A Reexamination of College Athletes: Are Athletes Students or Employees?

JOHN WOLOHAN*

* Professor of Sports Law, Sport Management Department at the David B. Falk College of Sport and Human Dynamics; Adjunct Professor, College of Law at Syracuse University.

In the last ten years there has been a growing call from college athletes, the National Labor Relations Board (NLRB) and the United States Supreme Court for colleges and universities to recognize college athletes as employees. While the National Collegiate Athletic Association (NCAA) and schools have so far resisted the call, claiming that the NCAA's amateur sports model is essential for college sports. If college athletes were ever to considered employees, or allowed to be compensated directly by the schools, the NCAA claims that the whole college sports system would fail. The purpose of this paper is to examine whether, as Jennifer A. Abruzzo, the NLRB's general counsel, wrote in a memo dated September 28, 2021, college athletes should be considered employees. Or, as many courts to consider the issue have concluded, since athletes do not perform work that is an *integral* part of the university (education), they cannot be employees.

I. INTRODUCTION

In August 2022, the Big Ten Conference signed the richest annual television deal in the history of college sports. The seven-year deal guarantees the Big Ten Conference at least $1 billion annually, the first time a college conference has secured such a lucrative media rights

deal.[1] The Big Ten's new television deal is just another in the dramatic escalation in revenue that colleges and universities can generate from athletics. For example, only 20 years ago, Big Ten schools were splitting less than $200 million in media rights revenue annually, according to a database run by the Knight Commission on Intercollegiate Athletics and Syracuse University.[2]

As a result of the new television deal, the Big Ten Conference will eventually distribute anywhere from $80 million to $100 million per year to each of its 16 members.[3] While the money will allow Big Ten schools to stay in the forefront of the arms race in college sports, it also promises to fuel the intensifying debate that has raged over the past ten years: With college athletics (especially football and basketball) generating so much revenue for the schools, should college athletes receive some of that money in salary and be treated as employees? This question was highlighted when former Big Ten Commissioner Kevin Warren said that he is open to discussing unionization and other aspects. [4]

The purpose of this Article is to look at the relationship between colleges and universities and their athletes, especially Division I

1. Alan Blinder & Kevin Draper, *With $7 Billion Television Deal, Big Ten Follows N.F.L. Playbook*, N.Y. TIMES, Aug. 19, 2022, at A1. Although universities make money from sports in numerous ways, such as tickets sales, sponsorships and merchandise sales, for FBS schools, especially those in the Power Five Conferences (The ACC, Big Ten, Big 12, Pac 12 and the SEC), television rights are the largest source of revenue.

2. *Id.*

3. In 2024, the University of Southern California (USC) and the University of California, Los Angeles (UCLA) will join the current fourteen members. Sam Connon, *Big Ten Signs $7 Billion Media Deal, UCLA Included Amid Roadblocks*, FANNATION (Aug. 18, 2022 3:09 PM), https://www.si.com/college/ucla/news/big-ten-signs-7-billion-media-deal-ucla-included-amid-road-blocks#:~:text=The%20deal%2C%20which%20is%20the,revenue%20the%20moment%20they%20arrive. The current members of the Big Ten include: University of Illinois, Indiana University, University of Iowa, University of Maryland, University of Michigan, Michigan State University, University of Minnesota, University of Nebraska-Lincoln, Northwestern University, Ohio State University, Pennsylvania State University, Purdue University, Rutgers University-New Brunswick, and the University of Wisconsin-Madison. *Id.* While it is common for schools that join a new conference to receive a partial share of the conference's media rights deals, USC and UCLA will be receiving full shares once they join the conference in 2024. *Id.*

4. Blinder & Draper, *supra* note 1.

football and basketball players.[5] In particular, it attempts to answer the question of whether athletes are employees of their schools, or, as most courts to consider the issue have concluded, since athletes do not perform work that is an *integral* part of the university (education), they cannot be employees. The article begins by looking at past workers' compensation cases and how the courts have historically viewed college athletes. Particular attention will be given to how the courts have applied the *Economic Reality test* to determine whether a college athlete was an employee of the school or simply a student who played football. Next, the article examines how the National Labor Relations Board (NLRB) views scholarship football players. In particular, the paper will look at the NLRB's decision in *Northwestern University* and *College Athletes Players Association (CAPA)*,[6] and the two General Counsel memos[7] that were published after the Board's decision. The article will then examine the Supreme Court's decision in *NCAA v. Alston*[8] and the potential impact of that decision on the relationship between colleges and universities and their athletes. Finally, the article will reexamine the *Economic Reality test*, which previously found that athletes were not students, and will argue that when applied to college sports today college athletes should be considered employees.

II. THE HISTORY OF SCHOLARSHIP ATHLETES AS EMPLOYEES FOR THEIR SCHOOLS[9]

In looking at how past courts have treated college athletes, there is a point at which the courts stop viewing athletes as employees, who

5. Since most of the revenue generated in college athletics is from football and all of the cases and NLRB decisions involve scholarship football players, this paper will limit its discussion to Division I scholarship football players. The author, however, believes that the same arguments could be made for scholarship athletes in other revenue generating sports, such as basketball, both male and female, and other sports as well.

6. Nw. Univ., 2014 N.L.R.B. LEXIS 221 (2014) and Nw. Univ., 362 N.L.R.B. 1350 (2015).

7. Richard F. Griffin, NAT'L LAB. REL. BD., Gen. Couns. Mem. GC 17-01 (Jan. 31, 2017); Jennifer A. Abruzzo, NAT'L LAB. REL. BD., Gen. Couns. Mem. GC 21-08 (Sept. 29, 2021).

8. NCAA v. Alston, 141 S. Ct. 2141 (2021).

9. Legal scholars have been writing on the topics for years, here is just a sample of those articles: Keith A. Haskins, *Pay for Play: Should Scholarship Athletes be*

are paid to play football, and begin viewing them as students who play football. The following cases examine what changed in the view of the courts and some of the changes that the states, and NCAA, made regarding college athletes.

A. University of Denver v. Nemeth[10]

The first case to address whether a college football player was an employee of his school, and therefore eligible for workers' compensation when he was injured while playing football for the school, was *University of Denver v. Nemeth*. In 1950, Ernest Nemeth was playing football for the University of Denver when, during spring practice, Nemeth suffered an injury to his back.

While he was on the team, Nemeth received $50 per month from the University to perform work in and around the university tennis court. The University deducted $10 each month to cover the cost of three meals per day, which Nemeth ate in the school cafeteria. Nemeth's student housing fee was also waived by the university for custodial work Nemeth performed on campus.[11] As a result of his injury, Nemeth, who was no longer able to play or work for the school, filed a workers' compensation claim against the university. Nemeth based his worker's compensation claim on the fact that he was awarded

Included within State Worker's Compensation System?, 12 LOY. L.A. ENT. L. REV. 441 (1992); Sam C. Ehrlich, *But They're Already Paid: Payments In-Kind, College Athletes, and the FLSA*, 123 W. VA. L. REV. 1 (2020); Christine Colwell, *Playing for Pay or Playing to Play: Student-Athletes as Employees Under the Fair Labor Standards Act*, 79 LA. L. REV. 899 (2019); Tyler J. Murry, Note, *The Path to Employee Status for College Athletes Post-*Alston, 24 VAND. J. ENT. & TECH. L. 787 (2022); Andrew McInnis, Note, *Play Under Review: How the NLRB Failed to Protect Some of the Most Vulnerable Employees—College Athletes,* 2018 MICH. ST. L. REV. 189 (2018); Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQ. SPORTS L. REV. 287 (2016); John T. Wolohan, *Scholarship Athletes: Are They Employees or Students of the University? The Debate Continues*, 4 J. LEGAL ASPECTS OF SPORT 46 (1994).

10. Univ. of Denver v. Nemeth, 257 P.2d 423 (1953).

11. *Id.* at 424. Nemeth received $50 per month from the University to perform work in and around the university tennis court. *Id.* The University deducted $10 each month to cover the cost of three meals per day, which Nemeth ate in the school cafeteria. *Id.* Nemeth's student housing fee was also waived by the university for custodial work Nemeth performed around the premises. *Id.*

the jobs, meals, and housing only because he was a member of the school's football team, and that his injury arose out of and in the course of that employment.[12]

In ruling in favor of Nemeth, the Colorado Industrial Commission found that Nemeth was in fact an employee and awarded him benefits for his injury. In appealing the decision, the university argued that "the injury . . . did not arise out of Nemeth's employment, nor while he was performing services in the course of his employment."[13] The district court affirmed the award of the Commission after concluding that playing football was not an incidental duty to his employment. In particular, the district court found that Nemeth was employed by the university and was given time off to participate in football activities, and hence such participation in athletic activities was within the scope of his employment.[14]

The university appealed again, this time to the Colorado Supreme Court. Once again, the university claimed that, while Nemeth was an employee of the university, he was not employed to play football. Therefore, since his injury did not arise out of his employment, nor while he was performing services in the course of that employment, he should not be eligible for workers' compensation benefits. As for the benefits Nemeth received, the university argued that those opportunities, housing and meals, were extended to Nemeth because he was a student at the university, not because he was a member of the football team.[15]

In rejecting the university's arguments, the Colorado Supreme Court found that Nemeth was told that "by those having authority at the university, that 'it would be decided on the football field who received the meals and jobs.'"[16] Therefore, the Colorado Supreme Court ruled it was clear that Nemeth's injury arose out of and in the course of his employment. In support of this decision, the Colorado Supreme Court noted that only those students who worked hard on the football field received a "meal ticket," and that Nemeth's continued employment was dependent on his playing football.[17]

12. *Id.* at 425.
13. *Id.*
14. *Id.*
15. *Id*. at 426.
16. *Id*. at 426.
17. *Id*. at 426–27.

B. State Compensation Fund v. Industrial Commission[18]

Before college football players even had the chance to celebrate the Colorado Supreme Court's decision in *University of Denver v. Nemeth*, the issue was back in front of the same Colorado Supreme Court. In *State Compensation Insurance Fund v. Industrial Commission*, the Colorado Supreme Court was once again asked to determine whether an injured football player was an employee of the school, and therefore eligible for workers' compensation benefits.

While playing in a football game between his school, Fort Lewis A & M College, and Trinidad State Junior College, Ray Dennison suffered a fatal head injury.[19] As a result of his death, Dennison's widow filed a workers' compensation claim. The Colorado Industrial Commission, the office that oversees benefits, found that Dennison was an employee of Fort Lewis A & M College and awarded his wife benefits. In support of this finding, the commission found that Dennison was induced to leave his job as a gas station attendant and return to college by the football coach who offered to find Dennison another job, which would not interfere with football practice, and an athletic scholarship, if he would play football for the college.[20] Dennison, who needed to work to support his family, accepted the coach's offer, and his college tuition and expenses were paid from various sources. In addition, Dennison was employed by the school as a part time employee and paid an hourly rate to manage the student lounge and work on the college farm.[21]

In a two-page decision overturning the Industrial Commission findings, the Colorado Supreme Court held that there was no evidence to support the claim that Dennison was employed to play football for the college at the time of his injury. In particular, the court found that "the benefits [Dennison] received could, in anyway, be claimed as consideration to play football . . . ."[22] In support of this conclusion, the Colorado Supreme Court found that there was no evidence showing Dennison was under any contractual obligation to play football. As a result, the Colorado Supreme Court held that an "employer-employee

18. State Comp. Ins. Fund v. Indus. Comm'n, 314 P. 2d 288 (1957).

19. *Id.* at 289.

20. *Id.*

21. *Id.*

22. *Id.* at 289–90.

relationship does not exist and there is no contract which would support a claim for compensation. . . ."[23] In distinguishing the case from *University of Denver v. Nemeth*,[24] the Court held that unlike Nemeth, Ray Dennison's agreement with the college was not dependent on him playing football.[25] Finally, in foreshadowing future court decisions, the Colorado Supreme Court noted that it was "significant that the college did not receive a direct benefit [from Dennison playing football], since the college was not in the football business and received no benefit from this field of recreation."[26]

C. Van Horn v. Industrial Accident Commission[27]

The next state to examine the relationship between scholarship athletes and colleges and universities was California in *Van Horn v. Industrial Accident Commission.* In Van Horn, Edward Van Horn's widow filed a claim for workers compensation benefits when the plane for the California State Polytechnic College football team crashed returning from a game in Ohio. In support of her claim, Van Horn's widow argued that Van Horn was employed, under contract, to play football for the College. Therefore, she argued, that since he died on the job the estate was eligible to receive workers' compensation benefits. In support of this argument, Van Horn noted that in order to get Van Horn to play football for the college, he not only received a scholarship, but also money from a special account the football coach utilized to supplement the rent of married football players.[28] Additionally, Van Horn was paid an hourly rate for lining the football fields.[29] The facts also showed that, but for the scholarship and additional

23. *Id.* at 289.

24. Univ. of Denver v. Nemeth, 257 P.2d 423 (1953).

25. State Comp. Ins. Fund, 314 P.2d at 290.

26. *Id.* at 290. The court noted that the school, supported by taxpayer money, could not as a matter of business enter into the maintenance of a football team for the purpose of making a profit directly or indirectly out of the taxpayers' money. It would be interesting to know how the Colorado Supreme Court would view those public universities in the Big Ten, such as Ohio State and Michigan. These schools clearly maintain a football team for the purpose of making a profit.

27. Van Horn v. Indus. Accident Comm'n, 219 Cal. App. 2d 457 (1963).

28. *Id.* at 171.

29. *Id.*

compensation, Van Horn would not have played football for the school.[30] The school, however, argued that Van Horn's "participation in football was voluntary and the 'scholarship' was a gift, not payment for services".[31]

The Industrial Accident Commission denied Van Horn's claim, ruling that Van Horn was not rendering services to the school within the meaning of the workers' compensation act.[32] The Industrial Accident Commission also found that, since the scholarship was awarded for the entire year, it was not dependent on whether Van Horn played football.

On appeal to the California District Court of Appeals, Second District, the court annulled the decision of the Industrial Accident Commission and ruled that Van Horn had "established a prima facie case for benefits upon presentation of evidence showing the alleged contract of employment" between Van Horn and the school.[33] In support of its decision, the court held that the evidence clearly established that Van Horn rendered a service to the school—playing football—for which he was compensated by receipt of his scholarship and rent money.[34] In addition, the court ruled that it was possible for someone to have a "dual capacity of student and employee. . . ."[35] Therefore, the court concluded that Van Horn was an employee of the school and eligible for workers' compensation benefits. It is important to note that the court based its decision on Van Horn's scholarship and not his job. If the services were not gratuitous, the court held, the form of compensation, whether academic credit, free tuition and board or wages "is immaterial."[36] The court also rejected the commission's finding that Van Horn's scholarship was awarded for reasons other than his football ability. As the court noted, the evidence clearly showed that the only way for Van Horn to receive an athletic scholarship was to be a member of the football team and be recommended by the coach to the scholarship committee.[37]

30. *Id.* at 170.
31. *Id.* at 172.
32. *Id.* at 172–73.
33. *Id.* at 173.
34. *Id.*
35. *Id.* at 173.
36. *Id.* at.
37. *Id.* at 174.

As for the argument that awarding worker's compensation benefits to college athletes would be against public policy,[38] the court held that public policy was best served if the workers' compensation statute was liberally construed.[39] The court, however, made it clear that not every scholarship athlete is not automatically an "employee of the school."[40] Only in those cases where the evidence establishes an employment contract, the court held, should such an employee-employer relationship be found.[41]

D. Graczyk v. Workers' Compensation Appeals Board[42]

As in the Colorado cases, the California courts also received a second opportunity to review the issue of whether scholarship athletes are employees of their college or university. In the second case, however, the state legislature had passed an amendment to the workers' compensation laws defining who was an employee. In *Graczyk v. Workers' Compensation Appeals Board*, Ricky Graczyk sustained head, neck, and spine injuries while playing football for California State University, Fullerton.[43] As a result of his injuries, Graczyk filed a workers' compensation claim, arguing that, as a scholarship football player, he was an employee of the school, and he was injured while working. Ruling in favor of Graczyk, the workers' compensation judge found that Graczyk was attending college on an athletic scholarship to play football.[44] Once that relationship was established, the judge, using the statutory definition of employee as interpreted by the Van Horn court, concluded that Graczyk was an employee of the university and eligible for workers' compensation benefits.[45]

In overturning the workers' compensation judge, the Workers' Compensation Appeals Board ruled that Graczyk was not an employee of the university. In support of this conclusion the Board pointed to the amendment passed by the California state legislature two years after

38. *Id.* at 173–74.
39. *Id.*
40. *Id.* at 175.
41. *Id.*
42. Graczyk v. Workers' Comp. Appeals Board, 184 Cal. App. 3d 997 (1986).
43. *Id.* at 495.
44. *Id.* at 496.
45. *Id.* at 497.

the Van Horn decision, amending the state's workers' compensation statute to exclude "any person, other than a regular employee, participating in sports or athletics who receives no compensation for such participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodging, or other expenses incidental thereto" from the definition of employee.[46] The California legislature amended the California Labor Code § 3352 further in 1981 when it specifically excluded "[a]ny student participating as an athlete in amateur sporting events sponsored by any public agency, public or private nonprofit college, university or school, who receives no remuneration for such participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodging, scholarships, grants in aid, and other expenses" from the definition of employee.[47]

On appeal, the Court of Appeals of California ruled that the legislation changes could properly be applied retroactively to cover Graczyk. In particular, the court ruled that California specially intended for individuals like Graczyk, and all college athletes, to be excluded from coverage under the workers' compensation laws.[48]

E. Rensing v. Indiana State University Board of Trustees[49]

In *Rening v. Indiana State University Board of Trustees*, the Indiana Supreme Court had its chance to consider whether college football players were employees of their universities. Indiana State University had offered Fred Rensing a scholarship covering his tuition, room and board, and a book allowance, in return for playing football.[50] Rensing's scholarship also stated that if he became physically unable to continue playing football, Indiana State would continue to honor his

46. *Id.* at 499 (citing the CAL. LAB. CODE § 3352).

47. *Id.* at 499. The legislative history of the 1981 Amendment to Cal. Lab. Code § 3352 revels that it originated to exclude from workers' compensation coverage certain persons engaged in amateur athletics (college athletes) and the bill makes these exclusions retroactive.

48. California is not the only state to specifically excluded college athletes, other states have followed California's example of expressly excluding scholarship athletes from workers' compensation benefits.

49. Rensing v. Ind. St. Univ. Bd. of Tr., 444 N.E.2d 1170 (Ind. 1983).

50. *Id.* at 1171.

scholarship.[51] In the case of an injury, Rensing would be required to work at other jobs to the extent of his physical capabilities.

During spring practice drills, Rensing suffered an injury that rendered him a quadriplegic.[52] As a result of his injury, Rensing filed a workers' compensation claim with the Industrial Board of Indiana. The Industrial Board ruled that Rensing had failed to establish an employer-employee relationship and denied his claim for workers' compensation benefits.[53] The Indiana Court of Appeals reversed the Board's ruling and found that Rensing had established an employer-employee relationship and that maintaining a football team was in the usual course of a university's trade or business.[54]

The Indiana Supreme Court reversed the Court of Appeals decision and found that no employee-employer relationship between Rensing and Indiana State University.[55] Interpreting *Ind. Code* § 22-3-6-1, the court ruled that an employee is defined as "every person, including minors, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer."[56] The term employer was defined as "the state and any political subdivision, any municipal corporation with the state, any individual, firm, association or corporation of receiver or trustee of the same, or the legal representative of a deceased person, using the services of another for pay."[57]

In ruling that Rensing was not an employee of Indiana State University, the court found significant the fact that neither Rensing nor the university intended to enter into an employer-employee relationship.[58] For example, the court noted that neither the NCAA nor the university considered Rensing's scholarship "pay" for playing football because such fact would have made him a professional, in violation of the NCAA's amateur status requirement.[59] As for Rensing, if he

51. *Id.*
52. *Id.* at 1170.
53. *Id.* at 1172.
54. Rensing v. Ind. St. Univ. Bd. of Tr., 437 N.E.2d 78 (1982).
55. *Rensing*, 437 N.E.2d at 1170.
56. *Id.* at 1172 (citing IND. CODE § 22-3-6-1(b)).
57. *Id.* (citing IND. CODE § 22-3-6-1(a)).
58. *Id.* at 1173.
59. *Id.*

considered his scholarship income, he would have claimed it for tax purposes.[60] Since he did not, the court found that not even Rensing believed he was in the service of the university. Therefore, the court held that, since Rensing held no job with the university, he "cannot be considered an 'employee' of the University within the meaning of the Workmen's Compensation Act."[61]

F. Coleman v. Western Michigan University[62]

In *Coleman v. Western Michigan University*, the Court of Appeals of Michigan, citing the Rensing decision, also concluded that scholarship athletes are not employees within the meaning of the workers' compensation statute. During football practice, Willie Coleman, who was on a full scholarship to play football at Western Michigan, suffered a disabling injury and could no longer play.[63] While Coleman continued to receive his scholarship the year he was injured, the next year his scholarship was reduced, and he was forced to leave the university.[64]

In rejecting his workers' compensation claim, it was determined that he was not an employee of the university but a scholarship student-athlete.[65] On appeal, the Workers' Compensation Appeal Board, using the economic reality test, also found that no employment relationship existed between Coleman and Western Michigan University.[66]

On appeal, the Court of Appeals of Michigan ruled that under the state Worker's Disability Compensation Act an employee is defined as "every person in the service of another, under any contract of hire, express or implied."[67] To determine whether there existed an express or implied contract for hire between Coleman and Western Michigan, the Court of Appeals, using the economic reality test, examined the following factors:

60. *Id.*
61. *Id.* at 1175.
62. Coleman v. W. Mich. Univ., 336 N.W.2d 224 (Mich. Ct. App. 1983).
63. *Id.* at 225.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* (citing MICH. COMP. LAWS ANN. § 418.161(1)(b) (2012)).

> (1) the proposed employer's right to control or dictate the activities of the proposed employee;
> (2) the proposed employer's right to discipline or fire the proposed employee;
> (3) the payment of "wages" and, particularly, the extent to which the proposed employee is dependent upon the payment of wages or other benefits for his daily living expenses; and
> (4) whether the task performed by the proposed employee was "an integral part" of the proposed employer's business.[68]

In rejecting Coleman's claim, the court found that Coleman could only satisfy one of the four factors. According to the court, Coleman's scholarship did constitute the payment of wages.[69] As far as the other factors, the court found that the university's right to control and discipline Coleman required by the first two factors was substantially limited.[70] In support of this conclusion, the court found significant that even if Coleman was removed from the team in any given year he would retain his scholarship for that year.

In considering the fourth factor, the court noted that the Workers' Compensation Appeal Board found "that the primary function of the defendant university was to provide academic education rather than conduct a football program."[71] The term "integral," the court held, "suggests that the task performed by the employee is one upon which the proposed employer depends in order to successfully carry out its operations."[72] Since the business of the university is education, not football, the court found that the university's "academic program could operate effectively even in the absence of the intercollegiate football program."[73]

68. *Id.* at 225–26.
69. *Id.* at 226.
70. *Id.*
71. *Id.*
72. *Id.* at 227.
73. *Id.*

G. Tookes v. Florida State University[74]

The next example of a scholarship athlete filing a workers' compensation claim against a college or university never made it to court. In *Tookes v. Florida State University*, a basketball player at Florida State University suffered a knee injury that required him to stop playing. As a result of his injury, Tookes filed a workers' compensation claim for lost wages and medical expenses.[75] Tookes argued that, as a scholarship athlete, he was an employee of the university, and therefore entitled to workers' compensation benefits.[76]

The Florida Department of Labor and Employment Security and Industrial Claims Judge, however, disagreed. The judge determined that there was no employer-employee relationship between Tookes and the university. However, even if there was an employment relationship, the judge ruled that Tookes would still be ineligible for benefits. Such a relationship, the judge reasoned, would have made Tookes a professional athlete, since he would be getting paid to play basketball by the university. Florida Workers' Compensation Statute specifically excludes professional athletes as a class from workers' compensation benefits.[77]

H. Waldrep v. Texas Employers Insurance Association[78]

The most recent workers' compensation case to examines the employment relationship between college athletes and their schools is *Weldrep v. Texas Employers Insurance Association*. Alvis Kent Waldrep Jr. was recruited and offered a scholarship to play football at Texas Christian University (TCU). The scholarship provided that TCU would provide Waldrep room, board, and free tuition and ten dollars per month for incidentals, "laundry money," in exchange for playing football for TCU. In October 1974, while playing in a game against the University of Alabama, Waldrep sustained a severe injury to his

74. Tookes v. Fla. St. Univ., Claim No. 266-39-0855.

75. *Id.*

76. *Id.*

77. *Id.*

78. Waldrep v. Tex, Emp. Ins. Ass'n, 21 S.W.3d 692 (Tex. Ct. App. 2000).

spinal cord and was paralyzed below the neck. In 1991, Waldrep filed a workers' compensation claim against TCU for his injury.[79]

The Texas Workers' Compensation Commission entered an award in his favor.[80] On appeal, the district court found that Waldrep was not an employee of TCU at the time of his injury and rejected his claim. Since the district court concluded that Waldrep was not an employee of TCU at the time of his injury,[81] the Court of Appeals of Texas concluded that the only issue on appeal was whether at the time of his injury Waldrep was an employee of TCU.[82]

An employee, the court ruled, is defined as "a person in the service of another under a contract of hire, express or implied, oral or written, whereby the employer has the right to direct the means or details of the work and not merely the result to be accomplished."[83] In support of his claim that he was an employee at the time of his injury, Waldrep

79. *Id.* at 696. While the court noted that it was almost 20 years between the time Waldrep was injured in 1974, and the claim was filed, the case was not time-barred since TCU did not file a report of Waldrep's injury with the Industrial Accident Board, the Texas Workers' Compensation Commission's predecessor, immediately following the accident. TCU did not file a report with the Commission until 1991. Therefore, the court held that when an "employer" has been given notice or has knowledge of an injury and fails to file a report of the injury, the statute of limitations does not begin to run until the report is filed.

80. *Id.*

81. *Id.* at 697.

82. An interesting note about the Waldrep case was the deposition of Walter Byers, the Executive Director of the NCAA from 1952 to 1988. Although the court refused to allow the jury to hear Byers' testimony, it was entered into the record on appeal. Byers, while refusing to answer the question directly at the deposition, wrote in his book Unsportsmanlike Conduct noted that the NCAA created the term student-athlete based on past workers' compensation claims by athletes. The term "student-athlete," Byers and the NCAA believed would allow colleges to better deal with workers' compensation claims because of the emphasis on "student" not athlete. The district court in excluding Byers's deposition, concluded that the testimony was irrelevant to whether Waldrep was an employee in the current case. *Id.* at 705.

83. *Id.* at 698.

claimed that the Letter of Intent[84] and Financial Aid Agreement[85] were express contracts of hire that set forth the terms of his employment.[86]

84. "The Letter of Intent provided in pertinent part:

> This is to express my desire to participate in the athletic program at Texas Christian University and to certify my intention to enroll at that institution on August 1972. My decision is subject to acceptance by this institution, the fulfillment of its admission requirements and scholastic requirement for athletic awards.
> . . . .
> Regulations and Procedures for Pre-Enrollment Applications.
> . . . .
> Financial aid is awarded by Southwest Conference members on the basis of a student-athlete's desire to participate in the athletic program of the institution making the award. By the signing of the Letter of Intent, the student-athlete pledges that he will participate to the best of his ability in the athletic program of the signing institution.
> Southwest Athletic Conference, Pre-Enrollment Application (1972)."

Id. at 696 n.4.

85. "The Financial Aid Agreement states:

> This is to certify that [Alvis Kent Waldrep] will be awarded financial aid at Texas Christian University to the extent of room, board, tuition, fees, and $ 10 per month for incidentals.
> The above award will be for the period . . . extending from August 1972, to May, 1976 inclusive, and will not be canceled during this time except for failure of the student to comply with the rules and regulations of this institution and of the Southwest Athletic Conference. This award may be renewed during the period of the student's athletic eligibility.
> . . . .
> Both my parents . . . and I understand that my failure to meet the scholastic requirements for athletic awards, or the admission requirements of Texas Christian University by August 15, 1972, will render this agreement null and void. Southwest Athletic Conference, Financial Aid Agreement (1972)."

Id. at 696 n.6.

86. *Id.* at 698.

In rejecting this argument, the court found that, at best, the two documents only partially set forth the relationship between Waldrep and TCU and must be considered against the circumstances surrounding the execution of the documents and the parties' conduct after execution.[87]

Just as the Indiana Supreme Court did in *Rensing*, the court ruled that it was significant that neither TCU or Waldrep believed they were entering into a contract for hire, since both parties understood that his recruitment and eligibility at TCU was subject to the rules of the NCAA.[88] Since the NCAA's rules were designed to ensure that college athlete were amateurs and would not be considered professionals, it would be impossible for either party to believe they were entering an employment contract. If TCU hired Waldrep to play football, the court concluded, this would have made him a professional, which would have violated NCAA rules and made Waldrep ineligible to participate.[89]

Additionally, the court noted that neither Waldrep nor TCU treated the financial aid Waldrep received as pay or income. In particular, the court noted that "TCU never placed Waldrep on its payroll, never paid him a salary, and never told him that he would be paid a salary."[90] In addition, no social security or income tax was withheld from Waldrep's grant-in-aid, nor did Waldrep ever file a tax return reporting his financial aid as salary.[91]

As for whether TCU had the right to direct the means or details of Waldrep's "work," the court found that "TCU exercised direction and control over all of the athletes in its football program, including non-scholarship players, while they were participating in the football program."[92] Even so, the court concluded that it was clear that TCU

87. *Id.* at 699.

88. *Id.* at 700. The NCAA rules at the time stated that "[a] student-athlete shall not be eligible for intercollegiate athletics if . . . he takes or has taken pay, or has accepted the promise of pay, in any form, for participation in athletics, or . . . has entered into an agreement of any kind to compete in professional athletics, or to negotiate a professional contract." The National Collegiate Athletic Association, 1972-73 Manual of the National Collegiate Athletic Association, 6 (1972); *id.* at 707 n.11.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 702.

did not have the right to direct or control all of Waldrep's academic activities.

Although the court found that Waldrep was not employed by TCU at the time of his injury, it also recognized that "college athletics has changed dramatically" since Waldrep was injured in 1974 and that its decision was based on facts and circumstances as they existed almost twenty-six years ago, not those in existence in the year 2000.[93]

III. NCAA CATASTROPHIC INJURY INSURANCE PROGRAM

While they may be less adept at it today, historically the NCAA has been particularly good at identifying a potential problem and producing a solution, especially if that problem involved the amateur status of athletes. Seeing the potential problems colleges and universities faced with workers' compensation claims and whether athletes were considered employees, the NCAA implemented the NCAA Catastrophic Injury Insurance Program.[94]

Implemented in August 1991, the NCAA Catastrophic Injury Insurance Program is intended to address one of the main reasons college athletes sought workers' compensation benefits in the past: out-of-pocket expenses associated with long term medical care and disabilities. Under the NCAA program, every student who participates in college athletics, whether as an athlete, coach, manager, trainer, or cheerleader, and suffers a catastrophic injury while participating in a covered intercollegiate athletic activity is covered for up to $20 million in benefits over the individual's life.[95]

The NCAA's Catastrophic Injury Insurance Program is like workers' compensation in that it provides medical, dental, and rehabilitation expenses plus lifetime disability payments to students who are catastrophically injured, regardless of fault. The plan also includes $25,000 if the individual dies within 12 months of the accident. The NCAA plan, however, is more attractive than workers' compensation

93. *Id.* at 707.

94. For more information on the NCAA's Catastrophic Injury Insurance Program go to the NCAA Website: http://www.ncaa.org/sports/2019/2/18/ncaa-catastrophic-injury-insurance-program.aspx.

95. For more information on the NCAA's Catastrophic Injury Insurance Program go to the NCAA Website: http://www.ncaa.org/sports/2019/2/18/ncaa-catastrophic-injury-insurance-program.aspx.

in several important ways. First, a scholarship athlete can collect benefits without litigating the issue of whether the athlete is an employee. Second, the NCAA's plan provides the athlete with benefits immediately, without time delays, litigation costs, and the uncertainties involved in litigation. Finally, another benefit of the NCAA's plan is that it guarantees that catastrophically injured athletes will receive up to $120,000 toward the cost of completing their undergraduate degree.[96]

IV. FAIR LABOR STANDARD ACT CASES

Besides workers' compensation cases, the employment status of college athletes is also being challenged under the Fair Labor Standards Act (FLSA). The FLSA requires employers to pay their employees at least a minimum wage for the work they perform. The following two cases, with two very different outcomes, illustrate a few of the issues the NCAA and member schools face under the FLSA.

A. Berger v. NCAA[97]

While not a workers' compensation case, Gillian Berger and Taylor Hennig, former members of the University of Pennsylvania's women's track and field team, sued Penn, the NCAA, and more than 120 other NCAA Division I member schools alleging that student athletes are "employees" within the meaning of the FLSA[98] and that the NCAA and its member schools violated the Act by not paying their athletes a minimum wage.[99]

The district court rejected Berger's claim against the NCAA and other schools, finding that Berger lacked standing to sue any of the defendants except the University of Pennsylvania. As for her claim against the university, the court found that college athletes were not employees under the FLSA.[100]

On appeal to the Seventh Circuit, the court held that, under the Act, alleged injuries to an employee "are only traceable to, and

96. *Id.*

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

98. Fair Labor Standards Act (FLSA) 29 U.S.C. § 201.

99. *Berger*, 843 F.3d at 288 ("The Fair Labor Standards Act required every employer to pay his employees a minimum wage of $7.25 per hour.").

100. Berger v. NCAA, 162 F. Supp. 3d 845, 857 (S.D. Ind. 2016).

redressable by, those who employed them."[101] Since the athletes attended Penn, the court ruled that their connection to the other schools and the NCAA was far too tenuous to be considered an employment relationship. Thus, they lacked standing to sue the NCAA and other schools.[102]

As for Berger's arguments that she was an employee of Penn, the Seventh Circuit rejected this argument too and held that as a matter of law, student athletes are not employees and are not entitled to a minimum wage under the FLSA. In support of this conclusion, the Seventh Circuit held that, while the "Supreme Court has instructed the courts to construe the terms 'employee' and 'employer' expansively under the FLSA,"[103] "the Court has also held that the definition of employee 'does have its limits.'"[104]

In examining "the true nature of the relationship" between Berger and Penn, the Seventh Circuit noted, there exists "a revered tradition of amateurism in college sports."[105] In order to maintain this amateur model, the NCAA and its members have created an elaborate system of eligibility rules.[106] Therefore, any test examining the relationship between athletes and their schools must take into account this tradition of amateurism and the reality of the college athlete experience.

In addition, the Seventh Circuit noted that the Department of Labor, in its Field Operations Handbook (FOH'), "has also indicated that student athletes are not employees under the FLSA."[107] In particular, the court cited § 10b03(e) of the handbook, which states:

> As part of their overall educational program, public or private schools . . . may permit or require students to engage in activities in connection with

101. *Berger*, 843 F.3d at 289 (quoting Roman v. Guapos III, Inc., 970 F.Supp.2d 407, 412 (D. Md. 2013)).

102. *Id.* at 289.

103. *Id.* at 290 (quoting Vanskike v. Peters, 974 F.2d 806, 807 (7th Cir. 1992)), (quoting Nationwide Mut. Ins. v. Darden, 503 U.S. 31, 326 (1992)).

104. *Id.* at 290. (quoting Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 295 (1985)).

105. *Id.* at 291 (quoting NCAA v. Board of Regents of The Univ. of Okla., 468 U.S. 85, 120 (1984)).

106. *Id.* at 291.

107. *Id.* at 291.

> dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and *interscholastic athletics* and other similar endeavors. Activities of students in such programs, *conducted primarily for the benefit of the participants* as a part of the educational opportunities provided to the students by the school or institution, 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 . . . .[108]

Based on the language of the handbook, the Seventh Circuit ruled that it did not believe that the Department of Labor intended the FLSA to apply to student athletes. Student participation in collegiate athletics, the court ruled, was "entirely voluntary" and done so for "reasons wholly unrelated to [] compensation."[109]

While the court rejected Berger's claim, Justice Hamilton in his concurring opinion wished "to add a note of caution."[110] In particular, Judge Hamilton noted that the plaintiffs in this case did not receive athletic scholarships and participated in a non-revenue sport, track and field, at Penn. Therefore, "the economic reality and the sometimes frayed tradition of amateurism both point toward dismissal of these plaintiffs' claims."[111] Judge Hamilton, however, expressed doubt as to whether the court's "reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men's basketball and FBS football."[112]

B. Johnson v. NCAA[113]

Almost as if he was predicting the future, the doubts expressed by Judge Hamilton that the court's decision in *Berger v. NCAA* may

108. *Id.* at 292–93 (emphasis added) (quoting Field Operations Handbook (FOH), United States Department of Labor, https://www.dol.gov/Whd/FO H/index.htm).

109. *Id.* at 293.

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

111. *Id.*

112. *Id.*

113. Ralph "Trey" Johnson, et al., v. NCAA, 556 F. Supp. 3d 491 (2021).

not extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men's basketball and FBS football are currently being argued in the Third Circuit Court in *Ralph "Trey" Johnson, et al. v. NCAA*.

Johnson and a group of Division I college athletes filed a claim under the FLSA against a group of colleges and universities, as well as the NCAA, claiming that the athletes are employees who should be paid for the time they spend related to their athletic activities and that the NCAA is a joint employer. In support of this position, Johnson and the other athletes noted that NCAA DI member schools require athletes to participate in Countable Athletically Related Activities (CARAs), which are recorded on timesheets under an NCAA DI bylaw.[114] NCAA bylaws also require student athletes to participate in Required Athletically Related Activities like fundraising and community service. A student athlete who fails to attend meetings, participate in practice, or participate in scheduled competitions can be disciplined, including suspension or dismissal from the team.[115]

Unlike the track athletes in *Berger*, Johnson noted that the NCAA procures substantial revenues from sports. In the 2018 fiscal year, the NCAA reported total revenues of $1,064,403,240. These revenues came from fees collected for television and marketing rights, championships, tournaments, and merchandise sales.[116] In their 2016 fiscal year, NCAA DI schools in the football power five subdivision had median total revenues related to NCAA sports of $97,276,000; schools in the football bowl subdivision reported median total revenues related to NCAA sports of $33,470,000; schools in the football championship subdivision had median total revenues related to NCAA sports of $17,409,000; and schools that did not have NCAA football teams reported median total revenues from NCAA sports of $16,018,000.[117]

Because of the control member schools exercise over their athletes and the revenue these athletes generate for the schools, Johnson and the other athletes asserted they were employees who should be paid for the time they spent engaged in activities connected to NCAA sports.

114. *Id.* at 497.

115. *Id.*

116. *Id.*

117. *Id.* at 505.

Since the athletes did not get paid, Johnson asserted that the NCAA and the member schools had violated the FLSA.

The NCAA and schools sought to dismiss the lawsuit on the grounds that the athletes were not employees. In particular, the NCAA and schools argued that the athletes could not be their employees because (1) college athletes are amateurs; (2) the Department of Labor has determined that interscholastic athletes are not employees for purposes of the FLSA; and (3) the athletes fail to qualify as employees based on the to the economic realities of the relationship.

In rejecting the motion to dismiss by the NCAA and schools, the court examined the three arguments one at a time. First, in considering the amateur status of the athletes, the court rejected the NCAA's longstanding policy of not paying athletes because they were amateurs. Citing Justice Kavanaugh's concurring opinion in *NCAA v. Alston*,[118] the court found that the argument "that colleges may decline to pay student athletes because the defining feature of college sports . . . is that the student athletes are not paid . . . is circular and unpersuasive."[119]

The court also rejected the second argument, that the Department of Labor has already determined that student participation in extracurricular activities, including that of interscholastic athletes, does not result in an employer/employee relationship. The Department of Labor guidelines, the court ruled, do not apply to the athletes' relationship with the NCAA and school because they participate in NCAA sanctioned college sports, not student-run groups.[120] In support of this conclusion, the court found that NCAA DI interscholastic athletics are not conducted primarily for the benefit of the athletes who participate in them, but for the monetary benefit of the NCAA and the colleges and universities.[121] Additionally, the court found that NCAA DI interscholastic athletics are not part of the educational opportunities provided to the student athletes by the colleges and universities that they attend, but rather interfere with the student athletes' abilities to

118. *Id.* at 501 (citing NCAA v. Alston, 141 S. Ct. 2141 (2021)). Alston, which is an antitrust case, is discussed in the next section. As noted in the Johnson case, Alston is very critical of the NCAA and the whole amateur sports model.

119. *Id.* at 501.

120. *Id.* at 502.

121. *Id.* at 502.

participate in and get the maximum benefit from the academic opportunities offered by their colleges and universities.[122]

As for the final argument, that college athletes are not employees based on the to the economic realities of the relationship between the athletes and the schools, the court concluded that after balancing all of the factors involved in college sports, both the educational and economic, the weight fell in favor of finding the athletes are employees.[123] In examining the economic realities of the relationship between athletes and their schools, the court agreed with the NCAA and schools that the athletes clearly understand that there is no expectation of compensation for their services.[124] The court, however, also found that NCAA sports are not tied to the students' formal education program by integrated coursework and that the amount of time that athletes spend in connection with their participation in NCAA DI athletics actually interferes with their ability to take the classes that they might want to take or major in academic fields they might prefer, as well as inhibiting their ability to keep up with the classes they do take.[125] Based on the economic benefits that the NCAA and schools receive, compared to the economic benefits athletes supposedly received from participation in interscholastic athletics, the court concluded that when all the factors are balanced, it would be reasonable for a fact finder to determine that college athletes are employees of the NCAA and their schools.[126]

V. *NCAA V. ALSTON*[127]

In *NCAA v. Alston*, a group of current and former athletes who played men's Division I Football Bowl Subdivision (FBS) football and men's and women's Division I basketball filed a class action against the NCAA and 11 Division I conferences (collectively referred to as the NCAA).[128] The athletes challenged the NCAA rules and policies limiting the compensation they could receive from their colleges and

122. *Id.*
123. *Id.* at 508.
124. *Id.* at 509.
125. *Id.* at 510.
126. *Id.* at 512.
127. NCAA v. Alston, 141 S. Ct. 2141 (2021).
128. *Id.* at 2151.

universities in exchange for their athletic services,[129] claiming that the NCAA's rules violated Section 1 of the Sherman Act.[130]

The NCAA claimed that the limits on athlete compensation and benefits were necessary and had a procompetitive effect on college sports for two reasons. First, they argued that the limits helped "increase output in college sports and maintain a competitive balance among teams."[131] Second, the NCAA claimed that the rules helped preserve amateurism, which increased consumer choice "by providing a unique product—amateur college sports as distinct from professional sports."[132]

In applying the rule of reason analysis to the NCAA's restraints, the district court noted that the NCAA and the 11 conferences joined as defendants "enjoy[ed] 'near complete dominance of, and exercise[d] monopsony power in, the relevant market,'— which it defined as the market for 'athletic services in men's and women's Division I

129. *Id.* (quoting In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1062, 1065 n.5 (N.D. Cal. 2019)).

130. *Id.*; *see* 15 U.S.C. § 1. Passed in 1890, with the goal of breaking up large monopolies and increasing competition, Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The goal of § 1 of the Sherman Act is to prohibit agreements among competitors that unreasonably restrained trade in the relevant market. Exec. Order No. 14036, 86 F.R. 36987 (July 9, 2021). It is important to note, however, that not every restraint of trade violates the antitrust law. Because nearly every contract that binds the parties to an agreed course of conduct "is a restraint of trade" of some sort, the Supreme Court has limited the restrictions contained in Section 1 to bar only unreasonable restraints of trade. In determining whether a defendant's conduct is an unreasonable restraint of trade, the courts generally use a rule of reason analysis. *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015). The focus of the rule of reason inquiry is the actual purpose and effects of the restraint and how it affects competition. Under the rule of reason analysis, the court must perform a three-step test. First, "the plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market." *Id.* "If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's pro-competitive effects." *Id.* "The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner." *Id.*

131. *Alston*, 141 S. Ct. at 2152 (citing *In re NCAA*, 375 F. Supp. 3d at 1070 n.12).

132. *Id.* (citing *In re NCAA*, 375 F. Supp. 3d at 1098).

basketball and FBS football.'"[133] Under the NCAA's amateur model, "the 'most talented athletes are concentrated' in the 'markets for Division I basketball and FBS football.'"[134] "The district court found that "the NCAA and its member schools had the 'power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance.'"[135]

However, even though the district court found that the NCAA had complete monopsony power in the relevant market,[136] it was only willing to find the NCAA rules limiting education-related benefits to athletes in violation of the antitrust laws.[137] The district court held "[o]n no account . . . could such education-related benefits be 'confused with a professional athlete's salary.'"[138] Therefore, any NCAA rules "aimed at ensuring 'student-athletes do not receive unlimited payments unrelated to education,' the court concluded, were reasonable and could play some role in product differentiation with professional sports and thus help" preserve the popularity of college sports.[139]

On appeal, the Ninth Circuit affirmed the district court's ruling in full, holding that "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."[140]

133. *Id.* at 2151 (quoting *In re NCAA*, 375 F. Supp. 3d at 1097).

134. *Id.* at 2152 (quoting *In re NCAA*, 375 F. Supp. 3d at 1067).

135. *Id.* (quoting *In re NCAA*, 375 F. Supp. 3d at 1070).

136. *Id.* at 2151 (quoting In re NCAA, 375 F. Supp. 3d at 1097). As the Supreme Court noted: "the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor. Nor does the NCAA dispute that its member schools compete fiercely for student-athletes but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer." *Alston*, 141 S. Ct. at 2154.

137. *In re NCAA*, 375 F. Supp. 3d at 1088.

138. *Alston*, 141 S. Ct. at 2153 (quoting *In re NCAA*, 375 F. Supp. 3d at 1083).

139. *Id.* (quoting *In re NCAA*, 375 F. Supp. 3d at 1083).

140. *Id.* (quoting In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1263 (9th Cir. 2020)).

On appeal to the Supreme Court,[141] the NCAA argued that, based on the Supreme Court's decision in *NCAA v. Board of Regents*,[142] the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis. According to the NCAA, the courts should have at most only given the NCAA rules an "abbreviated deferential review," or a "quick look," before approving them.[143] The NCAA argued that the Supreme Court's decision in *Board of Regents* expressly approved its limits on student-athlete compensation, thereby foreclosing any meaningful review of those limits.[144] In particular, the NCAA pointed to the Supreme Court's language that:

> the NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.[145]

In rejecting the NCAA's position, the Supreme Court held that while its decision in *Board of Regents* may have suggested that courts should take care when assessing the NCAA's restraints on athlete compensation, it did not suggest that courts must reject *all* challenges to the NCAA's compensation restrictions.[146] In particular, the Court held that "while *Board of Regents* did not condemn the NCAA's broadcasting

141. Alston and the other athletes did not appeal, therefore, the only issue in front of the Supreme Court was whether the NCAA rules capping education-related benefits were, as the district court found, illegal under antitrust law. *See Alston*, 141 S. Ct. at 2154.

142. NCAA v. Bd. of Regents of The Univ. of Okla., 468 U.S. 85 (1984). In Board of Regents the Supreme Court was asked to consider the NCAA's rules restricting the number of football games member schools could televise during a two-year period. *Id.* at 88. The case did not involve NCAA rules regulating college athletes.

143. *Alston*, 141 S. Ct. at 2155.

144. *Id.* at 2157.

145. *Id.* at 2157 (citing *Bd. of Regents*, 468 U.S. at 120).

146. *Id.* at 2158.

restraints as *per se* unlawful, it invoked abbreviated antitrust review as a path to condemnation, not salvation."[147]

Next, the Supreme Court noted that even if the NCAA's compensation restrictions did not violate antitrust law in 1984, the college sports market had evolved since then. To illustrate this point, the court noted that "in 1985, Division I football and basketball raised approximately $922 million and $41 million, respectively."[148] By 2016, NCAA Division I schools raised more than $13.5 billion. From 1982 to 1984, CBS paid $16 million per year to televise the March Madness Division I men's basketball tournament.[149] In 2016, those annual television rights brought in closer to $1.1 billion.[150] As a result of all that money flooding into college sports, the president of the NCAA, conference commissioners, athletic directors, and the majority if Division I football and basketball coaches now earn millions of dollars in salary per year. Meanwhile, the compensation to athletes—the scholarship—had not significantly changed.[151]

In reviewing whether the district court applied the antitrust laws correctly to the NCAA's restraints, which the NCAA claimed "threaten[ed] to 'micromanage' its business,"[152] the Supreme Court found that, while "antitrust courts must give wide berth to business judgments before finding liability,"[153] it believed that the district court honored that principle. The district court only enjoined "restraints on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like."[154] Additionally, the district court only did so after finding that relaxing these restrictions would not blur the distinction between college and professional sports

147. *Id.* at 2157 (citing *Bd. of Regents*, 468 U.S. at 109 n.39).

148. *Id.* at 2158.

149. *Id.*

150. *Id.*

151. The court did note that since 1984 the NCAA has also dramatically increased the amounts and kinds of benefits schools may provide to student-athletes. For example, it has allowed the conferences flexibility to set new and higher limits on athletic scholarships. It has increased the size of permissible benefits "incidental to athletics participation." And it has developed the Student Assistance Fund and the Academic Enhancement Fund, which in 2018 alone provided over $100 million to student-athletes. *Id.*

152. *Id.* at 2163.

153. *Id.* at 2164.

154. *Id.*

and thus impair consumer demand for the college sports—and only after finding that this course represented a significantly less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules. All of which was proper, and required, under the antitrust laws.[155]

The NCAA also argued that allowing schools to offer scholarships for graduate degrees or vocational school and to pay for things like computers and tutoring would be problematic because schools might exploit this to give athletes luxury cars to get to class and other unnecessary or inordinately valuable items only nominally related to education.[156] In rejecting this argument, the Supreme Court held that the district court had extended the NCAA considerable leeway with respect to what was an education-related benefit. In particular, the district court noted that the NCAA could develop its own definition of benefits that relate to education and was free to forbid in-kind benefits unrelated to an athlete's actual education. In other words, the Supreme Court held, nothing is stopping the NCAA from enforcing a "no Lamborghini" rule. In addition, the Supreme Court concluded that, if the NCAA is confused as to which benefits are legitimately related to education, it is free to seek clarification from the district court.[157]

More damning than the Supreme Court's majority decision, however, was the concurring decision by Justice Kavanaugh, who noted that the "NCAA has long restricted the compensation and benefits that student athletes may receive. . . . [and that] the Court's decision marks an important and overdue course correction"[158] regarding the NCAA and antitrust law. However, instead of just commenting of the educational benefits involved in the case, Justice Kavanaugh also raised questions about the legality of the NCAA's remaining compensation rules under the antitrust laws. Justice Kavanaugh wrote that

155. *See id.*

156. *Id.* at 2165.

157. *Id.* The Supreme Court noted that since the district courts original decision the NCAA was free to seek clarification from the district court concerning any ambiguity regarding internships, academic awards, in-kind benefits, or anything else. In the three years since the district court's ruling, the NCAA has sought clarification only once—about the precise amount at which it can cap academic awards—and the question was quickly resolved. *Id.* at 2165.

158. *Id.* at 2166 (Kavanaugh, J., concurring).

"[t]he NCAA's business model would be flatly illegal in almost any other industry in America."[159] No other business in America could

> get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.[160]

Of particular importance for future cases was Justice Kavanaugh's finding that "the NCAA and its member colleges [were] suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year."[161] Yet, even with all the money being generated by college sports, the "athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing."[162] Therefore, while the NCAA can require athletes to be enrolled students in good standing, Justice Kavanaugh wrote that "the NCAA 's [sic]business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws."[163] In particular, Justice Kavanaugh wrote that "it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes."[164]

While *NCAA v. Alston* did not examine the employment relationship between athletes and their schools, as illustrated by the Third Circuit in *Johnson v. NCAA*, *Alston* is already having a significant impact on that relationship and how college athletes are now viewed by the courts. In addition, the Supreme Court's decision forced the NCAA to abandon its long-held position against athletes profiting off their Name, Image, and Likeness (NIL) rights from endorsements,

159. *Id.* at 2167 (Kavanaugh, J., concurring).
160. *Id.* at 2169 (Kavanaugh, J., concurring).
161. *Id.* at 2168 (Kavanaugh, J., concurring).
162. *Id.* (Kavanaugh, J., concurring).
163. *Id.* (Kavanaugh, J., concurring).
164. *Id.* (Kavanaugh, J., concurring).

autograph sales, and public appearances, among other ventures. Further, college athletes can now hire agents to assist them in engaging with companies over NIL sponsorship, making the athletes more like professional athletes.

VI. NATIONAL LABOR RELATIONS BOARD

In addition to the courts, another judicial body that is playing a key role in determining the employment status of college athletes is the National Labor Relations Board (the Board). The NLRB was created in 1935 when Congress passed the National Labor Relations Act (the Act).[165] The Board is made up of five members, appointed for a term of five years by the President of the United States.[166] The President also gets to designate one member to serve as Chairman of the Board.

One of the most important roles of the Board is to conduct and certify union elections. In other words, determining whether a majority of employees have voted to be represented by a union for collective bargaining purposes. Since only employees can vote, the question of whether college athletes are employees is important. The following section examines the attempt of the College Athletes Players Association (CAPA), a labor organization, to represent a group of Northwestern University scholarship football players. These efforts turn on whether scholarship athletes are "employees" within the meaning of Section 2(3) under the National Labor Relations Act and are therefore entitled to choose whether to be represented for the purposes of collective bargaining.

A. Northwestern v. College Athletes Players Association (CAPA)[167]

In 2014, the CAPA, a labor organization, attempted to represent a group of Northwestern University scholarship football players. The CAPA claimed that those football players who receive grant-in-aid scholarships from the Northwestern were "employees" under the Act and were therefore entitled to choose whether to be represented for the purposes of collective bargaining. Northwestern claimed that the

165. National Labor Relations Act, 29 U.S.C. §§ 151–69.

166. National Labor Relations Act, 29 U.S.C. § 153.

167. Nw. Univ., 2014 N.L.R.B. LEXIS 221 (2014).

athletes were not employees under the Act and therefore had no right to be represented by a labor union.

CAPA and the athletes petitioned the Board's regional office in Chicago under Section 9(c), after review of the fact, the Regional Director, Peter Sung Ohr agreed with the union. The Board held that "under the common law definition, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."[168] Applying this common law test, the Board determined that those players who received scholarships to perform football-related services for Northwestern were working under a contract for hire in return for compensation and were subject to Northwestern's control and were therefore employees within the meaning of the Act.[169] Accordingly, the NLRB ordered that an election be conducted to determine whether the majority of scholarship football players at Northwestern who have not exhausted their playing eligibility wished to be represented by CAPA.[170]

In support of this finding, the Board pointed to the fact that the football players (both scholarship athletes and walk-ons) are subject to "certain team and athletic department rules set forth, inter alia, in the Team Handbook that is applicable solely to the players."[171] The

168. *Id.* at 13 (citing NLRB v. Town & Country Electric, 516 U.S. 85, 94 (1995)).

169. *Id.* at 14. Sec. 2. (3) of the NLRA states that the term

> "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.].

170. Nw. Univ., 2014 N.L.R.B. LEXIS 221 at 23.

171. *Id.* at 4. Athletes on the football team are required to live on campus during their first two years, these players live in a dorm room and are provided a meal card,

purpose of the rules, the Board found, was to allow Northwestern to monitor and control the players.

The Board found that the school not only monitored and controlled the players on the field, but it also controlled the players' academic lives. All first-year football players were required to attend six hours of study hall each week, and any players who failed to maintain a certain grade point average (GPA) were also required to attend study hall.[172]

In addition to the special rules the players must follow, the NLRB also found that the players who received scholarships were under strict and exacting control by Northwestern the entire year commencing with training camp, which begins approximately six weeks before the start of the academic year.[173] Once classes start, the NLRB

which allows them to buy food at the school cafeteria. Upper class students can elect to live off campus, and scholarship players are provided a monthly stipend totaling between $1,200 and $1,600 to cover their living expenses. Players are required to disclose to their coaches detailed information pertaining to the vehicle that they drive. The players must also abide by a social media policy, which restricts what they can post on the internet, including Twitter, Facebook, and Instagram. In fact, the players are prohibited from denying a coach's "friend" request and the former's postings are monitored. Players are prohibited from swearing in public, and if a player "embarrasses" the team, he can be suspended for one game. A second offense of this nature can result in a suspension up to one year. Players who transfer to another school to play football must sit out a year before they can compete for the new school. In addition, the players are prohibited from giving media interviews unless they are directed to participate in interviews that are arranged by the Athletic Department. Players are prohibited from profiting off their image or reputation, including the selling of merchandise and autographs. The last one prohibiting the players from profiting off their NIL rights was in place before the NCAA allowed athletes to profit off their NIL rights in June 2021. The players are subject to strict drug and alcohol policies and must sign a release making themselves subject to drug testing by Northwestern, Big Ten Conference, and NCAA. The players are subject to anti-hazing and anti-gambling policies as well. During the regular season, the players are required to wear a suit to home games and team issued travel sweats when traveling to an away football game. They are also required to remain within a six-hour radius of campus prior to football games. If players are late to practice, they must attend one hour of study hall on consecutive days for each minute they were tardy. Players receiving scholarships were also not permitted to miss football practice during the regular season because of a class conflict.

172. *Id.* at 5.

173. *Id.* at 5–9. The Board found that the scholarship and walk-on players begin their football season with a month-long training camp, which is considered the most

found that the players were required to devote between 40 and 50 hours per week on football-related activities.[174] During this time, the players were under the complete control of the coaches. The Board noted that even though the NCAA rules limit "countable athletically related activities" (CARA) to 20 hours per week from the first regular season game until the final regular season game (or until the end of Northwestern's Fall quarter in the event it qualifies for a Bowl game), the CARA total does not include activities such as travel, mandatory training meetings, voluntary weight conditioning or strength training, medical check-ins, training tape review and required attendance at training table.[175] Even when the season is over, the Board found that the players

demanding part of the season. In training camp (and the remainder of the calendar year), the coaching staff prepares and provides the players with daily itineraries that detail which football-related activities they are required to attend and participate in. The itineraries likewise delineate when the players are to eat their meals and receive any necessary medical treatment. For example, the daily itinerary for the first day of training camp in 2012 showed that the athletic training room was open from 6:30 a.m. to 8:00 a.m. so the players could receive medical treatment and rehabilitate any lingering injuries. At the same time, the players had breakfast made available to them at the N Club. From 8:00 a.m. to 8:30 a.m. The players were then separated by position and required to attend position meetings from 8:30 a.m. to 11:00 a.m. so that they could begin to install their plays and work on basic football fundamentals. The players were also required to watch film of their prior practices at this time. Following these meetings, the players had a walk-thru from 11:00 a.m. to 12:00 p.m. at which time they scripted and ran football plays. The players then had a one-hour lunch during which time they could go to the athletic training room, if they needed medical treatment. From 1:00 p.m. to 4:00 p.m., the players had additional meetings that they were required to attend. Afterwards, at 4:00 p.m., they practiced until team dinner, which was held from 6:30 p.m. to 8:00 p.m. at the N Club. The team then had additional position and team meetings for a couple of more hours. At 10:30 p.m., the players were expected to be in bed ("lights out") since they had a full day of football activities and meetings throughout each day of training camp. After about a week of training camp on campus, the Employer's football team made their annual trek to Kenosha, Wisconsin for the remainder of their training camp where the players continued to devote 50 to 60 hours per week on football related activities.

174. Nw. Univ., 2014 N.L.R.B. LEXIS 221.

175. *Id.* at 6–7. "NCAA rules limit 'countable athletically related activities' (CARA) to 20 hours per week from the first regular season game until the final regular season game (or until the end of the Employer's Fall quarter in the event it qualifies for a Bowl game). The CARA total also cannot exceed four hours per day and the players are required to have one day off every week. However, the fact that the players devote well over 20 actual hours per week on football-related activities does not violate the NCAA's CARA limitations since numerous

were required to devote an additional 20 to 25 hours a week to mandatory meetings, strength and conditioning sessions and other workouts conducted by the football team's coaches.[176]

activities such as travel mandatory training meetings, voluntary weight conditioning or strength training, medical check-ins, training tape review and required attendance at 'training table' are not counted by the NCAA." *Id.* at 6.

176. *Id.* at 6–9. During the season players must "devote 40 to 50 hours per week to football-related activities, including travel to and from their scheduled games. During each Monday of the practice week, injured players must report to the athletic training room to receive medical treatment starting at about 6:15 a.m. Afterwards, the football coaches require the players to attend mandatory meetings so that they can begin to install the game plan for their upcoming opponent. However, the only physical activity the coaches expect the players to engage in during this day is weightlifting since they are still recovering from their previous game. The next several days of the week (Tuesday through Thursday), injured players must report to the athletic training room before practice to continue to receive medical treatment. The coaches require all the players to attend mandatory practices and participate in various football related activities in pads and helmets from about 7:50 a.m. until 11:50 a.m. In addition, the players must attend various team and position meetings during this time. Upon completion of these practices and meetings, the scholarship players attend a mandatory 'training table' at the N Club where they receive food to assist them in their recovery. Attendance is taken at these meals and food is only provided to scholarship players and those walk-ons who choose to pay for it out of their own pocket. Because NCAA rules limit the players' CARA hours to four per day, the coaches are not permitted to compel the players to practice again later in the day. The players, however, regularly hold 7-on-7 drills (which involve throwing the football without the participation of the team's offensive and defensive linemen) outside the presence of their coaches. To avoid violating the NCAA's CARA limitations, these drills are scheduled by the quarterback and held in the football team's indoor facility in the evening. On Fridays, for home games, the team will initially meet at 3:00 p.m. and have a series of meetings, walk-thrus and film sessions until about 6:00 p.m. The team will then take a bus to a local hotel where the players will be required to have a team dinner and stay overnight. In the evening, the players have a team breakdown meeting at 9:00 p.m. before going to bed. About half of the games require the players to travel to another university, either by bus or airplane. In the case of an away game against the University of Michigan football team on November 9, 2012, most players were required to report to the N Club by 8:20 a.m. for breakfast. At 8:45 a.m., the offensive and defensive coaches directed a walk-thru for their respective squads. The team then boarded their buses at 10:00 a.m. and traveled about five hours to Ann Arbor, Michigan. At 4:30 p.m. (EST), after arriving at Michigan's campus, the players did a stadium walk-thru and then had position meetings from 5:00 p.m. to 6:00 p.m. The coaches thereafter had the team follow a similar schedule as the home games with a team dinner, optional chapel, and a team movie. The players were once again expected to be in bed by 10:30 p.m. On Saturday, the day of the Michigan game, the players received a wake-up call at 7:30

The football coaches maintained control over the players by monitoring their adherence to NCAA and team rules and disciplining them for any violations. If a player arrives late to practice, he was required to attend one hour of study hall on consecutive days for each minute he was tardy. The players must also run laps for violating minor team rules. And in instances where a player repeatedly missed practices and/or games, he may be deemed to have voluntarily withdrawn from the team and would lose his scholarship. In the same way, a player who violated a more egregious rule stands to lose his scholarship or be suspended from participating in games. In addition, the coaches had control over every aspect of the players' private lives by virtue of the fact that there are many rules that they must follow under threat of discipline and/or the loss of a scholarship. The players had restrictions placed on them and/or had to obtain permission from the coaches before they could: (1) make their living arrangements; (2) apply for outside employment; (3) drive personal vehicles; (4) travel off campus; (5) post items on the Internet; (6) speak to the media; (7) use alcohol and drugs; and (8) engage in gambling.[177]

a.m. and were required to meet for breakfast in a coat and tie by no later than 8:05 a.m. The team then had 20 minutes of meetings before boarding a bus and departing for the stadium at 8:45 a.m. Upon arriving at the stadium, the players changed into their workout clothes and stretched for a period of time. They afterwards headed to the training room to get taped up, receive any medical treatment, and put on their football gear. About 65 minutes before kickoff, the players took the field and did additional stretches and otherwise warmed-up for the game. At noon, the game kicked off… While most games normally last about three hours, this one lasted about four hours since it went into overtime. Following the game, the coaches met with the players, and some of those individuals were made available to the media for post-game interviews by the Employer's athletic department staff. Other players had to receive medical treatment and eventually everyone on the roster changed back into their travel clothes before getting on the bus for the five hour drive back to the Evanston campus. At around 9:00 or 10:00 p.m., the players arrived at the campus. Although no mandatory practices are scheduled on Sunday following that week's football game, the players are required to report to the team's athletic trainers for a mandatory injury check. Those players who sustained injuries in the game will receive medical treatment at the football facility. In the years that the team qualifies for a Bowl game, the season will be extended another month such that the players are practicing during the month of December in preparation for their Bowl game—which is usually played in early January." *Id.* at 7–8.

177. *Id.* at 11.

In further distinguishing scholarship football players from students, the Board pointed to its decision in *Brown University*[178] concerning graduate assistants. In finding that the graduate assistants were not employees but "primarily students," the Board held that the "students serving as graduate student assistants spend only a limited number of hours performing their duties [as graduate assistants], and it is beyond dispute that their principal time commitment at Brown is focused on obtaining a degree and, thus, being a student."[179] In contrast, the Board found, that scholarship football players at Northwestern not only spent more hours on football-related activities every week than many undisputed full-time employees work at their jobs, but they also committed more time to football-related activities than to their studies. In fact, the Board noted, players did not attend academic classes while in training camp or the first few weeks of the regular season. After the beginning of the academic year, the players continued to devote 40 to 50 hours per week on football-related activities while only spending about 20 hours per week attending classes. Therefore, it could not be said that football players were "primarily students" who "spend only a limited number of hours performing their [athletic] duties."[180]

The Board also found that scholarship football players "[were] identified and recruited in the first instance because of their football

178. *Brown Univ.*, 342 N.L.R.B. 483 (2004). While the Board in the 2014 Northwestern case cited the NLRB's Brown University to distinguish scholarship football players from graduate students, it must be noted that the Board in The Trustees of Columbia Univ.y in the City of New York , 364 N.L.R.B. 90, (2016) reversed Brown and held that student assistants working at private colleges and universities are statutory employees covered by the National Labor Relations Act. In reversing *Brown*, Board held that the earlier decision "deprived an entire category of workers of the protections of the Act without a convincing justification." *Id. at*1. In support of this conclusion, the Board found that the duties of graduate assistants constituted work for the university and were not primarily educational. Columbia *Id.* at 15. In distinguishing the graduate students in Columbia University and from the scholarship athletes in Northwestern University, the Board held that in exercising discretion, "we denied the protections of the Act to certain college athletes—without ruling on their employee status—because, due to their situation within and governance by an athletic consortium dominated by public universities, we found that our extending coverage to them would not advance the purposes of the Act. Here, conversely, we have no reason to believe that extending bargaining rights will not meaningfully advance the goals of the Act." *Id.* at n.56.

179. *Id.* at 18. (citing *Brown Univ.*, 342 N.L.R.B. at 483).

180. *Id.*

prowess and not because of their academic achievement in high school. Only after the Employer's football program becomes interested in a high school player based on the potential benefit[,] he might add to the Employer's football program does the potential candidate get vetted through the Employer's recruiting and admissions process."[181] In addition, the Board found that the athletes performed a valuable service for Northwestern. For example, "monetarily, the Northwestern football program generated revenues of approximately $235 million during the nine-year period 2003 - 2012 through its participation in the NCAA Division I and Big Ten Conference that were generated through ticket sales, television contracts, merchandise sales and licensing agreements. As a result of the profit realized from the football team's annual revenue, Northwestern was able to fund the school's non-revenue generating sports (i.e., all the other varsity sports except for men's basketball)."[182]

Finally, the Board found that the scholarships were an exchange of economic value, whereby the schools provide a scholarship in exchange for the athlete's services. "Indeed, the monetary value of these scholarships totals as much as $76,000 per calendar year and results in each player receiving total compensation in excess of one quarter of a million dollars throughout the four or five years they play football for the Employers."[183] "While it is true that the players do not receive a paycheck in the traditional sense, they nevertheless receive a substantial economic benefit for playing football. And those players who elect to live off campus receive part of their scholarship in the form of a monthly stipend well over $1,000 that can be used to pay their living expenses."[184] Equally important, the Board found that the type of compensation that was provided to the players was set forth in a "tender" that they were required to sign before the beginning of each period of the scholarship. This "tender" serves as an employment contract and gives the players detailed information concerning the duration and conditions under which the compensation will be provided to them. In

181. Nw. Univ., 2014 N.L.R.B. LEXIS 221, 9–10 (2014).

182. *Id.* at 13.

183. *Id.* at 14. In distinguishing scholarship athletes from walk-ons, the Board found that walk-on players do not share the significant threat of losing up to the equivalent of a quarter million dollars in scholarship if they stop playing football for the Employer as do the scholarship players. *Id.* at 14.

184. *Id.* at 14.

addition, the Board found that it was clear that the scholarships that players received were in exchange for the athletic services being performed, which the head football coach could immediately reduce or cancel if the player voluntarily withdraws from the team or abuses team rules.[185] Based on the above facts, the Board found that the players met the definition of employee under Section 2(3) [186] of the Act.

B. National College Players Association (NCPA)[187]

With the NLRB Regional Office in Chicago having concluded that scholarship football players were employees within the meaning of Section 2(3) of the Act, Northwestern University in accordance with Section 102.67 of the Board's Rules and Regulations, formally filed a "request for review" of the ruling by the five-member NLRB in Washington DC contending that the scholarship players were not statutory employees. [188] The Board, agreeing that the case raised important issues concerning the scope and application of Section 2(3), granted Northwestern's request.

The Board, "after carefully considering the arguments," passed the issue onto Congress by ruling that at the current time[189] it would not effectuate the policies of the Act to assert jurisdiction in this case.[190] Nor, the Board found, would asserting jurisdiction serve to promote stability in labor relations.[191] Therefore, believing that the

185. *Id.* at 20.

186. Under Section 2(3) of the National Labor Relations Act "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular, employer unless the subchapter explicitly states otherwise . . . ." *NLRA*, 29 U.S.C.A. § 152.

187. *Northwestern Univ.*, 362 N.L.R.B. at 1350 (2015).

188. *Id.* at 1350.

189. *Id.* The Board, however, did leave open the possibility that it might assert jurisdiction in another case involving scholarship athletes. *Id.*

190. *Id.* at 1352.

191. *Id.* In support of this conclusion, the Board noted that most FBS teams are created by state institutions, they may be subject to state labor laws governing public employees. For example, the Board noted that in at least two states (Ohio and Michigan) which, between them, operate three universities that are members of the Big Ten state statute specifically excludes scholarship athletes at state schools from the definition of employees. *See* OHIO REV. CODE § 3345.56 (West 2014); MICH. COMP. LAWS § 423.201(1)(e)(iii) (West 2014).

issue was better left to Congress, the courts or college sport administrators (the NCAA), the Board without actually ruling on the issue effectively denied the athletes the right to unionize and collectively bargain.

In support of this decision, the Board found that although it had ruled on the employee status of graduate student assistants, student janitors, and cafeteria workers, scholarship players did not fit into the same analytical framework that it had used in these other cases. For example, while "scholarship players are students who are also athletes receiving a scholarship to participate in what has traditionally been regarded as an extracurricular activity…materially sets them apart from the Board's student precedent."[192] At the same time, the Board held that "scholarship players are unlike athletes in undisputedly professional leagues, given that the scholarship players are required to be enrolled full time as students and meet various academic requirements, and they are prohibited by NCAA regulations from . . . profiting from the use of their names or likenesses."[193] In addition, the Board held that "even if scholarship players were regarded as analogous to players for professional sports teams who are considered employees for purposes of collective bargaining, such bargaining has never involved a bargaining unit consisting of a single team's players, where the players for competing teams were unrepresented or entirely outside the Board's jurisdiction."[194] As a result, the Board held that given the absence of any controlling precedent, it was appropriate to exercise its discretion to decline to assert jurisdiction in this case, even assuming the Board is otherwise authorized to act.

In addition, the Board held that in creating the NCAA, the member schools gave the NCAA power "to police and enforce the rules and regulations that govern eligibility, practice, and competition."[195] Such arrangements, the Board held, are Essential for the creation of level and fair competition that ensures the uniformity and integrity of individual games, and thus league competition. "There is thus a symbiotic

192. *Id.* at 1353.

193. *Id.* It must be noted that this decision was from 2015, six years before the Supreme Court's decision in *NCAA v. Alston* and before the NCAA allowed athletes to profit off the NIL rights.

194. *Id.*

195. *Id.*

relationship among the various teams, the conferences, and the NCAA."[196] Therefore, the Board found that anything that changes or alters the relationship between an individual school and its student athletes, such as finding the athletes to be employees, would indirectly also impact the relationship between all college athletes in the Big Ten and NCAA member institutions. "'Consequently, it would be difficult to imagine any degree of stability in labor relations' if we were to assert jurisdiction in this single-team case. Indeed, such an arrangement is unprecedented; all previous Board cases concerning professional sports involve league wide bargaining units."[197] Finally, the Board ruled that the "nature of league sports and the NCAA's oversight renders individual team bargaining problematic, the way that FBS football itself is structured and the nature of the colleges and universities involved strongly suggest that asserting jurisdiction in this case would not promote stability in labor relations."[198] In support of this position the Board noted that "Northwestern is the only private school that is a member of the Big Ten."[199] This is important because the Board does not have the authority to regulate public employees. Therefore, the Board reasoned, it would be unable to assert jurisdiction over the vast majority of FBS teams or Big Ten because they would not be controlled or covered under Section 2(2) of the Act. In such a situation, the Board held, asserting jurisdiction over a single school would not promote stability in labor relations.[200]

196. *Id.*

197. *Id.* at 1354 (quoting N. American Soccer League, 236 N.L.R.B. 1317, 1321–22 (1978)).

198. *Id.*

199. *Id.*

200. For a more in-depth examination of the case, see Andrew McInnis, *Play Under Review: How the NLRB Failed to Protect Some of the Most Vulnerable Employees –College Athletes*, MICH. ST. L. REV. 189 (2018).

C. Post-Northwestern Memos

1. January 31, 2017 – Memorandum GC 17-01 from Richard F. Griffin, General Counsel at the NLRB[201]

On January 31, 2017, Richard F. Griffin, General Counsel at the NLRB, issued a memo concerning the Northwestern University case. In particular, the memo was intended as a guide to set forth the General Counsel's position on whether scholarship football players[202] at NCAA Division I Football Bowl Subdivision (FBS) private colleges and universities[203] are employees under the NLRA, and therefore are entitled to the protections of Section 7 of the Act. [204]

In the memo Richard F. Griffin stated that since the issue was raised but left unresolved in *Northwestern*, it was important that scholarship football players at private Division I FBS colleges and universities know whether the Act's protection extends to them, i.e., whether if they engage in concerted activity for mutual aid and protection, such activity would be protected by the NLRA.[205]

In extending coverage to the college athletes, the General Counsel held that he had no reason to believe that extending bargaining rights would not meaningfully advance the goals of the National Labor Relations Act.[206] In support of the conclusion that Division I FBS

201. It should be noted that the memo only addresses the 17 private colleges and universities at the FBS level. The memo does however take note of the "revered tradition of amateurism in college sports," the role extracurricular activities play in a university education, and the issue of whether football players should be treated differently from equally committed athletes in non-revenue sports or students participating in equally time-consuming non-athletic activities. GC 17-01, *supra* note 7.

202. The memo only deals with football players at the FBS level because they were the athletes in the Northwestern case; therefore, it could not conclusively determine the employee status of other kinds of student athletes in cases that may arise in the future. *See id.* at 2.

203. The 17 private colleges and universities are: Baylor; Boston College; BYU; Duke; Miami (Florida); Northwestern; Notre Dame; Rice; Southern Methodist; Stanford; Syracuse; TCU; Tulane; Tulsa; University of Southern California; Vanderbilt and Wake Forest. The official opinion letter only deals with the 17 private universities because the NLRB does not have jurisdiction over public colleges and universities.

204. *Id.*

205. *Id.* at 17.

206. *Id.* (citing Northwestern Univ., 362 N.L.R.B. No. 167 (2015)).

scholarship football players in private colleges and universities are employees under the NLRA, the General Counsel pointed to the statutory language and policies of the NLRA.[207] In particular, the memo noted an "employee" as defined in Section 2(3) contains only a few enumerated exceptions, and university employees, football players, and students are not among them.[208]

In addition, the General Counsel noted that "the Board has long made use of common-law agency rules governing the conventional master-servant relationship."[209] Applying those common-law rules here, the General Counsel noted "it is clear from the evidentiary record established in Northwestern University that scholarship football players at Northwestern and other Division I FBS private colleges and universities are employees under the NLRA because they perform services for their colleges and the NCAA, subject to their control, in return for compensation."[210] As a result the General Counsel held that scholarship football players should be protected by Section 7 when they act concertedly to speak out about aspects of their terms and conditions of employment. For example, any actions to advocate for greater protections against concussive head trauma and unsafe practice methods,

207. *Id.* at 18. The memo also cited the decision of the Board in: The Trustees of Columbia Univ. in the City of New York, 364 N.L.R.B. 90 (2016) and Boston Med. Cent., 330 N.L.R.B. 30 (1999).

208. GC 17-01, *supra* note 7, at 17. Under the NLRA 29 U.S.C. §§ 2(3) the term "employee" shall include any employee**,** and shall not be limited to the employees of a particular employer, unless the Act this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act 45 U.S.C. § 151, as amended from time to time, or by any other person who is not an employer as herein defined.

209. *Id*. at 18. Under common law agency rules governing the conventional master-servant relationship, an employee includes any person "who perform[s] services for another and [is] subject to the other's control or right of control. Consideration, i.e., payment, is strongly indicative of employee status. *Id*.

210. *Id.* at 19.

reform NCAA rules so that football players can share in the profit derived from their labor.[211]

In considering whether college football players are employees, the memo concluded that "the revered tradition of amateurism in college sports"[212] against the "enormous revenue generated by Division I FBS football programs and the substantial salaries paid to university administrators, coaches and conference officials" judges sometimes fail to focus on the narrow question and instead examine the college athletics as a whole.[213] However, focusing only on Division I FBS scholarship football players, it is clear that they are employees under the NLRA, and that they therefore have the right to be protected from retaliation when they engage in concerted activities for mutual aid and protection.[214]

2. September 29, 2021 – Memorandum GC 21-08 from Jennifer A. Abruzzo, General Counsel at the NLRB215

Since the General Counsel of the NLRB is appointed by the President, when President Obama left office in 2016 a new General Counsel was appointed. On December 1, 2017, the new General Counsel, Peter B. Robb, issued his own memorandum rescinding Memorandum GC 17-01.[216] As a result, the employment status of college athletes under the Act was once again uncertain.

When President Biden was elected in 2020, his new NLRB General Counsel, Jennifer A. Abruzzo, reinstated GC 17-01 and provided additional guidance regarding college athletes under the Act. In addition to stating that college athletes should be considered statutory employees under the Act and afforded all the rights and protections of employees under federal labor laws, the General Counsel also stated that she believed that the NCAA was "misclassifying such employees as mere 'student-athletes,' and leading them to believe that they do not

211. *Id.* at 21.

212. *Id.* at 22 (citing NCAA v. Bd. of Regents of The Univ. of Okla., 468 U.S. 85 (1984)).

213. *Id*.

214. *Id*. at 23.

215. GC 21-08, *supra* note 7.

216. Peter B. Robb, NAT'L LAB. REL. BD., Gen. Couns. Mem. GC 18-02 (Dec. 1, 2017).

have statutory protections is a violation of Section 8(a)(1) of the Act."[217] The term "student-athletes," the memo stated, "was created to deprive those individuals of workplace protections."[218]

In support of her conclusion that scholarship football players were employees, the General Counsel's memo noted that under common law, "an employee includes a person 'who perform[s] services for another and [is] subject to the other's control or right of control.'"[219] Based on this definition, the General Counsel reasoned that the "law fully supports a finding that scholarship football players at Division I FBS private colleges and universities, and other similarly situated Players at Academic Institutions, are employees under the NLRA."[220] Therefore, those football players, and other similarly situated Players at Academic Institutions, should be protected by Section 7 when they act concertedly to speak out about their terms and conditions of employment, or to self-organize, regardless of whether the Board ultimately certifies a bargaining unit.[221] In addition, Abruzzo claimed that because scholarship football players are employees under the Act, misclassifying them as "student-athletes" and leading them to believe that

217. Memorandum GC 21-08 from Jennifer A. Abruzzo, General Counsel at the NLRB on the Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act. (September 29, 2021). GC 21-08, *supra* note 7, at 1.

218. *Id.* at 1 n.1. In support of this position the memo cited: *Molly Harry, A Reckoning for the Term "Student-Athlete,"* DIVERSE (Aug. 26, 2020), https://www.diverseeducation.com/sports/article/15107633/a-reckoningfor-the-term-student-athlete (explaining that NCAA's president and lawyers coined term "student athlete" in 1950s to avoid paying workers' compensation claims to injured athletes and NCAA continues to utilize it in litigation involving rights of college athletes); LEVEL PLAYING FIELD: MISCLASSIFIED (HBO documentary broadcast Sept. 21, 2021) (describing ongoing use of moniker "student-athlete" to deprive those employees of their workplace rights); Jay D. Lonick, *Bargaining with the Real Boss: How Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 139–42 (2015) (arguing that "student athlete" is "used to deny athletes legal protection and to preserve the myth that today's student athletes are amateurs pursuing sports as a mere hobby or avocation").

219. *Id.* at 3.

220. *Id.* at 3. The 17 private colleges and universities identified are: Baylor; Boston College; Brigham Young (BYU); Duke; Miami (Florida); Northwestern; Notre Dame; Rice; Southern Methodist; Stanford; Syracuse; Texas Christian (TCU); Tulane; Tulsa; University of Southern California (USC); Vanderbilt and Wake Forest.

221. *Id.* at 4.

they are not entitled to the Act's protection has a chilling effect on Section 7 activity.[222]

Finally, the General Council stated that although scholarship athletes at public colleges and universities are outside of NLRB jurisdiction, because they perform services for, and subject to the control of, the NCAA and their athletic conference, in addition to their college or university, in appropriate circumstances the Board would consider pursuing a joint employer theory of liability.[223] In support of the joint employer theory of liability, Abruzzo cited a case involving the Big East Conference,[224] in which the Board asserted jurisdiction even though two of nine member institutions were state institutions, because those two institutions "cannot control the operations" of the conference.[225] In addition, the memo noted that "the NCAA exercises strict control over certain athletes, beginning with establishing eligibility standards and terms pursuant to which they may enter the workforce (athletic team), including unilateral contract terms in the "Student-Athlete Agreement" and detailed recruitment rules, and through extensive compliance requirements, which can result in termination if violated."[226]

VII. THE ECONOMIC REALITY TEST

As the courts in *Alston* and *Johnson* and Jennifer A. Abruzzo, the General Counsel at the NLRB all noted, it is undeniable that college athletes have changed significantly over the last twenty years. Today, college athletics is a multi-billion-dollar industry, and the value has "increased consistently over the years."[227] As the courts noted, the NCAA generates over $1 billion a year from the broadcast rights to the March Madness college basketball tournament. The FBS College Football Playoff generates another $470 million per year. The value of regular season football games has also exploded, so that individual colleges and universities in the Power-Five conferences are being paid tens of millions of dollars for the television rights to their games.

222. *Id.* at 4 n.12.

223. *Id.* at 9 n.34.

224. Big East Conference, 282 N.L.R.B. 335, 340–42 (1986).

225. *Id.* at 9 (citing Big East Conference, 282 N.L.R.B. 335, 340–42 (1986)).

226. *Id.* at 9 n.34.

227. NCAA v. Alston, 141 S. Ct. 2141, 2151 (2021).

Even with all the money that the players are generating for their schools, the one thing that has not "increased consistently over the years" is the compensation athletes can receive from their schools. Today, athletes receive the same compensation they received in 1974 when Kent Waldrep went to TCU. This cap on compensation is based on the argument that scholarship athletes are not employees; however, this argument has been rejected by the NLRB, which has held that scholarship athletes—especially football players—fit the definition of employee under both the common law and Section 2(3) of the NLRA.

While the NLRB seems to be moving in the direction of classifying scholarship athletes as employees, this section of the paper explores whether the courts using the *economic reality test* would still not consider athletes receiving grant-in-aid scholarships employees. This section examines each of the four prongs individually.

A. The Proposed Employer's Right to Control or Dictate the Activities of the Proposed Employee

As noted in the *Northwestern* case, the NCAA and its member schools at the Division I level control scholarship football players (and other scholarship athletes) from the time they are recruited until the time they leave the university. College athletes, both scholarship players and walk-ons, are subject to certain team and athletic department rules that are not imposed on the general student population. For example, at Northwestern "the players have restrictions placed on them and/or have to obtain permission from the coaches before they can: (1) make their living arrangements;[228] (2) apply for outside employment;[229] (3) drive personal vehicles;[230] (4) travel off campus;[231] (5) post items

228. Nw. Univ., 2014 N.L.R.B. LEXIS 221 at 4. The players are required to submit their lease agreements to the coach for approval before they can sign them.

229. *Id.*

230. *Id.* at 5. The players are required to disclose to their coaches detailed information pertaining to the vehicle that they drive. *Id.*

231. *Id.* The players are required to remain within a six-hour radius of campus prior to football games. *Id.*

on the Internet;[232] (6) speak to the media;[233] (7) use alcohol and drugs;[234] and (8) prohibits the players from engaging in and gambling."[235]

Other controls the NLRB found that the NCAA and colleges and universities placed on the players was a prohibition from swearing in public. Under the Northwestern policy, if a player "embarrasses" the team, he can be suspended for one game, the second offense could result in a suspension of up to one year.[236] Northwestern also imposed a dress code on the players for both home and away games. At home games, the players are required to wear a suit and team issued university sweats to an away football game.[237] In addition, the Board noted that scholarship football players were required to sign a release permitting Northwestern and the Big Ten Conference to utilize their name, likeness, and image for any purpose.[238]

The football coaches and school's control over the players even extends to the off-season[239] and the players academics. During the off-season, scholarship players are expected to devote 12 to 25 hours per week on football-related activities.[240] On the academic side, scholarship athletes at Northwestern are not permitted to miss football practice

232. *Id*. The players at Northwestern must abide by a social media policy, which restricts what they can post on the internet, including Twitter, Facebook, and Instagram. In addition, the players are prohibited from denying a coach's "friend" request and the former's postings are monitored. *Id.*

233. Northwestern prohibits players from giving media interviews unless they are directed to participate in interviews that are arranged by the Athletic Department. *Id.*

234. The players are subject to strict drug and alcohol policies and must sign a release making themselves subject to drug testing by the Employer, Big Ten Conference, and NCAA. *Id.*

235. *Id.* at 4.

236. *Id.* at 5.

237. *Id*.

238. *Id*. While colleges and universities still require players to sign a release for the NIL rights for team marketing and promotions beginning in 2021 the players have gained more control over their personal NIL rights.

239. *Id.* at 9. Off-season is a misleading term. Scholarship athletes, as illustrated in the Northwestern case, are expected to commit the entire year either training or playing games. The athletes are only given a few "discretionary weeks, at the end of the fall season and the beginning of the summer when they are not required to be somewhere working out or training. *Id.*

240. *Id.* at 8–9.

during the regular season for classes. As a result, the players are limited in the courses they could enroll in during the academic quarter.[241] To help the players succeed academically, and to keep them eligible to play, scholarship football players are also often discouraged from taking "difficult" majors. In addition, Northwestern also mandated that freshmen, and player who fail to maintain a certain grade point average (GPA) in their classes, attend a study hall six hours per week.[242] "However, these noble efforts by the Employer, in some ways only further highlight how pervasively the players' lives are controlled when they accept a football scholarship."[243]

Based on the above facts, it is clear that college football coaches control and dictate the activities of scholarship athletes not only during the football season, but during the off-season and in the classroom to such a degree that it impacts their academics.

It has also been argued that scholarship football players are students first and athletes second. The Board on the *Northwestern* case and the Third Circuit Court in the *Johnson* case clearly illustrate that the relationship is an economic one, not educational. In comparing scholarship players to graduate assistants, the Board citing *Brown University*, found that graduate assistants were primarily students, not employees, due to their relationship with the university faculty. [244] Graduate assistants work closely with faculty from the students' degree program, as part of their assistantship and education. Especially since it is those same faculty members who will be working with the students in the preparation of their theses or dissertations. [245] This overall collaborative relationship between the graduate assistants and their professors and university demonstrated that the graduate assistants' teaching and research duties were inextricably related to their education.[246] As a result, the Board concluded that graduate assistants were not employees, and the relationship was primarily an educational one, rather than an economic one.[247]

241. *Id.* at 16.
242. *Id.*
243. *Id.*
244. *Id.* at 18 (citing Brown Univ., 342 N.L.R.B. 483 (2004)).
245. *Id.*
246. *Id.*
247. *Id.* at 19.

Scholarship football players, the Board found, are in a different position since their football-related duties are unrelated to their academic studies.[248] Unlike graduate assistants, the players are controlled by non-academic football coaches.[249] Accordingly, the Board found that the relationship that scholarship players have with their schools "is an economic one that involves the transfer of great sums of money to the players in the form of scholarships."[250] Scholarship football players, the Board found, were not "primarily students."[251] In support of this conclusion, the Board noted that scholarship football players "spend 50 to 60 hours per week on their football duties during a one-month training camp prior to the start of the academic year and an additional 40 to 50 hours per week on those duties during the three or four month football season.[252] Not only is this more hours than many undisputed full-time employees work at their jobs, the Board noted, "but it is also many more hours than the players spend on their studies."[253] Once classes begin, scholarship football players only spending about 20 hours per week attending classes.[254] Based on the number of hours the players are required to spend time playing games and practicing their football skills, the Board found that it cannot be said that scholarship football players are primarily students who "spend only a limited number of hours performing their athletic duties."[255] Therefore, the relationship between scholarship football players and their schools is clearly an economic one that involves the transfer of great sums of money to the players in the form of scholarships.[256]

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 18.

252. *Id.* at 15.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 14. College and universities spend between $61,000 and $76,000 per scholarship per year or over five million dollars per year for the eighty-five scholarships allowed by the NCAA for FBS football teams.

B. The Proposed Employer's Right to Discipline or Fire the Proposed Employee

The type of compensation the players receive, the scholarship, is set forth in a "Athletic Tender Agreement" which the players are required to sign before receiving the scholarship. This "tender" serves as an employment contract and gives the players detailed information concerning the duration and conditions under which the compensation will be provided to them.[257] Beginning in 2014, colleges and universities at the Division I level decided to move from one-year renewable scholarships to four-year scholarships. While the move to award four-year scholarships, instead of one-year renewables, might seem to reduce some of the pressure on scholarship players to make significant contributions on the field to avoid having their scholarship revoked, as the Board found, even under the new four-year scholarship agreement the coach can still reduce or cancel the players' scholarship for a variety of reasons.[258] The athletic scholarship is tied directly to the player's performance of athletic services, and will be immediately canceled if the player voluntarily withdraws from the team or abuses team rules.[259] The threat of losing their scholarships hangs over every scholarship player and provides a powerful tool to control the players and force them to abide by all the team and NCAA rules. [260]

In addressing the control schools have over football players, the Board concluded that "it is clear that the players are controlled to such a degree that it does impact their academic pursuits to a certain extent. This appears especially true for the scholarship players."[261]

257. *Id.* at 10–11.

258. *Id.* at 15.

259. *Id.*

260. *Id.* at 10. Northwestern had cancelled two scholarships in the five years prior to the case, one player for shooting a BB gun in a dormitory, while the other player had his scholarship canceled for violating the alcohol and drug policy. *Id.* at 4.

261. *Id.* at 21.

C. The Payment of "Wages" and the Extent to Which the Proposed Employee is Dependent Upon the Payment of Wages or Other Benefits for Daily Living Expenses

The NCAA and college and university officials argue that since the players do not receive a salary or other direct monetary compensation from the schools, therefore they cannot be employees. While this claim may be true for walk-ons, it is debatable when talking about scholarship players. Northwestern and other colleges and universities provide scholarship athletes who live off campus a monthly stipend to cover their living expenses.[262] Also, since *O'Bannon v. NCAA*[263] schools can pay scholarship athletes an additional $2,000 to $5,000 per year to cover the full cost of attendance, for expenses such as travel, and other miscellaneous expenses. The NCAA also permits schools to provide players with additional funds out of a "Student Assistance Fund" that covers expenses such as health insurance, dress clothes required to be worn by the team while traveling to games, the cost of traveling home for a family member's funeral, and fees for graduate school admittance tests and tutoring.[264] As noted by the Supreme Court in *Alston*, the fund in 2018 provided over $100 million to scholarship athletes.[265]

So while you can debate whether these additional payments to scholarship athletes constitute direct monetary compensation, what is not debatable is that scholarship athletes are "sought out and recruited and ultimately granted scholarships because of their athletic prowess on the football field."[266] These scholarships, the NLRB ruled, "are a transfer of economic value" in which the school pays for the players' tuition, fees, room, board, and books for up to five years.[267] Over the

262. In Northwestern, the NLRB found that scholarship players were provided a monthly stipend totaling between $1,200 and $1,600 to cover their living expenses. *Id.* at 9.

263. *See* O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015). O'Bannon considered whether NCAA's rules prohibiting colleges and universities from awarding "scholarships up to the full cost of attendance" violated the antitrust laws. The courts said it did.

264. Nw. Univ., 2014 N.L.R.B. LEXIS 221 at 3.

265. NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021).

266. *Id.* at 14.

267. *Id.* at 20.

four or five years scholarship athletes receive these scholarships, which totaled as much as $76,000 in 2014,[268] each player receives total compensation in excess of one quarter of a million dollars to perform football duties for the school.[269]

Therefore, the Board found while it may be true that the scholarship athletes are not paid to play in the traditional sense, have FICA taxes withheld, or receive a W-2 tax form, they nevertheless receive a substantial economic benefit for playing football from the schools.[270] Whether or not the NCAA, colleges, and universities consider these scholarships as taxable income, according to the NLRB, is irrelevant to whether the scholarship is compensation.[271]

Now that the NCAA has eased its NIL restriction in 2021, the NCAA and schools might argue that scholarship players are no longer truly dependent on their scholarships to pay for necessities. This argument, however, would be an incorrect assumption. There are only a handful of scholarship athletes making enough money in which they could cover their daily living expenses. Most scholarship athletes are still dependent on their scholarships to pay for basic necessities, such as food and shelter.

The NCAA also argue that the Grant-in-Aid Scholarship players receive is not pay for services performed, but rather financial aid to attend the university.[272] To support this argument, the schools cite the two factors relied on in Brown University: (1) that scholarship football players all receive the same award, just like the graduate assistants; and (2) that scholarship football players, like the graduate assistants' compensation, was not tied to the quality of their work.[273]

The NLRB, however, distinguished scholarship players from graduate assistants in that unlike the graduate assistants, colleges and

268. In 2023, the value of a full athletic scholarship (covering tuition, room and board, books and full cost of attendance to Syracuse University) was over $83,000. *See generally* SYRACUSE UNIVERSITY https://www.syracuse.edu/admissions/cost-and-aid/cost-of-attendance/undergraduate/. When you add the value of coaching, training, travel, free equipment (shoes and other gear), the amount is easily over $150,000 a year.

269. *Alston*, 141 S. Ct. at 2158.

270. *Nw. Univ.*, 2014 N.L.R.B. LEXIS 221 at 19.

271. *Id.* (citing Seattle Opera v. NLRB, 292 F.3d 757, 764 n.8 (D.C. Cir. 2002)).

272. *Id.* at 19 (citing *Brown Univ.*, 342 N.L.R.B. at 488–89 (2004)).

273. *Id.*

universities never offer a scholarship to a prospective student unless they intend to play football.[274] In fact, the players can have their scholarships immediately canceled if they voluntarily withdraw from the football team.[275] In contrast to scholarships athletes, need-based financial aid that walk-ons are free to quit the team at any time without losing their financial aid.[276]

Importantly, since payment of wages or compensation is a requirement of employment because walk-on players do not receive any compensation for the athletic services they perform, they cannot be considered employees of the college or university. While this distinction is not important for our discussion on scholarship athletes, it would be if the players at one of the seventeen private colleges or universities tried to unionize. Since walk-ons are not employees, they would not be eligible for representation or voting.[277]

D. Whether the Task Performed by the Proposed Employee Was "An Integral Part" of the Proposed Employer's Business

Having met the first three prongs of the *economic reality* test, the paper now considers whether college football is an integral part of a college or university. In previous cases the courts have held that the term "integral" suggests that the task performed by the employee is essential for the employer to conduct his business. Apply this definition to colleges and universities, the courts have held "that the primary function of the defendant university was to provide academic education rather than conduct a football program."[278] Therefore, the courts reason that an integral part of the university was not football, but education and research.[279]

Since the court's decision in *Coleman v. Western Michigan University* in 1983, however, there have been some significant changes in college sports. Today college athletics is a multi-billion-dollar industry, in which the only people not getting paid are the ones playing the games. As the Supreme Court in *Alston v. NCAA* noted "the president

274. *Id.* at 20.
275. *Id.* at 19.
276. *Id.*
277. *Id.*
278. Coleman v. W. Mich. Univ., 336 N.W.2d 224, 226 (Mich. Ct. App. 1983).
279. *Id.* at 227.

of the NCAA earns nearly $4 million per year, while Commissioners of the top conferences take home between $2 to $5 million, and college athletic directors average more than $1 million annually. The annual salaries for top Division I college football coaches' approach $11 million, with some of their assistants making more than $2.5 million."[280]

As for the impact football has on a school like Northwestern, the Board Power-Five schools "football team generates hundreds of millions of dollars in revenue from their football team. Northwestern generated total revenues of $265 million and incurred total expenses of $180 million between 2003 and 2013.[281] Fast forward eight years, and for the academic year 2020 – 21, the Northwestern athletic department generated over $112 million in revenue, while reporting $112 million in expenses.[282] Northwestern, however, is not one of the top revenue generating programs. In 202021, the University of Texas generated more than $200 million in total revenue through ticket sales, donations, merchandising and television contracts.[283] Football is the engine that drives college athletics. The revenue generated by the school's football program is used to subsidize the entire athletic department's non-revenue generating sports.[284] The revenue football generate is also an important to ensure that schools come into compliance with Title IX of the Education Amendments of 1972.[285]

VIII. CONCLUSION

In today's world of college athletics, as the courts in Alston and Johnson have noted scholarship football and basketball players at major Division I perform valuable services for the benefit of their colleges and universities by generating millions of dollars in revenue and

280. NCAA v. Alston, 141 S. Ct. 2141, 2150–51 (2021).

281. *Nw. Univ.*, 2014 N.L.R.B. LEXIS 221 at 13.

282. COLLEGE FACTUAL, https://www.collegefactual.com/colleges/northwestern-university/student-life/sports/ (College Factual Northwestern University) (last visited Mar. 15, 2023).

283. Brian Davis, *Texas Revenue Dropped $48.1 Million During Pandemic-impacted 2020-21 Athletic Year*, USA TODAY (last visited Nov. 13, 2022) https://www.legalbluebook.com/bluebook/v21/rules/18-the-internet-electronic-media-and-other-nonprint-resources/18-1-basic-citation-forms.

284. *Nw. Univ.*, 2014 N.L.R.B. LEXIS 221 at 13.

285. *Id.*

providing an immeasurable positive image of the college or university. Athletic success can increase both alumni giving and the number of applicants seeking to enroll in the university. In addition, as the courts have noted, because of the amount of time athletes spend in connection with their sports, athletics actually interferes with their promised education.

Therefore, when future courts consider whether scholarship athletes are employees of their schools, it is important that they consider the true economic benefits that the schools receive. When all of the benefits colleges receive are compared to those received by the athletes, it is reasonable to determine that college athletes are employees of their schools.