

'Entertaining' a New College Athlete Unionization Structure

Joseph Sabin, Sam C. Ehrlich, Flory Bierma, and Andrew Goldsmith

Between athletes still feeling short-changed despite name, image, and likeness (NIL) compensation and coaches and administrators feeling generally unhappy with the unregulated, “wild west” landscape of NIL, college sports is faced with two competing forces pushing college athletics in two distinctly different directions. There is an obvious solution to all of the strife in college sports: the legal recognition of college athletes as employees and the creation of a formally recognized college athlete labor union, allowing athletes to collectively bargain for a share of media rights revenues and other work conditions, while also allowing the National Collegiate Athletic Association (NCAA) to collectively bargain for more regulations and restrictions on NIL activity without facing antitrust scrutiny by virtue of the non-statutory labor exemption.

There are several unique challenges to organizing a labor union comprised of athletes, including the breadth and variety of their negotiating interests. However, there is a robust union that has been in operation since the 1930s that may provide a baseline framework: the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA). In this article, we explore potential frameworks for a college athlete union by using SAG-AFTRA and other major unions as templates. SAG-AFTRA's unique national-local structure serves as a guide for how to create a robust and effective college athlete union that meets all sides' interests in reforming college sports.

Keywords: intercollegiate sports, labor law, labor unions, NIL, NCAA

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I. Introduction

Practically overnight, the National Collegiate Athletic Association (NCAA) pivoted from a total restriction on athlete name, image, and likeness (NIL) compensation to a new, arguably overly permissive policy that essentially only provides that NIL compensation may not be used as a recruiting inducement or as a form of pay-for-play in disguise.¹ Unsurprisingly, this extreme deregulation has created some confusion and chaos, particularly in the realm of athlete recruiting, leading some to refer to the current landscape as the “wild west.”²

Simultaneously, however, revenues in college athletics continue to soar, as do seemingly excessive expenses.³ This has only further highlighted the fact that—despite advances in NIL compensation—the schools and conferences still do not pay athletes to play, as that is still prohibited by NCAA rules. The disparity has, once again, put the college sports business model under scrutiny. This scrutiny may have come to a boiling point in late 2023 when multiple different antitrust lawsuits were filed against the NCAA in a single week.⁴

¹ Ben Kercheval & Dennis Dodd, *NCAA Approves Interim Name, Image and Likeness Policy Removing Restrictions for College Athletes to Earn Money*, CBS SPORTS (Jun. 30, 2021), <https://www.cbssports.com/college-football/news/ncaa-approves-interim-name-image-and-likeness-policy-removing-restrictions-for-college-athletes-to-earn-money/>.

² See, e.g., Jared Yaggie, *The New Wild West: An Update to the Existing NIL Environment in College Sports*, UNIV. OF CINCINNATI L. REV. BLOG (Oct. 4, 2022), <https://uclawreview.org/2022/10/04/an-update-to-the-existing-nil-environment/>; Mark Wogenrich, *Penn State's James Franklin Calls NIL 'the Wild, Wild West'*, SPORTS ILLUSTRATED (Dec. 26, 2022), <https://www.si.com/college/penn-state/football/penn-state-football-james-franklin-nil-wild-wild-west>; Maddox Greenberg, *'The Wild, Wild West': The Collective and the Future of NIL Deals*, UNIV. PRESS (Jan. 24, 2023), <https://www.upressonline.com/2023/01/the-wild-wild-west-the-collective-and-the-future-of-nil-deals/>.

³ *Finances of Intercollegiate Athletics Database*, NAT'L COLLEGIATE ATHLETIC ASSOC. (Dec. 2023), <https://www.ncaa.org/sports/2019/11/12/finances-of-intercollegiate-athletics-database.aspx>.

⁴ See Mike Scarcella, *NCAA Faces Legal Blitz as States, More Athletes Sue over Curbs on Student Players*, REUTERS (Dec. 7, 2023), <https://www.reuters.com/legal/litigation/ncaa-faces-legal-blitz-states-more-athletes-sue-over-curbs-student-players-2023-12-07/>; Michael McCann, *New Antitrust Lawsuit Directly Attacks NCAA Amateurism*, SPORTICO (Dec. 8, 2023), <https://www.sportico.com/law/analysis/2023/carter-v-ncaa-could-end-ncaa-amateurism-1234755447/>.



With the NCAA facing legal challenges on three fronts—antitrust,⁵ employment,⁶ and labor⁷—opinions vary as to how college sports should proceed into the future. Most leaders in the NCAA seem flatly committed to waiting for Congress to step in with some sort of limited antitrust relief and affirmation that college athletes are not employees, warning of “permanent damage” to college sports if such action is not done.⁸ Conversely, NCAA president Charlie Baker has proposed a new breakaway division that would allow larger revenue athletic programs to compensate athletes directly through an “enhanced educational fund” while ensuring that the athletes

⁵ See, e.g., *House v. NCAA*, 545 F.Supp.3d 804 (N.D. Cal. 2021) (denying motion to dismiss antitrust claim over past and present NCAA bars to athlete NIL rights, including the right for athletes to negotiate directly with schools for media rights revenue); Order on Motion for Temp. Restraining Order, *State of Ohio v. NCAA*, No. 23-cv-00100 (N.D.W. Va. Dec. 19, 2023) (ECF No. 71) (granting seven states’ motion for temporary restraining order against NCAA rules requiring multi-time transfers to sit out a year before being eligible for athletic competition at their new schools on antitrust grounds); Complaint, *Carter v. NCAA*, No. 23-cv-06325 (N.D. Cal. Dec. 7, 2023); Complaint, *Fontenot v. NCAA*, No. 23-cv-03076 (D. Colo. Nov. 20, 2023) (each challenging the entirety of the NCAA’s remaining anti-“pay-for-play” rules on antitrust grounds.)

⁶ See *Johnson v. NCAA*, 556 F.Supp.3d 491 (E.D. Pa. 2021) (finding that Division I college athletes could plausibly be pled as employees under the Fair Labor Standards Act.) This case is currently awaiting decision on appeal at the Third Circuit, with most experts stating that February 2023 oral arguments did not go well for the NCAA. See, e.g., Nicole Auerbach, In *Johnson v. NCAA*, Judges Are Asking the Right Questions of the College Sports Model, THE ATHLETIC (Feb. 15, 2023), <https://theathletic.com/4208822/2023/02/15/johnson-v-ncaa-case-judges-appeals/> (noting that the appellate panel “poked holes early and often in many of the NCAA’s long-running arguments in defense of its business model”); Amanda Christovich, *Federal Judges Blast NCAA’s Amateurism Model*, FRONT OFFICE SPORTS (Feb. 16, 2023), <https://frontofficesports.com/federal-judges-blast-ncaas-amateurism-model/>.

⁷ Amanda Christovich, *‘It Could Not Have Gone Better’ For the Athletes: First Session of NCAA Athlete Employment Trial Concludes*, FRONT OFFICE SPORTS (Dec. 21, 2023), <https://frontofficesports.com/it-could-not-have-gone-better-for-the-athletes-first-session-of-ncaa-athlete-employment-trial-concludes/> (summarizing arguments in a hearing for an NLRB claim that the University of Southern California, the Pac-12 Conference, and the NCAA acted as joint employers and collectively misclassified their football and basketball athletes as non-employees); Amanda Christovich, *NLRB Rules that Dartmouth Men’s Basketball Players Are Employees*, FRONT OFFICE SPORTS (Feb. 6, 2024), <https://frontofficesports.com/nlr-rules-that-dartmouth-mens-basketball-players-are-employees/> (discussing a to-be-appealed NLRB regional board decision that college basketball players at Dartmouth College are union-eligible employees.)

⁸ Manu Raju, Clare Foran, & Morgan Rimmer, *NCAA Leaders Warn College Sports at Risk of ‘Permanent Damage’ Without Action From Congress*, CNN (Dec. 3, 2023), <https://www.cnn.com/2023/12/03/politics/ncaa-college-sports-at-risk-nil/index.html>.



remain non-employees⁹—an idea that has been met with surprise and hostility both from other NCAA leaders and athlete advocates.¹⁰

Yet there is one potential solution that would not require the help of Congress: the legal recognition of college athletes as employees and the creation of a formally recognized college athlete labor union. Doing so would allow the athletes to collectively bargain for a share of media rights revenues and other work conditions, while also allowing the NCAA to mirror professional team sport leagues by collectively bargaining for more regulations and restrictions on NIL activity without facing antitrust scrutiny by virtue of the non-statutory labor exemption.¹¹

Of course, creating a labor union composed of college athletes presents a number of unique challenges. One frequently cited concern, of course, is the limited jurisdiction of the National Labor Relations Act (NLRA) and its lack of applicability to government employers—a class that would include the wide array of public institutions that make up the NCAA.¹² These jurisdictional questions are a sharp focus of current NLRB general counsel Jennifer Abruzzo, who opined in a September 2021 memorandum that joint employer theories could bring in the private NCAA and member conferences as employers, allowing the NLRB jurisdiction over their relationships with college athletes.¹³

But even if this joint employer theory is successful, organizing thousands of college athletes with varying interests and motivations into one singular union still

⁹ Nicole Auerbach, *NCAA Proposes Creation of New Subdivision with Direct Compensation for Athletes*, THE ATHLETIC (Dec. 5, 2023), <https://theathletic.com/5114092/2023/12/05/ncaa-subdivision-athlete-compensation-charlie-baker/>.

¹⁰ See, e.g., ‘How Will We Pay for This?’ — College Leaders React to NCAA’s New Subdivision Proposal, YAHOO SPORTS (Dec. 7, 2023), <https://sports.yahoo.com/how-will-we-pay-for-this--college-leaders-react-to-ncaas-new-subdivision-proposal-165436131.html>; Marc Edelman, *Baker’s Proposed NCAA Reforms Are Reactionary, Not Revolutionary*, FORBES (Dec. 6, 2023), <https://www.forbes.com/sites/marcedelman/2023/12/06/bakers-proposed-ncaa-reforms-are-reactionary-not-revolutionary/>.

¹¹ See, e.g., Thomas Baker, *Why Losing the Latest Labor Dispute Would Actually Help the NCAA*, FORBES (Dec. 20, 2023), <https://www.forbes.com/sites/thomasbaker/2023/12/20/why-losing-the-latest-labor-dispute-would-actually-help-the-ncaa/>.

¹² See *Nw. Univ.*, 362 N.L.R.B. 1350 (2015) (denying Northwestern University football players’ petition to unionize on jurisdictional grounds, holding that it would not promote stability in labor relations to allow athletes at one school to unionize and not others since NLRB would not be able to assert jurisdiction over athletes at public universities.)

¹³ N.L.R.B. Guidance Mem. 21-08 at 9 n. 34 (Sept. 29, 2021).



feels like an impossible task.¹⁴ While athletes have become increasingly open to the potential benefits of unionization,¹⁵ determining how an athlete union could actually work in practice is still an open question given the wide variety of interests between athletes in different sports, universities, social upbringings, and priorities in how they want the future of college sports to take shape. A model that is both flexible on a location-to-location basis yet wide enough to set nationwide rules is necessary to ensure that both athletes and the NCAA can be happy with any resulting collective bargaining agreement (CBA) that would result from these efforts.

This article proposes that such a model already exists. Indeed, there is a robust union that has been in operation since the 1930s that has been able to navigate many similar issues and may provide a baseline framework for the proposed union. That union is the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA). As with college sports, the legal environment of the entertainment industry is one with a vast array of differing interests, industries, and social classes, yet has even recently shown itself as both strong and diverse enough to forcefully advocate for its members' interests—as distinct as those interests are.¹⁶

Part II of this article provides background on the various legal challenges facing the NCAA while Part III details the long-running athlete-employee debate and the challenges to the creation of a college athlete labor union. Part IV will then analyze some unique aspects of SAG-AFTRA that make it a sound analog to a proposed college athlete union and applies those characteristics to the college athletic space. Parts V and VI then conclude by assessing the practicality of the proposed union including the financial feasibility of athlete-employees and discussing the undesirable alternative the NCAA will face if it is not proactive in addressing the athlete-employee future that may be the future of college sports—whether the NCAA likes it or not.

¹⁴ See, e.g., Richard Johnson, *How a Tweet Revealed the Difficulties of the College Athlete Unionization Push*, SPORTS ILLUSTRATED (Jul. 28, 2022), <https://www.si.com/college/2022/07/28/college-athlete-unionization-tweet-revealed-difficulties> (discussing the rise and fall of the College Football Players Association—an entity that briefly sought to negotiate terms and conditions of athlete employment with the Big Ten Conference while trying and failing to define itself as a union due to external pressures and internal infighting.)

¹⁵ Nick Niedzwiaek, *College Athletes Open to Unionization's Potential*, POLITICO (Dec. 18, 2023), <https://www.politico.com/newsletters/weekly-shift/2023/12/18/college-athletes-open-to-unionizations-potential-00132224> (noting a survey finding that 62% of “top-flight” NCAA athletes support unionization.) This openness manifested in the Dartmouth College men’s basketball team filing a petition with the NLRB seeking to hold union elections—a petition that was granted by the NLRB Region 1 board in February 2024. Decision and Direction of Election, Trustees of Dartmouth College, No. 01-RC-325633 (N.L.R.B. Feb. 5, 2024), <https://apps.nlr.gov/link/document.aspx/09031d4583c5ebe4>. See *infra* notes 140-142 and accompanying text.

¹⁶ See Gene Maddaus, *SAG-AFTRA Approves Deal to End Historic Strike*, VARIETY (Nov. 8, 2023), <https://variety.com/2023/biz/news/sag-aftra-tentative-deal-historic-strike-1235771894/> (discussing SAG-AFTRA’s 2023 strike and the resulting CBA that resulted in “the first-ever protections for actors against artificial intelligence and a historic pay increase.”)



II. The Legal Challenges Currently Facing the NCAA

A. Background on the NCAA

The NCAA, first known as the Intercollegiate Athletic Association (IAA), originated in 1906.¹⁷ The high number of deaths and severe injuries on the field of play led to the start of the organization as it was originally formed to improve the rules and safety of football.¹⁸ In 1910, the organization's name changed into the National Collegiate Athletic Association.¹⁹

Years later, the NCAA started to govern rules for other intercollegiate sports as well. Today, the NCAA serves as the general legislative and administrative authority for all men's and women's college sports.²⁰ Currently, the organization oversees 24 sports and hosts a total of 90 championships.²¹ While the organization creates and implements rules of play in competition, more notably it promulgates and enforces rules regarding the eligibility criteria for athletes and prospective athletes.²²

In 1973, the NCAA decided to create divisions that better reflect their competitive capacity: Division I, Division II, and Division III.²³ Each division has its own rules and operating guidelines.²⁴ The motive behind the separation of its member schools into three divisions is equality and a more level playing field in college sports.²⁵ This way, smaller schools with less resources will have the opportunity to compete for championships.²⁶ Larger schools compete in Division I and Division II, while smaller schools compete in Division III.²⁷ All divisions except Division III schools are allowed to offer athletic scholarships.²⁸ Currently, the NCAA consists of

¹⁷ Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQUETTE SPORTS L. REV. 9, 12 (2000).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *National Collegiate Athletic Association*, ENCYCLOPEDIA BRITANNICA (Sep. 14, 2023), <https://www.britannica.com/topic/National-Collegiate-Athletic-Association>

²¹ Overview, NCAA.ORG, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> (last visited Dec. 8, 2023).

²² *Id.*

²³ Smith, *supra* note 17, at 15.

²⁴ *How the NCAA Works*, NCAA.ORG, <https://www.ncaa.org/sports/2015/10/28/how-the-ncaa-works.aspx> (last visited Dec. 8, 2023).

²⁵ Justin Berkman, *What Are the NCAA Divisions? Division 1 vs 2 vs 3*, PREP SCHOLAR (Oct. 23, 2021), <https://blog.prepscholar.com/what-are-ncaa-divisions-1-vs-2-vs-3>

²⁶ *Id.*

²⁷ Kim-Ling Sun, *D1 vs. D2 vs. D3 Schools: What's the Difference?* BEST COLLEGES (March 21, 2023), <https://www.bestcolleges.com/blog/d1-d2-d3-difference/>.

²⁸ *Id.*



a total of 1,104 member schools: 352 Division I schools, 311 Division II schools, and 441 Division III schools.²⁹

To be considered a Division I school, schools must sponsor seven men's and seven women's sports at a minimum, or six men's sports and eight women's sports at a minimum.³⁰ Between the three divisions, this division offers the highest level of competition.³¹ Division I schools have the biggest student bodies, the largest athletic budgets, and the most athletic scholarships.³² Therefore, they tend to recruit the best athletes. The NCAA has set rules for its members to meet in order to reach or maintain Division I status.³³ The NCAA also has Division II and Division III. The athletic teams in these divisions do not garner the fan and national media attention or the corresponding television contracts of their Division I counterparts. There are also significantly fewer athletic scholarships allowable at the Division II level and athletic scholarships are not permitted at the Division III level.³⁴ Thus, this article will focus on NCAA Division I.

Even with the three separate divisions, a wide gap exists among Division I schools in terms of finances and media attention. Within Division I schools there are two football subdivisions: Football Bowl Subdivision (FBS) and Football Championship Subdivision (FCS). The FBS was created by the NCAA in 1973 to give certain schools with strong football programs a way to compete against each other on a national level.³⁵ The FCS was created in 1978 as a way to give smaller schools a chance to compete against each other on a more equal footing.³⁶ FBS schools are typically much larger than FCS schools, both in terms of student population and their athletics budget.³⁷ Because of this, FBS schools are able to offer additional scholarships, provide better facilities for their program, and tend to have more experienced coaches and more competitive schedules.³⁸

²⁹ NCAA, *Membership Directory*, NCAA.ORG, <https://www.ncaa.org/sports/2021/5/3/member-ship-directory.aspx> (last visited Aug. 27, 2023).

³⁰ Sun, *supra* note 27.

³¹ NCSA College Recruiting, *The Differences Between NCAA Divisions*, NEXT COLLEGE STUDENT ATHLETE (NCSA), <https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions> (last visited Sep. 13, 2023).

³² Berkman, *supra* note 25.

³³ *Id.*

³⁴ *Id.*

³⁵ FBS vs. FCS Explained, Signing Day Sports (Oct. 7, 2022), <https://thewire.signingdaysports.com/articles/fbs-vs-fcs-explained>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*



The FBS consists of bigger and more competitive conferences including the five conferences known as the “Power Four”: the ACC, Big Ten, Big 12, and SEC.³⁹ These conferences all fuel their athletic departments with massive TV contracts.⁴⁰ For example, the Big Ten signed a seven-year, \$7 billion deal with NBC, FOX, and CBS that took effect in 2023-24.⁴¹ Each team that is part of the Big Ten will receive between \$80-100 million annually from the television contracts.⁴² To make up for the difference in revenue that FCS teams don’t see from TV contracts, bowl games, ticket sales, and major corporate sponsors, they often play one or more games per year against an FBS opponent (almost exclusively at the FBS school’s home field) and receive a significant payout from the host FBS institution.⁴³

B. NCAA Athletes’ Path to NIL Rights

NIL rights refer to a college athlete’s right to monetize their reputation and name value through endorsement deals. This right is not unique to college athletes, as everyone has these rights, which are more commonly known as “rights of publicity” outside of the college sports context. The right of publicity can be defined as “the inherent right of every human being to control the commercial use of his or her identity.”⁴⁴

These rights began evolving in the courts in the early 1900s and the phrase “right of publicity” was first used in 1953.⁴⁵ California was the first state to specifically codify the right of publicity in 1972, prompting several states to follow suit in the ensuing decades.⁴⁶ Currently, 35 states recognize the right of publicity either

³⁹ Derek Fleming, *Ranking the Power 5 NCAAF TV Contracts*, STREAMING STADIUM, <https://streamingstadium.com/league/ncaaf/ncaaf-tv/> (last visited Sep. 18, 2023). The authors use “Power Four” instead of “Power Five” to reflect the demise of the Pac-12 Conference. See David Rumsey, *College Football’s New Power Four Taking Shape*, FRONT OFFICE SPORTS (Aug. 6, 2023), <https://frontofficesports.com/college-footballs-new-power-four-taking-shape/>.

⁴⁰ Fleming, *supra* note 39.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Trevor Woller, *The Business Behind FBS vs. FCS Football Games*, THE DAILY UNIVERSE (Oct. 9, 2013), <https://universe.byu.edu/2013/10/09/1the-business-behind-fbs-vs-fcs-football-games/>

⁴⁴ J. Thomas McCarthy & Roger E. Schechter, *The Rights of Publicity and Privacy*, THOMSON REUTERS, (2019).

⁴⁵ Mark Roesler & Garrett Hutchinson, *What’s in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, LANDSLIDE (Sep. 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law (noting that the phrase was first used in *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953)).

⁴⁶ *Id.*



by statute or by common law.⁴⁷ While there is no federal statute regarding publicity rights, the Supreme Court recognized a right of publicity in 1977.⁴⁸

These rights are seldom an issue in contexts outside of college sports; however, the NCAA's bylaws regarding amateurism prevented college athletes from monetizing their NIL for roughly a century. The NCAA's amateurism principle states that "An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport..." if he or she "[u]ses athletics skill (directly or indirectly) for pay in any form in that sport."⁴⁹ Under this principle, anyone who wished to participate in NCAA athletics was essentially forced to strip themselves of their NIL rights in order to remain eligible.

These staunch rules against the athletes monetizing their NIL stands in stark contrast to the increasing commercialization of the NCAA and collegiate sports at large. The NCAA, a non-profit entity, generates more than \$750 million from the broadcasting rights to the annual men's basketball tournament (March Madness) alone, with an already signed extension that will pay the NCAA more than \$1 billion annually in the near future.⁵⁰ The NCAA's revenue pales in comparison to that of the revenue generated by its member institutions. The Power 5, a group of the five most profitable athletic conferences in the NCAA (which included the Pac-12 prior to its impending demise), generated more than \$2.9 billion in 2019, with member institutions receiving payouts from the conferences as high as \$55.6 million per institution.⁵¹ This windfall of revenue was highly beneficial to coaches of football and men's basketball teams so much so that in 40 states, the highest paid state employee is a football or basketball coach.⁵² On top of seven-figure salaries, coaches were not beholden to the same NIL restrictions as athletes, and were able to make additional money through endorsements and media appearances.⁵³

⁴⁷ *Id.*

⁴⁸ *Zachinni v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)

⁴⁹ 2022-23 NCAA Division I Manual § 12.1.2, NCAA (2020), available at <https://www.ncaapublications.com/productdownloads/D123.pdf>.

⁵⁰ Mike Ozanian, *March Madness is Most Profitable Postseason TV Deal in Sports*, FORBES (Mar. 19, 2019, 09:24am), <https://www.forbes.com/sites/sportsmoney/2019/03/19/march-madness-is-most-profitable-postseason-tv-deal-in-sports/?sh=1f8f3b031795>.

⁵¹ Steve Berkowitz, *Power Five Conferences Had Over \$2.9 Billion in Revenue in Fiscal 2019, New Tax Records Show*, USA TODAY (Jul. 10, 2020), <https://www.usatoday.com/story/sports/college/2020/07/10/power-five-conference-revenue-fiscal-year-2019/5414405002/>.

⁵² Charlotte Gibson, *Who's Highest-Paid in Your State?* ESPN, https://www.espn.com/espn/feature/story/_/id/28261213/dabo-swinney-ed-oregon-highest-paid-state-employees (last visited May 10, 2022).

⁵³ See e.g. Paul Myerberg, *Nick Saban Takes Aflac Commercials, Relationship with De-ion Sanders Seriously*, USA Today (Sept. 1, 2023), <https://www.usatoday.com/story/sports/ncaaf/2023/09/01/nick-saban-aflac-duck-deion-sanders-new-commercial/70730064007/>



Perhaps the most brazen and relevant commercial venture by the NCAA was the licensing of athlete rights within the *NCAA Football* and *NCAA Basketball* video games produced by EA Sports.⁵⁴ These games were lauded for their authenticity and realistic depictions of schools' uniforms, stadiums, and even realistic depictions of the very players that were not allowed to share in the billions of dollars of revenue generated by the games.⁵⁵ Unable to pay players for their likenesses, EA Sports instead crafted player avatars using players' height, weight, position, skills, and other details as accurately as possible while naming the player by the player's position and uniform number.⁵⁶

Complaints about this unsubtle use of player likenesses led to three separate lawsuits and three plaintiff victories in *Keller v. Electronic Arts*, *Hart v. Electronic Arts*, and *O'Bannon v. NCAA*.⁵⁷ *Keller* and *Hart* were based on right of publicity theories, with the plaintiffs overcoming the defendants' First Amendment-based defenses, while *O'Bannon* featured antitrust law. Of the three, *O'Bannon* ended up having the widest impact, as the Ninth Circuit eventually ruled that the NCAA's rules regarding compensation of athletes were an unlawful restraint of trade under the Sherman Antitrust Act, forcing schools to increase their athletic scholarships to the total cost of attendance as a substantially less restrictive alternative to the NCAA's NIL rules.⁵⁸ However, this ruling did not end amateurism or even allow college athletes to earn compensation for the use of their NIL; to the contrary, the Ninth Circuit specifically crafted its ruling to avoid making the "quantum leap" between "offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses" and thus violating the NCAA's amateurism-based mission.⁵⁹

⁵⁴ See *Hart v. Electronic Arts*, 717 F.3d 141 (3d Cir. 2013); *In re NCAA Student-Athlete NIL Licensing Litigation (Keller v. Electronic Arts)*, 724 F.3d 1268 (9th Cir. 2013) (each finding that Electronic Arts and the NCAA had violated athletes' rights of publicity by featuring them in the *NCAA Football* games without compensation); *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) (finding similarly under antitrust law.)

⁵⁵ *Keller*, 724 F.3d at 1271-72.

⁵⁶ For example, the Ninth Circuit noted comparing the virtual starting quarterback in the 2005 edition of the game to lead plaintiff and then-Arizona State quarterback Samuel Keller that "the virtual starting quarterback for Arizona State wears number 9, as did Keller, and has the same height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, facial features, and school year as Keller." *Id.* at 1272. The same was true for Third Circuit lead plaintiff Ryan Hart. *Hart*, 717 F.3d at 146.

⁵⁷ See *supra* note 54.

⁵⁸ *O'Bannon*, 802 F.3d at 1079.

⁵⁹ *Id.* at 1078-79.



While *O'Bannon* was not the first case against the NCAA regarding college athlete NIL rights and compensation, it brought the topic into the public conscience to a greater degree. Other lawsuits and legal challenges to the NCAA's restrictions on athlete compensation followed, and the increased public awareness of the NCAA's exploitative policies put pressure on state legislatures. California brought forth and passed the Fair Pay to Play Act⁶⁰ in 2019, which specifically forbade the NCAA from sanctioning college athletes for earning NIL compensation⁶¹ and had an original effective date of Jan. 1, 2023. California was the first state to pass an "NIL law" but several states soon followed suit with more aggressive timelines with laws that had effective dates as early as July 1, 2021. Additionally, six federal bills were proposed, but none of them received much traction.⁶²

Meanwhile, a case regarding the legality of the NCAA's rules limiting athlete compensation under antitrust law, *NCAA v. Alston*,⁶³ was making its way through the court system and up to the Supreme Court of the United States. On June 21, 2021, in a 9-0 decision against the NCAA, the Court ruled that the association's limits on athlete compensation was a violation of the Sherman Antitrust Act,⁶⁴ thus dashing any hopes the NCAA had of receiving an antitrust exemption it could wield in legal battles against the various states passing NIL laws. On June 30, 2021, a little over a week after the *Alston* ruling and mere hours before many state NIL laws were to go into effect, the NCAA released its interim "policy" regarding NIL. Despite having nearly two years to prepare for state NIL laws to go into effect and the litany of concerns the NCAA displayed regarding NIL, the NCAA's policy provided minimal guidance for this new era of amateurism. The policy is a single-page and provides that all NCAA athletes were able to engage in NIL activity with no impact to their eligibility and reiterated the prohibitions on pay-for-play and improper recruiting inducements remain in effect.⁶⁵ In contrast, the NCAA's 2022-2023 Division 1 Manual is 465 pages in length; over 30 of those pages are dedicated to the NCAA's principle of "amateurism." Conspicuously absent in those 30 pages is any meaningful NIL policy or regulation.

⁶⁰ Cal. Educ. Code § 67456 (2021).

⁶¹ *Id.* at (a)(2)

⁶² Alicia Jessop & Joe Sabin, *The Sky is Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men's Sport and Women's Sports Athletes*, 31 JOURNAL OF LEGAL ASPECTS OF SPORT 253, 267 (2021).

⁶³ 141 U.S. 2141 (2021).

⁶⁴ *Id.*

⁶⁵ INTERIM NIL POLICY, NCAA (Jul. 2021), available at https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf.



C. Antitrust Law and the “Wild-West” Era of NIL

Unsurprisingly, this abrupt pivot from a total restriction on athlete NIL compensation to a policy that is arguably too permissive has created some confusion and chaos. Further complicating matters is a similarly extreme loosening of the NCAA’s transfer rules, which now make it much easier for an athlete to transfer to another institution. This extreme deregulation has had a significant impact on the recruiting and retention of an institution’s athletes, leading some commentators to refer to the current climate as the “wild west.”⁶⁶

The new era also gave rise to a new type of entity—the NIL collective. While no two of these organizations are identical, their basic purpose is quite universal: to funnel money to athletes and/or prospective athletes of a particular institution. The first known collective, called the Gator Collective, was created in August 2021 by boosters and fans of the University of Florida’s athletic department.⁶⁷ While there was no direct affiliation with the university (as such an affiliation was forbidden by NCAA rule at the time), the Gator Collective was set up for the sole benefit of the Florida athletic department and its athletes. The founder went as far as to say that he was on a mission to help the university win national championships.⁶⁸

Since then, these types of booster-led organizations have appeared at several NCAA Division I institutions, with some schools having multiple collectives.⁶⁹ Boosters have long been believed to be paying athletes under the table even under the old NCAA rules;⁷⁰ these collectives allow for them to do so without fear of NCAA sanctions. While a monetary offer to a recruit from an organization that would only make good on the offer if the recruit attends a particular institution appears to be a *prima facie* case of a recruiting inducement, the NCAA has yet to levy any sanctions due to

⁶⁶ Eric Prisbell, *When it Comes to Recruiting, NIL Has Become the ‘Wild West’ That Some Feared*, ON3 (Feb. 9, 2022), <https://www.on3.com/nil/news/when-it-comes-to-recruiting-nil-has-become-wild-west-everyone-feared/>

⁶⁷ Gator Collective – Florida Gators Collective, ON3, <https://www.on3.com/nil/collectives/gator-collective-1/> (last updated Jun. 7, 2023).

⁶⁸ *Id.*

⁶⁹ *See Tracker: University-Specific NIL Collectives*, BUSINESS OF COLLEGE SPORTS, <https://businessofcollegesports.com/tracker-university-specific-nil-collectives/> (last updated Oct. 4, 2023) (Showing multiple collectives affiliated with several schools)

⁷⁰ Steven Godfrey, *Meet the Bag Man: 10 Rules for Paying College Football Players*, BANNER SOCIETY (Apr. 10, 2014), <https://www.bannersociety.com/2014/4/10/20703758/bag-man-paying-college-football-players>



the activity of collectives.⁷¹ While the NIL era continues to shift and evolve, the one constant is that nobody directly involved with college athletics is particularly pleased.

Recruiting talented athletes is one of the most vital jobs for any collegiate head coach, and the tectonic shift in the recruiting landscape has many of the NCAA's highest profile coaches frustrated. This frustration boiled over in May of 2022 when two of college football's most prominent coaches, Nick Saban of the University of Alabama and Jimbo Fisher of Texas A&M University (TAMU), had a public feud in which Saban made the accusation that TAMU "bought every player on their team" to which Fisher took great exception.⁷² Another prominent football coach, Clemson University's Dabo Swinney, voiced his displeasure with the recruiting landscape in an ESPN interview, stating "[t]here's no rules, no guidance, no nothing. It's out of control. It's not sustainable. It's an absolute mess and a train wreck."⁷³ Whether the complaints of three football coaches, each of whom have seven- or eight-figure salaries,⁷⁴ should be taken seriously is debatable, but they are illustrative of many coaches' frustrations with current climate.

Despite the fact that NIL rights represent significant progress for athletes, they have also experienced pitfalls and frustrations. The Big Ten Conference announced a new media rights deal in August 2022 that is worth more than \$7 billion over seven years, with per school payouts nearing \$100 million per year.⁷⁵ These soaring revenues have only served to further highlight the fact that the schools and conferences still do not pay athletes to play, as that is still prohibited by NCAA rules. The disparity has, once again, put the college sports business model under scrutiny, and athletes are

⁷¹ To date, the only NIL sanctions the NCAA has handed down were the result of impermissible contact between a booster and two women's basketball players. Isabel Gonzalez, *NCAA Hands Down First Known NIL Ruling in Miami Women's Basketball Cavinder Twins Infraction Case*, CBS SPORTS (Feb. 24, 2023), <https://www.cbssports.com/womens-college-basketball/news/ncaa-hands-down-first-known-nil-ruling-in-miami-womens-basketball-cavinder-twins-infraction-case/>.

⁷² Ben Kercheval, *Alabama's Nick Saban Goes In-depth on Out-of-Control NIL: '[Texas] A&M Bought Every Player on Their Team'*, CBS SPORTS (May 19, 2022), <https://www.cbssports.com/college-football/news/alabamas-nick-saban-goes-in-depth-on-out-of-control-nil-texas-a-m-bought-every-player-on-their-team/>.

⁷³ Chris Low, *Clemson Football's Dabo Swinney Talks Transfer Portal, NIL, Coaching Salaries and Winning His Way*, ESPN (Apr. 8, 2022, 8:00am), https://www.espn.com/college-football/story/_/id/33700907/clemson-football-dabo-swinney-talks-transfer-portal-nil-coaching-salaries-winning-way.

⁷⁴ *College Football Head Coaches Salaries*, USA TODAY, <https://sports.usatoday.com/ncaa/salaries/football/coach> (last updated Oct. 2, 2023).

⁷⁵ Adam Rittenberg, *Big Ten Completes 7-Year, \$7 Billion Media Rights Agreement with Fox, CBS, NBC*, ESPN (Aug. 18, 2022, 09:30am), https://www.espn.com/college-football/story/_/id/34417911/big-ten-completes-7-year-7-billion-media-rights-agreement-fox-cbs-nbc.



chiming in. Upon hearing about the Big Ten deal, then current Ohio State University quarterback C.J. Stroud commented “... I’m not sure what our [Ohio State] tuition is, but I’m sure it’s not ... what we’re actually worth.”⁷⁶ NIL gives the opportunity for athletes to earn money through endorsement deals, but that still requires effort beyond their sport and their studies to extract value. Building a marketable personal brand and selling it to companies takes a specific skill and, perhaps more importantly, time.⁷⁷ NCAA athlete schedules are notoriously full, leaving little time to dedicate to NIL activities even for those who have the skill or the desire to do so.⁷⁸

While collectives have helped some athletes in this regard, with many of their agreements appearing to be de facto pay-for-play, they raise some concerns of their own. Some collectives require athletes to give exclusive rights to their NIL, which may not be a good deal for the athlete, and also raises common gig economy concerns.⁷⁹ This also has the effect of shifting the “employment” relationship away from the school and to a third party whose interests may not always align with the educational institutions’ and who is not directly subject to any NCAA rules or regulations that could protect the athlete.⁸⁰

The unregulated nature of NIL has also allowed the emergence of bad (or at least inept) actors into the arena. The most glaring example of this is the recruitment of Jaden Rashada. Rashada was the seventh ranked high school quarterback in the country.⁸¹ He committed to play football at the University of Miami, swayed at least in part by a \$9.5 million NIL offer from a Miami booster.⁸² Rashada later changed his commitment to play for the University of Florida as a result of a \$13.85 million offer that came from the aforementioned Gator Collective.⁸³ In December 2022, with Rashada set to enroll

⁷⁶ Wilton Jackson, *Ohio State QB CJ Stroud: Big Ten Should Share TV Revenue with Players*, SPORTS ILLUSTRATED (Aug. 19, 2022), <https://www.si.com/college/2022/08/19/ohio-state-cj-stroud-big-ten-should-share-tv-revenue-with-players-media-rights-deal-fox-cbs-nbc>.

⁷⁷ See Matt Brown, *The NIL Market Isn’t Running Efficiently. Here’s Why*, EXTRA POINTS (Apr. 4, 2022), <https://www.extrapointsmb.com/p/nil-problems-solutions-earning-athletes-college-sports>.

⁷⁸ Matt Brown, *What Is a Typical College Athlete’s Day REALLY Like? I Asked One*, EXTRA POINTS (Sept. 27, 2022), <https://www.extrapointsmb.com/p/typical-college-athlete-day-inter-view-notre-dame-nil>.

⁷⁹ See Sam C. Ehrlich, Joe Sabin, & Neal Ternes, *With NIL, College Sports Enters the Gig Economy*, 37 J. SPORT MGMT 319 (2023) (comparing the market for college athlete NIL labor to gig economy markets with similar legal and ethical concerns, particularly app-based gig economy work like driving for Uber or Lyft.)

⁸⁰ *Id.* at 325

⁸¹ Stewart Mandel & Andy Staples, *Jaden Rashada’s Unprecedented Recruitment: How a 4-Star QB Went From \$13.85 Million To No NIL Deal*, THE ATHLETIC (Feb. 6, 2023), <https://theathletic.com/4149181/2023/02/06/jaden-rashada-nil/>

⁸² *Id.*

⁸³ *Id.*



at Florida the next month and well after the recruiting cycle ended, the Gator Collective renege on its offer two days after its first payment to Rashada was due.⁸⁴ The contract contained a clause that stated that the collective, in its sole and absolute discretion, could terminate the agreement without penalty or further obligation,⁸⁵ a boon to the collective, which essentially made this contract unilateral in nature.

Rashada was represented in his NIL negotiations by an agency called JTM Sports,⁸⁶ whose agents/founders include a then 22-year-old commercial real estate agent and a then sophomore at Southern Methodist University.⁸⁷ Notably, an attorney and Florida alumnus whom the Gator Collective retained “to provide legal counsel and ensure that all operations comply with NIL law” was also retained by JTM Sports.⁸⁸ While the attorney denies having any direct involvement with the Rashada contract,⁸⁹ this represents a clear conflict of interest. This conflict combined with the dubious contract clause in favor of the collective raises questions as to the credibility of Rashada’s representation in the matter. The certification of player agents and policing of their conduct is a task that, at the professional sports level, is typically managed by professional players’ associations.⁹⁰

To say the NCAA is unhappy with the current landscape is an understatement. The organization fought against NIL until the bitter end and are now left in a situation wherein it cannot even enforce its already loose limits on NIL. While the operations of most collectives would appear to violate one of the few NIL restrictions that exist—a prohibition on recruiting inducements—the NCAA has been powerless to do anything for fear that any sanction levied would welcome an antitrust challenge in which the NCAA is unlikely to fare well.⁹¹

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Pete Nakos, *Florida Commit Jaden Rashada Signs with JTM Sports for NIL Representation*, ON3 (Nov. 28, 2022), <https://www.on3.com/nil/news/jaden-rashada-florida-gators-football-recruiting-jtm-sports-nil-representation/>; Mandel & Staples *supra* note 81.

⁸⁷ Pete Nakos, *JTM Sports Emerges as Reliable Agency in New World of NIL*, ON3 (Dec. 21, 2022), <https://www.on3.com/news/jtm-sports-college-football-recruiting-nil-inducements-jackson-zager-tommy-thomsen/>

⁸⁸ Mandel & Staples *supra* note 81.

⁸⁹ *Id.*

⁹⁰ *See, e.g.*, *Collins v. Nat’l Basketball Players Ass’n*, 850 F. Supp. 1468 (D. Colo. 1991) (rejecting a challenge by a basketball player agent to the authority of the NBA’s players’ association to suspend him for violating association agent regulations.)

⁹¹ Marc Edelman, *NCAA ‘NIL’ Guidance Places Association at Renewed Antitrust Risk*, FORBES (May 12, 2022), <https://www.forbes.com/sites/marcedelman/2022/05/12/ncaa-nil-guidance-places-association-at-renewed-antitrust-risk/?sh=14f0b75783cd>; Stewart Mandel & Nicole Auerbach, *As NCAA Prepares to Crack Down on Booster Involvement in NIL, Lawyers and Sports Agents Say ‘Bring It’*, THE ATHLETIC (May 9, 2022), <https://theathletic.com/3300616/2022/05/09/as-ncaa-prepares-to-crack-down-on-booster-involvement-in-nil-lawyers-and-sports-agents-say-bring-it/>



When the NCAA issued new NIL guidelines in May of 2022, signaling a potential crackdown on collective activity, the collectives and their representatives did not blink, with one agent even describing the concept as “adorable.”⁹² Each time the NCAA issues more guidelines regarding NIL, it appears more desperate. The NCAA passed a new bylaw in January of 2023 that allowed for it to use circumstantial evidence to presume a school has violated NIL rules,⁹³ a move that would be unlikely to stand up to legal challenges.⁹⁴ In June of 2023, the NCAA issued a memo stating that schools should follow NCAA rules even if they are in conflict with state laws.⁹⁵

Concurrent with its issuance of ineffective guidelines and memos, the NCAA is aggressively lobbying Congress for an antitrust exemption for its rules on amateurism.⁹⁶ The odds of Congress passing such an exemption appear low.⁹⁷ There have been several federal NIL-related bills proposed⁹⁸, but few have gained much traction, and a pair of bipartisan senators who are still working on drafting narrow NIL legislation do not intend to include an antitrust exemption within the bill.⁹⁹

Between athletes still feeling short-changed despite progress in NIL compensation and coaches, administrators, and the NCAA feeling generally unhappy with the unregulated, “wild west” landscape of NIL, college sports is faced with two competing forces pushing college athletics in two distinctly different directions. In an effort to bridge this gap, many are proposing creative solutions (or non-solutions). For example, the Pac-12 Conference’s solution is an initiative with Twitter that allows

⁹² *Id.* Mandel & Auerbach

⁹³ Ross Dellenger, *The Doors Are Opening for NCAA to Close in on NIL Violations*, SPORTS ILLUSTRATED (Jan. 30, 2023), <https://www.si.com/college/2023/01/30/ncaa-enforcement-name-image-likeness-more-room-investigations>

⁹⁴ Michael McCann, *NCAA’s Guilty-Until-Proven-Innocent NIL Policy Sure to Draw Lawsuits*, SPORTICO (Feb. 6, 2023), <https://www.sportico.com/law/analysis/2023/new-ncaa-nil-policy-1234708651/>

⁹⁵ Nicole Auerbach, *NCAA Says Schools Must Comply with Its NIL Rules in States with Conflicting Laws*, THE ATHLETIC (Jun. 27, 2023), <https://theathletic.com/4644949/2023/06/27/ncaa-nil-rules-state-laws/>

⁹⁶ Michael McCann, *Congressional Push for NCAA NIL and Employment Faces Long Road*, SPORTICO (May 30, 2023), <https://www.sportico.com/law/analysis/2023/congress-nil-employment-debates-might-be-too-late-1234724281>; Dennis Dodd, *Congress to Hold First NIL Hearing Wednesday as New NCAA President Seeks Oversight, Antitrust Exemption*, CBS SPORTS (Mar. 28, 2023), <https://www.cbssports.com/college-football/news/congress-to-hold-first-nil-hearing-wednesday-as-new-ncaa-president-seeks-oversight-antitrust-exemption/s>.

⁹⁷ McCann, *supra* note 96.

⁹⁸ Jessop & Sabin, *supra* note 62, at 267-70.

⁹⁹ Daniel Libit, *Tuberville Throws Cold Water on NCAA Antitrust Exemption*, SPORTICO (Dec. 19, 2022), <https://www.sportico.com/leagues/college-sports/2022/tuberville-nixes-ncaa-antitrust-exemption-1234698957/>



football players to monetize videos of their “top moments” on the field via automatic ad placement. The compensation for this ad placement includes \$1,250 total and a “potential percentage of the program’s overall revenue.”¹⁰⁰ The late Mike Leach, former Mississippi State University head football coach, proposed an ill-fated plan that included the choice of individual athletes to be considered amateur and therefore subject to NCAA rules, or sign an employment contract as a professional.¹⁰¹

Coach Leach’s idea to fix college sports could conceivably work, but would be remarkably out of character for the NCAA. After all, the association has staunchly opposed college athlete employment for decades. Still, however, if nothing is done on Congress’s end, the idea of college employee-athletes is a specter that is fast approaching regardless of the NCAA’s relentless opposition to the concept.

D. A Brief History of the Athlete-Employee Debate

The NCAA’s opposition to college athlete employment debates back to the 1950s, when then-NCAA president Walter Byers coined the term “student-athlete” to describe college athletes precisely to advance the goal of ensuring that courts would see athletes as students engaged in extracurricular activities rather than institutional employees performing a service for the university.¹⁰²

While the use of this pointed terminology did not convince the California Court of Appeals to rule against a finding that a college football player killed in an airplane crash while returning from a game was an employee of his university and was thus entitled to worker’s compensation,¹⁰³ it did convince the California legislature to overturn that ruling by statute by specifically exempting intercollegiate athletes from the state’s worker’s compensation law.¹⁰⁴ The effects of this legislative change

¹⁰⁰ Paolo Uggetti, *Pac-12, Football Players Can Profit Off Highlight Videos Posted to Twitter Under NIL Deal*, ESPN (Aug. 4, 2022), https://www.espn.com/college-football/story/_/id/34347280/pac-12-players-profit-highlight-videos-posted-twitter-nil-deal

¹⁰¹ Ross Dellenger, *Mike Leach’s Ambitious Plan to Fix NIL: ‘Are You a Professional or Are You Not?’*, SPORTS ILLUSTRATED (Oct. 5, 2022), <https://www.si.com/college/2022/10/05/college-football-mike-leach-nil-plan-pro-athletes>

¹⁰² See N.L.R.B. Guidance Mem. 21-08 at 1 n.1 (Sept. 29, 2021), available at <https://www.nlrb.gov/guidance/memosresearch/general-counsel-memos> (citing Molly Harry, *A Reckoning for the Term “Student-Athlete,”* DIVERSE (Aug. 26, 2020), <https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete>; *Level Playing Field: Misclassified* (HBO television broadcast Sept. 21, 2021); Jay D. Lonick, *Bargaining with the Real Boss: How Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 139-42 (2015).

¹⁰³ *Van Horn v. Industrial Acc. Com.*, 219 Cal. App. 2d 457 (Cal. Ct. App. 1963). See also *Univ. of Denver v. Nemeth*, 257 P. 2d 423 (Colo. 1953) (finding a college football player was an employee eligible for worker’s compensation.)

¹⁰⁴ *Graczyk v. Worker’s Comp. App. Bd.*, 184 Cal. App. 3d 997, 1005-06 (Cal. Ct. App. 1983).



of heart would be felt over the next few decades into different states¹⁰⁵ and across different fields of employment law.¹⁰⁶

Legal clashes over college athlete employment would continue in the mid-2010s in two separate arenas. In the courts, the Seventh Circuit in 2015 would find unanimously and easily that the plaintiffs—two female track and field athletes at the University of Pennsylvania—were not employees for the purposes of applying the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA).¹⁰⁷ Yet one of the three judges, Judge David Hamilton, writing in concurrence focused intently on the specific circumstances of the two plaintiffs, writing that while the plaintiffs—athletes who did not receive athletic scholarships (as no Ivy League athlete does) and do not play “a ‘revenue’ sport”—were clearly not employees, he was “less confident” that the same reasoning “should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men’s basketball and FBS football.”¹⁰⁸ In those “revenue” sports, Judge Hamilton wrote, “economic reality and the tradition of amateurism may not point in the same direction” as those sports “involve billions of dollars of revenue for colleges and universities.”¹⁰⁹

Judge Hamilton’s concurrence was obviously the most fleeting of judicial dicta—a status stonily noted one year later by a California district court rejecting a new FLSA case filed by former University of Southern California (USC) football player Lamar Dawson.¹¹⁰ Yet the tides would continue to turn. That Dawson case would be affirmed on appeal by the Ninth Circuit, but explicitly on much narrower

¹⁰⁵ *Coleman v. Western Mich. Univ.*, 336 N.W. 2d 224 (Mich. Ct. App. 1983); *Rensing v. Ind. St. Univ. Bd. of Trustees*, 444 N.E. 2d 1170 (Ind. 1983); *Waldrep v. Tex. Emp. Ins. Ass’n*, 21 S.W. 3d 692 (Tex. Ct. App. 2000) (each finding the college athlete plaintiff to not be an employee for the purposes of the state worker’s compensation law.)

¹⁰⁶ *See Townsend v. State of California*, 191 Cal.App.3d 1530, 1537 (Cal. Ct. App. 1987) (finding that a college athlete plaintiff was not a statutory employee for the purposes of the Tort Claims Act); *Shephard v. Loyola Marymount Univ.*, 125 Cal. Rptr. 2d 829, 832-36 (Cal. Ct. App. 2002) (finding that a college athlete plaintiff was not a statutory employee for the purposes of applying California’s Fair Employment and Housing Act.)

¹⁰⁷ *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016).

¹⁰⁸ *Id.* at 294 (Hamilton, J., concurring).

¹⁰⁹ *Id.*

¹¹⁰ *Dawson v. NCAA*, 250 F. Supp. 3d 401, 406 (N.D. Cal. 2017) (rejecting the plaintiff’s reliance on the Judge Hamilton concurrence from *Berger* as Judge Hamilton “did not consider, much less find, that football players are ‘employees’ under FLSA” and that the concurrence “did not purport to represent an alternative line of legal analysis.”)



grounds—the Ninth Circuit instead found only that Dawson was not an employee of the NCAA and Pac-12 Conference while leaving the “pure question of employment ... for another day.”¹¹¹

Yet not all courts would continue to agree. In a third FLSA suit—this time filed by former Villanova University football player Lawrence “Poppy” Livers—the U.S. District Court for the Eastern District expressed serious doubt about the finality of college athletes’ lack of employment status under the FLSA even while initially dismissing the suit.¹¹² To this end, the court would initially dismiss the claim without prejudice—giving the plaintiff the ability to file an amended complaint—while giving the plaintiffs something of a roadmap for how to succeed on a future claim.¹¹³ The plaintiff would on an amended complaint use this roadmap to the court’s satisfaction, as the court a few months later rejected a renewed NCAA motion to dismiss, sending the case to limited discovery to decide a potential statute of limitations issue.¹¹⁴

While this case ended up being voluntarily dismissed,¹¹⁵ the soil had been tilled for a third case filed in the same court: *Johnson v. NCAA*.¹¹⁶ Rather than simply being limited to revenue or non-revenue sports like its predecessors, *Johnson* involved six

¹¹¹ Dawson v. NCAA, 932 F. 3d 905, 907 (9th Cir. 2019). The limited nature of the Ninth Circuit’s finding was due to Dawson’s choice to not include USC as a defendant in his claim and not allege that he was an employee of USC. *Id.* The reasoning behind Dawson’s omission of USC from the claim is unknown, much to the continued chagrin of one author (who can only speculate that Dawson perhaps did not want to bring harm to his alma mater). Sam C. Ehrlich, *The FLSA and the NCAA’s Potential Terrible, Horrible, No Good, Very Bad Day*, 39 LOY. LA ENT. L. REV. 77, 86 N.38 (2019). See also Sam C. Ehrlich, “*But They’re Already Paid*”: *Payments In-Kind, College Athletes, and the FLSA*, 123 W. VA. L. REV. 1, 10 n. 34 (2020); Ehrlich, Sabin, & Ternes, supra note 79, at 6 n.4 (continuing to express a lack of information as to why Dawson did not include USC in the lawsuit.)

¹¹² Livers v. NCAA, No. 17-cv-4271, 2018 WL 2291027, at *16 (E.D. Pa. 2018) (dismissing without prejudice the plaintiff’s claim of employment status under the FLSA while declining the NCAA’s request to “endorse their argument that a multi-factor test is not appropriate for evaluating whether a student athlete is an employee under the FLSA” and refusing to “foreclose the possibility that an appropriate multi-factor test could be identified for evaluating the question of whether a student athlete who receives an Athletic Scholarship is an ‘employee’ for FLSA purposes.”)

¹¹³ *Id.* (stating that the Third Circuit’s test from *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir. 1985), “may offer a useful starting point for developing rules of analysis for the threshold question of who is an ‘employee’ at all.) The “road map” offered by the court was noted by Ehrlich, *The FLSA and the NCAA’s Potential Terrible, Horrible, No Good, Very Bad Day*, supra note 111, at 94-95.

¹¹⁴ Livers v. NCAA, No. 17-cv-4271, 2018 WL 10669663 (E.D. Pa. 2018).

¹¹⁵ Ehrlich, “*But They’re Already Paid*”: *Payments In-Kind, College Athletes, and the FLSA*, supra note 111, at 12.

¹¹⁶ 556 F.Supp.3d 491 (E.D. Pa. 2021).



athletes at five different schools in a variety of different sports—but notably included zero athletes at major athletic programs.¹¹⁷ However, that did not end up mattering to the court, as motions to dismiss by the schools attended by the plaintiffs and the NCAA were each denied in light of findings that college athletes could plausibly be held as employees under the FLSA.¹¹⁸ The NCAA and the attended schools have appealed this case to the Third Circuit Court of Appeals, with a result pending as of this writing.¹¹⁹

The second progressing battleground for athlete employment rights is the legal area more relevant to this article: the NLRB. In 2014, football players at Northwestern University took steps toward unionization, much to the displeasure of the university and the NCAA.¹²⁰ Yet when the Chicago region of the NLRB ruled on the matter, it found that college athletes were indeed employees under the NLRA and thus eligible to unionize.¹²¹ The regional board found that the facts were relatively straightforward in pointing toward an employment relationship, citing specifically the “valuable services” provided to Northwestern and the “great deal of control” that coaches had over the Northwestern players throughout the entire year.¹²² As such, the regional board directed Northwestern’s players to commence elections on whether they desired collective bargaining representation.¹²³

But this decision would not stand for long. Clearly unsatisfied, Northwestern exercised its rights for review, appealing the decision to the full NLRB in Washington,

¹¹⁷ The plaintiffs included a football player at Villanova University (a member of a Football Championship Series conference—i.e., the lower subdivision within the NCAA Division I structure and certainly not a “Power Four” program), a swimmer and a baseball player at Fordham University, tennis players at Sacred Heart University and Lafayette College, and a soccer player at Cornell University. *Id.* at 495-96.

¹¹⁸ *Id.* at 512. *See also* Johnson v. NCAA, 561 F.Supp.3d 490 (E.D. Pa. 2021) (rejecting the NCAA’s motion to dismiss.) A motion to dismiss by schools not attended by the plaintiffs (but included for the purpose of joint employment theories) was granted, as the court found that the relationship between the athletes and the schools they did not attend was too remote to be considered a joint employment relationship. *Id.* at 500-05.

¹¹⁹ While you can never take away too much from oral arguments, the three-judge panel seemed far more hostile to the NCAA than the plaintiffs, perhaps forecasting affirmation of the lower court decision. *See* Sam C. Ehrlich, *The Inherent Bad Faith of the NCAA’s Use of Title IX to Shield Their Illegal Business Practices*, 25 GEO. J. GENDER & L. 39, 52 n. 71 (2023) (unpublished manuscript) (on file with authors) (collecting citations to various news articles discussing how poorly the Johnson appeals court oral arguments went for the NCAA.)

¹²⁰ Ehrlich, Sabin, & Ternes, *supra* note 79, at 5; Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned From Northwestern University and Potential Next Steps in The College Athletes’ Rights Movement*, 38 CARD. L. REV. 1627, 1636 (2016)

¹²¹ Decision and Direction of Election, *Nw. Univ. v. Coll. Athletes Players Ass’n (CAPA)*, No. 13-RC121359 (N.L.R.B. Mar. 26, 2014), <http://apps.nlr.gov/link/document.aspx/09031d4581667b6f>.

¹²² *Id.* at 14-15.

¹²³ *Id.* at 28.



D.C.¹²⁴ After an unprecedented 16-month delay, the board sided with Northwestern and reversed the regional board decision, but did so not through declaration that college athletes were not employees, but instead by simply declining to exercise jurisdiction over the dispute.¹²⁵ The board noted that even if the Northwestern players were employees, “it would not effectuate the policies of the [NLRA] to assert jurisdiction” due to the nature of sports leagues and of the NCAA in particular.¹²⁶ If the board allowed Northwestern football players to unionize it would have to allow all of the teams Northwestern competes with to unionize, and “the overwhelming majority of [Northwestern’s] competitors are public colleges and universities over which the Board cannot assert jurisdiction.”¹²⁷ Relying solely on this rationale, the board dismissed the players’ petition.

Many commentators would decry the full board’s ruling, deeming it a “punt” away from deciding the athlete employment issue.¹²⁸ However, another commentator noted that the decision “did not outright reject the possibility of asserting jurisdiction over a different bargaining unit of college athletes” and that the decision, as written, “kept alive the possibility that union organizers could still seek to obtain NLRB jurisdiction over a different potential bargaining unit of college athletes.”¹²⁹

Furthermore, throughout the next several years, the NLRB would subtly (and not so subtly) make clear its feelings that college football players are, in fact, NLRA-covered employees. In 2016, an associate general counsel of the NLRB issued an

¹²⁴ Edelman, *supra* note 120, at 1639.

¹²⁵ *Id.* at 1639-40.

¹²⁶ Nw. Univ., 362 N.L.R.B. No. 167, 2015 WL 4882656, at *3 (Aug. 17, 2015).

¹²⁷ *Id.* The Board’s note about its inability to assert jurisdiction over public colleges and universities was, of course, a point towards the limited scope of the NLRA: the NLRA does not cover public-sector employees, i.e., employees of state, federal, and local governments. See *Are You Covered?* NAT’L LABOR RELATIONS BD., <https://www.nlr.gov/about-nlrb/rights-we-protect/the-law/employees-are-you-covered> (last visited Dec. 15, 2022). Current NLRB general counsel Jennifer Abruzzo has proposed a workaround that would allow the Board to assert jurisdiction over public university athletes as well as private sector employees—a workaround that will be tested in a forthcoming unfair labor practice charge against the NCAA, the Pac-12 Conference, and a member school. See *infra* notes 54-55 and accompanying text.

¹²⁸ See, e.g., Sheldon D. Pollack & Daniel V. Johns, *Northwestern Football Players Throw a “Hail Mary” but the National Labor Relations Board Punts: Struggling to Apply Federal Labor Law in the Academy*, 15 VA. SPORTS & ENT. L.J. 77 (2015); Michael McCann, *Breaking Down Implications of NLRB Ruling on Northwestern Players Union*, SPORTS ILLUSTRATED (Aug. 17, 2015), <http://www.si.com/college-football/2015/08/17/northwestern-football-players-union-nlrb-ruling-analysis>; Cade Foster, *The NLRB Punts, Despite Fans Screaming to Go For It: NLRB Declines To Assert Jurisdiction in Seminal Issue*, 41 J. LEGAL PROFESSION 143 (2016).

¹²⁹ Edelman, *supra* note 120, at 1640.



advice memorandum picking at certain terms in Northwestern’s football handbook as having been possibly violative of the NLRA before Northwestern modified its terms to reach compliance—all while repeatedly referring to the handbook as “the Employer’s handbook.”¹³⁰

Such was the landscape leading up to the Supreme Court’s *Alston* decision. And while *Alston* of course did not get into college athlete employment, it did remove the legal shield relied upon by the NCAA for nearly four decades.¹³¹ Moreover, in his *Alston* concurrence, Justice Kavanaugh alluded strongly toward his feelings that college athletes may be union-eligible employees, noting that that the “difficult [policy] questions” that would arise by declaring the NCAA’s remaining compensation rules illegal could be resolved by colleges and athletes “engag[ing] in collective bargaining (or seek some other negotiated agreement).”¹³²

Even despite *Alston*’s lack of direct impact in the employment space, those prosecuting and adjudicating the employment question were quick to jump on the language of the *Alston* decision. In the *Johnson* FLSA case, for example, Judge Padova noted both the unanimous opinion’s comment about how the Supreme Court’s prior *Board of Regents* decision “d[id] not suggest that courts must reflexively reject all challenges to the NCAA’s compensation restrictions” and Justice Kavanaugh’s much more extensive comments in his concurrence in rejecting the NCAA’s argument “that Plaintiffs are not employees entitled to minimum wages pursuant to the FLSA because there is a long-standing tradition of amateurism in NCAA interscholastic athletics that defines the economic reality of the relationship between Plaintiffs and the ASD.”¹³³

On the NLRB side of the debate, shortly after the *Alston* decision, NLRB general counsel Jennifer Abruzzo would issue a memorandum making a case for the NLRB to attempt to pick up where *Northwestern University* left off.¹³⁴ Stating from the outset her “prosecutorial position that certain Players at Academic Institutions are employees under the [NLRA]” and that “misclassifying such employees as mere ‘student-athletes,’ and leading them to believe that they do not have statutory protections is a violation of Section 8(a)(1) of the Act,” Abruzzo relied heavily on *Alston* to

¹³⁰ Memorandum from the Office of the Gen. Counsel, Div. of Advice, Case 13-CA-157467 (Sep. 22, 2016), available at <https://www.trbas.com/media/media/acrobat/2016-10/69842749972780-11142020.pdf>.

¹³¹ See Sam C. Ehrlich, *Probing for Holes in the 100-Year-Old Baseball Exemption*, 90 U. CIN. L. REV. 1172, 1192-94 (2022) (summarizing the protections granted to the NCAA by the Supreme Court’s decision in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), and the impact of *Alston* on those protections.)

¹³² *NCAA v. Alston*, 594 U.S. ___, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

¹³³ *Johnson v. NCAA*, 556 F.Supp.3d 491, 501 (E.D. Pa. 2021).

¹³⁴ N.L.R.B. Guidance Mem. 21-08 (Sept. 29, 2021), available at <https://www.nlr.gov/guidance/memosresearch/general-counsel-memos>.



cite changing circumstances that *Northwestern University* would support a renewed effort.¹³⁵ In a closing footnote, Abruzzo proposed using joint employer theories to bring in public university employees, arguing that “the NCAA exercises strict control over certain Players at Academic Institutions” and that “it may be appropriate for the Board to assert jurisdiction over the NCAA and an athletic conference, and to find joint employer status with certain member institutions, even if some of the member schools are state institutions.”¹³⁶

Abruzzo’s paved path would start to pick up some traffic in February 2022 when the National College Players Association (NCPA) filed unfair labor practice charges against USC, UCLA, the Pac-12 Conference, and the NCAA for alleged misclassification of the schools’ football and men’s and women’s basketball players as non-employee “student-athletes.”¹³⁷ While charges against UCLA were soon dropped, the NLRB later turned these charges into a formal complaint against USC, the Pac-12 Conference, and the NCAA.¹³⁸ The parties held a hearing in front of an administrative judge in December 2023 to begin the process of whether athletes are ultimately covered under the NLRA and thus eligible to unionize as employees with a ruling expected sometime in 2024.¹³⁹

However, employment claims would not be limited to larger schools like USC and UCLA. In September 2023, the men’s basketball team at Dartmouth College unanimously filed a petition to the NLRB seeking to hold unionization elections.¹⁴⁰ This petition—backed by the existing Dartmouth College chapter of the Service Employees International Union (SEIU)—became the most tangible effort to athlete unionization since *Northwestern* when in February 2024 the Region 1 board of the NLRB declared that the athletes are, in fact, employees of their school under the NLRA and directed the school to hold union elections for the team.¹⁴¹ While the decision will understandably be appealed by Dartmouth, the particulars of the *Dartmouth College* decision was seen by commentators as a significant expansion of even

¹³⁵ *Id.* at 1, 5-6.

¹³⁶ *Id.* at 9 n.34.

¹³⁷ Liz Mullen, *NCPA Files Unfair Labor Charges Against USC, UCLA*, SPORTS BUSINESS JOURNAL (Feb. 8, 2022), <https://www.sportsbusinessjournal.com/SB-Blogs/Breaking-News/2022/02/NCPA.aspx>.

¹³⁸ Chris Vannini, *National Labor Relations Board Issues Complaint Against NCAA, Pac-12, and USC*, THE ATHLETIC (May 18, 2023), <https://theathletic.com/4533435/2023/05/18/nlr-b-ncaa-pac-12-usc-complaint/>.

¹³⁹ Christovich, ‘It Could Not Have Gone Better’ For the Athletes, *supra* note 7.

¹⁴⁰ See Glynn A. Hill, *Dartmouth Men’s Basketball Players File NLRB Petition to Unionize*, WASHINGTON POST (Sep. 14, 2023), <https://www.washingtonpost.com/sports/2023/09/14/dartmouth-mens-basketball-unionize-nlr-b/>.

¹⁴¹ Decision and Direction of Election, Dartmouth College, *supra* note 15.



the most generous definitions of employment for college athletes given the fact that members of the Dartmouth men’s basketball team—like all Ivy League athletes—do not receive athletic scholarships.¹⁴²

III. College Athletes as Employees— From Problem to Solution?

A. The Non-Statutory Labor Exemption: An Attainable Antitrust Exemption

Needless to say, *Dartmouth College*—alongside *Johnson*, the USC case, and the variety of antitrust litigation—represent significant threats to the sustainability of the NCAA moving forward. However, the looming specter of college athlete employment may in fact be a solution to all of the strife in college sports.

If, for example, the NCAA and its member institutions were to voluntarily recognize college athletes as employees of the schools, conferences, and the NCAA jointly and help usher in the creation of a formally recognized college athlete labor union, such a move could create the stability that college sports now lacks. While this seems like an unlikely move for the NCAA based upon its previous actions, this would allow the athletes to collectively bargain for a share of media rights revenues and other work conditions, while also allowing the NCAA to collectively bargain for more regulations and restrictions on NIL activity, the transfer portal, etc., without facing antitrust scrutiny by virtue of the non-statutory labor exemption.¹⁴³

Born from judicial interpretation of Clayton Act and NLRA’s statutory labor exemption—which grants antitrust immunity to labor unions and related activities—the non-statutory labor exemption extends broadly to immunize most agreements between labor unions and management formalized in the collective bargaining process.¹⁴⁴ Such protection has been regularly relied upon by the major professional team sport leagues, all of which boast union relationships that immunize key competitive balance restraints on athlete compensation and freedom of movement. To this end, leagues commonly employ practices that are facially violative of antitrust law in their restriction of the market

¹⁴² See, e.g., Matt Brown, *Five Quick Thoughts on the NLRB Dartmouth Men’s Basketball Ruling*, EXTRA POINTS (Feb. 5, 2024), <https://www.extrapointsmb.com/p/five-quick-thoughts-nlr-b-dartmouth-mens-basketball-ruling> (writing that given the metric of employment status defined in the *Dartmouth College* ruling applies to “[v]irtually every single D-I athlete” and “maybe even D-II or D-III athletes” as well.)

¹⁴³ Baker, *supra* note 11.

¹⁴⁴ Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUMBIA L. REV. 1045, 1051-53 (1994). See also generally *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) (interpreting the NLRA to “place[] beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work.”)



for athlete labor (i.e., the draft system and salary caps), and therefore they are amenable to the unionization of their athletes to gain the antitrust shield the non-statutory labor exemption provides.¹⁴⁵ Indeed, each the four major North American professional sport leagues¹⁴⁶ (eventually, in the case of MLB¹⁴⁷) voluntarily recognized their respective players' associations as the official bargaining representative of their athletes.¹⁴⁸

The potential benefit of this partial antitrust shield for the NCAA cannot be understated, as an athlete-NCAA collective bargaining agreement could prevent challenges not only to potential new NIL-focused competitive balance restraints but also to current NCAA practices under the Sherman Antitrust Act that are subject to a grand whittling away of the NCAA rulebook by antitrust law.¹⁴⁹ Recently, multiple state attorneys general have publicly criticized and/or pursued antitrust action against the NCAA regarding its transfer eligibility rules¹⁵⁰ and rules regarding postseason eligibility for teams transitioning to the FBS.¹⁵¹ Further, voluntary recognition would save the NCAA the time and resources of continuously litigating challenges to its rules regarding athlete compensation.¹⁵²

¹⁴⁵ See Kieran M. Corcoran, *When Does the Buzzer Sound: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045 (1994).

¹⁴⁶ Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL).

¹⁴⁷

¹⁴⁸ Nicholas M. Ohanesian, *Collective Bargaining and Workforce Protections in Sports*, in THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 195, 201 (Michael A. McCann, 2018). Notably the leagues were not as friendly to the unionization efforts of other segments of their labor force (i.e. umpires). *Id.* But in turn, they do not impose similar restrictions on umpires, coaches, and other segments of labor. Ohanesian, *supra* note 92, at 201.

¹⁴⁹ See e.g. Taylor Skaggs, *The Only Game in Town: An Examination of the NCAA's Anticompetitive Conduct*, 31 MARQUETTE SPORTS L. REV. 107 (2020).

¹⁵⁰ Eric Prisbell, *Legal Threats from State AGs underscore the NCAA's Vulnerability*, On 3 NIL (Oct. 30, 2023), <https://www.on3.com/os/news/ncaa-legal-threats-from-state-ags-underscore-vulnerability/>. Such efforts bore fruit in December 2023, when a federal district court judge granted a temporary restraining order after seven state attorneys general filed antitrust litigation against the NCAA challenging its transfer restrictions. Order on Motion for Temp. Restraining Order, State of Ohio v. NCAA, No. 23-cv-00100 (N.D.W. Va. Dec. 19, 2023) (ECF No. 71). The order was soon thereafter converted to a preliminary injunction preventing the NCAA from enforcing its year-in-residence rule on multi-time transfers for the remainder of the 2023-24 school year on the consent of both parties to avoid confusion regarding the question of whether athletes who played during the fourteen-day temporary restraining order period would burn a year of NCAA eligibility. John Raby, *NCAA, States Seek to Extend Restraining Order Letting Transfer Athletes Play Through the Spring*, ASSOC. PRESS (Dec. 15, 2023), <https://apnews.com/article/ncaa-transfer-rule-lawsuit-ed99948447479e34f6edfec4e94412af>.

¹⁵¹ David Teel, *Virginia Attorney General Urges NCAA to Make JMU Bowl-Eligible This Season*, RICHMOND TIMES-DISPATCH (Oct. 4, 2023), https://richmond.com/sports/college/attorney-general-jmu-james-madison-university/article_166235c4-6227-11ee-9e20-9f5f952e3012.html.

¹⁵² Alicia Jessop et. al., *Charting a New Path: Regulating College Athlete Name, Image and Likeness After NCAA v. Alston Through Collective Bargaining*, 37 J. SPORT MGMT 307, 314 (2023).



B. Challenges to Unionization

Notably, to avoid a patchwork of varying state and federal labor laws, it is vital that the NCAA and/or the member athletic conferences be considered a joint employer of the athletes. This would put the labor relationship between all athletes and their schools under the purview of the NLRA and NLRB as private employees. But this could be accomplished if the NCAA itself were to take control and set the wheels turning on athlete unionization and bargaining through voluntary recognition of an athlete union.

Voluntary recognition is becoming increasingly popular among U.S. employers.¹⁵³ It is a process by which a majority of workers (in this case athletes) must sign cards authorizing the union to represent them. Management (in this case the NCAA and/or member conferences) voluntarily recognizes the union, therefore not requiring a formal election.¹⁵⁴

Whether athletes are ultimately successful in their legal battle at the NLRB to be recognized as a union or the NCAA and member institutions take the prudent route of voluntarily recognizing an athlete union, it appears that college athletes' recognition as employees is inevitable. Unionization of athletes with their newfound status as employees would not likely be far behind. Still, however, beyond the potential legal struggle with the NCAA and universities, the structure and operation of a union of college athletes presents several challenges.

The main purpose of labor unions is for employees to join together to advance common interests involving their work conditions. While the size and scope of unions can vary greatly, they are typically composed of employees with similar jobs at roughly similar firms where many common interests are easily discernible.

The concept of a "job" as a college athlete is quite nebulous. This is not only because the NCAA and its member institutions have repeatedly insisted that their athletes are not employees nor are they even independent contractors, but also because not all athletes' experiences are the same and vary greatly depending on their school, conference, sport, and gender. This makes it unclear as to who should be allowed into the union. The sheer size of the NCAA also presents a challenge, with membership in Division I (by far the most profitable NCAA division) consisting of 351 schools and more than 188,710 athletes.¹⁵⁵

¹⁵³ Aurelia Glass, *Voluntary Recognitions of Unions Is Increasingly Popular Among U.S. Employers*, CENTER FOR AMERICAN PROGRESS (Jan. 18, 2023), <https://www.americanprogress.org/article/voluntary-recognition-of-unions-is-increasingly-popular-among-u-s-employers/>

¹⁵⁴ *Id.*

¹⁵⁵ *NCAA Recruiting Facts*, NCAA (2022), available at https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf.



Further, college athletic rosters have a much higher degree of turnover than most union jobs, which may make organization more difficult.¹⁵⁶ The common interests of college athletes are also not easily discernible. This fact alone leads some to believe that a college athlete union that included all athletes would be folly and harm the college athlete labor movement by making it nearly impossible for the potential union to meet the “community of interest” requirement the NLRB has imputed upon such organizations.¹⁵⁷

While each of these issues certainly present some challenges, and particularly the combination of these issues appears daunting, all is not lost. None of the aforementioned issues are entirely unique to a college athlete union. To the contrary, at least one other union has managed and even solved at least some of these issues, and thus may provide a baseline framework for the potential college athlete union. That union is the Screen Actors Guild-American Federation of Television and Radio Artists.

IV. SAG-AFTRA as a Template for the College Athlete Labor Union

A. Background on SAG-AFTRA

SAG-AFTRA was formed by the merger of two previously independent unions: the Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA). Both were founded in the 1930s and they merged in 2012. Today, the union represents roughly 160,000 actors, announcers, broadcast journalists, dancers, disk jockeys, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists, and other media professionals.¹⁵⁸ The same labor union represents famous movie stars and relatively unknown local radio hosts. More recently, SAG-AFTRA expanded its reach to include certain social media influencers and put in place an influencer agreement.¹⁵⁹

SAG-AFTRA collectively bargains on behalf of its membership with several different entities, most notably the Alliance of Motion Picture and Television Producers (AMPTP), which is a trade association representing more than 350 movie and

¹⁵⁶ Dave Jamieson, *Amazon’s Greatest Weapon Against Unions: Worker Turnover*, HUFFINGTON POST (June 17, 2021) https://www.huffpost.com/entry/amazon-worker-turnover-anti-union_n_60ca1b3ee4b0d2b86a818d1b; Alex Kirshner, *Why a College Athlete Union Seems Inevitable – and How it Could Work*, GLOBAL SPORT MATTERS (March 9, 2022), <https://globalsportmatters.com/business/2022/03/09/ncaa-college-athlete-labor-union-inevitable-how-it-could-work/>

¹⁵⁷ Edelman, *supra* note 120, at 1652.

¹⁵⁸ *About*, SAG-AFTRA. <https://www.sagaftra.org/about> (last visited Jan. 6, 2024).

¹⁵⁹ See Sara Shiffman, *The TikTok Union: Unionization in the Age of New Media*, 34 LOY. CONSUMER L. REV. 308 (2023).



television producers.¹⁶⁰ Notably, as of July 2023, the SAG arm of SAG-AFTRA was on strike in conjunction with the Writers Guild of America (WGA), which represents screenwriters, against the AMPTP.¹⁶¹ The WGA ended its strike in October of 2023 by coming to a new collective bargaining agreement with the AMPTP; however, SAG-AFTRA and the AMPTP were still far apart in their discussions.¹⁶² SAG-AFTRA ratified a deal in December 2023, thus ending its strike, boasting an estimated value triple the previous agreement.¹⁶³ As is the case with many work stoppages, compensation is a major factor contributing to this work stoppage.¹⁶⁴ This is the fifth actors strike since 1960 and the first since SAG and AFTRA merged in 2012.¹⁶⁵ While a work stoppage is not necessarily something to which a labor union should aspire, such collective action is one of the most important functions of a labor union, and striking for better wages and working conditions is one of the greatest benefits of union membership.

B. How the Unique Structure of SAG-AFTRA Fits College Sports

SAG-AFTRA represents a unique analog and template for a potential college athlete labor union for several reasons. These reasons include the national reach, overall size, disparity of economic interests among members, high membership turnover, and needed benefits that are not consistently provided by their employers.

i. National Reach

Like many major national labor unions, SAG-AFTRA's governance is divided among a large national board and smaller, more localized branches.¹⁶⁶ The national board is responsible for the overarching management of the union with some of its specific responsibilities including approval of the budget, approval of collective bargaining

¹⁶⁰ *About*, AMERICAN MOTION PICTURE AND TELEVISION PRODUCERS, <https://amptp.org/aboutus.html> (last visited Jan. 6, 2024).

¹⁶¹ George Petras & Javier Zarracina, *When Was the Last Hollywood Strike? A History of Actor and Writer Entertainment Shutdowns*, USA TODAY (Jul. 14, 2023), <https://www.usatoday.com/story/graphics/2023/07/14/hollywood-actor-screenwriter-strikes-history/70413248007/>.

¹⁶² Alissa Wilkinson, *The Actors Strike Negotiations Have Broken Down*, VOX (Oct. 12, 2023), <https://www.vox.com/culture/2023/10/12/23914241/sag-aftra-strike-negotiations>

¹⁶³ Andrew Dalton, *Actors Vote to Approve Deal that Ended Strike, Bringing Relief to Union Leaders and Hollywood*, AP NEWS (Dec. 6, 2023), <https://www.vox.com/culture/2023/10/12/23914241/sag-aftra-strike-negotiations>

¹⁶⁴ Petras & Zarracina, *supra* note 158.

¹⁶⁵ *Id.*

¹⁶⁶ *How your SAG-AFTRA Governance Works*, SAG-AFTRA (n.d.), available at <https://www.sagaftra.org/about/governance>



agreements, oversight of member benefit programs, public relations strategy, and approving the constitution and bylaws for all local branches.¹⁶⁷ SAG-AFTRA has 25 local sub-branches of the union that are divided geographically with their own jurisdictions.¹⁶⁸ There does not appear to be any substantive differences among the local branches outside of their geographic locations and the consequent size. Some of the local sub-branches are in locations that are more strongly associated with the type of work that SAG-AFTRA covers (i.e., New York and Los Angeles); therefore, they hold a position of particular importance relative to other locals. Each of the sub-branches have authority to ratify and enter into local CBAs and initiate strikes subject to approval by the national board.¹⁶⁹

Similarly, governance in the NCAA's Division I also has multiple layers. In addition to being subject to NCAA rules, all Division I institutions are members of an athletic conference¹⁷⁰ that can set its own additional rules and enforce those rules¹⁷¹ within the guidelines of the NCAA. The conferences are somewhat geographically organized, although there has been a recent wave of conference realignment that saw some schools join conferences that are well outside of their geographic footprint.¹⁷² Similar to some SAG-AFTRA locals holding places of relative importance, some Division I conferences are far more prestigious than others and being a member of one of those conferences can imbue an institution with a high degree of earning power.

For example, the aforementioned Big Ten media rights deal gives each of the conference's member institutions an annual payout of \$100 million.¹⁷³ Comparatively, the American Athletic Conference (also in the FBS) is set to receive \$83.3 million

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ SAG-AFTRA CONSTITUTION at Art. X, § B(5), SAG-AFTRA (Oct. 16, 2021), available at https://www.sagaftra.org/files/sa_documents/2021%20SAG-AFTRA%20Constitution%20w-Updated%20Rules%202021%200417.pdf.

¹⁷⁰ While there are a few schools that are "independent" in FBS football (Notre Dame, the University of Massachusetts, and the University of Connecticut), their other athletic teams are members of a conference. Most non-football sports at Notre Dame participate in the Atlantic Coast Conference, non-football sports at the University of Massachusetts mostly participate in the Atlantic-10 Conference, and most non-football sports at the University of Connecticut participate in the Big East Conference. See *NCAA Division I FBS Independent Schools*, WIKIPEDIA, https://en.wikipedia.org/wiki/NCAA_Division_I_FBS_independent_schools (last visited Jan. 7, 2024).

¹⁷¹ See, e.g. Heather Dinich, *Michigan's Jim Harbaugh accepts Big Ten's 3-game suspension*, ESPN (Nov. 16, 2023), https://www.espn.com/college-football/story/_/id/38914714/michigan-jim-harbaugh-accepts-big-ten-3-game-suspension.

¹⁷² See NCAA 2023: College football realignment tracker, ESPN (Sept. 1, 2023), https://www.espn.com/college-football/story/_/id/35804245/cfb-conference-realignment-tracker-2023.

¹⁷³ Rittenburg, *supra* note 75.



per year total to be divided among its member schools.¹⁷⁴ The television revenue is negotiated by the conference and split evenly among the member schools, even if one of the schools does not carry the same media value as its counterparts. For example, Rutgers (a member of the Big Ten conference) receives the same revenue as the larger Big Ten brands despite ranking 58th in college football viewership last year with an average of 618,000 viewers.¹⁷⁵ By contrast, the United States Naval Academy ranked 40th with an average of 976,000 viewers yet receives far less revenue due to its membership in the far less lucrative American Athletic Conference.¹⁷⁶ Further, Rutgers' viewership numbers were buoyed by virtue of playing against three teams in the top 10 for average viewership and six total teams inside of the top 20,¹⁷⁷ whereas Navy had just one opponent that was ranked inside the top 50.¹⁷⁸ Despite the fact that Navy was a far more attractive media draw, Rutgers received and will continue to receive much higher television revenue distributions just by virtue of being a member of the Big Ten conference.

Yet another way that NCAA athletes have a degree of natural separation and governance from one another is the different sports they play. There are 24 different NCAA-sponsored sports,¹⁷⁹ each with varying playing seasons and each with varying fan interest and the corresponding ability to produce revenue. The overwhelming majority of revenue in collegiate athletics comes from football and men's basketball,¹⁸⁰ leading some to believe that only athletes in those sports should be deemed employees.¹⁸¹

Such a structure raises a litany of problems of its own. While it is true that there are major revenue production discrepancies among the sports, as the Rutgers and

¹⁷⁴ Michael Smith & John Ourand, *AAC, ESPN Agree To 12-Year Media-Rights Deal Worth \$1B*, SPORTS BIZ. J. (Mar. 19, 2019), <https://www.sportsbusinessjournal.com/Daily/Closing-Bell/2019/03/19/AAC.aspx>.

¹⁷⁵ Zach Miller, *Which College Football Programs Were the Most-Watch in 2022*, MEDIUM (Nov. 30, 2022), <https://medium.com/run-it-back-with-zach/which-college-football-programs-were-the-most-watched-in-2022-94eca4f6acbd>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (showing the rankings of the following teams on Rutgers' schedule: 1. Ohio State, 3. Michigan, 9. Penn State, 16. Nebraska, 17. Michigan State, 19. Maryland)

¹⁷⁸ *Id.* (showing Notre Dame ranked sixth).

¹⁷⁹ NCAA, *supra* note 21.

¹⁸⁰ See Andrew Zimbalist, *Analysis: Who is winning in the high-revenue world of college sports?* PBS (March 18, 2020), <https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports> (explaining that "almost all" revenue generated by NCAA sports comes from football and men's basketball).

¹⁸¹ Edelman *supra* note 120, at 1652-1653. See also Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into The Alt-Labor Future*, 95 CHICAGO-KENT L. REV. 187 (2019).



Navy example illustrates, major discrepancies still exist even within a single division of a single sport (Division I FBS football). Thus, it appears that the revenue-producing ability of an athletic team is much more closely tied to conference affiliation than it is with what sport it plays. Further, the governance and NCAA guidelines that athletes are subject to varies little by sport. Sports may have different playing seasons, calendars, and scholarship limits, but the vast majority of NCAA regulations apply equally to athletes in every sport. Union sub-branches divided among the conferences—in a manner similar to SAG-AFTRA’s differing sub-branches for its different geographic sectors—is a more logical approach.¹⁸²

ii. Union Size & Membership Requirements

At 160,000 members nationwide, SAG-AFTRA has a similar size to the 188,710 athletes that compete in NCAA Division I intercollegiate athletics. As discussed *infra*, scholarship athletes have a much stronger case for employee status (and thus the ability to unionize) than their non-scholarship counterparts. Only 58% of Division I athletes receive an athletic scholarship, which would put membership at nearly 110,000.¹⁸³

While these may seem like large numbers, SAG-AFTRA does not crack the top 10 of union membership in the United States, some of which boast membership numbers in excess of 1 million.¹⁸⁴ With the NLRB’s ruling in American Steel Construction, Inc.¹⁸⁵ making it more difficult for employers to expand the size of unions, there is little risk that such a challenge by the NCAA would deem a scholarship athlete labor union overly exclusive.

Similar to the concept of a job being nebulous in the college athletics context, it is difficult to find consistent, steady work in the film and entertainment industry.¹⁸⁶ This can make it difficult to decide who is truly actively “employed” and thus eligible for union membership. Determining who is eligible for union membership always represents a bit of a balancing act. A union needs to be exclusive enough to meet

¹⁸² See William W. Berry III, *Amending Amateurism: Saving Intercollegiate Athletics Through Conference-Athlete Revenue Sharing*, 37 ALA. L. REV. 540, 575 (2016).

¹⁸³ NCAA, *supra* note 152.

¹⁸⁴ Monica Herald, *The Largest Labor Unions in the US*, WORLD ATLAS (March 16, 2020), <https://www.worldatlas.com/articles/the-largest-labor-unions-in-the-us.html>.

¹⁸⁵ 372 NLRB No. 23 (2022).

¹⁸⁶ See Blaine Roth, *Tuning into the On-Demand Streaming Culture- Hollywood Guilds’ Evolution Imperative in Today’s Media Landscape*, 27 UCLA ENT. L. REV. 141, 142 (2020) (describing the impermanent nature of jobs in the television and film industry.)



the community of interest tests under the NLRA,¹⁸⁷ but an overly exclusive union welcomes legal challenges not only from those who would like to be in the union but do not meet eligibility requirements, but also the employer.

Employers prefer larger unions for a multitude of reasons, one of which is that a larger union means fewer entities with which they must collectively bargain and fewer parties outside of the union that may have their own individual interests. A more cynical reason is that a more inclusive union can allow for easier manipulation of CBAs by employers as they can make offers and concessions that appeal only to the union members on the fringes of the job market and have only detrimental impacts to those with real negotiating leverage.

An example of this in the sport context is the current CBA between the National Football League (NFL) and the NFL Players' Association (NFLPA). The current CBA was agreed to in 2020 and included an extra regular season game (up to 17 from 16), which is something the league and owners have long coveted.¹⁸⁸ While concessions are always necessary in collective bargaining, experts believe the players did not get nearly enough in return for this particular concession.¹⁸⁹ Many of the NFL's star players felt the same and spoke out, urging their fellow players to vote no.¹⁹⁰

This raises the question as to how the CBA was passed. With 500 players abstaining from the vote, the CBA was approved by just a 60 vote margin (1,019-959)¹⁹¹ due largely in part to concessions that helped out the lowest level NFL players such as expanded rosters (i.e., more jobs) and increased minimum salaries.¹⁹² Notably, there

¹⁸⁷ See *Am. Steel Const. and Local 25*, 372 N.L.R.B. No. 23, at 2 (2022) (describing and reinstating the community of interest test.) Per this decision's definition of the community of interest test, the Board is to consider:

1. Whether employees "are organized into a separate department";
2. Whether employees have "distinct skills and training," have "distinct job functions," and "perform distinct work" while also examining "the amount and type of job overlap between classifications"; and,
3. Whether employees are "functionally integrated with the employer's other employees," have "frequent contact with other employees," "interchange with other employees," have "distinct terms and conditions of employment," and are "separately supervised."

Id.

¹⁸⁸ Andrew Brandt, *The Inequities of the Proposed CBA*, SPORTS ILLUSTRATED, (March 3, 2020), <https://www.si.com/nfl/packers/news/brandt-the-inequities-of-the-proposed-cba>.

¹⁸⁹ *Id.* See also Geoff Schwartz, *Why NFL players Voted to Approve the New CBA, Despite its Clear Flaws*, SB NATION (March 16, 2020), <https://www.sbnation.com/nfl/2020/3/16/21180683/nfl-players-vote-approve-cba-collective-bargaining-agreement-reasons-money>.

¹⁹⁰ Schwartz, *supra* note 187.

¹⁹¹ *Id.*

¹⁹² Dan Graziano, *NFL CBA Approved: What Players Get in New Deal, How Expanded Playoffs and Schedule Will Work*, ESPN (March 15, 2020), https://www.espn.com/nfl/story/_/id/28901832/nfl-cba-approved-players-get-new-deal-how-expanded-playoffs-schedule-work.



are 32 NFL teams with an active roster of 53 (expanded to 55 in the CBA) for a total of 1,760 players. With 1,978 votes and another 500 eligible voters who abstained, there is a large discrepancy between the NFLPA membership and the number of active NFL players (718 total players or roughly 29% of the membership).

This indicates that the NFLPA is perhaps overly inclusive in its membership. Per the NFLPA Constitution, any player who is employed by an NFL team or is party to an NFL player contract is eligible for membership.¹⁹³ Additionally, “[a] player actively seeking employment as a professional football player shall also be eligible to be a member of the NFLPA.”¹⁹⁴ By allowing those who are simply seeking jobs in the NFL to vote, the NFLPA made it easier for the owners to get their 17th game by expanding rosters. It is likely that many of those who voted “yes” on the CBA were still not able to make an NFL team and are therefore not subject to the obligations and benefits of the CBA.

SAG-AFTRA takes a different (and likely more effective) approach to union membership. If it allowed everyone who was merely “seeking employment” in its covered industries into the union as the NFLPA does, SAG-AFTRA would likely include nearly every waiter in Los Angeles as well.¹⁹⁵ However, if SAG-AFTRA limited its membership to just A-List celebrities, there would be little need for a labor organization as those celebrities possess plenty of negotiating leverage individually. SAG-AFTRA strikes a balance by having a threshold to join that goes beyond merely “seeking employment” but is still low enough to give those actors on the fringes the ability to gain union membership. Background actors need only attain three days of work, while the threshold for a principal or speaking actor is one day of work.¹⁹⁶ Indeed, despite the vast diversity of SAG-AFTRA members’ employment, it is difficult to find an historical example of its “community of interests” facing a legal challenge.¹⁹⁷

A college athlete labor union would need a similarly low, yet present and specifically defined, threshold for union membership. As discussed *infra*, it is prudent to use the awarding of an athletic scholarship as the threshold for union membership.

¹⁹³ NFLPA Constitution at Art. II §2.01 (2023), available at https://nflpaweb.blob.core.windows.net/website/New-Constitution_05_26_2023-002.pdf.

¹⁹⁴ *Id.*

¹⁹⁵ See Tori Latham, *The Hollywood Strikes are Pushing Actors Back into Restaurant Work*, ROBB REPORT (Oct. 16, 2023), <https://robbreport.com/food-drink/dining/hollywood-strikes-actors-writers-restaurant-work-1235348176/> (describing the fact that all waiters and servers in Los Angeles are aspiring actors as an old cliché); Leah Rosen, *The First Role for Many Actors: Waiter*, THE NEW YORK TIMES (May 19, 2016), <https://www.nytimes.com/2016/05/22/theater/the-first-role-for-many-actors-waiter.html>

¹⁹⁶ SAG-AFTRA CONSTITUTION, *supra* note 167, at Art. III, § A(1)(a); *Steps to Join*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/steps-join> (last visited Jan. 7, 2024).

¹⁹⁷ See Howard D. Fabrick, *Unique Aspects of Labor Law in The Entertainment Industry*, 31 ENT. & SPORTS LAWYER 1, 31 (2015).



iii. Disparity of Economic Interests

Perhaps one of the most unique aspects of SAG-AFTRA that is particularly prescient to collegiate athletics is the major disparity of economic interests and/or earning potential of its members. Some SAG-AFTRA members can garner eight-figure and even nine-figure payments for their performance in a single movie,¹⁹⁸ while others struggle to find consistent acting work and wait tables to make ends meet.¹⁹⁹ Somewhere in the middle of those two extremes are popular NPR hosts who do not have near the earning potential of major movie stars, but can earn comfortable six-figure salaries and are also members of SAG-AFTRA.²⁰⁰ The union navigates these discrepancies by focusing its collective bargaining on bare minimum protections for its members on the fringes while not limiting the earning potential of the union's biggest stars.²⁰¹ This is a vital feature of this union and a major reason why it is able to represent such a wide variety of workers. It is also something that none of the major professional sports players' associations have been able to accomplish, as every major sports league has some degree of collectively bargained for salary control.²⁰²

Such a focus and structure would be vital to the success and survival of a scholarship athlete union. Because of the vast disparity in earning potential that is apparent both across and within the various sports, conferences, and even individual institutions, it may be difficult to get the athletes with high earning potential on the same page as their peers with considerably less. The main focus of the larger union's collective bargaining would have to be on minimum requirements for all athletes, while individuals, sub-units, etc. would be permitted to use their high earning leverage to negotiate higher wages. While it is true that football and men's basketball produce the vast majority of revenue for athletic departments,²⁰³ all athletes have

¹⁹⁸ See Greg Macarthur, *10 Highest Paid Movie Actors of All Time*, SCREEN RANT (Jul. 12, 2023), <https://screenrant.com/highest-paid-actors-movie-star-salaries-all-time/>.

¹⁹⁹ See Latham, *supra* note 193.

²⁰⁰ See, e.g., Alicia C. Shepard, *Scott Simon's Salary and Steak Knives*, NPR (Sept. 30, 2009), <https://www.npr.org/sections/publiceditor/2009/09/30/113182682/scott-simons-salary-and-steak-knives>.

²⁰¹ See Roth, *supra* note 184, at 144 (discussing the prevalence of the minimum basic agreement in SAG.)

²⁰² The NFL and NHL both have hard caps on the amount of money that each team is allowed to pay its players. The NBA has a "soft-cap" system and has a cap on the maximum allowable salary for any individual player. MLB does not have a salary cap, but they do have a "competitive balance tax" that is imposed on teams who spend above a predetermined threshold, and it has had at least a moderate chilling effect on the size of MLB player contracts. For further discussion and comparison, see generally Daniel A. Rascher & Andrew D. Schwarz, *Competitive Balance in Sports: "Peculiar Economics" Over the Last 30 Years*, 31 ENT., ARTS, & SPORTS J. 11 (Winter 2020).

²⁰³ Zimbalist, *supra* note 178.



similarly grueling schedules trying to balance their sport, academics, and personal lives.²⁰⁴ It is likely that all Division I scholarship athletes have very similar interests as it pertains to non-economic issues. Issues such as practice time limits and their enforcement, additional time off during holidays, academic freedom and support, and procedural safeguards for disciplinary actions are unlikely to vary among athletes simply because of their gender or the respective sport they play.²⁰⁵ Indeed, the largest disparity of interests among college athletes lies only in economic issues, particularly revenue sharing.

iv. High Membership Turnover

SAG-AFTRA membership has a high degree of turnover, to the point where it previously passed rules making it more difficult to rejoin the union if a member drops out to help combat the prevalence of members joining and leaving depending on what was most convenient for the time and job prospect(s).²⁰⁶ This is due, in part, to the low threshold required to attain SAG-AFTRA membership and the highly competitive nature of the jobs that SAG-AFTRA covers.

Similarly, a collegiate athletic career is, by definition, a relatively short-term profession. Generally, NCAA rules provide that, once an athlete enrolls at a member institution, they have five calendar years to compete in four competitive seasons.²⁰⁷ For many athletes, when they arrive on campus as freshmen they are “redshirted,” which means they practice with the team, but they do not participate in the actual competitions. They then participate in practices and competitions for the next four years until their eligibility expires. With a typical career lasting only five years, organizing and developing a cultural center and competency becomes difficult. This issue would not be wholly unique to college athletics (or SAG-AFTRA).

²⁰⁴ Marcel Lopes Dos Santos et. al., *Stress in Academic and Athletic Performance in Collegiate Athletes: A Narrative Review of Sources and Monitoring Strategies*, 2 FRONTIERS IN SPORTS & ACT. LIVING 1, 4 (2020); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 97 (2006); Nw. Univ., No. 13-RC-121359, 2014 WL 1246914, at *14–15 (N.L.R.B. Mar. 26, 2014).

²⁰⁵ See e.g., Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFFALO L. REV. 1003, 1072-1073 (2012); Nicholas P. Ensinger, *Whether Equivalency Scholarship College Athletes could be Employees Under the NLRA*, 54 U. TOL. L. REV. 119, 151-52 (2022).

²⁰⁶ Carl Diorio, *New SAG Rules Make it Harder for Comebacks*, HOLLYWOOD REPORTER (June 14, 2007), <https://www.hollywoodreporter.com/business/business-news/new-sag-rules-make-harder-138799/>

²⁰⁷ 2022-23 NCAA DIVISION I MANUAL, *supra* note 49, at § 12.8.1.



The average career for a player in the NFL is a mere 3.3 years, making this turnover a particular challenge.²⁰⁸ While not perfect, the NFLPA has made significant strides for the players it represents including free agency, a pension, and greater health and safety regulations.²⁰⁹ The distinguishing characteristic, however, between college athletes and the NFL players/SAG-AFTRA members, is that while the average amount of time as a member in each of these unions is low, there are a decent contingent of members whose tenure in the union far exceeds the average, therefore providing a degree of continuity. It is likely prudent to also look to graduate student unions for solutions to the transient membership problem.

The prevalence of graduate student unions has grown in recent years;²¹⁰ however, they have been around since 1969.²¹¹ Similar to temporary employees, the right of graduate student employees at private colleges to unionize seems to oscillate based on the membership of the NLRB.²¹² Further, the (hopefully) temporary nature of being a graduate student makes union organizing difficult, as there is a lack of continuity.²¹³ To help with this, many graduate student unions are aided by an affiliate union such as the United Auto Workers Union (UAW), which has been prominent in the rise of graduate student unions.²¹⁴ Affiliating with a much more established and stable labor union is vital to the success of any union with high membership turnover and would be a necessity for a union of college athletes. Further, it appears that existing labor unions would be interested in helping, as the local branch of the SEIU in Concord, New Hampshire, backed the thus-far successful petition to the NLRB to

²⁰⁸ John Keim, *With Average NFL Career 3.3 Years, Players Motivated to Complete MBA Program*, ESPN, (Jul. 19, 2016), https://www.espn.com/blog/nflnation/post/_/id/207780/current-and-former-nfl-players-in-the-drivers-seat-after-completing-mba-program.

²⁰⁹ *Our History of Wins*, NFLPA, <https://nflpa.com/about/history> (last visited Jan. 7, 2024).

²¹⁰ See Vimal Patel, *Graduate-Student Union Efforts Gain Momentum, Despite New Uncertainties*, CHRONICLE OF HIGHER ED. (Jan 6., 2017), <https://www.chronicle.com/article/graduate-student-union-efforts-gain-momentum-despite-new-uncertainties/>.

²¹¹ Parbudyal Singh, Deborah M. Zinni & Anne F. MacLennan, *Graduate Student Unions in the United States*, 27 J. LABOR RES. 55, 57 (2006).

²¹² See Vimal Patel, *A New Era for Grad-Student Organizing*, THE CHRONICLE OF HIGHER ED. (Aug. 26, 2016), <https://www.chronicle.com/article/a-new-era-for-grad-student-organizing/>.

²¹³ Singh et al., *supra* note 208, at 69.

²¹⁴ *Id.* at 62-63; Patel, *supra* note 209.



recognize Dartmouth College basketball players as a union.²¹⁵ SAG-AFTRA would also make a logical choice as an affiliate union for college athletes.²¹⁶

v. Needed Benefits Not Provided by Employers

Major portions of the employment that SAG-AFTRA members receive is considered temporary, and thus the only supplemental benefits they receive for their work are those that they can individually negotiate. This means that typically the employer does not provide actors with health insurance or retirement. To help assuage this issue, SAG-AFTRA has developed its own health insurance plan, pension, and retirement plan.²¹⁷ It also provides other resources to its members through education and seminars to help navigate the difficult industry.²¹⁸

NCAA athletes are not provided primary medical coverage by the NCAA, and athletes are in fact mandated to have their own medical coverage that is great enough to cover the deductible for the NCAA's Catastrophic Injury Insurance Program.²¹⁹ This could leave athletes or their families liable for thousands in medical expenses, even for injuries that occur during the course of a competition.²²⁰ Further, because the schools are not allowed to compensate the students directly, there is no pension or retirement planning. The closest analog is that some schools used to provide loss of value protection for athletes who had legitimate prospects of playing professionally to protect against an injury, and now some of the higher-resourced schools provide critical injury insurance for some of their athletes. Both are allowable under the

²¹⁵ Michael McCann & Daniel Libit, *SEIU Lays Claim to Dartmouth Basketball in Unionization Push*, SPORTICO (Sept. 14, 2023), <https://www.sportico.com/law/analysis/2023/dartmouth-college-mens-basketball-union-1234738665/>. See Decision and Direction of Election, Dartmouth College, *supra* note 15. See also *supra* notes 140-142 and accompanying text.

²¹⁶ See also Michael McCann, *College Athlete Pay Push Looks to SAG-AFTRA Reality TV Rules*, SPORTICO (Sept. 18, 2023), <https://www.sportico.com/law/analysis/2023/college-athlete-union-reality-tv-1234738888/> (highlighting arguments from a management consultant that SAG-AFTRA should allow college athletes to join the union outright)

²¹⁷ *Member Benefits*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/member-benefits> (last visited Jan. 7, 2024).

²¹⁸ *Id.*

²¹⁹ 2022-23 NCAA Division I Manual, *supra* 49, § 20.2.4.9.

²²⁰ See Nicole Kline, *Bridging the NCAA's Accident Insurance Coverage Gaps? A Deep Dive into the Uncertainties of Injury Coverage in College Contact Sports, and the Impact that has on Athletes' Future Physical and Financial Comfort*, 31 J. L. & HEALTH 55, 64 (2018).



NCAA.²²¹ The overwhelming majority of college athletes, even in the revenue sports, do not play professional sports, thus their peak athletic value is during their collegiate years. A union-provided pension plan would be a welcome benefit for college athletes.

Yet another benefit that SAG-AFTRA provides is the certification or “franchising” of talent agents and representation.²²² At current there is no structure in place for the NCAA, conferences, or member institutions to certify player agents. As previously discussed, this has led to some questionably competent representation of college athletes in the NIL space. A union looking out for the best interests of its members by vetting and certifying agents could prove highly beneficial to college athletes.

V. Modeling a Proposed College Athlete Labor Union on SAG-AFTRA

A. The Potential Membership Eligibility Structures of a SAG-AFTRA Model College Athlete Labor Union

With 192,000 athletes in NCAA’s Division I, the size of the membership would not be an insurmountable issue even if it included every single athlete in the division. However, inclusion of all Division-I athletes is likely folly. In addition to the aforementioned issues that come along with an overly inclusive union, many of those 192,000 athletes were/are unrecruited and “walked on” to the team.

Because of NCAA rules regarding scholarship limits that vary by sport, no single athletic team can offer scholarships to every player it would like to have on the team. For example, NCAA bylaws allow for up to 110 athletes to participate in football practice prior the school’s first day of classes,²²³ and does not provide a limit to the total number of players on a roster once classes have started, but the NCAA limits the number of football scholarships to 85.²²⁴ The teams then fill out their roster with “walk-on” players who do not receive any athletic scholarship money for their play. With some exceptions, walk-ons are typically not recruited and seldom participate in team athletic competitions. They are largely students who chose to go to a certain institution in mere hopes of making the team during tryouts. While there are

²²¹ See Daniel Libit, *Critical Injury Insurance Gains Value Amid NIL, NCAA Changes*, SPORTICO (Sept. 2, 2022), <https://www.sportico.com/leagues/college-sports/2022/college-athlete-critical-injury-1234687267/>.

²²² *Frequently Asked Questions*, SAG-AFTRA, <https://www.sagaftra.org/contracts-industry-resources/agents-managers/frequently-asked-questions> (last visited Jan. 7, 2024).

²²³ 2022-23 NCAA DIVISION I MANUAL, *supra* 49, § 17.11.3.1.2.

²²⁴ *Id.* at § 15.5.6.1.



compelling stories of walk-on players eventually earning a scholarship²²⁵ and significant playing time, that is not the experience of the vast majority of walk-on athletes.

If NCAA institutions were forced to pay these unrecruited athletes, it is possible they would simply no longer have walk-ons, thus removing opportunities to participate and putting extra strain on scholarship athletes, as teams would have fewer participants to run practices. If a potential labor union would not be inclusive of all NCAA athletes, this begs the question as to who should be eligible for membership in a hypothetical college athlete labor union.

Some in the legal community have posited employee status for athletes in “revenue sports” only.²²⁶ This is a term that generally refers to the highest revenue-producing sports in the NCAA and is typically inclusive of only football and men’s basketball,²²⁷ although some consider women’s basketball in this category as well. The legal premise for excluding the vast majority of NCAA athletes from employment status is difficult to ascertain; however, the idea appears to have originated from a concurring opinion in *Berger v. NCAA*.²²⁸ As discussed previously, *Berger* involved women’s, non-scholarship track and field athletes suing for minimum wage wherein the Court ultimately ruled against the plaintiff athletes.²²⁹ In a concurring opinion, Judge Hamilton admits skepticism regarding whether the court’s “reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports...”²³⁰

Further fueling this narrative, in 2021 NLRB general counsel Jennifer Abruzzo posited in her memo that scholarship football players at Northwestern University and “other similarly situated Players at Academic Institutions, are employees under the NLRA.”²³¹ The memo never fully defines what is meant by “similarly situated,” but as football is the highest revenue-producing sport in the NCAA, it is plausible that the board intended that to mean revenue sport athletes.

²²⁵ See, e.g., ESPN, *Special Moments when Walk-Ons get Surprise Scholarships*, YouTube (Sep. 9, 2017), <https://youtu.be/DCKUYhPGHuk>

²²⁶ Edelman, *supra* note 120; Corrada, *supra* note 179.

²²⁷ See, e.g., Zimbalist, *supra* note 178 (explaining that almost all revenue generated by NCAA sports comes from football and men’s basketball.)

²²⁸ 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring).

²²⁹ *Id.* at 289. See also *supra* notes 107-109 and accompanying text.

²³⁰ *Id.* at 294 (Hamilton, J., concurring).

²³¹ N.L.R.B. Guidance Mem. 21-08 at 3 (Sept. 29, 2021), available at <https://www.nlrb.gov/guidance/memosresearch/general-counsel-memos>.



Indeed, this exclusive membership structure would likely be challenged by excluded athletes and would certainly raise a high degree of Title IX scrutiny.²³² Further, the reasoning for delineating employee versus non-employee by revenue production is inherently flawed. There are several legal tests to determine whether an individual is an employee, and none of them use revenue production as a factor.²³³ This would nonsensically preclude large swaths of the American workforce from employee status.

The happy medium between the overly inclusive structure of allowing all Division I athletes and the overly exclusive structure of only allowing football and men's basketball athletes is to create a union consisting of all scholarship athletes in Division I. It is possible, even likely, that the excluded athletes (in this case walk-ons) would take exception to their exclusion and even take legal action, but it is unlikely to gain much traction. There is a much weaker argument for non-scholarship athletes to claim employment status when they voluntarily participate in their respective sports without any expectation of compensation (not even a scholarship).²³⁴ If a walk-on athlete found the athletic schedule too arduous or did not like how things were going on the team, they could simply choose to no longer participate in athletics with no impact to their status or funding at the school. If a scholarship athlete wants to walk away from the team, it greatly impacts how they are going to be able to fund their education.

Further, a scholarship is the closest analog the NCAA membership institutions and their athletes have to an employment agreement. Scholarship athletes are actively recruited and are offered a form of compensation (scholarship, room and board, housing, etc.) in return for their services (participating on the athletics team and representing the institution in competition). The same cannot be said for walk-on athletes. While it is true that, outside of initial recruiting and game days, the time commitment and other expectations of walk-ons are similar to their scholarship counterparts, this fact alone does not necessitate that both scholarship athletes and walk-on athletes be treated identically under existing labor law. Paid employees and unpaid volunteers work side-by-side in similar roles frequently in the nonprofit sector and this is generally allowed under the FLSA.²³⁵ Notably, all NCAA Division

²³² See, e.g., Elizabeth Reinbrecht, *Northwestern University and Title IX: One Step Forward for Football Players, Two Steps Back for Female Student Athletes*, 47 U. TOLEDO L. REV. 243 (2015) (discussing Title IX's application to the NLRB regional board's initial decision permitting football players at Northwestern University to unionize.)

²³³ See, e.g., *Dawson v. NCAA*, 932 F.3d 905, 910 (9th Cir. 2019) (noting that "precedent demonstrates that revenue does not automatically engender or foreclose the existence of an employment relationship under the FLSA.")

²³⁴ *Berger*, 843 F.3d at 294 (Hamilton, J., concurring) (comparing and contrasting scholarship and nonscholarship college athletes within the context of the economic reality of their relationships.)

²³⁵ See 29 CFR § 553.101 (1987)



I institutions are nonprofit organizations.²³⁶ Whether walk-on athletes would fit the legal definition of “volunteer” is beyond the scope of this article.

B. How a SAG-AFRA Model Addresses Financial Feasibility Arguments

Critics of employment status for college athletes are quick to point out the financial challenges this would bring for college athletic departments.²³⁷ Indeed, only a small portion of athletic departments generate more revenue than expenses on paper.²³⁸ However, those numbers do not tell the full story. The NCAA brings in over \$1 billion annually for the television rights to the men’s basketball tournament alone,²³⁹ which pales in comparison to the revenue the member conferences and institutions bring in. The notion that most athletic departments lose money for their institutions is based, at least in part, on unique accounting practices, flawed economic analysis, and poor resource allocation.²⁴⁰

According to the NCAA’s own research, coaching and administrative salaries totaled \$5.5 billion at the Division I level in 2021 while another \$2.5 billion was spent on lavish athletics facilities.²⁴¹ By contrast, only \$2.9 billion went toward athletics scholarships.²⁴²

²³⁶ See Tim Rohan, *For-Profit University’s Shift to Division I Stokes Debate*, N.Y. TIMES, Nov. 30, 2012, at B10 (explaining that Grand Canyon University was to be the first and only school competing in NCAA Division I); Doug Lederman, *Grand Canyon Sues U.S. Over Nonprofit Status Ruling*, INSIDE HIGHER ED (Jan. 14, 2023), <https://www.insidehighered.com/news/2021/01/15/grand-canyon-sues-us-education-department-rejecting-its-conversion-nonprofit-status> (explaining that GCU is recognized as a non-profit organization by the IRS but considered a for-profit institution by the Dept. of Education.)

²³⁷ See, e.g., Christine Colwell, *Playing for Pay or Playing to Play: Student-Athletes as Employees Under the Fair Labor Standards Act*, 79 LOUISIANA L. REV. 900, 933 (2019); Cody J. McDavis, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275 (2018); John I. Jenkins & Jack Swarbrick, *College Sports Are a Treasure. Don’t Turn Them into the Minor Leagues*, N.Y. TIMES (Mar. 23, 2023).

²³⁸ See *Finances of Intercollegiate Athletics: Division I Dashboard*, NCAA.ORG, available at <https://www.ncaa.org/sports/2022/10/14/finances-of-intercollegiate-athletics-division-i-dashboard.aspx> (showing that the number of schools who reported positive net generated revenue was 10 in 2021 compared to 20 in 2020).

²³⁹ NCAA.com, *Turner, CBS, and the NCAA Reach Long-Term Multimedia Rights Extension for DI Men’s Basketball*, NCAA (Apr. 12, 2016), <https://www.ncaa.com/news/basketball-men/article/2016-04-12/turner-cbs-and-ncaa-reach-long-term-multimedia-rights>.

²⁴⁰ See, e.g., Eben Novy Williams, *Maybe Colleges Should Be Adding Sports, Not Dropping Them*, SPORTICO (Jul. 2, 2020), <https://www.sportico.com/leagues/college-sports/2020/maybe-colleges-should-be-adding-sports-not-dropping-them-1234608297/>.

²⁴¹ See *Finances of Intercollegiate Athletics: Division I Dashboard*, *supra* note 349.; See also, Jeffrey Petersen & Lawrence W. Judge, *Reframing the Collegiate Facilities Arms Race: The Looming Impact of NIL and Conference Realignment*, 13 J. APPLIED SPORT MGMT 36 (2021).

²⁴² *Id.*



With these numbers in mind, it is clear that there are ample areas for athletic departments to remove excess, allowing them to increase compensation to athletes. Salaries for head football coaches are extravagant with at least 81 coaches making more than \$1 million annually.²⁴³ On top of inflated salaries, these coaches often receive lucrative buyouts when they get fired for poor performance.²⁴⁴ For example, Jimbo Fisher was relieved of his head coaching duties at Texas A&M University after the 2023 football season and will receive a total buyout of roughly \$76 million.²⁴⁵ When Nebraska decided to part ways with then head coach Scott Frost (a Nebraska alum) during the 2022 season, it could have saved \$7.5 million on his buyout had it fired him just a few weeks later (which still would have been in-season), but it could not exercise such patience and thus owed him a buyout of \$15 million.²⁴⁶ Spending on athletic facilities for Division I institutions has risen 204% from 2005-2020, due at least in part to the fact that as non-profit entities athletic departments find ways to raise expenses whenever they get an increase in revenue.²⁴⁷

While athletic scholarships are counted as a major expense for athletic departments, their calculation can be a bit misleading. Institutions frequently calculate this number based on the price of that institution's out of state tuition, regardless of how many athletes would be considered "in-state."²⁴⁸ Further, while the cost of an out-of-state tuition scholarship appears as an expense on the athletic department's budget, the actual cost of such a scholarship to the institution is negligible.²⁴⁹ If an institution

²⁴³ *College Football Head Coaches Salaries*, USA TODAY, <https://sports.usatoday.com/ncaa/salaries/football/coach> (last visited Oct. 2, 2023).

²⁴⁴ See Len Simon, *How College Athletes Finally Got Paid*, *WASH. MONTHLY* (Jun. 19, 2023), <https://washingtonmonthly.com/2023/06/19/how-college-athletes-finally-got-paid/> (noting that "in the past decade, public universities spent \$530 million on coaches they had already fired.")

²⁴⁵ Pete Thamel, *Jimbo Fisher fired by Texas A&M, to Receive Record Buyout*, ESPN (Nov. 12, 2023), https://www.espn.com/college-football/story/_/id/38880082/jimbo-fisher-expected-fired-texas-sources-confirm

²⁴⁶ Shehan Jeyarajah, *Nebraska Fires Scott Frost: Cornhuskers Pay Massive Buyout to Dismiss Coach Three Games into Fifth Season*, CBS SPORTS (Sep. 11, 2022), <https://www.cbssports.com/college-football/news/nebraska-fires-scott-frost-cornhuskers-pay-massive-buyout-to-dismiss-coach-three-games-into-fifth-season/>

²⁴⁷ Jeffrey Petersen and Lawrence W. Judge, *Reframing the Collegiate Facilities Arms Race: The Looming Impact of NIL and Conference Realignment*, 13 *J. APPLIED SPORT MGMT* 36, 37-38 (2021).

²⁴⁸ *About Sportico's Intercollegiate Finance Database*, SPORTICO (Nov. 10, 2021), <https://www.sportico.com/leagues/college-sports/2021/about-sporticos-college-sports-1234645998/>.

²⁴⁹ *Id.*



is already offering classes to its student body, and those classes are not completely full, the cost of adding athletes to these classes are low, assuming that athlete is not replacing a student who would otherwise pay full price.²⁵⁰

Undoubtedly, paying wages to athletes who previously were unpaid will add expenses to any athletic department's budget; however, the costs may be lower than speculated. Employment status under FLSA would only dictate that the athletes are paid minimum wage (currently \$7.25 per hour federally) and overtime. Any compensation beyond that, including sharing of revenue, would be subject to individual or collective bargaining (assuming the bargaining unit exists), meaning the institutions, conferences, and/or the NCAA would have some control and presumably be able to avoid negotiating themselves into a venture that loses (more) money.²⁵¹

Further, FLSA §3(m) allows for goods and services in kind to be credited toward employee wage payments so long as those goods and services meet five requirements: (1) that they are customarily provided, (2) voluntarily accepted, (3) in compliance with statutes, (4) primarily benefit the employee (in this case the athlete), and (5) that the employer keep accurate records.²⁵² While direct payment from colleges to their athletes has long been and continues to be prohibited, institutions customarily provide other benefits to their athletes including meals, housing, clothing, and scholarships.²⁵³ An in-depth analysis of these benefits under 3(m) revealed that the meals, housing, and clothing provided to athletes could potentially be credited as wage payments to employees.²⁵⁴ But the largest benefit provided, the scholarship, could

²⁵⁰ See also Daniel A. Rascher et al., *Because It's Worth it: Why Schools Violate NCAA Rules and the Impact of Getting Caught in Division I Basketball*, 12 J. ISSUES INTERCOLLEGIATE ATHLETICS 226, 240 (2019).

²⁵¹ See e.g. Alicia Jessop et. al., *Charting a New Path: Regulating College Athlete Name, Image and Likeness After NCAA v. Alston Through Collective Bargaining*, 37 J. SPORT MGMT 307, 314 (2023).

²⁵² Sam C. Ehrlich, "But They're Already Paid": *Payments In-Kind, College Athletes, and the FLSA*, 123 W. VA. L. REV. 1, 21 (2020). See, e.g., *Roces v. Reno Housing Authority*, 300 F. Supp. 3d 1172, 1185-93 (D. Nev. 2018) (applying these five requirements in practice to employer-provided lodging for apartment maintenance workers.) See also generally 29 U.S.C. § 203(m)(1) (2020).

²⁵³ Ehrlich, *supra* note 248, at 13-17.

²⁵⁴ *Id.* at 35-46.



likely not be credited toward wages.²⁵⁵ A carve out to explicitly allow for athletic scholarships to be credited toward wages under FLSA 3(m) would likely be a much more fruitful lobbying effort for the NCAA than its current efforts to lobby for an antitrust exemption.

With athletes gaining employment status and thus permissibly paid for playing, the need for NIL collectives would largely cease to exist. Many collectives have questionable business value, and appear to be thinly veiled pay for play.²⁵⁶ Some are even set up as non-profit organizations with the stated purpose of putting money into the pockets of athletes at a specific institution.²⁵⁷ Some of these collectives manage millions of dollars in assets and are largely funded by individuals and businesses that already donate money to the university athletic department, which has created “donor fatigue” for some high-profile donors.²⁵⁸ It is plausible that the money that is funding these donor-led collectives would be diverted back to the athletic departments, thus offsetting some of the costs associated with paying the athletes.

Tables 1 and 2 reflect the revenue for the 2021-2022 academic year of athletic departments in two athletic conferences: the Southeastern Conference (SEC) and the Sun Belt Conference. The SEC is one of the larger athletic conferences in terms of both revenue and on-field success. The Sun Belt is a lower level Division I conference with much smaller budgets. The two conferences share a similar geographic footprint with both conferences having institutions in Texas, Mississippi, Alabama, Georgia,

²⁵⁵ *Id.* at 45-56. The rationale of the author is under the second and fourth requirements, that the benefit be voluntarily accepted and primarily benefit the employee. While in most cases where tuition assistance programs are offered by employers as employment benefits this requirement is fairly easy to satisfy, scholarships for NCAA college athletes function more like employer-supplied licenses rather than actual benefits in the sense that since NCAA rules require athletes to be part of a degree program to be eligible for intercollegiate competition, a university paying for that degree program can be favorably compared to an employer paying for an employee’s license to work in a certain field—a “benefit” found repeatedly in case law to not be creditable under § 3(m) even if the license is transferable and/or has benefits to the employee beyond simply giving them license to do their job for the supplying employer. *Id. See, e.g.,* Lilley v. IOC-Kansas City, No. 19-cv-00553, 2019 WL 5847841, at *3 (W.D. Mo. 2019) (holding that a gaming license fee supplied by a casino employer to an employee is not creditable under § 3(m) because the license “is a cost arising from employment and not arising in the ordinary course of life” despite the fact that the supplied license was “portable in that employees can use the licenses to work at other Missouri casinos.”)

²⁵⁶ Matt Brown, *What Can Research Tell Us About How to Make an Effective NIL Deal?*, EXTRA POINTS (Aug. 31, 2023), <https://www.extrapointsmb.com/p/can-research-tell-us-make-effective-nil-deal> (describing the bulk of NIL activity as talent-acquisition fees.)

²⁵⁷ *Some Nonprofit NIL Collectives May Not Qualify as Tax-Exempt*, ESPN (Jun. 30, 2023), https://www.espn.com/college-sports/story/_/id/37939005/some-nonprofit-nil-collectives-not-qualify-tax-exempt.

²⁵⁸ Matt Brown, *Here’s One Way NIL Collectives Could Fight Donor Fatigue*, EXTRA POINTS (Jun. 28, 2023), <https://www.extrapointsmb.com/p/heres-one-way-nil-collectives-fight-donor-fatigue>.



Table 1. Athletic Department Revenue for Southeastern Conference (SEC) Schools, 2021-2022

Southeastern Conference (SEC)	Total Athletes ¹	Scholarship Estimate	Total Revenue ²	50% Share for Athletes	Revenue Share/Scholarship Athlete
Alabama	636	368.88	\$214,370,000.00	\$107,185,000.00	\$290,568.75
Arkansas	470	272.6	\$152,510,000.00	\$76,255,000.00	\$279,732.21
Auburn	505	292.9	\$174,570,000.00	\$87,285,000.00	\$298,002.73
Florida	560	324.8	\$190,420,000.00	\$95,210,000.00	\$293,134.24
Georgia	571	331.18	\$203,050,000.00	\$101,525,000.00	\$306,555.35
Kentucky	577	334.66	\$159,080,000.00	\$79,540,000.00	\$237,674.06
LSU	505	292.9	\$199,310,000.00	\$99,655,000.00	\$340,235.58
Ole Miss	411	238.38	\$133,560,000.00	\$66,780,000.00	\$280,140.95
Mississippi State	372	215.76	\$110,650,000.00	\$55,325,000.00	\$256,419.17
Missouri	552	320.16	\$141,160,000.00	\$70,580,000.00	\$220,452.27
South Carolina	584	338.72	\$142,210,000.00	\$71,105,000.00	\$209,922.65
Texas A&M	643	372.94	\$193,140,000.00	\$96,570,000.00	\$258,942.46
SEC Totals	6,386	3703.88	\$2,014,030,000.00	\$1,007,015,000.00	\$271,881.11

¹ All "Total Athlete" and "Total Revenue" figures were retrieved from the Knight-Newhouse College Athletics Database, available at <https://knightnewhousedata.org/>.

² *Id.*

Arkansas, Louisiana, and South Carolina. Vanderbilt of the SEC was left off of the chart because it is a private school and its financial information is not publicly available. It is worth noting that four of the schools²⁵⁹ listed in the Sun Belt were not part of the Sun Belt for the fiscal year provided but have since joined the conference. The scholarship estimate is a result of multiplying the total number of athletes by the national average of 58% of all NCAA Division I athletes receiving a scholarship.²⁶⁰ To estimate potential revenue sharing, we used a benchmark of 50% of all revenue as a share for students. This is, by no means, intended to be a prediction of what potential revenue share college athletes would garner through collective bargaining

²⁵⁹ James Madison, Marshall, Old Dominion, and Southern Mississippi.

²⁶⁰ NCAA, *supra* note 152.



Table 2. Athletic Department Revenue for Sun Belt Conference Schools, 2021-2022

Sun Belt Conference (SBC)	Total Athletes ¹	Scholarship Estimate	Total Revenue ²	50% Revenue Share for Athletes	Revenue Share/ Scholarship Athlete
Appalachian State	485	281.3	\$38,540,000.00	\$19,270,000.00	\$68,503.38
Arkansas State	360	208.8	\$32,380,000.00	\$16,190,000.00	\$77,538.31
Coastal Carolina	496	287.68	\$45,440,000.00	\$22,720,000.00	\$78,976.64
Georgia Southern	395	229.1	\$30,070,000.00	\$15,035,000.00	\$65,626.36
Georgia State	345	200.1	\$45,670,000.00	\$22,835,000.00	\$114,117.94
James Madison*	499	289.42	\$57,800,000.00	\$28,900,000.00	\$99,854.88
Louisiana (Lafayette)	418	242.44	\$33,020,000.00	\$16,510,000.00	\$68,099.32
Louisiana - Monroe	319	185.02	\$19,120,000.00	\$9,560,000.00	\$51,670.09
Marshall*	436	252.88	\$39,340,000.00	\$19,670,000.00	\$77,783.93
Old Dominion*	453	262.74	\$53,420,000.00	\$26,710,000.00	\$101,659.44
South Alabama	387	224.46	\$39,120,000.00	\$19,560,000.00	\$87,142.48
Southern Mississippi*	358	207.64	\$28,360,000.00	\$14,180,000.00	\$68,291.27
Texas State	349	202.42	\$37,290,000.00	\$18,645,000.00	\$92,110.46
Troy	382	221.56	\$33,360,000.00	\$16,680,000.00	\$75,284.35
SBC Totals	5,682	3295.56	\$532,930,000.00	\$266,465,000.00	\$80,855.76

¹ *Id.*

² *Id.*



but it is roughly what the major professional sport league players receive.²⁶¹ The last column reflects the athlete share of revenue (50% of all revenue) divided by the total number of scholarship athletes at the institution to get a rough estimate of revenue per athlete. This is not a prediction or endorsement of all athletes being paid equally, it is only intended to show a mean number per athlete.

The data illustrates that there is a very wide disparity in terms of the revenue per scholarship athlete between the SEC and the Sun Belt Conference. Additionally, every institution in the Sun Belt relies on some form of direct institutional support and/or student fees to balance its athletic department budget and in some cases the reliance is substantial. Coastal Carolina's athletic department, for example, receives roughly 73% of its revenue from direct institutional/government support.²⁶² Whether schools would or should use direct institutional support or student fees to pay their athletes is arguable. While some SEC athletic departments receive direct institutional support and student fees, the proportion for those athletic departments is much lower than the Sun Belt, as the SEC's other sources of revenue, particularly from media rights, are much higher than those in the Sun Belt. Notably, even the Sun Belt institutions in this calculation have a per athlete share that is more than double NCAA President Charlie Baker's proposal of \$30,000 per athlete per year in an "educational trust fund."²⁶³

These numbers indicate that athletes in smaller conferences would have much more limited earning potential than those in the larger conferences and some form of revenue sharing among the conferences may be necessary. The willingness of conferences to share revenue among each other does not appear to be present in the current landscape;²⁶⁴ however, revenue sharing is a common practice in major professional sports.²⁶⁵

²⁶¹ Thomas Thomas Jr., *Profitable Partnerships: Athletes, NIL, and the Evolution of TV Revenue Sharing*, SPORTS BIZ. J. (Oct. 25, 2023), <https://www.sportsbusinessjournal.com/Articles/2023/10/25/oped-25-thomas.aspx>.

²⁶² Coastal Carolina University, *Knight-Newhouse College Athletics Database*, KNIGHT COMMISSION/SYRACUSE UNIV., available at <https://knightnewhousedata.org/fbs/sunbelt/coastal-carolina-university> (last visited Jan. 8, 2024).

²⁶³ David Ubben, *Charlie Baker Details NCAA Proposal on Athlete Compensation, Commissioners React*, THE ATHLETIC (Dec. 6, 2023), https://theathletic.com/5118246/2023/12/06/ncaa-charlie-baker-proposal-athlete-compensation/?redirected=1&source=googlesearch&access_to_ken=12979140

²⁶⁴ Conferences regularly poach institutions from other conferences in an effort to garner a more attractive television deal. See, e.g., Doug Lederman, *Conference Realignment Poses Threats to Big-Time Sports*, INSIDE HIGHER ED. (Sept. 5, 2023), <https://www.insidehighered.com/news/students/athletics/2023/09/05/conference-realignment-poses-risks-big-time-college-sports>.

²⁶⁵ See, e.g. Thomas Thomas Jr., *Profitable Partnerships: Athletes, NIL, and the Evolution of TV Revenue Sharing*, SPORTS BIZ. J. (Oct. 25, 2023), <https://www.sportsbusinessjournal.com/Articles/2023/10/25/oped-25-thomas.aspx>.



C. How a SAG-AFRA Model Addresses Fears of Negative Title IX Implications

Regardless of employment structure, there would undoubtedly be issues with Title IX to sort through. Title IX refers to the eponymous section of the Education Amendments of 1972 and was intended to prevent discrimination on the basis of sex in any educational program that receives federal funds.²⁶⁶ While its original intent had little to do with athletics, its practical implication in college sports has been profound.

Through Dear Colleague letters and other guidance, Title IX has evolved to require three broad categories of compliance for gender equity in collegiate athletics: (1) athletic scholarships, (2) benefits and services, and (3) effective accommodation of students' interest and abilities.²⁶⁷ Most relevant to the compensation of college athletes is the second prong and in the time leading up to the current NIL era, scholars disagreed as to whether NIL was a Title IX issue at all.²⁶⁸ Despite the fact that football and men's basketball account for more than 80% of the overall NIL market,²⁶⁹ this compensation has, thus far, been at least partially shielded from Title IX scrutiny as the money comes from outside sources.²⁷⁰ While there has yet to be a legal challenge regarding NIL compensation under Title IX, the collectives becoming further intertwined with schools has led to increasing concern that Title IX lawsuits may be on the horizon.²⁷¹ Well-known sports economist and Drake Group president Andrew Zimbalist wrote a letter to the Department of Education and the Office of Civil Rights calling on them to issue a clear warning to institutions, conferences, and the NCAA "that actions by 'collectives' will be attributed to the universities when

²⁶⁶ 20 U.S.C. § 1681-82.

²⁶⁷ See, e.g., *Cohen v. Brown University*, 991 F.2d 888, 897-98 (1st Cir. 1993) (demonstrating and discussing this three-prong test.) For contextual discussion, see also e.g., Tan Boston, *As California Goes, So Goes the Nation: A Title IX Analysis of the Fair Pay to Play Act*, 17 STAN. J. C.R. & C.L. 1, 22 (2021).

²⁶⁸ Compare Jessop & Sabin, *supra* note 62, at 270-274 (arguing that because NIL payments are made by third parties to athletes and not by the schools themselves, Title IX was unlikely to apply) and Boston, *supra* note 263 (arguing that even third party payments could be under the purview of Title IX.)

²⁶⁹ *Top Sports by NIL Compensation Through August 2023*, OPENDORSE, <https://biz.opendorse.com/nil-insights/> (last visited Nov. 16, 2023). It is worth pointing out that Opendorse numbers need to be taken with a grain of salt as athlete NIL deals are not typically publicly available and the Opendorse numbers only reflect deals formed through the Opendorse ecosystem. Given Opendorse's placement as a leader in the NIL marketplace, however, the cited numbers can be used as a rough sample of the overall market for these limited circumstances.

²⁷⁰ See generally Jessop & Sabin, *supra* note 62.

²⁷¹ See Eric Prisbell, *NCAA president warns NIL could lead to Title IX implications for school-affiliated collectives*, ON3 (Apr. 26, 2023), <https://www.on3.com/nil/news/ncaa-president-warns-nil-could-lead-to-title-ix-implications-for-school-affiliated-collectives/>.



appropriate.²⁷² While interested parties are trying to sort out whether the activities of NIL collectives fall under the purview of Title IX, the question of how college athlete employment and Title IX would interact remains largely untested.²⁷³

An athlete employment model would entail direct wages paid from the employer (the institutions) to the employees (athletes), thus likely triggering much greater Title IX scrutiny than the current NIL landscape as the claim that the source of compensation is not subject to Title IX becomes wholly irrelevant. As discussed *supra*, football and men's basketball produce the vast majority of revenue in the current college athletics landscape, leading some to believe that the athletes in those sports should exclusively be the athletes who are paid as employees.²⁷⁴ However, such a model wherein women are excluded from employment opportunities is likely to give rise to a number of employment discrimination claims, including Title IX. The question then becomes whether Title IX would require that women athletes receive equal compensation to their male counterparts. There is no jurisprudence or guidance surrounding Title IX employment discrimination claims for college athletes; however, the closest analog for such a claim is that of coaches of women's teams who have filed Title IX claims.²⁷⁵ While it has provided minimal protection for women coaches, Title IX has not been a particularly effective tool for closing the wage gap between coaches of men's and women's teams.²⁷⁶ The equal pay act has been similarly ineffective in closing the coaching compensation gap as courts have consistently found that coaching a men's team is significantly different from coaching a women's team, therefore justifying the disparity in compensation.²⁷⁷ It is plausible that courts

²⁷² The Drake Group Letter to Officials at the OCR/DOE at 6, (Jan. 10, 2023) available at <https://www.thedrakegroup.org/wp-content/uploads/2023/01/FINAL-Drake-Letter-to-OCR-1-10-23-1.pdf>. The Drake Group is a nonprofit advocacy organization whose stated mission is to “educate policymakers and advance legislative initiatives that foster academic integrity and athlete wellbeing in intercollegiate athletics.” See *Mission and Goals*, THE DRAKE GROUP, <https://www.thedrakegroup.org/about/mission-and-goals/>.

²⁷³ See, e.g., Ehrlich, *supra* note 119, at 41 (discussing a circuit split as to whether sex-based discrimination relief for is only available through the “less expansive” Title VII or whether Title IX can be used as a basis for a student-employee claim as well.) It is worth noting that Ehrlich argues in a footnote to this discussion that this circuit split may not even apply to student-employees (including college athletes) as the case law holding more narrowly that only Title VII could be applied all had more plaintiffs who were more traditional employees while the all of the case law involving *student-employees* found that both Title VII and Title IX could apply to the discrimination claims. Ehrlich, *supra* note 119, at 41 n. 7.

²⁷⁴ Edelman, *supra* note 120; Corrada, *supra* note 179.

²⁷⁵ See Joseph Sabin et al., *Gender Employment Discrimination in Intercollegiate Sport: A Review of Case Law*, J. NCAA COMPLIANCE (May-Jun. 2022), available at <https://sportslitigationalert.com/gender-employment-discrimination-in-intercollegiate-sport-a-review-of-case-law/>.

²⁷⁶ *Id.*

²⁷⁷ *Id.*



would rule similarly on the issue of disparities in compensation among male and female athletes and determine that paying athletes somewhat commensurate to their revenue production is allowable.

An athlete employment model is certain to raise novel issues in regards to Title IX. More analysis is needed; however, a system that allows for male athletes to be paid at the absolute exclusion of women athletes is likely to bring forth significant legal challenges.

VI. The Alternative: A Legal Minefield

While the NCAA is staunchly fighting against athlete employment, and the voluntary recognition of athletes as employees (and themselves as joint employers) seems unlikely, the alternative that awaits the NCAA if it receives an unfavorable ruling in *Johnson*, or if states begin passing legislation that recognizes athletes as employees, appears particularly grim. If, for example, the court in *Johnson* deems that college athletes are employees of their school, the patchwork and inconsistency that the NCAA laments in the current NIL era will only get worse. As discussed in the *Northwestern* case, athletes at private institutions would be immediately eligible to unionize under the NLRA, but this represents a small percentage of NCAA Division I institutions. The NLRA is only applicable to private employers; therefore, if athletes at publicly funded institutions are deemed employees of said institutions, the NLRA would not apply. Those athletes would be subject to their state's labor laws. A 2012 analysis of state labor laws revealed that college athletes would likely be able to unionize in several states.²⁷⁸ However, not all state labor unions have the same collective bargaining power and leverage. In 15 states, the government is not obligated to collectively bargain with public-sector unions.²⁷⁹ In five states, the government is specifically prohibited from collective bargaining with public-sector unions.²⁸⁰ This greatly limits the leverage of state employees in those states.

Non-unionized athlete labor would likely present a familiar problem for the NCAA. In the absence of uniform rules and collective bargaining, institutions would need to meet the individual demands of the most talented athletes to persuade them to play on their athletic teams. This would inevitably lead to boosters at various institutions attempting to outbid one another for these athletes' services. Further complicating

²⁷⁸ Fram & Frampton, *supra* note 202, 1038-1068.

²⁷⁹ Eric J. Brunner & Andrew Ju, *State Collective Bargaining Laws and Public-Sector Pay*, 72 IND. & LAB. RELATIONS REV. 480, 487 (2019). (listing Alabama, Arizona, Arkansas, Colorado, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, Tennessee, Utah, West Virginia, and Wyoming as states that have "CB allowed")

²⁸⁰ *Id.* (listing Georgia, North Carolina, South Carolina, Texas, and Virginia as states that have "CB prohibited")



matters is that several institutions would likely be limited as to how much they can offer an individual recruit by virtue of their own collective bargaining agreements. These are the very problems that administrators and the NCAA have with the current NIL system. This is likely among the many reasons that all of the major professional sport leagues voluntarily recognized their respective players associations.

There are further questions as to what employee under the FLSA would mean for athletes at public institutions in certain states. Despite the fact that the FLSA explicitly applies to private, state, and federal workers, the enforceability of an FLSA claim against an arm of the state may depend upon that state's sovereign immunity statute pursuant to the Supreme Court ruling in *Alden v. Maine*.²⁸¹ In at least two cases involving higher education institutions in states with multiple NCAA Division I universities (Texas and New Mexico) the courts ruled that the institutions could not be sued for FLSA overtime claims from employees as they had sovereign immunity from the suits.²⁸² Universities in states with similar sovereign immunity statutes and jurisprudence could, in theory, opt not to pay their athlete employees who would, in turn, have little to no recourse under the FLSA, further adding to the lack of uniformity among the states in an athlete-employee world. An in-depth analysis of each state's sovereign immunity statutes is beyond the scope of this paper, but it is illustrative of the potential for unforeseen legal issues to arise in such a patchwork system.

VII. Conclusion

Much like it did with NIL rights, the NCAA seems content to fight the athlete-employment battle until the bitter end, regardless of public pressure or increasing futility. If the NCAA gets dragged kicking and screaming into this era (as it was with NIL), it is difficult to see a scenario wherein the entity wields any real control over the "amateur" athletic competitions which it is charged to govern. The prudent maneuver for the NCAA, its member conferences, and its member institutions is to voluntarily recognize that their athletes are employees and that they, in turn, are joint employers. While this route has its fair share of challenges, none of them are wholly unique to college athletics, and each of them have been successfully navigated in the past—most notably by SAG-AFTRA. Each of the major professional sports leagues voluntarily recognized their respective players associations; the NCAA should take the lead of its more successful (and at least slightly less litigated) professional counterparts.

²⁸¹ 577 US 706 (1999).

²⁸² *Wells v. Tex. A&M Univ. System*, No. 06-04-00001, 2004 WL 2114438 (Tex. App. Sep. 24, 2004); *Cockrell v Bd. of Regents of New Mex. St. Univ.*, 45 P.3d 876 (N.M. 2002). See Ehrlich, *The FLSA and the NCAA's Potential Terrible, Horrible, No Good, Very Bad Day*, *supra* note 111, at 102-05.

