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Amateur Hour Is Over: Time for College Athletes to Clock In Under the FLSA

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AMATEUR HOUR IS OVER: TIME FOR COLLEGE ATHLETES TO CLOCK IN UNDER THE FLSA

Nicholas C. Daly*

ABSTRACT

The debate surrounding the National Collegiate Athletic Association's (NCAA) amateurism principles has waged for decades. The governing body of college athletics insists that the athletes who compete on a daily basis should not—or shall not—receive any compensation in exchange for their services while NCAA executives line their pockets with billions of dollars each year. This concept of “no pay for play” has drawn national criticism since the NCAA created the term “student-athlete” in the 1950s to combat a workers’ compensation claim. The amateurism principles were concocted as an attempt to prevent college athletes from being classified as employees of their universities; put more plainly, the NCAA intentionally labeled college athletes as “amateurs” to deny the athletes the compensation they are entitled to.

* Editor in Chief, *Georgia State University Law Review*; J.D. Candidate, 2021, Georgia State University College of Law. Thank you to Professors Jack Williams, Moraima Ivory, and Kelly Timmons for your guidance, commentary, and feedback throughout the process of drafting this Note. Thank you to my colleagues and classmates from the *Georgia State University Law Review* for your time, attentiveness, and dedication to reviewing and editing this Note to prepare it for publication and thank you for your friendship throughout law school. Thank you to the judges and clerks whom I have had the great fortune of working with and learning from while in law school; your guidance and mentorship have helped me grow as a writer, as a student, and as a person. Thank you to my friends and family outside of law school for indulging me in conversations about this Note and law school more generally; your support and encouragement throughout this journey have meant more to me than you could understand. Finally, and most importantly, thank you to Claude Felton and all of those in the University of Georgia Sports Communications Department for giving me the opportunity of a lifetime—one that allowed me to develop my love of sports and my passion for college athletes’ rights. Though the arguments and opinions expressed in this Note may not be shared by all of those in the office, thank you all for your kindness, support, and mentorship during my time in Athens, Georgia, and beyond. Thank you for making me feel like part of your family.

Athletes have challenged the NCAA's amateurism principles under the Fair Labor Standards Act (FLSA) in the past, petitioning courts to recognize athletes as "employees" of their universities, but to no avail. Courts traditionally rely on an "economic reality" test to determine whether an employer–employee relationship exists, entitling the petitioning party to guaranteed protections under federal labor laws. In the context of college athletics, however, the economic reality of the relationship between the athletes, their universities, and the NCAA is traditionally defined by the NCAA's concept of amateurism. But what happens when amateurism is exposed for the sham of a concept it truly is?

*This Note explores how recent judicial, legislative, and societal events have eviscerated the credibility of the NCAA's amateurism principles. Specifically, this Note argues that a district court order, though issued in the antitrust context, precludes future courts from relying on the amateurism principles to define the economic reality of college athletics. The case, *In re National Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litigation* (Alston), exposes the hypocrisy behind the NCAA's compensation rules in a way that changes the calculus of an FLSA challenge and demands a finding that college athletes qualify as employees under federal labor laws. Now, the Supreme Court is set to get involved, granting certiorari to review Alston and allow the Court to assess the amateurism principles for the first time in thirty-five years. With the pressure surrounding the NCAA's exploitation of college athletes reaching an all-time high, this Note proposes that the NCAA proactively abandon its commitment to its antiquated concept of amateurism and afford college athletes the basic fundamental rights they are entitled to through collective bargaining and group licensing agreements.*

The NCAA has stubbornly insisted on labeling college athletes as "amateurs" when reality reflects that the athletes are anything but. In fact, the only distinguishing factor that separates college athletes from their professional counterparts is the arbitrary—and frankly insulting—label that the NCAA desperately clings to. No longer can the charade continue. The NCAA's time is up; amateur hour is over.

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INTRODUCTION

Picture this: a billion-dollar industry growing at a rate faster than Fortune 500 corporations that prohibits the very individuals responsible for generating such revenue from earning their fair share.¹ Something seems inherently wrong with this scenario, but this is the reality of college athletics.² The National Collegiate Athletic

1. SENATOR CHRIS MURPHY, MADNESS, INC.: HOW EVERYONE IS GETTING RICH OFF COLLEGE SPORTS—EXCEPT THE PLAYERS 2 (2019); NAT'L COLLEGIATE ATHLETIC ASS'N, 2019–20 NCAA DIVISION I MANUAL art. 12.1.2 (2019) [hereinafter NCAA DIVISION I MANUAL]; Jay D. Lonick, Note, *Bargaining with the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA As an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 138 (2015). The National Collegiate Athletic Association's (NCAA) Division I Bylaws directly prohibit college athletes from receiving "any direct or indirect salary, gratuity or comparable compensation" in return for their athletics services, unless such compensation qualifies as an educational expense. NCAA DIVISION I MANUAL, *supra*, at arts. 12.1.2.1, 15.01.1.

2. See generally NCAA DIVISION I MANUAL, *supra* note 1, at art. 12.1.2.1; Brian Murphy, *NCAA Must Allow Players to Profit from Name and Image, NC Republican's New Bill Says*, THE NEWS & OBSERVER [hereinafter Murphy, NC NIL Bill], <https://www.newsobserver.com/sports/article227181209.html> (Mar. 7, 2019, 2:45 PM) ("[T]he current set-up is denying athletes—99.4 percent of whom . . . won't collect a paycheck from a professional sports organization—a chance to monetize their talents."). Following the lead of many journalists in the past, and more recently the editors of *The Daily Tar Heel*, the University of North Carolina's student newspaper, this Note uses the term "college athlete" rather than "student-athlete" to describe those engaging in college athletics. John Feinstein, *The NCAA Uses 'Student-Athlete' As a Weapon. Some College Journalists Just Stripped It Away.*, WASH. POST (Aug. 19, 2020, 10:46 AM), <https://www.washingtonpost.com/sports/2020/08/19/daily-tar-heel-student-athletes-unc/> [https://perma.cc/Z38A-T3ZC]. The term "student-athlete" is really a derogatory label that the NCAA concocted to bolster the illusion that college athletes are students first and not workers who deserve their fair share of the millions of dollars they generate for their universities and the NCAA. *Id.* ("[T]he term 'student-athlete' has been used for years by college administrators, coaches and (sadly) some in the media as a barrier to the notion that college athletes should be compensated for the work they do—and for the millions of dollars they help generate for their schools."). As the *Daily Tar Heel* editors eloquently wrote, "[t]o accept the term 'student athlete' is to accept the NCAA and the nation's college athletic departments' agenda that these athletes are not employees and to silence the voices of these athletes." The Daily Tar Heel Staff, *The Daily Tar Heel Will No Longer Use the Term 'Student Athlete.'* DAILY TAR HEEL (Aug. 9, 2020, 8:17 PM), <https://www.dailytarheel.com/article/2020/08/student-athlete-term-editorial> [https://perma.cc/D3PA-D59A]. National outlets, such as *Sports Illustrated*, have since followed suit. Feinstein, *supra*; see also Julie Kliegman (@jmkliegman), TWITTER (Aug. 11, 2020, 10:54 AM), <https://twitter.com/jmkliegman/status/1293199236021080064?s=20>. As the antiquated concept of amateurism topples, so too must the stilts that have propped up its hypocritical principles for so long. See Feinstein, *supra* ("The term 'student-athletes' has been a naked hypocrisy for years, used by the media and others to promote absurd myths dreamed up by the emperors of college athletics.").

Association (NCAA) justifies the prohibition on compensating college athletes by hiding behind the facade of “amateurism.”³ The NCAA vehemently insists that amateurism is a bedrock principle of the organization’s existence yet fails to actually define the term in its Division I Bylaws.⁴ Traditionally, amateurism is understood to stand for the proposition that college athletes must not receive compensation in exchange for their participation in intercollegiate athletics.⁵ But this concept of amateurism ignores the ever-changing makeup of the market surrounding college athletics.⁶ Fortunately for the athletes, recent developments in the judiciary, legislature, and even the NCAA’s internal Board of Governors signal that times are indeed changing.⁷

3. Christine Colwell, Comment, *Playing for Pay or Playing to Play: Student-Athletes As Employees Under the Fair Labor Standards Act*, 79 LA. L. REV. 899, 913 (2019) (stating that amateurism ensures “that student-athletes focus on attaining a quality education and preserving the idea that student-athletes do not play for pay”).

4. See *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig. (Alston I)*, 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019) (“[The NCAA] offer[s] no stand-alone definition of amateurism . . . in the NCAA rules.”), *aff’d*, 958 F.3d 1239 (9th Cir. 2020). See generally NCAA DIVISION I MANUAL, *supra* note 1, at art. 2.9.

5. *Alston I*, 375 F. Supp. 3d. at 1071 (“[The NCAA] and their witnesses often describe amateurism by reference to what they say it is not: namely, amateurism is not ‘pay for play.’”). See generally NCAA DIVISION I MANUAL, *supra* note 1, at art. 12.

6. MURPHY, *supra* note 1, at 12 (“The NCAA and collegiate sports more broadly no longer primarily benefit the players. The current system does more to advance the financial interests of broadcasters, apparel companies, and athletic departments than it does for the student-athletes who provide the product from which everyone else profits.”).

7. See generally Pamela A. Maclean & Eben Novy-Williams, *NCAA Loses Critical U.S. Court Ruling on Athlete Compensation*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2019-03-09/ncaa-loses-critical-u-s-court-ruling-on-pay-for-play> [<https://perma.cc/8RYF-SBAM>] (Mar. 8, 2019, 11:09 PM) (discussing the most recent landmark judicial ruling in *Alston I*, 375 F. Supp. 3d 1058, that the NCAA’s compensation rules violate federal antitrust laws); Michael McCann, *What’s Next After California Signs Game Changer Fair Pay to Play Act into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019) [hereinafter McCann, *California Game Changer*], <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12> [<https://perma.cc/75W3-BU9F>] (discussing state legislation creating a statutory right for college athletes to profit from the commercial use of their names, images, and likenesses (NILs) and noting that college sports fans should “buckle up” because “times may be changing”); Dan Murphy, *NCAA, Congress Have Labyrinth of Options, but NIL Clock Is Ticking*, ESPN (Dec. 17, 2020) [hereinafter Murphy, *Congressional NIL Options*], https://www.espn.com/college-sports/story/_/id/30534578/ncaa-congress-labyrinth-options-nil-clock-ticking [<https://perma.cc/77RR-HJTG>] (discussing multiple forms of proposed federal legislation that would allow college athletes to

In September of 2019, California became the first state in the country to create a legal right for college athletes to earn compensation for the commercial use of their name, image, and likeness (NIL).⁸ The “Fair Pay to Play Act” stoked an already intense debate surrounding the NCAA’s compensation regulations and ignited a trend of legislators across the country proposing similar legislation in their respective states.⁹ Florida and Colorado notably passed similar legislation in the summer of 2020.¹⁰ While the

earn compensation for the commercial use of their NILs in various ways, subject to varying restrictions); Steve Berkowitz & Dan Wolken, *NCAA Board of Governors Opens Door to Athletes Benefiting from Name, Image and Likeness*, USA TODAY: COLLEGE, <https://www.usatoday.com/story/sports/college/2019/10/29/ncaa-board-opens-door-athletes-use-name-image-and-likeness/2492383001/> [<https://perma.cc/LZM7-AZ9Y>] (Oct. 29, 2019, 9:26 PM) (discussing the NCAA Board of Governors’ unanimous vote to allow college athletes to benefit from the commercial use of their NILs); Steve Berkowitz, *NCAA Unveils Proposed Rules Changes Related to Athletes’ Name, Image and Likeness*, USA TODAY: COLLEGE [hereinafter Berkowitz, *NCAA Unveils Proposed Rules Changes*], <https://www.usatoday.com/story/sports/college/2020/11/13/ncaa-nil-name-image-likeness-proposal/6281507002/> [<https://perma.cc/JNC2-EYFR>] (Nov. 13, 2020, 2:15 PM) (discussing the NCAA’s proposed rules changes that would allow college athletes to benefit from the commercial use of their NILs).

8. McCann, *California Game Changer*, *supra* note 7. The Fair Pay to Play Act essentially codifies the landmark decision in *O’Bannon v. National Collegiate Athletic Ass’n (O’Bannon II)*, 802 F.3d 1049 (9th Cir. 2015), discussed *infra* Section I.A. McCann, *California Game Changer*, *supra* note 7.

9. Sam C. Ehrlich, *The FLSA and the NCAA’s Potential Terrible, Horrible, No Good, Very Bad Day*, 39 LOY. L.A. ENT. L. REV. 77, 78 (2019) (“[T]he call to give student-athletes their fair share [of the revenue they generate] has only intensified.”); Billy Witz, *California Lawmakers Vote to Undo N.C.A.A. Amateurism*, N.Y. TIMES, <https://www.nytimes.com/2019/09/09/sports/college-athlete-pay-california.html> [<https://perma.cc/XNJ8-XL3H>] (Sept. 11, 2019); Robert Pearl, *Coronavirus Poses 5 Huge Threats to the Future of Sports*, FORBES (Aug. 25, 2020, 6:30 AM), <https://www.forbes.com/sites/robertpearl/2020/08/25/coronavirus-future-of-sports/#38e02fe0792a> [<https://perma.cc/W5NX-KF8V>] (“[T]he death of so-called amateurism in sports has been a long time coming.”); *see also* Alan Blinder & Billy Witz, *In Push to Play, College Football Stars Show Sudden Unity*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/sports/ncaafotball/coronavirus-college-football-players.html> [<https://perma.cc/BRR3-W6KX>].

10. Zachary Zagger, *Ball in Congress’ Court As States Tackle NCAA Athlete Pay*, LAW360.COM (Aug. 26, 2020), <https://www.law360.com> (search in search bar for “Ball in Congress’ Court As States Tackle NCAA Athlete Pay”) (“Since then, however, both Colorado and Florida have passed similar legislation to allow college athletes to be paid for the use of their names, images and likenesses—often referred to as NIL.”). For a detailed overview of the Florida law, *see* Steve Berkowitz, *Florida Governor Signs Bill on College Athletes’ Name, Image and Likeness*, USA TODAY: COLLEGE [hereinafter Berkowitz, *Florida NIL Law*], <https://www.usatoday.com/story/sports/college/2020/06/12/florida-bill-college-athletes-name-image-likeness/5347470002/> [<https://perma.cc/AF7P-U9HB>] (June 12, 2020,

California and Colorado laws do not take effect until 2023, Florida's law takes effect on July 1, 2021, forcing the NCAA to make quick but substantial adjustments to the governing body's compensation regulations.¹¹ Collectively, these laws represent a tremendous threat to the NCAA's amateurism principles, and over half of the country is following suit.¹²

3:28 PM). For a detailed overview of the Colorado law, see Steve Berkowitz, *Colorado Governor Signs College Athlete Name, Image and Likeness Bill*, USA TODAY: COLLEGE [hereinafter Berkowitz, *Colorado NIL Law*], <https://www.usatoday.com/story/sports/college/2020/03/20/colorado-governor-signs-college-athlete-name-image-likeness-bill/2887481001/> [<https://perma.cc/USP7-83RY>] (Mar. 20, 2020, 6:11 PM).

11. Dan Murphy, *Florida Name, Image, Likeness Bill Now a Law; State Athletes Can Profit from Endorsements Next Summer*, ESPN (June 12, 2020) [hereinafter Murphy, *Florida NIL Law*], https://www.espn.com/college-sports/story/_/id/29302748/florida-name-image-likeness-bill-now-law-meaning-state-athletes-profit-endorsements-next-summer [<https://perma.cc/3XR4-72F4>] ("Florida's law puts additional pressure on NCAA leaders by significantly shrinking the timeline for them to enact the type of uniform national changes they say they prefer."). Because the California and Colorado laws do not go into effect until 2023, experts are pessimistic about the likelihood of such laws having the effect their drafters intended, particularly because the NCAA could challenge the legality of such laws. Will Hobson & Ben Strauss, *The California Governor Signed a Law to Let NCAA Athletes Get Paid. It's Unclear What's Next.*, WASH. POST (Sept. 30, 2019, 11:08 AM), https://www.washingtonpost.com/sports/colleges/california-lawmakers-voted-to-let-ncaa-athletes-get-paid-its-unclear-whats-next/2019/09/10/80d0a324-d3e6-11e9-9343-40db57cf6abd_story.html [<https://perma.cc/U29Z-RQ4P>] ("[T]here are reasons to be pessimistic this bill will be implemented in 2023 as written."); Dan Murphy, *California Defies NCAA As Gov. Gavin Newsom Signs into Law Fair Pay to Play Act*, ESPN (Sept. 30, 2019) [hereinafter Murphy, *California NIL Law*], https://www.espn.com/college-sports/story/_/id/27735933/california-defies-ncaa-gov-gavin-newsom-signs-law-fair-pay-play-act [<https://perma.cc/5M2C-FAPU>] ("[I]f California and the NCAA remain at odds in 2023, the Fair Pay to Play Act will likely lead to lawsuits The NCAA contends that the new law is unconstitutional because it violates rules that protect interstate commerce."). The Florida law, however, contains a number of unique provisions that seem to "represent an attempt to address" some of the NCAA's concerns about the California and Colorado laws—namely, allowing athletes to "more easily monetize [NIL] than they can under current NCAA rules." Berkowitz, *Florida NIL Law*, *supra* note 10. As a result, "Florida lawmakers believe that their law would [be] less susceptible to legal challenge from the NCAA than California's law because it only directs schools in the state to allow athletes to have greater freedom regarding their NIL—it does not address the NCAA." *Id.*; see also Murphy, *California NIL Law*, *supra*.

12. Alan Blinder, *N.C.A.A. Athletes Could Be Paid Under New California Law*, N.Y. TIMES, <https://www.nytimes.com/2019/09/30/sports/college-athletes-paid-california.html> [<https://perma.cc/J3EJ-XX9R>] (Oct. 1, 2019) ("The measure . . . threatens the business model of college sports."); Tyler Tynes, *The Ripple Effects of California's 'Fair Pay to Play' Act*, THE RINGER (Oct. 11, 2019, 6:55 AM), <https://www.theringer.com/2019/10/11/20909171/california-sb-206-ncaa-pay-college-players> [<https://perma.cc/6DXR-U83A>] ("I don't want to say this is checkmate, but this is a major problem for the NCAA." (quoting California Governor Gavin Newsom)); Rodger Sherman, *The Fair*

In response to the mounting legislative pressure, the NCAA announced that it intends to reform its own NIL policies.¹³ In 2020, the NCAA Board of Governors announced, and the Division I Council subsequently approved, its support for a series of proposed amendments to the governing body's NIL rules that would allow college athletes to earn previously impermissible forms of compensation.¹⁴ Exactly how the NCAA plans to implement such

Pay to Play Act Has Been Signed. Now the NCAA Must Address a Question to Which It's Never Had a Good Answer., THE RINGER (Oct. 1, 2019, 8:38 AM), <https://www.theringer.com/2019/10/1/20892842/fair-pay-to-play-act-college-sports-california-law-gavin-newsom> [<https://perma.cc/48BV-GPNF>] (“California’s new bill presents a unique legal threat to an organization that’s long clung to an outdated model of amateurism. It also exposes the flaws in each argument made by those desperate to prevent this from starting a movement.”); *see also* Zagger, *supra* note 10 (“The NCAA says a total of [thirty-six] states have introduced similar bills . . .”).

13. Michael McCann, *Key Questions, Takeaways from the NCAA’s NIL Announcement*, SPORTS ILLUSTRATED (Oct. 29, 2019) [hereinafter McCann, *NCAA’s NIL Announcement: Key Takeaways*], <https://www.si.com/college/2019/10/30/ncaa-name-image-likeness-announcement-takeaways-questions> [<https://perma.cc/ZFQ4-C5HY>] (noting that the NCAA’s Board of Governors voted unanimously on October 28, 2019, “to permit college athletes ‘the opportunity to benefit from the use of their [NILs]’” (quoting *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019, 1:08 PM) [hereinafter *NCAA NIL Announcement*], <https://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities> [<https://perma.cc/VV65-CLR8>])).

14. Dan Murphy, *NCAA Group Supports Player Endorsement Plan*, ESPN (Apr. 29, 2020) [hereinafter Murphy, *NCAA Group Supports NIL Plan*], https://www.espn.com/college-sports/story/_/id/29112263/ncaa-group-oks-conditional-player-endorsements [<https://perma.cc/54PG-TSSQ>] (discussing the NCAA Board of Governor’s announcement in April of 2020 supporting the proposed rules changes); Ralph D. Russo, *NCAA Will Vote in January to Change NIL, Transfer Rules*, AP NEWS (Oct. 14, 2020), <https://apnews.com/article/sports-hockey-football-a27bc79b763a4dcdb8f3586320492588> (discussing the Division I Council’s approval of the proposed rules changes in October of 2020); *see also* Berkowitz, *NCAA Unveils Proposed Rules Changes*, *supra* note 7 (providing an overview of the proposed rules changes). The proposal would “allow college athletes to sign endorsement contracts and receive payment for other work, provided that the schools they attend [were] not involved in any of the payments.” Murphy, *NCAA Group Supports NIL Plan*, *supra*. The proposal came from a working group appointed by the NCAA in October of 2019—on the heels of California’s Fair Pay to Play Act being signed into law—to investigate potential rules changes that would “permit students participating in athletics the opportunity to benefit from the use of their [NILs] in a manner consistent with the collegiate model.” *NCAA NIL Announcement*, *supra* note 13. The NCAA’s initial announcement specified that any adopted reform must maintain the distinction between college and professional athletes and “[m]ake clear that compensation for athletics performance or participation is impermissible.” *Id.* Such caveats to the NCAA’s supposed “embrace” of change drew considerable criticism as experts speculated about how effective any rules changes may be in actually compensating the athletes, let alone compensating them adequately. Ben Pickman, *NCAA Votes to Start Process Permitting Athletes to Benefit from Likeness*, SPORTS ILLUSTRATED,

reform, however, still remains to be seen.¹⁵ In the meantime, the NCAA has lobbied Congress to adopt federal legislation that will preempt all state laws addressing college athlete NILs, allowing the NCAA to retain its dictatorial control over college athlete compensation.¹⁶ Such federal intervention may not come to the

<https://www.si.com/college/2019/10/29/ncaa-student-athlete-likeness-permitted-vote> [<https://perma.cc/6UJE-KLZZ>] (Oct. 29, 2019); J. Brady McCollough, *News Analysis: NCAA Makes Move on Name, Image and Likeness Use, but There's a Long Way to Go*, L.A. TIMES (Oct. 29, 2019, 11:34 AM), <https://www.latimes.com/sports/story/2019-10-29/ncaa-athletes-nil-college-athletes-profit-name-image-likeness> [<https://perma.cc/T8CM-L5QS>] (“The NCAA has been signaling for months that such benefits would not be actual compensation . . .” (quoting National College Players Association Executive Director Ramogi Huma)); Berkowitz, *NCAA Unveils Proposed Rules Changes*, *supra* note 7 (noting that the various restrictions included in the NCAA’s proposed rules changes—which provide universities broad discretion to regulate any permissible marketing endeavors for college athletes—could make the proposed changes “functionally useless,” such that the amendments would “do little to change the current exploitative state of college athletes” (quoting Connecticut Senator Richard Blumenthal)).

15. Murphy, *NCAA Group Supports NIL Plan*, *supra* note 14. Though the working group proposed recommendations that would allow athletes to earn compensation for the use of their NILs, the recommendations must still go through the formal rulemaking process, which may take months or even years to implement. *Id.*; see also Barrett Sallee & Adam Silverstein, *NCAA Takes Big Step Toward Allowing Name, Image and Likeness Compensation for Athletes*, CBS SPORTS (Apr. 29, 2020, 9:52 AM), <https://www.cbssports.com/college-football/news/ncaa-takes-big-step-toward-allowing-name-image-and-likeness-compensation-for-athletes/> [<https://perma.cc/6LEM-F4KP>]. In October of 2020, the Division I Council approved the working group’s proposed rules changes to be formally voted on for adoption in January of 2021. See Russo, *supra* note 14. The Council ultimately delayed the official vote in mid-January, however, citing “several external factors,” such as “judicial, political and enforcement issues,” as the reason for the delay. Michelle Brutlag Hosick, *Division I Council Tables Proposals on Name, Image, Likeness and Transfers*, NCAA (Jan. 11, 2021, 6:48 PM), <https://www.ncaa.org/about/resources/media-center/news/division-i-council-tables-proposals-name-image-likeness-and-transfers> [<https://perma.cc/GWC6-S4RF>]. Nonetheless, the NCAA’s proposed NIL rules changes are still significantly more restrictive than the laws passed in states such as California, Colorado, and Florida—a contrast that could spur eventual legal action absent federal intervention. Murphy, *NCAA Group Supports NIL Plan*, *supra* note 14; see also Berkowitz, *NCAA Unveils Proposed Rules Changes*, *supra* note 7 (observing that the NCAA’s proposed rules changes fall far short of providing similar autonomy to the athletes as provided by state legislation, which “could put the NCAA at odds with the provisions of laws that have [already] been passed by four states”).

16. Ross Dellenger, *NCAA Presents Congress with Bold Proposal for NIL Legislation*, SPORTS ILLUSTRATED (July 31, 2020) [Dellenger, *NCAA’s Congressional NIL Proposal*], <https://www.si.com/college/2020/07/31/ncaa-sends-congress-nil-legislation-proposal> [<https://perma.cc/378U-AV55>]; see also Murphy, *NCAA Group Supports NIL Plan*, *supra* note 14 (“The NCAA sees a federal solution as vital to avoid trying to operate a nationwide organization with a patchwork of different state laws.”); Berkowitz, *Colorado NIL Law*, *supra* note 10 (“The NCAA has asked for help from Congress as it faces the possibility of state-by-state action . . .”). Although Congress may not be overly sympathetic to the NCAA’s predicament, the NCAA recognizes that it

NCAA's rescue as quickly as the governing body would like, however, thanks to the COVID-19 pandemic.¹⁷

desperately needs Congress's help to maintain its relevancy. Murphy, *NCAA Group Supports NIL Plan*, *supra* note 14 ("It's clear we need Congress's help in all of this." (quoting NCAA President Mark Emmert)); *see also* Steve Berkowitz, *Judge's Ruling Stands: NCAA Can't Limit College Athletes' Benefits That Are Tied to Education*, USA TODAY: COLLEGE (May 18, 2020, 4:09 PM) [hereinafter Berkowitz, *Judge's Ruling Stands*], <https://www.usatoday.com/story/sports/college/2020/05/18/ncaa-cant-limit-college-athletes-benefits-tied-education-ruling/5213391002/> [<https://perma.cc/ZD4N-V5F7>] ("Given the billions of dollars the NCAA makes, I don't think they'll have a sympathetic ear in Congress." (quoting attorney and athletes' rights advocate Steve Berman)).

17. Murphy, *NCAA Group Supports NIL Plan*, *supra* note 14 ("Federal legislators ha[d] shown interest in creating laws about how college athletes are paid in the past year, but the [COVID-19] pandemic and . . . presidential election present[ed] obstacles to quickly passing any legislation."). Ironically, even though the pandemic and the presidential election affected Congress's ability to pass swift legislation, these events and the national push for racial justice that occurred during the summer of 2020 spurred federal legislators into action to address the inequities of college athletes. Dan Murphy, *U.S. Senators Lay Out Framework for Future College Sports Legislation*, ESPN (Aug. 13, 2020) [hereinafter Murphy, *Framework for Federal College Sports Legislation*], https://www.espn.com/college-sports/story/_/id/29651474/senators-lay-framework-future-college-sports-legislation [<https://perma.cc/2E96-TK7A>] ("This isn't radical thinking . . . It's just the right thing to do." (quoting Connecticut Senator Chris Murphy)); *see also* Murphy, *Congressional NIL Options*, *supra* note 7 (discussing four forms of proposed federal legislation). In response, nine U.S. senators published a "College Athletes Bill of Rights" that identified a "list of items they [saw] as important rights belonging to college athletes that they hope to soon protect or enforce with federal laws." Murphy, *Framework for Federal College Sports Legislation*, *supra*; *see also* Ross Dellenger, *Inside the Landmark College Athletes Bill of Rights Being Introduced in Congress*, SPORTS ILLUSTRATED (Dec. 17, 2020) [hereinafter Dellenger, *Landmark College Athletes Bill of Rights*], <https://www.si.com/college/2020/12/17/athlete-bill-of-rights-congress-ncaa-football> [<https://perma.cc/WFJ3-2RXX>] (detailing the College Athletes Bill of Rights that was formally proposed in mid-December of 2020). Congress then took a gigantic step toward enacting federal legislation that implicates the operation of college athletics in September of 2020 by proposing bipartisan legislation that would allow college athletes to earn compensation from endorsement deals. Dan Murphy, *Bipartisan Federal NIL Bill Introduced for College Sports*, ESPN (Sept. 24, 2020) [hereinafter Murphy, *Bipartisan Federal NIL Bill*], https://www.espn.com/college-sports/story/_/id/29961059/bipartisan-federal-nil-bill-introduced-college-sports [<https://perma.cc/U4VN-ETS7>]. Much to the NCAA's chagrin, however, the bill "stops short of implementing all of the restrictions that the NCAA and other college sports administrators have asked Congress to help them impose." *Id.* *But see* Ross Dellenger, *In Significant Step Around NCAA Athlete Rights, New Name, Image and Likeness Bill to Be Introduced in Congress*, SPORTS ILLUSTRATED (Dec. 10, 2020) [hereinafter Dellenger, *Congress Introduces NIL Bill*], <https://www.si.com/college/2020/12/10/ncaa-name-image-likeness-bill-congress> [<https://perma.cc/NPH8-AHA3>] (discussing one piece of proposed federal legislation, introduced by former Commerce Committee Chair and current Mississippi Senator Roger Wicker, which would provide antitrust protections for the NCAA and "prohibit schools from classifying athletes as employees"). In fact, the legislation could have an opposite effect to what the NCAA had hoped for as one of the bill's co-authors even expressed optimism that the bill could represent "an interim step on a

The COVID-19 pandemic spurred an unprecedented response from the NCAA and its Division I affiliates that threatened the very existence of college sports as a whole.¹⁸ First, the NCAA canceled the 2020 Division I men's and women's basketball tournaments and ceased competition of 2020 spring sports entirely.¹⁹ Then, after monitoring the development of the pandemic over the summer of 2020, numerous Division I conferences and countless Division II and Division III programs canceled football seasons and fall sports as well.²⁰ The NCAA itself, however, failed to issue any semblance of a directive to its member institutions, instead allowing the institutions to adopt their own contingency plans, leading to significant discord among even the most powerful conferences in Division I.²¹ The lack

path toward eventually giving college athletes an opportunity to be paid like professionals." Murphy, *Bipartisan Federal NIL Bill*, *supra*. Ironically, the very same federal legislation that the NCAA once viewed as its saving grace could end up codifying the abolishment of its amateurism principles.

18. Jeff Gordon, *Tipsheet: NCAA Football Facing Upheaval from Players, Power 5 Conferences*, ST. LOUIS POST-DISPATCH (Aug. 4, 2020), https://www.stltoday.com/sports/columns/jeff-gordon/tipsheet-ncaa-football-facing-upheaval-from-players-power-5-conferences/article_3343c775-8fea-5f5b-b2c6-eed1e6a366a0.html [<https://perma.cc/7YBL-VL9Y>] ("College sports in general—and college football in particular—[are] threatening to implode in the face of the global pandemic.").

19. David M. Hale, *A Timeline of College Sports' Postponements, Return-to-Play Rules and Cancellations*, ESPN (Aug. 11, 2020), https://www.espn.com/college-football/story/_/id/29633084/a-line-college-sports-postponements-return-play-rules-cancellations [<https://perma.cc/9EYW-PNMT>].

20. *Id.*; Gordon, *supra* note 18.

21. Dennis Dodd, *College Football Playoff to Be Played As Scheduled After 2020 Season with No Plans for Spring 2021*, CBS SPORTS (Aug. 24, 2020, 7:08 PM), <https://www.cbssports.com/college-football/news/college-football-playoff-to-be-played-as-scheduled-after-2020-season-with-no-plans-for-spring-2021/> [<https://perma.cc/855F-JHMH>]. Two of the so-called Power Five conferences, the Big Ten and the Pacific-12 Conference (Pac-12), originally postponed their 2020 football seasons before following the lead of the remaining Power Five conferences (the Southeastern Conference (SEC), Atlantic Coastal Conference (ACC), and Big 12) in announcing plans to compete in a limited, conference-only schedule. *Id.*; Alan Blinder, *Pac-12 Will Play Football in 2020, Joining Other Top Leagues During the Pandemic*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/09/24/sports/ncaaf-football/coronavirus-pac-12-restart.html> [<https://perma.cc/SG2X-HT8C>]; Heather Dinich & Adam Rittenberg, *Inside the Meeting That Saved the Big Ten Football Season*, ESPN (Sept. 22, 2020), https://www.espn.com/college-football/story/_/id/29939665/inside-meeting-saved-big-ten-football-season [<https://perma.cc/279H-LRTW>]. For a detailed overview of each conference's respective response to the 2020 college football season, see *Will There Be College Football This Fall? A Conference-by-Conference Breakdown*, ESPN (Aug. 11, 2020), https://www.espn.com/college-football/story/_/id/29636505/will-there-college-football-fall-conference-conference-breakdown [<https://perma.cc/5V3R-TVP3>].

of centralized leadership pushed the athletes to the brink, resulting in collective groups of players threatening to opt out of competition for fall sports while unifying to advocate for economic, social, and racial equality.²² Experts speculate that such a response by the athletes and

22. Gordon, *supra* note 18. On August 9, 2020, in the midst of the COVID-19 pandemic, Clemson quarterback Trevor Lawrence issued a statement via Twitter advocating for the creation of a college football players association. Trevor Lawrence (@Trevorlawrence), TWITTER (Aug. 10, 2020, 12:01 AM), <https://twitter.com/Trevorlawrence/status/1292672300152758273?s=20> (demanding that the NCAA and affiliated conferences establish health and safety procedures to protect athletes during the pandemic, allow athletes the opportunity to opt out of competition during the pandemic, and allow the athletes of the Power Five conferences to unionize). The announcement unified college football players associated with the #WeAreUnited and #WeWantToPlay movements, representing the single largest culmination of player advocacy in the history of college athletics. Derek Silva et al., *Cancelling the College Football Season Is About Union Busting, Not Health*, THE GUARDIAN (Aug. 12, 2020, 7:34 PM), <https://www.theguardian.com/sport/2020/aug/12/cancelling-the-college-football-season-is-about-union-busting-not-health> [<https://perma.cc/HQ85-V9YK>]; Blinder & Witz, *supra* note 9; Ryan Kostecka, *How Pac-12's #WeAreUnited Came to Be College Football's #WeWantToPlay*, SPORTS ILLUSTRATED (Aug. 11, 2020), <https://www.si.com/college/utah/football/how-pac-12s-weareunited-came-to-be-college-footballs-wewanttoplay> [<https://perma.cc/882K-R7SD>]. For a detailed discussion of the #WeAreUnited movement, established by athletes in the Pac-12, see Players of the Pac-12, #WeAreUnited, THE PLAYERS' TRIB. (Aug. 2, 2020), <https://www.theplayertribune.com/en-us/articles/pac-12-players-covid-19-statement-football-season> [<https://perma.cc/TGB4-GK7T>]. A collection of Big Ten college football players also issued a list of demands similar to those of the Pac-12's #WeAreUnited movement, though the Big Ten's announcement focused entirely on protections against the COVID-19 pandemic. Mark Schlabach, *Big Ten Players Follow Pac-12, Form Unity Group to Address Concerns*, ESPN (Aug. 5, 2020), https://www.espn.com/college-football/story/_/id/29601344/like-pac-12-big-ten-players-form-unity-group-address-concerns [<https://perma.cc/D9SA-WQ8X>]. This movement caught the eyes of federal legislators as well, nine of whom authored the College Athletes Bill of Rights, discussed *supra* note 17, which addressed many of the same issues and concerns as the Pac-12 and Big Ten movements. See Murphy, *Framework for Federal College Sports Legislation*, *supra* note 17. For a detailed overview of the College Athletes Bill of Rights, formally introduced to Congress in December of 2020, see Steve Berkowitz, *Democratic Senators Introduce 'College Athletes Bill of Rights' That Could Reshape NCAA*, USA Today: College (Dec. 17, 2020) [hereinafter Berkowitz, *Democrats Introduce College Athletes Bill of Rights*], <https://www.usatoday.com/story/sports/college/2020/12/17/ncaa-overhaul-come-democrats-college-athletes-bill-rights/3935483001/> [<https://perma.cc/WQ8Z-2UD5>]. The weight of the Pac-12 and Big Ten's unionization efforts faltered slightly in the eyes of the public, however, as both conferences initially announced plans to postpone their respective 2020 football seasons before then reversing course and announcing an abbreviated, conference-only schedule—following the lead of their Power Five counterparts, albeit in delayed fashion. Graham Hays & Mechelle Voepel, *Big Ten, Pac-12 Postpone Fall College Football: What You Need to Know*, ESPN (Aug. 11, 2020), https://www.espn.com/college-football/story/_/id/29640578/big-ten-pac-12-postpone-fall-college-football-need-know [<https://perma.cc/7PUX-HKYH>]; Pat Forde & Ross Dellenger, *First Power 5 Dominoes Fall As Big Ten, Pac-12 Pull Plug on Fall Season*, SPORTS ILLUSTRATED (Aug. 11, 2020), <https://www.si.com/college/2020/08/11/ncaa-football-season-big-ten-pac-12-canceled>

conferences could push some conferences to break away from the NCAA and provide the athletes with expanded healthcare benefits or pay the athletes outright, effectively ending amateurism.²³

In the midst of the ongoing legislative and societal battles addressing the NCAA's amateurism principles, recent judicial developments may have accelerated the imminent upheaval of amateurism in one fell swoop.²⁴ A class of former men's and women's college athletes led by Shawne Alston, a former football

[<https://perma.cc/G5K3-6QAH>]; see also Blinder, *supra* note 21; Dinich & Rittenberg, *supra* note 21. Regardless, the unprecedented outpouring of support for the athletes' unionization efforts is sure to have lasting effects in the collective fight against the NCAA's amateurism principles. Blinder & Witz, *supra* note 9 ("Regardless of the outcome of the debate about the football season, '[the] burst of activism was certain to intensify the protracted debate over the rights of players, an issue that has been the subject of lawsuits, legislation and congressional hearings.'").

23. Gordon, *supra* note 18 ("By cancelling those (fall) championships, the board might set in motion an eventual breakaway from the NCAA by the Power Five Simply put, those power conferences have thought for a while they could [operate college football] better than the NCAA." (quoting Dennis Dodd of CBSsports.com)); Joshua Drew & Stephen A. Miller, *Coronavirus Pandemic May Force Shift in Oversight of College Sports*, LAW.COM: THE LEGAL INTELLIGENCER (Oct. 19, 2020, 12:13 PM), <https://www.law.com/thelegalintelligencer/2020/10/19/coronavirus-pandemic-may-force-shift-in-oversight-of-college-sports/> (discussing the COVID-19 pandemic's "forced modernization of the NCAA" that raised "significant questions about the NCAA's future" and the possibility and feasibility of a "new major conference athletic association" independent from the NCAA); see also Amanda Mull, *College Football's Great Unraveling*, THE ATLANTIC (Aug. 13, 2020), <https://www.theatlantic.com/health/archive/2020/08/college-football-falling-apart/615277/> [<https://perma.cc/JBS6-EMPT>] ("But if conferences are intent on playing, Power [Five] universities could reject the dangers of amateurism by, at the very least, paying players a fair wage and providing expanded health benefits for their perilous and near-limitlessly profitable work."). Scholars speculate that conferences choosing to cancel football seasons—or fall sport seasons entirely—in the wake of the COVID-19 pandemic stemmed more from an institutional fear of college athletes organizing and unionizing rather than an effort to ensure athlete safety. Silva et al., *supra* note 22. The threat of players—especially a collective group of players representing an entire conference—opting out of a competitive season represents the greatest protest of its kind against the NCAA's reign over college athletics. Gordon, *supra* note 18 ("[T]he most forceful [threat] came . . . with the announcement that a group of Pac-12 players [were] threatening to opt out of playing until a number of economic, racial justice and safety issues [were] addressed." (quoting Bill Connelly of ESPN.com)); Blinder & Witz, *supra* note 9 ("The way athletes urgently came together . . . demonstrated a breadth to their unity that had not existed before."). Such a unified push could add a nail in the coffin of amateurism and significantly speed up its imminent demise. *Id.*

24. See generally *Alston I*, 375 F. Supp. 3d 1058, 1061 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020); see also Ehrlich, *supra* note 9, at 99 (speculating that an antitrust decision against the NCAA could alter how courts analyze challenges against the NCAA under other legal theories, such as under federal labor laws).

player at West Virginia University, challenged the NCAA's compensation regulations capping grant-in-aid scholarship limits at the cost of attendance.²⁵ In March of 2019, Judge Wilken of the U.S. District Court for the Northern District of California, who has earned a reputation as a staunch opponent to the NCAA's compensation regulations,²⁶ issued an injunction prohibiting the NCAA from limiting grant-in-aid scholarships and education-related benefits at less than the cost of attendance after finding that such caps violated federal antitrust law.²⁷ The U.S. Court of Appeals for the Ninth Circuit Court of Appeals affirmed Judge Wilken's ruling just one year later in May of 2020.²⁸ Then, in a decision that shocked the

25. *Alston I*, 375 F. Supp. 3d at 1061–62; Berkowitz, *Judge's Ruling Stands*, *supra* note 16 (“A three-judge panel of the U.S. Circuit Court of Appeals [for the Ninth Circuit] . . . unanimously upheld a district judge’s ruling that the NCAA cannot limit education-related benefits that college athletes can receive.”); *see also* Michael McCann, *Why the NCAA Lost Its Latest Landmark Case in the Battle Over What Schools Can Offer Athletes*, SPORTS ILLUSTRATED (Mar. 8, 2019, 10:45 PM) [hereinafter McCann, *NCAA Landmark Loss*], <https://sports.yahoo.com/why-ncaa-lost-latest-landmark-034532251.html> [<https://perma.cc/6GT8-QNND>]. The NCAA permits universities to award athletic scholarships to college athletes, known as “grants-in-aid.” *Alston I*, 375 F. Supp. 3d at 1063. The NCAA has revised its definition of permissible benefits encompassed by this grant-in-aid several times since its original enactment in 1956. *Id.* at 1063–64. Following the adoption of the autonomy-structure legislative process in 2014, the Power Five conferences voted to amend the NCAA’s definition of “grant-in-aid” in response to the ongoing litigation in *O’Bannon v. National Collegiate Athletic Ass’n (O’Bannon I)*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff’d in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015). *Alston I*, 375 F. Supp. 3d at 1064. Currently, a full grant-in-aid scholarship comprises “tuition and fees, room and board, books and other expenses related to attendance at the institution up to the cost of attendance.” *Id.*

26. Judge Wilken was also the presiding district court judge in the landmark *O’Bannon* case discussed *infra* Section I.A. *O’Bannon I*, 7 F. Supp. 3d at 955.

27. *Alston I*, 375 F. Supp. 3d at 1109–10.

28. *See In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig. (Alston II)*, 958 F.3d 1239, 1266 (9th Cir. 2020) (affirming the district court’s “liability determination and injunction in all respects”). Though the Ninth Circuit upheld Judge Wilken’s injunction, the NCAA quickly petitioned the Supreme Court in August of 2020 to stay the injunction, but the Court denied the request just a week later. Steve Berkowitz, *Supreme Court Denies NCAA’s Request for Stay of Injunction in Case on Athlete Benefits*, USA TODAY: SPORTS, <https://www.usatoday.com/story/sports/2020/08/11/supreme-court-denies-ncaa-request-athlete-benefits/3344086001/> [<https://perma.cc/TUZ8-X63T>] (Aug. 11, 2020, 12:37 PM) (“[Justice] Kagan’s ruling sets the stage for at least one recruiting cycle in which schools will be able to decide on a conference-level basis whether to allow offers to football, men’s basketball and/or women’s basketball players that go beyond covering the full cost of attending school.”). The NCAA subsequently petitioned the Supreme Court in October of 2020 to officially grant full review of the case. *NCAA Statement Regarding Supreme Court Petition for Alston Case*, NCAA (Oct. 15, 2020, 10:32 AM) [hereinafter

college sports world, the Supreme Court granted certiorari to take the case in December of 2020, agreeing to review the NCAA's amateurism principles for the first time in over thirty-five years.²⁹ The case, *In re National Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litigation (Alston)*,³⁰ carries significant legal implications stretching far beyond the realm of antitrust law.³¹ Specifically, the language used in Judge Wilken's order could transform the analysis of a challenge to classify college athletes as employees under federal labor laws.³²

The landscape of college athletics is on the verge of a monumental transformation that threatens the very existence of the NCAA.³³ This

NCAA Petitions Supreme Court], <http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-regarding-supreme-court-petition-alston-case> [https://perma.cc/87AT-FZQC].

29. Robert Barnes & Rick Maese, *Supreme Court Will Hear NCAA Dispute over Compensation for Student-Athletes*, WASH. POST (Dec. 16, 2020, 11:08 AM), https://www.washingtonpost.com/politics/courts_law/supreme-court-ncaa/2020/12/16/90f20dbc-3fa9-11eb-8db8-395dedaaa036_story.html [https://perma.cc/6RYZ-7JKC]. The Court's grant of cert. came as a shock to experts because the Court declined to take up the *O'Bannon* case just five years prior. Joe Nocera, Opinion, *Supreme Court Can End the College Sports Charade*, POST-GAZETTE (Dec. 19, 2020, 6:00 AM) [hereinafter Nocera, *College Sports Charade*], <https://www.post-gazette.com/opinion/Op-Ed/2020/12/19/Joe-Nocera-Supreme-Court-can-end-the-college-sports-charade/stories/202012190007> [https://perma.cc/EKL2-ZBRZ]. The Court last took up a case involving the NCAA in the landmark 1984 case *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984). Barnes & Maese, *supra*.

30. *Alston I*, 375 F. Supp. 3d 1058; *Alston II*, 958 F.3d 1239.

31. Ehrlich, *supra* note 9, at 98–99 (explaining that a ruling in an antitrust case allowing colleges and universities to provide grant-in-aid scholarships to athletes beyond the cost of attendance could allow future courts to find that college athletes qualify as employees under federal labor laws); Berkowitz, *Judge's Ruling Stands*, *supra* note 16 (acknowledging that the district court's decision and the Ninth Circuit's subsequent affirmance represents a landmark victory for college athletes and “opens the door for more challenges” to the NCAA's amateurism principles in the future).

32. Ehrlich, *supra* note 9, at 98–99. Though the Ninth Circuit ultimately affirmed Judge Wilken's order, this Note focuses specifically on the language used in the original order. Judge Wilken's deliberate use of specific terminology, discussed *infra* Section II.A, carries potentially damning implications for the NCAA's amateurism principles that apply to various areas of law outside of the antitrust context. Ehrlich, *supra* note 9, at 98–99. In affirming Judge Wilken's order, the Ninth Circuit adopted Judge Wilken's factual findings and thus her use of such specific terminology. *Alston II*, 958 F.3d at 1244.

33. Gordon, *supra* note 18 (“[W]ithin a calendar year, college athletics will be operating in a seismically different way.” (quoting Pete Thamel of Yahoo! Sports)); Pat Forde, *An Unprecedented Athlete Push Caps a Surreal Weekend As College Football Drama Intensifies*, SPORTS ILLUSTRATED (Aug. 10, 2020), <https://www.si.com/college/2020/08/10/college-football-updates-status-players-union>

Note explains how abandoning the NCAA's amateurism principles by formally recognizing college athletes as employees under federal labor laws may be the only way to preserve college athletics as we know it. Judge Wilken's analysis, though applied in an antitrust challenge, can be translated into the context of a challenge under the Fair Labor Standards Act (FLSA) to find that college athletes of revenue-generating sports like Division I men's basketball and Football Bowl Subdivision (FBS) football qualify as employees of their universities and the NCAA.³⁴

Part I provides a contextual background of the NCAA's amateurism principles while examining how those principles have transformed through antitrust and employment litigation. Part II analyzes the language and judicial scrutiny of amateurism in Judge Wilken's district court order in *Alston* and then translates that analysis to the context of an FLSA challenge, recognizing college athletes of revenue-generating sports as employees. Finally, Part III proposes that the NCAA abandon its amateurism principles once and for all and provide college athletes with the compensation and protection they are entitled to under the FLSA. This Note proposes two methods that allow the NCAA and its member institutions to operate in compliance with the FLSA while preserving the distinction between college and professional sports.

[<https://perma.cc/K88B-WRS2>] (speculating that, had the NCAA "terminate[d] the flawed concept of amateurism in a timely fashion," the implications of the cancellations caused by COVID-19 may have been minimized); Blinder & Witz, *supra* note 9; *see also* Pearl, *supra* note 9 ("[T]he death of so-called amateurism in sports has been a long time coming.").

34. Ehrlich, *supra* note 9, at 99 ("[A] ruling in the antitrust cases that allows for colleges and universities to pay student-athletes beyond these elements could lead a future court . . . to decide that a future plaintiff who receives grant-in-aid beyond qualified expenses . . . is an employee under the FLSA.").

I. BACKGROUND

In 2018, college athletics programs generated \$14 billion in total revenue.³⁵ Of that \$14 billion, \$7.6 billion came from programs in the Power Five conferences (Atlantic Coastal Conference (ACC), Big Ten, Big 12, Pacific-12 Conference (Pac-12), and Southeastern Conference (SEC)).³⁶ Schools from these conferences have engaged in an athletics “arms race” of sorts, nearly doubling the amount of spending towards personnel, facilities, and other athletic amenities from 2004 to 2014.³⁷ The NCAA and its member institutions have also inked billion-dollar broadcast deals, adding to a revenue pot that actually exceeds that of its professional counterparts.³⁸ Yet among the sixty-five Power Five programs, only 12% of all athletic revenue ultimately finds its way to the athletes in the form of grant-in-aid scholarships.³⁹

The NCAA and its member institutions, while enjoying tax-exempt, non-profit status, currently deny athletes a meaningful share of the revenue for fear of blurring the “line of demarcation

35. MURPHY, *supra* note 1, at 3. Over the course of fifteen years—from 2003 to 2018—the total revenue generated by college athletics rose from \$4 billion to \$14 billion. *Id.*

36. *Id.* at 5. For context, there are 2,078 institutions with athletic programs under the NCAA umbrella and only sixty-five institutions in the Power Five conferences. *Id.* (noting that 3% of college programs generated 54% of all college sports revenue in 2018). Thirty-six of these programs reported more than \$100 million in revenue, eleven reported more than \$150 million, and two reported over \$200 million. *Id.*

37. *Id.* at 12. For example, schools have reported apparel deals totaling \$173.8 million, \$252 million, and \$280 million. *Id.*

38. Murphy, *NC NIL Bill*, *supra* note 2 (noting that, in 2016, CBS and Turner Sports signed an eight-year, \$8.8 billion extension to broadcast the NCAA Tournament through 2032, bringing the current contract to a cumulative twenty-two-year deal worth \$19.6 billion); MURPHY, *supra* note 1, at 2 (noting that the 2019 NCAA Tournament brought in a total of \$1.2 billion in media revenue, boasting a \$1 million price tag to purchase a thirty-second commercial spot). The \$14 billion in total revenue reported in 2018 by the Power Five conferences was more than every professional sports league in the world, except for the National Football League (NFL). MURPHY, *supra* note 1, at 3; *see also* Kassandra Ramsey, Alston v. NCAA: Judge Rules for Plaintiffs but NCAA Keeps Amateurism, UNAFRAID SHOW (Sept. 19, 2019), <https://unafraidshow.com/alston-ncaa-ruling-amateur-college-sports/> (comparing the similarities of broadcast deals garnered at the collegiate level to those at the professional level).

39. MURPHY, *supra* note 1, at 7. In contrast, 16% of athletic revenue goes to salaries for coaches. *Id.*

between college athletics and professional sports” that is supposedly essential to preserving the spirit of college athletics.⁴⁰ To maintain the distinction between collegiate and professional athletes, the NCAA concocted its concept of amateurism.⁴¹

Purportedly entrenched as a “revered tradition” of college athletics, the NCAA formed its amateurism principles in the 1950s following a workers’ compensation challenge by a university employee for injuries sustained during a spring football practice.⁴² In response to the ruling, the NCAA issued a memo to its member schools introducing the label “student-athlete” to discourage future employer liability litigation.⁴³ Though the concept of amateurism quickly developed into a mainstay requirement in the NCAA’s Division I Bylaws, the NCAA never took the time to define the term.⁴⁴ Thus, the lack of clarity and evidentiary support surrounding

40. Colwell, *supra* note 3, at 931 n.221 (quoting Lindsay J. Rosenthal, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA Is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 SETON HALL J. SPORT L. 321 (2003)); MURPHY, *supra* note 1, at 2 (“Meanwhile, tax-exempt non-profit institutions of higher education condone and endorse broadcasting and apparel contracts that surpass \$250 million, coaches’ salaries that beat their professional equivalents, and lavish spending on facilities that amount to amusement parks aimed at seducing the nation’s top teenagers in their sport.”); *see also* NCAA DIVISION I MANUAL, *supra* note 1.

41. Lonick, *supra* note 1, at 140.

42. *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 291 (7th Cir. 2016) (citing *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984)); *Univ. of Denver v. Nemeth*, 257 P.2d 423, 424 (Colo. 1953) (en banc) (finding that injuries to a student-employee of the university resulting from a spring football practice arose out of and in the context of his employment even though he was employed to maintain tennis courts and not to play football).

43. Lonick, *supra* note 1, at 140. The NCAA also strongly encouraged all member institutions to include the word “amateurism” directly in all grant-in-aid athletic scholarships. *Id.*

44. *See Alston I*, 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019) (“The ‘Principle of Amateurism,’ as described in the current version of the NCAA’s constitution, uses the word ‘amateurs’ to describe the amateurism principle, and is thus circular.”), *aff’d*, 958 F.3d 1239 (9th Cir. 2020); *see also Alston II*, 958 F.3d 1239, 1259 (9th Cir. 2020) (“Amateurism does not have a fixed definition, as NCAA officials themselves have conceded.”). *See generally* NCAA DIVISION I MANUAL, *supra* note 1, at art. 12. Article 2.9 of the 2019–20 NCAA Division I Manual describes the “Principle of Amateurism,” providing that “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.” NCAA DIVISION I MANUAL, *supra* note 1, at art. 2.9. Notably, however, nothing in the NCAA’s Division I Bylaws directly links compensation with

this concept of amateurism has left the area “ripe for litigation.”⁴⁵ Former athletes have challenged the NCAA’s amateurism principles under various legal theories, but antitrust law has represented the most direct threat thus far.⁴⁶

A. *Overview of Antitrust Challenges to the NCAA’s Amateurism Principles*

Antitrust law governs anticompetitive practices and unreasonable restraints of trade.⁴⁷ Section 1 of the Sherman Antitrust Act prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce.”⁴⁸ In determining whether a restraint of trade is unreasonable, a court may consider the nature or character of the contracts at issue, or the surrounding circumstances giving rise to an inference or presumption of intent to restrain trade.⁴⁹ To state a claim under section 1, a plaintiff must establish (1) the existence of a contract, combination, or conspiracy that (2) unreasonably restrains trade—under either a per se rule of illegality or rule of reason analysis—that (3) affects interstate commerce.⁵⁰

Traditionally, courts have afforded the NCAA broad latitude under antitrust challenges because the “integrity of the ‘product’ [of college athletics] cannot be preserved except by mutual agreement.”⁵¹ As a

the concept of amateurism. *Alston I*, 375 F. Supp. 3d at 1098–99 (“The Principle [of Amateurism] does not mention or address compensation . . . Accordingly, no link appears between this principle and the challenged compensation limits.”).

45. Colwell, *supra* note 3.

46. Lucas Novaes, Comment, *It’s Time to Stop Punting on College Athletes’ Rights: Implications of Columbia University on the Collective Bargaining Rights of College Athletes*, 66 AM. U. L. REV. 1533, 1561 (2017).

47. *Bd. of Regents*, 468 U.S. at 98.

48. Sherman Antitrust Act, 15 U.S.C. § 1.

49. *Bd. of Regents*, 468 U.S. at 103 (“Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.”).

50. *Alston I*, 375 F. Supp. 3d 1058, 1091 (N.D. Cal. 2019), *aff’d*, 958 F.3d 1239 (9th Cir. 2020); *see also Alston II*, 958 F.3d 1239, 1256 (9th Cir. 2020).

51. *O’Bannon II*, 802 F.3d 1049, 1069 (9th Cir. 2015) (“[R]estrictions on competition are essential if the product is to be available at all.” (quoting *Bd. of Regents*, 468 U.S. at 101–02)).

result, courts have typically subjected NCAA practices to the rule of reason analysis.⁵² The rule of reason analysis places the initial burden on the challenger to establish anticompetitive effects within a relevant market.⁵³ The burden then shifts to the defendant to offer justification with evidence of the alleged restraint's procompetitive effects.⁵⁴ If any legitimate procompetitive objectives exist, the plaintiff must then show that those objectives are achievable through substantially less restrictive means, or the challenge fails.⁵⁵

The “first serious legal challenge to the NCAA’s amateurism rules” came in the 2014 case *O’Bannon v. National Collegiate Athletic Ass’n*.⁵⁶ There, the same Judge Wilken of the Northern District of California found that NCAA rules restraining the ability of schools to compensate college athletes for the use of their NILs violated the rule of reason analysis.⁵⁷ On appeal, however, the Ninth Circuit narrowed the impact of Judge Wilken’s ruling significantly, vacating a \$5,000 stipend award to the challengers to avoid eradicating the NCAA’s amateurism principles.⁵⁸ Judge Wilken took the Ninth Circuit’s concerns to heart when writing her order in *Alston*, finding—albeit hesitantly—that there may be some

52. *Alston I*, 375 F. Supp. 3d at 1092 (“But where, as here, a ‘certain degree of cooperation’ is necessary to market college sports, the Rule of Reason [analysis] is appropriate.” (citing *O’Bannon II*, 802 F.3d at 1069)).

53. *O’Bannon II*, 802 F.3d at 1070.

54. *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 335–36 (7th Cir. 2012) (“If the plaintiff meets his burden, the defendant can show that the restraint in question actually has a procompetitive effect on balance, while the plaintiff can dispute this claim or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective.”).

55. *O’Bannon II*, 802 F.3d at 1070 (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

56. 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff’d in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015); Joe Nocera, *O’Bannon Ruling Stands, but NCAA’s Status Quo May Yet Collapse*, N.Y. TIMES (Oct. 3, 2016) [hereinafter *Nocera, O’Bannon Ruling Stands*], http://www.nytimes.com/2016/10/04/sports/ncaa-obannon-case-ruling-supreme-court.html?_r=0 [<https://perma.cc/3RFF-CGTU>].

57. *See generally O’Bannon I*, 7 F. Supp. 3d 955.

58. *O’Bannon II*, 802 F.3d at 1078–79 (“The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap.”); *Nocera, O’Bannon Ruling Stands*, *supra* note 56.

legitimacy to a narrow portion of the NCAA's amateurism principles.⁵⁹ Even in issuing a ruling that kept the core of the NCAA's amateurism principles intact, however, Judge Wilken may have opened Pandora's box for future challenges seeking to classify college athletes as employees under federal labor laws.⁶⁰

B. *FLSA Challenges and the Economic Reality Test*

Though antitrust challenges may represent the most persistent threat to the NCAA's amateurism principles thus far, they offer a relatively minimal likelihood of redress to current athletes.⁶¹ Challenges under federal labor laws, however, could prove to upend the concept entirely while also providing college athletes with

59. *Alston I*, 375 F. Supp. 3d 1058, 1082–83 (N.D. Cal. 2019) (“The Court does credit the importance to consumer demand of maintaining a distinction between college sports and professional sports. . . . [T]he distinction . . . arises [only] because student-athletes do not receive unlimited payments unrelated to education, akin to salaries seen in professional sports leagues.”), *aff'd*, 958 F.3d 1239 (9th Cir. 2020); *see also Alston II*, 958 F.3d 1239, 1244 (9th Cir. 2020) (“We further conclude that the record supports the factual findings underlying the injunction and that the district court’s analysis is faithful to our decision in [*O’ Bannon II*], 802 F.3d 1049.”). Critics in the arena viewed Judge Wilken’s ruling as a “middle ground of sorts in a case that had the potential to shatter the college sports economy.” Maclean & Novy-Williams, *supra* note 7. The potential impact of this decision should not be overlooked, however, because it still delivered a critical blow to the NCAA’s principles of amateurism. *Id.* (“The big picture for me is that once again the courts have deemed the NCAA rules to be a violation of antitrust laws.” (quoting Boston College’s Carroll School of Management sports business professor Warren Zola)).

60. *Alston I*, 375 F. Supp. 3d at 1088; Will Hobson, *For Former Athletes Fighting NCAA Amateurism Rules, a Muted Victory*, WASH. POST (Mar. 13, 2019, 6:33 AM), https://www.washingtonpost.com/sports/colleges/for-former-athletes-fighting-ncaa-amateurism-rules-a-muted-victory/2019/03/12/53ea96c0-44fe-11e9-aaf8-4512a6fe3439_story.html [<https://perma.cc/5WPW-JSM3>]. The Supreme Court granted cert. to review the case in December of 2020, just seven months after the Ninth Circuit Court of Appeals affirmed Judge Wilken’s ruling. Barnes & Maese, *supra* note 29. The Court’s decision to review the NCAA’s amateurism principles for the first time in over thirty-five years comes “at a time when the college sports landscape is rapidly shifting and the NCAA’s longtime amateurism model faces attacks on multiple fronts.” *Id.* Experts have opined that the Court’s surprising decision to review the case suggests that the Court recognizes that this case “strikes directly at the NCAA’s power and authority” and could “fundamentally transform the century-old institution of NCAA sports.” *Id.*

61. Novaes, *supra* note 46, at 1560–62 (observing that although the NCAA has faced challenges to the amateurism principles under various legal theories, the “most direct threats” to the principles have come from challenges “in the antitrust realm”).

immediate protection and compensation.⁶² The FLSA provides protection for covered employees in the form of guaranteed minimum wage and overtime rates for work performed over the forty-hour threshold in a single week.⁶³ Congress enacted the FLSA to protect covered workers from substandard wages and oppressive working hours.⁶⁴ Congress did not, however, explicitly define the parameters of an employer–employee relationship covered under the FLSA.⁶⁵ Thus, the difficulty lies in determining who qualifies as a covered “employee.”⁶⁶ Specifically, in the context of college athletes seeking FLSA protection, challengers thus far have been unsuccessful in convincing courts that participation in intercollegiate athletics constitutes “work” for an “employer.”⁶⁷

62. Ehrlich, *supra* note 9, at 80 (“A win on FLSA grounds . . . would seemingly assure college athletes minimum wage and time-and-a-half for any time worked over forty hours.”).

63. Fair Labor Standards Act of 1937, 29 U.S.C. §§ 201–219.

64. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012) (citing *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981)).

65. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947).

66. *Vanskike v. Peters*, 974 F.2d 806, 807 (7th Cir. 1992).

67. *See generally* *Dawson v. Nat’l Collegiate Athletic Ass’n*, 932 F.3d 905 (9th Cir. 2019) (arguing that a college football player at the University of Southern California qualified as an employee of the Pac-12 and the NCAA under the FLSA through the joint-employer doctrine); *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285 (7th Cir. 2016) (arguing that women’s track athletes at the University of Pennsylvania qualified as employees of the university under the FLSA); *Livers v. Nat’l Collegiate Athletic Ass’n (Livers II)*, No. 17-4271, 2018 WL 3609839 (E.D. Pa. July 26, 2018) (arguing that a college football player at Villanova University qualified as an employee of the university and the NCAA under the FLSA through the joint-employer doctrine); *Northwestern Univ.*, 362 N.L.R.B., No. 167, 1350 (2015) (arguing that college football players at Northwestern University qualified as employees of the university under the National Labor Relations Act (NLRA) and were thus entitled to unionize to protect their employee interests). To qualify as an employee under the FLSA, the plaintiff must establish that they perform work for an employer. *Berger*, 843 F.3d at 290. The FLSA provides only vague definitions of the terms “employee” (“any individual employed by an employer”) and “employer” (“any person acting directly or indirectly in the interest of an employee in relation to an employee”), however, and remains silent on what constitutes requisite “work.” 29 U.S.C. § 203(d)–(e).

1. Berger's "Long-Standing Tradition" of Amateurism and the Revenue Caveat

Though college athletes had attempted to gain employee recognition in different contexts, the first challenge under the FLSA to gain traction in federal courts came in the 2016 case *Berger v. National Collegiate Athletic Ass'n*.⁶⁸ There, members of the University of Pennsylvania track team argued that they qualified as employees of the university within the meaning of the FLSA and were thus entitled to minimum wage and overtime compensation.⁶⁹ The U.S. Court of Appeals for the Seventh Circuit observed that, due to the FLSA's circular definition of "employee" and "employer," examination of the "economic reality" of the working relationship between the alleged employee and the alleged employer [was required] to decide whether Congress intended the FLSA to apply to that particular relationship.⁷⁰ The court held that the NCAA's "long-standing tradition" of amateurism defined the economic reality of the relationship between the athletes and the institutions.⁷¹ The court ultimately affirmed dismissal of the athletes' claim, observing that the tradition of amateurism stood for the principle that college athletes voluntarily participate in their respective sports without "any real expectation of earning an income."⁷² As a result, the court held that a college athlete's "play" did not equate to "work" entitling the athletes to employee coverage under the FLSA.⁷³

68. 843 F.3d at 290–92.

69. *Id.* at 289.

70. *Id.* at 290 (citing *Vanskike*, 974 F.2d at 808). The Supreme Court has instructed courts to adopt a broad construction of "employee" and "employer" under the FLSA, but the definitions are not limitless. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 295 (1985).

71. *Berger*, 843 F.3d at 291.

72. *Id.* at 293 ("[T]he long tradition of amateurism in college sports, by definition, shows that student athletes . . . participate in their sports for reasons wholly unrelated to immediate compensation.").

73. *Id.* ("Simply put, student-athletic 'play' is not 'work,' at least as the term is used in the FLSA.").

In a concurring opinion, however, Judge Hamilton qualified the court's decision by emphasizing the fact that the challengers in that case "did not receive athletic scholarships and participated in a non-revenue sport."⁷⁴ Judge Hamilton further expressed that he was "less confident . . . that [the court's] reasoning should extend to students who receive athletic scholarships to participate in . . . revenue sports like Division I men's basketball and FBS football . . . [because the] economic reality and the tradition of amateurism may not point in the same direction."⁷⁵ He concluded his concurrence by suggesting that there "may be room for further debate . . . for cases addressing employment status" under the economic reality analysis, immediately sparking subsequent FLSA challenges from athletes of revenue-generating sports.⁷⁶

2. "Roadmap" to Success: Economic Dependence on Scholarships

Most notably, Lamar Dawson, a former football player at the University of Southern California, and Lawrence "Poppy" Livers, a former football player at Villanova University, pursued FLSA challenges against the NCAA under the guidance of Judge Hamilton's concurring opinion.⁷⁷ Dawson alleged that he was an employee of the Pac-12 and the NCAA under the joint-employer doctrine.⁷⁸ Dawson inexplicably failed to name his own university as a defendant in the case, however, leading to the ultimate dismissal of

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

75. *Id.* (observing that these sports generate "billions of dollars of revenue for colleges").

76. *Id.* See generally Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905 (9th Cir. 2019); Livers II, No. 17-4271, 2018 WL 3609839 (E.D. Pa. July 26, 2018). It is important to note, however, that although Judge Hamilton's concurrence suggests that there may be merit to the argument of whether athletes in revenue-generating sports qualify as employees under the FLSA, his language carries only persuasive authority and is not binding upon any court. Ehrlich, *supra* note 9, at 93.

77. Dawson, 932 F.3d at 905; Livers II, 2018 WL 3609839, at *1.

78. Dawson, 932 F.3d at 908.

his claim by the Ninth Circuit.⁷⁹ Livers, on the other hand, earned a monumental victory for college athletes pursuing FLSA challenges by surviving the NCAA's motion to dismiss his amended complaint.⁸⁰

Initially, the U.S. District Court for the Eastern District of Pennsylvania dismissed Livers's complaint but did so without prejudice and with leave to amend after Livers had attempted to allege that his academic scholarship from Villanova qualified as a form of compensation.⁸¹ Though Livers conceded that he was not directly compensated in exchange for his athletic services, he alleged that his scholarship could be considered "wages in another form."⁸² The court acknowledged that a worker who is not paid directly for his services may still qualify as an employee if the worker remains personally dependent on any benefits received from the alleged employer during the existence of the relationship.⁸³ On first pass, however, the court dismissed Livers's complaint, finding that he had not sufficiently alleged reliance to the extent of dependence on any benefits received.⁸⁴

Livers then amended his complaint, alleging additional facts showing that he had relied on the financial benefits of his scholarship to the extent of being personally economically dependent upon that

79. *Id.* at 913 ("There is no authority that supports an inference that, even though the student-athletes are not considered to be employees of their schools under California law, the NCAA and the [Pac]-12 can nevertheless be held to be 'joint employers' with the students' schools."). There is no available explanation for Dawson's fatal mistake in omitting the university as a named defendant, though scholars have speculated that the reason may be due in part to the University of Southern California's status as a private school. See Ehrlich, *supra* note 9, at 85–86 n.38.

80. *Livers II*, 2018 WL 3609839, at *6. Livers's case ultimately ended inconclusively in April of 2019 when he withdrew from the case for personal reasons. Robert Iafolla, *NCAA Hit with Another Lawsuit Seeking Pay for Athlete's Play (3)*, BLOOMBERG L. (Nov. 7, 2019, 10:53 AM), <https://news.bloomberglaw.com/daily-labor-report/ncaa-hit-with-another-lawsuit-seeking-pay-for-athletes-play> [https://perma.cc/RQT8-JQD3].

81. *Livers v. Nat'l Collegiate Athletic Ass'n (Livers I)*, No. 17-4271, 2018 WL 2291027, at *1, *16 (E.D. Pa. May 17, 2018).

82. *Id.*

83. *Id.*

84. *Id.*

scholarship, and survived the NCAA's renewed motion to dismiss.⁸⁵ Allowing Livers to amend his complaint to allege his economic dependence on his scholarship appears to have “provided a clear roadmap” for future college athletes challenging the NCAA's compensation restrictions under the FLSA.⁸⁶ Because the court focused on whether Livers was economically dependent on his scholarship rather than whether the scholarship could actually be considered compensation itself, however, the court applied a holistic approach—rather than a multi-factor test, as Livers had urged the court to adopt—to evaluate the economic reality of the relationship.⁸⁷ An alternative finding that athletes actually are compensated in the current landscape could significantly alter this economic reality analysis in a beneficial manner for the athletes and future challengers.⁸⁸

85. *Livers II*, 2018 WL 3609839, at *5 (citing *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290 (1985)).

86. Ehrlich, *supra* note 9, at 97–98 (“According to the court, a football student-athlete plaintiff who is within the statute of limitations can find success by . . . showing that the student-athlete is economically dependent on his or her athletic scholarship.”). On November 6, 2019, Trey Johnson, another former Villanova football player, filed a class-action lawsuit in the Eastern District of Pennsylvania arguing that college athletes are employees under the FLSA and thus entitled to minimum wage and overtime pay. Billy Witz, *N.C.A.A. Is Sued for Not Paying Athletes As Employees*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/sports/ncaa-lawsuit.html> [<https://perma.cc/JYG5-Z4VU>]. Johnson, who is represented by the same attorney who represented Livers, sought to classify all Division I college athletes—not just those in revenue-generating sports and regardless of whether they received a scholarship—as employees under the FLSA. *Id.* (“This is not about being paid hundreds of thousands of dollars, and we are not limiting this case only to the select few athletes that can receive endorsement deals We are simply asking the N.C.A.A. to pay its student athletes the basic minimum wage as required by federal law.” (quoting former Villanova football player Trey Johnson)).

87. *Livers II*, 2018 WL 3609839, at *5 n.2; *Livers I*, No. 17-4271, 2018 WL 2291027, at *16 (declining to apply a multi-factor test because the cases applying such a test dealt with the question of whether particular workers who receive monetary compensation for their work qualified as “employees” under the FLSA and, here, the appropriate question was whether Livers may properly be considered to be a worker who is entitled to compensation at all).

88. Ehrlich, *supra* note 9, at 97–98 (suggesting that resolution of antitrust cases allowing grant-in-aid scholarships in excess of cost of attendance “could change the calculus on this element”).

II. ANALYSIS

Examining the economic reality of the relationship between college athletes, their universities, and the NCAA has proven to be a complicated task.⁸⁹ Because an examination of the economic reality requires consideration of the totality of the circumstances, courts have focused on differing factors.⁹⁰ The only factor that courts have consistently emphasized in the context of college athletics has been the “revered tradition of amateurism in college sports.”⁹¹ To comply with this tradition, courts have primarily adopted a holistic approach in considering the importance of amateurism.⁹² Under this approach, courts have looked to the Department of Labor (DOL) Field Operations Handbook (FOH) as persuasive authority guiding their analysis.⁹³

The FOH provides commentary used to guide DOL staff and investigators when interpreting the statutory provisions of the

89. *See Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 290–91 (7th Cir. 2016) (recognizing that courts have developed and adopted a myriad of multi-factor tests and differing approaches in guiding their analysis of the economic reality of the relationship).

90. *Dawson v. Nat’l Collegiate Athletic Ass’n*, 932 F.3d 905, 909 (9th Cir. 2019) (recognizing that an examination of economic reality requires consideration of the totality of the circumstances surrounding the relationship, including: (1) expectation of compensation; (2) the power to hire and fire; and (3) evidence of an agreement “conceived or carried out” to evade the law); *Berger*, 843 F.3d at 291 (rejecting a multi-factor test for failing to capture the true nature of the relationship, which is defined by the long-standing tradition of amateurism); *Livers I*, 2018 WL 2291027, at *12 (“In some circumstances, the Third Circuit has invoked a multi-factor test to evaluate the ‘economic realities’ of employment relationships for the purpose of determining FLSA rights.”).

91. *Berger*, 843 F.3d at 291 (citing *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 120 (1984)). The court in *Berger* ultimately declined to adopt a multi-factor test to determine the economic reality of the relationship because the proposed multi-factor test “simply [did] not take into account this tradition of amateurism or the reality of the student-athlete experience.” *Id.* (“That long-standing tradition defines the economic reality of the relationship between student athletes and their schools.”).

92. *Livers I*, 2018 WL 2291027, at *16 (adopting a holistic approach to evaluate economic reality after considering precedent from various FLSA challenges, including previous attempts to qualify college athletes as employees).

93. *Berger*, 843 F.3d at 292 (“[T]he provisions in this handbook are not dispositive, but they are certainly persuasive.”); *Livers I*, 2018 WL 2291027, at *16 (“While the DOL’s interpretation in the FOH is ‘not controlling’ on this Court, it is ‘persuasive.’”).

FLSA.⁹⁴ Chapter 10 of the FOH contains detailed interpretations of the “employment relationship required for the [FLSA] to apply.”⁹⁵ Section 10b03(e) lists and describes several “extracurricular activities” as voluntary endeavors “conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution.”⁹⁶ According to the FOH, such extracurricular activities are “not work of the kind contemplated by [the FLSA] and do not result in an employer–employee relationship between the student and the school.”⁹⁷

Section 10b03(e) explicitly characterizes “interscholastic athletics” as an extracurricular activity.⁹⁸ Section 10b24(a) further—and perhaps redundantly—emphasizes that any university or college students participating in these extracurricular activities “are generally not considered to be employees within the meaning of the [FLSA].”⁹⁹ As a result, courts have been reluctant to find that college athletes perform “work” in exchange for compensation that would entitle them to “employee” status under the FLSA.¹⁰⁰ Other approaches are available, however, and may be more applicable moving forward.¹⁰¹

Challengers have consistently petitioned courts to adopt a multi-factor test to evaluate the economic reality of the relationship,

94. WAGE & HOUR DIV., U.S. DEP’T. OF LAB., FIELD OPERATIONS HANDBOOK ch. 10, § 10a00 (2016) [hereinafter DOL FOH], https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf [https://perma.cc/B42W-UNSC]; see also *Berger*, 843 F.3d at 292.

95. *Berger*, 843 F.3d at 292 (alteration in original) (citing DOL FOH, *supra* note 94).

96. *Id.* at 292–93 (citing DOL FOH, *supra* note 94, § 10b03(e)); *Livers I*, 2018 WL 2291027, at *14.

97. *Berger*, 843 F.3d at 293 (alteration in original) (citing DOL FOH, *supra* note 94, § 10b03(e)).

98. *Id.*

99. *Id.* (alteration in original) (citing DOL FOH, *supra* note 94, § 10b24(a)).

100. See, e.g., *Livers I*, 2018 WL 2291027, at *14–16 (finding that college football players do not receive compensation in exchange for their participation in college athletics); Colwell, *supra* note 3, at 910 (“[A]ccording to the DOL . . . participation [in athletics] does not qualify as sufficient ‘work’ to qualify for minimum wage and overtime pay under the FLSA.”).

101. *Livers I*, 2018 WL 2291027, at *16 (“While much of our analysis has centered around a holistic application of the ‘economic reality’ test, . . . this does not foreclose the possibility that an appropriate multi-factor test could be identified for evaluating . . . whether a student athlete who receives an Athletic Scholarship is an ‘employee’ for FLSA purposes.”).

suggesting that such an approach may be more favorable in finding that college athletes qualify as employees under the FLSA.¹⁰² Though numerous multi-factor tests exist, courts have recognized that the most applicable may be the six-factor test enumerated in *Donovan v. DialAmerica Marketing, Inc.*¹⁰³ The *Donovan* test considers: (1) the alleged employer's right to control how the work is to be performed; (2) the alleged employee's opportunity to experience profit or loss; (3) the alleged employee's investment in equipment or material required for the work; (4) whether the services rendered require special skill; (5) the permanence of the working relationship; and (6) whether the service rendered is integral to the alleged employer's business.¹⁰⁴ Though the DOL has enumerated similar factors in its FOH, the *Donovan* test offers a fairer assessment of the circumstances surrounding the relationship without the prejudicial influence of the FOH commentary dismissing interscholastic athletics as mere extracurricular activities.¹⁰⁵

In *Donovan*, and in similar cases adopting the six-factor test, the court focused on the question of whether a particular worker who receives monetary compensation for their work is entitled to FLSA protection.¹⁰⁶ In contrast, courts evaluating the economic reality of the relationship between college athletes, their universities, and the NCAA have focused on the more "threshold question" of whether an athlete may properly be considered a worker entitled to compensation

102. See *Berger*, 843 F.3d at 291; *Livers II*, No. 17-4271, 2018 WL 3609839, at *5 n.2 (E.D. Pa. July 26, 2018); *Livers I*, 2018 WL 2291027, at *8.

103. 757 F.2d 1376, 1382 (3d Cir. 1985); *Livers II*, 2018 WL 3609839, at *5 n.2; *Livers I*, 2018 WL 2291027, at *16 ("Any such test would likely lean on the factors outlined by the Third Circuit in *Donovan*, a standard . . . which may offer a useful starting point for developing rules of analysis for the threshold question of who is an 'employee' at all.")

104. *Livers I*, 2018 WL 2291027, at *12–13 (citing *Donovan*, 757 F.2d at 1382).

105. *Berger*, 843 F.3d at 292–93; *Livers I*, 2018 WL 2291027, at *9; Colwell, *supra* note 3, at 906–07; WAGE & HOUR DIV., U.S. DEP'T OF LAB., FACT SHEET #13: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) [hereinafter DOL FACT SHEET #13], <https://www.dol.gov/whd/regs/compliance/whdfs13.pdf> [<https://perma.cc/C5SM-JSDZ>] (July 2008).

106. *Donovan*, 757 F.2d at 1376; see also *Safarian v. Am. DG Energy Inc.*, 622 F. App'x 149 (3d Cir. 2015); *Martin v. Selker Bros.*, 949 F.2d 1286 (3d Cir. 1991).

at all.¹⁰⁷ Perhaps the only reason courts have refrained from applying a multi-factor test is a general reluctance to characterize an athlete's performance as "work" or "labor" and an athletic scholarship as "compensation."¹⁰⁸ Following Judge Wilken's *Alston* order and the Ninth Circuit's subsequent affirmance of Judge Wilken's factual findings, however, courts now have a basis for overcoming this reluctance.¹⁰⁹

A. Examining Judge Wilken's Order in *Alston*

In March of 2019, Judge Wilken of the Northern District of California issued an order permanently enjoining the NCAA from capping grant-in-aid scholarships and education-related benefits at less than the cost of attendance.¹¹⁰ Judge Wilken found that the NCAA's rules limiting compensation that Division I basketball and FBS football athletes are permitted to receive in exchange for their athletic services violated section 1 of the Sherman Antitrust Act under a rule of reason analysis.¹¹¹ The Ninth Circuit subsequently affirmed Judge Wilken's order in May of 2020 and upheld her injunction against the NCAA.¹¹² Importantly, the Ninth Circuit affirmed all of Judge Wilken's factual findings and adopted the language Judge Wilken used during her thorough assessment of the NCAA's amateurism principles.¹¹³

107. *Livers I*, 2018 WL 2291027, at *13.

108. *Id.* at *15 (recognizing that a multi-factor test is "particularly appropriate where . . . it is clear that some entity is an 'employer' and the question is which one" (quoting *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992))).

109. *Alston I*, 375 F. Supp. 3d 1058, 1097 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020); *see also Alston II*, 958 F.3d 1239, 1244 (9th Cir. 2020).

110. *Alston I*, 375 F. Supp. 3d at 1110.

111. *Id.* at 1109.

112. *Alston II*, 958 F.3d at 1244 ("We conclude that the district court properly applied the Rule of Reason in determining that the enjoined rules are unlawful restraints of trade under section 1 of the Sherman Act, 15 U.S.C. § 1.").

113. *Id.*

As the first step in the rule of reason analysis, Judge Wilken chose to adopt the market definition previously defined in *O'Bannon*.¹¹⁴ There, the court defined the relevant market as one comprising of national markets for college athletes' "labor in the form of athletic services" where each athlete participates in their sport-specific market.¹¹⁵ In *Alston*, Judge Wilken further recognized that, in these markets, the athletes "sell their athletic services . . . in exchange for grants-in-aid and other compensation and benefits permitted by NCAA rules."¹¹⁶ In choosing to use this specific language in defining the relevant market, Judge Wilken expressly recognized that college athletes perform "labor" in exchange for "compensation," a stark contrast from the reluctance of the court in *Livers* to characterize such scholarships as compensation.¹¹⁷ Further, Judge Wilken found

114. *Alston I*, 375 F. Supp. 3d at 1066; see also *Alston II*, 958 F.3d at 1248 ("As to the merits, [the district court] adopted, at the parties' request, the market definition from *O'Bannon I*: the market for a college education or, alternatively, student-athletes' labor."). In *O'Bannon*, Judge Wilken recognized that the NCAA maintained monopsony power in the market of college athletics, characterizing schools as buyers and college athletes as sellers in a market for recruits' athletic services and licensing rights. *Alston I*, 375 F. Supp. 3d at 1067, 1097 (citing *O'Bannon I*, 7 F. Supp. 3d 955, 991 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015)). Importantly, the NCAA did not challenge the market definitions on appeal, and the Ninth Circuit adopted those definitions as well. *Id.* at 1067 (citing *O'Bannon II*, 802 F.3d 1049, 1070 (9th Cir. 2015)). The Ninth Circuit further emphasized that, due to the absence of any viable substitutes, the NCAA maintains monopsony power in these markets because the athletes are unable to obtain the same combination of college education, high-level television exposure, and opportunities to enter professional sports that are provided by Division I programs. *Id.* at 1067, 1097.

115. *Alston I*, 375 F. Supp. 3d at 1097 (emphasis added); see also *Alston II*, 958 F.3d at 1248. In both *O'Bannon* and *Alston*, the courts limited the market definition to the specific markets of Division I basketball and FBS football as the primary revenue-generating sports. *Alston I*, 375 F. Supp. 3d at 1097.

116. *Alston I*, 375 F. Supp. 3d at 1097 (emphasis added); see also *Alston II*, 958 F.3d at 1248 ("To begin, the district court accepted Student-Athletes' trial theory narrowing the relevant market to one in which Student-Athletes sell their 'labor in the form of athletic services' to schools in exchange for athletic scholarships and other payments permitted by the NCAA." (quoting *Alston I*, 375 F. Supp. 3d at 1067, 1097)).

117. Compare *Alston I*, 375 F. Supp. 3d at 1067 (finding that college athletes "sell their athletic services to the schools that participate in Division I basketball and FBS football in exchange for grants-in-aid and other benefits and compensation permitted by NCAA rules"), with *Livers I*, No. 17-4271, 2018 WL 2291027, at *1, *16 (E.D. Pa. May 17, 2018) (finding that the plaintiff athlete failed to sufficiently allege facts establishing that a full academic scholarship constituted "wages [received] in another form" in exchange for "his agreement to participate as a member of the Villanova football team").

that the challenged compensation regulations harmed the athletes directly by depriving them of compensation they would receive in the absence of such restraints.¹¹⁸ Once the relevant market was defined, Judge Wilken quickly concluded that the challenged regulations resulted in anticompetitive effects due to the NCAA's near complete dominance of, and exercise of monopsony power within, the market.¹¹⁹

The NCAA offered two procompetitive justifications for the challenged rules regulating compensation for athletes.¹²⁰ Unsurprisingly, the NCAA relied most heavily on the “long[-]standing principle of amateurism,” arguing that consumer demand would evaporate instantaneously if the athletes were allowed to be compensated for their services.¹²¹ Judge Wilken balked at this

118. *Alston I*, 375 F. Supp. 3d at 1070, 1098; see also *Alston II*, 958 F.3d at 1270 (Smith, J., concurring) (“Here, Student-Athletes are quite clearly deprived of the fair value of their services.”).

119. *Alston I*, 375 F. Supp. 3d at 1097–98 (finding sufficient evidence to show that the compensation regulations amount to horizontal price-fixing among competitors by essentially eliminating price competition as to the recruitment of college athletes, resulting in harm to the athletes by depriving them of compensation they would receive in the absence of such restraints); see also *Alston II*, 958 F.3d at 1256–57 (“The district court found that the NCAA’s rules have ‘significant anticompetitive effects in the relevant market’ for Student-Athletes’ labor on the gridiron and the court. These findings ‘have substantial support in the record,’ and the NCAA does not dispute them.” (first quoting *Alston I*, 375 F. Supp. 3d at 1070; and then quoting *O’Bannon II*, 802 F.3d at 1070) (citations omitted)). Unlike a monopoly, which exists when *sellers* in a market collude or exercise dominant power within that market, a monopsony exists when *buyers* collude or exercise dominant power within a market. *O’Bannon I*, 7 F. Supp. 3d at 991. The Supreme Court has noted that “similar legal standards should apply to claims of monopolization and to claims of monopsonization.” *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 322 (2007). As in *O’Bannon*, Judge Wilken analyzed the plaintiffs’ claims in *Alston* “[u]nder the theory of monopsony, sometimes referred to as a buyers’ cartel, [where] schools were characterized as buyers and student-athletes as sellers in a market for recruits’ athletic services and licensing rights.” *Alston I*, 375 F. Supp. 3d at 1067 (citing *O’Bannon I*, 7 F. Supp. 3d at 991).

120. *Alston I*, 375 F. Supp. 3d at 1098. On appeal, the NCAA relied on only one procompetitive justification—the principle of amateurism—choosing not to assert the “wedge” theory as a justification as it had at the district court level. *Alston II*, 958 F.3d at 1257 (“On appeal, the NCAA advances a single procompetitive justification: The challenged rules preserve ‘amateurism,’ which, in turn, ‘widen[s] consumer choice’ by maintaining a distinction between college and professional sports.” (alteration in original)).

121. *Alston I*, 375 F. Supp. 3d at 1098; see also *Alston II*, 958 F.3d at 1258; Colwell, *supra* note 3, at 932–33 (“The long[-]standing principle of amateurism, which requires that student-athletes may not receive any type of compensation and will be deemed ineligible to play if they violate this rule, supports

assertion, finding that the NCAA failed to offer any evidence establishing that the challenged compensation rules, as stated, were directly connected with consumer demand.¹²²

In coming to this conclusion, Judge Wilken first attempted to identify a clear definition of amateurism.¹²³ Alarming, Judge Wilken was unable to locate anything even attempting to define the supposed “bedrock” principle of college athletics.¹²⁴ The NCAA, as it had in each preceding instance, insisted that the principle of amateurism relies on the notion that college athletes should not be paid for their participation in their respective sports; i.e., “pay for play” is not consistent with the principle of amateurism.¹²⁵ Shockingly, however, the NCAA Constitution does not mention compensation nor payment when describing the principle of

the NCAA’s stance that student-athletes are not employees.”). The NCAA argued that the principle of amateurism drives consumer demand on its own and that the regulations regarding compensation are procompetitive because they “implement” or “effectuate” that principle. *Alston I*, 375 F. Supp. 3d at 1070 (“The corollary is that if consumers did not believe that student-athletes were amateurs, they would watch fewer games and revenues would decrease as a result.”); *see also Alston II*, 958 F.3d at 1258 (“[T]he NCAA accuses the district court of straying from a purported ‘judicial consensus’ that the NCAA expands consumer choice by enforcing an amateurism principle under which student-athletes ‘must not be paid’ a penny over the [cost of attendance].”).

122. *Alston I*, 375 F. Supp. 3d at 1070 (“No connection between the ‘Principle of Amateurism’ and the challenged compensation limits is evident.”); *see also Alston II*, 958 F.3d at 1258 (“NCAA witnesses confirmed that the NCAA set[s] limits on education-related benefits without consulting any [consumer] demand studies.”).

123. *Alston I*, 375 F. Supp. 3d at 1070; *see also Alston II*, 958 F.3d at 1258.

124. *Alston I*, 375 F. Supp. 3d at 1070 (“Defendants nowhere define the nature of the amateurism they claim consumers insist upon. Defendants offer no stand-alone definition of amateurism either in the NCAA rules or in argument.”); *see also Alston II*, 958 F.3d at 1259. The NCAA’s Division I Bylaws provide a circular definition of “amateurism,” by using the word “amateurs” to then attempt to describe the principle itself. *Alston I*, 375 F. Supp. 3d at 1070. Additionally, Judge Wilken acknowledged that the NCAA did not actually have rulemaking or enforcement authority over its members until the 1950s, thus refuting the claim that amateurism represents a concept entrenched at the foundation of college athletics. *Id.* at 1075.

125. *Alston I*, 375 F. Supp. 3d at 1071; *see also Alston II*, 958 F.3d at 1249 (observing that “the NCAA defined amateurism during the litigation as “not paying” the participants” (quoting *Alston I*, 375 F. Supp. 3d at 1071)).

amateurism.¹²⁶ Nor do the NCAA Constitution or Division I Bylaws even mention “pay for play,” let alone define the phrase.¹²⁷

The NCAA vehemently argued that allowing a “pay for play” system would be inherently inconsistent with the essential qualities of amateurism and would negatively affect consumer demand.¹²⁸ Judge Wilken recognized, however, that reality paints a different picture: athletes currently receive numerous forms of compensation that appear to violate the regulations—and thus amateurism—at first glance.¹²⁹ This is possible because the NCAA compensation regulations do not actually follow a coherent definition of “amateurism” because no such definition exists.¹³⁰ Because no

126. *Alston I*, 375 F. Supp. 3d at 1070; *see also Alston II*, 958 F.3d at 1259.

127. *Alston I*, 375 F. Supp. 3d at 1071; *see also Alston II*, 958 F.3d at 1249 (observing that the “purported pay-for-play prohibition is riddled with exceptions”). The term “pay” is only defined by listing a variety of forms of compensation that are prohibited by the NCAA rules unless the form of compensation falls under an exception in a subsequent provision. *Alston I*, 375 F. Supp. 3d at 1071 (“Thus, whether any form of compensation constitutes ‘pay’ in violation of NCAA rules cannot be determined except by studying all of the relevant bylaws and all of their exceptions and cross-references.”); *see also Alston II*, 958 F.3d at 1244 (“‘[P]ay’ is defined as the ‘receipt of funds, awards or benefits not permitted by governing legislation.’” (alteration in original)); NCAA DIVISION I MANUAL, *supra* note 1, at arts. 12.1.2.1, 15.01.1.

128. *Alston I*, 375 F. Supp. 3d at 1098; *see also Alston II*, 958 F.3d at 1249, 1258.

129. *Alston I*, 375 F. Supp. 3d at 1071–72 (“[A] review of the bylaws shows that many forms of payment, often in unrestricted cash, from schools and other sources, are allowed by the NCAA as ‘not pay,’ and thus as not inconsistent with amateurism.”); *see also Alston II*, 958 F.3d at 1244 (“[G]overning legislation permits a wide range of above-[cost-of-attendance] payments—both related and unrelated to education.”). Judge Wilken’s review of the NCAA’s Division I Bylaws found that athletes currently receive compensation in the following forms: (1) cost-of-attendance grants-in-aid that, if in an amount exceeding the cost of fixed expenses (tuition, room, board, books, etc.), are often provided in cash; (2) athletics participation and performance awards not related to education (often provided in the form Visa gift cards that can be used like cash); (3) monies provided by the NCAA each year through the Student Assistance Fund (SAF) and the Academic Enhancement Fund (AEF); and (4) payments from outside entities for winnings earned from outside competition such as in the Olympics. *Alston I*, 375 F. Supp. 3d at 1064, 1072–74; *see also Alston II*, 958 F.3d at 1244–45. These forms of compensation, some of which are unrelated to education and may be provided in cash or a cash-equivalent, can add up to several thousand dollars yet are not considered “pay” according to the Bylaws. *Alston I*, 375 F. Supp. 3d at 1072, 1074; *see also Alston II*, 958 F.3d at 1261 (“When asked about the propriety of above-[cost-of-attendance] compensation, the current [Mid-American Conference] commissioner similarly testified that the ‘key’ is ‘linking’ payments to the ‘pursuit of the educational opportunities of the individual involved.’”).

130. *Alston I*, 375 F. Supp. 3d at 1070, 1074 (“The only common thread underlying all forms and amounts of currently permissible compensation is that the NCAA has decided to allow [that form].”);

concrete definition exists, the application and enforcement of the amateurism principles have varied significantly throughout the history of college athletics.¹³¹

Not only has the world continued to turn while athletes have received various forms of compensation, but consumer demand has remained as strong as ever.¹³² In fact, revenue generated from Division I men's basketball and FBS football has increased since 2015 (when the Power Five conferences voted to increase grant-in-aid scholarship amounts), suggesting that consumer demand has actually increased as well.¹³³ Faced with factual findings directly contradicting the NCAA's assertions, the governing body was unable

see also Alston II, 958 F.3d at 1259.

131. *Alston I*, 375 F. Supp. 3d at 1075 n.18 (“[T]he fact that the NCAA currently permits student-athletes to receive . . . forms of compensation . . . in addition to a full grant-in-aid scholarship, such as compensation ‘incidental to athletics participation,’ . . . distinguishes today’s concept of [amateurism] from that in effect in earlier years.”); *see also Alston II*, 958 F.3d at 1255 (recognizing that the compensation landscape has “meaningfully changed since *O’Bannon*” because athletes have received awards and permissible forms of compensation in the thousands of dollars to pay for personal expenses unrelated to education).

132. *Alston I*, 375 F. Supp. 3d at 1074–75, 1100; *see also Alston II*, 958 F.3d at 1258–59 (“[T]he court reasonably declined to adopt the Not One Penny standard based on considerable evidence that college sports have retained their distinctive popularity despite an increase in permissible forms of above-[cost-of-attendance] compensation and benefits.”). Judge Wilken recognized that Dr. Daniel Rascher, the plaintiffs’ expert witness, provided “[t]he only economic analysis in the record that specifically [spoke] to the effects of compensation amounts on consumer demand.” *Alston I*, 375 F. Supp. 3d at 1076. Dr. Rascher’s economic analysis focused on a comparison of consumer demand before and after the Power Five conferences voted to independently increase the limit of grant-in-aid scholarships to the cost-of-attendance in 2015. *Id.* at 1076–78; *see also Alston II*, 958 F.3d at 1258. Dr. Rascher ultimately concluded that increased college-athlete compensation does not negatively affect consumer demand of Division I basketball and FBS football. *Alston I*, 375 F. Supp. 3d at 1076; *see also Alston II*, 958 F.3d at 1258 (“Dr. Rascher’s . . . demand analyses demonstrate that the NCAA has loosened its restrictions on above-[cost-of-attendance], education-related benefits since *O’Bannon* without adversely affecting consumer demand.”).

133. *Alston I*, 375 F. Supp. 3d at 1076 (accepting Dr. Rascher’s economic findings that revenues generated from Division I basketball and FBS football have increased since 2015); *see also Alston II*, 958 F.3d at 1245, 1250, 1262 (“The district court had before it (and fairly credited) evidence that demand would withstand even *higher* caps on such awards and incentives.”). Revenue generation is regarded as “one of the best economic measures of consumer demand.” *Alston I*, 375 F. Supp. 3d at 1077; *see also Alston II*, 958 F.3d at 1250 (“In fact, Dr. Rascher found that revenues from [Division I] basketball and FBS football, ‘one of the best economic measures of consumer demand,’ have increased since 2015.” (quoting *Alston I*, 375 F. Supp. 3d at 1077)).

to present *any* evidence showing that its Division I Bylaws limiting compensation were enacted based on an analysis of consumer demand.¹³⁴ To the contrary, the evidence overwhelmingly suggested that the limits were arbitrarily enacted.¹³⁵ Such a finding undermined the NCAA's argument that the challenged compensation restrictions were necessary to preserve consumer demand.¹³⁶

Likewise, Judge Wilken was not persuaded by the NCAA's second asserted justification that the challenged rules promote integration within the school community and improve the athletes' academic experience.¹³⁷ Not only do the NCAA's limits on compensation lack a causal connection to positive student experience, but the NCAA's own experts even conceded that additional compensation could improve student-related outcomes for the athletes.¹³⁸ The NCAA relied on a "wedge" theory that the Ninth Circuit previously accepted in *O'Bannon*, arguing that compensation limits help prevent a "wedge" between the athletes and other students that could form if the athletes received compensation not available to the other students.¹³⁹ Judge Wilken recognized, however, that the present circumstances differed substantially from those in *O'Bannon* in light

134. *Alston I*, 375 F. Supp. 3d at 1080; see also *Alston II*, 958 F.3d at 1258.

135. *Alston I*, 375 F. Supp. 3d at 1102; see also *Alston II*, 958 F.3d at 1258.

136. *Alston I*, 375 F. Supp. 3d at 1074; see also *Alston II*, 958 F.3d at 1258 ("The record in this case . . . reflects no such procompetitive effect of limiting non-cash, education-related benefits.").

137. *Alston I*, 375 F. Supp. 3d at 1083 ("While the evidence shows that student-athletes benefit from receiving a college education, it does not support the notion that . . . such benefits arise out of, or are caused by, the . . . compensation limits."). The NCAA did not raise this "wedge" theory justification on appeal, choosing only to rely upon the amateurism justification. *Alston II*, 958 F.3d at 1249 n.8.

138. *Alston I*, 375 F. Supp. 3d at 1084, 1103. Such a concession belies the notion that limits on compensation are necessary to achieve positive outcomes for college athletes. *Id.* at 1074. Judge Wilken was persuaded by the fact that most of the education-related benefits college athletes receive are caused by the education itself and the policies surrounding that education. *Id.* at 1102–03 ("[S]tudent-athletes would still enjoy the benefits caused by the latter rules and policies even if the challenged compensation limits were changed.").

139. *Id.* at 1084, 1103. NCAA witness Dr. James Heckman opined that athletic achievement incentives would "isolate student-athletes 'from the rest of the student body' and affect the 'camaraderie in these various institutions.'" *Id.* at 1084.

of the finding that college athletes have actually received increasing amounts of compensation since 2015.¹⁴⁰

Yet again, the NCAA was unable to produce any additional evidence to support its position—this time failing to show that the increase in compensation had actually created a “wedge.”¹⁴¹ Instead, Judge Wilken concluded that compensation limits may actually serve to *increase* the separation among students, not decrease or prevent a “wedge” from occurring.¹⁴² Judge Wilken recognized that the compensation regulations often divert funds that would otherwise go to the athletes directly elsewhere into investments like “extravagant, athletes-only facilities.”¹⁴³ Schools often end up spending excess revenue on recruitment resources that exclusively benefit athletes.¹⁴⁴ Additionally, the compensation limits may constrain the athletes’ financial abilities to engage in social activities with other students, further separating the athletes from the general school population.¹⁴⁵

Ultimately, however, Judge Wilken did recognize—albeit reluctantly—a lone credible procompetitive effect of amateurism in preventing “unlimited, professional-level cash payments . . . that could blur the distinction between college sports and professional sports.”¹⁴⁶ Importantly, Judge Wilken emphasized that such a

140. *Id.* at 1085, 1103.

141. *Id.* at 1085, 1103. Judge Wilken observed that economic and income-related disparities are inevitable, regardless of the context, due to family background and various sources of wealth. *Id.* at 1084.

142. *Id.* at 1085, 1103 (“[T]he [compensation limits] may create or exacerbate a wedge . . .”).

143. *Id.* at 1103.

144. *Alston I*, 375 F. Supp. 3d at 1085.

145. *Id.* at 1086, 1103.

146. *Id.* at 1082, 1103–04 (“The Court does credit the importance to consumer demand of maintaining a distinction between college sports and professional sports.”); *see also Alston II*, 958 F.3d at 1260 (“In short, the district court fairly found that NCAA compensation limits preserve demand to the extent they prevent unlimited cash payments akin to professional salaries, but not insofar as they restrict certain education-related benefits.”). Judge Wilken conceded that precedent weighs in favor of allowing the NCAA “ample latitude” to “superintend college athletics” so that the court “may not ‘use antitrust law to make marginal adjustments to broadly reasonable market restraints.’” *Alston I*, 375 F. Supp. 3d at 1104 (quoting *O’Bannon II*, 802 F.3d. 1049, 1074–75 (9th Cir. 2015)). Judge Wilken emphasized, however, that the distinction between college and professional sports “cannot be based on

distinction lies in maintaining an educational connection to the permissible compensation while preventing “unlimited cash payments [to college athletes] similar to those observed in professional sports.”¹⁴⁷ After considering three alternatives proposed by the athlete challengers, Judge Wilken imposed a slightly modified but less restrictive alternative, preventing the NCAA from limiting education-related compensation and benefits at less than the cost of attendance, but did so without opening the door for potentially unlimited, non-education-related cash payments.¹⁴⁸

Although experts initially speculated that Judge Wilken’s ruling left a relatively muted impact on the NCAA’s compensation regulations, the Ninth Circuit’s subsequent affirmance added more

student-athletes not receiving any compensation . . . because [they] currently can receive thousands or tens of thousands of dollars in such compensation, related and unrelated to education, while remaining NCAA amateurs.” *Id.* at 1082. Rather, Judge Wilken specifically narrowed the distinction between college and professional sports to the fact that “student-athletes do not receive *unlimited* payments unrelated to education, akin to salaries seen in professional sports leagues.” *Id.* at 1083 (emphasis added); see also *Alston II*, 958 F.3d at 1258 (“Instead, the record supports a much narrower conception of amateurism that still gives rise to procompetitive effects: Not paying student-athletes ‘unlimited payments unrelated to education, akin to salaries seen in professional sports leagues’ is what makes them ‘amateurs.’” (quoting *Alston I*, 375 F. Supp. 3d at 1083)).

147. *Alston I*, 375 F. Supp. 3d at 1082–83 (finding that rules limiting or prohibiting non-cash-related benefits do not foster consumer demand by maintaining a distinction between college and professional sports, but rules limiting cash or cash-equivalent benefits untethered to education do have procompetitive effects to the extent they prevent unlimited cash payments akin to those in professional sports); see also *Alston II*, 958 F.3d at 1258. Judge Wilken did find, however, that recent increases in compensation that were even *unrelated* to education had not decreased consumer demand for Division I basketball or FBS football. *Alston I*, 375 F. Supp. 3d at 1089; see also *Alston II*, 958 F.3d at 1265 (“The record indicates that the Power Five schools have exercised their autonomy in recent years to expand benefits unrelated to education and that conferences and schools have provided largely discretionary SAF and AEF payments for a wide range of expenses unrelated to education—both without harming consumer demand.”).

148. *Alston I*, 375 F. Supp. 3d at 1087, 1105 (finding that the alternative “would be virtually as effective as the challenged set of rules in preserving the same contribution to consumer demand for Division I basketball and FBS football” because it “expands education-related compensation and benefits only, and it does so in a way that would not result in unlimited cash payments, untethered to education, similar to those observed in professional sports”); see also *Alston II*, 958 F.3d at 1263 (“In our view, the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports. Thus, we neither vacate nor broaden the injunction, but affirm.”).

weight to the ruling and its potential long-term implications.¹⁴⁹ Luckily, the judiciary has gained assistance in the fight against the NCAA's amateurism principles in the form of mounting legislative and societal pressure.¹⁵⁰ Sensing the foundation of amateurism shaking beneath it, the NCAA has lobbied Congress to step in and save the governing body—though a swift salvation seems unlikely.¹⁵¹

149. Hobson, *supra* note 60; *see also* Berkowitz, *Judge's Ruling Stands*, *supra* note 16 (recognizing that the Ninth Circuit's holding "opens the door for more challenges" in the future against the NCAA's compensation regulations); Associated Press, *Supreme Court Agrees to Hear NCAA Athlete Compensation Case*, ESPN (Dec. 16, 2020), https://www.espn.com/college-sports/story/_/id/30530625/supreme-court-agrees-hear-ncaa-athlete-compensation-case [<https://perma.cc/E5TJ-XM6E>] ("This case, and I don't think it's overstating it, . . . could fundamentally change the structure of college sports and the relationship between college athletes and their schools and conferences It could . . . ultimately allow schools to pay anything they want to try to attract the athlete." (quoting Tulane Sports Law Program Director Gabe Feldman)). Despite experts' initial skepticism about how profound an impact the ruling could have on the college sports world, the NCAA understood that such a ruling could threaten the organization's very existence, explicitly acknowledging as much in its petition to the Supreme Court. Amy Howe, *Court to Take On Student-Athlete Compensation, Class Action Cases*, SCOTUS BLOG (Dec. 16, 2020, 1:32 PM), <https://www.scotusblog.com/2020/12/court-to-take-on-student-athlete-compensation-class-action-cases/> [<https://perma.cc/Z3UZ-SMTB>] ("The NCAA told the justices that, if allowed to stand, the 9th Circuit's ruling 'will fundamentally transform the century-old institution of NCAA sports, blurring the traditional line between college and professional athletes.'"). Now, with the Supreme Court set to formally review the case in 2021 and evaluate the NCAA's amateurism principles for the first time in over thirty-five years, there can be no doubt about, or denial of, the significance of Judge Wilken's ruling and the Ninth Circuit's subsequent affirmation. *Id.*

150. Thomas Baker, *5 Issues to Keep an Eye On with the NCAA's New NIL Policy*, FORBES (Nov. 1, 2019, 11:40 AM), <https://www.forbes.com/sites/thomasbaker/2019/11/01/examining-the-ncaas-evolving-nil-policy-keep-an-eye-on-the-following-issues/#3e265577591> [<https://perma.cc/54LU-CV49>] ("[W]e should not ignore the legal pressure asserted on the NCAA that forced its change in position."); Michael Cunningham, *Time for Power 5 Football Bubble and Further Break from NCAA*, ATLANTA J.-CONST. (Aug. 21, 2020), <https://www.ajc.com/sports/mike-check-blog/time-for-power-5-football-bubble-further-break-from-ncaa/IGOSMFJAZJFMBKD34MNT6NMGC4/> [<https://perma.cc/C7BU-UPJN>] ("Social and political changes are putting pressure on college sports."); Dan Murphy, *Florida Name, Image, Likeness Bill Now a Law; State Athletes Can Profit from Endorsements Next Summer*, ESPN (June 12, 2020), https://www.espn.com/college-sports/story/_/id/29302748/florida-name-image-likeness-bill-now-law-meaning-state-athletes-profit-endorsements-next-summer [<https://perma.cc/FT4K-DEAJ>] ("Now that Florida's law is official, . . . Congress has less than [thirteen] months to pass federal legislation if it is going to preempt state law."); Blinder & Witz, *supra* note 9.

151. Murphy, *NCAA Group Supports NIL Plan*, *supra* note 14; Berkowitz, *Colorado NIL Law*, *supra* note 10; Zagger, *supra* note 10 (recognizing that the NCAA has asked Congress to not only pass federal legislation preempting state NIL laws but to also afford the governing body antitrust exemption); *see also* George F. Will, *The NCAA's Shameless Excuses for Denying 'Student-Athletes' the Money They*

Tension remains at an all-time high in the meantime, as the NCAA's amateurism principles—and the NCAA's overall existence—reach previously unimaginable levels of volatility.¹⁵² The driving factor underlying this tension is the national recognition that college athletes have been consistently exploited by the NCAA and remain victims of economic inequality.¹⁵³ Athletes have seized the opportunity in these tumultuous times, presenting a unified front advocating for the economic protections they deserve—and indeed, are entitled to.¹⁵⁴ These “once-in-a-lifetime circumstances” make the

Earn, WASH. POST (Nov. 15, 2019, 2:26 PM), https://www.washingtonpost.com/opinions/the-ncaa-is-a-cafeteria-of-embarrassments/2019/11/15/668e2c80-071b-11ea-8292-c46ee8cb3dce_story.html [<https://perma.cc/C9KQ-DB2T>] (“[The California Fair Pay to Play Act and similar proposed legislation represent] a small but widening fissure in the NCAA’s crumbling wall of resistance to allowing athletes to be among those who profit from their talents.”). Congress may not come to the NCAA’s rescue as quickly as the governing body may like, however. Murphy, *NCAA Group Supports NIL Plan*, *supra* note 14 (hypothesizing that the COVID-19 pandemic and the 2020 presidential election could inhibit Congress’s ability to quickly pass legislation). Though, as discussed *supra* note 17, Congress has introduced bipartisan legislation, the proposed bill “stops short of implementing all of the restrictions that the NCAA and other college sports administrators have asked Congress to help them impose.” Murphy, *Bipartisan Federal NIL Bill*, *supra* note 17. *But see* Dellenger, *Congress Introduces NIL Bill*, *supra* note 17 (discussing proposed federal legislation that would provide antitrust protections for the NCAA and “prohibit schools from classifying athletes as employees”). The NCAA’s plea to Congress could blow up in its face as legislators have also introduced a “College Athletes Bill of Rights,” discussed *supra* note 17, which would provide athletes even more protections than the recently enacted state legislation. Berkowitz, *Democrats Introduce College Athletes Bill of Rights*, *supra* note 22. For a detailed overview of the varying forms of proposed federal legislation, including the College Athletes Bill of Rights, the College Athlete and Compensation Rights Act (which would provide antitrust protection for the NCAA and establish that college athletes cannot be classified as employees), the Student Athlete Level Playing Field Act, and the Fairness in College Athletics Act, see Murphy, *Congressional NIL Options*, *supra* note 7.

152. Pearl, *supra* note 9; Blinder & Witz, *supra* note 9; Gordon, *supra* note 18; Zagger, *supra* note 10 (“[E]xplicitly allowing athletes to be paid for their NIL—even if it is only from third parties—could undercut the organization’s primary defense in antitrust suits: that not paying college athletes is key to what makes college sports so popular.”).

153. Zagger, *supra* note 10 (“The momentum in state legislatures is being driven by . . . the idea that college athletes are being exploited and should be able to earn money, at least from third-party sponsors, [which] has gained traction among politicians on both sides of the aisle in recent years.”).

154. Dan Wolken, *Opinion: As College Football Plans Are Discussed, It’s Time for Athletes to Have a Say*, USA TODAY (May 19, 2020, 12:34 PM), <https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2020/05/19/college-football-now-time-athletes-form-union/5219557002/> [<https://perma.cc/F4BP-6P4V>] (“There’s never been a more opportune time in the history of the NCAA for athletes to form a union and wield real power to negotiate their compensation, their working conditions and their rights.”); Gordon, *supra* note 18 (“That

landscape of college athletics ripe for seismic change, and a judicial finding that supports the athletes' need for economic equality and protection threatens to topple the entire structure.¹⁵⁵ As a result, Judge Wilken's language in *Alston* regarding the reality of college athlete compensation—that the athletes are indeed compensated in exchange for their services but deprived of their fair value—could act as the final nail in the coffin for the NCAA's amateurism principles in legal contexts outside the realm of antitrust law.¹⁵⁶

B. The Alston Effect on Future FLSA Challenges: Applying the Donovan Test

Judge Wilken's explicit recognition that college athletes are directly compensated in exchange for their athletic services changes the entire evaluation of the economic reality of the relationship between the athletes, their universities, and the NCAA in the FLSA context.¹⁵⁷ As a result, the relevant question no longer focuses on whether an athlete is deserving of any compensation in the first place as it did in *Livers*.¹⁵⁸ Rather, the scenario is now more analogous to that in *Donovan* and cases of the same progeny: the question becomes whether a particular worker who *receives monetary compensation in exchange for their services* is in fact an "employee"

chronic, underlying financial inequality is the largest driver of the player protest movement, although the movement has gained added resonance due to racial and health concerns." (quoting Pat Forde of *Sports Illustrated*); Silva et al., *supra* note 22 ("[T]housands of athletes across the country are demanding the basic rights long denied them.").

155. Gordon, *supra* note 18; Cunningham, *supra* note 150 ("I'm hoping that every Power 5 school that scuttles in-person classes keeps the athletes working. Keep the players around even if other students go home. If that happens then it's possible a court of law might one day rule, finally, that college players are employees. That's the quickest way to dismantle a system that enriches coaches and administrators while schools can collude to deny athletes basic economic rights."); Wolken, *supra* note 154.

156. *Alston I*, 375 F. Supp. 3d 1058, 1097 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020); *see also Alston II*, 958 F.3d 1239, 1270 (9th Cir. 2020) (Smith, J., concurring) ("Student-Athletes are quite clearly deprived of the fair value of their services."); Ehrlich, *supra* note 9, at 98–99.

157. *Alston I*, 375 F. Supp. 3d at 1097; *see also Alston II*, 958 F.3d at 1244, 1248; Ehrlich, *supra* note 9, at 97–98.

158. *Livers I*, No. 17-4271, 2018 WL 2291027, at *13 (E.D. Pa. May 17, 2018).

entitled to FLSA coverage or if the worker is simply an independent contractor operating on their own accord.¹⁵⁹ As a result, the stage is set for courts to finally adopt the multi-factor *Donovan* test that athlete challengers have urged the courts to adopt.¹⁶⁰ Translating Judge Wilken’s language into the FLSA context, while considering the rapidly changing landscape of modern college athletics, demands a finding that the NCAA’s amateurism principles can no longer preclude classifying college athletes as employees entitled to FLSA coverage.¹⁶¹

159. *Id.* (“As in *Donovan*, the cases that have followed it in applying the multi-factor test have dealt with the question of whether particular workers who receive monetary compensation for their work . . . are in fact ‘employees’ entitled to FLSA coverage.”). See generally *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376 (3d Cir. 1985) (applying a multi-factor test to determine whether a worker who receives monetary compensation in exchange for their services qualifies as an employee entitled to FLSA coverage or an independent contractor); *Safarian v. Am. DG Energy Inc.*, 622 F. App’x 149 (3d Cir. 2015) (same); *Martin v. Selker Bros.*, 949 F.2d 1286 (3d Cir. 1991) (same).

160. *Dawson v. Nat’l Collegiate Athletic Ass’n*, 932 F.3d 905, 911 (9th Cir. 2019) (“These factors [considered in a multi-factor test] prove ‘particularly appropriate where . . . it is clear that some entity is an ‘employer’ and the question is which one.’” (quoting *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993))); *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (recognizing that a multi-factor test is appropriate “where . . . it is clear that some entity is an employer and the question is which one”); see also *Livers II*, No. 17-4271, 2018 WL 3609839, at *5 n.2 (E.D. Penn. July 26, 2018) (“Plaintiff urges this Court to import [a multi-factor] test . . . to evaluate whether NCAA Scholarship Athletes are FLSA employees . . .”). The *Donovan* test also remains consistent with previous courts’ reliance on the DOL guiding factors enumerated in the FOH for determining whether an employer–employee relationship exists because the *Donovan* test essentially codifies those factors. Compare *Donovan*, 757 F.2d at 1382 (enumerating six factors for consideration to determine whether a worker qualifies as an employee under the FLSA), with *Colwell*, *supra* note 3, at 906–07 (listing the six factors enumerated by the DOL for consideration “to determine the ‘economic reality’ of the employment relationship”), and DOL FACT SHEET #13, *supra* note 105 (same).

161. Ehrlich, *supra* note 9, at 99; Joseph M. Hanna, *One More Time: New Lawsuit Argues NCAA Must Pay Athletes Minimum Wage*, LEXOLOGY (Nov. 18, 2019), <https://www.lexology.com/library/detail.aspx?g=87b9e8e8-987f-419b-a65e-912bf56f69e6> [<https://perma.cc/6YCX-WP7J>] (providing an overview of former Villanova football player Trey Johnson’s 2019 lawsuit against the NCAA arguing that college athletes qualify as employees entitled to FLSA protections due to the “rapidly changing” landscape of college athletics, discussed *supra* note 86); Cunningham, *supra* note 150; Rohan Nadkarni, *College Football Players Need a Union Now More Than Ever*, SPORTS ILLUSTRATED (July 2, 2020), <https://www.si.com/college/2020/07/02/college-football-needs-a-union-now-more-than-ever> [<https://perma.cc/5FNR-WFF9>] (“Even in failure, [former Northwestern University quarterback Kain] Colter’s union push did lay the groundwork for what to expect from a future attempt. Players will almost certainly have to combat a union-busting campaign. . . . But it also set a precedent, that college athletes could be considered employees.”). Though Judge Wilken’s district court order may only represent persuasive authority for future

1. *Degree of the NCAA's Right to Control the College Athletes*

Although college athletes engage in their respective sports voluntarily, they remain subject to the almost dictatorial control of the NCAA, their universities, and their coaches.¹⁶² Typically, employers exercise control over their employees by setting the schedule of when, and defining the parameters in which, the employees will perform their work.¹⁶³ Independent contractors on the other hand generally operate under their own conditions, free of employer control.¹⁶⁴ Because the NCAA represents the only viable option for athletes pursuing professional opportunities, the governing body operates as a monopsony, unilaterally regulating college athletics.¹⁶⁵ Even on a more “day-to-day” level, coaches, universities, and the NCAA maintain a considerable amount of control over the athletes.¹⁶⁶ Not only do the universities and the coaches control the

challengers, the Ninth Circuit unanimously affirmed Judge Wilken’s factual findings and adopted the language employed in the order, adding weight to its persuasive value. *Alston II*, 958 F.3d at 1244. Now that the Supreme Court is set to review the case, Judge Wilken’s findings and revelations could ultimately become binding precedent upon all courts, further eroding the narrowing foundation beneath the NCAA’s antiquated amateurism principles. See Howe, *supra* note 149.

162. *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 293 (7th Cir. 2016) (“Student participation in collegiate athletics is entirely voluntary.”); *Livers II*, 2018 WL 3609839, at *5; Colwell, *supra* note 3, at 930.

163. Colwell, *supra* note 3, at 929 (citing *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1441 (10th Cir. 1998)).

164. *Id.* (“An independent contractor, in contrast, typically works relatively free of employer control.” (citing DOL FACT SHEET #13, *supra* note 105)).

165. *Alston I*, 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019) (“[B]ecause elite student-athletes lack any viable alternatives . . . they are forced to accept . . . whatever compensation is offered to them by Division I schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services.”), *aff’d*, 958 F.3d 1239 (9th Cir. 2020); see also *Alston II*, 958 F.3d at 1256–57 (affirming the district court’s finding that the NCAA rules have significant anticompetitive effects in the market for college athletes’ labor because the athletes lack viable alternatives). For a discussion on the NCAA’s monopsony status, see *supra* note 119.

166. Colwell, *supra* note 3, at 930 (“Because of the nature of collegiate athletics, college coaches have a considerable amount of control over student-athletes. . . . Coaches dictate student-athletes’ day-to-day activities . . . and determine what needs to be accomplished for the student-athlete to participate in his sport.”); see also *Alston II*, 958 F.3d at 1266 (Smith, J., concurring) (“Nevertheless, their coaches and others in the Division I ecosystem make sure that Student-Athletes put athletics first, which makes it difficult for them to compete for academic success with students more focused on academics.”).

scheduling of athletic practices, workouts, and competitions, but they essentially control the academic schedules of the athletes as well.¹⁶⁷ When push comes to shove in the balance of academics and athletics, athletes are frequently forced to put their books down.¹⁶⁸

Courts have already recognized that athletes are personally dependent upon their respective universities while in school, leaving them vulnerable to any rules or demands imposed upon them.¹⁶⁹ Taking advantage of this dependence, the NCAA requires that all member institutions comply with its Division I Bylaws.¹⁷⁰ Should any athlete violate any provision of the Bylaws, the NCAA commands that the athlete's university suspend or even ultimately disqualify the violator.¹⁷¹ Because the athletes are under the complete control of the NCAA and their respective universities, this factor weighs in favor of classifying the athletes as employees under the FLSA.¹⁷²

167. Patrick Hruby, *The NCAA Says Paying Athletes Hurts Their Education. That's Laughable.*, WASH. POST (Sept. 20, 2018, 1:11 PM), https://www.washingtonpost.com/outlook/the-ncaa-says-paying-athletes-hurts-their-education-thats-laughable/2018/09/20/147f26c0-bb80-11e8-a8aa-860695e7f3fc_story.html [https://perma.cc/QNT4-KMH2] (discussing that former Northwestern University quarterback Kain Colter testified during the Northwestern football team's petition of the National Labor Relations Board "that he was steered away from strenuous classes like chemistry and had to abandon a pre-med major because his sport was too time consuming"); see also *Alston II*, 958 F.3d at 1266 (Smith, J., concurring).

168. Hruby, *supra* note 167 ("You can't ever reach your academic potential with the time demands . . . You have to sacrifice, and we're not allowed to sacrifice football." (quoting former Northwestern University quarterback Kain Colter)); see also *Alston II*, 958 F.3d at 1266 (Smith, J., concurring) ("They are often forced to miss class, to neglect their studies, and to forego courses whose schedules conflict with the sports in which they participate.").

169. *Livers II*, No. 17-4271, 2018 WL 3609839, at *5 (E.D. Pa. July 26, 2018).

170. NCAA DIVISION I MANUAL, *supra* note 1, at art. 2.1.

171. *Id.* at art. 12.11.1 ("If a student-athlete is ineligible under the provisions of the constitution, bylaws or other regulations of the [NCAA], the institution shall be obligated to apply immediately the applicable rule and to withhold the student-athlete from all intercollegiate competition.").

172. Colwell, *supra* note 3, at 929 (citing DOL FACT SHEET #13, *supra* note 105).

2. *Opportunities for College Athletes to Experience Profit or Loss*

Because college athletes remain subject to the control of their universities and the NCAA, they lack managerial influence when it comes to making critical decisions affecting the operation of their athletic departments.¹⁷³ According to FLSA case law, workers who maintain managerial influence over the work they perform typically fall into the category of independent contractors rather than employees.¹⁷⁴ When workers are able to exercise their managerial influence in a way that improves the efficiency in which they perform their work such that they can complete more work, workers can experience the profits and losses generated by their work.¹⁷⁵ A worker who does not share the opportunity to experience profits or losses and remains subject to the unilateral decisions of superiors is more likely classified as an employee rather than an independent contractor.¹⁷⁶

Because college athletes are denied managerial influence, their interests often go unaccounted for, especially when it comes to matters regarding compensation.¹⁷⁷ As a result, the NCAA intentionally deprives the athletes of the opportunity to experience the value created by their athletic performance, making the athletes economically dependent on the scholarships and permissible funds provided by their universities.¹⁷⁸ Economic dependence is indicative

173. *Id.* at 928 (“Student-athletes do not make critical business decisions for a university athletic department and do not exercise any managerial control as employees of the university.”).

174. *Acosta v. Off Duty Police Servs.*, 915 F.3d 1050, 1059 (6th Cir. 2019) (citing *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 813 (6th Cir. 2015)).

175. *Id.*

176. *Dole v. Snell*, 875 F.2d 802, 808–10 (10th Cir. 1989) (holding that a worker who has “no control over the essential determinants of profits in a business, and no direct share in the success of the business” has not undertaken the typical risks of an independent contractor and is more likely entitled to employee status under the FLSA); *see also* *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1387 (3d Cir. 1985) (holding that the opportunity to experience profits and losses is more indicative of an independent contractor relationship rather than an employer–employee relationship).

177. *See* *Dole*, 875 F.2d at 808–10.

178. *Alston I*, 375 F. Supp. 3d 1058, 1068, 1070 (N.D. Cal. 2019), *aff’d*, 958 F.3d 1239 (9th Cir. 2020); Alexia Fernández Campbell, *Free Labor from College Athletes May Soon Come to an End*, VOX

of an employer–employee relationship entitled to FLSA protection.¹⁷⁹ Thanks to *Livers*—and as common sense dictates¹⁸⁰—courts already acknowledge that college athletes are indeed economically dependent on the NCAA and their respective universities.¹⁸¹

Moreover, Judge Wilken’s analysis shows that although college athletes undeniably do not earn their fair share of compensation under the existing structure, they do actually receive some forms of compensation—albeit those arbitrarily labeled “permissible” according to the NCAA.¹⁸² Not only are college athletes compensated in the form of their grant-in-aid scholarships, but the NCAA also disburses money to the athletes annually through payments from Student Assistance Funds (SAF) and Academic Enhancement Funds (AEF).¹⁸³ The NCAA supposedly earmarks these funds to “assist student-athletes in meeting financial needs, improve their welfare or academic support, or recognize academic achievement.”¹⁸⁴ These funds and other arbitrarily permitted forms of compensation represent some form of a “wage” (deficient as it may be) paid to the athletes to

MEDIA (Oct. 3, 2019, 5:40 PM), <https://www.vox.com/identities/2019/10/3/20896738/california-fair-pay-to-play-act-college-athletes> (“The only ones who aren’t making money are the athletes themselves. . . . [They] can get scholarships and small stipends but no sponsorship or endorsement deals of any kind.”).

179. *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 150 (4th Cir. 2017) (“When a worker is economically dependent on a putative employer—or, in the event two or more entities codetermine the essential terms and conditions of the worker’s employment, his putative joint employers—he qualifies as an employee protected by the FLSA.” (citing *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947), *superseded by statute*, Fair Labor Standards Amendments of 1985, Pub. L. No. 99–150, 99 Stat. 787)); *see also Walling*, 330 U.S. at 152 (“The definition ‘suffer or permit to work’ was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.”).

180. Nocera, *College Sports Charade*, *supra* note 29 (“To people like me, who have been calling for players to be paid for years—and who are offended at how their free labor enriches everyone else in College Sports Inc.—it seems plain as day that [the NCAA’s amateurism rules preventing universities from paying athletes violate antitrust laws].”).

181. *Livers II*, No. 17-4271, 2018 WL 3609839, at *5 (E.D. Pa. July 26, 2018) (citing *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985)).

182. *Alston I*, 375 F. Supp. 3d at 1071–74, 1106; *see also Alston II*, 958 F.3d 1239, 1244–45 (9th Cir. 2020).

183. *Alston I*, 375 F. Supp. 3d at 1072; *see also Alston II*, 958 F.3d at 1244–45.

184. *Alston I*, 375 F. Supp. 3d at 1072 & n.15; *see also Alston II*, 958 F.3d at 1245.

perform their work by competing in their respective sports.¹⁸⁵ Earning a set wage as defined by superiors who deny the workers any input as to the amount of the wage is again indicative of an employer–employee relationship entitled to FLSA protection.¹⁸⁶ Thus, the NCAA’s own stubbornness and intentional regulation of athlete compensation—depriving college athletes the opportunity to experience the profits and losses generated by their work in their respective sports—ironically also weigh in favor of classifying the athletes as employees under the FLSA.¹⁸⁷

185. *Alston I*, 375 F. Supp. 3d at 1072 n.15; *see also Alston II*, 958 F.3d at 1245.

186. *Dole v. Snell*, 875 F.2d 802, 808–10 (10th Cir. 1989) (noting that a worker who has no input whatsoever in the amount of compensation they receive for their services means the worker has “no control over the essential determinants of profits in a business”); *Acosta v. Off Duty Police Servs.*, 915 F.3d 1050, 1059 (6th Cir. 2019) (holding that a worker earning a set wage to perform a job for a fixed period of time supports a finding of an employer–employee relationship).

187. *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 150 (4th Cir. 2017) (holding that economic dependence supports a finding of the existence of an employment relationship). As discussed *supra* notes 8–12 and accompanying text, multiple states have passed laws granting college athletes the right to earn compensation derived from the use of their NILs, threatening to take the control away from the NCAA and allow the athletes an opportunity to experience profit. *Zagger*, *supra* note 10. The NCAA responded to the mounting legislative pressure by announcing plans to modernize its own NIL rules to “permit students participating in athletics the opportunity to benefit from the use of their NILs,” but again, strictly subject to the governing body’s regulation. *Sallee & Silverstein*, *supra* note 15; *Berkowitz*, *NCAA Unveils Proposed Rules Changes*, *supra* note 7; *see also Pickman*, *supra* note 14; *McCullough*, *supra* note 14 (“[T]he NCAA statement included the word ‘compensation’ only once, as in: ‘Make clear that compensation for athletics performance or participation is impermissible.’”). In an even more desperate attempt to maintain control over athlete compensation, the NCAA lobbied Congress to adopt federal NIL legislation that would preempt the state laws allowing college athletes to profit off of their NILs. *Dellenger*, *NCAA’s Congressional NIL Proposal*, *supra* note 16; *see also Murphy*, *NCAA Group Supports NIL Plan*, *supra* note 14; *Berkowitz*, *Colorado NIL Law*, *supra* note 10. Though allowing college athletes to profit off of their NILs may actually tip the scale of factor two away from employee status, the NCAA’s insistence on maintaining control over NIL compensation could negate any shifting of the scales. *Murphy*, *NCAA Group Supports NIL Plan*, *supra* note 14; *Brent Schrottenboer*, *NCAA Petitions U.S. Supreme Court in Bid to Preserve Amateurism*, USA TODAY: SPORTS, <https://www.usatoday.com/story/sports/2020/10/15/ncaa-petitions-supreme-court-preserve-college-sports-amateurism/3664496001/> [<https://perma.cc/G26V-NPTW>] (Oct. 15, 2020, 1:43 PM). Perhaps in an attempt to safeguard the governing body from another ironic side effect of such modernization (allowing athletes to receive compensation for their NILs undercuts the basic premise of the NCAA’s amateurism principles), the NCAA’s proposal to Congress also included a subsection codifying the amateur status of college athletes, preventing a finding that the athletes qualify as employees. *Zagger*, *supra* note 10. Just because the governing body may appear ready to (reluctantly) allow college athletes to profit from the commercial use of their NILs while still in school “doesn’t mean the NCAA is willing to let go of the concept of amateurism in college sports.” *Schrottenboer*,

3. *College Athletes' Personal Investment in Equipment and Materials*

Another consequence flowing from the NCAA's control over college athletes is that the athletes themselves are not required to personally invest in facilities and equipment.¹⁸⁸ Individuals who personally invest in tools and equipment needed to perform their respective work are typically classified as independent contractors not entitled to coverage under the FLSA.¹⁸⁹ The materials and equipment needed to participate in college athletics, on the other hand, are typically provided to the athletes by their universities.¹⁹⁰ Universities frequently invest increasing amounts of the revenue generated from college athletics—amounts that could be used to compensate the athletes—into upgrading athletic facilities and equipment.¹⁹¹ Universities also enter into multi-million dollar apparel contracts to provide athletes with the equipment necessary for participation in athletics and then some.¹⁹² Because college athletes are not required to individually invest in facilities and equipment like independent contractors, this factor also weighs in favor of finding that college athletes qualify as employees under the FLSA.¹⁹³

supra; see also *NCAA Petitions Supreme Court*, *supra* note 28 (concluding the NCAA's official announcement regarding its petition for the Supreme Court to review the *Alston* case by stating that the governing body "will continue to defend the line between professional sports and college sports").

188. Colwell, *supra* note 3, at 927.

189. *Id.* at 926 (first citing DOL FACT SHEET #13, *supra* note 105; and then citing *Chao v. Mid-Atl. Installation Servs., Inc.*, 16 F. App'x 104, 107 (4th Cir. 2001)).

190. *Id.* at 927; NCAA DIVISION I MANUAL, *supra* note 1, at art. 16.8.

191. *Alston I*, 375 F. Supp. 3d 1058, 1085, 1103 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020); see also *Alston II*, 958 F.3d 1239, 1249 & n.8 (9th Cir. 2020) ("[I]n 2013, the Power Five began to urge the NCAA to loosen its compensation restrictions based on a concern that existing rules incongruously allowed schools to spend on virtually anything, including palatial athletic facilities and seven-figure coaches' salaries, *except* direct financial support for student-athletes."); MURPHY, *supra* note 1, at 9; McCann, *NCAA Landmark Loss*, *supra* note 25.

192. MURPHY, *supra* note 1.

193. Colwell, *supra* note 3, at 927.

4. *Level of Athletic Skill Required*

Ironically, the importance of an athlete's skill and ability actually weighs against finding that college athletes qualify as employees under the FLSA.¹⁹⁴ Highly skilled workers who maintain the ability to make independent business decisions about whom they work for are typically classified as independent contractors rather than employees entitled to FLSA protection.¹⁹⁵ Not only do top-tier Division I athletes possess elite athletic skills, but these skills are exactly what make them desirable recruits for top-rated programs.¹⁹⁶ Some schools and apparel companies have even willfully violated NCAA rules in efforts to land commitments from highly-touted prospects.¹⁹⁷ Because the athletes are the ones in demand, they enjoy a certain degree of decision-making power when choosing where to attend school and render their services.¹⁹⁸ This ability to make personal "business judgments" weighs against finding that college athletes qualify as employees under the FLSA.¹⁹⁹

194. *Id.* at 929.

195. *Id.* (citing DOL FACT SHEET #13, *supra* note 105).

196. *Alston I*, 375 F. Supp. 3d at 1067 (defining the relevant market as one where schools are characterized as the buyers of recruits selling their athletic services and licensing rights); *see also Alston II*, 958 F.3d at 1248, 1266 ("Based on these analyses, [the district court] also found that, but for the challenged restraints, schools would offer recruits compensation that more closely correlates with their talent.").

197. Hobson & Strauss, *supra* note 11 (observing that, in reference to the Department of Justice's investigation into Adidas youth basketball operations, major shoe companies and universities are already attempting to pay top-rated high school recruits).

198. Colwell, *supra* note 3, at 929 ("A student-athlete is similar to an independent contractor because his skills and specialization allow him to make 'business judgements' and use his talents as leverage when being recruited by schools.").

199. *Id.* These "business judgments" differ from the ability to make "business decisions" allowing an employee to experience profits and losses because the judgment is one of individual interest. *Id.* at 928.

5. *Permanence of the Relationship Between the NCAA and the College Athletes*

As a result of the nature of college athletics, the duration of the relationship between the athletes, their universities, and the NCAA is confined to a finite period of time.²⁰⁰ Typically, a longer and more permanent relationship between the alleged worker and employer suggests the existence of an employment relationship.²⁰¹ But a temporary relationship does not defeat the existence of an employment relationship if the temporariness is a product of the industry in which the individual is employed, however.²⁰² This is precisely the case with college athletics because the NCAA alone defines the parameters of eligibility in terms of the number of seasons an athlete can participate in their respective sport.²⁰³

Further, the NCAA represents the only viable option for college athletes realistically pursuing professional opportunities.²⁰⁴ Though alternative avenues such as the National Association of Intercollegiate Athletics or international competition are available, the combination of high-level television exposure and professional preparation place the NCAA in a league of its own.²⁰⁵ Additionally, the majority of professional sports leagues require at least one season of intercollegiate competition—or equivalent experience from a

200. NCAA DIVISION I MANUAL, *supra* note 1, at art. 12.8 (“A student-athlete shall not engage in more than four seasons of intercollegiate competition in any one sport.”).

201. *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1442 (10th Cir. 1998) (“Generally speaking, “independent contractors” often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas “employees” usually work for only one employer and such relationship is continuous and of indefinite duration.” (quoting *Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989))).

202. *Id.* (“However, “[m]any seasonal businesses necessarily hire only seasonal employees, [and] that fact alone does not convert seasonal employees into seasonal independent contractors.” (alterations in original) (quoting *Sec’y of Lab. v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987))).

203. *See generally* NCAA DIVISION I MANUAL, *supra* note 1, at art. 12.8.

204. *Alston I*, 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019), *aff’d*, 958 F.3d 1239 (9th Cir. 2020); *see also Alston II*, 958 F.3d 1239, 1256–57 (9th Cir. 2020).

205. *Alston I*, 375 F. Supp. 3d at 1067, 1097; *see also Alston II*, 958 F.3d at 1256–57.

comparable alternative—to become eligible for professional competition.²⁰⁶

Even though college athletes in the NCAA are confined to a maximum of four seasons of intercollegiate competition, their relationship with the NCAA is “permanent and exclusive for the duration of” their eligibility.²⁰⁷ The finite duration of the relationship is no different than that of students participating in a work-study program or student assistants engaging in a common-law employment relationship with their universities.²⁰⁸ Despite the temporary nature of college athletics—indeed *because* the temporary nature is imposed by a monopsony power—the permanency and exclusivity of the relationship between the athletes, their universities, and the NCAA weigh in favor of finding that college athletes qualify as employees under the FLSA.²⁰⁹

206. Kelly Hines, *Going Pro: Which Sport Gets Draft Rules Right?*, TULSA WORLD, https://www.tulsaworld.com/sportsextra/collegebasketball/going-pro-which-sport-gets-draft-rules-right/article_ea5642ca-4a94-5084-bd1f-f3f3213cbec3.html [https://perma.cc/S5N7-X6FN] (Sept. 27, 2019).

207. *Baker*, 137 F.3d at 1442 (quoting *Lauritzen*, 835 F.2d at 1537) (finding that the relationship between oil and gas pipeline construction workers and the pipeline construction company, though seasonal and thus confined to a short duration, was still appropriately characterized as an employee–employer relationship because the temporary nature of the position was defined by the market). NCAA Division I athletes maintain the ability to transfer universities for various reasons, but they ultimately remain under the NCAA’s umbrella and thus subject to the NCAA’s eligibility requirements. See generally NCAA DIVISION I MANUAL, *supra* note 1, at arts. 14.5–.5.6.10.

208. *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 293 (7th Cir. 2016) (recognizing that, under section 10b24(b) of the FOH, students participating in a work-study program while holding an additional job are generally considered employees under the FLSA); *Trs. of Columbia Univ.*, 364 N.L.R.B. No. 90 (Aug. 23, 2016) (finding that student assistants have a common-law employment relationship with their universities and thus qualify as statutory employees under the NLRA entitled to full bargaining rights and protection). Though the NLRA only governs private enterprises, its interpretation and application remain highly influential in the FLSA context. *Novaes*, *supra* note 46, at 1542 n.44.

209. *Alston I*, 375 F. Supp. 3d at 1097 (“[The NCAA has] near complete dominance of, and exercise[s] monopsony power in, the relevant market [of intercollegiate athletics]”); see also *Alston II*, 958 F.3d at 1248, 1270; *Baker*, 137 F.3d at 1442 (“Plaintiffs’ lack of permanence is due to natural characteristics in the industry, and not the independent choice usually exhibited by one who intentionally chooses to be in business for oneself.” (citing *Baker v. Barnard Constr. Co.*, 860 F. Supp. 766 (D.N.M. 1994), *aff’d*, 137 F.3d 1436 (10th Cir. 1998)); NCAA DIVISION I MANUAL, *supra* note 1, at art. 12.8.

6. *College Athletes As an Integral Part of the NCAA's Business*

As the actual competitors performing week-in and week-out and generating billions of dollars in revenue for Division I programs, college athletes are undeniably an integral part of the NCAA's business.²¹⁰ An individual performing an integral or vital task is more likely to be considered an employee if the business's ultimate success depends on the completion of said task.²¹¹ As Judge Wilken observed in *Alston*, a college athlete's task—more appropriately termed, “labor”—takes the form of performing their athletic services.²¹² Judge Wilken even directly credited these services as the source of the extraordinary value of college athletics.²¹³ The value of college athletics—specifically in the context of Division I men's basketball and FBS football—is seemingly at an all-time high, as evidenced by the increasing revenues generated by universities and billion-dollar media rights contracts signed in recent years.²¹⁴ If the athletes ever collectively ceased competition entirely, the NCAA would suffer catastrophic harm.²¹⁵ Because of the NCAA's undeniable

210. MURPHY, *supra* note 1, at 3; Campbell, *supra* note 178; *see also* Tynes, *supra* note 12 (“[The Fair Pay to Play Act] falls short of [California Senator Nancy Skinner's] ultimate ambition of letting athletes earn a share of the revenues they help generate in the multibillion-dollar college sports industry.”).

211. Colwell, *supra* note 3, at 931.

212. *Alston I*, 375 F. Supp. 3d at 1097; *see also Alston II*, 958 F.3d at 1248.

213. *Alston I*, 375 F. Supp. 3d at 1070 (“Moreover, the compensation that class members receive under the challenged rules is not commensurate with the value that they create for Division I basketball and FBS football; this value is reflected in the extraordinary revenues that [the NCAA] derive[s] from these sports.” (emphasis added)); *see also Alston II*, 958 F.3d at 1266 (Smith, J., concurring) (“[T]hat is not because their athletic services have little value. On the contrary, the NCAA and Division I universities make billions of dollars from ticket sales, television contracts, merchandise, and other fruits that directly flow from the labors of Student-Athletes.”).

214. *Alston I*, 375 F. Supp. 3d at 1077–78; *see also Alston II*, 958 F.3d at 1245; MURPHY, *supra* note 1, at 11 (“In 2016, the Big Ten conference signed a six-year broadcast rights deal with Fox, ESPN, and CBS worth \$2.64 billion.”); Murphy, *NC NIL Bill*, *supra* note 2 (detailing an \$8.8 billion extension signed by CBS and Turner Sports in 2016 to broadcast the NCAA Tournament through 2032).

215. Ray Glier, *California NIL Law Is Weak, Leaving NCAA Athletes on Their Own, Professor Says*, FORBES (Nov. 19, 2019, 9:47 PM), <https://www.forbes.com/sites/rayglier/2019/11/19/california-law-weak-so-athletes-on-their-own-with-nil/#5c13711d3fba> [<https://perma.cc/CQN4-W9T5>] (“[I]f the athletes don't get their rights they should walk out, boycott, refuse to play and tip over the system once

dependency on the labor of college athletes, this factor too weighs in overwhelming favor of finding that college athletes qualify as employees under the FLSA.²¹⁶

7. *Other Factors Necessary to Assess Economic Reality*

Even when applying the *Donovan* factors, courts must still consider the totality of the circumstances when determining the economic reality of the relationship in question.²¹⁷ In the context of college athletics, this necessitates an assessment of the effects of amateurism.²¹⁸ As Judge Wilken made abundantly clear in *Alston*, however, the NCAA's amateurism principles are inherently inconsistent.²¹⁹ Moreover, a survey of the current landscape of

and for all.”); Bobby Rush, *Without Athletes, the Big Money in College Sports Disappears*, U.S. NEWS (Apr. 2, 2013, 10:35 AM), <https://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/without-athletes-the-big-money-in-college-sports-disappears> [<https://perma.cc/CVL9-E3MN>] (“Without [the athletes] . . . the billions of dollars that collegiate athletics generates simply would not exist.”); *see also* Silva et al., *supra* note 22 (speculating that conferences choosing to cancel the 2020 college football season in the wake of the COVID-19 pandemic stemmed more from an institutional fear of college athletes organizing and unionizing rather than an effort to ensure athlete safety). This hypothetical almost became reality in the fall of 2020 in the midst of the COVID-19 pandemic as athletes collectively threatened to opt out of competition entirely. *See* sources cited *supra* note 22. Though some individual athletes, and even collective conferences, did in fact opt out of competition for health-related concerns, the Power Five conferences were ultimately able to still put on a college football season, though the season was not without its fair share of speedbumps. *See supra* notes 21–23 and accompanying text. The turmoil that accompanied the 2020 college football season was enough to stir skepticism about the NCAA's ability to continue to exist as a governing body should any of the top revenue-generating conferences or institutions choose to secede from the association. *See* Drew & Miller, *supra* note 23.

216. *Sec'y of Labor v. Lauritzen*, 835 F.2d 1429, 1529 (7th Cir. 1987); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985). Though courts have found that college athletes are personally economically dependent on their athletic scholarships, the NCAA—paradoxically—is entirely economically dependent on the athletes. *Livers II*, No. 17-4271, 2018 WL 3609839, at *5 (E.D. Pa. July 26, 2018) (citing *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290 (1985)).

217. *Dawson v. Nat'l Collegiate Athletic Ass'n*, 932 F.3d 905, 910 (9th Cir. 2019) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)); *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 290 (7th Cir. 2016) (citing *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992)); *Livers I*, No. 17-4271, 2018 WL 2291027, at *13 (E.D. Pa. May 17, 2018) (citing *Donovan*, 757 F.2d at 1382).

218. *Berger*, 843 F.3d at 291 (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)); *Livers I*, 2018 WL 2291027, at *14.

219. *Alston I*, 375 F. Supp. 3d at 1070–71, 1074–75 (recognizing (1) that the NCAA's concept of amateurism has changed several times throughout its existence, suggesting that the principle is inherently inconsistent, and (2) that the NCAA's current compensation regulations do not follow a

college athletics reveals an influx of legislative and player efforts attacking amateurism.²²⁰ The NCAA itself has even undermined its position on amateurism by admitting that its own NIL policies are outdated, implicitly conceding that the economic reality of its relationship with college athletes is no longer consistent with amateurism.²²¹ As a result, amateurism no longer retains the weight it

coherent definition of amateurism because the NCAA has failed to define the term anywhere within its Division I Bylaws); *see also Alston II*, 958 F.3d at 1259; Tynes, *supra* note 12 (“The doomsday rhetoric around paying players has existed as long as the NCAA has operated. The argument is that college athletics will implode if players are paid. Yet when has that ever been true?”).

220. Zagger, *supra* note 10 (discussing the California, Colorado, and Florida laws allowing athletes to earn compensation for the use of their NILs while observing that thirty-six total states have proposed similar legislation); Silva et al., *supra* note 22 (observing that “thousands of athletes across the country are demanding the basic rights long denied them”).

221. *See* Zagger, *supra* note 10; *see also* Iafolla, *supra* note 80 (“The NCAA is saying it’s OK for athletes to be paid as long as somebody else pays them . . .” (quoting Michael Willemin, the attorney representing Trey Johnson in his pending FLSA lawsuit against the NCAA, discussed *supra* note 86)); *NCAA NIL Announcement*, *supra* note 13. Though the NCAA’s proposed NIL rules changes, on their face, seemingly undermine the governing body’s amateurism principles, the NCAA has signaled time and time again that it will do whatever it can to maintain the current concept of amateurism. Schrottenboer, *supra* note 187. Notably, the proposed NIL rules changes contain several restrictions on how college athletes may earn compensation from permissible marketing endeavors and still afford universities broad discretion to regulate such endeavors. *Id.*; Berkowitz, *NCAA Unveils Proposed Rules Changes*, *supra* note 7. Such restrictions threaten to render any rules allowing college athletes to earn compensation “functionally useless,” drawing well-deserved criticism from advocates for athletes’ rights. Berkowitz, *NCAA Unveils Proposed Rules Changes*, *supra* note 7 (“This disappointing proposal appears to be just more of the same from the NCAA, which has always prioritized its own self-interest above its athletes.” (quoting Connecticut Senator Richard Blumenthal)). Additionally, the NCAA made clear in its petition to the Supreme Court to rehear the *Alston* case that the governing body “will continue to defend the line between professional sports and college sports.” *NCAA Petitions Supreme Court*, *supra* note 28. In fact, the petition explicitly expressed the NCAA’s (legitimate) concerns that “[t]he ruling blurs the line between student-athletes and professionals,” and it is thus “critical for the Supreme Court to address the consequential legal errors in [the] case so that college sports can be governed, not by the courts, but by those who interact with and lead students every day.” *Id.*; Schrottenboer, *supra* note 187 (“The NCAA petitioned the Supreme Court . . . in an effort to save amateurism and avoid having to give players more than their current compensation, which has been restricted to the cost of attending college.”). These two developments—one seemingly monumental (reforming NCAA NIL policies to allow athletes to earn compensation for commercial use of their NILs) and the other a last-ditch effort (petitioning the Supreme Court for review of a case that allows athletes to receive additional compensation above the cost of attendance)—seem in direct conflict with one another yet came just one day apart. Schrottenboer, *supra* note 187. These paradoxical pursuits make abundantly clear that the NCAA sees the writing on the wall regarding its antiquated amateurism principles. Murphy, *Framework for Federal College Sports Legislation*, *supra* note 17 (“[The NCAA is] just in denial that college football and college basketball [are] professional.” (quoting Connecticut

once held in the economic reality analysis, and it no longer precludes a finding that college athletes qualify as employees under the FLSA.²²² Accordingly, the NCAA must finally face reality and acknowledge that there is no longer a place for amateurism in modern college athletics.²²³

III. PROPOSAL

The landscape of college athletics has evolved rapidly, while the NCAA has stubbornly remained stagnant.²²⁴ Though the NCAA has bought itself some time—and saved some face—by announcing plans to reform its own NIL policies, the governing body still faces a bleak future unless it drastically alters its current model.²²⁵ Proactively

Senator Chris Murphy)).

222. *Berger*, 843 F.3d at 294 (Hamilton, J., concurring) (suggesting that there may be a time when the economic reality of amateurism may not preclude a finding that college athletes are employees under the FLSA).

223. Robert A. McCormick & Amy C. McCormick, *The Myth of the Student-Athlete: The College Athlete As Employee*, 81 WASH. L. REV. 71, 156–57 (2006) (“To call NCAA Division I athletes in revenue-generating sports amateurs is farcical.”).

224. See Forde, *supra* note 33 (blaming the NCAA’s “failure to terminate the flawed concept of amateurism in a timely fashion” for the governing body’s ineffective responses to, and directives issued in the face of, the COVID-19 pandemic); Cunningham, *supra* note 150; Baker, *supra* note 150; Hanna, *supra* note 161; McCann, *NCAA’s NIL Announcement: Key Takeaways*, *supra* note 13.

225. Baker, *supra* note 150 (“The relatively rapid push for legislation in . . . states and in Congress represents a loss of deference for the NCAA’s bylaws and a tightening noose with regard to the political pressure placed on the NCAA to change those bylaws.”); McCann, *California Game Changer*, *supra* note 7; Murphy, *Florida’s NIL Timeline*, *supra* note 11 (noting that Florida’s NIL law is set to take effect in July 2021, placing great pressure on the NCAA to act quickly); McCollough, *supra* note 14 (“This [NCAA NIL-policy-amendment announcement] is another attempt at stalling on this issue.” (quoting National College Players Association Executive Director Ramogi Huma)). Experts initially expected the NCAA’s proposed NIL rules changes to pass the Division I Council’s official vote in January of 2021, but the Council tabled the vote shortly after the Supreme Court granted cert. to review *Alston*. Russo, *supra* note 14 (suggesting initially that the proposed rules changes would “likely” pass vote in January and go into effect for the 2021–2022 academic year); Hosick, *supra* note 15 (announcing that the Division I Council elected to delay the formal vote to adopt the proposed NIL rules changes). Until such rules changes are formally implemented, however, critics and legislators remain skeptical of any actual benefit that may result from NCAA NIL reform. Berkowitz, *NCAA Unveils Proposed Rules Changes*, *supra* note 7 (noting that the proposed rules changes would still be far more restrictive than, and thus at odds with, already-enacted state legislation set to take effect in the near future). Further, the NCAA’s desperate plea for federal legislation could actually backfire on the

abandoning its antiquated amateurism principles and recognizing college athletes as employees under the FLSA would not only benefit the athletes but it could save the NCAA from extinction.²²⁶ Critics argue that forcing the NCAA and its member institutions to pay college athletes a guaranteed minimum wage would financially cripple the industry, though studies suggest that the entities would actually still be able to operate profitably.²²⁷ In fact, implementing

governing body because it turns out that legislators on both sides of the aisle seem to empathize with the athletes who have been exploited rather than the executives who have reaped the benefits of the athletes' free labor. Murphy, *Bipartisan Federal NIL Bill*, *supra* note 17 (noting that proposed federal legislation "stops short of implementing all of the restrictions that the NCAA and other college sports administrators have asked Congress to help them impose," and that some legislators view the bipartisan bill as "an interim step on a path toward eventually giving college athletes an opportunity to be paid like professionals"). *But see* Dellenger, *Congress Introduces NIL Bill*, *supra* note 17. Though one piece of proposed federal legislation grants the NCAA many of its desired protections (including antitrust exemption and provisions preventing schools from classifying athletes as employees), the bill is likely to face stark opposition that could halt the bill's potential progress following the Democrats' recent victories in the Senate. Dellenger, *Landmark College Athletes Bill of Rights*, *supra* note 17. The College Athletes Bill of Rights, discussed *supra* note 17, represents the most formidable proposal for federal legislation regulating college athletics, threatening to statutorily eradicate the NCAA's amateurism principles. *See* Berkowitz, *Democrats Introduce College Athletes Bill of Rights*, *supra* note 22 (recognizing that the proposed legislation contains numerous clauses that "run[] counter to proposals for NIL rules changes the NCAA is scheduled to vote on" because the bill's sponsors, including former Stanford football player and current New Jersey Senator Cory Booker, "want to see athletes annually receive money directly based on the revenue surpluses they help their teams generate").

226. Nicolas A. Novy, Note, "*The Emperor Has No Clothes*": *The NCAA's Last Chance As the Middle Man of College Athletics*, 21 *SPORTS LAWS J.* 227, 249 (2014) ("[I]f the NCAA were to reformulate its bylaws to redistribute some of the wealth to the teams that earn it, it would face a much better chance of continuing to control the market for college athletes."); Geoffrey J. Rosenthal, *College Play and the FLSA: Why Student-Athletes Should Be Classified As "Employees" Under the Fair Labor Standards Act*, 35 *HOFSTRA LAB. & EMP. L.J.* 133, 160 (2017) ("It is possible that eliminating 'amateurism' in college athletics would actually work in the NCAA's favor because 'hypocrisy and corruption will no longer be core components [of supporting the NCAA].'" (alteration in original) (quoting Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, *THE ATLANTIC: CULTURE* (July 25, 2012), <https://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/> [https://perma.cc/2VUN-D84K])).

227. Caroline K. Kane, Comment, *The NCAA Is Dropping the Ball: Refining the Rights of Student-Athletes*, 65 *DEPAUL L. REV.* 171, 208 (2016). For a detailed analysis of the feasibility of the NCAA and its member universities paying guaranteed wages to college athletes, see Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 *OR. L. REV.* 1019, 1053 (2014).

such procedures would not be far off from those currently in place that provide FLSA-compliant payments to students in work-study programs.²²⁸

Still, because of the scale of Division I college athletics, the feasibility concerns have merit and must be addressed with specifically tailored models.²²⁹ Two such models could appropriately compensate college athletes as employees under the FLSA while allowing the NCAA to remain in place as the governing body of college athletics. The first allows member institutions to voluntarily opt out of the existing amateurism model to provide direct salaries to athletes that will no longer be tied to education. The second proposes a collective bargaining agreement (CBA) that sets sport-specific salary caps based on an econometric model and evenly distributes university funds generated from NIL promotion across all sports at each university.

A. *Refuting the Myth of the “Student-Athlete”*: Optional Education

Though Judge Wilken largely dismissed the NCAA’s amateurism principles as justification for the NCAA’s compensation regulations, she credited one lone procompetitive justification: preserving a distinction between college and professional athletics to maintain consumer demand.²³⁰ But does such a distinction really exist in the modern landscape of college athletics?²³¹ The distinction is traditionally thought to be rooted in the NCAA’s commitment to

228. See Dan Murphy, *Lawsuit Makes Another Attempt at Wages for All College Athletes*, ESPN (Nov. 7, 2019), https://www.espn.com/college-sports/story/_/id/28029070/lawsuit-makes-another-attempt-wages-all-college-athletes [https://perma.cc/A8RS-2ENZ]; Witz, *supra* note 86.

229. Kane, *supra* note 227.

230. *Alston I*, 375 F. Supp. 3d 1058, 1082 (N.D. Cal. 2019), *aff’d*, 958 F.3d 1239 (9th Cir. 2020); see also *Alston II*, 958 F.3d 1239, 1257 (9th Cir. 2020) (“Thus, the district court properly ‘credit[ed] the importance to consumer demand of maintaining a distinction between college and professional sport.’” (alteration in original) (quoting *Alston I*, 375 F. Supp. 3d at 1082)).

231. McCann, *California Game Changer*, *supra* note 7 (observing that college athletics mimic professional sports in the aspects of lucrative media contracts, facilities, and coach salaries).

tying athletic competition to a pursuit of education.²³² But a closer examination of the modern “student-athlete” breeds skepticism about just how important the “student” aspect truly is.²³³

Academics frequently take a backseat to athletic commitments for the athletes.²³⁴ Due to the already overwhelming time commitments of their respective sports, athletes are steered away from demanding classes and majors.²³⁵ Still, recent investigations have revealed an educational community rife with academic fraud.²³⁶ Even those athletes legitimately pursuing a degree face an uphill battle due to the strenuous time commitments of intercollegiate athletics.²³⁷ Once you

232. Michael McCann, *Six Reasons to Be Skeptical of Proposals to Tax College Athletes' Scholarships*, SPORTS ILLUSTRATED (Oct. 30, 2019) [hereinafter McCann, *Six Skepticisms*], <https://www.si.com/college/2019/10/30/ncaa-name-image-likeness-tax-scholarship-richard-burr> [https://perma.cc/J6E7-3WE7] (characterizing the NCAA's “long[-]standing advocacy of student-athletes' academic success” as central to the collegiate model).

233. *Id.* (recognizing that “there are real questions about the quality of education received by some athletes”); Cunningham, *supra* note 150 (“Preserving the [amateurism] model requires maintaining the myth of athletes as regular students.”); Nocera, *College Sports Charade*, *supra* note 29 (calling the NCAA's supposed prioritization of education for college athletes “laughable”).

234. *Alston II*, 958 F.3d at 1266 (Smith, J., concurring); Kevin Trahan, *Athletes Are Getting Degrees, but Does That Actually Mean Anything?*, SB NATION (July 9, 2014, 7:03 PM), <https://www.sbnation.com/college-football/2014/7/9/5885433/ncaa-trial-student-athletes-education>; Zócalo Pub. Square, *Why Student Athletes Continue to Fail*, TIME (Apr. 20, 2015, 10:34 AM), <https://time.com/3827196/why-student-athletes-fail/> [https://perma.cc/2Z63-A7E7].

235. *Alston II*, 958 F.3d at 1266 (Smith, J., concurring) (“As amici describe, Student-Athletes work an average of [thirty-five-to-forty] hours per week on athletic duties during their months-long athletic seasons, and most work similar hours during the off-season to stay competitive.”); Hruby, *supra* note 167.

236. Hruby, *supra* note 167; Trahan, *supra* note 234; Zócalo Pub. Square, *supra* note 234.

237. *Alston II*, 958 F.3d at 1266 (Smith, J., concurring); Dennis Dodd, *Pac-12 Study Reveals Athletes 'Too Exhausted to Study Effectively'*, CBS SPORTS (Apr. 21, 2015 5:05 AM), <https://www.cbssports.com/college-football/news/pac-12-study-reveals-athletes-too-exhausted-to-study-effectively/> [https://perma.cc/76SJ-5JFC] (“Pac-12 athletes spend an average of [fifty] hours per week on their sport and are often ‘too exhausted to study effectively,’ a Pac-12 study revealed” (citing PENN SCHOEN BERLAND, *STUDENT-ATHLETE TIME DEMANDS 2* (2015), <https://sports.cbsimg.net/images/Pac-12-Student-Athlete-Time-Demands-Obtained-by-CBS-Sports.pdf> [https://perma.cc/39LA-YDJ5])); Malcolm Lemmons, *If You're a College Athlete, Your Degree Might Mean Next to Nothing*, HUFFPOST (May 5, 2017), https://www.huffpost.com/entry/if-youre-an-college-athlete-your-degree-might-mean_b_58e3dfd1e4b09dbd42f3dae8 [https://perma.cc/XR7M-3U3Z] (“Athletes are merely being offered the *opportunity* to be educated without substantial access or time to gain any necessary resources, experience or skills, which are what actually lead to success in the real world. . . . In actuality, they don't get a *real education*.”). For a detailed study of the time demands of

remove education from the equation, however, the only remaining dissimilarity between college and professional sports is the amount of compensation the athletes receive.²³⁸

Accepting both the reality that education falls far from the forefront of college athletics and that the athletes qualify as employees under the FLSA, as discussed *supra* Section II.B, means they are no longer “student-athletes” but rather “employee-athletes” instead.²³⁹ This characterization puts the athletes on the same ground as traditional university employees who receive a salary and enjoy optional educational opportunities.²⁴⁰ Rather than allow individual athletes to independently opt out of their educational commitments, however, the decision should lie with the universities to maintain consistency across athletic departments and to avoid placing the universities in a situation that requires the schools to treat similarly-situated athletes dissimilarly—an outcome that would raise more than its fair share of administrative issues.²⁴¹ Because only a small percentage of Division I institutions may be profitable enough to sustain paying athletes salaries untethered to education, the NCAA could allow member institutions to elect to do so under the optional educational model or continue to operate under the traditional amateurism model.²⁴²

college athletics, see PENN SCHOEN BERLAND, *supra*.

238. Ramsey, *supra* note 38. For a detailed examination of the similarities between college athletes of revenue-generating sports and their professional counterparts in the form of lucrative media deals, revenue generation, and coach salaries, see *id.*

239. Cunningham, *supra* note 150 (“Eventually, schools no longer will be able to pretend athletes aren’t employees.”); McCormick & McCormick, *supra* note 223, at 157 (“The NCAA’s droning insistence on labeling them ‘student-athletes’ is done simply to shore up the fiction that they are something other than employees.”).

240. Jamie Nicole Johnson, Note, *Removing the Cloak of Amateurism: Employing College Athletes and Creating Optional Education*, 2015 U. ILL. L. REV. 959, 1003 (2015).

241. See Colwell, *supra* note 3, at 938 (considering administrative issues that may arise for schools to independently determine which athletes are owed a salary, how much, and for how many hours).

242. See MURPHY, *supra* note 1, at 5–6; see also Timothy Davis, *Intercollegiate Athletics in the Next Millennium: A Framework for Evaluating Reform Proposals*, 9 MARQ. SPORTS L.J. 253, 255–70 (1999); Mull, *supra* note 23 (“If some conferences manage to play [during the COVID-19 pandemic], they’ll tap into television deals worth hundreds of millions of dollars, gaining an advantage in recruiting

This salary would essentially take the place of the current grant-in-aid stipend model that covers expenses for athletes living off campus but provides a fairer alternative for the athletes above the cost of attendance.²⁴³ The NCAA and its member institutions would negotiate a fixed salary across all Division I athletic programs choosing to opt out of the traditional amateurism model.²⁴⁴ Setting a fixed salary would lessen the disparity among the universities electing to operate under the optional educational model, thus promoting competition while still avoiding a professional-style open market.²⁴⁵

This model raises certain concerns that could prove detrimental to the NCAA in the long run, however. For example, setting a fixed salary could potentially raise antitrust concerns as an agreement amongst institutions to restrain trade.²⁴⁶ Additionally, allowing institutions to completely forego imposing an educational requirement to a college athlete's university commitment would turn college athletics into a de facto minor league.²⁴⁷ Doing so would essentially eliminate the distinction between college and professional athletics²⁴⁸—a distinction that is already blurry at best²⁴⁹—even while preventing a completely open market. Because such an outcome contradicts the credited justification accepted by Judge Wilken (and subsequently the Ninth Circuit), an alternative model may be more beneficial for the NCAA.²⁵⁰

high-school players and luring stars away from suspended leagues.”).

243. Johnson, *supra* note 240.

244. *Id.* at 1011.

245. *Id.* at 1012.

246. *Id.* at 1011.

247. Rosenthal, *supra* note 226, at 163–64.

248. McCann, *Six Skepticisms*, *supra* note 232.

249. Murphy, *Framework for Federal College Sports Legislation*, *supra* note 17 (“[The NCAA is] just in denial that college football and college basketball [are] professional.” (quoting Connecticut Senator Chris Murphy)).

250. *Alston I*, 375 F. Supp. 3d 1058, 1082 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020); *see also Alston II*, 958 F.3d 1239, 1257–58 (9th Cir. 2020).

B. Collective Bargaining Salary Caps and University Group Licensing Unions

Instead of simply allowing universities to voluntarily opt out of the traditional amateurism model, the NCAA should abandon the model altogether and restructure its Division I Bylaws to equitably distribute the revenue generated from college athletics.²⁵¹ Rather than starting from scratch, the NCAA can build off of existing frameworks already in place for students in work-study programs who operate under similar circumstances but enjoy FLSA protections.²⁵² For instance and perhaps most importantly, the NCAA should adopt a collective bargaining approach, like those implemented in work-study unions, to negotiate directly with the athletes to reach equitable resolutions to ancillary disputes.²⁵³ Not

251. Novy, *supra* note 226.

252. Ehrlich, *supra* note 9, at 111.

253. *Id.* (“[C]ollective bargaining already exists within the student-employment framework with graduate assistants for doctoral students.”); Novaes, *supra* note 46, at 1582–83 (recognizing that collective bargaining is a “regimented process with a mandatory scope of bargaining that is more appropriate for meaningful labor disputes”); *see also* Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1085 (2012) (proposing a collegiate CBA similar to the one implemented by the NFL because of the similarities between the restrictions imposed by the NFL that led to the adoption of its initial CBA and the restrictions currently imposed by the NCAA). College athletics lag behind their counterparts in professional leagues, which allow for athletes to unionize and advocate for their own interests under the protection of labor laws. Nadkarni, *supra* note 161. The need for a college union became more evident than ever during the COVID-19 pandemic. *Id.* (“As schools make decisions that could profoundly impact the lives of their athletes, with little or no input from those athletes themselves, college football players are plainly lacking the key mechanism that protects their professional counterparts: A union.”); Wolken, *supra* note 154 (“[C]ollege athletes have no . . . ability to demand certain safeguards or expanded health care or that they’re getting something more than their scholarship for playing football during a pandemic.”). Recognizing that the circumstances surrounding the 2020 college football season presented a “once-in-a-lifetime” opportunity, thousands of college athletes unified in an unprecedented exhibition of advocacy for their own rights. Wolken, *supra* note 154 (“There’s never been a more opportune time in the history of the NCAA for athletes to form a union and wield real power to negotiate their compensation, their working conditions and their rights.”); Silva et al., *supra* note 22. In a simple social media post, college football players collectively issued a call to unionize, demanding equality and advocating for social justice. Lia Assimakopoulos, *College Football Players Attempt to Unionize As Hope for a Season Dies Out*, NBC SPORTS WASH. (Aug. 10, 2020, 1:27 PM), <https://www.nbcsports.com/washington/ncaa/college-football-players-attempt-unionize-hope-season-dies-out> [<https://perma.cc/PEV3-Z3JZ>]. Though ultimately unsuccessful at the time, the unification of

only would a CBA provide the athletes with a more substantial voice in the governing process, but it would also allow the NCAA to continue to enforce rules and requirements tied to education while still addressing the administrative hurdles that would arise from recognizing athletes as employees.²⁵⁴

Because athletes from different universities have varied interests, the NCAA should allow universities to form individual unions to

college athletes during the 2020 college football season lends hope for future movements that could further build on the groundwork of past attempts to unionize. Nadkarni, *supra* note 161; *see also* Northwestern Univ., 362 N.L.R.B., No. 167, 1350 (2015). Future movements will also benefit from judicial developments that, for the first time ever, suggest (and support finding) that college athletes have a right to unionize to protect their economic and personal interests. *See* Nadkarni, *supra* note 161 (“There is a need for some type of union. As of now, student-athletes don’t have anything.”); *see also* Wolken, *supra* note 154 (observing that allowing college athletes to unionize “would benefit [both] the athletes and the schools, whose resistance to collective bargaining has led them down the path of endless antitrust lawsuits and feckless attempts to placate lawyers and courts that only serve to blur the lines of amateurism and expose how arbitrary the entire system is”).

254. Lonick, *supra* note 1, at 167 (“Collective bargaining would ensure the NCAA enforces rules to keep student-athletes on track to graduate—a fair outcome given the NCAA’s activism in preventing student-athletes from reaping financial gains while in college.”); Nadkarni, *supra* note 161 (“Unionization would . . . mak[e] players an active part of the return process. It would also give them a say in how schools handle their safety once they’re on campus. Without it? ‘There are zero ways to address abuse’” (quoting National College Players Association Executive Director Ramogi Huma)); Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/955Z-YXJQ>] (“The most basic reform would treat the students as what they are—adults, with rights and reason of their own—and grant them a meaningful voice in NCAA deliberations.”). Recognizing college athletes as employees under the FLSA would raise a myriad of issues—such as administrative issues, Title IX compliance, tax implications, sovereign immunity, and potential applicability of FLSA exemptions—that must be addressed but fall outside of the scope of this Note. *See, e.g.*, Brief for Respondent-Appellee at 49, *Dawson v. Nat’l Collegiate Athletic Ass’n*, 932 F.3d 905 (9th Cir. 2019) (No. 17-15973), 2017 WL 5632769, at *39. It is worth noting, however, that a CBA likely represents the most effective way to address these issues collectively and efficiently. Ehrlich, *supra* note 9, at 110 (“Collective bargaining could allow the NCAA to work with student-athletes directly to negotiate a system that fits with college athletics while still complying with the FLSA.”). For a discussion on the potential impact of Title IX, see Josephine R. Potuto et al., *What’s in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879, 938–39 (2014), and Colwell, *supra* note 3, at 940. For a discussion on potential tax implications, see Kane, *supra* note 227, at 204 (“Significantly, even if student-athletes were considered employees, their athletic scholarships would still not be taxed.”). For a discussion on the potential impact of sovereign immunity, see Ehrlich, *supra* note 9, at 104–05 (emphasizing the importance of finding that the NCAA qualifies as an employer under the joint-employer doctrine). For a discussion on the potential applicability of FLSA exemptions, see Rosenthal, *supra* note 226, at 166 (citing 29 U.S.C. § 213), and Ehrlich, *supra* note 9, at 106.

represent the interests of their athletes and then negotiate with the NCAA directly.²⁵⁵ To preserve consistency across Division I athletics and limit disparity between universities, however, the NCAA should impose two overarching requirements: (1) set a sport-specific salary cap across all universities with a minimum compensation floor; and (2) require that all universities adopt a group licensing model to evenly distribute revenue generated from the use of athletes' NILs across all sports.

1. *Sport-Specific Salary Cap*

Once recognized as employees under the FLSA, all college athletes will be entitled to a guaranteed minimum compensation.²⁵⁶ To remain consistent with Judge Wilken's ruling in *Alston*, however, the NCAA cannot create an open market akin to that in professional sports.²⁵⁷ The NCAA could avoid such an outcome by imposing sport-specific salary caps across Division I athletics.²⁵⁸ Under this model, the NCAA and representatives from the university-specific

255. Lonick, *supra* note 1, at 170 (citing Novy, *supra* note 226, at 246); *see also* LeRoy, *supra* note 253, at 1119–20 (proposing a “unique hybrid form of collective bargaining that draws from elements in the NLRA and state collective bargaining laws” while imposing limits that preserve the amateur character of NCAA athletic competition). For a detailed discussion of the NLRA and state law aspects included in this unique CBA proposal, *see* LeRoy, *supra* note 253, at 1121–29.

256. Rosenthal, *supra* note 226, at 135 (citing 29 U.S.C. § 206).

257. *Alston I*, 375 F. Supp. 3d 1058, 1082 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020); *see also Alston II*, 958 F.3d 1239, 1258 (9th Cir. 2020).

258. Wayne M. Cox, *One Shining Moment to a Dark Unknown Future: How the Evolution of the Right of Publicity Hammers Home the Final Nail in the NCAA's Argument on Amateurism in Collegiate Athletics*, 80 ALB. L. REV. 195, 229 (2017) (citing Joe Nocera, *A Way to Start Paying College Athletes*, N.Y. TIMES (Jan. 8, 2016), <http://www.nytimes.com/2016/01/09/sports/a-way-to-start-paying-college-athletes.html> [<https://perma.cc/6D7Y-44F6>] (proposing that the National College Players Association, on behalf of the Power Five conferences, negotiate a salary cap and minimum salaries with the NCAA)). Though a salary cap is not inherently distinctive of professional sports (each of the five major professional sports leagues—the MLB, MLS, NBA, NFL, and NHL—all have some form of a salary cap), the collegiate salary cap would be set significantly lower than the inflated caps in professional sports to ensure compliance with Judge Wilken's accepted procompetitive effect of the NCAA's rules. Brief for Petitioner-Appellant at 58, *Alston II*, No. 19-15566 (9th Cir. Aug. 16, 2019).

unions would negotiate the salary cap as part of the CBA, basing the cap on an econometric model.²⁵⁹

The econometric model would estimate the average value generated per college athlete based on the average revenue generated for their respective sport, categorizing universities into different percentiles based on average annual revenue.²⁶⁰ The model would calculate average revenue generation into twenty-fifth, fiftieth, and seventy-fifth percentiles.²⁶¹ To limit the potential effect of disparities between the most and least profitable athletic departments, the salary cap would adopt the average value of the fiftieth percentile.²⁶²

The model would then extrapolate these values to encompass the minimum roster size for each sport to determine the total cap for the team. Once calculated, half of the resulting total would define the amount allocable to the athletes, while the remaining half would cover the salaries for the coaches and support staff.²⁶³ Dividing the allocation of cap space between the athletes and the coaches would combat the potential for universities or boosters to provide incentivizing payments to lure recruits to commit to a certain school.²⁶⁴ The NCAA and university representatives would renegotiate the salary cap periodically to account for shifting market conditions.

Because the econometric model attempts to place a value on a college athletes' contributions based on generated revenue, the model may be difficult to implement across all sports.²⁶⁵ A simpler model,

259. Potuto, *supra* note 254, at 919.

260. *Id.*

261. *Id.* at 936.

262. *Id.* at 923 (concluding that, according to a 2013 econometric analysis, a football player on a team in the fiftieth percentile had a marginal revenue product of approximately \$101,000 per year, while a men's basketball player in the same percentile had a marginal revenue product of approximately \$127,000 per year).

263. Cox, *supra* note 258.

264. McCollough, *supra* note 14 ("The fear is that a booster for one school will pay far above perceived market value . . . to secure [a recruit's] commitment to the school.").

265. Rosenthal, *supra* note 226, at 167 ("Basing a student-athlete's pay on the revenue generated by

perhaps, would be to provide each college athlete with a defined stipend on top of their grant-in-aid scholarships to make up for lost wages while also providing performance-based bonuses for athletic achievements such as winning championships or earning accolades.²⁶⁶ Such bonuses would function similarly to SAF and AEF payments—which are currently permissible under the NCAA regulations—by equitably distributing gross revenue produced from different sports.²⁶⁷ Unlike the SAF and AEF payments, however, these distributions would be directly tied to each individual university’s success rather than distributed at the discretion of the conferences.²⁶⁸

Both models would result in some disparity between programs, however, because they are each directly tied to the revenue generated from athletics. Because smaller programs typically generate less revenue than larger programs, the performance-based model may only exacerbate the gap that already exists between profitable Power Five programs and smaller universities.²⁶⁹ The econometric model, on the other hand, results in internal disparity amongst a university’s revenue-generating and non-revenue-generating sports.²⁷⁰ The

his or her university, or even the revenue that is attributable to his or her team would also be an interesting tack, though the details of such a system may be too convoluted to be put into action.”).

266. Cork Gaines, *Texas AD Says It Would Cost \$6 Million to Pay Their Athletes and the Fallout Would Change College Sports Forever*, BUS. INSIDER (Oct. 22, 2014, 5:40 PM), <https://www.businessinsider.com/university-texas-pay-athletes-2014-10> [<https://perma.cc/45NJ-FYA7>]; see also NCAA DIVISION I MANUAL, *supra* note 1, at art. 12.1.2.4.3 (establishing that performance-based bonuses are permissible so long as “such payments and expenses provided to the individual [do] not exceed his or her actual and necessary expenses to participate on the team”). Before the Ninth Circuit’s holding in *O’Bannon*, University of Texas Athletic Director Steve Patterson stated that, if the court required the NCAA to compensate athletes in some form, the University of Texas would provide a \$10,000 stipend to all athletes and have no problem covering the estimated \$6 million expense. Gaines, *supra*.

267. *Alston I*, 375 F. Supp. 3d 1058, 1072–73 (N.D. Cal. 2019) (discussing the distribution of SAF and AEF payments), *aff’d*, 958 F.3d 1239 (9th Cir. 2020); see also discussion *supra* note 129 (providing an overview of other currently permissible forms of compensation).

268. *Alston I*, 375 F. Supp. 3d at 1070.

269. Johnson, *supra* note 240, at 1001.

270. Potuto, *supra* note 254, at 919.

NCAA could easily mitigate this disparity through the implementation of a university-specific group licensing agreement.

2. *University Group Licensing*

Currently, college athletes grant their universities exclusive rights to market their NILs while enrolled at the university.²⁷¹ The NCAA plans to revise these current regulations, but substantive changes are not expected to take effect before the 2021–2022 academic year at the earliest.²⁷² Rather than allowing each individual college athlete to independently pursue marketing opportunities (as California’s Fair Pay to Play Act provides) and to avoid a potential “patchwork” of state-specific legislation,²⁷³ the NCAA can amend its Division I Bylaws to require universities to redistribute NIL-generated marketing funds back to the athletes evenly.²⁷⁴

Again, the NCAA would not have to start from scratch and could adopt a group licensing model similar to that implemented by the Major League Baseball Players Association (MLBPA).²⁷⁵ The MLBPA holds the exclusive rights to license active MLB players’ NILs and publicity rights.²⁷⁶ Under the group licensing arrangement, the MLBPA pools all revenue generated from the licensing of the

271. Novy, *supra* note 226, at 24.

272. Murphy, *NCAA Group Supports NIL Plan*, *supra* note 14; Russo, *supra* note 14; Sallee & Silverstein, *supra* note 15. Though originally slated to vote on the proposed NIL rules changes in January of 2021, the NCAA’s Division I Council elected to delay the vote in mid-January, citing “several external factors,” such as “judicial, political and enforcement issues.” Hosick, *supra* note 15.

273. Murphy, *Florida’s NIL Timeline*, *supra* note 11 (recognizing that NCAA President Mark Emmert “is concerned that a ‘patchwork’ of state laws would cause student-athletes to pick schools based on where they can make the most money and give some athletic programs an unequal recruiting advantage”).

274. This proposal mirrors one of many provisions included in the College Athletes Bill of Rights, discussed *supra* note 17. See Murphy, *Framework for Federal College Sports Legislation*, *supra* note 17 (observing that the College Athletes Bill of Rights seeks to “[c]reate revenue-sharing agreements with associations, conference[s] and schools that [would] result in ‘fair and equitable compensation’”).

275. Novy, *supra* note 226, at 224.

276. MLB PLAYERS INC., <https://www.mlbplayers.com/mlb-players-inc> [<https://perma.cc/8NW7-VJ5K>].

players' NILs and distributes the proceeds to the players on a pro rata basis according to the number of days each player logged on an active major league roster that season.²⁷⁷ Adapting this model to the context of college athletics, the NCAA would grant the university-specific unions exclusive rights to market the NILs of its athletes in association with the school.²⁷⁸ The universities would pool all revenue generated from the marketing and advertising of its athletes' NILs and then evenly distribute a percentage of those funds to all athletes at the university.

Importantly, this revision to the NCAA's Division I Bylaws would negate the governing body's monopsony status.²⁷⁹ By granting each university independent responsibility for marketing the publicity rights of its own athletes, the NCAA would no longer maintain exclusive control over the NILs of college athletes.²⁸⁰ Despite relinquishing control over the operation of college athletics, this revision could resolidify the NCAA's necessity as a governing body in college athletics.²⁸¹ In fact, the NCAA would take on an even more important role in regulating commercial activity to prevent fraudulent or exploitative transactions.²⁸² Additionally, allowing marketing

277. *The Players Choice Group Licensing Program*, MLB PLAYERS INC. (July 18, 2016), https://www.nmnathletics.com/ViewArticle.dbml?DB_LANG=C&DB_OEM_ID=34000&ATCLID=211072624 [<https://perma.cc/27KA-3FCX>]. In 2017, MLB players collectively received over \$125 million in distributions from the MLBPA generated from the group licensing program. Eric Fisher & Liz Mullen, *MLB Players Receive \$125M from Union*, SPORTS BUS. J. (May 14, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/05/14/Labor-and-Agents/MLBPA.aspx> [<https://perma.cc/83XH-X78U>].

278. Novy, *supra* note 226, at 24.

279. *Id.* at 24–25, 27–28.

280. *Id.* at 24–25.

281. *Id.* at 25.

282. Kane, *supra* note 227, at 206 (“With commercialization comes ‘ample opportunities for unethical behavior that the NCAA’s regulations and enforcement committees can address.’” (quoting Mathew R. Cali, *The NCAA’s Transfer of Power: An Analysis of the Future Implications the Proposed NCAA Transfer Rules Will Have on the Landscape of College Sports*, 21 JEFFREY S. MOORAD SPORTS L.J. 217, 248–49 (2014))).

funds to flow directly to the athletes would limit the amount of money that universities must account for in compensating athletes.²⁸³

This two-tiered approach successfully maintains the distinction between college and professional athletics highlighted by Judge Wilken in *Alston* by providing athletes with the benefits and protections they are entitled to as employees under the FLSA while preventing a professional-style open market. Further, university-specific unions and a collective bargaining platform provide the athletes with a voice to effectively represent their own interests while negotiating directly with the NCAA to maintain the foundational qualities of college athletics. Finally, this approach allows the NCAA to retain a critical role in governing and regulating college athletics even in the absence of amateurism requirements.

CONCLUSION

Tragedy permeates through the billion-dollar industry of college athletics in the form of the NCAA's prohibition on compensating college athletes.²⁸⁴ The NCAA justifies this ban through its principles of amateurism, maintaining that college athletics simply would not exist if the athletes were paid.²⁸⁵ But then Judge Wilken of the Northern District of California exposed the hypocrisy underlying the NCAA's amateurism principles as arbitrarily imposed and baselessly enacted.²⁸⁶ A perfect storm of events and a once-in-a-lifetime collection of surrounding circumstances threaten to disrupt the model

283. McCann, *Six Skepticisms*, *supra* note 232.

284. Branch, *supra* note 254; McCollough, *supra* note 14 (“Colleges reap billions from these student athletes’ sacrifices and success but, in the same breath, block them from earning a single dollar.” (quoting California Governor Gavin Newsom)).

285. See *Alston I*, F. Supp. 3d 1058, 1070 (N.D. Cal. 2019), *aff’d*, 958 F.3d 1239 (9th Cir. 2020); see also *Alston II*, 958 F.3d 1239, 1258 (9th Cir. 2020); Nocera, *College Sports Charade*, *supra* note 29 (“[The NCAA] has developed a 400-page rule book whose primary purpose is to ensure that money does not find its way into players’ pockets. It claims that it is doing so to prevent players from being exploited—which is laughable—and to make sure that education comes first—equally laughable.”).

286. *Alston I*, 375 F. Supp. 3d at 1070–71, 1074–75; see also *Alston II*, 958 F.3d at 1258.

even further, leaving the NCAA wounded and vulnerable.²⁸⁷ Rather than delaying the inevitable any longer, the NCAA must face reality and abandon its amateurism principles for the good of the athletes and for its own livelihood.²⁸⁸

Judge Wilken's order in *Alston* and the Ninth Circuit's subsequent affirmance jumpstarted that process by explicitly recognizing that college athletes are in fact compensated in exchange for their athletic services.²⁸⁹ Translating this exact language into the FLSA context compels a finding that college athletes qualify as employees entitled to the protections of the FLSA. Though the NCAA and its member institutions would face administrative hurdles in complying with the FLSA, classifying college athletes as employees would actually reinforce the NCAA's position as a necessary governing body in college athletics.²⁹⁰ Two models could be implemented to allow the NCAA and its member institutions to continue to function in compliance with the FLSA: (1) an optional educational model that provides a fixed-salary for athletes; or (2) a unique collective bargaining approach featuring sport-specific salary caps and university group licensing agreements.

Mounting judicial, legislative, and societal pressure shows a loss of deference for the NCAA's amateurism principles.²⁹¹ The NCAA must face reality and proactively abandon the antiquated principles, recognizing college athletes as employees under the FLSA, or else the governing body of college athletics faces imminent extinction.

287. See, e.g., Forde, *supra* note 33; Gordon, *supra* note 18; Murphy, *Congressional NIL Options*, *supra* note 7 (“The [Supreme Court] made what several experts say is a surprising decision . . . to hear the NCAA’s appeal of [the] recent antitrust lawsuit decision [in *Alston*].”).

288. Rosenthal, *supra* note 226, at 16; see also Kane, *supra* note 227, at 209 (“Recognizing student-athletes as employees and compensating them as such is the most beneficial way to reform the NCAA and its relationship with student-athletes.”); see also Pearl, *supra* note 9.

289. *Alston I*, 375 F. Supp. 3d at 1097; see also *Alston II*, 958 F.3d at 1248.

290. Johnson, *supra* note 240; LeRoy, *supra* note 253, at 1119–20.

291. See, e.g., Zagger, *supra* note 10; Gordon, *supra* note 18; Nocera, *College Sports Charade*, *supra* note 29 (“The charade has gone on far too long, as has the exploitation of college athletes.”).