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## The Money Game: Student-Athletes' Battle for Employee Status

Matthew Ehrhardt

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MATTHEW EHRHARDT

## The Money Game: Student-Athletes' Battle for Employee Status

67 N.Y.L. SCH. L. REV. 61 (2022–2023)

ABOUT THE AUTHOR: Matthew Ehrhardt was a Staff Editor of the 2021–2022 *New York Law School Law Review*. He received his J.D. from New York Law School in 2022.

## THE MONEY GAME: STUDENT-ATHLETES' BATTLE FOR EMPLOYEE STATUS

### I. INTRODUCTION

The sports entertainment industry is a lucrative and growing one. In North America, it was projected to reach \$83.1 billion in revenue this year alone.<sup>1</sup> One of the largest segments of this profitable industry is U.S. college sports,<sup>2</sup> which generated revenues of \$14.4 billion in 2019, before the COVID-19 pandemic began to affect earnings.<sup>3</sup>

In the 2018–2019 fiscal year, the University of Texas football program generated approximately \$223.9 million in revenue, while the University of Alabama football program produced approximately \$164.1 million.<sup>4</sup> These high revenue figures are reflected in the salaries of the teams' head coaches, who are paid on par with Fortune 500 executives.<sup>5</sup> The National Collegiate Athletic Association (NCAA), the nonprofit organization that governs Division I college sports,<sup>6</sup> has also “cashed in;”<sup>7</sup> its revenue surpassed \$1.1 billion in the 2020–2021 fiscal year.<sup>8</sup>

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1. PRICEWATERHOUSECOOPERS, 2019 PWC OUTLOOK FOR THE SPORTS MARKET IN NORTH AMERICA THROUGH 2023, at 2 (2019), <https://www.pwc.com/us/en/industries/tmt/assets/pwc-sports-outlook-2019.pdf>.
  2. This Note uses the term “college” as it is used colloquially, that is, to include private and public colleges and universities in the United States.
  3. *What Is the Total Amount of Revenues Reported?*, OFF. OF POSTSECONDARY EDUC., U.S. DEP'T OF EDUC., <https://ope.ed.gov/athletics/Trend/public/#/answer/6/601/trend/-1/-1/-1> (click “Trend”) (last visited Feb. 12, 2023) (reporting that revenues generated by college sports programs in 2020, the most recent year for which the U.S. Department of Education has published revenue figures, totaled approximately \$11.9 billion—a downturn from 2019); see also Joe Drape et al., *2020: The Year in Sports when Everybody Lost*, N.Y. TIMES (Dec. 15, 2020), [www.nytimes.com/interactive/2020/12/13/sports/coronavirus-sports-economy-wisconsin.html](http://www.nytimes.com/interactive/2020/12/13/sports/coronavirus-sports-economy-wisconsin.html) (“In 2020, the sports industry in North America was projected to generate \$75.7 billion . . . Instead, it lost more than a third of its value as leagues suspended play before returning with stripped-down seasons.”).
  4. Steve Berkowitz et al., *NCAA Finances, 2018–19 Finances*, USA TODAY (Mar. 7, 2021), <https://perma.cc/7AAR-YRCU>.
  5. Richard Johnson, *A History of Skyrocketing College Football Coach Salaries, from Camp to Dabo*, BANNER Soc'y (Aug. 15, 2019), <https://www.bannersociety.com/2019/8/15/20732192/coach-salaries-history-highest>; see also Fred Bowen, *Big Money in College Football Pays for Coaching and Not Coaching*, WASH. POST (Oct. 13, 2022), <https://www.washingtonpost.com/kidspost/2022/10/13/colleges-pay-coaches-after-firing/> (observing that many college football coaches make more money than the head coaches of professional football teams).
  6. See *NCAA v. Alston*, 141 S. Ct. 2141, 2150 (2021) (“Over the decades, the NCAA has become a sprawling enterprise. Its membership comprises about 1,100 colleges and universities, organized into three divisions.”).
  7. Robert Harding, Note, *Calling Time: The Case for Ending Preferential Antitrust Treatment of NCAA Amateurism Rules After Alston*, 2022 U. ILL. L. REV. 1637, 1644 (2022).
  8. NCAA, CONSOLIDATED FINANCIAL STATEMENTS 4 (2021); see also Dan Murphy, *NCAA President Mark Emmert Made \$2.9 Million as NCAA's Revenue Dropped More than 50%*, ESPN (Jul. 19, 2021), [https://www.espn.com/college-sports/story/\\_/id/31844825/mark-emmert-made-29-million-ncaa-revenue-dropped-more-50-percent](https://www.espn.com/college-sports/story/_/id/31844825/mark-emmert-made-29-million-ncaa-revenue-dropped-more-50-percent) (reporting that NCAA President Mark Emmert earned a salary of nearly \$3 million in the 2019–2020 fiscal year, despite the NCAA's pandemic-related drop in revenue).

Central to the NCAA's core values is the notion that a student-athlete<sup>9</sup> participates in college sports as an "avocation" that comes second to academics.<sup>10</sup> In accordance with this principle, the NCAA's rules require that student-athletes compete in college sports as "amateurs," compensated only with athletic scholarships to attend the colleges they play for.<sup>11</sup> Notably, the NCAA rules forbid direct monetary payments to student-athletes for their performance in college sports.<sup>12</sup>

Traditionally, the NCAA also banned a student-athlete from endorsing products or services for profit.<sup>13</sup> But this policy was abandoned once states passed laws permitting a student-athlete to profit from their name, image, and likeness (NIL) without jeopardizing their amateur eligibility with the NCAA ("NIL laws").<sup>14</sup>

The debate over student-athlete compensation has raged for years. On one side, student-athletes advocate for remuneration by their colleges and the NCAA, which both profit immensely from the student-athletes' efforts.<sup>15</sup> The NCAA and its member colleges, however, counter that NIL laws put this debate to rest by permitting student-athletes to profit from lucrative sponsorships.<sup>16</sup>

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9. This Note uses the common term "student-athlete" to refer to students who participate in college sports programs. The term was minted to emphasize the academic component of these athletes' lives, "to deprive those [students] of workplace protections." Memorandum GC 21-08 from Jennifer A. Abruzzo, Gen. Couns., NLRB, to All Reg'l Dir's., Officers-in-Charge, and Resident Officers 1 n.1 (Sept. 29, 2021) [hereinafter 2021 NLRB Memorandum]. But it has come to be used by all, even those who believe that these students should be paid.
  10. NCAA, 2021–22 NCAA DIVISION I MANUAL § 2.9 (2021) [hereinafter 2021–22 NCAA MANUAL] ("Student participation in intercollegiate athletics is an *avocation*, and student-athletes should be protected from exploitation by professional and commercial enterprises." (emphasis added)).
  11. NCAA, 2022–23 NCAA DIVISION I MANUAL §§ 12.01–.12 (2022) [hereinafter 2022–23 NCAA MANUAL]. The NCAA defines an "amateur" as "someone who does not have a written or verbal agreement with an agent, has not profited above [their] actual and necessary expenses or gained a competitive advantage in [their] sport." *What Is Amateurism?*, NCAA, <https://naaa.egain.cloud/kb/EligibilityHelp/content/KB-2219/What-is-amateurism> (last visited Feb. 12, 2023).
  12. 2022–23 NCAA MANUAL, *supra* note 11, § 12.1.2.
  13. 2021–22 NCAA MANUAL, *supra* note 10, § 12.5.2.1.
  14. Jada Allender, *The NIL Era Has Arrived: What the Coming of July 1 Means for the NCAA*, HARV. J. SPORTS & ENT. L. (Jul. 1, 2021), <https://harvardjssel.com/2021/07/the-nil-era-has-arrived-what-the-coming-of-july-1-means-for-the-naaa/>. *But see* 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> ("Athletes will still not be paid directly by universities beyond the cost of attendance, and the N.C.A.A. has been keen to ensure that athletes not be considered employees of their colleges.").
  15. *See* Laine Higgins, *Should College Athletes Be Paid? A Once-Radical Idea Gains Momentum*, WALL ST. J. (Jul. 24, 2022), <https://www.wsj.com/articles/college-athlete-pay-ncaa-employees-11658502884>.
  16. *See* Jackson C. Field, Comment, *Punt and Pass: Why Congress Should Punt on an Antitrust Exemption and Pass on Express Preemption when Regulating Student-Athlete Name, Image, and Likeness*, 53 TEX. TECH. L. REV. 743, 748–49 (2021).

## THE MONEY GAME: STUDENT-ATHLETES' BATTLE FOR EMPLOYEE STATUS

This Note contends that student-athletes competing in revenue generating sports<sup>17</sup> should be recognized as employees of their respective colleges and the NCAA and thus should be entitled to the privileges and benefits that accompany employee status, including fair pay and collective bargaining rights. Part II of this Note sketches the history of the NCAA and the changing legal landscape surrounding its practices, including recent Supreme Court and National Labor Relations Board (NLRB) decisions and a pending challenge to the NCAA's classification of student-athletes as "nonemployees." Part III argues that denying employee status to student-athletes is deeply troubling and merits judicial review. Part IV of this Note proposes a framework for a court to apply when determining whether student-athletes are entitled to play for pay. Part V concludes this Note.

### II. THE HISTORY OF THE NCAA'S AMATEURISM RULES AND THE SHIFTING LEGAL BATTLEGROUND

#### *A. The Development of the NCAA's Amateurism Rules*

The first organized college sports program was a boating club established at Yale University in 1843.<sup>18</sup> One year later, Harvard University formed its own boating club.<sup>19</sup> The two clubs were purely recreational until 1852, when they met to race in the Harvard-Yale Regatta: the first intercollegiate sporting event in U.S. history.<sup>20</sup> Throughout the remainder of the nineteenth century, college sports programs cropped up across the country,<sup>21</sup> their activities unchecked by any governing body until the early 1900s.<sup>22</sup> But after a particularly violent season of college football saw 18 deaths and 159 serious injuries, an outraged public insisted that college football be either overhauled or prohibited.<sup>23</sup>

In 1905, then-president Theodore Roosevelt, an avid football fan, called upon the nation's top college football programs to "clean up" the sport.<sup>24</sup> In December of that year, sixty-two colleges became charter members of a regulatory body known as the Intercollegiate Athletic Association of the United States, renamed the NCAA in

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17. NCAA Division I men's basketball and the Football Bowl Subdivision (FBS) are referred to as the "revenue generating sports." Cody J. McDavis, Comment, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 276 (2018). The FBS is the NCAA subdivision to which the 130 principal Division I football-playing colleges belong. *Our Division I Members*, NCAA, <https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx> (last visited Feb. 12, 2023). As used in this Note, the term "NCAA Division I scholarship football players" includes only those players in the FBS. See 2021 NLRB Memorandum, *supra* note 9, at 2 n.2.

18. Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 AM. Q. 222, 224 (1970).

19. *Id.*

20. *Id.*

21. *Id.* at 227–29.

22. *History*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> (last visited Feb. 12, 2023).

23. *Id.* (noting that this violent college football season occurred in 1904).

24. *Id.*

1910.<sup>25</sup> Since its formation, the NCAA has promulgated a multitude of rules that student-athletes and their colleges are bound to follow to remain eligible for NCAA events.<sup>26</sup>

The most controversial of these rules concerns the players' amateurism.<sup>27</sup> When the NCAA was founded, of the four major men's sports, only baseball had formed a professional league; basketball, football, and hockey had not.<sup>28</sup> Thus, student-athletes then generally treated their participation in college sports as a hobby motivated by collegiate pride, rather than as a stepping stone toward professional athletics.<sup>29</sup> To ensure that student-athletes prioritized their educations over sports, the NCAA banned student-athletes from receiving monetary compensation—a policy still in effect today.<sup>30</sup>

For decades, the NCAA has had the power to discipline any student-athlete who breaks this rule.<sup>31</sup> Famously, the NCAA suspended Tiger Woods, then a student-athlete, from the Stanford University men's golf team for enjoying a modest twenty-five dollar dinner paid for by family friend and golf hall-of-famer Arnold Palmer.<sup>32</sup> To end the suspension and regain his amateur status, Woods was ordered by the NCAA to reimburse Palmer for the meal.<sup>33</sup> To this day, the NCAA's amateurism rules reflect its view that participation in college sports is a "recreational pursuit."<sup>34</sup>

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25. *Id.*

26. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 88 (1984); *see generally* 2022–23 NCAA MANUAL, *supra* note 11.

27. *See* Ben Strauss, 'As a College Athlete, You Really Have No Rights', POLITICO MAG. (Mar. 16, 2017), <https://www.politico.com/magazine/story/2017/03/congress-ncaa-march-madness-214918/> (recounting decades of criticism concerning "the arbitrary and capricious way [the NCAA] policed its strict amateurism rules"); Nicolas Chapman, Comment, *Money for Nothing (I Want Publicity)*, 52 U. PAC. L. REV. 649, 653 (2021) ("The NCAA has repeatedly drawn ire from student-athletes, sports critics, and legal commentators alike for its refusal to repeal its amateurism bylaws.").

28. *Baseball, Sports Industry: A Research Guide*, LIB. OF CONG., <https://guides.loc.gov/sports-industry/baseball> (last visited Feb. 12, 2023); *see also* JAMES QUIRK & RODNEY D. FORT, PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS 25–35 (1997).

29. *See* ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 18 (1998).

30. 2022–23 NCAA MANUAL, *supra* note 11, § 12.1.2.

31. *Id.* §§ 19.01–.13.

32. Mark Soltau, *If Tiger Bolts from Stanford, Blame NCAA*, SFGATE (Oct. 22, 1995), <https://www.sfgate.com/sports/article/If-Tiger-bolts-from-Stanford-blame-NCAA-3124623.php>.

33. *Id.* In another case, the NCAA suspended a football player for three years after he received a twelve-dollar discount on a pair of pants. Strauss, *supra* note 27.

34. 2021–22 NCAA MANUAL, *supra* note 10, § 1.2(a); *see also* Arash Afshar, Note, *Collegiate Athletes: The Conflict Between NCAA Amateurism and a Student Athlete's Right of Publicity*, 51 WILLAMETTE L. REV. 101, 101 (2014) ("A student-athlete is widely considered exactly what the name implies: a student first and an athlete second.").

## THE MONEY GAME: STUDENT-ATHLETES' BATTLE FOR EMPLOYEE STATUS

### *B. Antitrust Scrutiny*

In the mid-twentieth century, colleges began televising their football games.<sup>35</sup> The NCAA, fearing a downturn in attendance at games, exerted “complete control” over the number of games its member colleges could televise<sup>36</sup> and, in 1981, granted exclusive broadcast rights to two major networks.<sup>37</sup> When the College Football Association<sup>38</sup> negotiated its own contract with another network that offered to televise more games and pay more for broadcast rights, the NCAA threatened to sanction any member college that participated in the deal.<sup>39</sup> In response, two colleges sought to enjoin the NCAA, claiming its dominion over the broadcast rights for college football games violated federal antitrust law.<sup>40</sup> In its 1984 decision *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court agreed, holding that the NCAA’s television policy was rife with “hallmarks of anticompetitive behavior” and violated the Sherman Antitrust Act.<sup>41</sup>

Despite the Court’s decision, the NCAA continued to control competition by prohibiting monetary payments to student-athletes for the use of their NILs.<sup>42</sup> But after the NCAA licensed the rights to student-athletes’ images and likenesses to a video game developer without asking or compensating the student-athletes, two former NCAA college players<sup>43</sup> sued.<sup>44</sup> In the 2015 antitrust case *O’Bannon v. NCAA*,

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35. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 89 (1984).

36. *Id.* at 89–91 (“The [NCAA]’s 1951 plan provided that only one game a week could be telecast in each area, with a total blackout on 3 of the 10 Saturdays during the season.”).

37. *Id.* at 91–94.

38. The College Football Association was comprised of five major conferences and other independent major football-playing colleges to “promote the[ir] interests . . . within the NCAA structure.” *Id.* at 89.

39. *Id.* at 94–95.

40. *Id.* at 88.

41. *Id.* at 113, 120.

42. See, e.g., 2021–22 NCAA MANUAL, *supra* note 10, § 12.5.2.1; see also *Bd. of Regents of Univ. of Okla. v. NCAA*, 601 F. Supp. 307, 310 (W.D. Okla. 1984) (enjoining the NCAA’s television policy but clarifying that the ruling would not prohibit the NCAA from “[i]mposing sanctions restricting televising of a member’s football games for violation of non-television rules and regulations”).

43. One of the lead plaintiffs, former NCAA college basketball player Ed O’Bannon, only learned he was featured in a video game when he

visited a friend’s house, where his friend’s son told [him] that he was depicted in a college basketball video game . . . . The friend’s son turned on the video game, and O’Bannon saw an avatar of himself—a virtual player who visually resembled O’Bannon, played for [O’Bannon’s college team], and wore O’Bannon’s jersey number, 31. O’Bannon had never consented to the use of his likeness in the video game, and he had not been compensated for it.

*O’Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015).

44. *Id.* at 1055–56. The two lead plaintiffs sued on behalf of a class composed of

[a]ll current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I . . . college or university men’s basketball team or on an NCAA Football Bowl Subdivision . . . men’s football team and whose images,

the U.S. Court of Appeals for the Ninth Circuit held that the NCAA must allow its member colleges to provide student-athletes with stipends for the use of their NILs up to the full cost of attendance at their respective colleges,<sup>45</sup> thereby offsetting any “shortfall” in their scholarships.<sup>46</sup> The court viewed these stipends as “substantially less restrictive” than the NCAA’s total ban on compensation for the use of student-athletes’ NILs, but equally effective in preserving the NCAA’s “tradition of amateurism.”<sup>47</sup> Although a victory for student-athletes, this “limited” ruling did not immediately usher in a new era of student-athlete compensation.<sup>48</sup>

Traditionally, the NCAA’s amateurism rules allowed colleges to reimburse student-athletes for some, but not all, education-related expenses.<sup>49</sup> For example, while colleges could reimburse students for school supplies, the NCAA curbed non-cash education-related benefits, such as “scholarships for graduate or vocational school, payments for academic tutoring, [and] paid posteligibility internships.”<sup>50</sup> But in the 2021 case *NCAA v. Alston*, a unanimous Court struck down the NCAA rules limiting education-related benefits on antitrust grounds.<sup>51</sup> In a strongly worded concurring opinion, Justice Brett Kavanaugh admonished the NCAA regarding student-athlete compensation more broadly:

[T]raditions alone cannot justify the NCAA’s decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.<sup>52</sup>

In recent years, states have enacted laws allowing student-athletes to profit from their NILs while retaining NCAA eligibility.<sup>53</sup> These laws overrode decades of NCAA policy. Consequently, a student-athlete could profit from promotional activities only if

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likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.

*Id.*

45. *Id.* at 1074–76.

46. *Id.* at 1061 (quoting *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1005 (N.D. Cal. 2014)).

47. *Id.* at 1074, 1079.

48. *Id.* at 1079.

49. *See NCAA v. Alston*, 141 S. Ct. 2141, 2149–50, 2153 (2021).

50. *Id.* at 2153.

51. *Id.* at 2166.

52. *Id.* at 2169 (Kavanaugh, J., concurring).

53. *See Allender, supra* note 14. Many states, including Alabama, Florida, Georgia, Kentucky, Mississippi, New Mexico, Ohio, and Texas, enacted their NIL policies to take effect on July 1, 2021, and thirteen other states set later effective dates. *Id.*



## THE MONEY GAME: STUDENT-ATHLETES' BATTLE FOR EMPLOYEE STATUS

the state where they were attending college had enacted an NIL law. It was not until June 2021, after the introduction of a proposed federal NIL law<sup>54</sup> and the Supreme Court's holding in *Alston*, that the NCAA voted in favor of an interim policy permitting all its student-athletes to partake in NIL activities for profit.<sup>55</sup>

### C. *The NLRB's Role*

The NLRB has recently joined the heated debate over student-athlete compensation. The NLRB is an independent federal administrative agency tasked with protecting the rights of private-sector employees to join together, with or without a union, to improve their wages and working conditions.<sup>56</sup> To accomplish this purpose, the NLRB investigates and prosecutes violations of the National Labor Relations Act (NLRA) and issues quasi-judicial decisions.<sup>57</sup>

In a 2015 decision, the NLRB declined to exert jurisdiction over a labor union's petition to represent scholarship football players at Northwestern University.<sup>58</sup> Yet, the NLRB suggested that it would exercise jurisdiction over a petition joined by all NCAA Division I Football Bowl Subdivision (FBS) scholarship football players nationally.<sup>59</sup>

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54. Competing bills were first introduced by Senate Republicans and Democrats in 2020. *Compare* Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. (2020), *with* College Athletes Bill of Rights, S. 5062, 116th Cong. (2020). Neither passed, but both bills were reintroduced in 2022 and were pending at the time this Note was written and edited for this publication. *See* Collegiate Athlete Compensation Rights Act, S. 4855, 117th Cong. (2022); College Athletes Bill of Rights, S. 4724, 117th Cong. (2022).

55. *See* Press Release, Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (Jun. 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>. NCAA President Emmert commented on the policy:

With the variety of state laws adopted across the country, [the NCAA] will continue to work with Congress to develop a solution that will provide clarity on a national level. The current environment—both legal and legislative—prevents [the NCAA] from providing a more permanent solution and the level of detail student-athletes deserve.

*Id.*

56. *See* National Labor Relations Act (NLRA), 29 U.S.C. §§ 151, 153.

57. *See id.* §§ 160–61.

Despite the NLRB's power to issue cease-and-desist orders to offending employers, the orders require judicial review to be enforceable and so lack legal force on their own. *See id.* §§ 160(e), (j). Circuit courts hear approximately sixty-five cases from the NLRB a year, deciding over three-quarters of these cases in a manner consistent with the NLRB's decision. *Enforce Orders*, NLRB, <https://www.nlr.gov/about-nlr/what-we-do/enforce-orders> (last visited Feb. 12, 2023).

58. *Nw. Univ.*, 362 N.L.R.B. 1350, 1354–55 (2015). In 2014, Northwestern University football players conducted a “secret ballot election” concerning whether to attempt unionization, which the university strongly encouraged the players to vote against. Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/sports/ncaaf-football/nlr-says-northwestern-football-players-cannot-unionize.html>.

59. *Nw. Univ.*, 362 N.L.R.B. at 1355 (“[W]e are declining jurisdiction only in this case involving the football players at Northwestern University; we therefore do not address what the [NLRB]’s approach might be to a petition for all FBS scholarship football players (or at least those at private colleges and universities).”).

The NLRB raised but did not decide the issue of whether NCAA Division I scholarship football players are “employees” as defined by the NLRA.<sup>60</sup>

To resolve this issue, NLRB General Counsel (GC) Jennifer Abruzzo issued a memorandum in 2021 (the “2021 NLRB Memorandum”), concluding that “scholarship football players at Division I FBS private colleges and universities, and other similarly situated Players at Academic Institutions, are employees under the NLRA.”<sup>61</sup> To support this conclusion, the GC highlighted that the NLRB interprets the term “employee” liberally, based on the NLRA’s broad statutory definition and its purpose to protect employees’ rights to organize and bargain collectively.<sup>62</sup> In addition, she relied on common-law agency principles, which define an “employee” as a person “who perform[s] services for another and [is] subject to the other’s control” and regard “[c]onsideration, *i.e.*, payment, [a]s strongly indicative of employee status.”<sup>63</sup> Moreover, the GC reasoned, a broad interpretation of “employee” was consistent with NLRB precedent<sup>64</sup> and had also garnered Supreme Court approval.<sup>65</sup> Granting employee status to certain student-athletes, the memorandum noted, was further supported by changes in the law, including the Court’s decision in *Alston*, and the rise of activism among student-athletes.<sup>66</sup>

In particular, the GC deemed the following factors material to determining that NCAA Division I scholarship football players and similarly situated student-athletes are “employees” under both the NLRA and common law. First, these student-

60. *See id.* at 1353, 1355. The NLRB explained that

even if scholarship players were regarded as analogous to players for professional sports teams who are considered employees for purposes of collective bargaining, such bargaining has never involved a bargaining unit consisting of a single team’s players, where the players for competing teams were unrepresented or entirely outside the [NLRB]’s jurisdiction.

*Id.* at 1353.

61. 2021 NLRB Memorandum, *supra* note 9, at 3.

The 2021 NLRB Memorandum issued by GC Abruzzo reinstated a January 2017 memorandum issued by then-GC Richard F. Griffin, Jr. (the “2017 NLRB Memorandum”) concluding that NCAA Division I FBS scholarship players are indeed considered “employees” under the NLRA. *Id.* at 1; *see also* Memorandum GC 17-01 from Richard F. Griffin, Jr., Gen. Couns., NLRB, to All Reg’l Dirs., Officers-in-Charge, and Resident Officers 16 (Jan. 31, 2017). The 2017 NLRB Memorandum was rescinded less than a year after it had been released. Memorandum GC 18-02 from Peter B. Robb, Gen. Couns., NLRB, to All Reg’l Dirs., Officers-in-Charge, and Resident Officers 4–5 (Dec. 1, 2017).

62. 2021 NLRB Memorandum, *supra* note 9, at 2–3 (noting that the NLRA defines an “employee” as “any employee,” subject to a few enumerated exceptions that do not include college employees, student-athletes, or students).

63. *Id.* at 3 (first three alterations in original) (quoting *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152, 160 (1999)).

64. *Id.* at 2 (first citing *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. at 160; and then citing *Trs. of Columbia Univ.*, 364 N.L.R.B. No. 90, slip op. at 4–5 (Aug. 23, 2016)).

65. *Id.* at 3; *see also* *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90, 94 (1995) (determining that the NLRB’s broad interpretation of “employee” was consistent with the statutory and ordinary dictionary definitions of the term, and with Congress’s intent that the term be defined in accordance with common-law agency principles).

66. 2021 NLRB Memorandum, *supra* note 9, at 5–8.

## THE MONEY GAME: STUDENT-ATHLETES' BATTLE FOR EMPLOYEE STATUS

athletes perform services for their colleges and the NCAA, from which their colleges and the NCAA profit.<sup>67</sup> Second, these student-athletes receive significant compensation for their services in the form of scholarships and education-related benefits.<sup>68</sup> Third, the NCAA controls the terms and conditions of the student-athletes' "employment."<sup>69</sup> And, finally, colleges monitor their student-athletes on and off the field to ensure their behavior conforms to NCAA rules.<sup>70</sup>

The 2021 NLRB Memorandum recognized that because NCAA Division I scholarship football players and similarly situated student-athletes are employees, they enjoy protections under the NLRA and are entitled to unionize.<sup>71</sup> Notably, the GC invited student-athletes who continue to be classified as amateurs to submit charges against their employers<sup>72</sup> to the NLRB.<sup>73</sup>

### *D. A Nationwide Charge Against the NCAA*

In recent years, student-athletes have organized collectively at "unprecedented levels" to respond to issues regarding compensation.<sup>74</sup> One advocacy group in particular, the National College Players Association (NCPA), has relentlessly pursued reform for student-athletes with respect to NIL laws and fair compensation.<sup>75</sup>

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67. *Id.* at 3 ("[T]he athletes play football (perform a service) for the[ir] universit[ies] and the NCAA, thereby generating tens of millions of dollars in profit and providing an immeasurable positive impact on the[ir] universit[ies]' reputation[s], which in turn boosts student applications and alumni financial donations . . .").

68. *Id.* ("[T]he football players receive[] significant compensation, including up to \$76,000 per year, covering their tuition, fees, room, board, and books, and a stipend covering additional expenses such as travel and childcare . . .").

69. *Id.* ("[T]he NCAA controls the players' terms and conditions of employment, including maximum number of practice and competition hours, scholarship eligibility, limits on compensation, minimum grade point average [(GPA)], and restrictions on gifts and benefits players may accept, and ensures compliance with those rules through its 'Compliance Assistance Program' . . .").

70. *Id.* at 4 ("[F]or example, the universit[ies] maintain[] detailed itineraries regarding the players' daily activities and football training, enforce[] the NCAA's minimum GPA requirement, and penalize[] players for any college or NCAA infractions, which could result in removal from the team and loss of their scholarship.").

71. *Id.*

72. If an employee believes their NLRA rights are being infringed, they may file a "charge" with the NLRB against their employer. *See* NLRA, 29 U.S.C. § 160(b).

73. 2021 NLRB Memorandum, *supra* note 9, at 4. The 2021 NLRB Memorandum cautioned that classifying employees as "student-athletes" has a "chilling effect" on employee organization and collective bargaining activity because it convinces players that they are not protected by the NLRA. *Id.*

74. *Id.* at 7 (noting that activism among student-athletes also "sky-rocketed" concerning racial justice and the COVID-19 pandemic).

75. *See About the NCPA*, NCPA, <https://www.ncpanow.org/about-us> (last visited Feb. 12, 2023).

The NCPA is a student-athlete advocacy group founded by former college football player Ramogi Huma "to give college athletes the means to voice their concerns and secure basic protections in NCAA sports." *Id.* Notably, in 2014, the NCPA arranged an antitrust claim against the NCAA, *see In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-2541 CW, 2016 WL 4154855 (N.D. Cal. Aug. 5, 2016), which later became part of *NCAA v. Alston*, 141 S. Ct. 2141 (2021). *About the NCPA*, NCPA, <https://www.ncpanow.org/about-us> (last visited Feb. 12, 2023). Additionally, in 2019, the NCPA

In February 2022,<sup>76</sup> the NCPA responded to the 2021 NLRB Memorandum by filing an unfair labor practice (ULP) charge with the NLRB against the NCAA, the Pac-12 Conference,<sup>77</sup> and the University of Southern California (USC), as joint employers,<sup>78</sup> for continuing to classify NCAA Division I scholarship football and basketball players<sup>79</sup> as “student-athletes.”<sup>80</sup> In December 2022, the NLRB Los Angeles regional office “found merit” in the NCPA’s claim.<sup>81</sup> NLRB GC Abruzzo explained the basis for the finding: “USC, the Pac-12 Conference, and the NCAA, as joint employers, have maintained unlawful rules and unlawfully misclassified scholarship basketball and football players as mere ‘student-athletes’ rather than employees entitled to protections under our law.”<sup>82</sup> If the parties do not reach a settlement, the NLRB will

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co-sponsored California’s NIL law; in 2020, Huma testified before the Senate in support of NIL laws; and in 2021, the NCPA helped over a dozen states adopt NIL laws. *Id.*

76. The events discussed in this paragraph were unfolding at the time this Note was written and edited for this publication.
77. The Pac-12 is an athletic conference that represents the student-athletes and athletic programs of twelve colleges located along or near the Pacific Coast of the United States. *About the Pac-12, PAC-12 CONF.*, <http://pac-12.com/content/about-pac-12-conference> (last visited Feb. 12, 2023).
78. See 29 C.F.R. § 103.40(a) (2023) (“An employer, as defined by Section 2(2) of the [NLRA], may be considered a joint employer of a separate employer’s employees only if the two employers share or codetermine the employees’ essential terms and conditions of employment.”).
79. The NCPA strategically limited its charge to student-athletes in revenue generating sports because “they are the only college athletes [who] are paid full scholarships and receive less than their fair market value.” Eric Olson, *College Athlete Group Files Complaint, Seeks Employee Status*, ASSOCIATED PRESS (Feb. 8, 2022), <https://apnews.com/article/college-football-sports-business-california-football-b97408791211ad71805124636cc16722>. As such, they are “similarly situated” to the NCAA Division I scholarship football players considered “employees” by the NLRB. See 2021 NLRB Memorandum, *supra* note 9, at 4. Although it is possible that student-athletes who participate in non-revenue generating sports are “employees” within the meaning of the NLRA, that discussion is beyond the scope of this Note.
80. NLRB Charge Against Employer at 1, 31-CA-290326 (Feb. 8, 2022) [hereinafter NCPA Charge Letter]. Specifically, the NCPA’s charge alleged the following:
- Within the past 6 months, the employers have interfered with, restrained, and coerced its employees in the exercise of rights protected by Section 7 of the [NLRA] by repeatedly [classifying employees as “student-athlete” nonemployees to circumvent the [NLRA] and their right[s] under the [NLRA]. Within the past 6 months, the employers have interfered with, restrained, and coerced its employees in the exercise of rights protected by Section 7 of the [NLRA] by maintaining unlawful rules and policies in its handbook, including restricting communications with third parties, in the media, on social media, related to discipline, etc.
- Id.*; see also *University of Southern California (USC), Pac-12 Conference, and The National Collegiate Athletics Association (NCAA), as Joint Employers*, NLRB, <https://www.nlr.gov/case/31-CA-290326> (last visited Feb. 12, 2023).
81. Press Release, Kayla Blado, Dir. & Press Sec’y, NLRB (Dec. 15, 2022) (on file with author) [hereinafter NLRB Press Release]; see also Josh Eidelson, *NCAA Found to Have Violated Labor Rights of Student Athletes*, BLOOMBERG (Dec. 15, 2022), <https://www.bloomberg.com/news/articles/2022-12-15/ncaa-violated-athletes-labor-rights-us-labor-officials-say>.
82. NLRB Press Release, *supra* note 81; see also Chris Isidore, *NLRB Opens Door for Union for College Athletes*, CNN (Dec. 15, 2022), <https://www.cnn.com/2022/12/15/business/nlr-unfair-labor-practice-athletes-usc-pac-12-ncaa/index.html>.

## THE MONEY GAME: STUDENT-ATHLETES' BATTLE FOR EMPLOYEE STATUS

issue a complaint against the NCAA, the Pac-12 Conference, and USC.<sup>83</sup> A hearing will then be held before an administrative law judge who will render a determination, which can be appealed to the NLRB for review.<sup>84</sup> In turn, the NLRB's final decision can be appealed to a federal circuit court.<sup>85</sup>

### III. THE PROBLEM WITH DENYING EMPLOYEE STATUS TO STUDENT-ATHLETES AND THE NEED FOR JUDICIAL REVIEW

Student-athletes showcase their skills for a chance to play professionally, earn scholarships to attend prestigious colleges, and can now profit from NIL deals. But, for the reasons that follow, these benefits are insufficient to fairly compensate student-athletes for their performance in college sports.

First, the opportunity to play professionally is illusory. The NCAA estimates that FBS players<sup>86</sup> have only a 6.8 percent chance of competing in the National Football League (NFL).<sup>87</sup> This statistic shows that the opportunity for a future in professional sports is too elusive to be considered compensation, especially for the thousands of FBS players who are not drafted to professional teams each year.

Next, athletic scholarships do not constitute fair compensation. The athletics departments of the top NCAA Division I colleges collectively generate approximately \$8.5 billion in revenue annually, 58 percent of which derives from football and men's

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Initially, the NCPA also named the University of California, Los Angeles (UCLA), in its charge, positing that the NLRB should exert jurisdiction over UCLA and other public colleges and universities based on their membership in private organizations like the NCAA and the Pac-12 Conference. NCPA Charge Letter, *supra* note 80, at 1; *see also* J. Brady McCollough, *Player Advocates Petition NLRB to Make USC and UCLA Classify Athletes as Employees*, L.A. TIMES (Feb. 8, 2022), <https://www.latimes.com/sports/story/2022-02-08/group-petitions-to-force-usc-and-ucla-to-classify-athletes-as-university-employees>. Though the NLRB had indicated its willingness to embrace this argument, *see* 2021 NLRB Memorandum, *supra* note 9, at 9 n.34, its December 2022 merit determination found only the NCAA, the Pac-12 Conference, and USC to be joint employers of the student-athletes.

83. NLRB Press Release, *supra* note 81; *see also* NLRA, 29 U.S.C. § 160(b).

84. NLRB Press Release, *supra* note 81; *see also* 29 U.S.C. § 160(c).

85. NLRB Press Release, *supra* note 81; *see also* 29 U.S.C. § 160(f) (explaining that an aggrieved party can appeal an NLRB final order to a U.S. circuit court in the jurisdiction where the ULP occurred or where the party resides or conducts business).

86. This first argument focuses on college football as a case study, since football is the most profitable, and arguably most famous, college sport. *See* Cork Gaines & Mike Nudelman, *The Average College Football Team Makes More Money than the Next 35 College Sports Combined*, BUS. INSIDER (Oct. 5, 2017), <https://www.businessinsider.com/college-sports-football-revenue-2017-10>.

87. *Estimated Probability of Competing in Professional Athletics*, NCAA, <https://www.ncaa.org/sports/2015/3/6/estimated-probability-of-competing-in-professional-athletics.aspx> (Apr. 8, 2020) (reporting that out of 3,491 FBS players, only 238 were drafted in 2019). Even players who do progress to the National Football League (NFL) do not enjoy job security, as they could be docked earnings if they become injured or their performance declines. *See* Memorandum from NFL Mgmt. Council to Chief Execs., Club Presidents, Gen. Managers, & Head Coaches (May 5, 2021) (on file with author) (reminding NFL teams that injuries sustained by players away from team facilities are considered "Non-Football Injuries," and that teams "have no contractual obligation to provide salary continuation during the year in which the injury was sustained").

basketball alone.<sup>88</sup> Remarkably, though, less than 7 percent of the revenue earned by football and men's basketball programs is shared with those players by way of scholarships and education-related benefits.<sup>89</sup> In comparison, NFL and National Basketball Association (NBA) players receive approximately 50 percent of league revenues through their salaries.<sup>90</sup> If the NCAA mirrored this practice, on average, each NCAA Division I football player would receive \$360,000 per year, while each NCAA Division I basketball player would earn nearly \$500,000 annually.<sup>91</sup> Because student-athletes collectively generate billions of dollars in revenue, illiquid and finite athletic scholarships fall far below fair compensation, particularly when compared to the revenue-sharing schemes followed by the NFL and NBA.

In addition, although some student-athletes have enjoyed lucrative NIL deals, that is not the norm. For instance, after the Alabama legislature enacted its NIL law in April 2021,<sup>92</sup> Bryce Young earned nearly \$1 million from NIL deals before he even began his first season as the University of Alabama's starting quarterback.<sup>93</sup> Comparatively, the average aggregated income for Division I student-athletes who made one or more NIL deals in the first four months after NIL laws were enacted in their states amounted to \$686.<sup>94</sup>

This earnings gap is due, in part, to the emergence of NIL funds at certain colleges. These funds are typically founded by wealthy alumni groups that pool donations toward facilitating NIL deals or otherwise helping players to monetize their brands.<sup>95</sup> One group of alumni from the University of Texas, for example, pledged \$10 million to its student-athletes, while Nike founder and billionaire Phil Knight belongs to a similar group that helps student-athletes at his alma mater, the

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88. Craig Garthwaite et al., *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 1, 42 tbl.1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27734, 2020).

89. *Id.* at 1.

90. *Id.* at 1–2.

91. *Id.* at 6. Meanwhile, the highest paid positions—starting quarterbacks and wide receivers in football, for example—would earn \$2.4 million and \$1.3 million, respectively. *Id.*

92. ALA. CODE §§ 8-26B-32, 8-26B-50–61 (2021) (repealed 2022); see also Julia McQueen, *NIL Legislation: States' Race to the Bottom*, FORDHAM INTELL. PROP., MEDIA & ENT. L.J.: BLOG (Sept. 26, 2022), <http://www.fordhamiplj.org/2022/09/26/nil-legislation-states-race-to-the-bottom/> (explaining that Alabama repealed its NIL law in 2022 because it was more restrictive than the interim NCAA policy and would hamper the state's colleges in recruiting student-athletes).

93. Alex Scarborough, *Alabama QB Bryce Young Approaching \$1M in Endorsement Deals, Says Coach Nick Saban*, ESPN (Jul. 20, 2021), [https://www.espn.com/college-football/story/\\_/id/31849917/alabama-qb-bryce-young-approaching-1m-endorsement-deals-says-head-coach-nick-saban](https://www.espn.com/college-football/story/_/id/31849917/alabama-qb-bryce-young-approaching-1m-endorsement-deals-says-head-coach-nick-saban).

94. Alex Kirshner, *How College Athletes Are Making 'Massive Decisions' in the NIL Era*, GLOB. SPORT MATTERS (Dec. 7, 2021), <https://globalsportmatters.com/business/2021/12/07/college-athletes-massive-decisions-nil-era/>.

95. Jim Vertuno, *Latest NIL Twist: Millions Being Pledged to College Athletes*, NBCDFW (Dec. 15, 2021), <https://www.nbcdfw.com/news/sports/latest-nil-twist-millions-being-pledged-to-college-athletes/2838989/>.

## THE MONEY GAME: STUDENT-ATHLETES' BATTLE FOR EMPLOYEE STATUS

University of Oregon, land NIL deals.<sup>96</sup> NIL funds attract top players to certain colleges, resulting in a massive competitive imbalance in recruiting.<sup>97</sup>

Although the 2021 NLRB Memorandum indicated that certain student-athletes are “employees” under the NLRA, it has had little practical impact on student-athletes. Importantly, the memorandum is not legally binding; it merely informs the public about the NLRB’s position.<sup>98</sup> Additionally, the 2021 NLRB Memorandum is ambiguous because it does not clearly define which student-athletes are “employees.”<sup>99</sup> And despite the NLRB’s guidance, the NCAA’s amateurism rules remain in full force, while all student-athletes continue to be improperly classified as “nonemployees” by their colleges and the NCAA.<sup>100</sup>

The NCPA’s charge pending before the NLRB presents an opportunity for judicial review to cement the NLRB’s position recognizing certain student-athletes as employees. Student-athletes have the support of the NLRB, as evidenced by its recent decisions and memoranda, while the NCPA’s charge is the type of sweeping effort invited in *Northwestern University*. Victory for student-athletes, at least at the NLRB level, would grant employee status to student-athletes and afford them NLRA protections, including the right to bargain for proper compensation.

Any final decision the NLRB renders regarding the NCPA’s charge will likely be appealed to a federal circuit court.<sup>101</sup> The appeal will be greeted with a post-*Alston* judicial attitude—one concerned with protecting student-athletes against the NCAA. Yet it will be a case of first impression; the circuit court that reviews the NLRB decision will have no precedential standard to follow.

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96. *Id.*

97. See Field, *supra* note 16, at 746.

98. Further, without a live case, the memorandum can be rescinded if a new general counsel is appointed. See 2021 NLRB Memorandum, *supra* note 9, at 1 (discussing the issuance of the 2017 NLRB Memorandum, its repeal, and its subsequent reinstatement); see also Mike Ingersoll, *College Athlete Employee Status Would Raise Novel Issues*, LAW 360 (Oct. 1, 2021), <https://www.law360.com/employment-authority/articles/1427084/college-athlete-employee-status-would-raise-novel-issues> (“It remains to be seen whether the [2021 NLRB Memorandum] will be rescinded like its predecessor [the 2017 NLRB Memorandum], a result that may ultimately be dictated by the next presidential administration, as [the] history of NLRB decisions and guidance shows.”).

99. 2021 NLRB Memorandum, *supra* note 9, at 4; see also Ingersoll, *supra* note 98 (noting that the 2021 NLRB Memorandum does not define “other similarly situated players at academic institutions”). Therefore, it is unclear whether the 2021 NLRB Memorandum expands NLRA protections to “(1) all scholarship athletes, (2) both men’s and women’s teams, (3) [] revenue and Olympic sports, (4) [] all private colleges and universities, (5) [] all divisions, [or] (6) [] both NCAA member and nonmember institutions.” Ingersoll, *supra* note 98.

100. 2022–23 NCAA MANUAL, *supra* note 11, § 12.1.

101. See NLRB Press Release, *supra* note 81; Olson, *supra* note 79 (speculating about possible appeals). Moreover, the Ninth Circuit is likely to hear this appeal. See *Student Athletes File NLRB Charges Claiming Employee Status*, MCGUIREWOODS (Feb. 10, 2022), <https://www.mcguirewoods.com/client-resources/Alerts/2022/2/student-athletes-file-nlr-b-charges-claiming-employee-status> (“[C]hoosing schools within the Ninth Circuit seems to be deliberate, as the Ninth Circuit and federal district courts in California have issued opinions favorable to college athletes, including in *NCAA v. Alston*.”).

#### IV. A PROPOSED FRAMEWORK FOR JUDICIAL REVIEW

When determining whether NCAA Division I scholarship football and basketball players are “employees” under the NLRA, a reviewing circuit court should apply the factors enumerated in the 2021 NLRB Memorandum. This approach is rooted in the text of the NLRA, the common law, past NLRB rulings, and Supreme Court precedent.<sup>102</sup> Per the memorandum, the circuit court should recognize that the NLRA’s broad definition of “employee” extends to certain student-athletes who perform in NCAA events in return for athletic scholarships. Specifically, the court should find that student-athletes meet the definition of “employee” when they (1) perform services that generate profits for their colleges and the NCAA, (2) receive scholarships and education-related benefits in exchange for their performance, (3) are subject to the NCAA’s control over the terms and conditions of their “employment,” and (4) are monitored by their colleges to ensure compliance with NCAA rules.<sup>103</sup> For the reasons that follow, each element of this test is readily met by NCAA Division I scholarship football and basketball players.

First, NCAA Division I scholarship football and basketball players are held to rigorous practice schedules and must perform athletically at levels that their coaches deem deserving of athletic scholarships. For example, the average NCAA Division I football player reports spending forty hours per week on football-related activities alone while in season.<sup>104</sup> Moreover, after adding the time they spend on NCAA-mandated academic requirements,<sup>105</sup> Division I football players report dedicating more than seventy hours per week to their sport and schoolwork.<sup>106</sup> In turn, colleges and the NCAA profit directly from their student-athletes’ work and performance through ticket sales, broadcast rights, and sporting events.<sup>107</sup>

Second, NCAA Division I scholarship football and basketball players are compensated for their work through athletic scholarships. Indeed, Division I and II colleges provide more than \$3.7 billion in athletic scholarships annually to more than

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102. See 2021 NLRB Memorandum, *supra* note 9, at 2–3.

103. *Id.* at 3–4.

104. NCAA RSCH., FIVE THEMES FROM THE NCAA GOALS STUDY OF THE STUDENT-ATHLETE EXPERIENCE 13 (2020) [hereinafter NCAA GOALS STUDY]. This time commitment far exceeds the NCAA’s in-season limit of twenty hours per week. 2022–23 NCAA MANUAL, *supra* note 11, § 17.1.7.1. And these hours do not wane when the season ends, as the majority of players report spending as much time on their sport in the off-season as they do while in season. B. David Ridpath, *It Is Time to Re-Frame College Athletes’ Time Commitments*, FORBES (Jan. 26, 2016), <https://www.forbes.com/sites/bdavidridpath/2016/01/26/it-is-time-to-re-frame-college-athletes-time-commitments/?sh=6375fa8bbc62> (reporting figures from an NCAA study published in January 2016).

105. To participate in their sports, student-athletes are required by the NCAA to maintain certain GPA minimums and to meet percentage-of-degree requirements each year. 2022–23 NCAA MANUAL, *supra* note 11, § 14.01.2.

106. NCAA GOALS STUDY, *supra* note 104, at 13, 15.

107. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1266 (9th Cir. 2020) (Smith, J., concurring).



## THE MONEY GAME: STUDENT-ATHLETES' BATTLE FOR EMPLOYEE STATUS

190,000 student-athletes.<sup>108</sup> Most scholarships must be renewed by coaches annually and so are not guaranteed; if a student-athlete becomes injured, fails to perform, or struggles to maintain their grades, their scholarship may be discontinued.<sup>109</sup> Accordingly, an athletic scholarship, although not a direct cash payment to a student-athlete, is a form of compensation dependent on their work because its renewal is contingent on their performance in NCAA athletic events.

Third, the NCAA exercises strict control over the terms and conditions of NCAA Division I scholarship football and basketball players' "employment." Before these student-athletes even arrive on their college campuses, they must meet standards set by the NCAA, including minimum grade-point-average and core-curriculum requirements.<sup>110</sup> Once student-athletes begin competing in NCAA events, the NCAA exercises further control by requiring student-athletes and their colleges to abide by the rules in its over four-hundred-page manual to remain eligible for events.<sup>111</sup> Additionally, the NCAA has complete discretion to sanction violators.<sup>112</sup> Beyond controlling student-athletes' conduct, the NCAA has ultimate authority over each rule and schedule of every college sport.<sup>113</sup>

Lastly, colleges exercise control over their NCAA Division I football and basketball players. Not only are colleges responsible for maintaining their own compliance with NCAA rules, but they must also report infractions by their student-athletes to the NCAA.<sup>114</sup>

The NLRB's imminent decision concerning the NCPA's charge will inevitably be appealed to a circuit court. In anticipation of that appeal, the framework proposed in this Note equips a reviewing circuit court with a principled and measured test to apply when determining whether NCAA Division I scholarship football and basketball players are "employees" within the meaning of the NLRA and the common law. Applying the test proposed in this Note, it is clear that these student-athletes—who are controlled by, and earn billions of dollars annually for, their colleges and the NCAA in exchange for scholarships—are employees. Continuing to allow colleges and the NCAA to profit without fairly compensating their employees

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108. NCAA, NCAA RECRUITING FACTS 2 (2022).

109. *See Scholarships*, NCAA, <https://www.ncaa.org/sports/2014/10/6/scholarships.aspx> (last visited Feb. 12, 2023).

110. NCAA ELIGIBILITY CTR., NCAA GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE 2022–23, at 17–19 (2022).

111. *See* 2022–23 NCAA MANUAL, *supra* note 11.

112. *Id.* §§ 19.01–13.

113. *See How the NCAA Works*, NCAA, <https://www.ncaa.org/sports/2015/10/28/how-the-ncaa-works.aspx> (last visited Feb. 12, 2023); *see, e.g., Important Rule Changes for the 2022 College Football Season*, NAT'L FOOTBALL FOUND. (Aug. 18, 2022), <https://footballfoundation.org/news/2022/8/18/important-rule-changes-for-the-2022-college-football-season.aspx> ("The mission of the [NCAA Football] Rules Committee is to develop and evaluate rules changes that will enhance the sport, protect the image of the game, and enhance the student athlete's health and safety . . .").

114. *See, e.g.,* 2022–23 NCAA MANUAL, *supra* note 11, at xiii .

expressly contradicts the purpose of the NLRA, enacted to protect employees from exploitation by their employers.<sup>115</sup>

#### V. CONCLUSION: PLAY FOR PAY

Those who oppose paying student-athletes speculate that fans would lose their passion for college sports if it were sullied by money paid to the players.<sup>116</sup> Opponents also speculate that large-budget schools would buy up all the nation's talent and spoil healthy competition.<sup>117</sup> But these issues can be handled with careful planning. In contrast, student-athlete participation in the sports entertainment industry, without the right to bargain for fair treatment and pay, is unconscionable. There is no workaround for this problem other than fair compensation.

NCAA Division I scholarship football and basketball players endure grueling schedules to participate in NCAA events and represent vital sources of revenue for their colleges and the NCAA, which exercise control over almost every aspect of the players' lives. In any common-sense definition, these players are "employees."

The NLRB has blown the whistle on the NCAA's nonsense. After decades of amateur participation, student-athletes have banded together to say "enough is enough." And when the NLRB's impending decision on the employment status of student-athletes is appealed, this Note offers a workable framework for a reviewing court to apply to arrive at the only reasonable conclusion under the law. It is time to let "student-athletes" play for pay.

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115. NLRA, 29 U.S.C. § 151.

116. *See* Defendant NCAA's Post-Trial Brief at 21–22, *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (No. 4:09-CV-3329-CW).

117. *Id.* at 25–27.