-for-play,[41] why has it reduced guidance and clarity on amateurism in its constitution? The problem for the NCAA has almost always been definitional. It is difficult to define an activity as amateur when student-athletes receive scholarships to cover the full cost of tuition, room, board, educational expenses, and, in some cases, cash stipends.[42] In recent litigation, the NCAA was unable to successfully define its concept of amateurism and the concomitant need for the compensation-related limitations it imposes on student-athletes.[43] In essence, the NCAA argued that spectators are attracted to college sports due to the amateur nature of the contest and that this crucial difference is what distinguishes its products from those created by the professional leagues and makes its products popular.[44] However, the NCAA was not able to show, beyond ballpark guesses,[45] the dividing line between amateurism and professionalism—a far cry from a clear line of demarcation.[46]

The NCAA's inability to prove the compensation limitations it imposed on student-athletes were "procompetitive"—in the sense of increasing consumer demand and options in the marketplace[47]—forced its hand in approving NIL compensation, leaving it on the defense to legal attacks based on antitrust law. This legal maelstrom, in which the NCAA forcibly advocates for amateurism but perhaps lacks a solid legal footing on which to regulate student-athletes, is

[41] *See generally* NCAA, NCAA DIVISION I INSTITUTIONAL INVOLVEMENT IN A STUDENT-ATHLETE'S NAME, IMAGE AND LIKENESS ACTIVITIES (2022); Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA (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/3UTR-BXTQ] (summarizing NCAA's clarifications on what schools can and cannot do in terms of their involvement in student-athletes' NIL compensation).

[42] 2022-23 NCAA DIVISION I MANUAL, *supra* note 32, at 192-93 (enumerating different types of financial aid student-athletes may receive from member institution).

[43] *See* NCAA v. Alston, 141 S. Ct. 2141, 2152-53 (2021) (summarizing district court's finding on anticompetitive effect of NCAA's compensation limitation).

[44] *Id.* at 2152 (addressing NCAA's argument that its restrictive rules on compensation promote amateurism and increase demand for intercollegiate athletics, which has procompetitive benefits).

[45] *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1071-75 (N.D. Cal. 2019) (describing testimony from witnesses indicating student-athletes could receive performance awards of up to $5,600 in gift cards, significant funds from schools, and other aid in excess of tuition costs, while still being considered amateurs by NCAA).

[46] *Compare id.* at 1071-74 (describing various payments available to student-athletes), *with* 2019-20 NCAA DIVISION I MANUAL, *supra* note 31, at 4, 63 (identifying professional athletes as those who receive payment for sports participation and seeking clear line between amateurism and professional model).

[47] *See NCAA Athletic Grant-in-Aid Cap Antitrust Litig.* 375 F. Supp. at 1078, 1080 (finding no evidence additional compensation to student-athletes would reduce consumer interest and no evidence NCAA had enacted bylaws limiting compensation based on market analysis of consumer preference).

probably the number one reason that we have only seen a single enforcement attempt concerning NIL compensation.[48]

B. *America's Pastime Is Protected—But It Is Not Enough To Help the NCAA*

Congress passed the Sherman Antitrust Act in 1890 ("Sherman Act") to protect against monopolies and other anticompetitive combinations or conspiracies that would cause harm in the marketplace.[49] The Sherman Act was overwhelmingly popular and passed in the Senate by a vote of 51-1, and in the House by a vote of 242-0.[50] As the Supreme Court said in *Spectrum Sports, Inc. v. McQuillan*,[51] "[t]he purpose of the [Sherman] Act is . . . to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[52] In large part, NCAA member schools act as a collective or collusive monopsony as the only purchaser for the labor of college athletes.[53] As a monopsony, this collective has yielded incredible market strength to the extent it has been able to prohibit any compensation for student-athletes.[54] This anticompetitive behavior has been the focal point for student-athlete litigation against the NCAA, conferences, and schools over the last few decades.[55] This collusive behavior is arguably the exact type of anticompetitive behavior that the Sherman Act was designed to police against. However, only one sport has ever succeeded in winning an antitrust exemption at the Supreme

[48] *See* Meghan Durham, *Recruiting Violations Occurred in Miami (Florida) Women's Basketball Program*, NCAA (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/76X7-8EV2] (reporting violation of NCAA recruitment rules by head coach who coordinated meeting between student-athletes and booster but no violation of NIL-related rules).

[49] Act To Protect Trade and Commerce Against Unlawful Restraints and Monopolies, Pub. L. No. 51-190, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7).

[50] *Sherman Anti-Trust Act (1890)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/sherman-anti-trust-act (last reviewed Mar. 15, 2022).

[51] 506 U.S. 447 (1993).

[52] *Id.* at 458.

[53] NCAA v. Alston, 141 S. Ct. 2141, 2154 (2021) (noting the NCAA did not object to the court's characterization of NCAA as having monopsony control in college sports market).

[54] *See* Austin Quick, *Breaking the Monopsony Mirror: Evaluating the Collateral Market Procompetitive Justification in the Context of* NCAA v. Alston, 64 ARIZ. L. REV. 887, 893 (2022) (defining monopsony as having power to restrict compensation below what competitive markets would provide due to lack of other buyers).

[55] *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015) (summarizing plaintiff's claim that NCAA's prohibition on any payment from use of athlete's NIL violates Sherman Act); White v. NCAA, No. 06-999, 2006 WL 8066802, at *1-2 (C.D. Cal. Sept. 21, 2006) (summarizing complaint by student-athletes asserting NCAA's restrictive interpretation of "grant-in-aid" violates Sherman Act).

Court.[56] Baseball, through a quirk of fate or propitious timing, is and was the only sport in the United States to successfully argue for exemption from antitrust laws.[57] While the NCAA would like to replicate MLB's success in the antitrust arena, it is unlikely to do so as the decision in *Federal Baseball Club of Baltimore, Inc. v. National League Owners of Professional Baseball Clubs*[58] is best described as anomalous.[59]

Baseball itself was not immediately an economic success for the owners or players.[60] The National League, founded in 1876, is the oldest continuing professional sports league in the United States, but its early years were characterized by fierce economic competition against rivals.[61] The National League raided competitor leagues for players, poached top teams, merged with other leagues, imposed strict limitations on player salaries and movement, waged a "baseball war" in 1901 and 1902, and successfully fought against player-free agency long into the twentieth century.[62] The Supreme Court's decision in *Federal Baseball* gave legal cover to the owners to continue to engage in anticompetitive activity within the sphere of the game.[63]

[56] *See* Fed. Baseball Club of Balt. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200, 208-09 (1922) (holding plaintiff's Sherman Act claim cannot stand because business of baseball, as a "purely state affair[]," does not constitute interstate commerce).

[57] *See* discussion *infra* Part I.B.2 (illustrating failure of other sports to argue for antitrust law exemptions in Supreme Court).

[58] *Fed. Baseball Club*, 259 U.S. at 208-09.

[59] *See* Flood v. Kuhn, 407 U.S. 258, 282 (1972) (describing *Federal Baseball* "as an 'aberration'").

[60] *See* Michael J. Haupert, *The Economic History of Major League Baseball*, EH.NET (Dec. 3, 2007), https://eh.net/encyclopedia/the-economic-history-of-major-league-baseball/ [https://perma.cc/M5JA-E5A3] (explaining landscape of baseball industry in late 1900s where players lacked bargaining powers and owners experienced financial struggles due to frequent player transfers for higher wages).

[61] *See National League*, BRITANNICA (last updated Sept. 26, 2023), https://www.britannica.com/topic/National-League [https://perma.cc/D869-W6VC] (stating National League is "oldest existing" professional baseball league in United States); Haupert, *supra* note 60 (noting National League teams often paid best players in other teams to transfer midseason).

[62] *See* Haupert, *supra* note 60 (providing overview of professional baseball player labor market, which was largely characterized by team owners' attempts to protect against competition); C. Paul Rogers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 SMU L. REV. 325, 326-27 (2002) (elaborating on "baseball war" between National League and American League); Bruce Markusen, *Four Decades Later, Free Agency Still Fuels Baseball*, NAT'L BASEBALL HALL OF FAME, https://baseballhall.org/discover/short-stops/free-agency-still-fuels-baseball [https://perma.cc/G8JG-4K6W] (last visited Sept. 29, 2022) (outlining development of free agent system since its formation in 1970s).

[63] *Fed. Baseball Club*, 259 U.S. at 209 (exempting business of providing exhibitions of baseball from Sherman Act).

1. *Federal Baseball*'s Narrow Path to an Antitrust Exemption

At the lower level, the D.C. Court of Appeals ruled the Federal Baseball Club of Baltimore was not subject to the provisions of the Sherman Act.[64] The basis for the ruling was the court's conclusion that the Sherman Act only applies to restraints of commerce, and that commerce requires "the transfer of something."[65] In the D.C. Court of Appeals's opinion, the product in question, a game of baseball, was not susceptible of being transferred.[66]

> The players, it is true, travel from place to place in interstate commerce, but they are not the game. Not until they come into contact with their opponents on the baseball field and the contest opens does the game come into existence. It is local in its beginning and in its end. Nothing is transferred in the process to those who patronize it. . . . [T]he game effects no exchange of things according to the meaning of 'trade and commerce' . . . .[67]

On appeal, the Supreme Court affirmed the D.C. Court of Appeals's ruling.[68] Justice Oliver Wendell Holmes, in declining to apply the Sherman Act to interstate agreements to conduct baseball games, held:

> The business is giving exhibitions of base ball, which are purely state affairs. . . . [T]he fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.[69]

Reevaluating this decision one hundred years later, a generous interpretation would be that the economic impacts of the game at the time were so minimal that a baseball game was best viewed legally as a purely local event available only to individuals in that community. A more pragmatic analysis would conclude that, even in 1922, Justice Holmes's majority opinion was specious in its characterization of baseball games and the applicability of the Sherman Act to constrain market abuses.[70] This decision led to multiple challenges and has

[64] Nat'l League of Pro. Baseball Clubs v. Fed. Baseball Club of Balt., 269 F. 681, 684-85 (D.C. Cir. 1920).

[65] *Id.* at 684.

[66] *Id.* at 684-85.

[67] *Id.*

[68] *Fed. Baseball Club*, 259 U.S. at 209.

[69] *Id.* at 208-09.

[70] Justice Holmes founded his decision "on the conclusion 'the transport [of players and gear] is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade of commerce in the commonly accepted use of those words.'" *Id.* at 209. This incidental nature of the interstate aspect of baseball games, however, is belied by the fact that in this case, the sixteen teams in question were located in seven different states as well as the District of Columbia, had their own stadia for general public attendance, were organized for profit, and were governed to regularly compete against one another in their home states. *Id.* at 208-09; *see also Nat'l League of Pro. Baseball Clubs*, 269 F. at 682-83.

been repeatedly questioned by various parties—including the Supreme Court itself.[71]

The Supreme Court first revisited the *Federal Baseball* decision roughly thirty years later in *Toolson v. New York Yankees*.[72] In a per curiam, one paragraph decision, the Supreme Court declined to examine the underlying issues and adhered to the principle of stare decisis, stating:

> The business [of baseball] has . . . been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.[73]

Then, in 1972, the Supreme Court revisited *Federal Baseball* for the second time in fifty years.[74] Curt Flood, a two-time World Series Champion, three-time all-star, and seven-time Gold Glove recipient, brought a lawsuit against the MLB in yet another challenge against the reserve clause.[75] Yet again, the Court concluded that any change to baseball's antitrust exemption should come from Congress, not the Court.[76] The *Flood* decision recognized the illogical nature of baseball's antitrust exemption and characterized it as "an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis."[77] The decision concluded, as had the ones before, that to the extent the Court's treatment of baseball's antitrust exemption needed revision, the revision had to come from Congress.[78] Congress took note and passed a revision in the form of the Curt Flood Act of 1998, which kept large portions of MLB's antitrust exemption intact while allowing players the mobility (and increased remuneration) of free agency.[79]

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[71] *See, e.g.*, Radovich v. Nat'l Football League, 352 U.S. 445, 450-52 (1957) (upholding and isolating *Federal Baseball* by solely holding business of baseball outside federal antitrust laws); Flood v. Kuhn, 407 U.S. 258, 282-85 (1972) (reciting history built on *Federal Baseball* that courts will not overturn exemption unless and until Congress takes action).

[72] 346 U.S. 356, 357 (1953). In *Toolson*, a baseball player challenged the reserve clause that essentially bound players to a particular club until the club decided to release the player or the player simply opted to no longer play professionally. Toolson v. N.Y. Yankees, 101 F. Supp. 93, 93 (S.D. Cal. 1951).

[73] *Toolson*, 346 U.S. at 357. The year before, the 1952 Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary concluded "evidence adduced [on chaotic market conditions that existed before MLB's enactment of a reserve clause] at the hearings would clearly not justify the enactment of legislation flatly condemning the reserve clause." H.R. REP. NO. 82-2002, at 229 (1952).

[74] *Flood*, 407 U.S. at 269-71.

[75] *Id.* at 265-66.

[76] *Id.* at 283-84.

[77] *Id.* at 282.

[78] *Id.* at 283-84.

[79] 15 U.S.C. § 26b.

2. No Other Sport Has Received an Antitrust Exemption

While baseball has now enjoyed one hundred years of some form of antitrust exemptions, how other sports have fared is not good news for the NCAA. In 1955, the Supreme Court held that boxing and the promotion of boxing contests were not immune from the Sherman Act, noting "*Federal Baseball* did not hold that all businesses based on professional sports were outside the scope of the antitrust laws."[80] The Court in *International Boxing Club*, distinguishing *Federal Baseball* on the ground that MLB had an established exemption, declined to grant boxing an exemption in the first instance.[81] Two years later, the Court ruled against the National Football League's ("NFL's") claim for an antitrust exemption for football, noting that *Federal Baseball* only held the business of baseball outside the reach of the Sherman Act.[82] While the NFL argued that its sport was similar in structure to baseball and should be treated similarly with regard to the Sherman Act, the Court expressly limited its holding in *Federal Baseball* to the sport of baseball.[83] In doing so, it noted "[i]f this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer . . . that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act."[84] Not to be left out, in 1971, a player challenged the National Basketball Association ("NBA") draft on group boycott grounds, and in a motion upholding a preliminary injunction against the NBA, the Court stated succinctly, "[b]asketball, however, does not enjoy exemption from the antitrust laws."[85]

While MLB does, at least for the time being,[86] enjoy a partial antitrust exemption, trying to secure a similar judicially-created exemption is not a viable path for the NCAA without legislative action.

C. *The NCAA's Need for a Statutory Exemption*

Sports, by their very nature, require collaboration to exist. If teams and owners are not permitted to work together to create schedules, establish uniform rules for the game, decide on a framework for membership in the league, or choose a structure by which a victor is crowned, then no league will be formed, and no product produced. Otherwise, any of the contracts on league formation

[80] United States v. Int'l Boxing Club of N.Y., 348 U.S. 236, 243 (1955).

[81] *Id.*

[82] Radovich v. Nat'l Football League, 352 U.S. 445, 451 (1957).

[83] *Id.* at 447-48.

[84] *Id.* at 452.

[85] Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1205 (1971).

[86] *See* Christian Red, *Major League Baseball's Antitrust Exemption Once Again Faces Scrutiny on Capitol Hill*, FORBES (July 2, 2022, 7:00 AM), https://www.forbes.com/sites/christianred/2022/07/02/major-league-baseballs-antitrust-exemption-once-again-faces-scrutiny-on-capitol-hill/?sh=7aaac3c71a15 (describing baseball's immunity to federal antitrust laws despite recent legislative and judicial actions for change).

could be construed as unreasonable acts "in restraint of trade or commerce," or, in certain cases, as attempts (successful or not) to unlawfully monopolize a market.[87] In a standard marketplace, activity in the form of a group boycott would likely be subject to the per se rule of illegality because it is "plainly anticompetitive."[88] However, in the world of sports, group boycotts are common as owners determine who can own a team in the league.[89] Recognizing the inherent need to act collectively in the world of sport, the Supreme Court has acknowledged that a strict application of the Sherman Act would be inappropriate as it could act to eliminate the product from the marketplace entirely, thereby limiting consumer choice.[90] Instead, the Court has most often used a "rule of reason" analysis in resolving antitrust claims in the sporting world.[91]

The traditional application of the rule of reason test goes through several burden-shifting steps. The first step requires the plaintiff to prove the defendant engaged in collective activity in the unreasonable restraint of trade or commerce.[92] If this step is satisfied, the burden shifts to the defendant to offer procompetitive justifications for the restraint.[93] If the defendant meets this obligation, the burden shifts back to the plaintiff to show either the restraint is not "reasonably necessary," or the defendant had "substantially less restrictive"

[87] *See* 15 U.S.C. §§ 1-2.

[88] Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[89] *See* NCAA v. Alston, 141 S. Ct. 2141, 2155 (2021) (recognizing some collaboration among sports group members is necessary to maintain profession); *Radovich*, 352 U.S. at 449 (finding certain contracts allowing group boycotts to be part of sports profession business).

[90] *Alston*, 141 S. Ct. at 2155 ("At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful per se or rejected after only a quick look.").

[91] *See, e.g.*, *id.* at 2155-58 (describing rule of reason and its past application). Between the per se rule and the unabridged rule of reason lies the quick look test. As the Court noted in *NCAA v. Board of Regents of the University of Oklahoma*, the quick look test can "be applied in the twinkling of an eye." 468 U.S. 85, 110 n.39 (1984). In *Law v. NCAA*, the Tenth Circuit did just that. *See* 134 F.3d 1010, 1020 (10th Cir. 1998). In *Law*, assistant coaches challenged the NCAA's imposition of horizontal price restraints (salary limits on part-time coaching positions). *Id.* at 1014-15. The Tenth Circuit adopted the quick look approach declaring, "where a practice has obvious anticompetitive effects . . . anticompetitive effect is established [under the quick look test], even without a determination of the relevant market." *Id.* at 1020. The *Law* court granted the plaintiffs summary judgment, holding that the NCAA failed to meet its burden of showing that procompetitive reasons for salary limitations justified their anticompetitive effects. *Id.* at 1021-24.

[92] Included within this initial step are the requirements that the plaintiff identify the relevant product and market, the market power of the defendant, and the existence of anticompetitive effects (or "antitrust injury"). *See* United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993) (conducting abbreviated rule of reason analysis to assess plaintiff's assertion of defendants' price fixing). The quick look test discussed above obviates the need to review the relevant market and market power of the defendant. *Law*, 134 F.3d at 1020.

[93] *See Brown Univ.*, 5 F.3d at 669 (requiring defendant universities to justify their price fixing system on procompetitive grounds).

options available that would allow it to achieve its "legitimate objectives."[94] Finally, if the first three steps are satisfied and it becomes necessary to do so, the reviewing court balances the benefits of the restraint against its harms.[95]

The landmark NCAA case involving the rule of reason test is *NCAA v. Board of Regents*.[96] In *Board of Regents*, the NCAA imposed limitations on member schools as to how often their games could be televised, fixed the price for certain broadcasts, and entered into exclusive network contracts preventing the member schools from entering into their own deals with other broadcasters.[97] The district court, finding for the plaintiff university, concluded the NCAA acted as a "classic cartel" that "impose[d] production limits on its members, and maintain[ed] mechanisms for punishing cartel members who [sought] to stray from these production quotas."[98]

The NCAA argued its exclusive system for televised games was necessary to protect procompetitive interests such as protecting live attendance at games, maintaining competitive balance among amateur teams, and promoting the overall concept of amateurism in college sports.[99] The Court made short shrift of these arguments, noting "if the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games. . . . Here production has been limited, not enhanced."[100] As for the competitive balance argument, the Court noted the television broadcast plan was not even structured to facilitate that interest.[101] There were no mandates on university use of the television money or restrictions on the use of any one type of revenue versus another—thus, no clear relation between the procompetitive goal of competitive balance and how much revenue teams made via the television plan—nor any evidence that reducing universities' television appearances increased competitive balance in NCAA sports.[102] While the Court did acknowledge the "revered tradition of amateurism in college sports," it held

[94] *Id.* at 679.

[95] *See Law*, 134 F.3d at 1019 ("Ultimately, if these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.").

[96] 468 U.S. 85 (1984).

[97] *Id.* at 91-94.

[98] *Id.* at 96.

[99] *Id.* at 114-19.

[100] *Id.* at 114. The Court went further in its critique of the NCAA's plan: "At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market. The television plan protects ticket sales by limiting output—just as any monopolist increases revenues by reducing output." *Id.* at 116-17 (footnote omitted).

[101] *Id.* at 117-19.

[102] *Id.* at 119.

that the overly broad limitations the NCAA imposed on universities went too far and ran afoul of the Sherman Act.[103]

In the 2000s, the number of student-athlete antitrust claims against schools, conferences, and the NCAA began to increase. In 2005, walk-on athletes (nonscholarship recipients) sued the NCAA, arguing that the cap on athletic scholarships violated the Sherman Act.[104] The NCAA's move for judgment on the pleadings was denied.[105] A year later, the NCAA lost a motion to dismiss in a suit brought by a student-athlete challenging the NCAA's rules preventing grants-in-aid from covering incidental expenses such as laundry, travel, and insurance.[106] Then, in 2009, former UCLA basketball player Ed O'Bannon filed perhaps the most famous case against the NCAA since *Board of Regents*.[107] O'Bannon sued the NCAA and the video game company Electronics Arts for violation of the Sherman Act for using student-athletes' likenesses in a video game without compensation.[108] O'Bannon ultimately prevailed at the Ninth Circuit in 2015 when the Court of Appeals found the NCAA's cap on education-related expenses violated the Sherman Act.[109]

Finally, in 2021, the Supreme Court unanimously held in *Alston* that the NCAA's prohibitions on noncash compensation for academic-related purposes

[103] *Id.* at 120. In a 2004 case that was a forerunner to the antitrust cases of *O'Bannon* and *Alston*, Jeremy Bloom, an Olympian and World Champion skier, sought to play college football at the University of Colorado while continuing to earn money from endorsement opportunities with ski equipment companies, clothing brands, and television. Bloom v. NCAA, 93 P.3d 621, 622 (Colo. Ct. App. 2004). Although not an antitrust case, the NCAA presciently argued that if student-athletes were allowed to endorse products, it would be essentially impossible to police whether the endorsements were true endorsements or simply disguised payments to facilitate pay-to-play. *Id.* at 626-27. The Colorado Court of Appeals ruled against Bloom, finding the NCAA neither violated any contractual obligations nor acted arbitrarily in applying its amateurism rules. *Id.* at 625-27. The Colorado Court of Appeals cited the lower court, which identified one of the NCAA's biggest concerns with allowing endorsement payments being that "there would 'be no way to tell whether [Bloom] is receiving pay commensurate with his [] football ability or skiing ability.'" *Id.* at 627.

[104] *In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1146-47 (W.D. Wash. 2005) (denying NCAA's motion for judgment on pleadings). This claim has been raised in other jurisdictions as well. *See, e.g.*, Rock v. NCAA, 928 F. Supp. 2d 1010, 1026-27 (S.D. Ind. 2013) (granting NCAA's motion to dismiss).

[105] *NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1152.

[106] White v. NCAA, No. CV 06–999, 2006 WL 8066802, at *1, *4 (C.D. Cal. 2006) (finding plaintiff's allegation about NCAA's product market, geographic market, and harm to competition as legally sufficient to survive motion to dismiss).

[107] *See generally* O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

[108] *Id.* at 963.

[109] O'Bannon v. NCAA, 802 F.3d 1049, 1075-76 (9th Cir. 2015) (finding NCAA's cap below cost of attendance to be too restrictive and unrelated to procompetitive reasons). Student-athletes also prevailed in a companion case against Electronic Arts on right of publicity grounds. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1284 (9th Cir. 2013).

violated the Sherman Act.[110] The NCAA argued that *Board of Regents* gave it the authority to prohibit student-athlete compensation.[111] To do so, the NCAA relied on dicta from *Board of Regents*:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.[112]

The NCAA interpreted that language to mean it could impose financial restrictions to maintain amateurism.[113]

Justice Neil Gorsuch clarified that *Board of Regents* did *not* grant the NCAA permission to limit student-athlete compensation—nor was that issue even addressed in the case[114]—and that if the NCAA desired more favorable antitrust treatment it should direct its efforts toward Congress.[115] Otherwise, any collective action the NCAA takes is subject to antitrust review under the rule of reason, and the NCAA's restriction on additional education-related expenses failed that test.[116] In addressing the NCAA's core argument about its ability to continue to offer a unique product (amateur sports), the Court held the NCAA could not avoid the Sherman Act by "relabel[ing] a restraint as a product feature and declar[ing] it 'immune from § 1 scrutiny'".[117] The most oft-quoted portions of the *Alston* decision come from Justice Brett Kavanaugh's concurrence, in which he stated, "there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny . . . [as] [t]he NCAA's business model would be flatly illegal in almost any other industry in America."[118]

Although the *Alston* decision addressed the fairly narrow question of enhanced educated-related benefits, its impact was significant, as just days after

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[110] NCAA v. Alston, 141 S. Ct. 2141, 2164-66 (2021).

[111] *Id.* at 2157 ("On the NCAA's reading, [the *Board of Regents*] decision expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today.").

[112] *Id.* (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984)).

[113] *Id.* at 2157-58.

[114] *Id.* at 2158 ("*Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions.").

[115] *Id.* at 2160 (noting Congress has historically modified antitrust law for favored industries).

[116] *Id.* at 2159-63 (noting restrictions' anticompetitive effect despite substantially less restrictive measures available to NCAA).

[117] *Id.* at 2163. Importantly, for a plaintiff making the claim that an essential feature of its product is its amateur nature, the Court also noted the NCAA's inability to maintain a consistent definition of amateurism. *Id.* at 2152.

[118] *Id.* at 2167.

the decision the NCAA moved to allow student-athletes to earn NIL-related compensation.[119] Changing public sentiment in favor of compensating student-athletes, weak (and weakening) antitrust positions, and the era of influencers led to the drastic shift in 2021 that the NCAA is now racing to address. It remains to be seen what will happen to the NCAA's amateur student-athlete model as its ability to regulate continues to erode.

D. *Fair Market Value "Guardrails" in This Environment Are Likely To Fail*

In May 2019, two years prior to the *Alston* decision and the NCAA's move to allow NIL-related income, the NCAA appointed a working group to examine NIL issues.[120] As discussions continued, the NCAA began to consider "guardrails" that would allow student-athletes to earn money from NIL but still meet the NCAA's stated goal of preserving amateurism.[121] One of these guardrails made it into the final regulation—requiring student-athletes to disclose NIL agreements to their schools.[122] However, a guardrail related to the NCAA's key concern on pay-for-play—a prohibition on "abnormal payments" that are not "consistent with [the] level of compensation that should be provided relative to the activity"—quickly fell away, presumably because it clearly violated antitrust laws.[123] In these early stages, the NCAA looked at limitations

[119] *NCAA Interim NIL Policy*, *supra* note 3 (calling policy temporary solution pending Congressional action).

[120] *See* Michelle Brutlag Hosick, *NCAA Working Group to Examine Name, Image and Likeness*, NCAA (May 14, 2019, 2:40 PM), https://www.ncaa.org/news/2019/5/14/ncaa-working-group-to-examine-name-image-and-likeness.aspx [https://perma.cc/528A-G6LQ] (stressing group would not consider paying student-athletes).

[121] *See* Ralph D. Russo, *Skeptics Loom as NCAA Builds Guardrails Around Compensation*, AP NEWS (Apr. 29, 2020, 6:25 PM), https://apnews.com/article/laws-us-news-ap-top-news-sports-general-in-state-wire-e1d5efbe231c1b70134ace013a008036 [https://perma.cc/2DQ9-V4M2] ("[T]he NCAA fears individuals and companies using business relationships with athletes as cover for paying prospects to attend a particular school.").

[122] *See* Dan Murphy, *College Conference Commissioners Pushing Minimalist Plan To Regulate NIL*, ABC NEWS (June 20, 2021, 3:59 PM), https://abcnews.go.com/Sports/college-conference-commissioners-pushing-minimalist-plan-regulate-nil/story?id=78389334 [https://perma.cc/UGH8-LTVR] ("The guardrails include rules that, among other items, prohibit schools from partnering with their athletes in NIL deals, require athletes to disclose the deals they sign and prohibit athletes from endorsing some types of products such as gambling websites or tobacco."); *NCAA Interim NIL Policy*, *supra* note 3 (requiring athletes to report consistent with school policy).

[123] Jeff Metcalfe, *NCAA Moves Closer to Allowing College Athletes To Be Paid for Name, Image, Likeness*, ARIZ. REPUBLIC (Apr. 29, 2020, 9:01 AM), https://www.azcentral.com/story/sports/college/asu/2020/04/29/ncaa-moves-closer-allowing-athletes-paid-name-image-likeness/3047214001/ [https://perma.cc/C4J8-7LXV] (quoting Ohio State Athletic Director Gene Smith). Big East Commissioner Val Ackerman added that the market-based guardrail was to ensure "our system continues to feature student-athletes and not employees paid disguised salaries." *Id.* Leading sport law scholar Michael McCann notes, however, that any such rule "would be vulnerable to claims of illegal price fixing under federal antitrust law."

that could tie NIL income to the fair market value of the endorsement to protect against pay-for-play improprieties.[124] The problem with that system is the inherently subjective ascertainment of fair market value.[125]

Reports from January 2020 indicate the Department of Justice ("DOJ") was already addressing antitrust concerns with NCAA executives in late 2019.[126] Then, in early 2021 when the NCAA was poised to vote on an initial NIL rule change, the DOJ issued a letter to the NCAA stating, "[u]ltimately, the antitrust laws demand that college athletes, like everyone else in our free market economy, benefit appropriately from competition."[127] These antitrust concerns, coupled with the *Alston* decision, led the NCAA to quickly adopt an Interim NIL Rule on June 30, 2021, which took effect July 1, 2021.[128] The initial Interim NIL Rule and subsequent interim rules and guidance issued in May 2022 did not contain any compensation-based limitations other than explicitly prohibiting "pay-for-play."[129]

Michael McCann, *Legal Challenges Await After NCAA Shifts on Athletes' Name, Image and Likeness Rights*, SPORTS ILLUSTRATED (Apr. 29, 2020), https://www.si.com/college/2020/04/29/ncaa-name-image-likeness-changes-legal-analysis.

[124] *See* Russo, *supra* note 121. Then-Ohio State athletic director Gene Smith gave an example of an endorsement deal with Panera for a $50,000 payment in exchange for two likes as problematic and not within the realm of the initial proposal. *Id.*

[125] *See* McCann, *supra* note 123 (highlighting difficulties with enforcing such system).

[126] *See* Lauren Hirsch, *DOJ Antitrust Chief Met with NCAA as It Faces Pressure to Let College Athletes Make Money*, CNBC (Jan. 14, 2020, 5:41 PM), https://www.cnbc.com/2020/01/14/doj-antitrust-chief-met-with-ncaa-over-rules-for-paying-college-athletes.html [https://perma.cc/RT3M-RSL3] (reporting Justice Department warned it would take action if NCAA released anticompetitive policies).

[127] Ralph D. Russo, *After DOJ Warning, NCAA To Delay Vote on Compensation Rules*, AP NEWS (Jan. 9, 2021, 6:42 PM), https://apnews.com/article/athlete-compensation-mark-emmert-legislation-laws-f456f4ffa9869653573c146bf5387a34 [https://perma.cc/4KUS-TV5M]. Interestingly, for future consideration, the DOJ letter to the NCAA expressed antitrust concerns about both NIL-related limitations as well as transfer limitations. *Id.*

[128] *NCAA Interim NIL Policy*, *supra* note 3 (describing policy as "specific, short-term action"); Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/NLZ3-SSH6] (noting legal uncertainty in this area prevented more permanent solution).

[129] *NCAA Interim NIL Policy*, *supra* note 3 ("[P]rohibitions on pay-for-play . . . remain in effect . . . ."); Brutlag Hosick, *supra* note 128 ("[T]he policy . . . preserves the commitment to avoid pay-for-play . . . ."); *see also Interim Name, Image and Likeness Policy: Guidance Regarding Third Party Involvement*, NCAA (May 9, 2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf [https://perma.cc/KW2D-UEG3] (prohibiting NIL-compensation "contingent on initial or continuing enrollment at a particular institution").

Many outlets and commentators have described the NIL era as the "wild west."[130] The NCAA's unclear and hastily composed rules have led to uncertainty among the member institutions and a lack of action and enforcement by the NCAA.[131] As of February 2023, the NCAA has only reported a single NIL-related enforcement action.[132] The NCAA reached out to its member institutions seeking their assistance in investigating and policing NIL-related misconduct,[133] and in the spring of 2023 implemented a new burden-shifting policy. The new policy presumes impermissible conduct in NIL matters, which should improve the efficacy of NCAA NIL-related enforcement actions.[134]

Currently, the NCAA is effectively hamstrung as any NIL-related enforcement activities will likely yield a vigorous antitrust defense. In this legal environment, if the amateur collegiate sports model is to be able to continue, it will not be through rules and regulations issued by the NCAA as was once the case. Rather, as the NCAA has stated frequently over the past few years[135] and continues to state,[136] congressional intervention will be necessary. At the 2023 NCAA Convention, Baylor President Linda Livingstone, the chair of the NCAA's Board of Governors, noted "Congress is really the only entity that can affirm student-athletes' unique status," and stated the NCAA is seeking and

[130] *See, e.g.*, *The Wild West of College Football's NIL Program*, LAST WORD ON SPORTS (May 20, 2022), https://lastwordonsports.com/collegefootball/2022/05/20/the-wild-west-of-college-footballs-nil-program/ [https://perma.cc/6YAG-ASYC] ("The 'wild west' is a fitting description for this era of NIL in college athletics."); Mark Wogenrich, *Penn State's James Franklin Calls NIL 'the Wild, Wild West'*, SPORTS ILLUSTRATED: FANNATION (Dec. 26, 2022, 12:37 AM), https://www.si.com/college/pennstate/football/penn-state-football-james-franklin-nil-wild-wild-west (quoting football coach as saying the sport "got as crazy as I've seen in my 26 years").

[131] *See* Ralph D. Russo, *Lack of Detailed NIL Rules Challenges NCAA Enforcement*, AP NEWS (Jan. 29, 2022, 1:46 PM), https://apnews.com/article/college-football-sports-business-15e776b5d115dac0a37a1563d5bfce00 [https://perma.cc/PV72-GXVN] (reporting NCAA official stated they were not enforcing NIL policy).

[132] *See* Durham, *supra* note 48 (detailing NCAA's first reported NIL-related enforcement action against University of Miami's women's basketball program).

[133] Ralph D. Russo, *NCAA Asks Members for Help with NIL Violation Investigations*, AP NEWS (Aug. 18, 2022, 5:18 PM), https://apnews.com/article/college-football-sports-433a4d23792fc1d5a8f1a6d0ca9016fc [https://perma.cc/ECA6-JZKG] (reporting NCAA urged schools to "self-regulate").

[134] *See* Nicole Auerbach, *The 'NIL Presumption' and How an NCAA Bylaw Change Aims To Alter Infractions Cases*, ATHLETIC (Feb. 2, 2023), https://theathletic.com/4148166/2023/02/02/ncaa-nil-presumption-rules-infractions-cases/ (noting policy would remove need to find "smoking gun" in every case).

[135] *See, e.g.*, Emily Caron & Michael McCann, *NCAA Returns to Swamped Congress Seeking NIL, Antitrust Help*, SPORTICO (Oct. 1, 2021, 10:00 AM), https://www.sportico.com/leagues/college-sports/2021/ncaa-still-waiting-congress-federal-nil-bill-1234642992/.

[136] *See* Dan Murphy, *Congress Allows Ivy League Antitrust Exemption To Expire*, ESPN (Sept. 30, 2022, 1:17 PM), https://www.espn.com/college-sports/story/_/id/34696671/congress-allows-ivy-league-antitrust-exemption-expire [https://perma.cc/R8QJ-4EKM] (noting Congress appears unlikely to grant antitrust exemption).

lobbying for a partial antitrust exemption.[137] While Senator Lindsey Graham has circulated a draft bill that would grant an antitrust exemption to a designated clearinghouse (which could be the NCAA),[138] none of the other proposed bills would do so.[139] At this point, it appears a congressional antitrust exemption is unlikely, and we may very well be on the path toward the full or partial professionalization of college athletes.

II. THE PROFESSIONALIZATION OF COLLEGE ATHLETES

If the NCAA is unsuccessful in its pursuit of an antitrust exemption, it may be forced to deal with athletes in a collective bargaining posture if it seeks to impose limits on competition (e.g., transfer restrictions, compensation limitations, etc.). The National Labor Relations Act ("NLRA"), with its statutory exemption to antitrust laws and the accompanying nonstatutory exemption, allows for collaboration in the marketplace that would otherwise be prohibited by the Sherman Act.[140] If an employment model is adopted however, there remain a host of consequences yet to be addressed and resolved.

During the January 2023 NCAA convention, Livingstone recognized the movement to grant college athletes employee status, but said it is essential that athletes not become employees of the schools they attend.[141] Nonetheless, adopting an employment model is one of the few paths forward that would allow the NCAA and its member institutions to impose the guardrails they so clearly

[137] Karen Weaver, *With Kevin Warren's Departure, Big Ten Presidents Have a Massive Decision To Make*, FORBES (Jan. 15, 2023, 3:48 PM), https://www.forbes.com/sites/karenweaver/2023/01/15/with-kevin-warrens-departure-big-ten-presidents-have-a-massive-decision-to-make/?sh=3bd6093f71af [https://perma.cc/QK6X-5TK9] (emphasis omitted).

[138] College Sports NIL Clearinghouse Act of 2023, 118th Cong. (2023), https://heitnerlegal.com/wp-content/uploads/College-Sports-NIL-Clearinghouse-Act-of-2023.pdf [https://perma.cc/PPC5-HKDS] (discussion draft circulated by Senator Lindsey Graham).

[139] *See* David P. Weber, *Is a Federal Name Image & Likeness Solution on the Horizon for US College Sport?*, LAWINSPORT (July 28, 2023), https://www.lawinsport.com/topics/item/is-a-federal-name-image-likeness-solution-on-the-horizon-for-us-college-sport [hereinafter Weber, *Is a Federal NIL Solution on the Horizon*]; David P. Weber, *An Analysis of the Six Federal Name, Image & Likeness Bills in US College Sport*, LAWINSPORT (July 28, 2023), https://www.lawinsport.com/topics/item/an-analysis-of-the-six-federal-name-image-likeness-bills-in-us-college-sport [hereinafter Weber, *An Analysis of the Six Federal NIL Bills*] (analyzing six federal bill proposals in 2023).

[140] *See* Cynthia E. Richman & Daniel G. Swanson, *Balancing the Interests of Labor and Antitrust Law*, L.A. & S.F. DAILY J. (July 9, 2019), https://www.gibsondunn.com/wp-content/uploads/2019/07/Richman-Swanson-Balancing-the-Interests-of-Antitrust-and-Labor-Laws-Daily-Journal-7-9-2019.pdf [https://perma.cc/CK28-S2GJ] (discussing exemptions' origins).

[141] Ralph D. Russo, *NCAA Board Approves Recommendations for Division I Reform*, AP NEWS (Jan. 12, 2023, 8:21 PM), https://apnews.com/article/sports-massachusetts-georgia-college-2469e6b77addc708f81cb5303c192c94 [https://perma.cc/JTV6-LHAX] (noting student-athletes could perhaps be compensated without becoming employees).

want to ensure the continuation of college athletics. The application of labor law and the trends seen from the NLRB in treating college athletes as employees of universities brings with it protections in the form of the right to collective bargaining and regulations of working conditions and hours, as well as the benefits for athletes to capitalize on their name, image, and likeness. Employee status also opens the door to a number of ancillary consequences and issues that will need to be addressed and that may alter the future course of college athletics, especially in the Football Bowl Subdivision ("FBS") and Division I college basketball. Those include consequences related to coverage of Title IX (and Title VII as applicable), the Fair Labor Standards Act ("FLSA"), immigration-related concerns, workers' compensation laws, and tax consequences.[142]

A. *The National Labor Relations Act*

In 1935, Congress enacted the NLRA "to protect the rights of employees, to encourage collective bargaining, and to curtail certain private sector labor and management practices" that could otherwise be detrimental to the general welfare of workers, businesses, and the economy as a whole.[143] The NLRA provides protections to most employees in the private sector but generally excludes from its coverage government employees (including public university employees), agricultural laborers, independent contractors, supervisors, and individuals employed by employers subject to the Railway Labor Act.[144]

As an integral part of the NLRA, Congress created the NLRB. Among its functions, the NLRB is "vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative."[145] When a group of employees desires the right to collective bargaining and representation, it files a petition with the geographically

[142] *See infra* Part III. Another potential concern that may arise with the classification of student-athletes as employees would be the doctrine of *respondeat superior*. That doctrine has not traditionally applied in this context as student-athletes have not previously been found to be employees. *See, e.g.*, Kavanagh v. Trs. of Bos. Univ., 795 N.E.2d 1170, 1175 (Mass. 2003).

[143] *Introduction to the NLRB*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/introduction-to-the-nlrb [https://perma.cc/9MDX-HHZ6] (last visited Sept. 30, 2023); 29 U.S.C. §§ 151-169.

[144] 29 U.S.C. § 152(3); *see also Frequently Asked Questions*, NLRB, https://www.nlrb.gov/resources/faq/nlrb [https://perma.cc/SG53-Q3FV] (last visited Sept. 30, 2023) (noting government employees not covered).

[145] *About NLRB*, NLRB, https://www.nlrb.gov/about-nlrb [https://perma.cc/96D9-DYK6] (last visited Sept. 30, 2023). The NLRB is a bifurcated agency comprising a five-person board on one side and a general counsel on the other side; board members and the general counsel are appointed by the President, with consent from the Senate. *Who We Are*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are [https://perma.cc/CX5W-TC6X] (last visited Sept. 30, 2023). The Board has regional offices, charged with investigation and prosecution of alleged violations of the Act, under the authority of the General Counsel. *See Introduction to the NLRB*, *supra* note 143.

appropriate NLRB Regional Office.[146] That regional office then investigates and follows either consent procedures or formal procedures, including formal hearings, and issues a decision either granting or denying the requested relief.[147]

1. Northwestern Football Players Seek Certification

In August 2015, the NLRB issued its decision and order in *Northwestern University and College Athletes Players Association*,[148] ultimately holding that it would not exercise jurisdiction over the petitioners' request to declare grant-in-aid scholarship football players as employees within the meaning of Section 2(3) of the Act.[149] Although the Board declined to exercise jurisdiction on public policy grounds,[150] *Northwestern University* was significant in shining a light on the discussion of whether college athletes should legally be considered "employees."

In *Northwestern University*, a group of scholarship football players at Northwestern University petitioned the NLRB for recognition as university employees to organize and seek union representation through the College Athlete Players Association ("CAPA").[151] Previously, an NLRB Regional Director had found that the student-athletes were employees and that the university was an employer under the NLRA, thereby accepting the requested union representation.[152] Northwestern University then requested Board review.[153]

In its decision on review and order, the Board recognized that the case presented "novel and unique circumstances," in that the Board had not previously been asked to assert jurisdiction in a case involving college athletes.[154] The Board also noted the athletes did not easily fit into the analytical framework previously used in cases involving other types of students or athletes, such as graduate student assistants, student janitors, or cafeteria workers on the one hand, or athletes in professional leagues on the other hand.[155] Still, the Board

[146] *The NLRB Process*, NLRB, https://www.nlrb.gov/resources/nlrb-process [https://perma.cc/FRM8-NMBZ] (last visited Sept. 30, 2023).

[147] *Id.* A party dissatisfied with the decision of the Regional Director may then request the Board review the action, and the Board can affirm, modify, or reverse the decision of the Regional Director or order other appropriate action. *Id.*

[148] 362 N.L.R.B. 1350 (2015).

[149] *Id.* at 1354 (noting majority of FBS schools are state-run).

[150] *Id.* at 1352 (noting decision covering only small percentage of employees involved in college football "would not promote stability in labor relations").

[151] *See* Daniel Uthman, *College Athletes Take Steps To Form Labor Union*, USA TODAY (Jan. 29, 2014, 7:37 AM), https://www.usatoday.com/story/sports/ncaaf/2014/01/28/college-athletes-players-association-northwestern-football/4958861/ [https://perma.cc/SHS7-673D].

[152] *Northwestern Univ.*, 362 N.L.R.B. at 1350.

[153] *Id.*

[154] *Id.* at 1352.

[155] *Id.* at 1352-53 (noting sports have traditionally been regarded as extracurricular activities).

recognized the similarities between FBS college football and professional sports, in light of the substantial revenues involved and the necessary joint participation between the players and teams.[156]

The Board ultimately declined to address and resolve the question of whether the athletes should be considered statutory employees, instead recognizing that although the Board may have "the statutory authority to act (which it would . . . were [it] to find that the [athletes] were statutory employees), 'the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction.'"[157] The NLRB recognized the difficulties and complications a Board decision regarding a group of athletes from one university would have because of the relationship between that one university's team and other teams, conferences, and the NCAA as a whole.[158] The NLRB also recognized the vast majority of institutions involved in FBS football are public institutions, over which the NLRB has no jurisdiction.[159] Those complications led the NLRB to conclude it would not promote stability in labor relations to assert jurisdiction in the case, regardless of whether the athletes satisfied the requirements to be deemed statutory employees.[160]

After declining to exercise jurisdiction, the NLRB made a point of emphasizing that its decision was limited solely to the petition before it and was "not address[ing] what the Board's approach might be to a petition for all FBS scholarship football players," leaving the issue open to reconsideration in the future.[161]

2. Post-Northwestern Developments

After the decision in *Northwestern University*, the NLRB continued to periodically address the issue of whether college athletes are employees for purposes of protection under the NLRA. Those interpretations have swung back and forth on the pendulum of defining athletes as employees.[162]

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[156] *Id.* at 1353.

[157] *Id.* at 1352 (quoting NLRB v. Denver Bldg. Trades Council, 341 U.S. 675, 684 (1951)).

[158] *Id.* at 1353-54 (noting sports cases usually involve bargaining at league instead of team level).

[159] *Id.* at 1352, 1354 (noting only 17 of 125 colleges are private); *see also* 29 U.S.C. § 152(2) (defining employers for purposes of the Board's authority).

[160] *Northwestern Univ.*, 362 N.L.R.B. at 1354 ("In other contexts, the Board's assertion of jurisdiction helps promote uniformity and stability, but in this case, asserting jurisdiction would not have that effect because the Board cannot regulate most FBS teams." (footnote omitted)).

[161] *Id.* at 1355.

[162] *See, e.g.*, Memorandum GC 18-02 from Peter B. Robb, Gen. Couns., NLRB, to All Regional Dirs., Officers-in-Charge, and Resident Officers (Dec. 1, 2017) [hereinafter NLRB Mem. 18-02] (raising skepticism as to whether athletes are classifiable as employees); Memorandum GC 21-08 from Jennifer A. Abruzzo, Gen. Couns., NLRB, to all Regional

a. *GC 17-01 (2017)*

In January 2017, the NLRB's Office of the General Counsel issued Memorandum GC 17-01, reporting on the statutory rights of university faculty and students in the context of unfair labor practices.[163] In the memorandum, the General Counsel recognized that the Board's recent prior decisions, including *Northwestern University*, were representation cases and did not directly address the rights of workers to seek protection against unfair labor practices.[164] The Office of the General Counsel thus sought to provide "a guide for employers, labor unions, and employees that summarize[d] Board law regarding NLRA employee status in the university setting and explain[ed] how the . . . General Counsel [would] apply" that law in unfair labor practice situations.[165] In doing so, the Office of the General Counsel specifically addressed the question of "whether scholarship football players at NCAA Division I Football Bowl Subdivision ("FBS") private colleges and universities are employees under the NLRA."[166]

The General Counsel concluded that Division I FBS scholarship football players at private colleges and universities *are* employees under the NLRA.[167] In reaching that conclusion, the General Counsel determined this classification was supported by the statutory language and policies of the NLRA, as well as the Board's interpretation in prior decisions.[168] Historically, the Board has taken

Dirs., Officers-in-Charge, and Resident Officers, NLRB (Sept. 29, 2021) [hereinafter NLRB Mem. GC 21-08] (finding athletes *are* classifiable as employees).

[163] Memorandum GC 17-01 from Richard F. Griffin, Jr., Gen. Couns., NLRB, to all Regional Dirs., Officers-in-Charge, and Resident Officers, NLRB (Jan. 31, 2017) [hereinafter NLRB Mem. GC 17-01] (finding athletes qualify as "employees" as defined by NLRA).

[164] *Id.* at 1 (explaining General Counsel's purpose for issuing this report).

[165] *Id.*

[166] *Id.* at 2.

[167] *Id.* at 20.

[168] *Id.* at 10-19 (relying on broad interpretation of "employee" and past decisions resolving applicability of NLRA to academic and nonacademic student employees). The General Counsel followed the Supreme Court's reasoning in continuing a broad interpretation of "employee" under the NRLA and reasoned that occupations not named within the Act's exceptions were strong evidence of inclusion under the statute. *Id.* at 18 (showing this reading of statute is legitimized by Supreme Court's endorsement of such interpretation). Additionally, in past decisions, the Board indicated that graduate student employees and student assistants were covered under the NLRA and could bring unfair labor practice complaints. *Id.* at 10 (referring to *Columbia University* decision, which overturned Board's prior decision in *Brown University*). The Board reasoned a student could be a student and employee because the students met the common-law test of an employee by performing their work for the university, under the university's control, and were paid for such work. *Id.* at 10-12 (rejecting arguments students are not covered under Act because their work is "primarily educational"). Finally, the Board applied student-employee coverage to nonacademic roles, extending this rationale to Division I FSB football players who also met the common-law test and were not listed as exempt from NLRA coverage. *Id.* at 14, 18-20 (explaining process by which Board concluded athletes in question were protected under NLRA).

a broad interpretation of the statutory definition of "employee" in the NLRA, recognizing that employees, students, and football players at universities are not contained in the few enumerated exceptions.[169] Further, the Board's prior decisions in addressing who is an employee have relied heavily on common-law agency rules governing conventional master-servant relationships, where one party performs services for another–for consideration–and is subject to the other's right to control.[170] Applying that framework to scholarship athletes led the General Counsel to conclude that college athletes are employees, as they perform services for their university and the NCAA, for compensation in the form of scholarships, and are subject to control over the manner and means of work on the field and facets of the athletes' daily lives.[171]

The General Counsel specifically recognized the underlying basis for the Board's decision not to exercise jurisdiction in *Northwestern University*, but concluded the difficulties discussed in the Board's decision–including the relationships between other schools, conferences, and the NCAA, as well as the large number of public universities–were not relevant to the direct question of whether the athletes are employees under the NLRA.[172] General Counsel thus concluded that Division I FBS scholarship football players at private colleges and universities are employees under the NLRA and are therefore entitled to its protections.[173]

b. *GC 18-02 (2017)*

In December 2017, a new General Counsel issued Memorandum GC 18-02, setting forth guidelines for mandatory Advice submissions.[174] In the memorandum, the General Counsel explicitly rescinded a number of prior General Counsel Memoranda, including Memorandum GC 17-01, regarding statutory rights of university faculty and students in the context of unfair labor

[169] *See id.* at 18 (reaffirming *Columbia University*'s holding that strong evidence of statutory coverage comes solely from not being listed as exempt from Act). Enumerated exemptions include agricultural laborers, independent contractors, and individuals employed by their parents or as a supervisor. *See* 29 U.S.C. § 152(3).

[170] *See, e.g.*, NLRB Mem. GC 17-01, *supra* note 163, at 18 (noting transfer of payment is strong indicator of employee status under common-law agency rules); *see also Columbia Univ.*, 364 N.L.R.B. No. 90, at 2-3 (Aug. 23, 2016) (explaining prior decisions that rested on applicability of master-servant doctrine as to whether worker may be deemed employee).

[171] NLRB Mem. GC 17-01, *supra* note 163, at 18-20 (concluding work of athletes in question is directly applicable to elements making up master-servant relationship).

[172] *Id.* at 20-21 (distinguishing Board's holding in *Northwestern University*, which reached opposite conclusion, but on other grounds).

[173] *Id.* at 22-23 (explaining General Counsel's findings are narrowly applicable to specific athletes in question and its holding should not broadly apply to all university football players).

[174] NLRB Mem. GC 18-02, *supra* note 162, at 1-5 (explaining NLRB's guidelines and clarifying inconsistencies related to mandatory Advice submissions).

practices.[175] This updated memorandum removed the prior guidance's finding that Division I FBS scholarship football players were employees under the NLRA and thus entitled to protection under the Act.[176]

c. *GC 21-08 (2021)*

The Board was relatively silent on the issue of athletes' employment status following the issuance of Memorandum GC 18-02 until September 2021 when the new General Counsel issued Memorandum GC 21-08.[177] Memorandum GC 21-08 specifically addressed the rights of athletes at academic institutions, reinstated Memorandum GC 17-01 to the extent consistent with Memorandum GC 21-08, and provided updated guidance regarding the General Counsel's position that certain athletes are employees under the Act.[178]

In the memorandum, the General Counsel explained that it would refer to athletes as "Players at Academic Institutions," rather than as student-athletes, because the term "student-athlete" was created to deprive those individuals of workplace protections.[179] The General Counsel advised that "misclassifying such employees as mere 'student-athletes,' and leading them to believe that they do not have statutory protections is a violation . . . of the Act."[180]

The General Counsel also recognized there had been "significant developments in the law, NCAA regulations, and the societal landscape" since the issuance of Memorandum GC 17-01, further demonstrating "that traditional notions that all Players at Academic Institutions are amateurs have changed" and further supporting the conclusion that certain such athletes are employees under

[175] *Id.* at 4-5 (rescinding several Memoranda written by previous General Counselors who identified novel legal theories that no longer apply).

[176] *Id.* (rescinding "novel legal theory" decided in GC 17-01); NLRB Mem. GC 17-01, *supra* note 163, at 18-23 (concluding Division I FBS scholarship football players met statutory and common-law tests to qualify as employees and receive protections under NLRA).

[177] NRLB Mem. GC 21-08, *supra* note 162, at 1 (reinstating GC 17-01, which was rescinded by GC 18-02).

[178] *Id.* (recognizing importance of GC 17-01 in reinstating previously rescinded memoranda).

[179] *Id.* at 1 n.1 (providing examples of instances when "student-athletes" were denied protections provided to workers already understood to be employees).

[180] *Id.* at 1. The General Counsel summarized and reiterated the key analysis and conclusions of Memorandum GC 17-01 that supported the conclusion the scholarship football players at Northwestern University and other similarly situated athletes at academic institutions should be considered employees and protected by the Act. *Id.* at 4, 9 (reinstating coverage of scholarship football players, and expanding to similarly situated athletes, under NLRA by following Supreme Court-endorsed broad interpretation of "employee;" lack of specific exemption under statute; and common-law rules governing employer-employee relationships, which hinge on one performing services for another while subject to their control, in exchange for payment).

the Act.[181] Among those changes, the General Counsel recognized the Supreme Court's decision in *NCAA v. Alston*, the NCAA's subsequent suspension of NIL rules for Players at Academic Institutions, and growing collective action by athletes in activism about racial justice, the COVID-19 pandemic, and other efforts concerning conditions of their performance.[182] The General Counsel considered all of these developments as further reinforcement of such athletes' employee status.[183]

3. The USC Case (2022)

In February 2022, the National College Players Association (NCPA) filed a claim of unfair labor practice charges with the NLRB against the University of Southern California (USC), the University of California Los Angeles (UCLA), the Pac-12 Conference, and the NCAA.[184] The issuance of the General Counsel's Memorandum GC 21-08 in September 2021 "helped give . . . the green light to file" the claim with the Board's regional field office in California.[185] NCPA executive director, Ramogi Huma, framed the issue as "both a labor rights issue and a civil rights issue," arguing that fair compensation for athletes is a matter of economic and racial justice because FBS football and Division I basketball rosters are composed largely of Black athletes.[186] The NCPA claim alleged that the athletes were being denied rights as employees because the schools, the conference, and the NCAA referred to them as "student-athletes," directly in contravention of the General Counsel's guidance in Memorandum GC 21-08.[187]

In December 2022, the Board's regional field office in California "found merit" in the case concerning USC, the Pac-12 Conference, and the NCAA, finding that they are joint employers of football and basketball players at

[181] *Id.* at 5 (justifying reinstatement of previous guidance finding athletes in question qualified as employees).

[182] *Id.* at 5-8 (explaining Justice Kavanaugh's concurrence in *Alston* questioned whether NCAA may continue justifying not paying student-athletes portion of their billions of dollars in revenue).

[183] *Id.* at 5-9.

[184] *See* J. Brady McCollough, *Player Advocates Petition NLRB To Make USC and UCLA Classify Athletes as Employees*, L.A. TIMES (Feb. 8, 2022, 1:04 PM), https://www.latimes.com/sports/story/2022-02-08/group-petitions-to-force-usc-and-ucla-to-classify-athletes-as-university-employees (arguing for employee rights for several groups of college athletes following California's passage of pro-athlete name, image, and likeness legislation).

[185] *Id.*

[186] *Id.* (highlighting disparate impact compensation prohibition has on minority athletes).

[187] *See* Chris Isidore, *NLRB Opens Door for Union for College Athletes*, CNN (Dec. 15, 2022, 10:14 PM), https://www.cnn.com/2022/12/15/business/nlrb-unfair-labor-practice-athletes-usc-pac-12-ncaa/index.html [https://perma.cc/8PRA-LV7E] (reporting General Counsel stated such gross misclassification "deprives these players of their statutory right to organize").

USC.[188] Like Northwestern University, USC is a private entity, subject to the jurisdiction of the Board, as is the Pac-12 Conference and the NCAA.[189]

While the ruling is a preliminary one, it is consistent with the foreshadowing of the General Counsel's Memorandum GC 21-08 that the Board intends to treat athletes as employees and afford them rights and protections under the Act.[190] The ruling indicates continued progress for those battling for employment status for college athletes. Huma suggests that the ruling "is an important part in ending NCAA sports' business practices that illegally exploit college athletes' labor" through alleged denials of fair compensation, protections of minimum wage, overtime, and workers' compensation laws.[191]

4. Federal Legislative Efforts

The developments before the NLRB occurred simultaneously with federal legislative efforts to clarify the employment status of collegiate athletes. In May 2021, U.S. Senators Chris Murphy of Connecticut and Bernie Sanders of Vermont introduced the College Athlete Right to Organize Act ("CARO"),[192] a piece of legislation that would amend the NLRA and explicitly grant collegiate athletes the right to collective bargaining, regardless of state laws.[193] CARO would formally recognize collegiate athletes as employees if they receive any direct compensation from the school that is contingent upon participation in intercollegiate sports.[194] Crucially, it would also amend the NLRA to define public colleges as employers, alongside private institutions, so that employment

[188] *Id.*; *see also* 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/WP3W-LVTN] (explaining director's decision could significantly impact college sports as whole).

[189] *See* Isidore, *supra* note 187 (explaining how school's status and Board's jurisdiction factor into ability to file charges). The NCPA indicated that it would withdraw the charge against UCLA, as a public entity, at the request of the Board. *See* Schad, *supra* note 188 (elaborating on status of numerous cases filed).

[190] *See* NRLB Mem. GC 21-08, *supra* note 162, at 1-3.

[191] Schad, *supra* note 188.

[192] S. 1929, 117th Cong. (2021).

[193] *Id.*; Ben Pickman, *Legislation Introduced Seeking To Provide Collective Bargaining Rights to College Athletes*, SPORTS ILLUSTRATED (May 27, 2021), https://www.si.com/college/2021/05/27/legislation-introduced-collective-bargaining-rights-college-athletes-bernie-sanders (explaining components of proposed legislation); *see also College Athlete Right To Organize Act* 1-2 [hereinafter CARO Fact Sheet], https://www.murphy.senate.gov/imo/media/doc/CARO%20Fact%20Sheet_ final_final.pdf [https://perma.cc/3SM2-Q2X6] (last visited Sept. 30, 2023) (discussing importance of CARO legislation and explaining how bill achieves its stated purpose).

[194] CARO Fact Sheet, *supra* note 193, at 1.

status would broadly apply to athletes at both types of institutions.[195] This last point–including public universities under the penumbra of the NLRA–may be the point that ultimately ushers in collective bargaining to collegiate sports.

The collective bargaining power afforded under CARO would grant athletes broad rights to organize at their individual institution or across institutions, and to negotiate a broad range of items, including compensation, as well as rules and standards regarding athlete health, safety, and educational opportunity.[196] A companion piece of legislation was also offered in the U.S. House of Representatives by Representatives Jamaal Bowman of New York, Andy Levin of Michigan, and Lori Trahan of Massachusetts.[197]

The pace of proposed NIL legislation increased in the spring and summer of 2023 when seven NIL-related bills were circulated or introduced in Congress.[198] Only one of the seven bills has directly addressed the employment issue—found in a discussion draft released by Senator Ted Cruz of Texas.[199] Senator Cruz's proposed bill would stipulate that college athletes are not employees for the purpose of state or federal law.[200] Two other NIL-related proposals expressly declined to address the employment issue, and the remainder were silent on it.[201] The NIL-related bill introduced by Senator Murphy and Representative Trahan of Massachusetts, titled the "College Athlete Economic Freedom Act," does not address employment status but would confer some quasi-employee rights allowing college athletes to bargain collectively for NIL contracts and to enter into group licensing agreements.[202] The bill introduced by Senator Murphy and

[195] *Id.* (noting CARO would supersede state laws to create uniform definition of public and private colleges as employers). Note that in GC 21-08, General Counsel Jennifer Abruzzo suggested her intention to consider the NCAA and the institution as joint employers, which would potentially bring public universities under the purview of the NLRB as well. *See* NRLB Mem. GC 21-08, *supra* note 162, at 9 n.34 (considering interpretation of NCAA as joint employer theory of liability due to control it exerts over athletes and educational institutions).

[196] CARO Fact Sheet, *supra* note 193, at 1-2 (detailing rights CARO would grant to college athletes).

[197] H.R. 3895, 117th Cong. (2021) (establishing collective bargaining rights for college athletes).

[198] *See* Weber, *An Analysis of the Six Federal NIL Bills*, *supra* note 139; Jeremy Bauer-Wolf, *Cruz Bill Would Give NCAA Power Over NIL Rules*, HIGHER ED DIVE (Aug. 3, 2023), https://www.highereddive.com/news/cruz-bill-would-give-ncaa-power-over-nil-rules/689873/.

[199] Senator Cruz, *To Protect the Name, Image, and Likeness Rights of Student Athletes and To Promote Fair Competition Among Intercollegiate Athletes, and for Other Purposes, § 8(b), Student Athletes Not Employees*, Senate Leg. Counsel MCC23890 R5F (Aug. 2, 2023), https://www.commerce.senate.gov/services/files/00530A65-EE3B-4EF9-862A-A4C942ACB156 (discussion draft).

[200] *Id.*

[201] Weber, *Is a Federal NIL Solution on the Horizon*, *supra* note 139 (noting bills introduced by Representative Carey and Representative Landsman, as well as bill introduced by Senator Manchin and Senator Tuberville declined addressing the issue).

[202] College Athlete Economic Freedom Act, S.2554, 118th Cong. (2023).

Representative Trahan would also create a new category of student visas that would allow international college athletes to remain in the United States and engage in NIL activity, even if college athletes are deemed employees under state or federal law.[203]

5. State Legislative Efforts

Similarly, there have been efforts made at the state level to pass legislation to grant collegiate athletes employee status. Some states have existing statutory guidance dictating whether collegiate athletes can be considered employees, although those statutes largely have specified that athletes are *not* employees of the college or university.[204]

In January 2022, a state representative in Iowa introduced a bill that would have been the first to classify college athletes in that state as employees.[205] At the same time, two state senators in Maine introduced NIL legislation that would afford NIL rights to collegiate athletes in the state, but that would also affirmatively declare that athletes are *not* employees of the college or university that they attend.[206]

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[203] See *infra* note 289 and accompanying text.

[204] *See* C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More than Ever*, 38 S. TEX. L. REV. 1081, 1094-96 (1997) (explaining ordinarily liberal construction of statutes designed to protect workers are generally not construed favoring amateur athletes). When state statutes do explicitly address the issue, it typically is accomplished in the context of state statutes defining "employee" for purposes of workers' compensation regulations. *Id.* (describing state workers' compensation statutes which make up majority of state legislation on issue); *see, e.g.*, Cal. Lab. Code § 3352 (2023) ("A student participating as an athlete in amateur sporting events sponsored by a public agency or public or private nonprofit college, university, or school, who does not receive remuneration for the participation, other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto."); Haw. Rev. Stat. § 386-1 (2023) ("'Employment' does not include . . . [s]ervice for a school, college, university, college club, fraternity, or sorority if performed by a student who is enrolled and regularly attending classes and in return for board, lodging, or tuition furnished, in whole or in part."). Compare Nevada's previous statute, Nev. Rev. Stat. § 616.251 (repealed), which specifically included collegiate athletes within the definition of "employee" for workers' compensation coverage. *See* Goplerud, *supra*, at 1095-96 (explaining how Nevada's previous definition of "employee" differed from most other states).

[205] *See* Dennis Dodd, *Iowa State Bill Aims To Reclassify College Athletes as Employees Due Compensation by Universities*, CBS SPORTS (Jan. 27, 2022, 11:51 AM), https://www.cbssports.com/college-football/news/iowa-state-bill-aims-to-reclassify-college-athletes-as-employees-due-compensation-by-universities/ [https://perma.cc/8YM3-C9GL] (detailing bill proposed by Representative Bruce Hunter, ranking member of Iowa House Labor Committee).

[206] *See* Andy Berg, *Maine Debates Student-Athlete Employment*, ATHLETIC BUS. (Jan. 7, 2022), https://www.athleticbusiness.com/operations/governing-bodies/article/15286993/maine-legislation-studentathletes-cannot-be-employees [https://perma.cc/4TKT-X74V] (explaining proposed bill would declare college athletes ineligible for benefits given to college employee).

B. *Integrating Title IX Within the Employment Model*

In 1972, Congress passed Title IX, which provides: "[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 subjected to discrimination under any education program or activity receiving Federal financial assistance."[207] At the time of its passage, no consideration was given to the possibility of universities directly hiring student-athletes for their athletic prowess, and therefore, it is unsurprising that Title IX does not directly address the issue of student-athletes as employees.[208] Therefore, one of the pivotal questions now facing college athletics is whether Title IX would apply to an employee model where athletes are compensated for their performances, rather than a benefits model under which athletes receive athletic scholarships allowing them to attend the university.[209] As Title IX does not directly address this issue, any answer will necessarily be the result of implication and most certainly the subject of legal challenge. For example, if Title IX is found to apply to universities that hire their athletes, those universities will need to adhere to the equitability strictures of Title IX and provide similar benefits and opportunities to both men and women.[210]

The language of Title IX is clear as to principals of equality and nondiscrimination, and from the outset it was meant to level the playing field between men's and women's athletics.[211] Additionally, the Supreme Court has interpreted Title IX expansively, and stated it believes Congress intended a very broad interpretation.[212] Commentators, however, are divided on the question of whether Title IX would require universities that compensate male athletes also to compensate female athletes.[213]

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[207] 20 U.S.C. §§ 1681-1689 (prohibiting sex-based discrimination in education under § 1681).

[208] While Title IX does address hiring and employment opportunities for students, it does so in the area of education programs or activities. *See* 34 C.F.R. §§ 106.51-106.62 (2020).

[209] Justice Amy Coney Barrett raised this very question during oral arguments for *Alston*. Transcript of Oral Argument at 39, NCAA v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512) (inquiring on effects of Court's potential ruling to Title IX and women's sports).

[210] *See* 20 U.S.C. §§ 1681-1689 (requiring equal treatment in education across gendered lines).

[211] *Id.* (banning sex-based discrimination in education).

[212] N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (stating Title IX must be accorded "a sweep as broad as its language" (quoting United States v. Price, 383 U.S. 787, 801 (1966))); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173, 175 (2005) (stating Title IX "broadly prohibits a funding recipient from subjecting any person to 'discrimination' 'on the basis of sex,'" and Congress's use of broad term that "covers a wide range of intentional unequal treatment" demonstrated its intent for statute to be broadly applied).

[213] *Compare* Marc Edelman, *When It Comes to Paying College Athletes, Title IX Is Just a Red Herring*, FORBES (Feb. 4, 2014, 9:30 AM), https://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/ ("Title IX does not directly touch upon whether there is a requirement of equal financial terms for all student-athletes, above and beyond their athletic

Two subparts of the Title IX regulations potentially address this issue: Subpart D dealing with athletics, and Subpart E dealing with certain employment situations.[214] The essential question under Subpart D is whether student-athlete compensation would be a "benefit" or "financial assistance."[215] If the wages or stipends are deemed benefits or financial assistance, Title IX would require equality of opportunity for both men and women.

For athletics, the overarching requirement under Title IX is that schools and universities provide an equitable distribution of benefits and opportunities for both sexes.[216] To assess compliance with this requirement, the Office of Civil

scholarships."), *and* Jon Solomon, *If Football, Men's Basketball Players Get Paid, What About Women?*, CBS SPORTS (June 5, 2014, 5:52 AM), https://www.cbssports.com/college-football/news/if-football-mens-basketball-players-get-paid-what-about-women/ [https://perma.cc/SFJ8-T7QZ] (quoting Jeffrey Kessler, attorney for the U.S. Women's National Team in its fight for pay equality, as stating, "Title IX says nothing about the issue of compensation," and to use it in argument for athlete pay is "a complete canard"), *and* Ellen J. Staurowsky, *"A Radical Proposal": Title IX Has No Role in College Sport Pay-For-Play Discussions*, 22 MARQ. SPORTS L. REV. 575, 575 (2012) (querying whether Title IX should have any role in pay-for-play context), *and The Uncertain Future of Title IX*, SPORTS BUS. J. (June 20, 2022), https://www.sportsbusinessjournal.com/Journal/Issues/2022/06/20/In-Depth/Title-IX.aspx [https://perma.cc/KC46-D8MH] (quoting West Coast Conference Commissioner Gloria Nevarez on her belief Title IX would not apply to paid athletes as they would be considered employees rather than students), *with* Erin E. Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of* Northwestern *and* O'Bannon, 41 J. COLL. & UNIV. L. 297, 300 (2015) (reframing "application of Title IX to athlete compensation as a tool, rather than an obstacle, to achieving college athletics reform"), *and* George Dohrmann, *Pay for Play: The Mission of Our Universities Is To Educate, but College Sports Is Big Business, and No One Wants Young Athletes Exploited*, SPORTS ILLUSTRATED (Nov. 7, 2011), https://vault.si.com/vault/2011/11/07/pay-for-play (identifying Title IX as largest hurdle to pay-for-play system), *and* Solomon, *supra* (quoting Neena Chaudhry, senior counsel for National Women's Law Center, who believes Title IX would apply if paid players received additional healthcare benefits), *and* Jane McManus, *Pressure To Pay Student-Athletes Carries Question of Title IX*, ESPN (Apr. 14, 2016, 8:13 AM), https://www.espn.com/espnw/culture/feature/story/_/id/15201865/pressure-pay-student-athletes-carries-question-title-ix [https://perma.cc/5T4V-XATV] (stating cost of paying female athletes to comply with Title IX would be prohibitive).

[214] *See* 34 C.F.R. §§ 106.31-106.43 (2022) (directing no person shall be denied benefits of academic or extracurricular activities based on sex); 34 C.F.R. §§ 106.51-106.61 (2022) (prohibiting pay rate distinctions based on sex).

[215] *See* 34 C.F.R. § 106.37(a) ("Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not . . . [o]n the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate . . . ."). *See generally* Mike Schinner, *Are Athletic Scholarships Merely Disguised Compensation?*, 8 AM. J. TAX POL'Y 127 (1990).

[216] *See* 34 C.F.R. § 106.37(c) (requiring universities to provide "reasonable opportunities" for athletic scholarships proportionate to number of male and female students participating in athletics); 34 C.F.R. § 106.41(c) (stating "[u]nequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams" may be considered in assessing

Rights ("OCR") issued a list of factors to consider, including financial assistance, provision of equipment supplies, travel and per diem, coaching, housing, and locker rooms.[217] OCR's 1979 Policy Interpretation further states:

> When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.[218]

The question then arises whether compensation for athletic services is included under the Title IX ambit of benefits and opportunities, financial assistance,[219] or "work-related aid."[220] Title IX clearly requires equitable treatment of athletic grants-in-aid (athletic scholarships), benefits, and additional stipends that universities have granted athletes in a post- *O'Bannon*, *Alston* world,[221] but it is not clear that it requires equitable treatment of compensation.

The 1979 OCR Policy Interpretation in two locations follows the phrase "financial assistance" with the parenthetical "scholarship aid"[222] or "[s]cholarships."[223] The use of these explanatory parentheticals suggests "financial assistance" under 34 C.F.R. § 106.37(c) was intended to be

university's compliance with Title IX). The Office of Civil Rights has promulgated many regulations to assist universities in implementing Title IX, and it has also issued policy guidance for additional clarity. *See* 34 C.F.R. §§ 100.1-110.39 (applying to any program receiving federal financial assistance from Department of Education); Intercollegiate Athletics, 44 Fed. Reg. 71413, 71413-23 (Dec. 11, 1979) (clarifying meaning of "equal opportunity" in intercollegiate athletics and explaining factors which Department will consider in determining whether institution's athletics program complies with law).

[217] 34 C.F.R. §§ 106.37(a), 106.41(c) (listing ten factors in addition to financial assistance Director may consider in determining whether equal opportunities are available).

[218] Intercollegiate Athletics, 44 Fed. Reg. at 71415.

[219] *See id.* (describing mandates to provide financial assistance in proportion to number of students of each sex participating in athletics). OCR will determine Title IX compliance "upon a determination of the following: . . . [w]hether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole." *Id.* at 71418.

[220] *Id.* at 71415 (noting disproportionate amount of work-related aid could constitute violation of Title IX).

[221] *See supra* Part I.C (discussing holdings of two student-athlete antitrust claims against NCAA).

[222] Intercollegiate Athletics, 44 Fed. Reg. at 71415 ("The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs.").

[223] *Id.*

synonymous, or nearly so, with athletic scholarships.[224] The requirement of equal benefits and opportunities stems from 34 C.F.R. § 106.41, which requires an analysis of certain types of benefits offered such as the provision of equipment, scheduling of games and practice times, travel and per diem allowances, opportunities to receive coaching and tutoring, provision of locker rooms and facilities, provision of medical training, housing, and dining, and publicity.[225] By their nature, these benefits differ considerably from compensation. Lastly, the 1979 OCR Policy Interpretation's reference to work-related aid is not defined, though it most likely relates to a work-study program such as the Federal Work-Study program that provides students with work-study aid to encourage work in community service or in their field of study.[226]

Under Subpart D, there is no clear answer to the applicability of Title IX to student-athlete compensation. While public policy and the broad scope of the statute support applying Title IX to this situation, the plain language of the statute, regulation, and policy interpretation do not directly compel that conclusion.[227] Perhaps the strongest statutory argument in favor of applying Title IX to athlete compensation comes from the 1979 OCR Policy Interpretation as well as the January 16, 1996 OCR *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*.[228] Both documents state that OCR will make an "overall determination of compliance" based on the "institution's program as a whole."[229] This catch-all language provides significant latitude for OCR to assess equitability in athletics and may provide them statutory cover to do so for athlete compensation.

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[224] *Cf. id.* (stating financial assistance could be provided in forms other than grants such as work-related aid or loans).

[225] 34 C.F.R. § 106.41 (2022) (listing factors for Director to consider when determining whether equal athletic opportunity is provided for both sexes).

[226] *See Federal Work-Study*, BENEFITS.GOV, https://www.benefits.gov/benefit/596 [https://perma.cc/37MM-96F4] (last visited Sept. 30, 2023) (explaining Federal Work-Study Program funds part-time employment for undergraduate and graduate students with financial need).

[227] *See supra* notes 222-26 and accompanying text (describing uncertainty of whether athletic compensation constitutes "financial assistance" or "work-related aid").

[228] *See* Intercollegiate Athletics, 44 Fed. Reg. at 71417-18; *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP'T OF EDUC. (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html [https://perma.cc/2NFN-G6JR].

[229] Intercollegiate Athletics, 44 Fed. Reg. at 71417-18 ("The Department will base its compliance determination . . . upon an examination of . . . whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole."); U.S. DEP'T OF EDUC., *supra* note 228 ("[W]hen an 'overall determination of compliance' is made by OCR, . . . [it] examines the institution's program as a whole.").

Subpart D only mentions student employment in § 106.38, which requires universities employing students to comply with Subpart E.[230] Subpart E prohibits universities from making employment decisions in a discriminatory manner on the basis of sex,[231] or paying different rates of pay on the basis of sex.[232]

As these types of claims are founded on sex-based discrimination, they are also the types of claims that could be brought under a different legal framework such as Title VII[233] or the Equal Pay Act.[234] As with the Equal Pay Act, Title IX provides an exception for employers who can establish "sex is a bona-fide occupational qualification . . . such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned."[235] This caveat would seem to apply directly to the composition of a men's or women's athletic team. Additionally, the Ninth Circuit has held that revenue disparities between the men's and women's teams, differences in ability or experience of the individual involved, and greater fan attendance and media interest in a given sport can justify pay differentials between men and women.[236] Consequently, Subpart E is unlikely to require equitable treatment should universities begin to pay athletes.

If universities begin to compensate athletes, one of the first claims made against them will likely be a violation of Title IX.[237] It is simply not clear at this time whether such a claim will be successful. In light of strong public policy in favor of equitable treatment between the genders, the modern trend toward equality, an expansive scope provided to it by Congress and the Supreme Court, and broad catch-all language, there is enough of an argument that Title IX would apply to athlete compensation to make universities suitably cautious, even if there is no direct statutory or regulatory language on point.[238]

C. *Fair Labor Standards Act*

In 2016, Gillian Berger and Taylor Henning sued the NCAA and the University of Pennsylvania ("Penn"), alleging that, as former track and field

[230] 34 C.F.R. § 106.38(b) ("A recipient which employs any of its students shall not do so in a manner which violates subpart E of this part.").

[231] 34 C.F.R. § 106.51(a).

[232] 34 C.F.R. § 106.54.

[233] *See* 42 U.S.C. § 2000e (making it unlawful for employers to discriminate on basis of sex).

[234] *See* 29 U.S.C. § 206(d) (making it unlawful for employers to discriminate between employees on basis of sex when paying wages).

[235] 34 C.F.R. § 106.61 (adding stereotyped characterizations of sex or preferences do not qualify under this exception).

[236] Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1322-23 (9th Cir. 1994) (rejecting appellant's sex discrimination claim and noting men's basketball team generated ninety times revenue produced by women's team).

[237] *See supra* notes 222-29 and accompanying text.

[238] *See id.*

athletes at Penn, they were entitled to minimum wage under the FLSA.[239] The FLSA requires all employers to pay employees the minimum wage established by law.[240] To qualify for protection under the FLSA, plaintiffs needed to establish they were "employees" of Penn.[241] The FLSA itself does not provide meaningful assistance in the determination of who qualifies as an employee, defining the term only as "any individual employed by an employer."[242] Likewise, the FLSA defines the word "employ" in a similarly cursory fashion to mean "to suffer or permit to work."[243] When considering these claims, "[t]he Supreme Court has instructed the courts to construe the terms 'employee' and 'employer' expansively under the FLSA."[244]

In the Seventh Circuit, because the definition of employee "depends on the totality of circumstances rather than on any technical label, courts must examine the 'economic reality' of the working relationship" between the alleged employee and the alleged employer to decide whether Congress intended the FLSA to apply to that particular relationship.[245] In applying this test in *Berger*, the court noted the long "tradition of amateurism in college sports" and "the reality of the student-athlete experience."[246] In *Berger*, the Seventh Circuit also cited to the Department of Labor's Field Operations Handbook ("FOH") as persuasive authority.[247] The FOH excludes from the definition of "employee" individuals who participate in "intramural and interscholastic athletics," though this exclusion is qualified.[248] Section 10b24(a) of the FOH excludes from the definition of employee athletes who participate in sports "generally recognized as extracurricular," and Section 10b03 further qualifies the exclusion noting it applies to situations "primarily for the benefit of the participants *as a part of the*

[239] Berger v. NCAA, 843 F.3d 285, 289 (7th Cir. 2016) (holding student-athletes are not employees and thus not covered by FLSA).

[240] 29 U.S.C. § 206 (noting current federal minimum wage is $7.25 per hour).

[241] *Id.* § 206(a)(1)(C); *Berger*, 843 F.3d at 290 (explaining plaintiff bears burden of establishing they performed work for employer).

[242] 29 U.S.C. § 203(e)(1) (noting exceptions for individuals employed by public agencies, family members of agricultural employers, and individuals who volunteer for public agencies).

[243] *Id.* § 203(g).

[244] Vanskike v. Peters, 974 F.2d 806, 807 (7th Cir. 1992) (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992)).

[245] *Id.* at 808.

[246] *Berger*, 843 F.3d at 291 (observing NCAA and its member universities have created elaborate system of eligibility rules to maintain "revered tradition of amateurism").

[247] *Id.* at 292 (noting handbook is not dispositive but persuasive).

[248] *Field Operations Handbook – Chapter 10*, DEP'T OF LAB. (Mar. 31, 2016), https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-10 [https://perma.cc/ZCQ5-Q8TN] (excluding student athletics "conducted primarily for the benefit of the participants as a part of the educational opportunities").

educational opportunities provided to the students by the school or institution."[249]

Notwithstanding these qualifiers, the Seventh Circuit concluded as a matter of law, based on the plain language of the FOH and the amateur tradition of college athletics, that the plaintiffs were not employees and therefore not entitled to minimum wage.[250] In *Berger*, the plaintiffs were athletes in a non-revenue-generating sport (track and field)[251] which more traditionally resembled the type of extracurricular activity the FOH referred to.[252] Had the plaintiffs been involved in the multi-billion-dollar sports of football or basketball, the analysis may have been quite different—especially in a post-*Alston* world where student-athletes are earning considerable sums from their NIL.[253]

Following *Berger*, an athlete in a revenue-generating sport (college football) at a major university (USC) in an autonomous or Power 5 conference (Pac-12) brought similar claims seeking minimum wage under the FLSA and California Law.[254] Lamar Dawson, a football player for USC, alleged that he was an employee of the NCAA and the Pac-12 and therefore entitled to minimum wage under the FLSA.[255] Dawson's approach differed from Berger's in that he did not sue his university, but rather the NCAA and Pac-12.[256] This strategy ultimately failed as the Ninth Circuit noted that neither the NCAA nor the Pac-12 hired (or could fire) Dawson, they exerted no control over his schedule or activities, they did not maintain his scholastic record, and USC, not the NCAA, granted his scholarship.[257] Assessing the economic realities of the situation, the Ninth Circuit concluded that Dawson was not an employee of the NCAA or the Pac-12 for the purposes of the FLSA, and California state law expressly excluded student-athletes from coverage of the California minimum wage law.[258] Had Dawson sued USC, the institution that granted his scholarship and exercised control over him, perhaps the results would have been different under an FLSA analysis.[259]

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[249] *Id.* (emphasis added).

[250] *Berger*, 843 F.3d at 293 ("Student participation in collegiate athletics is entirely voluntary.").

[251] *Id.* at 289.

[252] *See id.* at 292 ("University or college students who participate in activities generally recognized as *extracurricular* are generally not considered to be employees within the meaning of the [FLSA].").

[253] *See supra* notes 110-20and accompanying text.

[254] Dawson v. NCAA, 932 F.3d 905, 905 (9th Cir. 2019).

[255] *Id.* at 907.

[256] *Id.* ("[W]e need not consider whether he had employment status as a football player, nor whether USC was an employer. That question is left, if at all, for another day.").

[257] *Id.* at 910.

[258] *Id.* at 911-13.

[259] *See id.* at 910 (pointing to complaint's failure to allege NCAA and Pac-12 "hire and fire" or exercise analogous control over student-athletes).

Berger and *Dawson* were the precursors for *Johnson v. NCAA*,[260] which is currently on appeal in the Third Circuit.[261] Trey Johnson, a former football player for the University of Villanova, brought suit against Villanova and the NCAA arguing that he was an employee and therefore entitled to minimum wage under the FLSA and Pennsylvania labor law.[262] Defendants' motion to dismiss for failure to state a claim was denied even though the Third Circuit applies an "economic realities" test to determine if an individual qualifies as an employee similar to the Seventh Circuit.[263] In denying the defendants' motion to dismiss, the district court referenced the extensive oversight and control exercised over the student-athlete, both in academic and athletic arenas.[264] Additionally, the district court found the complaint plausibly alleged that "NCAA D1 interscholastic athletics are not conducted primarily for the benefit of the student-athletes who participate in them, but for the monetary benefit of the NCAA and the colleges and universities that those student-athletes attend."[265]

In assessing what type of test to apply to determine the economic realities of the alleged employment, the district court adopted the Second Circuit's primary beneficiary test that utilizes seven nonexhaustive factors (the "*Glatt* test").[266] The seven factors examine: (1) the extent to which the parties have an expectation of compensation; (2) the extent to which the position would provide training similar to that of an educational environment; (3) the extent to which

[260] 556 F. Supp. 3d 491, 498 (E.D. Pa. 2021), *motion to certify appeal granted sub nom.* Johnson v. NCAA, No. 19-5230, 2021 WL 6125095 (E.D. Pa. Dec. 28, 2021).

[261] *Johnson* 2021 WL 6125095, at *1 (E.D. Pa. Dec. 28, 2021).

[262] *Johnson* 556 F. Supp. 3d at 498 (E.D. Pa. 2021); *see also Johnson*, 2021 WL 6125095, at *1 (seeking unpaid minimum wages, liquidated damages, attorney's fees, and costs). The claim also involved plaintiffs from schools in other states alleging violations of the FLSA and the corresponding state minimum wage obligations. *Johnson* 556 F. Supp. 3d at 496 (asserting claims on behalf of student-athletes at Fordham University, Sacred Heart University, Cornell University, and Lafayette College).

[263] *Johnson*, 556 F. Supp. 3d at 500 ("[C]ourts must 'look to the economic realities of the relationship in determining employee status under the FLSA.'" (citation omitted)).

[264] *Id.* at 505 (noting student-athletes were required to schedule classes around their required NCAA athletic activities).

[265] *Id.* at 506.

[266] *Id.* at 512 ("[W]e conclude that the Complaint plausibly alleges that Plaintiffs are employees of the ASD under the *Glatt* test."). *Glatt* established a seven-factor test to analyze whether interns in the motion picture industry were employees under the FLSA. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536-37 (2d Cir. 2016) (laying out list of seven nonexhaustive considerations). *Glatt* stressed focus on who was the "primary beneficiary of the relationship." *Id.* at 536 (emphasizing what individual receives in exchange for work and economic reality of relationship between individual and employer). For true educational internships, the intern should be the primary beneficiary. *Id.* (observing interns enter into relationship with expectation of receiving educational or vocational benefits). The *Glatt* test is a balancing test and no one factor is dispositive. *Id.* at 537 (adding courts may consider relevant evidence beyond specified factors). The Ninth Circuit also adopted this primary beneficiary test. *See* Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1147 (9th Cir. 2017) (applying *Glatt* test to conclude plaintiffs were students, not employees).

coursework is integrated into the position or for which credit may be earned; (4) the extent to which the position accommodates the athlete's academic commitments; (5) the extent to which the position's duration is limited to a time-frame of beneficial learning; (6) the extent to which the athlete's work complements rather than displaces paid labor while still providing "significant educational benefits"; and (7) the extent to which the parties understand whether a paid position may result at the end of the program.[267]

In applying the *Glatt* test, the district court concluded that the third, fourth, and sixth factors favored finding the plaintiffs were employees, the second and fifth factors were neutral, and the first and seventh factors favored finding the plaintiffs were not employees.[268] Based on this conclusion, the district court concluded that plaintiffs' complaint plausibly alleged employee status and denied defendants' motion to dismiss.[269]

The NCAA and the university defendants immediately appealed the decision to the Third Circuit, and oral arguments were held on February 15, 2023.[270] During oral arguments, the court strenuously prodded attorneys for the NCAA and the universities to defend their position.[271] The panel probed along the lines of the *Glatt* test, focusing at one point on the expectation of remuneration, but also noting that no such expectation currently exists solely due to the fact that the NCAA has so mandated.[272] The panel also asked questions indicating a possible employment distinction between athletes in revenue-generating sports versus non-revenue-generating sports,[273] a line of questioning that was foreshadowed by the *Berger* decision. Finally, the panel asked whether the value given in scholarships did not already exceed minimum wage.[274] This line of questioning opens up flexibility for the NCAA and its member institutions in the event of a decision against them in *Johnson*. If the universities recharacterize athletic scholarships as income, they will be compliant with the FLSA and local

[267] *See Johnson*, 556 F. Supp. 3d at 509-10 (citing *Glatt,* 811 F.3d at 536-537) (describing test as "most appropriate test for deciding whether students should be regarded as employees under the FLSA").

[268] *Id.* at 512.

[269] *Id.*

[270] *See, e.g.*, Dan Murphy, *What You Need To Know About the Latest NCAA Legal Battle*, ESPN (Feb. 14, 2023, 6:30 AM), https://www.espn.com/college-sports/story/_/id/35467766/what-need-know-latest-ncaa-legal-battle [https://perma.cc/9Y2V-LQDK].

[271] *See* Amanda Christovich, *Federal Judges Blast NCAA's Amateurism Model*, FRONT OFFICE SPORTS (Feb. 15, 2023, 8:34 PM), https://frontofficesports.com/federal-judges-blast-ncaas-amateurism-model/ [https://perma.cc/BWT3-9ULU]; Nicole Auerbach, *In* Johnson v. NCAA*, Judges Are Asking the Right Questions of the College Sports Model*, ATHLETIC (Feb. 15, 2023), https://theathletic.com/4208822/2023/02/15/johnson-v-ncaa-case-judges-appeals/. During arguments, Judge Theodore McKee even declared he could not understand how NCAA Division I student-athletes were not employees. *See* Christovich, *supra*.

[272] Auerbach, *supra* note 271.

[273] Christovich, *supra* note 271.

[274] *See* Auerbach, *supra* note 271.

labor laws (at least for those with full scholarships). However, recharacterizing the scholarships as income could then trigger additional tax obligations for student-athletes because the educational component of a scholarship is currently tax exempt.[275] The net result would be a worsened financial position for the student-athletes unless universities increased the compensation to offset the additional tax owed.

D. *Immigration/Visa Concerns*

1. Student Visa Limitations/Concerns

Most international student-athletes enter and remain in the United States on F-1 student visas.[276] F visas allow the visa holder only very limited employment options[277] as they are designed for "bona fide student[s] . . . who seek[] to enter the United States temporarily and solely for the purpose of pursuing such a course of study."[278] F visa holders may work on campus (e.g., bookstore, cafeteria, within an academic unit), but the on-campus employment must not exceed twenty hours per week during the academic term while school is in session.[279] In limited circumstances, an F visa holder may also seek off-campus employment.[280] Off-campus employment is only available after the student completes the first year of studies, and, as with on-campus employment, is limited to twenty hours per week.[281] Furthermore, this type of off-campus employment is only available for students who experience "severe economic hardship caused by unforeseen circumstances."[282]

The two other principal types of employment permitted under an F visa are curricular practical training ("CPT") and optional practical training ("OPT").[283] CPT is intended to provide students experience in their field of study during their time as a student (e.g., a practicum in a clinic for a nursing student or student teaching for an education student).[284] Appropriate CPT opportunities must be "an integral part of an established curriculum."[285] OPT, while also intended to

[275] *See* 26 U.S.C. § 117 (exempting qualified scholarships from gross income).

[276] *See* Andrew Kreighbaum, *Star's Visa Is Rare Win for Foreign Athletes Banking on Likeness*, BLOOMBERG L. (Nov. 3, 2022 5:35 AM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X5LQDSGG000000.

[277] 8 C.F.R. §§ 214.2(f)(9)-(10) (2022) (limiting student employment to location on school premises or off-campus location educationally affiliated with school).

[278] 8 U.S.C. § 1101(a)(15)(F)(i).

[279] 8 C.F.R. § 214.2(f)(9)(i) (2022).

[280] *Id.* § 214.2(f)(9)(ii)(A).

[281] *Id.*

[282] *Id.* § 214.2(f)(9)(ii)(C).

[283] *Id.* §§ 214.2(f)(10)(i)-(ii).

[284] *Id.* § 214.2(f)(10)(i).

[285] *Id.*

provide students work experience directly related to their fields of study, is primarily intended for postgraduation employment.[286]

As currently interpreted and administered, none of these authorized types of employment for F visa holders would appear to cover student-athletes if the NCAA were to move to an employment/professional model. Many, if not most, D-I athletes would run afoul of the twenty-hour per week rule for both on and off-campus employment.[287] Likewise, CPT and OPT are designed to provide employment experiences in conjunction with the athlete's field of study rather than athletic pursuits.[288] Instead, the schools and universities would be required to apply for employment-related visas and the immigration pathway would be much more difficult for the vast majority of international student-athletes.

There is, however, a potential legislative fix. The College Athlete Economic Freedom Act, introduced in July 2023 by Senator Murphy and Representative Trahan, would create a new category of student visa that would allow international college athletes the ability to engage in NIL-related activity pursuant to their student visas.[289] Additionally, the bill would provide that international college athletes would be entitled to remain in the United States and continue their athletic pursuits under their student-athlete visas even if college athletes are deemed employees under state or federal law.[290]

2. Employment Visa Limitations/Concerns

Some student-athletes may qualify for a type of visa that has, since its creation in 1990, been used by professional athletes—the P visa.[291] The P visa, however, is only available to athletes who compete individually or as part of a team at an internationally recognized level, which most student-athletes, even at the D-I level, will not meet.[292] The regulations characterize internationally recognized skill as "having a high level of achievement . . . evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the extent that such achievement is renowned, leading, or well-known in more than one country."[293] Even more difficult will be the O visa which is for athletes who perform at the highest of levels—Olympics, World Championships, or top-tier

[286] *Id.* § 214.2(f)(10)(ii).

[287] *Id.* §§ 214.2(f)(9)(i)-(ii). Additionally, the limitation that work be done on-campus is also incompatible with athletic performances and competitions away from campus. *Id.* at § 214.2(f)(9)(i).

[288] *Id.* §§ 214.2(f)(10)(i)-(ii).

[289] College Athlete Economic Freedom Act, S.2554, 118th Cong. § 5 (2023).

[290] *Id.*

[291] 8 U.S.C. § 1101(a)(15)(P)(i)(a); Immigration Act of 1990 § 207(a), Pub. L. No. 101-649, 104 Stat. 4978, *amended by* Creating Opportunities for Minor League Professionals, Entertainers, and Teams through Legal Entry Act of 2006, Pub. L. No. 109-463, 120 Stat. 3477.

[292] 8 U.S.C. § 1184(c)(4)(A)(i)(I).

[293] 8 C.F.R. § 214.2(p)(3) (2022).

professional leagues.[294] O visas require athletes demonstrate sustained national or international acclaim, and that they be among "the small percentage [in their sport] who have risen to the very top of the field of endeavor."[295] To qualify for an O visa the athlete must demonstrate extraordinary ability; the standard is meant to be "highly restrictive."[296] Realistically, only student-athletes who have had Olympic or World Championship success or top-tier professional opportunities are likely to qualify for O visa.[297]

Without any statutory or regulatory changes to the current non-immigrant visa regime, universities and colleges will be left pursuing employment visa avenues imperfectly tailored for student-athletes, and have labor certification requirements as well as numerical limitations.[298] Prior to the 1990 creation of the P visa, international athletes petitioned for an H-1 or H-2 visa.[299] Now, H-1B visas would likely be inappropriate for student-athletes as they are generally reserved for "specialty occupation[s],"[300] which are defined as occupations that require "theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific

[294] *See* 8 U.S.C. § 1101(a)(15)(O).

[295] 8 C.F.R. § 214.2(o)(3)(ii) (2022).

[296] 2 C. GORDON, S. MAILMAN, S. YALE-LOEHR & R. WADA, IMMIGRATION LAW AND PROCEDURE, § 25.02[3] n.15 (2022) (citing Matter of X, File No. SRC 02-245-52561 (AAU Nov. 1, 2002)). For reference as to the talent threshold, the regulations provide that one type of award athletes can use in support of an application for an O visa is a Nobel Prize. *See* 8 C.F.R. § 214.2(o)(3)(iii)(A) (2022).

[297] Fortunately, for those athletes who do qualify, universities can act as the employers/petitioners in these cases. *See* 8 U.S.C. § 1184(c)(1) (describing petition process for importing any alien as nonimmigrant). Furthermore, because the visas are employment based and contemplate potential employer change (such as through a trade or via free agency), both visas already have provisions in place to facilitate a freer transfer of athletes. *See* 8 C.F.R. § 214.2(p)(iv)(C)(2) (2022); *id.* § 214.2(o)(iv)(G) (2022) (providing transitional rules for traded professional athletes).

[298] *See, e.g.*, 8 U.S.C. § 1182(a)(5)(A) (requiring labor certification by Secretary of Labor that "there are not sufficient workers who are able, willing, qualified . . . and available" where work is to be performed, and "employment . . . will not adversely affect the wages and working conditions of workers in the United States similarly employed").

[299] *See* Amy Worden, *Gaining Entry: The New O and P Categories for Nonimmigrant Alien Athletes*, 9 MARQ. SPORTS L.J. 467, 468 (1999) (citing 8 U.S.C. § 1101(H)(i)(B) (Supp. II 1990)). At the time, the H-1 visa required the athlete to demonstrate "distinguished merit and ability," while the H-2 visa allowed athletes who were coming temporarily to perform in the United States in a role for which there were no available domestic workers. *Id.* at 469.

[300] 8 U.S.C. § 1101(a)(15)(H)(i)(b).

specialty (or its equivalent)."[301] Universities would then be left with the H-2B visa for temporary service or labor which would also be a very imperfect fit.[302]

Since the addition of the O and P visa categories, H-2Bs (in the sporting context) have more traditionally been used by minor league athletes.[303] A key limitation on H-2B visas is that they are inherently temporary (generally one year or less),[304] and are meant to allow employers to meet a "one-time occurrence, a seasonal need, a peak load need, or an intermittent need."[305] As part of the H-2B application, the petitioning employer must complete the labor certification process establishing there are no unemployed persons within the United States capable of performing the work, and the hire would not adversely affect prevailing wages.[306] Furthermore, the number of H-2B visas is capped at 66,000 per year across all industries,[307] and even then, not all countries' citizens are eligible.[308]

Without legislative reform of the type proposed in the College Athlete Economic Freedom Act, the most viable pathway forward for foreign athletes competing in NCAA athletics as *employees* would be through the existing P or O visa categories, or via a regulation change to allow F-1 student visa holders the ability to work as athletes through an "on campus" designation.[309]

E. *Workers' Compensation*

As a general proposition, employers are required to provide coverage for injuries suffered by employees while on the job through workers' compensation

[301] 8 U.S.C. § 1184(i)(1)(A)-(B). To meet the experiential threshold, the applicant must show either full state licensure to practice the occupation (if licensure is required), the attainment of the aforementioned college degree, or experience in the specialty equivalent to a degree along with recognition of expertise. *See Id.* at § 1184(i)(2). Additionally, H-1B visas are numerically limited and subject to intense competition. *See, e.g.*, *id.* § 1184(g)(1)(A), (5) (limiting standard H-1B visas to 65,000 per year and extending cap by additional 20,000 visas for employees of institution of higher education).

[302] *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(B).

[303] *See* Casey Shilts, Kate Jett & Brett Lashbrook, *Major League Internationals with Minor-League Titles: Let Them in. Let Them Play*, 17 MARQ. SPORTS L. REV. 69, 72 (2006).

[304] 8 C.F.R. § 214.2(h)(6)(ii)(B).

[305] *Id.* In *Matter of Artee Corp.*, the Board of Immigration Appeals ("BIA") held that to assess the temporary element it needed to assess the nature of the employer's needs rather than the nature of the job duties. 18 I&N Dec. 366, 367 (BIA 1982).

[306] 8 C.F.R. § 214.2(h)(6)(i) (2022).

[307] 8 U.S.C. § 1184(g)(1)(B).

[308] As of 2023, the citizens of eighty-seven countries are eligible for H-2B visas. 87 Fed. Reg. 67930 (Nov. 10, 2022).

[309] NCAA regulations currently restrict student-athletes from more than twenty hours per week of "countable" athletic activity, which facially would comport with F-1 on-campus employment limitations. *See* 2022-23 NCAA DIVISION I MANUAL, *supra* note 32, at 240.

insurance coverage.[310] Workers' compensation benefits afford the injured employee the benefit of prompt and assured compensation for injuries and afford the employer the benefit of workers' compensation being the exclusive remedy for injuries arising out of the employment and suffered during the course of employment.[311]

Prior attempts by student-athletes to establish a right to workers' compensation benefits have largely resulted in courts denying coverage.[312] Those decisions, however, were based largely on the purported amateur nature of college athletics and the NCAA's characterization that college athletics is not a vocation.[313] Although student-athletes are typically provided medical benefits for surgery and rehabilitation arising from athletics-related injuries,[314] that coverage is not under a workers' compensation model,[315] and arises from either from state law[316] or NCAA regulation.[317]

In 1953, however, the Supreme Court of Colorado held that a student-athlete who was given on-campus employment contingent upon playing football was properly considered an employee under Colorado law and therefore entitled to

[310] Requirements for workers' compensation coverage are established at the state level, and each state has its own requirements, usually requiring coverage by employers with a certain minimum number of employees. *See, e.g.*, *Workers' Compensation Insurance*, INSUREON, https://www.insureon.com/small-business-insurance/workers-compensation/state-laws [https://perma.cc/7S9J-MNVV] (last visited Sept. 30, 2023); Nikki Nelson, *What You Need To Know About Workers' Compensation Laws*, WOLTERS KLUWER (Dec. 6, 2020), https://www.wolterskluwer.com/en/expert-insights/what-you-need-to-know-about-workers-compensation-laws [https://perma.cc/K5FT-V2FH].

[311] Nelson, *supra* note 310; *see also* Stephen Cormac Carlin & Christopher M. Fairman, *Squeeze Play: Workers' Compensation and the Professional Athlete*, 12 U. MIAMI ENT. & SPORTS L. REV. 95, 99-100 (1995).

[312] *See, e.g.*, Waldrep v. Tex. Emps. Ins. Ass'n, 21 S.W.3d 692, 698-701, 705 (Tex. Ct. App. 2000) (denying former student-athlete workers' compensation on grounds jury concluded there was no clear existence of contract for hire between athlete and university nor sufficient exercise of control); State Comp. Ins. Fund v. Indus. Comm'n, 314 P.2d 288, 389 (Colo. 1957) (holding deceased student-athlete was not under contract of hire with university).

[313] *See* Thomas R. Hurst & J. Grier Pressly III, *Payment of Student-Athletes: Legal & Practice Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55, 56 (2000).

[314] *Id.* at 69.

[315] *Id.* at 66-67 (noting workers' compensation statutes in most jurisdictions do not explicitly cover student-athletes).

[316] *See, e.g.*, NEB. REV. STAT. § 85-106.05 (providing compensation to injured student-athletes); CAL. EDUC. CODE § 67452 (West 2023) (requiring, inter alia, universities to provide academic scholarships to injured athletes no longer able to compete). While California provides a Student-Athlete Bill of Rights, CAL. EDUC. CODE §§ 67450-67457 (West 2023), it also specifically excludes student-athletes from the definition of employee. CAL. LAB. CODE §§ 3352(a)(7), (11) (West 2023).

[317] *See* 2022-23 NCAA DIVISION I MANUAL, *supra* note 32, at 227 (setting out requirements for circumstances under which institutions must provide medical care to student-athletes).

workers' compensation benefits.[318] If universities begin to compensate athletes, then the athletes would certainly be considered employees, and as such entitled to workers' compensation benefits. This would, in turn, initially seem to require universities to contract with private insurance carriers to provide the coverage or pay into state compensation funds to provide the coverage.[319] The issues surrounding comparable coverage for professional athletes, however, suggest that this possibility could be complicated and costly.[320]

Professional athletes are generally eligible to claim workers' compensation benefits for injuries suffered in the course of their work, although some states have moved to restrict this right.[321] The availability of supplemental benefits under a CBA may, however, impact professional athletes' entitlement to workers' compensation.[322] The interaction between the athlete's contractual rights and workers' compensation laws can be incredibly complicated.[323] Similar issues are likely to arise out of student unionization efforts if student-athletes are considered employees.

State workers' compensation statutes vary significantly with regard to their treatment of professional athletes.[324] Most states do not specifically address athletes and leave coverage issues to be resolved under the same compensation provisions as all other employees.[325] Other states have specific provisions that either explicitly include athletes or explicitly exclude athletes.[326] A couple of states have provisions that allow employers of athletes or the athletes themselves to make an election regarding participation in the statutory compensation

[318] Univ. of Denver v. Nemeth, 257 P.2d 423, 424, 428-30 (Colo. 1953) (en banc) (holding student injured while playing football, but given employment elsewhere on campus dependent on his ability to play, was employee entitled to benefits because injury was incident to his employment); *see also* Van Horn v. Indus. Accident Comm'n, 33 Cal. Rptr. 169, 175 (Cal. Ct. App. 1963) (annulling decision of Industrial Accident Commission declaring student-athlete could not be employee), *superseded by statute*, CAL. LAB. CODE §§ 3352(a)(7), (11) (West 2023).

[319] *See* Nelson, *supra* note 310.

[320] *See* Tom Dart, *College Athletes Are Unpaid. What If Injury Ruins Their Chance of Turning Pro?*, GUARDIAN (Sept. 6, 2021, 5:00 AM), https://www.theguardian.com/sport/2021/sep/06/college-athletes-are-unpaid-what-if-injury-ruins-their-chance-of-turning-pro [https://perma.cc/LR5Y-PJWP] (noting "huge cost of bespoke private athlete insurance").

[321] *See, e.g.*, FLA. STAT. § 440.02(17)(c)(3) (2023) (excluding from employment services performed by professional athletes).

[322] *See* Carlin & Fairman, *supra* note 311, at 110-11 (describing Texas scheme, in which professional athletes may choose to receive benefits through workers' compensation system or under their contract, resulting in "functional exclusion of coverage whenever contract benefits are greater than workers' compensation benefits").

[323] *See id.* at 112-17 (discussing various interactions evident in collective bargaining agreements for National Football League, National Basketball Association, and professional baseball and hockey organizations).

[324] *See id.* at 104-12.

[325] *Id.* at 104-07.

[326] *Id.* at 107-10.

procedures.[327] Still other states have attempted to implement set-off procedures, whereby athletes are covered by workers' compensation laws, but benefits are reduced by contract benefits paid to the athlete.[328] State legislatures are increasingly seeking to address questions surrounding medical coverage for athletes (amateur and professional alike) and workers' compensation claims.[329]

F. *Income Tax Concerns*

Scholarships for higher education are generally not subject to federal income taxation, so long as the recipient is a candidate for a degree at an eligible educational institution and the scholarship is used to pay for qualified education expenses.[330] Qualified education expenses include tuition, fees, books, supplies, and equipment required for courses at the educational institution.[331] The portion of a scholarship applied to cover room and board, however, only qualifies up to a certain amount.[332] Under current guidelines for athletic scholarships, the educational institution can expect, but not require, the recipient to participate in a particular sport because the scholarship cannot be considered a fee for services and remain tax free.[333]

The emergence of NIL deals has already changed the tax considerations for college athletes as "[a]nalysts [have] predict[ed] that individual athletes could make anywhere from $500 - $2 million a year off their NIL."[334] This income

[327] *Id.* at 110-11.

[328] *Id.* at 111-12.

[329] *See* Mona Carter, *Emerging Issues: Athletes and Workers Compensation*, *in* NAT'L COUNCIL ON COMP. INS., WORKERS COMPENSATION 2015 ISSUES REPORT 28, 29-30 (2015) (listing and describing legislative activity in various states addressing workers' compensation and athletes).

[330] *See Tax Benefits for Education: Information Center*, IRS, https://www.irs.gov/newsroom/tax-benefits-for-education-information-center [https://perma.cc/BF2V-U6L6] [hereinafter *Tax Benefits for Education*] (describing eligibility requirements for education credit, which reduces amount of federal income tax owed) (last updated Sept. 22, 2023); Letter from John A. Koskinen, Comm'r, I.R.S., to Richard Burr, Senator, N.C. (June 27, 2014) (providing information on federal tax treatment of college athletic scholarships).

[331] *Tax Benefits for Education*, *supra* note 330.

[332] *Id.* (explaining room and board costs are qualified education expense only if they are less than greater of either (1) "the allowance for room and board" specified by educational instituion included in cost of attendance; or (2) "actual amount charged if the student is residing in housing owned or operated by the eligible educational institution").

[333] Mark Kantrowitz, *Are Scholarships Taxable?*, SAVING FOR COLL. (May 10, 2019), https://www.savingforcollege.com/article/are-scholarships-taxable (explaining, per IRS, college can expect but not require student to play sport and must continue scholarship even if student is injured and cannot play).

[334] Marena M. Messina & Frank M. Messina, *A Primer on the Income Tax Consequences of the NCAA's Name, Image, and Likeness (NIL) Earnings for College Athletes*, 4 J. ATHLETE DEV. & EXPERIENCE 189, 189 (2022).

brings with it federal and state income tax consequences.[335] Generally speaking, college athletes earning NIL money are likely "considered 'self-employed' under the status of an independent contractor."[336] Because college athletes are not currently considered employees of the school, the NCAA, or a collective that facilitates the NIL earnings, athletes may be required to pay self-employment tax.[337] College athletes also need to comply with federal tax laws requiring payment of taxes as NIL income is earned, and may be required to pay quarterly estimated taxes because NIL earnings will not be subject to withholding like employee earnings.[338] Additionally, college athletes have to understand that compensation, and thus taxable income, may be in the form of cash or noncash benefits such as food, clothing, or equipment; the noncash compensation is also taxable.[339]

The tax consequences would increase, both in size and scope, however, if a model is adopted whereby the college athlete is considered an employee of the school. First, any scholarships provided to the college athlete could cease to be treated as tax free, because the scholarship could suddenly be considered compensation in return for playing.[340] This could require athletes to report as income the amount of the scholarship, which could often total from the tens to hundreds of thousands of dollars over the course of the athlete's college career; particularly for athletes without significant NIL deals, this sudden financial burden could be significant.[341]

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[335] *Id*. at 190 (noting student-athletes need to understand federal and state tax rules when earning NIL income).

[336] *Id.* at 191.

[337] Tim Shaw, *The Long Read: Tax Implications of College Collectives, NIL Deals*, REUTERS (Oct. 6, 2022), https://tax.thomsonreuters.com/news/the-long-read-tax-implications-of-college-collectives-nil-deals/ [https://perma.cc/YF47-2AD8] (stating, as independent contractors and not employees, student-athletes may be responsible for paying self-employment tax).

[338] *Id*. (stating student-athletes may be required to make quarterly estimated payments because taxes are not withheld as they would be if students were employees); Messina & Messina, *supra* note 334, at 194 (discussing "pay-as-you-go" rules and estimated tax payments applying to NIL income as self-employment income).

[339] *See* Ben Cahill, *Student-Athletes May Not Recognize the Tax Implications of NIL Deals*, CLIFTONLARSONALLEN (Dec. 15, 2022), https://www.claconnect.com/en/resources/articles/2022/student-athletes-may-not-recognize-the-tax-implications-of-nil-deals [https://perma.cc/A8FP-W7HA] (stating noncash compensation in form of equipment, food, clothes, and discounts, is also taxable income).

[340] *See* David Bollis, Gerald DesRoches, Matt Dianich, Mary Duffy, Florian Hanslik, Christian Martin, Neal McFarland, Olivia Pfister & Melodie Tsai, *Student-Athlete/Athlete-Employee: Tax Consequences, For Sure*, ANDERSEN TAX: FOR THE RECORD (Sept. 2014), https://andersen.com/publications/newsletter/september-2014/student-athlete-athlete-employee-tax-consequences-for-sure [https://perma.cc/F9RM-U7VZ] (noting tax-exempt status of scholarships would be invalidated by receipt of compensation for playing).

[341] *Id.* (exemplifying how the tax burden for a $50,000 scholarship could be over $10,000 annually, which is unfeasible for many athletes).

The issue of state income taxes could become incredibly complicated for college athletes too. Consider the treatment of professional athletes under state tax codes as illustrative. Professional athletes are subject to tax in states in which they compete, as well as their resident state.[342] As such, they typically have to allocate portions of their salary to the various states in which their employer-team plays or practices and report and pay taxes in those states, accordingly.[343] Arguably, if college athletes are considered employees, they may be subject to similarly allocating portions of their scholarship as being "earned" in every state in which the team competes and being subject to each state's tax laws.

Additionally, the scope of the tax consequences would reach the educational institution itself. These include basic employer responsibilities under federal tax law and potential impacts on status for athletic departments and educational institutions.

If the educational institution is considered an employer of the college athlete, the institution becomes subject to the federal tax obligations of employers. These include a variety of reporting and administrative requirements, as well as withholding obligations for income, Social Security, and Medicare taxes.[344] The educational institution would be required to keep track of taxable wages and benefits provided to the athlete, as well as to collect the athlete's share of taxes, such as payroll and withholding, even if little or no cash wages were paid to the athlete.[345] The educational institution would also need to register in the various states in which the athlete would be subject to tax, as discussed above.[346]

Educational institutes could also see additional burdens and impact under the Federal Patient Protection and Affordable Care Act ("ACA").[347] Under the ACA, employers incur obligations to offer a certain level of health care coverage to a certain percentage of full-time employees or face potential tax penalties.[348]

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[342] *See* Michael Weicher, *Taxation Is the Name of the Game for Professional Athletes*, BLOOMBERG TAX (Jan. 12, 2023, 4:45 AM), https://news.bloombergtax.com/daily-tax-report/taxation-is-the-name-of-the-game-for-professional-athletes [https://perma.cc/ZZ6X-C8WZ] (noting people who provide services in state other than their home state are subject to taxes in both, and professional athletes must pay taxes in states where they play and practice, while bonuses are usually allocable only to their home state).

[343] *Id.*

[344] *See Publication 15 (2023), (Circular E), Employer's Tax Guide*, IRS, https://www.irs.gov/publications/p15 [https://perma.cc/VL99-YT96] (last updated Dec. 15, 2022).

[345] *See* Joel Bush, *Student or Professional Athlete – Tax Implications in the United States if College Athletes Were To Be Classified as Paid Employees*, 68 LAB. L.J. 58, 62 (2017) (noting collection of taxes from students could require them to pay out-of-pocket if they receive little or no cash wages).

[346] *Id.* at 63 (noting universities, as employers, would need to register in states wherever students must pay taxes).

[347] *Id.* at 61.

[348] *Id.* (noting employers with at least fifty full-time employees, or equivalent in part-time employees, must provide minimum level of health care coverage with affordable premiums to "at least 95% of their full-time employees" or face penalties).

If athletes were considered full-time employees, this could result in a substantial tax issue for the educational institution.[349]

Treating college athletes as employees could impact the traditional tax-exempt status that athletic departments enjoy because it would cut against the traditional close relationship of athletic departments to the educational mission of the institution.[350] Even more significant for athletic departments, however, could be the potential impact on the tax-deductibility of contributions.[351] The tax-exempt status of athletic departments allows contributions from donors—the largest source of income for athletic departments—to be deductible and tax-exempt for the donor; if the athletic department loses its tax-exempt status, this would likely reduce donor willingness to make substantial contributions.[352]

III. A VIABLE PATH FORWARD

Barring any unexpected changes, college athletics appear to be on an inexorable march toward the classification of student-athletes as employees. The results of the recent NLRB determination regarding USC[353] and the *Johnson* FLSA case demonstrate that student-athletes' arguments as to their classification as employees are gaining ground. On the other hand, retaining an amateur sports model would allow universities to offer a much wider range of sports for men and women (such as traditional Olympic sports) than would be possible if they were required to compensate athletes.[354]

If student-athletes become employees, the revenue and budget model used by university athletics departments for decades will likely be discarded. With increased compensation costs and no additional revenue, college athletic

[349] *Id.* (noting considering student-athletes as full-time employees could cause educational institution to slip below ninety-five percent threshhold).

[350] *See* Bollis et al., *supra* note 340 (noting treating student-athletes as employees could "invalidate" relationship of athletic departments to their universities' educational mission). Some argue that this issue for athletic departments could also jeopardize Section 501(3)(c) status for schools, impacting taxation on bond financing and charitable gifts for the institutions as a whole. *See* 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/nlrb-college-athletes-employees-pursuit.

[351] *See* Bollis et al., *supra* note 340 (characterizing loss of tax-deductible contributions as "most severe consequence" for athletic departments).

[352] *Id.* (noting while an athletic department's loss of tax-exempt status might not make much of a difference to small donors, it would be significant matter for larger donors when deciding to contribute).

[353] *See supra* Part II.A.3.

[354] *See, e.g.*, Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future*, 95 CHI.-KENT L. REV. 187, 216 (2020) (stating granting employee status to athletes in nonrevenue sports could lead to those sports' elimination).

departments will likely have no choice but to begin cutting sports programming.[355] Faced with these budgetary constraints, some schools may retain only the revenue-generating sports and those required by Title IX. Other schools may instead decide to compete at a Division II or Division III level instead. However, the student-athletes who generate this revenue would finally receive compensation that reflects the value they bring to their universities. These athletes would be able to monetize a few more years of an athletic career which could be cut short at any time by injury.

For college athletics to continue with an "amateur" model, the NCAA will likely need at least a partial antitrust exemption to allow it to impose reasonable guardrails on pay-for-play to prevent recruiting violations, and to continue its characterization of athletes as student-athletes rather than employees.[356] Under such an exemption, the NCAA could even authorize monthly or yearly stipends at some level to student-athletes, which would be an improvement over the current position, but the stipends would be less than what the student-athletes could receive in a free market. This approach only works, however, with congressional blessing.[357] Only federal legislation that preempts conflicting state laws, and potentially conflicting federal laws such as the NLRA and FLSA, can provide the solution the NCAA seeks.[358] Expect new NCAA President, Charlie Baker, former Governor of Massachusetts, to continue to push for congressional action.[359]

As we saw from the MLB, an antitrust exemption in sports is not unheard of.[360] While the arguments for that particular exemption are weak, especially in retrospect, the arguments in favor of an exemption for college sports are more compelling. Reining in costs allows universities to continue to offer a wider

[355] *See* Cody J. McDavis, Opinion, *Paying Students To Play Would Ruin College Sports*, N.Y. TIMES (Feb. 25, 2019), https://www.nytimes.com/2019/02/25/opinion/pay-college-athletes.html (recounting in 2019 schools had already cut sports and reduced their athletic departments to pay for added expenses of stipends for certain sports).

[356] *See supra* Part I.A.

[357] Weaver, *supra* note 137.

[358] *See generally* Leonard Armato, *Congress and the Tipping Point for the NCAA, NIL and College Sports*, FORBES (May 27, 2023, 3:41 PM), https://www.forbes.com/sites/leonardarmato/2023/05/27/congress-and-the-tipping-point-for-the-ncaa-nil-and-college-sports/ (noting potential congressional legislation could preempt state laws and "prevent them from imposing mandatory revenue sharing requirements"); Weber, *Is a Federal NIL Solution on the Horizon*, *supra* note 139 (noting that all current NIL-related bills except one would preempt state NIL laws).

[359] *See* Dennis Dodd, *Congress To Hold First NIL Hearing Wednesday as New NCAA President Seeks Oversight, Antitrust Exemption*, CBS SPORTS (Mar. 28, 2023, 7:29 PM), https://www.cbssports.com/college-football/news/congress-to-hold-first-nil-hearing-wednesday-as-new-ncaa-president-seeks-oversight-antitrust-exemption/ [https://perma.cc/PU7L-Y9UE] (noting Baker had lobbied legislators ahead of March hearing on NIL regulations).

[360] *See supra* Part I.B.1.

variety of sports and, by extension, increased roster spots for men and women.[361] By fielding these additional teams, universities will further the pursuits of our Olympic athletes as many of them compete in the college ranks at some point in their careers.[362] Additionally, allowing greater regulation may prevent college sports from collapsing into two major conferences that represent the "have's" versus the rest of Division I along with Division II and Division III as the "have not's."[363]

An antitrust exemption is not without blemishes. The antitrust exemption would allow the NCAA to extend the status quo, which reallocates money from revenue-generating sports to non-revenue generating sports. In essence, the status quo requires the most lucrative sports and their athletes to subsidize the less lucrative ones without any say in the matter.[364] An unfortunate truth is that many of the college athletes who do the subsidizing of these sporting programs are people of color.[365] There are significant equity concerns that need to be addressed on that point,[366] and the optics of the matter are bad for the NCAA with its billion-dollar annual budget. An antitrust exemption would likely do nothing to remedy this issue.

CONCLUSION

This Article examines just a few of the consequences that will likely result if college athletes are professionalized. Student-athletes will likely seek to unionize immediately, though most schools are not yet considered subject to the NLRA. Universities may need to contend with the FLSA and ensure that compensation they are providing meets their legal obligations. The applicability of Title IX to the situation is murky at best and creates additional uncertainty for

[361] *Cf. NCAA Student-Athletes at the 2022 Winter Olympics*, NCAA (Feb. 15, 2022), https://www.ncaa.com/news/ncaa/article/2022-02-03/ncaa-student-athletes-2022-winter-olympics [https://perma.cc/KTN8-R9S8] (predicting schools may cut programs losing money to focus on "breadwinners" like football and basketball).

[362] *Id.* (stating more than two hundred current and former NCAA athletes competed at 2022 Winter Olympic Games).

[363] *See generally* Baily Lipschultz & Bloomberg, *NCAA Supreme Court Ruling Threatens to Further Divide the Haves and Have-Nots of College Sports*, FORTUNE (June 23, 2021, 10:07 AM), https://fortune.com/2021/06/23/ncaa-supreme-court-ruling-division-i-student-athletes-college-sports/ [https://perma.cc/J2KN-RRBF] (noting allowing rich schools to pay college athletes gives them "even greater edge" in recruiting).

[364] *See generally* Steve Maas, *Revenue Redistribution in Big-Time College Sports*, NAT'L BUREAU OF ECON RSCH: THE DIGEST (Nov. 2020), https://www.nber.org/digest/202011/revenue-redistribution-big-time-college-sports [https://perma.cc/K6N3-8CJ3] (arguing limitations on player compensation "result in a transfer of resources" away from revenue-generating sports).

[365] *See id.* (revealing Black players make up nearly fifty percent of football and basketball teams, but only eleven percent of sports that lose money).

[366] *See id.* (highlighting that, in addition to racial disparities, student-athletes in football and basketball are more likely to come from lower-income households, while those playing non-revenue-generating sports come from affluent backgrounds).

the industry. Workers' compensation coverage may require universities to pay costly premiums. International student-athletes may need different visa types. College athletes may also incur significant income tax liability depending on how compensation is structured. In addition to the legal issues, there are likely to be significant financial implications. If universities hiring athletes are required to provide financial compensation, fewer dollars will remain in the athletic department budgets. Athletic departments are likely to reallocate funding away from non-revenue-generating sports and into the salaries and benefits of the athletes in revenue-generating sports. As a result, it seems likely that if student-athletes are employees, sanctioned college sports teams are likely to shrink as department cuts become necessary. These additional costs will not kill NCAA sports—at least not the lucrative ones. People will likely always tune in or attend the games of their alma mater. Money concerns, might, however, be the death of many non-revenue-generating sports, and that itself is a cost to consider.