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College Athlete Unionization

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COLLEGE ATHLETE UNIONIZATION

by: Roberto L. Corrada*

ABSTRACT

The U.S. Supreme Court's landmark 2021 decision in NCAA v. Alston has opened the door to serious consideration of the potential for college athlete unionization and collective bargaining. The ruling, highlighted by Justice Kavanaugh's concurring opinion, suggests collective bargaining as a potential solution to the National Collegiate Athletic Association's ("NCAA's") antitrust vulnerabilities. This Article delves into the initial legal and strategic questions surrounding the prospect of unionization, focusing particularly on NCAA Division I football and basketball, due to their significant revenue generation making them prime candidates for unionization efforts.

The National Labor Relations Board ("NLRB" or "Board") is positioned to play a central role in the unionization attempts at private universities and potentially influence public university efforts. A recent NLRB complaint against the University of Southern California ("USC") accusing the institution of misclassifying student athletes as non-employees will answer some important labor law questions that will likely guide future unionization efforts. Moreover, the Service Employees International Union's ("SEIU's") successful union election bid involving the Dartmouth College men's basketball team represents a significant step forward, marking the potential beginning of college athlete unionization.

This Article provides a comprehensive examination of the issue, starting with the NLRB's involvement and its pivotal decision regarding the Northwestern University case. It proceeds to dissect the Supreme Court's Alston decision's implications for unionization and collective bargaining. It further explores the complex labor and employment law intricacies, such as the definitions of employee and employer, appropriate bargaining units, and the NLRB's jurisdiction over public universities. Finally, it theorizes on how unionization may unfold, outlining possible challenges, pitfalls, and the expected advantages for college athletes through collective bargaining.

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I. INTRODUCTION

The U.S. Supreme Court's 2021 decision in *National Collegiate Athletic Ass'n v. Alston* triggered a realistic discussion about the possibility of college athlete unionization and collective bargaining.¹ This possibility was fueled by Justice Kavanaugh's candid remarks in his concurrence about collective bargaining being one obvious answer to looming NCAA antitrust liability in the wake of the Court's decision.² According to Kavanaugh, as to the hard questions created by the NCAA's compensation rules:

[C]olleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, *akin to how professional football and basketball players have negotiated for a share of league revenues*.³

This Article takes an in-depth look at some of the initial questions, both legal and strategic, that the parties will face should there be a

1. Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021) (Kavanaugh, J., concurring).

2. *Id.* at 111.

3. *Id.* (emphasis added); see Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future*, 95 CHI.-KENT L. REV. 187, 210–11, 214–15 (2020) (discussing protections against antitrust liability and the ability to control wages embodied in professional football and basketball collective agreements).

college football or basketball player unionization attempt. The Article focuses primarily on NCAA Division I college football and basketball because, as these are the most lucrative college sports, they are the most likely places for unionization efforts to start. The NLRB would have jurisdiction over any attempt to unionize college teams at private universities, and it may well also indirectly influence any public university efforts.⁴ At the time of this writing, the NLRB had issued a complaint against USC based on a charge filed the preceding year alleging that USC had violated the National Labor Relations Act (“NLRA” or “Act”) by misclassifying student athletes as athletes and not employees.⁵ In August 2023, the SEIU filed an election petition against Dartmouth College seeking to represent the Dartmouth men’s basketball team.⁶ The NLRB Regional Director Laura Sacks issued her decision directing a union election on February 5, 2024, and one month later, on March 5, 2024, the Dartmouth men’s basketball team voted in favor of union representation.⁷

4. See *Jurisdictional Standards*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/jurisdictional-standards> [<https://perma.cc/5NGG-6LZ9>].

5. See Complaint and Notice of Hearing at 5, Univ. of S. Cal., No. 31-CA-290326 (NLRB May 18, 2023). Hearings before an Administrative Law Judge of the NLRB began on November 7, 2023, and may continue well into 2024. *Id.* at 7; see Steve Berkowitz, *NCAA, Pac-12, USC Cite First Amendment in Forceful Pushback Against Labor Complaint About Athletes*, USA TODAY (June 1, 2023, 11:14 PM), <https://www.usatoday.com/story/sports/college/2023/06/01/ncaa-pac-12-usc-push-back-against-nlr-employee-complaint/70280017007/> [<https://perma.cc/VG6P-UCWG>]; Michael McCann & Daniel Libit, *USC Athletes Designated as Employees in NLRB Complaint*, SPORTICO (May 18, 2023, 6:50 PM), <https://www.sportico.com/law/news/2023/usc-athletes-employees-nlr-complaint-1234723522/#!> [<https://perma.cc/76U5-M2JM>]; Marc Edelman, *Labor Board to Pursue Unfair Practices Charges Against USC, PAC-12, and NCAA*, FORBES (Dec. 16, 2022, 9:43 AM), <https://www.forbes.com/sites/marcedelman/2022/12/16/bidens-nlr-tackling-college-athletes-rights-one-step-at-a-time/?sh=2fa3727334ea> [<https://perma.cc/THM3-PMT8>]; Eric Olson, *College Athlete Group Files Complaint, Seeks Employee Status*, DENVER POST (Feb. 8, 2022, 5:51 PM), <https://www.denverpost.com/2022/02/08/college-athlete-group-files-complaint-seeks-employee-status/> [<https://perma.cc/ZA5X-JTEV>]. Interestingly, the National Collegiate Players Association, the entity that filed the charge on behalf of the USC players, simultaneously filed a similar one against the University of California, Los Angeles (“UCLA”), but decided to let that charge drop to concentrate on USC. Letter Approving Withdrawal Request, Univ. of Cal. L.A., No. 31-CA-290328 (NLRB Dec. 15, 2022). Since UCLA is a public entity, that case would trigger a much more complicated analysis involving the NLRB’s jurisdiction.

6. See RC Petition, Trs. Dartmouth Coll., No. 01-RC-325633 (NLRB Sept. 13, 2023); see also Braden Campbell, *College Hoops Union Bid Puts Athletes’ Rights Issue to NLRB*, LAW360 (Sept. 18, 2023, 8:46 PM), <https://www.law360.com/employment-authority/articles/1722816/college-hoops-union-bid-puts-athletes-rights-issue-to-nlr> [<https://perma.cc/9EFZ-88AB>]; Braden Campbell, *Dartmouth Emphasizes Academics in Hoops Union Hearing*, LAW360 (Oct. 5, 2023, 8:29 PM), <https://www.law360.com/employment-authority/articles/1729784/dartmouth-emphasizes-academics-in-hoops-union-hearing> [<https://perma.cc/9EAC-LTYM>]; Braden Campbell, *Dartmouth Hoops Players Are Paid in Swag, Union Says*, LAW360 (Oct. 10, 2023, 7:43 PM), <https://www.law360.com/articles/1731149> [<https://perma.cc/GMB8-GESH>].

7. See Decision and Direction of Election, Trs. Dartmouth Coll., No. 01-RC-325633 (NLRB Feb. 5, 2024). A motion to stay the election while Dartmouth sought review of

This Article will analyze college athlete unionization through the lens of the most likely initial concerted efforts at unionization. In Part I, this Article discusses the NLRB and its single existing decision on college football player unionization, the *Northwestern University* case. Part II briefly discusses and analyzes the implications of the U.S. Supreme Court's decision in *Alston* for unionization and collective bargaining. Part III discusses and analyzes all the technical labor and employment law issues involved in college athlete unionization, including the definition of employee and employer, the determination of an appropriate bargaining unit, and the issue relating to the NLRB's jurisdiction over public universities and colleges. Finally, Part IV will discuss and analyze how unionization is likely to happen, possible pitfalls, and the benefits of unionization and collective bargaining for college athletes.

II. THE NATIONAL LABOR RELATIONS BOARD AND ITS JURISDICTION OVER COLLEGE ATHLETES

The NLRB, an interesting governmental agency with an extensive history, was created in 1935 when Congress passed the Wagner Act.⁸ The Wagner Act was viewed as very progressive, encouraging unionization and collective bargaining, even though some have argued the law was passed to rein in the unbridled power of unions at the time.⁹ Many employers viewed the initial law as extremely employee/worker friendly and, in 1947, were finally able to get Congress to amend the law more in their favor through passage of the Taft–Hartley Act.¹⁰ Congress added some other amendments in 1959 and 1972.¹¹ Collectively, this law is known as the NLRA. The NLRB has jurisdiction over private

the Regional Director's decision was denied on March 5, an election was held on March 5, and, after the union won the election, Dartmouth the same day appealed the Regional Director's decision to the NLRB. *See* Motion to Stay an Election, Trs. Dartmouth Coll., No. 01-RC-325633 (NLRB Feb. 29, 2024); Trs. Dartmouth Coll., 373 N.L.R.B. 34, 2024 WL 982132 (Mar. 5, 2024); Request for Review of the Regional Director's Decision and Direction of Election, Trs. Dartmouth Coll., No. 01-RC-325633 (NLRB Mar. 5, 2024). Andrea Hsu, *Dartmouth Men's Basketball Team Votes to Unionize, Shaking Up College Sports*, NAT'L PUB. RADIO, <https://www.npr.org/2024/03/05/1235877656/ncaa-dartmouth-mens-basketball-union-election-nlr> [<https://perma.cc/HH9R-YRQD>].

8. National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–169).

9. *See generally* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 266 (1978); *see also* Catherine L. Fisk & Diana S. Reddy, *Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements*, 70 EMORY L.J. 63, 63 (2020) (“Law helped institutionalize unions—to give them autonomy, power, and legitimacy. At the same time, it subjected them to an increasingly restrictive regulatory scheme that made it harder for them to act—or to be seen—as a social movement.”).

10. Labor-Management Relations (Taft–Hartley) Act, Pub. L. No. 104-320, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 141).

11. ABA SECTION OF LAB. & EMP. L., *THE DEVELOPING LABOR LAW* 60–62 (John E. Higgins, Jr. et al. eds., 5th ed. 2006); *see* 9 EMP. COORD. LAB. RELS. § 1:34 (West 2023).

employers in the United States who meet a minimum threshold of commercial activity.¹² Most private colleges and universities qualify.¹³ The Board has regrettably been the ardent focus of political attention since its inception.¹⁴ The Board is led by five members, a mix of Republicans and Democrats, appointed to staggered terms.¹⁵ When a Republican President is elected, a Republican Chair of the Board is appointed, along with two more Republicans and two Democrats.¹⁶ When the President is Republican, the two Democrat appointees are usually on the conservative side.¹⁷ When a Democrat President is elected, the President appoints a Chair of the Board from the Democratic party and two moderate Republican board members along with two other Democrats.¹⁸ Since the early 1970s, the Board has spent some substantial amount of time reversing the precedents of the prior administration if that administration was of the opposite political persuasion.¹⁹

This is one of the problems in predicting what will happen with collective bargaining and unionization in college sports. Two very important legal doctrines, central to this question, are subject to this political back and forth: (1) who qualifies as a “joint employer” and (2) what test is used to determine who’s in the proper unit for collective bargaining. In December 2022, for example, the Board issued its decision in the *American Steel Construction* case,²⁰ overturning two precedents of the Trump Board and returning to the standard established by the Obama Board.²¹ In the decision, the Board reaffirmed the principle that

12. *Jurisdictional Standards*, *supra* note 4 (“[T]he Board’s jurisdiction is very broad and covers the great majority of non-government employers with a workplace in the United States . . .”).

13. *Id.* (“Cultural and educational centers: For private and non-profit colleges, universities, and other schools . . . the annual minimum [in gross annual volume] is \$1 million.”).

14. See JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994*, at 15 (Paula Rayman & Carmen Sirianna eds., 1995) (“Even before the Taft-Hartley Act went into effect on August 22, 1947, supporters and opponents . . . began maneuvering to influence the NLRB.”).

15. *Who We Are*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/who-we-are> [<https://perma.cc/3CD2-9CXV>] (“The Board has five Members . . . Members are appointed by the President to 5-year terms, with Senate consent, the term of one Member expiring each year.”).

16. See *Members of the NLRB Since 1935*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/who-we-are/the-board/members-of-the-nlr-since-1935> [<https://perma.cc/CJ4J-VMA4>].

17. See *id.*

18. See *id.*

19. See generally Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

20. See generally *Am. Steel Constr., Inc.*, 372 N.L.R.B. No. 23, 2022 WL 17974956 (Dec. 14, 2022).

21. *Id.* at 13 (“In light of *PCC-Boeing’s* extensive faults—its cumbersome and confusing approach to the ‘sufficiently distinct’ element, its detrimental effects on the rights of the petitioning employees, and its hollow statutory reasoning—we have decided to overrule *PCC Structurals* and *Boeing* and reinstate the *Specialty Healthcare* test. . . . Having reinstated *Specialty Healthcare*, we apply it retroactively to all pending cases.”).

employees in the petitioned-for unit (typically the group favored by the union) must be “readily identifiable as a group” and share a “community of interest.”²² However, where a party (typically an employer seeking a larger unit to make unionizing more difficult) argues that a proposed unit meeting these criteria must include additional employees, the Board reaffirmed that the burden is on that party to show that the excluded employees share an “overwhelming community of interest” to mandate their inclusion in the bargaining unit.²³

Meanwhile, in September 2022, the Board issued a notice that it was reconsidering the legal test for who qualifies as a “joint employer.”²⁴ The Trump Board had passed a test that would find only an employer with “direct and immediate control” over workers to be a joint employer.²⁵ The Biden Board, looking to overturn that precedent, expressly asked for comments on a proposed rule that would consider both direct evidence of control as well as evidence of reserved or indirect control

22. *Id.*

23. *Id.* at 6.

24. Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641 (Sept. 7, 2022) (to be codified at 29 C.F.R. pt. 103).

25. See KENNETH G. DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 356–73 (4th ed. 2024). In 2015, the Obama Board established a new joint-employer test which built on common law agency principles but expanded the test to include employers who have indirect and/or reserved control of workers. See *Browning-Ferris Indus. of Cal., Inc. (BFI II)*, 362 N.L.R.B. 1599, 1600 (2015). The Trump Board reversed the Obama Board’s standard and reestablished by rule the older joint employer test. See *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11184 (Feb. 26, 2020) (to be codified at 29 C.F.R. pt. 103). However, earlier in 2018, the D.C. Circuit upheld the Obama Board’s ruling “failed to differentiate between the aspects of indirect control relevant to status as employer, and those quotidian aspects of common-law third-party contract relationships.” See *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1220 (D.C. Cir. 2018). But the court also held that the Obama Board’s analysis in *BFI II* had failed to differentiate between the aspects of indirect control relevant to status as employer and the “quotidian aspects” of common-law third-party contract relationships. *Id.* The case was remanded to the Board for further consideration. *Id.* at 1222. In 2020, on remand, the Trump Board now held that it would be manifestly unjust to retroactively apply the Obama Board’s test in *BFI II* to the parties, including *Browning-Ferris* itself. *Browning-Ferris Indus. of Cal., Inc.*, 369 N.L.R.B. No. 139, slip op. at 1 (2020). Instead, the Trump Board issued an order in which it announced a revised joint-employer test, held that *Browning-Ferris* is not a joint employer of *Leadpoint*’s employees, and dismissed the General Counsel’s ULP complaint. *Id.* at 4. But in July 2022, the D.C. Circuit concluded that the Trump Board’s retroactivity analysis had been “erroneous,” because it failed to establish that *BFI I* “represented the kind of clear departure from longstanding and settled law that the agency said justified its retroactivity conclusion.” *Sanitary Truck Drivers & Helpers Loc. 350 v. NLRB*, 45 F.4th 38, 44 (D.C. Cir. 2022). Again, the case was remanded to the Board for further consideration, leading to the Notice of Proposed Rulemaking issued by the Board on Sept. 7, 2022 seeking to return Board law to the Obama standard first articulated in 2015. *Id.* at 48; Standard for Determining Joint-Employer Status, 87 Fed. Reg. at 54641. The NLRB issued its final Joint Employer Rule overturning the Trump Board rule and mostly reinstating the Obama Board rule. See *Standard for Determining Joint Employer Status*, 88 Fed. Reg. 73946 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103). The new rule has an effective date of December 26, 2023. *Id.*

in considering who would be a joint employer.²⁶ The Biden Board promulgated its new joint employer rule on October 27, 2023, mostly reinstating the earlier Obama Board rule, expanding the definition of joint employer to include those employers exercising indirect or reserved control over workers.²⁷

How is all of this relevant to questions regarding unionization and collective bargaining by football players? Well, for example, first, with regard to the appropriate bargaining unit, if a union seeks to organize, say, the USC football team, USC or the NCAA might argue that the team is not an appropriate unit, but that all football players in the Pac-12 or the Big 10 are the proper community of interest for collective bargaining purposes (and make arguments related to the commonality of players' conditions, the schedule, and maybe TV rights). The typical *real* reason they'll argue for the broader unit is they know it will be harder to organize all the players in a conference to vote for a union, as opposed to merely trying to unionize a single team.

Next, regarding the joint-employer test, a substantial issue surrounds who exactly controls the terms and conditions of a college football player's work. Is it the university or college? The NCAA? The athletic conference to which the university belongs? Or is it all three or only two of those? The Board's joint-employer test will, of course, be highly relevant here. For example, the athletic conference, the entity that negotiates TV rights to conference football games, may only assert what might be "indirect" or "reserved" control.²⁸ Reserved control is a reserved right to control, which is not typically exercised. Under a broad joint-employer standard, like the one recently promulgated by the Biden Board, all three would be joint employers, including the conference. If football players were to unionize, all three would be at the table in collective bargaining and would be parties to any collective bargaining agreement. Finally, there is a question about how the NLRB can exercise jurisdiction over public universities, given that its jurisdiction is over the private, not the public, sector.

26. See Standard for Determining Joint-Employer Status, 87 Fed. Reg. at 54663.

27. The NLRB issued its final Joint Employer Rule overturning the Trump Board rule and mostly reinstated the Obama Board rule. See Standard for Determining Joint Employer Status, 88 Fed. Reg. at 73946. The new rule has an effective date of December 26, 2023. *Id.* The new rule, however, did provide more extensive guidance to employers and specifically delineated a list of critical essential terms and conditions of employment that an employer must control to be deemed a joint employer. *Id.*; see Press Release, NLRB Off. Pub. Affs., Board Issues Final Rule on Joint Employer Status (Oct. 26, 2023), www.nlr.gov/news-outreach/news-story/board-issues-final-rule-on-joint-employer-status [<https://perma.cc/D3X6-G2ZY>]; NAT'L LAB. RELS. BD., NLRB FACT SHEET JOINT-EMPLOYER STANDARD FINAL RULE 2 (2023), www.nlr.gov/sites/default/files/attachments/pages/node-9558/joint-employer-fact-sheet-2023.pdf [<https://perma.cc/KBA5-TKFB>] ("[The new joint employer rule] also makes clear that an employer must control (or have authority to control) one or more of a specific and limited list of essential terms and conditions of employment to give rise to a joint employment relationship.").

28. See *BFI II*, 362 N.L.R.B. at 1600.

Analyzing these issues requires a focus on the NLRB, the extent of its jurisdiction, and its view of labor law. To fully understand what will happen with any future college athlete unionization effort, it's important to fully understand how the Board has handled the issue in the past. In the *Northwestern University* case, the Board was faced with a union election petition filed by a college football team.²⁹ The following is an analysis of that case.

A. *The Northwestern University Football Team Case*

1. The NLRB Regional Director Upholds the Election Petition

When the labor board Regional Director's decision in the Northwestern University football team unionization case was announced in 2015, facts found by the Regional Director revealed the extent of the money and financial resources the football team provided and the extraordinary level of control the university exercised over these athletes.³⁰ There were three separate revenue streams for Northwestern related to the football team: (1) football ticket sales, (2) TV broadcast contracts, and (3) football team merchandise sales.³¹ From 2003 to 2012, the Northwestern football team generated \$235 million in total revenue.³² With expenses totaling around \$159 million, the team generated a profit of \$76 million for the University over ten years.³³ In the 2012–2013 academic year alone, the University earned profits of approximately \$8 million from the football team.³⁴ These numbers and details relating to how the team was organized clearly showed that it was a substantial commercial enterprise. The University maintained a sizable athletic and administrative support staff.³⁵ In addition, at the time of the Regional Director's 2014 decision,

29. Nw. Univ. (*NLRB Decision*), 362 N.L.R.B. 1350 (2015); Nw. Univ. (*RD Decision*), 198 L.R.R.M. 1837, 2014–15 NLRB Dec. ¶ 15781, 2014 WL 1246914 (Mar. 26, 2014); see Roberto L. Corrada, *The Northwestern University Football Case: A Dissent*, 11 HARV. J. SPORTS & ENT. L. 15, 15–16 (2020). Although the Dartmouth basketball team case also involves a college athlete unionization effort, the NLRB has not yet weighed in. So far, there is only a Regional Director decision and, of course, an election in which the union was victorious. See *supra* note 7 and accompanying text.

30. See *RD Decision*, 2014 WL 1246914, at *2–5, *11.

31. See *id.* at *11.

32. *Id.*

33. See *id.*

34. *Id.*; see César F. Rosado Marzán & Alex Tillet-Saks, *Work, Study, Organize!: Why the Northwestern University Football Players Are Employees Under the National Labor Relations Act*, 32 HOFSTRA LAB. & EMP. L.J. 301, 318 (2015) (“[I]t is transparent from the facts determined by Region 13, prior studies, and from general knowledge of contemporary college football that commercial relationships have usurped traditional roles in universities, principally in college football, even as college athletes attempt to obtain an education from their university.”).

35. These include Head Coach, Director of Football Operations, Director of Player Personnel, Director of Player Development, nine full-time assistant coaches, four graduate assistant coaches, five full-time strength coaches, two full-time video staff employees, two administrative assistants, and various interns. See generally *2015 Football Coaching*

the football team itself, a Football Bowl Subdivision squad, was 112 players strong, 85 of whom were “grant-in-aid” scholarship recipients.³⁶ Annual “grant-in-aid” scholarships at the time paid \$61,000 per player to cover tuition, fees, room, board, and books.³⁷

Northwestern University exercised strict control over its football players. Northwestern football players were subject to special rules not imposed on other students, and their daily schedules were micromanaged, depriving them of the freedom enjoyed by most other college students.³⁸ The players were required to dedicate quite a bit of time to football.³⁹ Before the season started, the players had to spend substantial time in training and training camp.⁴⁰ During the regular season, players spent 40 to 50 hours per week on football-related activities, including travel to and from games.⁴¹ During the week, the players not only spent mornings in mandatory practices with helmets and pads on but also attended various team and position meetings.⁴² Since NCAA rules limit “countable athletically related activities” per week to 20 hours,⁴³ the players independently (and presumably “voluntarily”) engaged in non-countable evening practices without their coaches.⁴⁴ After these sessions, players went to their coaches’ offices to watch film on their own (again, presumably “voluntarily”) for a couple of hours.⁴⁵ Northwestern also had substantial control over many other aspects of its players’ lives, including their food, living arrangements, drug and alcohol use, and social media presence.⁴⁶

Staff, NW. UNIV. SPORTS: FOOTBALL, <https://nusports.com/sports/football/coaches/2015> [<https://perma.cc/4RHD-LC58>] (listing the current football coaching staff).

36. See *RD Decision*, 2014 WL 1246914, at *2.

37. *Id.* Some argue this is “payment” and by itself should make players eligible to organize unions and collectively bargain. See Dave Zirin, *The Absurd, Cowardly, and Morally Bankrupt NLRB Decision Against the Northwestern Football Union*, THE NATION (Aug. 17, 2015), <https://www.thenation.com/article/archive/the-absurd-cowardly-and-morally-bankrupt-nlrb-decision-against-the-northwestern-football-union/> [<https://perma.cc/5RE4-68VK>].

38. See *RD Decision*, 2014 WL 1246914, at *3–8.

39. *Id.* at *4–6.

40. During the first week of August—before classes begin—football players must participate in an intense month-long training camp. *Id.* at *4. From 6:30 A.M. to 8:00 P.M., Northwestern expects football players to engage in various football team activities. *Id.* After this first week on campus, the team travels to Kenosha, Wisconsin, for the rest of training camp, during which time the school expects players to spend 50 to 60 hours per week on football activities. *Id.* After training camp, the school starts its regular season football schedule, which runs from the beginning of September to the end of November. *Id.* at *5.

41. *Id.* at *5.

42. *Id.*

43. *Id.* at *5 n.11.

44. *Id.* at *5.

45. *Id.*

46. *Id.* at *14.

2. The NLRB Refuses to Assert Jurisdiction

On appeal, all five members of the NLRB reversed the Regional Director's direction of election, refusing to assert jurisdiction over the college football players at Northwestern.⁴⁷ The result was surprising for several reasons. First, it was surprising that the Board's decision was unanimous, given that three board members were Democratic appointees.⁴⁸ Second, the Board's refusal to exercise jurisdiction was surprising when it was clear that the Northwestern football team substantially affected interstate commerce.⁴⁹ Substantial effect on commerce is the touchstone of labor board jurisdiction, and indeed, there is a strong question of how the Board can even decline jurisdiction when it makes such a finding.⁵⁰

Third, the Board seemed hesitant to assert jurisdiction for the strange reason that it had never been faced with such a petition before, explaining that college football players were neither like professional football players nor like graduate students.⁵¹ The fact that some workers are not like other workers has never been an argument against asserting jurisdiction over them. Notably, the reason the Board asserted that college football players were not like the pros was that they were restricted with respect to name, image and likeness deals, which are forbidden by NCAA rules.⁵² That's certainly no longer the case.⁵³ Finally, without explaining exactly why, the Board claimed that finding a single football team to be a bargaining unit would destabilize labor relations, given that the team was in a league with other teams.⁵⁴

The NLRB typically has not shied away from exercising jurisdiction over educational institutions when they are found to be in interstate commerce. In 1970, the NLRB confronted another similar "unique" set of petitions when it asserted jurisdiction over a pair of nonprofit educational institutions for the first time in *Cornell University*.⁵⁵ In *Cornell University*—which involved not only Cornell but also Syracuse

47. *NLRB Decision*, 362 N.L.R.B. 1350, 1352 (2015).

48. Corrada, *supra* note 29, at 21 n.32.

49. *NLRB Decision*, 362 N.L.R.B. at 1355 n.28.

50. See Corrada, *supra* note 29, at 29–32 (arguing that neither the text, legislative history, nor the case law relevant to § 14(c)(1) of the NLRA support the Board's contention that it had independent jurisdictional discretion in individual cases beyond analyzing an employer's impact on commerce, and that as such, the NLRB is compelled to assert jurisdiction in cases where, as here, it finds a substantial effect on interstate commerce).

51. *NLRB Decision*, 362 N.L.R.B. at 1352–54.

52. *Id.* at 1353.

53. See *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 82–83, 107–08 (2021) (Kavanaugh, J., concurring); Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NAT'L COLLEGIATE ATHLETIC ASS'N (June 30, 2021, 4:20 PM), www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/K2C7-9RQE].

54. *NLRB Decision*, 362 N.L.R.B. at 1354.

55. *Cornell Univ.*, 183 N.L.R.B. 329, 334 (1970).

University—the Board found that despite their nonprofit status, the universities substantially affected interstate commerce as commercial enterprises.⁵⁶ The Board recognized that to ensure uniformity and stability in labor policy, it should assert jurisdiction over these institutions even though “a portion of the industry is relegated to the State or other control.”⁵⁷ Indeed, the Board’s sole concern about first exercising jurisdiction over private universities was whether the universities affected commerce.⁵⁸ These private universities, like Northwestern, both belonged to national associations (e.g., the NCAA or athletic conferences) and were required to follow rules imposed by accrediting bodies and state and federal governments, but that did not deserve even a mention in *Cornell University*.

3. The NLRB Punted

Many have argued that *Northwestern University* should serve as a precedent for denying college athlete union petitions.⁵⁹ However, close scrutiny shows that the NLRB really decided nothing, leaving all critical decisions for a later time. Much of what was written in the decision was taken back or severely limited in the footnotes. For example, the Board made none of the findings it is required to make while at the same time contradictorily suggesting all of the requisites for a valid union election were likely present.⁶⁰ The Board admitted that Northwestern and the football team substantially affected commerce,⁶¹ the primary criterion for jurisdiction.⁶² In fact, the Board has been called out in the past for not asserting jurisdiction in cases where the commerce criterion is met.⁶³ The Board further acknowledged that Northwestern was an employer.⁶⁴ The Board found that the Northwestern football team constituted an

56. *Id.* at 333.

57. *Id.*

58. *Id.* at 331 (“We adhere to the view that the Board has statutory jurisdiction over nonprofit educational institutions whose operations affect commerce.”).

59. The Dartmouth basketball team filed a union election petition with the NLRB on Sept. 13, 2023. See RC Petition, Trs. Dartmouth Coll., No. 01-RC-325633 (NLRB, Sept. 13, 2023). For example, in a hearing before the NLRB on the election petition on October 5, 2023, the attorney for Dartmouth argued that the basketball team players are not employees, and that “even if they are, the Northwestern decision blocks the regional office from processing the petition.” See *Dartmouth Emphasizes Academics in Hoops Union Hearing*, *supra* note 6.

60. See *NLRB Decision.*, 362 N.L.R.B. at 1355 n.28; see also Corrada, *supra* note 29, at 17.

61. *NLRB Decision.*, 362 N.L.R.B. at 1351 n.5 (“There is no dispute that Northwestern . . . is engaged in commerce within the meaning of the Act.”).

62. See *Jurisdictional Standards*, *supra* note 4 (“The Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level.”).

63. See Corrada, *supra* note 29, at 21.

64. NLRB Decision, 362 N.L.R.B. at 1351 n.5 (“There is no dispute that Northwestern is an employer within the meaning of Sec. 2(2) of the Act . . .”).

appropriate bargaining unit,⁶⁵ notwithstanding its suggestion that such a unit, being part of a larger league, may cause problems.⁶⁶ The Board refused to say one way or the other whether the football players were employees, despite the fact that the Regional Director had found they were, stating that it would decline jurisdiction regardless.⁶⁷ All of the requisites were in place for the Board to decide the validity of the union's election petition, but the Board punted instead.⁶⁸

III. THE U.S. SUPREME COURT'S *ALSTON* DECISION AND THE NCAA RESPONSE: IMPLICATIONS FOR UNIONIZATION

United States Supreme Court Justice Brett Kavanaugh and progressive scholars agree on very little, but apparently, they all see possible unionization of college athletes and subsequent collective bargaining the same way. Justice Kavanaugh, in the 2021 *Alston* case, cited collective bargaining or possibly some negotiated agreement as possible solutions to the myriad of liabilities that would be raised were college athletes found to be employees.⁶⁹ At the time of this writing, it is unclear what a negotiated agreement would look like between the NCAA and the class of college athletes certified in *Alston*. Attorneys following the case have talked about some sort of settlement agreement that would be administered and enforced by a federal judge. That agreement will likely, at a minimum, include some form of wage payment for athletes and a mechanism to handle athlete Name, Image and Likeness (“NIL”) rights.

The NCAA and others have looked to Congress to fix things.⁷⁰ Since *Alston*, there have been as many as seven separate bills in Congress

65. See generally *id.*

66. *Id.* at 1354 (“[T]he nature of league sports and the NCAA’s oversight renders individual team bargaining problematic . . .”).

67. *Id.* at 1355 (“For these reasons, we conclude, without deciding whether the scholarship players are employees under Section 2(3), that it would not effectuate the policies of the Act to assert jurisdiction in this case.”).

68. See generally Corrada, *supra* note 29.

69. Nat’l Collegiate Athletic Ass’n v. *Alston*, 594 U.S. 69, 111 (2021) (Kavanaugh, J., concurring).

70. See Kelly Lienhard, *Sens. Say Student-Athletes Should Not Be Deemed Employees*, LAW360 (Oct. 17, 2023, 8:43 PM), <https://www.law360.com/articles/1732612/sens-say-student-athletes-should-not-be-deemed-employees> [https://perma.cc/P7SG-7VA8] (“The full Senate Judiciary Committee met to discuss federal regulation and enforcement for how student-athletes can profit off their name, image and likeness, and how to better protect the students after calls from the NCAA for government intervention.”); Steve Berkowitz, *NIL Hearing Shows Desire to Pass Bill to Help NCAA. How It Gets There Is Uncertain*, USA TODAY (Oct. 17, 2023, 5:21 PM), <https://www.usatoday.com/story/sports/college/2023/10/17/nil-hearing-congress-pass-ncaa-bill/71219709007/> [https://perma.cc/4AM4-LMFV]; Nicole Auerbach, *The NCAA’s Hopes to Control NIL Laws Hinge on Congress. Will It Get What It Wants?*, THE ATHLETIC (June 2, 2023), <https://theathletic.com/4566889/2023/06/02/ncaa-nil-rules-laws-congress-bills/> [https://perma.cc/D6TN-Y2KG].

relating to college athletes.⁷¹ Most of these deal with NIL and many would give jurisdiction to the Federal Trade Commission.⁷² Only one past proposed bill would have amended the NLRA and contained specific provisions regarding college athlete collective bargaining.⁷³ Currently, only three bills have been proposed in the Senate.⁷⁴ The NCAA is asking for various rule changes that have been reflected in proposed legislation, including those that provide protections for athletes against injury, medical care even past college, and protection against athletes being cut from teams and losing scholarships.⁷⁵ Aside from the fact that Congress seems paralyzed and the proposed bills have been mostly partisan, legislative solutions have suffered from a lack of effective enforcement mechanisms and would not prevent the NCAA from coming back to Congress and asking for these provisions to be amended or withdrawn.⁷⁶ The NCAA decries treating student athletes like employees, citing the fact that their scholarships might be taxed and small college athletic budgets threatened.⁷⁷ Some have argued, however, that many students are employed on college campuses already, and there really is no argument for distinguishing college athletes from other employees.⁷⁸ Moreover, so long as all colleges are treated the same in this respect, the playing field is level.

Congressional hearings do not discuss unionization and collective bargaining much, most likely because those hearings were held mostly at the behest of the NCAA. The lack of discussion is unfortunate because unionization and collective bargaining could solve many of the questions that have arisen in the congressional hearings. As discussed and

71. Sydney Umeri, *How Each NIL Bill in Congress Will Affect Student-Athletes*, SBINATION (June 23, 2021, 6:09 PM), <https://www.sbnation.com/college-basketball/2021/6/23/22545287/college-athletes-name-image-likeness-bills-ncaa> [<https://perma.cc/3KQ9-BFH3>].

72. *See id.*

73. *See* College Athlete Right to Organize Act, S. 1929, 117th Cong. § 3(b) (2021).

74. *See* Lienhard, *supra* note 70 (discussing the PASS Act, CAPCA, and Sen. Ted Cruz's untitled legislation).

75. *See id.* (discussing Senator Richard Blumenthal's bill that contains specific provisions regarding these issues); *see also* Berkowitz, *supra* note 70 (explaining that NCAA President Baker expressed a willingness to work with Congress on these particular provisions).

76. *See* Berkowitz, *supra* note 70 ("This has long been point of emphasis for athlete advocates, who have argued that while it's positive for the NCAA's membership to make these enhancements, there's nothing to prevent the membership from diminishing them in the future."); Lienhard, *supra* note 70 ("Jill Bodensteiner, the vice president and director of athletics at Saint Joseph's University, pointed out that while over 30 states have enacted laws surrounding college athletes and their rights, those laws have barely been enforced.").

77. *See* Lienhard, *supra* note 70.

78. *See generally* Corrada, *supra* note 29, at 21; Lienhard, *supra* note 70 ("According to [Ramogi] Huma, [the executive director of the National College Players Association], schools already employ students in places like bookstores, and athletes' individual opinions about employee classification shouldn't negate an entire nation's history of workers rights. In fact, Huma said, it would be akin to second-class citizenship to carve out college athletes from employment rights.").

analyzed in this Article, collective bargaining can address issues related to student injury and healthcare and student rights to remain on a team, to retain scholarships, or to be paid. Moreover, it's not likely that the NCAA or Congress would just take away collectively bargained protections. Those are typically only modified in the bargaining process. Primarily, though, the reason to at least consider collective bargaining is that there already is a similar model in place. Professional sports leagues operate under collective bargaining agreements that would be analogous to college sports.⁷⁹ Take professional football: the NFL is similar to the NCAA, and the individual professional teams are similar to college and university teams. Except for education-related rights and provisions, professional athletes have the same concerns as college athletes: safety, healthcare, pay, length of season, practice requirements, trade (transfer) provisions, and the extent of team and individual branding and licensing (NIL) rights. Although the NLRB would be generally charged with enforcement, the parties, not a governmental agency, would decide the substantive contract provisions that govern their relationship.⁸⁰

IV. COLLEGE FOOTBALL UNIONIZATION AND COLLECTIVE BARGAINING

If college athletes were to unionize, a collectively bargained agreement between a union and the NCAA (possibly including conferences and universities as joint employers) could easily be imagined, especially given, as Justice Kavanaugh explicitly mentioned in his concurrence in *Alston*, that such agreements have existed for some time in professional sports.⁸¹

79. Ross Dellenger, *While Congress and NCAA Squabble, NIL Collectives Lead Push on Revenue Sharing*, YAHOO SPORTS (July 26, 2023), <https://sports.yahoo.com/while-congress-and-ncaa-squabble-nil-collectives-lead-push-on-revenue-sharing-130029751.html> [https://perma.cc/9GPJ-VK6T].

80. See DAU-SCHMIDT ET AL., *supra* note 25, at 704 (“Collective bargaining statutes reflect a policy determination that favors a privately ordered workplace over one controlled by direct government mandates specifying terms and conditions of employment. The collective bargaining process is the means by which an employer and its employees, acting through their exclusive bargaining representative, establish their private law of the workplace.”). Moreover, the NLRA provides a cause of action in federal court for breach of a collective bargaining contract. Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 104-320, 61 Stat. 136, 156 (1947) (codified at 29 U.S.C. § 141). The private agreement regime of collective bargaining agreements should assuage any concerns, mostly raised by conservatives, about government intervention. See, e.g., Lienhard, *supra* note 70 (“During Tuesday’s hearing, Cruz said he believed the NCAA should be the one to work with universities and conferences to set the rules, rather than a government-created agency. ‘Nobody wants to see Congress and politicians deciding what roughing the passer is,’ Cruz said. ‘Bad things will happen if the government takes over college sports.’”); Berkowitz, *supra* note 70 (“But John Kennedy, R-La., told [NCAA President Charlie] Baker and other representatives of schools on the witness panel: ‘You might regret asking Congress to intervene here. . . . I’d be real careful about inviting Congress to micro-manage your business. . . .’”).

81. See Nat’l Collegiate Athletic Ass’n v. *Alston*, 594 U.S. 69, 111 (2021) (Kavanaugh, J., concurring); see also Corrada, *supra* note 3, at 214–15 (discussing professional football and basketball collective agreements).

Despite the fact that football and basketball player unionization and a collective bargaining agreement is the answer to a host of NCAA concerns after *Alston*, the NCAA has steadfastly, repeatedly tried to get a legislative solution out of Congress.⁸² It's a little surprising that the NCAA has not, at least, entertained the notion of college football player unionization, even on an experimental or small-scale basis. Collective bargaining would come with a lot of benefits to the NCAA.

The probable primary benefit to the NCAA would be antitrust immunity. The non-statutory exemption from antitrust liability created for collectively bargained agreements allows parties to engage in combinations or restraints of trade explicitly prohibited by the Sherman Antitrust Act.⁸³ This is no small thing and is likely what prompted Justice Kavanaugh's statement about collective bargaining. Remember, too, any substantial damages would be tripled under the antitrust laws.⁸⁴ The NCAA would do well to avoid those.

Another benefit of unionization and collective bargaining to the NCAA relates to NIL issues. NIL issues have plagued the NCAA since Ed O'Bannon's victory over the NCAA in federal district court in 2014 for not paying him for the licensing of his likeness to a video game manufacturer.⁸⁵ Although the Ninth Circuit Court of Appeals vacated the part of the trial court opinion relating to NIL payments,⁸⁶ the trial court's decision fueled an onslaught of NIL laws passed by various states.⁸⁷ By the time of the *Alston* decision, the NCAA had not been able to formulate a plan to deal with NIL.⁸⁸ Consequently, when the NCAA realized the potential antitrust liability it faced regarding NIL restraints in light of *Alston*, it immediately announced a new policy allowing college athletes to enter into NIL deals.⁸⁹ Collective bargaining would allow the parties to establish rules to bring reason and transparency to NIL payments to college athletes.⁹⁰ Just as an example, in professional football,

82. See Manu Raju et al., *NCAA Leaders Warn College Sports at Risk of 'Permanent Damage' Without Action from Congress*, CNN (Dec. 3, 2023, 11:30 AM), <https://www.cnn.com/2023/12/03/politics/ncaa-college-sports-at-risk-nil/index.html> [<https://perma.cc/WB22-4TPB>].

83. See DAU-SCHMIDT ET AL., *supra* note 25, at 1266–67; *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236–37 (1996); see generally *Sherman Act—Antitrust Law—College Athletics—NCAA v. Alston*, 135 HARV. L. REV. 471, 477–78 (2021) (discussing *Alston*'s implications on antitrust exemption).

84. See 15 U.S.C. § 15(a).

85. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 965, 1009 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015) (upholding compensation remedy, but vacating trial court requirement of a NIL fund).

86. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1079 (9th Cir. 2015).

87. See Corrada, *supra* note 3, at 198–99 (discussing state NIL legislation).

88. Christopher Palmieri, *The Billion Dollar Industry that Has Never Paid Its Money Makers: The NCAA's Attempt at Compensation Through Names, Images and Likeness*, 37 *TOURO L. REV.* 1605, 1632 (2021) (“After having previously tabled its vote on the NIL policy, within a matter of days after the *Alston* decision came down, the NCAA adopted an interim NIL policy.”).

89. See Hosick, *supra* note 53.

90. See Corrada, *supra* note 3, at 214.

all players have to be paid a minimum amount negotiated in collective bargaining between players and the NFL.⁹¹ However, individual players may negotiate, within certain agreed-upon parameters, higher salaries with teams based on their skill level.⁹² That's why players like Kansas City Chiefs quarterback Patrick Mahomes makes \$45,000,000 per year, while rookies entering the NFL undrafted will make the required minimum of \$750,000 per year.⁹³ College NIL payments could be structured a similar way, with the top recruits allowed fairly lucrative NIL contracts (perhaps a combination of third-party and university or team money) while walk-ons, for example, might get a minimum base NIL amount (perhaps only a relatively small amount financed entirely by the college or university team).

Third, and very much less discussed by the media, as student athletes gain the ability to be paid for their athletic performance, invariably, there will be increased pressure to perform and to spend less time in class, especially for athletes in revenue-generating sports like football and basketball. Collective bargaining would allow a union to bargain to preserve educational benefits and guarantees for these students.⁹⁴ This is of particular importance to the vast number of players who will not make it into professional football.⁹⁵

Finally, collective bargaining agreements live in a structure that allows periodic amendments to take into account the changing needs of both students and colleges.⁹⁶ Especially as these new relationships begin to be fleshed out, collective bargaining holds the greatest promise

91. See NAT'L FOOTBALL LEAGUE PLAYERS ASS'N & NAT'L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT 172 (2020), nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf [https://perma.cc/PP55-XPA6] [hereinafter NFL COLLECTIVE BARGAINING AGREEMENT].

92. *Id.* at 174 ("A player will be entitled to receive a signing or reporting bonus, additional Salary payments, incentives, bonuses and such other provisions as may be negotiated between his Club (with the assistance of the Management Council) and the player or his agent in accordance with the terms of his Player Contract.").

93. See *id.*; see also Brett Yaris, *How Much Are NFL Undrafted Free Agent Contracts?*, PRO FOOTBALL NETWORK (Apr. 29, 2023, 2:00 PM), <https://www.profootballnetwork.com/how-much-are-nfl-undrafted-free-agent-contracts/> [https://perma.cc/Y85Y-FZNK] (explaining that most undrafted free agents sign for the minimum \$750,000 salary); Patrick Mahomes: Quarterback, OVER THE CAP, <https://overthecap.com/player/patrick-mahomes/5594> [https://perma.cc/3ADA-BHF4].

94. See Corrada, *supra* note 3, at 215 (discussing college athletes' interest in negotiating to preserve educational protections and objectives as changes in compensation cause students to be viewed as "employees" and, therefore, more like "professionals").

95. See College Advisory Committee, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/journey-to-the-nfl/nfl-development-pipeline/college-advisory-committee/> [https://perma.cc/2VJN-VTMD] ("Only 1.6% of all NCAA football players ever make it to the professional level.").

96. See generally 29 U.S.C. § 158(d) (outlining the circumstances for amending a collectively bargained agreement); see also Kenneth G. Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law*, 68 IND. L.J. 685, 692-93 (1993).

for adaptability to a changing environment.⁹⁷ Collective bargaining agreements can last for a short period or a longer one, depending on the agreement of the parties.⁹⁸ The current NFL collective bargaining agreement is a ten-year agreement lasting from 2020 until 2030.⁹⁹ However, there are a number of ways that parties can typically open bargaining again over critical issues.¹⁰⁰ Current professional sports agreements have provisions that deal with issues college athletes care about, including training parameters and health benefits.¹⁰¹ Various professional sports agreements cover issues very similar to NIL agreements in college, including provisions for revenue sharing, licensing, salary caps, and player transfers.¹⁰²

A. *Legal Issues Involved in College Athlete Unionization*

The NLRB has jurisdiction over most unionization and collective bargaining in United States commerce.¹⁰³ However, its jurisdiction is largely confined to the private sector.¹⁰⁴ That limitation is problematic but not insuperable in the context of college athletics in public colleges and universities. Assuming, for now, that the NLRB would have some type of jurisdiction, perhaps because public universities might be joint employers with private entities like the NCAA or the athletic conferences of which they are members (like the Pac-12, the Big 10, or the SEC),¹⁰⁵ unionizing college athletes would begin by collecting authori-

97. See *Sherman Act—Antitrust Law—College Athletics—NCAA v. Alston*, *supra* note 83, at 478–79 (“[I]f the NCAA were to engage in collective bargaining with its players, it might be able to receive more lenient treatment under antitrust law because student athletes, like professional athletes, would be able to negotiate for their fair share of the benefits coming from those labor market restraints.”); B. David Ridpath & Mit Winter, *Direct Bargaining with Athletes Is Best Way Forward for College Sports*, SPORTICO (Dec. 7, 2022, 8:40 AM) <https://www.sportico.com/leagues/college-sports/2022/bargaining-with-college-athletes-1234697684/> [<https://perma.cc/SG7Z-ZFND>]; Dan Papsun, *For NCAA’s Antitrust Woes, Athlete Unions Pose Ironic Solution*, BLOOMBERG L. (Aug. 6, 2021, 5:56 AM), <https://news.bloomberglaw.com/daily-labor-report/for-ncaas-antitrust-woes-athlete-unions-pose-ironic-solution> [<https://perma.cc/4FM-5WJ5Z>].

98. See, e.g., NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 91, at 330.

99. *Id.*

100. See *Int’l Union v. NLRB*, 765 F.2d 175, 179 n.19 (D.C. Cir. 1985); DAU-SCHMIDT ET AL., *supra* note 25 at 773–75.

101. Compare, e.g., NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 91, at 169, 214 (describing practice rules and players’ rights to medical care), with Adam Gopnik, *Team Spirit*, NEW YORKER (May 5, 2014), <https://www.newyorker.com/magazine/2014/05/12/team-spirit-4> [<https://perma.cc/Z373-PP3W>] (“The rationale for the players’ demands, which include concussion-testing, extended medical coverage, and more manageable practice schedules, is based on a real inequity.”).

102. See, e.g., NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 91, at 11, 58, 60–61, 69, 107, 281.

103. See *Jurisdictional Standards*, *supra* note 4.

104. See *id.*

105. See Jay D. Lonick, *Bargaining with the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 162–66 (2015), <https://dx.doi.org/10.2139/ssrn.2593835>

zation cards from “employees” in the relevant “workplace.”¹⁰⁶ Once an election petition is filed, the NLRB investigates and may be presented with the various jurisdictional questions mentioned earlier.¹⁰⁷ First, does the football team substantially affect interstate commerce? Second, are the college athletes involved employees? Third, is the NCAA an employer or a joint employer with other entities? Finally, is an election sought in an appropriate bargaining unit (is the group of employees involved a proper group for union representation)? This is the process that unfolded in the Dartmouth basketball player union election petition case.¹⁰⁸

1. Employees

The NLRB’s position that college student athletes are employees is beginning to concretize. In January 2017, the NLRB General Counsel first took the position that college athletes were employees for the purpose of unfair labor practices under the NLRA.¹⁰⁹ That means college athletes have standing to bring charges against employers who violate the NLRA.¹¹⁰ This position was reiterated and further developed two years ago after the Supreme Court’s decision in *Alston*. In September 2021, General Counsel Jennifer Abruzzo reinstated the General Counsel memorandum from 2017 and expanded upon it.¹¹¹ Her General Counsel memorandum GC 21-08 established that Division

(arguing that the NCAA as a private employer controlling public and private colleges and universities may be viewed by the NLRB as a locus of control allowing the NLRB to assert jurisdiction over the NCAA and then through it to public institutions).

106. Authorization cards typically serve a dual purpose: (1) to seek an election and (2) to affirmatively state the employees’ desire to be represented by a particular union. *See* DAU-SCHMIDT ET AL., *supra* note 25, at 664. Cards from 30% of employees are sufficient to call for an election. *Id.* at 589. Fifty percent + 1 would be enough for an employer to be satisfied that a majority of employees desire representation by a particular union. *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824 (2005). In such a case, an employer may voluntarily recognize the union without going through an NLRB election process. *Id.* A truly neutral employer might sign a neutrality agreement indicating that it will not intervene or attempt to affect in any way the union’s attempts to procure signed authorization agreements. *Id.* at 825–31. The NCAA may well want to sign such an agreement given the benefits of unionization and collective bargaining.

107. *See* DAU-SCHMIDT ET AL., *supra* note 25, at 589–90; *see also supra* Section I.A.3 (noting the jurisdictional questions).

108. *See generally* RC Petition, Trs. Dartmouth Coll., No. 01-RC-325633 (NLRB Sept. 13, 2023).

109. *See* NLRB Off. of the Gen. Couns., Memorandum GC 17-01: General Counsel’s Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context 18–20, 22 (Jan. 31, 2017) (later rescinded by NLRB Off. of the Gen. Couns., Memorandum GC 18-02: Mandatory Submissions to Advice 4–5 (Dec. 1, 2017)).

110. Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 104-320, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 141).

111. *See generally* NLRB Off. of the Gen. Couns., Memorandum GC 21-08: Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act 1–2, 4–5 (Sept. 29, 2021) [hereinafter Mem. GC 21-08].

I college football players and others similarly situated are “employees” under Section 2(3) of the NLRA.¹¹² The memorandum relied on the U.S. Supreme Court’s decision in *Alston* rejecting the NCAA’s arguments that the Division I men’s football and basketball and women’s basketball athletes involved in the case were amateurs.¹¹³ The memorandum proclaims that the college athletes involved in *Alston*, at the very least, are entitled to the full protection of the NLRA as employees.¹¹⁴ The memorandum also extends to other college athletes so long as they are similarly situated.¹¹⁵

Indeed, *Alston* precipitated what is likely to be an onslaught of litigation arguing that college athletes are employees for the purposes of many federal labor and employment laws, including the Fair Labor Standards Act (“FLSA”), because of the Court’s thorough dismantling of the NCAA’s primary defense that college athletes are amateurs.¹¹⁶ The legal tests for who is an employee are problematic in the case of college athletes. Most people realize that there is something quite wrong (including people as disparate in their views as progressive scholars and Justice Kavanaugh) with severely undercompensating athletes who are working to bring in multiple millions of dollars for their employers.¹¹⁷ No principled argument can even be made that the huge percentage of these athletes who will not turn pro will reap some long-term benefit that will make up for this under-compensation. For these athletes especially, there should be fairer recognition of their work beyond just free tuition and some small stipend.

112. *Id.* at 4.

113. *Id.* at 5.

114. *Id.*

115. *Id.* at 2.

116. See *Johnson v. Nat’l Collegiate Athletic Ass’n*, 556 F. Supp. 3d 491, 501, 512 (E.D. Pa. 2021) (denying the NCAA’s motion to dismiss and citing *Alston* for the proposition that college athletes are not amateurs but, in fact, are plausibly “employees” for purposes of the FLSA). Denial of the motion to dismiss in *Johnson* and the issue of whether student athletes can be found to be employees is currently on interlocutory appeal to the Third Circuit. *Johnson v. Nat’l Collegiate Athletic Ass’n*, No. 19-5230, 2021 WL 6125095, at *4 (E.D. Pa. Dec. 28, 2021); see also *House v. Nat’l Collegiate Athletic Ass’n*, 545 F. Supp. 3d 804, 808–09 (N.D. Cal. 2021) (seeking past and prospective damages for certain athletes against NCAA for capping athlete compensation); Complaint, *Hubbard v. Nat’l Collegiate Athletic Ass’n*, No. 4:23-cv-01593 (N.D. Cal. Apr. 4, 2023) (seeking damages for denial of education-related stipends—Academic Achievement Awards—against the NCAA for limiting athlete compensation).

117. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Alston*, 594 U.S. 69, 110 (2021) (Kavanaugh, J., concurring) (“The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.”).

Unfortunately, the current legal tests for employees do not focus on how much or even whether the worker makes money.¹¹⁸ These are mostly tests of control.¹¹⁹ Therefore, under these tests, one college athlete is pretty much like another. And so, under these tests, if one type of college athlete, like a football player, is an employee, then so is, say, a fencer. That's true even though a fencer is unlikely to generate heavy ticket sales or TV revenue. One federal judge has recognized this. In the 2016 *Berger v. National Collegiate Athletic Ass'n* case, a suit brought by track and field athletes at the University of Pennsylvania alleging violations of the FLSA (the minimum wage law), the court found the athletes were not employees, but amateurs.¹²⁰ However, Judge Hamilton, concurring in the decision, explained, "I am less confident, however, that our 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."¹²¹ Hamilton felt the outcome might be different in those cases because those sports involve "billions of dollars of revenue for colleges and universities," and therefore, an analysis of the economic reality of that relationship "may not point in the same direction."¹²² Hamilton suggested that in the appropriate case, with a developed factual record, the conclusion might be that there is, in fact, an employment relationship.¹²³ Judge Hamilton is possibly wrong about that as a matter of law, but he is not wrong about that as a matter of justice and fairness.

As this Article was going to print, the issue of whether college athletes are employees was being contested on three fronts. First, in *Johnson v. National Collegiate Athletic Ass'n*,¹²⁴ the Third Circuit will

118. See Corrada, *supra* note 3, at 197 n.52 (detailing arguments made in *Dawson v. Nat'l Collegiate Athletic Ass'n*, 932 F.3d 905 (9th Cir. 2017), that student athletes should be considered employees, summarizing the cases referenced in *Dawson* to dismiss those arguments by rejecting the premise that revenue generation is determinative of employment status, and arguing that this treatment is "inapposite and inapplicable to the issue of profit generation in the context of a revenue-generating college football or basketball team" because those players are "at the very heart of the commercial enterprise involved").

119. See generally JON SHIMABUKURO, CONG. RSCH. SERV., R46765, WORKER CLASSIFICATION: EMPLOYEE STATUS UNDER THE NATIONAL LABOR RELATIONS ACT, THE FAIR LABOR STANDARDS ACT, AND THE ABC TEST (2021) (establishing that control is an important part of the three common tests for what is an employee).

120. *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 294 (7th Cir. 2016).

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

122. *Id.*

123. *Id.*

124. See *Johnson v. Nat'l Collegiate Athletic Ass'n*, 556 F. Supp. 3d 491, 510, 512 (E.D. Pa. 2021). The district court judge in the case denied the NCAA's motion to dismiss the suit. *Id.* at 12. The NCAA had argued that the plaintiff had not pled facts sufficient to show he was an employee. The judge, however, certified an interlocutory appeal to the U.S. Court of Appeals for the Third Circuit on the employee question. *Johnson v. Nat'l Collegiate Athletic Ass'n*, No. 19-5230, 2021 WL 6125095, at *4 (E.D. Pa. Dec. 28, 2021). The Third Circuit heard oral argument in the case on February 15, 2023, but as of the time of writing had not rendered a decision. Josh Goldberg & Carter Gaines, *What You*

decide whether the trial court can even accept evidence regarding player employee status.¹²⁵ Second, an NLRB Administrative Law Judge, in the case of the unfair labor practice complaint filed against USC, will decide whether the university misclassified employees as students.¹²⁶ In this case, the definition of employee is front and center.¹²⁷ Third, though the case is now on appeal to the NLRB, the Regional Director of the NLRB has already decided that Dartmouth basketball players are employees for the purpose of a union election.¹²⁸ Of these, the *Johnson* case potentially has the most immediate and far-ranging impact. Since that case involves application of the FLSA, a finding that college athletes are employees may well mean that *all* college athletes are employees, subjecting universities to minimum wage and other wage and hour requirements.¹²⁹ Unless the Third Circuit narrows the class (perhaps to revenue-generating sports), such a ruling could sound the death knell for many smaller college athletic programs for financial reasons related

Need to Know About Johnson v. NCAA, GREENSPOONMARDER (May 1, 2023), <https://www.gmlaw.com/news/what-you-need-to-know-about-johnson-v-ncaa/> [<https://perma.cc/BVE9-ZB8J>]. If the Third Circuit upholds the decision of the district court judge in the case, the case will be remanded back to the district court judge for trial. Given the amount of time elapsed since oral argument before the Third Circuit, the court may well have quite a bit to say about whether college athletes can be considered employees, possibly even deciding the question if there's enough evidence to do so in the litigation up to this point.

125. See Richard Johnson, *Explaining Johnson v. NCAA and What's at Stake in Wednesday's Court Hearing*, SPORTS ILLUSTRATED (Feb. 15, 2023), <https://www.si.com/college/2023/02/15/johnson-v-ncaa-court-hearing-employment-status> [<https://perma.cc/VHY7-UDS8>].

126. See *supra* note 5 and accompanying text.

127. See *id.*

128. See *supra* note 6 and accompanying text. The Regional Director found Dartmouth's basketball players to be employees under Section 2(3) of the NLRA. See Decision and Direction of Election, *supra* note 7, at 18. Ivy league athletes are unique in that they do not receive athletic scholarships. *Id.* at 3. Nevertheless, the Regional Director found that the basketball players, like the football players in the *Northwestern* case, perform work that benefits their college. *Id.* at 18. The Regional Director further found that Dartmouth controls the work of the basketball players and that the players perform their work in exchange for compensation. *Id.* at 18–19. Although the basketball players do not receive athletic scholarships, the RD found that they receive other kinds of compensation, including athletic gear (beyond that actually required to play basketball), tickets to games, lodging, meals, special consideration in the admissions process, and other similar benefits. *Id.* at 18–21. Notably, and unlike the Regional Director's decision in *Northwestern*, the Regional Director here found the basketball players to be similar to graduate assistants and non-(athletic)scholarship athletes to be employees. *Id.* at 14, 18. According to the RD, “[t]o the extent that this decision is inconsistent with *Berger v. NCAA* or the Regional Director's [decision] in *Northwestern University*, I am not bound by those decisions, neither of which constitute Board precedent.” *Id.* at 21. The Regional Director's decision is now on appeal to the NLRB after the union prevailed in the election. See Request for Review of the Regional Director's Decision and Direction of Election, *supra* note 7. A motion to stay the election was denied by the NLRB on March 5, 2024. Trs. Dartmouth Coll., 373 N.L.R.B. 34, 2024 WL 982132 (Mar. 5, 2024).

129. William B. Gould IV et al., *Full Court Press: Northwestern University, A New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1, 50 (2014).

to having to pay all athletes minimum wages and overtime and to comply with other employment-related laws.¹³⁰

Aside from *Johnson*, the three cases discussed in this Article involve only Division I college athletes or are cases before the NLRB.¹³¹ The NLRB cases proceed through adjudication (USC and Dartmouth) and only bind the parties involved in those individual cases in the short term, though the adjudications do have precedential value.¹³² The overall benefit of proceeding before the NLRB on the issue of employee status is that unions can decide to only unionize athletes in revenue-generating sports or some other subset of college athletes.¹³³ They do not have to take on all college athletes.¹³⁴ Then, even if various unions did attempt to unionize all or some college athletes, unionization would only get the union to the bargaining table.¹³⁵ The employer(s) would not be obligated to agree to any particular provision.¹³⁶ A small college program could open its books to show the union its financial limitations as part of the bargaining process.¹³⁷ An NLRB approach allows the most flexibility in targeting athletes in truly profit-making commercial enterprises and ensuring that colleges and universities can handle the new financial burdens they will face.¹³⁸ And since NLRB cases, like the two now before the NLRB, proceed through adjudication, a better, more incremental approach is possible.

2. Employer/Joint Employer

Who is the employer of a college athlete? The answer seems straightforward. Shouldn't it be whoever signs their paycheck? That, of course, is an important factor. And to be sure, one answer could certainly be the athlete's college or university. However, the college or university may not be the only employer. Others exercising control over the college athlete's employment may also be considered to be an employer depending

130. See *id.* at 57 (analyzing the NCAA economic model and implications for colleges and universities of applying federal labor and employment regulations to them based on changes in student-athlete status). Title IX might also come into play since currently all athletes, men and women, receive scholarships as pay. *Id.* at 47–48. If colleges pay male athletes a minimum wage in addition to a scholarship, an argument might be made that opportunities for men and women athletes are unbalanced. *Id.*

131. See *supra* notes 5–6 and accompanying text.

132. See generally BERNARD SCHWARTZ ET AL., ADMINISTRATIVE LAW: A CASEBOOK 391–401, 497–98 (10th ed. 2022); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 (1969).

133. See Ashlyn Hare, *The Playbook: A Guide to College Athlete Unionization in the Wake of Alston*, 26 DENV. SPORTS & ENT. L.J. 109, 133 (2022).

134. See *id.* at 136.

135. See *id.* at 138.

136. See *id.*

137. See Gould IV et al., *supra* note 129, at 56.

138. See *id.*

on the extent of their control over the athlete.¹³⁹ Consequently, both the NCAA and the athletic conference to whom the college or university belongs could be considered “joint employers” with the athlete’s college or university.¹⁴⁰ General Counsel Abruzzo, in her 2021 GC Memorandum, addresses the joint employer issue in a final footnote.¹⁴¹ Abruzzo explains that, in appropriate circumstances, she would consider pursuing a joint employer theory of liability.¹⁴² Abruzzo favorably cites a commentator in her memorandum for the proposition that the NCAA exercises strict control over certain college athletes through eligibility terms and standards plus extensive compliance requirements.¹⁴³ Abruzzo concludes that “it may be appropriate for the Board to assert jurisdiction over the NCAA and an athletic conference, and to find joint employer status with certain member institutions, even if some of the member schools are state institutions.”¹⁴⁴ Abruzzo’s ability to extend joint employer status to all three of those entities will likely be more favorable under the Biden Board’s new joint employer rule.¹⁴⁵

The initial question here is who is the joint employer of these athletes? Joint employment exists when an employee’s work, either directly or indirectly, simultaneously benefits the interests of more than one employer so extensively that the labor is considered as one employment under the NLRA.¹⁴⁶ The contours of the basic joint employer test shift depending on whether the administration is conservative or liberal, but the two tests differ based on whether indirect control is sufficient to make an entity a potential joint employer.¹⁴⁷ This distinction is immaterial for determining which entities jointly employ college football players because the truth is that the NCAA, the athletic conference, and the college or university substantially and directly control college football players.¹⁴⁸ (The distinction between the joint employer tests may

139. *See id.* at 123–26; *see also* Corrada, *supra* note 3, at 209–10.

140. Hare, *supra* note 133, at 125–26. In the Dartmouth basketball case, the union only filed an election petition against the college, Dartmouth. The employer then never raised the issue, so the case proceeded solely against the college. *See* Decision and Direction of Election, *supra* note 7, at 16 n.21 (“No party argues that the NCAA and/or the Ivy League are joint employers of the basketball players.”).

141. Mem. GC 21-08, *supra* note 111, at 9 n.34.

142. *Id.*

143. *Id.*; *see* Lonick, *supra* note 105, at 161–67.

144. Mem. GC 21-08, *supra* note 111, at 9 n.34.

145. *See supra* note 27 and accompanying text. The new rule has already been reversed by a federal district court judge in Texas. *See* U.S. Chamber of Com. v. NLRB, No. 6:23-cv-00553, 2024 WL 1203056 (E.D. Tex., Mar. 18, 2024). The decision is on appeal by the NLRB to the Fifth Circuit. *See* Braden Campbell, *NLRB’s Joint Employer Rule Struck Down by Texas Judge*, LAW 360 (Mar. 9, 2024, 8:15 PM), <https://www.law360.com/articles/1804090/nlrbs-joint-employer-rule-struck-down-by-texas-judge> [https://perma.cc/2HRN-SZXM].

146. *See* Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195, 1211, 1218 (D.C. Cir. 2018).

147. *Id.* at 1201.

148. *See* Lonick, *supra* note 105, at 154 (“Implicitly, labor issues are ‘symbiotic’ among the various teams, conferences, and NCAA . . .”); Hare, *supra* note 133, at 122–26.

be more material in the case of some athletic conferences, where the control over athletes may be more indirect.¹⁴⁹)

The NCAA exercises control from the beginning with its Student-Athlete Agreement and its 96-page NCAA manual.¹⁵⁰ These control benefits flow to the athlete, from game ticket sales, exclusive licensing agreements for NCAA-licensed or team-licensed apparel, television contracts, and other secondary effects like advertisements during commercial breaks for products.¹⁵¹ There are rules governing eligibility for participation in NCAA events, awards and benefits for enrolled student athletes, enforcement guidance for individual student athletes, and university punishments for NCAA violations.¹⁵² The landscape is shifting, however. Soon after the *Alston* decision, the NCAA announced a plan of decentralization intended to give more power and control to the various NCAA divisions.¹⁵³ It's possible in the future, depending upon the extent of power given to Division I, say, that the Division rather than the NCAA could be the employer.

The athletic conferences (Big 10, Pac-12, SEC, etc.) also exercise quite a bit of control. College football players participate in conference events and championships, from which the conferences and teams benefit.¹⁵⁴ The Power Five conferences, for example, control university athletics personnel, insurance, career transition, promotional activities, recruiting restrictions, pre-enrollment expenses and support, financial aid awards, academic support, health and wellness, and meals and nutrition.¹⁵⁵

149. See Mem. GC 21-08, *supra* note 111, at 9 n.34; Hare, *supra* note 133, at 125–26.

150. See Lonick, *supra* note 105, at 164 (“The student-athlete agreement and the 96-page NCAA Manual provides structure for the NCAA’s dependency on the student-athletes, which among other things, control the flow of benefits from athletes’ labor. . . . The detail of the NCAA bylaws is astounding, there are rules governing eligibility for participation in a variety of NCAA events, awards and benefits for enrolled student-athletes, scheduling of athletic events, and enforcement principles which include both individual student-athlete and university punishments.”).

151. *Id.*

152. *Id.*

153. See *NCAA Approves New Constitution, Prepares to Give More Power to Schools, Conferences*, CNBC (Jan. 20, 2022, 5:49 PM), <https://www.cnbc.com/2022/01/20/ncaa-ratifies-new-constitution-paving-way-to-restructuring.html> [<https://perma.cc/NG9X-GZKC>].

154. See Jon Solomon, *NCAA Audit: Every Football Conference Made Money On 2012–13 Bowls*, AL.COM (Dec. 11, 2013, 9:00 AM), https://www.al.com/sports/2013/12/bowl_money_101_ncaa_audit_show.html [<https://perma.cc/3FQJ-LZVU>] (“The SEC received \$52.3 million in payouts from bowls last year and had \$37.5 million of revenue excess after paying for institutional expenses.”).

155. See, e.g., BIG TEN CONF., *BIG TEN CONFERENCE HANDBOOK 2017–18* (2017), https://iuhoosiers.com/documents/2018/4/5/2017_18_Big_Ten_Conference_Handbook.pdf?id=27323 [<https://perma.cc/HW6A-MHCW>]; PAC 12 CONF., *2018–19 HANDBOOK* (2018), https://usctrojans.com/documents/2018/12/20/Pac_12_2018_19_Handbook.pdf [<https://perma.cc/UPC9-BLHW>]; ATL. COAST CONF., *2020–21 ACC MANUAL* (2020), <https://virginiatech.sportswar.com/wp-content/uploads/sites/15/2022/08/2020-21-ACC-Manual-2020-9-17-2.pdf> [<https://perma.cc/US7T-L3YL>]; BIG 12 CONF., *2018–19 CONFERENCE HANDBOOK* (2018), <https://static.big12sports.com/custompages/pdfs/>

As stated before, the university or college controls the college football player's daily existence, including practice time, time spent studying film, and participating in workouts.¹⁵⁶ The university controls "wages" (including scholarships and stipends), gear and related clothing, meals, dwelling, and social media accounts.¹⁵⁷

3. Bargaining Unit

When a union seeks to organize a group of workers, it starts with key strategic questions: who is the employer and which group of workers? With respect to which workers, the union must determine whether to seek to represent a smaller group (typically easier to organize, but less payoff in terms of leverage against the employer and dues contributions to the union) or a larger group (typically harder to organize, but yielding greater leverage and monetary resources).¹⁵⁸ The union's discretion with respect to this decision is sanctioned by law.¹⁵⁹ The NLRB only requires that representation be sought in an "appropriate" bargaining unit, not the most appropriate or best unit.¹⁶⁰ There are some broad parameters, however. In determining whether the petitioned-for unit is "appropriate," the NLRB will inquire into whether the athletes in the petitioned-for bargaining unit share a "community

handbook/conferencehandbook.pdf [https://perma.cc/X87D-54VG]; SE. CONF. CONST. AND BYLAWS 2023–2024 (2023), <https://a.espncdn.com/sec/media/2023/2023-24%20SEC%20Bylaws.pdf> [https://perma.cc/6S6K-RWA2]. To underscore the power and control that the conferences possess, at recent hearings on NIL held by Congress, "Big Ten commissioner Tony Petitti said his conference's schools are open to providing additional health and welfare benefits for athletes and for athletes to receive benefits even greater than that 'directly from institutions.' While he did not specify what those items might cover, ideas that have been floated range from schools being willing to pay for athletes' graduate education, to providing cash bonuses for graduation." See Berkowitz, *supra* note 70.

156. See *supra* note 40 and accompanying text. The Regional Director in the Dartmouth case found the same things were controlled by Dartmouth. See Decision and Direction of Election, *supra* note 7, at 19–21.

157. *RD Decision*, 198 L.R.R.M. 1837 (2014), 2014–15 NLRB Dec. ¶ 15781, 2014 WL 1246914, at *14 (Mar. 26, 2014).

158. See, e.g., Mark Zuckerman, *Unions Need to Think Small to Get Big*, ATLANTIC (Feb. 9, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/how-online-organizing-can-revolutionize-unions/582343/> [https://perma.cc/9LUZ-GKTR] ("If a workplace is too small . . . it's not worth most unions' time to organize there, and so they don't.").

159. See Marni von Wilpert, *By Overturning Specialty Healthcare, the NLRB Has Made It Harder for Workers to Organize*, ECON. POL'Y INST. (Dec. 18, 2017, 11:37 AM), <https://www.epi.org/blog/by-overturning-specialty-healthcare-the-nlr-has-made-it-harder-for-workers-to-organize/> [https://perma.cc/34PL-CYXT] ("Federal labor law gives the Board wide discretion to determine the appropriate 'bargaining unit,' the term for the group of workers that will vote in the election and will be represented by the union.").

160. See *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 412 (1950) ("There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'").

of interest.”¹⁶¹ Employees have a “community of interest” if they share “substantial mutual interests in wages, hours, and other conditions of employment.”¹⁶² Under the NLRA, a “plantwide” unit is considered presumptively appropriate.¹⁶³ This principle was just recently re-emphasized by the labor board in its decision in *American Steel Construction* in December 2022.¹⁶⁴ Therefore, a unit of a single football team would likely be appropriate if a union sought to organize a single team, as in the *Northwestern* case or in the recent Dartmouth College basketball team case.¹⁶⁵ However, it should be noted that college football players at almost any level of organization could be considered an appropriate unit for collective bargaining. Wages, hours of work, and other conditions are likely to be very similar across teams in an athletic conference or even an entire NCAA division, like Division I.

In the case of *North American Soccer League*¹⁶⁶ in 1978, the labor board found that a league-wide unit of 17 of 19 teams was appropriate while leaving out 2 Canadian teams that were part of the league.¹⁶⁷ The labor board felt that since the Canadian teams were governed by different labor laws, they shouldn’t be subject to NLRB jurisdiction.¹⁶⁸ However, in that very case, the labor board said that both single-team units and a league-wide unit were appropriate.¹⁶⁹ What the union sought, however, was a league-wide unit.¹⁷⁰ The NLRB found a league-wide unit but declined to include Canadian teams outside their jurisdiction.¹⁷¹

161. See *Am. Steel Constr., Inc.*, 372 N.L.R.B. No. 23, 2022 WL 17974956, at *1 (Dec. 14, 2022). (“[I]n order for such a unit to be appropriate, the employees in the petitioned-for unit must be readily identifiable as a group and share a ‘community of interest.’”).

162. *Id.* at *3 (“[The Board’s] primary concern in resolving unit issues [is] ‘to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment.’”).

163. *Id.* at *4.

164. *Id.*

165. See Corrada, *supra* note 29, at 32–34; see also *supra* note 6 and accompanying text. In fact, in *Greenhoot, Inc.*, 205 N.L.R.B. 250, 250–51 (1973), the NLRB found appropriate 14 separate unions in 14 different buildings managed by the same owner because one person in each building, a chief engineer, had delegated supervisory authority, including the right to hire and fire, over all the building’s employees. Critically, the Board also found there was no intention on the part of the owner to be part of a multi-employer unit. *Id.* at 251. Presumably, individual schools can choose to go at it alone as the decision by any employer to join a multi-employer unit is completely voluntary. See *id.*; see also ABA SECTION OF LAB. & EMP. L., *supra* note 11, at 715–19.

166. *N. Am. Soccer League*, 236 N.L.R.B. 1317 (1978), *enforced*, *N. Am. Soccer League v. N.L.R.B.*, 613 F.2d 1379 (5th Cir. 1980).

167. *Id.* at 1319.

168. *Id.*

169. *Id.* at 1321 (“While these facts might support a finding that single-club units may be appropriate, they do not establish that such units are alone appropriate or that the petitioned-for overall unit is inappropriate. The only unit sought is leaguwide, with the exceptions of the Canadian clubs, and it is presumptively appropriate as an employer-wide unit.”).

170. *Id.* at 1321.

171. *Id.* at 1321–22.

Nonetheless, the Board found that since the league commissioner exercised considerable authority over the individual clubs, a league-wide unit comprised of all the clubs except the two in Canada was appropriate for collective bargaining.¹⁷² A dissenting Board member made a convincing case for the NLRB to assert jurisdiction over the Canadian teams as well.¹⁷³ The dissenting NLRB member found that

[T]he League, acting primarily through the commissioner, is a joint employer of the players on the Canadian clubs as well as those on the United States clubs. As such it possesses and exercises substantial control over the conditions of employment of all players, including those on the Canadian clubs. I find that the Canadian clubs engage in substantial activities in the United States and that in connection with these activities the players on the Canadian clubs spend a substantial portion of their time working in the United States. Based on these findings, I conclude that the Board has the authority to exercise jurisdiction over the Canadian clubs with respect to their activities in the United States and to include the players on Canadian clubs in the leaguewide unit.¹⁷⁴

With respect to the issue of extraterritorial reach, the dissenting member said:

I recognize that the exercise of jurisdiction over the Canadian clubs and the Canadian players may have some extraterritorial effect. That alone is not a basis for refusing to assert jurisdiction. Of course, in taking actions with respect to the Canadian clubs the Board must be aware of the rights of persons under the protection of Canadian laws. The comity of nations requires Canada to recognize the Board's application of the Act to League activities as long as the Board gives Canadian rights due consideration.¹⁷⁵

Likewise, the NLRB could extend its reach in the case of college athletes where the NCAA and the Conferences occupy the same role and control as exercised by the League commissioner in the *North American Soccer League* case, being careful, as suggested by Member Murphy, to give the state public sector rights of public universities and colleges due consideration.

So, too, in the *Big East Conference*¹⁷⁶ case in 1986, the Board asserted jurisdiction over an entire conference as an employer of referees even though the conference included two public, state-run colleges because those colleges could not exercise control over the others in the conference.¹⁷⁷ The same would be true in the case of college athletes because the NCAA and the Conference exercise substantial control over labor

172. *Id.*

173. *Id.* at 1322–25 (Murphy, Member, dissenting in part).

174. *Id.* at 1323.

175. *Id.*

176. Big E. Conf., 282 N.L.R.B. 335 (1986).

177. *Id.* at 335, 341.

relations involving the teams.¹⁷⁸ However, in the *Northwestern* case, the labor board did refuse to recognize the *Northwestern* football team as an appropriate bargaining unit, but not because there was no “community of interest” between the players (though the Regional Director did, in fact, find a community of interest), but because the Board felt that recognizing a single Big 10 team might threaten labor stability.¹⁷⁹ The Board did not explain its reasoning but likely felt that a single unionized team in a conference may have some unknown adverse consequences. Because of the *Northwestern* case, the Board may indeed find that a single team bargaining with a single university employer is inappropriate. The union in *Northwestern* only named Northwestern University as the employer.¹⁸⁰ Likewise, the union in the *Dartmouth College* case only named Dartmouth College as the employer.¹⁸¹ As a result, we do not know what the Board would have done if the Conference and the NCAA had also been listed as joint employers. Since the NCAA and the Conference have substantial control over labor relations, there may have been a different result.

Importantly, it is beyond the NLRB’s purview to worry about some vague notion of labor stability. If employees in an appropriate bargaining unit demonstrate by a showing of interest that they desire representation to bargain with an employer that substantially affects interstate commerce, as Northwestern University did, it is the Board’s obligation to conduct an election.¹⁸² It is also important to note that the NLRB in the *Northwestern* case emphasized that it “do[es] not reach whether and do[es] not decide that team-by-team organizing and bargaining is foreclosed or that [it] would never assert jurisdiction over an individual team.”¹⁸³ Moreover, in the same footnote, the Board, citing the *North American Soccer League* case, stated that “evidence of each team’s day-to-day autonomy ‘might support a finding that single-club units may be appropriate.’”¹⁸⁴ Given the control exercised by the NCAA and the athletic conference, it is unlikely that college and university teams will be able to show such autonomy. The issue may still be addressed in the

178. See *supra* notes 148–57 and accompanying text.

179. Nw. Univ., 362 N.L.R.B. 1350, 1354 (2015). At the Texas A&M symposium on NIL, participant Professor Jodi Balsam, Brooklyn Law School, termed it “the tail wagging the dog” problem. Jodi Balsam, Professor, Clinical L. and Dir. of Externship Program, Brooklyn Law School, Panelist at Texas A&M University Law Review Symposium: More than Sports: What Comes After NIL? (Sept. 29, 2023). However, even if only one team in a conference is organized, it would more than likely be adequately representing the interests of all universities, even public ones, at the bargaining table. All the teams would more than likely all want the same things. Likewise, if the NCAA and the conference are “joint employers,” they too, will be adequately representing the desires of any public university members of their organizations at the bargaining table.

180. *RD Decision*, 198 L.R.R.M. 1837, 2014–15 NLRB Dec ¶ 15781, 2014 WL 1246914, at *1 (Mar. 26, 2014).

181. Decision and Direction of Election, *supra* note 7, at 16 n.21.

182. See Corrada, *supra* note 29, at 32–34.

183. *NLRB Decision*, 362 N.L.R.B. 1350, 1354 n.16 (2015).

184. *Id.*

Dartmouth basketball union election case when the NLRB weighs in on appeal.¹⁸⁵

4. The Public School/Private School Jurisdictional Issue

One thorny issue with respect to the NLRB exercising jurisdiction over college-athlete unionization stems from the fact that the Football Bowl Series, Division I teams—and all college and university teams in collegiate athletic conferences—are housed in a mixture of public and private institutions. If this is the case, how could NLRB General Counsel Jennifer Abruzzo pledge to treat public colleges and universities as entities that would have to comply with NLRA requirements, given that the NLRB's scope of jurisdiction is the private sector? As there is no caselaw involving this situation, bold statements about what might happen cannot be made. However, some ideas can be put forward for discussion. Here are two possible approaches to the issue.

a. The First Approach: NLRB Indirect Influence

The first would be a sort of “cat’s paw” or indirect control by the NLRB model. With respect to the employer of the athletes, the NLRB could find that the real employer in these cases is the NCAA or perhaps the NCAA and the relevant athletic conference. These are private entities.¹⁸⁶ These employers could bargain with whatever private colleges or universities in a conference were in fact unionized. Any collectively bargained agreement could be applied to public sector institutions by agreement, much as public colleges and universities currently agree to abide by rules coming from the NCAA and the conference of which they are a member.¹⁸⁷ The *Big East Conference* case exemplifies this. There, a union represented the referees and the employer was the Big East Conference.¹⁸⁸ The collective bargaining agreement (“CBA”) applied to all members of the conference even though two members were public institutions.¹⁸⁹ The NCAA and athletic conferences may exercise sufficient control over labor relations to prevent public universities from being independently certified as employers. The control exercised by public colleges and universities would be governed by the terms of the CBA, as per agreement by the parties, including the NCAA and

185. The joint-employer issue is squarely posited in the USC unfair labor practice case. There, the union sued the NCAA, the Pac12, and USC as joint employers. Complaint and Notice of Hearing, Univ. of S. Cal., No. 31-CA-290326 (NLRB May 18, 2023). Thus, the NLRB has no choice but to decide the issue. Indeed, the NLRB may possibly hold the Dartmouth case in abeyance until it issues a decision on the question of joint-employer status in the USC case.

186. See *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 193–94 (1988); Hare, *supra* note 133, at 129.

187. Hare, *supra* note 133, at 129–30.

188. *Big E. Conf.*, 282 N.L.R.B. 335, 340–42, 345 (1986).

189. See *id.* at 335.

conferences as representatives of the colleges and universities and the National College Players Association (“NCPA”) (or some other union) as representative of the unionized college athletes.

With respect to the players as employees in this approach, the private-school players would unionize under regular NLRB processes (preferably voluntary recognition by their school upon a showing of majority support), and the public-school players could unionize and seek voluntary recognition of the union (upon showing majority support) by the public college or university in states where such a form of recognition is allowed.

This contractual, extra-jurisdictional approach is very similar to the way that the NLRB exercises influence over professional teams in hockey, baseball, and basketball that all have member teams in Canada. Perhaps the best example of this is hockey. The National Hockey League (“NHL”) is composed of 33 teams: 7 in Canada and 26 in the United States.¹⁹⁰ All of the existing NHL club owners recognized the hockey players’ union, the National Hockey League Players Association (“NHLPA”), in 1967 of their own accord, assumedly to avoid the NHLPA having to seek certification under Canadian law.¹⁹¹ The NHLPA was formed without certification under either the Canadian labor boards or the NLRB.¹⁹² However, ultimately, the NHL owners agreed to jurisdiction by the NLRB.¹⁹³

Starting in the mid-1990s, the NHL owners and the NHLPA began to disagree about labor matters and were unable to reach agreement.¹⁹⁴ This rift led to the first strike in the history of professional hockey in 1992 and subsequently to the first lockout by owners in 1994–1995.¹⁹⁵ A second lockout followed in 2004–2005, this time leading to the cancellation of the entire hockey season, a first in the history of professional sports in North America.¹⁹⁶ The second lockout, however, culminated in the signing of the CBA that governs the relationship between the NHL and the NHLPA.¹⁹⁷ The preamble to the 2005 CBA states that the NHL is a “joint venture organized as a not-for-profit unincorporated association . . . which is recognized as the sole and exclusive bargaining representative of the present and future Clubs of the NHL”¹⁹⁸ The CBA is between the team owners represented by the NHL, an employer

190. *Teams*, NAT’L HOCKEY LEAGUE, <https://www.nhl.com/info/teams/> [<https://perma.cc/PLU3-FQVH>].

191. See Mathieu Fournier & Dominic Roux, *Labor Relations in the National Hockey League: A Model of Transnational Collective Bargaining*, 20 MARQ. SPORTS L. REV. 147, 153–58 (2009).

192. *Id.* at 157–58.

193. *Id.* at 154.

194. *Id.* at 148.

195. *Id.*

196. *Id.*

197. *Id.* at 148.

198. *Id.* at 152–53.

association for labor purposes, and the players represented exclusively by their bargaining agent, the NHLPA, a union of players.¹⁹⁹ While the CBA has rules relating to individual contract negotiations between individual teams and players, individual contracts are negotiated at the team level.²⁰⁰ So in the NHL, the NHLPA negotiates a CBA with the NHL, and the teams essentially become signatories either individually or through the NHL.²⁰¹ The CBA describes which terms are left for the teams to negotiate with the players individually.²⁰² The CBA contains an arbitration regime to enforce the terms of the CBA or the individually negotiated contracts between teams and players.²⁰³ The NLRA also has a path to enforce a CBA in federal district court.²⁰⁴

Unionization of college football players would work the same way. The NCAA, like the NHL (but perhaps with the involvement of athletic conference(s)), would negotiate a CBA with whatever union is involved. (The union may represent many or only one or a few universities' players.) This CBA would then, as in professional leagues, explicitly state what items, perhaps including NIL packages along with scholarships, are negotiated individually between the schools and the players.

The NLRB's jurisdiction over public colleges and universities would then work exactly the same way as the NLRB's jurisdiction over Canadian teams in hockey.²⁰⁵ As described earlier, the NHLPA was voluntarily recognized by the hockey team owners and the NHL in 1967.²⁰⁶ That relationship remained stable and completely extra-governmental and extra-judicial until the strikes (players) and lockouts (owners) in 2005.²⁰⁷ During the 2005 lockout, the NHL apparently had threatened to use replacement players ("scabs") for the upcoming 2005–2006 hockey season.²⁰⁸ Under the NLRA, employers may use replacement workers after reaching an impasse in contract negotiations, but under Canadian labor law, hiring replacement workers is prohibited.²⁰⁹ Thus,

199. *Id.* at 153.

200. *Id.* at 152.

201. *Id.* at 152–53.

202. *Id.* (“As regards individual labor relations, these take place at the local level, that is, at the level of *the firm*. Although, indeed, the CBA significantly regulates the negotiation of the employment contract between the player and the team, this negotiation remains decentralized and individual, taking place between these two parties alone.”).

203. *Id.* (“If the parties reach a deadlock and if the object of the negotiation involves determining the salary to be paid to the player, the parties can, under certain circumstances, go to salary arbitration The same is true for grievances concerning the interpretation or application of the collective agreement or the individual employment contract.”).

204. *See* Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 104-320, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 141).

205. And, presumably, the same arrangement works with NLRB's extraterritorial jurisdiction over Canadian teams in professional baseball and basketball.

206. Fournier & Roux, *supra* note 191, at 153, 157–58.

207. *See id.* at 155.

208. *Id.*

209. *Id.*

the NHLPA turned to Canadian law seeking relief from the Quebec Labor Board on behalf of the Montreal Canadiens players.²¹⁰ During the same labor dispute, the NHLPA applied to the British Columbia Labor Board to become the certified representative for the players of the Vancouver Canucks, another NHL team.²¹¹

In the Quebec case, lawyers for the Montreal Canadiens argued that the NHL and NHLPA had been subject to the NLRA and NLRB jurisdiction for over 40 years and, therefore, should be the proper authority to handle any dispute.²¹² The Quebec Labor Board agreed and refused to take jurisdiction, stating also that the proper unit was all NHL players and not just the Montreal Canadiens.²¹³ Similarly, the British Columbia Labour Relations Board also found certification of the Vancouver Canucks players to be inappropriate based on the history of labor relations between the parties and the collective representation and bargaining system that had been set up in the NHL.²¹⁴

Unionization of college football and basketball players could follow a similar scheme. The NCAA, for example, could endeavor to recognize and collectively bargain with a union that organized all the football (or basketball) players at colleges and universities within the Division I Power Five conferences or some greater (all Division I) or lesser group (individual conferences like the ACC). The union could request bargaining for players at private universities and colleges within the framework of the NLRA, following all the requirements of that law. The union could also proceed to seek authorization cards from players at public universities and colleges within that unit and then ask for voluntary recognition by the colleges and universities, the relevant conferences, and the NCAA or whomever the NLRB deems to be a joint employer of these players.²¹⁵ One might imagine that the willingness of public universities and colleges to voluntarily recognize such a union and for state public sector labor relations authorities to follow the NLRB's lead could be quite high given their lack of expertise with respect to labor organizations representing college athletes.²¹⁶

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 155–57.

215. General Counsel Abruzzo herself alluded to this possibility when speaking at a Labor and Employment Relations Association of the Rocky Mountains annual meeting in Denver, Colorado on October, 13, 2023. In response to a question from the author about her memo involving college athletes and the prospect of asserting jurisdiction over public colleges and universities, she said that voluntary recognition was a possibility.

216. For colleges and universities, such a model would, at a minimum, present the prospect of antitrust immunity and some uniformity in handling NIL issues through a collective bargaining agreement covering everyone. For public sector labor relations authorities, the prospect of saving their budgets for other matters and of having a federal authority with much more experience take these complex matters out of their hands should seem attractive, much like it was for the Canadian labor authorities pulled into the NHL disputes in 2005.

b. The Second Approach: Separated Sectors

If a college or university is found by the NLRB to be a de facto joint employer along with the conference and the NCAA, the NLRB would have to take a different approach. In this approach, the NLRB would only have jurisdiction and influence over any private colleges and universities in the NCAA or in an athletic conference, even in a conference where there's only a single private college or university, as in the *Northwestern* case. In this scenario, public sector schools would be left to fend for themselves subject to the jurisdiction of their state's public sector labor relations law. There is precedent for the NLRB to assert jurisdiction over joint employers that include both public and private entities. *Management Training*, decided in 1995, involved a scenario in which a private employer was deemed a joint employer with a public entity.²¹⁷ In that case, a union was seeking to represent about 125 employee residential advisors at the Clearfield Job Corps Center in Utah.²¹⁸ The private company managing the center operated under a contract with the U.S. Department of Labor.²¹⁹ While the managing company in that case handled all labor relations (including jobs and job classifications, salary schedules, and personnel policies relating to compensatory pay, overtime, vacation, holidays, sick leave, raises, and severance pay), the contract specified that the Department of Labor was to approve any proposed changes to those policies as well as to dictate its own policies on hiring, firing, promotion, demotion, or transfer of any employee.²²⁰ Despite the fact that the Department of Labor had substantial control over labor relations, the NLRB determined that it would not look to see whether the public employer had all or most of the control of the employees in determining jurisdiction.²²¹ Rather, the NLRB will only ask whether an employer meets the definition of employer and affects interstate commerce, regardless of whether they are a joint employer.²²² The Board said, “[i]n our view, it is for the parties to determine whether bargaining is possible with respect to other matters” so long as the employer has control over some matters that they might bargain about.²²³ What this means is that the NLRB could assert jurisdiction over the NCAA, an athletic conference, and the private colleges and universities in the conference, but not including any public universities explicitly.

217. *Mgmt. Training Corp.*, 317 N.L.R.B. 1355, 1358 n.16 (1995).

218. *Id.* at 1355.

219. *Id.*

220. *Id.*

221. *Id.* at 1358.

222. *Id.*

223. *Id.* (“The Employer in question must, by hypothesis, control some matters relating to the employment relationship, or else it would not be an employer under the Act.”).

In this scenario, one might imagine that the NCAA and the conference would negotiate with the NCPA (or any other union) as representative of athletes in given states. In that case, the NCPA would seek to apply the collective agreement previously negotiated with private schools in the same conference. There is some precedent for this type of “pattern bargaining” under the NLRA in similar circumstances.²²⁴ The NCPA, the NCAA, the conference, and the public schools in a state would bargain the same agreement as they did with private schools in the same conference, but with a state public sector addendum or supplement. Let’s take Washington as an example since they have among the more favorable public sector laws for union organizing. The NCAA, the Pac-12, and Washington or Washington State, as joint employers, would negotiate an agreement with the union (say the NCPA) and seek to apply the same terms as already negotiated with Stanford, a private school in the same conference that was unionized first. However, any terms that must differ or even be omitted due to Washington’s public sector law requirements would be included in a Washington state addendum or supplement. That agreement would largely mirror the “pattern agreement” already established for the Pac-12 conference. In each of the Power 5 Division conferences there is at least one private school. Those schools might be organized first, and a “pattern” agreement negotiated with them. So, for example, in the Pac-12, the negotiations would first be with the NCAA, the Pac-12, and Stanford as joint employers and the NCPA as union representative of Stanford’s players. In the SEC, the initial private agreement would be between the NCAA, SEC, and Vanderbilt. In the Big 10, it would be between the NCAA, the Big 10 conference, and Northwestern and USC. In the ACC, it would be

224. Pattern bargaining is a negotiation strategy used in labor relations, where a union negotiates a contract with one employer and then seeks to use that agreement as a model or “pattern” for negotiations with other employers in the same industry. *See, e.g.*, LYNN RHINEHART & CELINE McNICHOLAS, ECON. POL’Y INST., COLLECTIVE BARGAINING BEYOND THE WORKSITE: HOW WORKERS AND THEIR UNIONS BUILD POWER AND SET STANDARDS FOR THEIR INDUSTRIES 8 (2020), <https://files.epi.org/pdf/193649.pdf> [<https://perma.cc/5DA9-4HBK>]. This approach is most commonly found in sectors with multiple employers and a large, centralized union representing workers across those employers. *See id.* The process typically involves selecting a “target” employer to negotiate with first. *See id.* This target is often one of the largest or most influential employers in the industry. *See id.* The union focuses its resources on reaching a favorable agreement with this employer, establishing a benchmark for wages, benefits, working conditions, and other employment terms. *See id.* Once the agreement is secured, the union uses it as a template in negotiations with other employers, arguing that the terms agreed upon with the target employer should be matched or improved upon. *See id.* Pattern bargaining can be beneficial for both workers and employers. For workers and their unions, it helps in achieving uniform standards across an industry, reducing disparities in wages and working conditions. For employers, it can provide predictability and stability, ensuring that no single employer is at a competitive disadvantage in terms of labor costs. Pattern bargaining has been particularly prominent in industries such as automotive manufacturing, where unions like the United Auto Workers (UAW) have historically used this strategy to negotiate with major car manufacturers. *See id.*

the NCAA, the ACC, and Boston College, Duke, Miami, Notre Dame, Syracuse, and Wake Forest.

There are, of course, substantial barriers involving either of these scenarios. In addition, there is a broad amount of skepticism among academics and labor lawyers regarding the likelihood of any sort of large-scale unionization effort, though most think the single-school, single-unit union with limited collective bargaining is the most likely. Certainly, the single-school unit approach is the only one tried so far as evidenced by unionization attempts at Northwestern and Dartmouth. The second most likely scenario is one involving only private universities within conferences. The most complete of these is the Ivy League with all colleges being private. The public university scenarios discussed above are most likely to begin on the West Coast. Washington, Oregon, and California have the most progressive public sector laws, which allow voluntary recognition, collective bargaining, and even striking by public sector employees in California and Oregon. At least one state expressly prohibits college students at public universities in the state from organizing.²²⁵ Some others forbid any public sector employees from organizing.²²⁶ For those states that allow unionization and collective bargaining, the scope of the bargaining allowed varies widely.²²⁷

225. See MICH. COMP. LAWS ANN. § 423.201(g) (West 2024) (“A student participating in intercollegiate athletics on behalf of a public university in this state is not a public employee entitled to representation or collective bargaining rights under this act.”).

226. Those states are North Carolina (N.C. GEN. STAT. ANN. § 95-98 (West 1959)), South Carolina, Tennessee, Virginia (VA CODE ANN. § 20.1-572 (West 2021)), and Georgia (GA. CODE ANN. § 45-19-2 (West 1999)), though Tennessee has an exception for teachers (TENN. CODE ANN. § 49-5-601 (West 2011)). And many states that allow public sector unions do not recognize card-check as a form of voluntary recognition. Those that do allow card-check recognition include California (CAL. GOV. CODE § 35071 (West 2012)), Washington (WASH. REV. CODE § 41.56.060 (West 2019)), Oregon (OR. ADMIN. R. 115-025-0030 (2021)), Illinois (5 ILL. COMP. STAT. ANN. 315/6 (West 2021)), and New Jersey (N.J. STAT. ANN. § 34:13A-5.1 (West 2005)).

227. See, e.g., MILLA SANES & JOHN SCHMITT, CTR. ECON. POL’Y RSCH., REGULATION OF PUBLIC SECTOR BARGAINING IN THE STATES 3 (2014), <https://cepr.net/documents/state-public-cb-2014-03.pdf> [<https://perma.cc/E3EE-2BU4>] (“At the state-and-local level, the right to bargain collectively, the scope of collective bargaining, and the right to strike in connection with union activity is determined by a combination of state laws and case law. The interpretations of the relevant laws and court interpretations, and the frequent silences of both legislators and the courts with respect to specific types of public-sector workers in particular legal jurisdictions, makes it difficult to summarize the legal state of play across 50 states, Washington, DC, and thousands of local jurisdictions.”); *Public-Sector Union Policy in the United States, 2018–2023*, BALLOTPEdia, https://ballotpedia.org/Public-sector_union_policy_in_the_United_States,_2018-2023 [<https://perma.cc/388K-92JZ>] (“Moreover, according to the Economic Policy Institute (EPI), ‘Classifying states by collective bargaining rights is not as straightforward as it might seem. Many states either lack laws on public-sector bargaining or rely on vague statutes and case law that can be interpreted in different ways. . . . In many states, there is no statewide right to collective bargaining, but local jurisdictions may allow or even require it.’”).

The Canadian hockey team example cited above may not be completely apt.²²⁸ First, though there are seven Canadian hockey teams, they are still in the minority of NHL teams.²²⁹ By contrast, in some college football and basketball conferences, like the SEC, public schools constitute the vast majority.²³⁰ Second, while the NLRA allows extraterritorial jurisdiction in certain circumstances, the NLRA prohibits NLRB public sector jurisdiction,²³¹ making public sector deference to the NLRB unlikely in any express way. The idea there would be that public schools beyond the NLRB's jurisdiction would voluntarily follow what the NLRB dictates for private colleges and universities, as happens with the Canadian hockey teams. Also, these scenarios all assume that the NCAA and conferences would agree to negotiate same or similar collective bargaining rules, especially with respect to NIL or transfer portal provisions, and that any union would agree to those. That perhaps seems far-fetched. Finally, the above-mentioned scenarios may seem, at first glance, extremely complicated and unlikely to work, especially given the history of employer, and even state, resistance to unionization. However, what happened with state NIL legislation is perhaps a good indicator of what could happen with college athlete unionization and collective bargaining. There, and perhaps unsurprisingly, a relatively comprehensive NIL law intended to protect student athlete rights was enacted by a progressive state: California.²³² Then, surprisingly, a similar law was passed within weeks by a conservative state: Florida.²³³ The state's conservative approach was quickly abandoned when it looked like its universities might suffer a competitive disadvantage in recruiting.²³⁴ Perhaps college athlete unionization of football and basketball players could unfold the same way.

B. *How It Can Happen*

Everyone should have a strong interest in knowing whether college football or basketball unionization and collective bargaining can work. Is it even feasible that a college football team union can negotiate successfully with whoever is deemed to be its employer for the benefit

228. See *supra* notes 190–214 and accompanying text.

229. See *id.*

230. See, e.g., *SEC Universities*, SE. CONF., <https://www.thesecon.com/sec-universities/> [<https://perma.cc/9PMJ-K454>].

231. See *Jurisdictional Standards*, *supra* note 4 (“The following employers are excluded from NLRB jurisdiction by statute or regulation: . . . Federal, state, and local governments, including public schools . . .”).

232. Fair Pay to Play Act, S.B. 26, 2021–22 Reg. Sess. (Cal. 2021); CAL. EDUC. CODE § 67456 (West 2021).

233. FLA. STAT. ANN. § 1006.74 (West 2023); see James Fielding & Phil Lu, *Changes to Florida's Name, Image, and Likeness Rules*, LITTLER (Apr. 12, 2023), <https://www.littler.com/publication-press/publication/changes-floridas-name-image-and-likeness-rules> [<https://perma.cc/Q8Y5-VJ7P>].

234. See Fielding & Lu, *supra* note 233.

of all involved? The best and perhaps only way to know for sure is to experiment with it initially, perhaps incrementally. Unionization starts with a union. Unions decide on whom they want to spend resources organizing. That typically starts with a worker or workers calling a union indicating an interest in organizing, often because of an issue in the workplace. In the *Northwestern* case, it started with concern over a Northwestern football player not receiving needed health care due to a football injury.²³⁵ What would a union want to do if it had a clean slate and had to choose where to start? The easiest unit to organize would be an individual university's football team. That would likely be the smallest appropriate unit. That means that the first of these should just be a single team. It's no coincidence that the two unionization efforts undertaken by unions so far have been of individual teams involving individual universities: Northwestern and Dartmouth.

Currently, two separate unions have initiated NLRB processes against single schools. First, the NCPA filed an unfair labor practice charge against USC for misclassifying employees as "student athlete" nonemployees and for maintaining unlawful rules in their handbook restricting employee conduct in various ways.²³⁶ The NLRB issued a complaint in the case in May 2023, essentially finding cause to allow the case to proceed to an Administrative Law Judge.²³⁷ The USC unfair labor practice case is a critical first step to organizing a union. The case will address key issues involving whether these colleges are joint employers with the Pac-12²³⁸ and the NCAA and whether the athletes involved are employees. Once this has been determined, a union can move forward with organizing leaving the NLRB's determination of the bargaining unit's definition as the only complicated remaining issue. Likewise, second, the SEIU recently filed a union election petition seeking to represent Dartmouth's basketball team.²³⁹ If ultimately successful, this effort would produce an isolated example of how unionization and collective bargaining under the NLRB's jurisdiction might work. The SEIU named only Dartmouth as the employer,²⁴⁰ so the NLRB will have to

235. See generally John Nocera & Ben Strauss, *Fate of the Union: How Northwestern Football Union Nearly Came to Be*, SPORTS ILLUSTRATED (Feb. 24, 2016), <https://www.si.com/college/2016/02/24/northwestern-union-case-book-indentured> [<https://perma.cc/3K5E-Y93A>].

236. See *supra* note 5 and accompanying text.

237. See *id.*; see also Steve Gorman, *U.S. Labor Board Region Sides with USC Athletes Seeking 'Employee' Designation*, REUTERS (Dec. 16, 2022, 12:47 PM), <https://www.reuters.com/world/us/us-labor-board-region-sides-with-usc-athletes-seeking-employee-designation-2022-12-16> [<https://perma.cc/3SNM-8AV9>].

238. See *supra* note 5 and accompanying text. USC is moving to the Big 10, so the complaint may need to be amended to substitute the Big 10 for the Pac-12.

239. Kyle Hightower, *Dartmouth College Basketball Players File Petition Seeking to Be Represented by Union*, AP NEWS (Sept. 14, 2023, 4:42 PM), <https://apnews.com/article/dartmouth-college-basketball-union-dd722c370fb2459d8850f06d29c73a57> [<https://perma.cc/QH4L-TU9X>].

240. *Id.*; see RC Petition, Trs. Dartmouth Coll., No. 01-RC-325633 (NLRB Sept. 13, 2023).

determine whether the Ivy League Conference and the NCAA are joint employers with Dartmouth or whether Dartmouth can go it alone and bargain over those items in their control. If the NLRB decides that the conference is a joint employer with Dartmouth, it may also find that the Ivy League Conference is the appropriate unit for bargaining. However, the NLRB may well, as in the *Northwestern* case, punt again, deciding only that a single team and a single university employer engaging in collective bargaining when many other teams and colleges are engaged in the collective enterprise of the sport is inappropriate and threatens labor stability. The SEIU will have to decide whether to try again filing a petition on behalf of the Dartmouth basketball players against Dartmouth, the Ivy League, and the NCAA as joint employers, or instead seek to organize basketball players at the other Ivy League schools and then file a petition for them and include the schools, the Ivy League, and the NCAA as joint employers.

Let's say that the NCPA does eventually move to organize USC's football team or that the SEIU is faced with having to organize all basketball players at Ivy League schools. An important initial step would be to seek a neutrality agreement with all employers, either the individual university, the conference, and the NCAA. A neutrality agreement is an agreement by employer(s) to stay "neutral" while the union works to organize the players.²⁴¹ Typical neutrality agreements have limited time spans, only lasting the time of a union organizing drive. With the short tenure of college athletes, a neutrality agreement might be limited to one year. The union would then seek authorization cards from players. Unions legally only need cards signed by 30% of bargaining unit members to file for an NLRB-conducted election,²⁴² but the union will probably try for 65% to 75% before filing to make sure they can win a majority at election time. However, many, if not most, neutrality agreements have a provision allowing for card check recognition, meaning that if the union presents authorization cards signed by a majority of players on a team, the employer will voluntarily recognize the union without the need for an election.²⁴³

Now, what about the public sector? Three states that have a substantial interest in college football also have progressive, collective bargaining-friendly public sector labor regimes—California, Oregon, and Washington.²⁴⁴ All of these jurisdictions allow public employees

241. See *supra* note 106 and accompanying text.

242. Brudney, *supra* note 106, at 845 n.116 (citing *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060, 1069–70 (1945)) (“[A] petition for election requires a showing of only 30% support.”).

243. The requisite number of authorization cards was presented by the union in the *Northwestern* case. There, an election was sought and conducted. See *NLRB Decision*, 362 N.L.R.B. 1350, 1350 (2015). However, the ballots were impounded and never counted as a result of the NLRB's final decision in the case. *Id.* at 1350 n.1.

244. See NEWS RELEASE, BUREAU OF LAB. STATS., U.S. DEP'T OF LAB., UNION MEMBERS—2023 (Jan. 23, 2024), <https://www.bls.gov/news.release/pdf/union2.pdf>

to engage in collective bargaining and to strike.²⁴⁵ As the history with NIL laws demonstrated, it would not be hard to imagine the legislatures in these states changing their laws to define college football players as employees for the purpose of unionizing and collectively bargaining under their laws. Remember, California was the first state to pass a NIL law favoring college athletes and challenging the NCAA's stranglehold on NIL rules.²⁴⁶ Accordingly, it was smart for the NCPA initially to also target UCLA. There's another reason too. Both USC and UCLA are based in Los Angeles, and the union will likely be able to more effectively organize two schools in the same city. This may be where it all starts.

V. CONCLUSION

In the coming year, many of the questions raised and discussed in this Article will be answered by either the NLRB, the courts, or both. With respect to the NLRB and college athlete unionization, the first cases involve, as many speculated, an NCAA Division I college football team (USC) and a college basketball team (Dartmouth). In the Dartmouth case, the union election petition names only Dartmouth College and not the NCAA or the Ivy League Conference as the employer.²⁴⁷ While the NLRB would be well within its rights to find an individual team and an individual college as an appropriate unit for bargaining, such a piecemeal approach is not likely to resolve many of the challenges faced by college sports after the U.S. Supreme Court's decision in *Alston*. The best hope for that lies in the unfair labor practice proceeding involving USC because, in that case, the union filed the charge against the NCAA, the Pacific-12 Conference, and USC, all as joint employers.²⁴⁸ As a result, the NLRB may wait to finally resolve the USC case before turning to the Dartmouth appeal.

The easiest path to large-scale unionization of college athletes lies in an NLRB finding that the NCAA or the NCAA and the athletic conference are joint employers who collectively control labor relations for

[<https://perma.cc/WV3A-H36L>] (tracking union membership by state where Washington, California, and Oregon are ranked third, fifth, and seventh, respectively).

245. See California Public Employees' Relations (PERB) Act, CAL. GOV'T CODE §§ 3540–3549.3 (West 1975); Oregon Public Employees' Collective Bargaining (PECBA) Act, OR. REV. STAT. §§ 243.650–243.782 (2021); Washington Public Employees' Collective Bargaining (PERC) Act, WASH. REV. CODE §§ 41.56.001–41.56.902 (2023). There are some narrow limits to strikes in these for certain groups of employees like essential workers, but these limits would likely not apply to athletes.

246. Colin Dwyer, *California Governor Signs Bill Allowing College Athletes to Profit from Endorsements*, NAT'L PUB. RADIO (Sept. 30, 2019, 11:13 AM), <https://www.npr.org/2019/09/30/765700141/california-governor-signs-bill-allowing-college-athletes-to-profit-from-endorsem> [<https://perma.cc/SW77-58A5>].

247. See RC Petition, Trs. Dartmouth Coll., No. 01-RC-325633 (NLRB Sept. 13, 2023).

248. See Complaint and Notice of Hearing at 5, Univ. of S. Cal., No. 31-CA-290326 (NLRB May 18, 2023).

their university and college members, which may happen in the USC matter. In that case, unionization could proceed within particular collegiate sports at the Division, conference, or multi-conference level. In this scenario, whether a team is at a public or private institution would not matter because the joint employer(s)—NCAA alone or NCAA and conference(s)—are private entities within the NLRB's jurisdiction. This scenario would be similar to the one that exists at the professional level in hockey and basketball where the NHL and MLB negotiate collective bargaining agreements with the union and on behalf of the teams in the league. While any disputes involving public colleges and universities could fall within the jurisdiction of individual state public sector labor authorities, those authorities may, similar to the Canadian labor authorities in Quebec and British Columbia during the professional hockey strikes and lockouts, adopt the views of the NLRB in making their own decisions or cite to NLRB rulings as persuasive authority in their own cases. This would be made easier and more likely if public sector unions and employers use a boilerplate type pattern agreement negotiated by the NCAA and conferences with private universities.

Should the NLRB find an individual college and team, like Dartmouth and the Dartmouth basketball team, to be an appropriate unit for bargaining, there will be a quick opportunity to see how collective bargaining at the level of college athletics would work. The number of topics negotiated would be limited because Dartmouth can only agree to items it has control over. However, it would be a real opportunity to see what players and colleges care about by monitoring the back-and-forth positions of the parties during negotiations. Dartmouth could later consent to joining the NCAA or the Ivy League Conference in bargaining, as part of a multi-employer association, should they so choose. It is hard to believe the NCAA would not have some curiosity about the outcome of negotiations at a smaller scale to determine whether more large-scale collective bargaining is feasible.

The ultimate hope for many, including this author, would be to see the NCAA and the NCAA Division I Power Five athletic conferences join in bargaining with a multi-conference union in individual revenue-generating sports like football and basketball. Only in that scenario would there seemingly be a chance to take control of currently unregulated and thorny issues like NIL rights and the transfer portal, in addition to other player concerns involving pay, health care, safety, and educational rights.