**The Path for Student Athletes’ Recognition as Employees**

**Under the National Labor Relations Act**

1. Introduction

 The National Collegiate Athletic Association (“NCAA”) was created over a century ago for the regulation of college sports and the protection of student athletes. However, as the landscape and beliefs of the country have shifted away from a purely amateur model of collegiate athletics, previous ideologies regarding student athletes and labor are no longer suitable for current times. The careful examination into the history of the NCAA and the previous failed efforts of reclassifying student athletes as employees under the National Labor Relations Act (“NLRA”) provides perspective as to how impactful current initiatives may be to the future of student athletes and the NCAA itself.

Currently, two avenues of action have emerged to attack the NCAA’s long-standing model of amateurism: legislative reform and judicial action. The former, which has garnered support in certain states such as California, has placed governmental pressure on the NCAA to evolve alongside the modern sentiment that student athletes should be receiving a share of their respective university’s athletic revenue. Even further, the federal government has interjected into the NCAA’s governance model, more specifically with new NCAA President Charlie Baker requesting that Congress assist in producing a centralized Name, Image, and Likeness (“NIL”) bill.

Unionization efforts for student athletes, which have seen a resurgence since the remarks of recently-appointed General Counsel Jennifer Abruzzo, is the second avenue that the National Labor Relations Board (“NLRB”) has utilized in recent months. After a unionization bid by the University of Northwestern Football team failed in 2015, Dartmouth men’s basketball is attempting to become the first ever collegiate athletic team to be recognized as employees under the umbrella of a union. The NLRB has also filed complaints on behalf of men’s and women’s basketball and football players of the Pac-12 Conference and the University of Southern California (“USC”) for their misclassification as student athletes and rather than employees.

While both efforts face winding paths, the possibility for success has never been greater. The introduction of student athletes’ ability to profit from their name, image, and likeness has created a shift in the public’s mind for the empowerment of athletes who make their colleges millions in annual revenue. Success in either effort, whether it be through legislative or judicial means, would ignite an unprecedented spark in collegiate athletics, one that would undermine the superiority of the NCAA and their current model of amateurism.

1. Background

 To fully grasp the magnitude in the current shift toward student athlete empowerment, it is necessary to begin with the origin of the NCAA. Long before athletics departments were lining their pockets with revenue from billion-dollar broadcast deals, the general public was fearful for the safety of student athletes.[[1]](#footnote-1) In 1904, during the early – and unregulated – years of college football, there were 18 deaths and 159 serious injuries in a singular football season. Making matters worse, colleges began to hire players who were not enrolled at their respective institutions to fill in the roster. The concern for player safety, coupled with non-existent and unenforceable standards, highlighted the unsustainability of the sport in its current form and drove the desire for organization.

* 1. The Origin of Organized Collegiate Sports and Early Years

President Theodore Roosevelt called for reform to football and urged the leading programs to convene in an effort to create a uniform set of rules. 13 colleges attended the first meeting, including Harvard, Princeton, Yale, and New York University, and by the end of 1905, the first version of the NCAA was created: the Intercollegiate Athletic Association of the United States (“IAAUS”). The IAAUS soon became the rule-making body of collegiate athletics and rebranded officially as the NCAA in 1910.

 The NCAA sharply grew after World War II and with it came an increase in institutional violations. The “Sanity Code” was adopted and its remnants parallel the principles that are at the forefront of reform today, such as financial aid, recruitment, and academic standards intended to ensure amateurism in college sports. In an effort to curb violations and enforce penalties against violating schools, the NCAA hired Walter Byers, the organization’s first Executive Director. Byers held the position for 36 years and created the Committee on Infractions, serving as the first Enforcement Officer of the NCAA.[[2]](#footnote-2) Byers also saw the first substantial revenue growth of the NCAA and its institutions through an agreement facilitating the live televising of football games. The first television deal was signed with NBC for $1.14 million dollars, which carefully restricted football broadcasts to ensure that in-person attendance was not drastically affected.[[3]](#footnote-3)

 Similar to the current landscape of collegiate athletics, the NCAA found themselves at a crossroads in the early 1970’s.[[4]](#footnote-4) As larger public schools invested heavily in their sports programs, smaller institutions struggled to keep pace. In 1973, the Association’s members voted to divide NCAA institutions into three separate divisions: Divisions I, II, and III. Each division held its own championships and created their own legislative bodies.

* 1. Limitations on NCAA Power

The NCAA enjoyed a relatively quiet half-decade until they entered an unprecedented partnership with ABC to televise a record-breaking 13 national games at the time.[[5]](#footnote-5) The agreement totaled $118 million dollars, pushing collegiate athletic revenue to new heights. However, as the NCAA profited, larger Division I programs began to question the Association’s unbridled power. The University of Oklahoma and the University of Georgia, along with other major college football programs, separately negotiated a broadcasting contract with NBC which would substantially increase the number of games televised and in turn provide greater revenue for the schools.[[6]](#footnote-6) The NCAA, since it did not allow schools to negotiate outside of the current ABC deal, challenged the NBC contract and announced disciplinary action for the schools involved. In the landmark decision of NCAA v. Oklahoma Board of Regents, the Supreme Court in 1984 determined the NCAA’s contract with ABC to be in violation of Section 1 of the Sherman Act. In limiting the number of broadcasted games, the Court found that the NCAA was attempting to artificially inflate the value of live tickets.

Although the ruling was grounded in antitrust law, Board of Regents had major implications on labor law and brought substantial change to the NCAA. Following the decision, universities and conferences became legally authorized to contract their own broadcasting deals to televise football games. Before Board of Regents, only one network had the rights to televise collegiate athletics, which has since ballooned to over 15 networks competing for broadcasting rights. Major conferences, such as the Big Ten, SEC, ACC, and PAC-12, even created their own television networks to broadcast their athletic competitions in addition to partnering with the major television players of ESPN, CBS, Fox, ABC, and NBC.[[7]](#footnote-7)

Although Board of Regents was viewed as a victory for universities and their student athletes, the aftermath of the decision is prevalent today.[[8]](#footnote-8) As schools seek more lucrative television contracts, the traditional composition of athletic conferences has been disturbed. For example, century-old conferences like the Pac-12 have been reduced to only two schools, as the other ten have departed to conferences with better broadcasting deals. Further, student athletes have been burdened with additional travel as conferences, which were historically comprised of institutions who shared geographical proximity, continue realignment with no regard to location. For instance, student athletes from Oregon, USC, UCLA, and Washington, all former Pac-12 institutions, will soon be required to travel thousands of miles for routine Big Ten matchups. Lastly, as larger, well-funded institutions continue to attract the majority of revenue, smaller schools and their student athletes continue to suffer at an alarming rate. The discrepancy between competition, resources, and money has never been greater, and is a challenge the NCAA currently faces.

* 1. Unionization Efforts

In response to the aforementioned hardships that student athletes have faced following

Board of Regents, and in an effort to improve the student athlete experience, some athletic programs have sought reform to the NCAA’s amateurism model through judicial action. More recently, this has taken the form of unionization. While graduate students and student research assistants have successfully obtained employee status in past rulings by the NLRB,[[9]](#footnote-9) student athletes had never challenged their employment status under the NLRA. In 2015, however, members of the Northwestern University football team attempted to alter the fabric of the NCAA by petitioning to unionize.[[10]](#footnote-10)

 The NLRB dismissed their petition, denying the football players’ claim that they should be viewed as university employees who are authorized to collectively bargain.[[11]](#footnote-11) Although the unanimous decision upheld the notion that student athletes are primarily students, the NLRB planted a seed that future petitions may be granted. In its decision, the NLRB conceded that Football Bowl Subdivision (“FBS”) football, in which Northwestern competed, “does resemble a professional sport in a number of relevant ways,” notably in the substantial revenue generated. However, the NLRB determined that it could not assert jurisdiction to determine whether the football players were statutory employees within the meaning of Section 2(3) of the NLRA – the section which defines the term “employee.” In its reasoning, the NLRB found that the potential impact on collegiate athletics by approving unionization would not have promoted “any degree of stability in labor relations.” The NLRB also took into account the fact that Northwestern was the only private institution in the Big Ten at the time of the petition, and all but 17 FBS programs were public institutions.

 Although Northwestern’s unionization efforts were halted some eight years ago, the framework was laid for future athletic programs to successfully petition the NLRB. This past September, all 15 members of the Dartmouth men’s basketball team unanimously signed and filed a petition to unionize under the Service Employees International Union (“SEIU”).[[12]](#footnote-12) Although the team faces various hurdles in being recognized as a bargaining unit, they possess some distinct advantages when compared to Northwestern’s football team. First, Dartmouth is a member of the Ivy League conference, which is comprised entirely of private institutions. The NLRB would be unable to rely on its prior justification of Northwestern being the only private institution in their respective conference at the time. Second, the collegiate athletic landscape has significantly shifted in the years following the Northwestern decision. The culmination of further Supreme Court intervention on the NCAA’s amateurism model, coupled with updated guidance from the NLRB’s General Counsel regarding student athletes’ employment status and further NLRB litigation regarding student athlete misclassification, has muddled the concept of whether student athletes are primarily students.

While Dartmouth prepared for the beginning of their basketball season, an NLRB hearing was held in early October for both the university and the union to argue the validity of the petition.[[13]](#footnote-13) The university’s attorneys argued that Dartmouth’s primary commitment is to the academic and personal growth of their students, especially considering their men’s basketball program does not generate profit for the school. Although an initial decision will be forthcoming in the next few months, a lengthy appeals process is likely to follow.

* 1. General Counsel Abruzzo Memo

As mentioned above, the resurgence of student athletes’ unionization efforts can be in

part attributed to the newly appointed General Counsel’s sentiment toward student athletes.[[14]](#footnote-14) In a memorandum written in September of 2021, General Counsel Jennifer Abruzzo, who was appointed by President Biden in July of 2021, issued updated guidance on whether student athletes are being incorrectly classified as non-employees. The memo strongly challenged the NCAA’s century-old amateurism model, and even declined to use the term “student athlete” “because the term was created to deprive those individuals of workplace protections.” Instead, she elected to refer to student athletes as “players at academic institutions.”

General Counsel Abruzzo’s memo relied on three key points to support her belief that student athletes should be classified as employees under the NLRA. First, Abruzzo noted that under Section 2(3) of the NLRA, FBS football players at private universities and “other similarly situated players at academic institutions” are employees because (1) “the athletes ... perform a service for the university and the NCAA, thereby generating tens of millions of dollars in profit”; (2) the athletes “[receive] significant compensation, including up to $76,000 per year, covering their tuition, fees, room, board, and books, and a stipend covering additional expenses such as travel and childcare”; and (3) “the NCAA controls the players’ terms and conditions of employment, including [the] maximum number of practice and competition hours, scholarship eligibility, limits on compensation, minimum grade point average, and restrictions on gifts and benefits players may accept.” Second, Abruzzo analyzed the Northwestern case, which she believes was wrongfully decided, and warned that in future appropriate cases she would “pursue an independent violation Section 8(a)(1) of the NLRA where an employer misclassifies [p]layers at [a]cademic [i]nstitutions as student athletes,” because such misclassification “has a chilling effect on Section 7 activity.” Lastly, Abruzzo acknowledged that since Northwestern was decided, “there have been significant developments in the law, NCAA regulations, and the societal landscape, that demonstrate that traditional notions that all [p]layers at [a]cademic [i]nstitutions are amateurs have changed.”

* 1. NCAA v. Alston, NIL, and Congressional Intervention

The “significant developments” that General Counsel Abruzzo was referring to took place just months before she released her memo. Following another landmark decision from the Supreme Court in June of 2021, the collegiate athletic and societal landscape shifted with the emergence of student athletes’ abilities to profit from their name, image, and likeness.[[15]](#footnote-15) In NCAA v. Alston, the Supreme Court addressed the validity of the NCAA’s rule limiting student athletes’ compensation to only the cost of attendance.[[16]](#footnote-16) The Court unanimously agreed that the NCAA was in violation of Section 1 of the Sherman Act by restricting other benefits tied to education, including postgraduate scholarships, vocational school scholarships, paid post-eligibility internships, payments for academic tutoring, and other similar expenses.[[17]](#footnote-17)

However, it was not the majority opinion that sent the collegiate athletic landscape into spiral, but rather the concurrence of Justice Brett Kavanaugh. He questioned the legality of the NCAA’s remaining rules, which restrict non-education related compensation, stating that “the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product.” Kavanaugh supported the idea of student athletes sharing in the revenue they generate for the NCAA and its institutions, and suggested that the NCAA could protect itself from “future judicial scrutiny” by engaging in collective bargaining with student athletes. However, he warned the NCAA that “[n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. ... The NCAA is not above the law.”

In response to Justice Kavanaugh’s chilling opinion, the NCAA quickly authorized student athletes to profit from their name, image, and likeness.[[18]](#footnote-18) The NCAA’s “interim policy” has remained in effect for over two years, allowing student athletes to engage in NIL activities so long as they are in accordance with their university’s state laws. The policy also requires student athletes to report their NIL engagements to their respective institutions. Although the interim NIL policy was designed to prohibit schools from recruiting student athletes by promising compensation through NIL deals, boosters and athletic departments have evaded the rule through workarounds. Only one major infraction has been enforced by the NCAA’s Committee on Infractions (“COI”) since the era of NIL began, a recruiting violation by the University of Miami where two perspective transfer student athletes, the highly popularized Cavinder twins, had “impermissible contact” with a Miami booster.[[19]](#footnote-19) The COI issued a three-game suspension for Miami’s women’s basketball coach Katie Meier, a fine of $5,000, and various recruiting restrictions for the upcoming season.

NIL’s power has not only been felt in the recruitment of high school athletes to colleges who boast thousands – and sometimes millions – of dollars of opportunity, but also in the transfer portal.[[20]](#footnote-20) Major universities and athletic programs have created NIL collectives where boosters, alumni, and benefactors donate money to a centralized NIL fund specifically dedicated for student athletes at their respective institutions. Student athletes attending schools with scarce NIL resources have increasingly felt the need to transfer in order to maximize their earning capacity. The transfer portal has been a major concern for the NCAA and is a driving force in their push toward federal NIL legislation. In Division I alone during 2022, over 20,000 student athletes entered the Transfer Portal, which was a 17% increase from 2021.[[21]](#footnote-21) This past October, newly-appointed President of the NCAA, Charlie Baker, testified before the Senate Judiciary Committee at a hearing titled, “Name, Image and Likeness, and the Future of College Sports,” to address these issues.[[22]](#footnote-22) Baker, the former governor of Massachusetts who was hired by the NCAA to navigate the various legislative battles ahead, has been an advocate for congressional intervention to create a centralized NIL bill. Although most members of the committee are in agreement that college athletics “are in need of reform,” congressional approval of a specific bill remains distant. Various bills have been introduced and cover a wide array of student athlete issues, including guaranteed scholarships, funding that allows student athletes to complete their undergraduate degrees after their eligibility expires, and student athlete healthcare for injuries suffered while playing for their schools. Among the bills gaining notable traction is one authored by Senator Ted Cruz, whose limited proposal replaces state NIL patchwork with a national standard, and another from Senators Richard Blumenthal and Cory Booker, who have proposed a medical trust fund to support long-term athlete healthcare and cover insurance for student athletes in addition to NIL regulation.

* 1. Ongoing Legislative and Judicial Action in California

In the midst of unionization and potential federal intervention, the amateurism model of

the NCAA is being challenged twofold in the state of California. This past June, the California Assembly approved California Assembly Bill 252, otherwise known as the College Athlete Protection Act (“CAP Act”), legislation which would allow student athletes to receive annual payments of up to $25,000 and even earn more by completing an undergraduate degree within 6 years of beginning their studies.[[23]](#footnote-23) Although many lawmakers fear that such a bill would cannibalize other non-revenue generating sports, bill sponsor Chris Holden noted that certain institutional funds would not be included in the revenue pool so that Olympic sports could still be properly funded. The bill would further prohibit Division I institutions from removing any sport or athletic scholarship funding, and schools would be subject to an annual, public evaluation of their Title IX compliance. In other words, both men’s and women’s student athletes would receive equal pay.

Although the CAP Act must still pass through California’s Senate and be signed into law by Governor Gavin Newsom, California has again shown that it is not afraid of being at the forefront of collegiate athletic reform.[[24]](#footnote-24) In 2019, California passed the first law that allowed student athletes to profit from their name, image, and likeness. Governor Newsom signed the bill into law before the NCAA authorized such activity and before the Supreme Court decided Alston. While some California legislators and institutions feared that their athletic programs would be punished by the NCAA, quite the opposite occurred. Instead, similar legislation in other states was introduced in order to remain competitive in attracting top student athletes to their institutions. A similar ripple may occur across the country if the CAP Act were to be signed into law, which would further challenge the NCAA’s amateurism model.

From the judicial front, the National College Players Association, with the support of the NLRB, recently filed a complaint against USC, the Pac-12 conference, and the NCAA.[[25]](#footnote-25) As General Counsel Abruzzo promised in her memorandum, she supports the claim and commented that “[t]he conduct of USC, the Pac-12 conference, and the NCAA, as joint employers, deprives their players of the statutory right to organize and join together to improve their working and playing conditions if they wish to do so.”[[26]](#footnote-26) Aside from the unraveling of the NCAA’s amateurism model, the NCAA and some athletic programs are also weary of an employment classification because they fear a path where student athletes may be fired for poor performance and less money is invested in non-profit generating sports.

While a hearing before an administrative law judge began earlier this month, the NCAA challenged the complaint on the grounds that the Northwestern case prevents the NLRB from relitigating the issue of jurisdiction.[[27]](#footnote-27) However, as General Counsel Abruzzo mentioned in her earlier memo, lack of jurisdiction likely will not be a valid argument because USC is not the only private institution in the Pac-12. Even when USC joins the Big Ten in 2024, they will not be the only private institution in that conference, either. Further, Abruzzo acknowledged in her memo that she would “[pursue] a joint employer theory of liability” and file “charges against an athletic conference or association even if some member schools are state institutions.”[[28]](#footnote-28) She has certainly followed through on those statements, and it is to be determined whether the National College Players Association will be successful in its efforts.

1. Analysis

Whether it be through judicial action or legislative reform, the NCAA will be eventually

forced to alter their amateurism model in an effort to survive. Between student athlete unionization efforts, NLRB complaints, pending California legislation, and potential congressional intervention, the current state of collegiate athletics feels bound to shift as soon as one of these proverbial “dominoes” fall. Whichever domino falls first will have major implications for the future of the NCAA and student athletes.

1. Optimal Scenario for the NCAA: Congressional Intervention

In an ideal scenario for the NCAA – and potentially for student athletes – Congress would proactively intervene and pass legislation before any other domino falls. With President Charlie Baker actively involved in the current Senate hearings, the NCAA would have direct input in the future law. Congress could then weigh the interests of the NCAA, the NLRB, student athletes, and other interested parties to find common ground. For example, student athletes may not be classified as employees under the NLRA but rather as a protected class that is still authorized to bargain with the NCAA and their respective institutions. Bargaining, like Justice Kavanaugh suggested in his Alston concurrence, would likely allow the NCAA to receive more lenient treatment under antitrust law because “student athletes, like professional athletes, would be able to negotiate for their fair share of benefits coming from those labor market restraints.”[[29]](#footnote-29) Additionally, the NLRB would likely be satisfied that student athletes could bargain for additional benefits while not worrying about being fired for poor performance.

Although Baker and the NCAA are ultimately seeking an antitrust exemption from Congress (which would allow the NCAA to continue classifying student athletes as amateurs), Major League Baseball (“MLB”) is the only other major sports entity who has successfully obtained it.[[30]](#footnote-30) Even then, the MLB’s exemption has faced extreme scrutiny in recent months, with the league being forced to settle a federal lawsuit earlier this month.[[31]](#footnote-31) It is uncertain whether Congress would be willing to enter the realm of an antitrust exemption for sports organizations, and even if it did, there will likely be lawsuits poised to reach the Supreme Court.

It is noteworthy to mention, however, that Congress is typically reactionary in its passing of legislation rather than being proactive. Legislators may feel content to watch how the other dominoes fall before engaging in any meaningful efforts to pass a bill. Some members of Congress, like Senator John Kennedy, have even gone so far as to warn Baker that he “might regret asking Congress to intervene here.”[[32]](#footnote-32)

1. Not-So-Detrimental Scenario for the NCAA: Unionization and NLRB Success

Assuming that Congress does not intervene, it would not be crippling to the NCAA if the

NLRB is successful in either its unionization efforts for Dartmouth’s men’s basketball team or misclassification efforts against the Pac-12 and USC. General Counsel Abruzzo and Justice Kavanaugh have sparked the trend toward bargaining for student athletes and it is likely to eventually happen, in spite of the NCAA’s best efforts. Although this scenario means that the NCAA would be forced to relinquish some of its revenue, it wouldn’t be as detrimental as some other dominoes falling first.

Practically speaking, unionization takes months to organize and negotiate a collective

bargaining agreement. Further, unionization efforts simply won’t catch on at every institution or within every athletic program. It is also uncertain how unionization and bargaining would look in the context of collegiate athletics. For example, if Dartmouth men’s basketball team is successful in their unionization efforts, the team will certainly undergo bargaining with the university. However, it is yet to be determined how schools would directly bargain with the NCAA. If unionization does grow amongst college athletics programs, the NCAA surely will not be able to bargain hundreds of collective bargaining agreements. It is likely that some coalition would need to be created to negotiate with the NCAA on behalf of a singular collective bargaining unit.

 Given that the needs of student athletes vary based on sport, competition level, location, and many other factors, the NCAA can argue the impracticability of this theoretical system. Additionally, the NCAA can question how the highly utilized transfer portal would affect unionization. For example, a system would have to exist where a transfer student athlete who is currently in a union would have to relinquish their current union membership in order to join another union at their new school. The transfer portal, which some already consider a “carousel,” would potentially turn into a “union carousel,” with student athletes trading affiliations every time they transfer.

 Another potential issue may arise if a unionized institution realigns to an athletic conference that has not previously supported a union. The question looms as to whether conferences would be authorized to refuse entry for an institution that does not decertify its union affiliation. These valid concerns give the NCAA more than enough reason to challenge unionization petitions. As the NCAA has fervently stood behind the Northwestern decision for years, the argument will continue to center around whether this potential system promotes “any degree of stability in labor relations.”[[33]](#footnote-33)

1. Detrimental Scenario for the NCAA: Passing of the CAP Act

The NCAA’s level of concern would reach its peak in the event that California Assembly Bill 252, the CAP Act, passes through the state Senate and is signed into law by Governor Newsom before Congress intervenes with a bill of its own. Similar to how California pioneered the NIL effort in 2019, the NCAA would be forced to judicially challenge the validity of the law. Given the Supreme Court’s sentiment in Alston, it is not so farfetched to imagine a harsh opinion delivered by Justice Kavanaugh where the NCAA would be forced to roll back all limitations on student athlete compensation. From there, states could follow California and enact their own versions of the CAP Act. The NCAA would again find themselves relatively powerless to regulate student athlete compensation and implore Congress to intervene.

1. Conclusion

Change is necessary in the collegiate athletic landscape. For over a century, the NCAA

has adapted its model to survive, and the next era of evolution is inevitable. A path where student athletes are classified under Section 2(3) of the NLRA as employees would cause unprecedented uncertainty that is only rivaled by the emergence of NIL. At its best, student athlete employees would be paid under a CAP Act model. Local unions would negotiate collective bargaining agreements with respective institutions, while a national coalition would represent all student athlete employees in bargaining with the NCAA. At its worst, the biggest athletic programs would grow weary of equal revenue splits under a Cap Act model. Understanding the earning power they possess, major programs would potentially break off from their respective universities and the NCAA, becoming their own standing entities and generating revenue solely for themselves. As a result, the NCAA’s revenue would be severely diminished. Unable to regulate revenue-generating sports such as football and basketball, the NCAA would be a resigned to smaller-scaled regulation of other Olympic sports.

This grim reality for the NCAA is not so farfetched. Reorganization has occurred in the past, most notably with the separation of collegiate athletics into three distinct divisions. There are also many instances of reorganization within college football specifically, such as the divide between FBS and the Football Championship Subdivision (“FCS”), the rebranding of the Bowl Championship Series (“BCS”) into the College Football Playoff (“CFP”), and now the expansion of the CFP to 12 teams.

In order to prevent such uncertainty, Congress must intervene and be the first domino to fall. Ideally, student athletes would not be considered employees under the NLRA, but rather be a protected class that is afforded bargaining ability. This would strike an appropriate balance between various interested parties. First, Congress would satisfy the Supreme Court’s sentiment in Alston regarding bargaining, without fully eliminating restrictions on non-education compensation. Second, Congress would partially adhere to the NLRB’s guidance on student athlete rights as the legislation could include inalienable rights that are unable to be bargained for, such as healthcare and insurance. While the NCAA would not be granted an antitrust exemption, President Baker would continue to offer direct input during Senate hearings and advocate for the best interest of the NCAA.

The proposed ideas will not solve every problem facing the NCAA, nor will they satisfy the needs of every student athlete. However, it is a path forward that offers survival for the NCAA and provides additional rights for student athletes.

1. *See* NCAA, *History*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> (detailing the origins of an organized college sports authority, calls for reform, and its growth over the decades). [↑](#footnote-ref-1)
2. *See* New York Times, *Enforcement History*, New York Times (Mar. 23, 1982), <https://www.nytimes.com/1982/03/23/sports/enforcement-history.html> (elaborating on Byers’ involvement in the creation of the infractions committee). [↑](#footnote-ref-2)
3. *See* Taylor Branch, *The Shame of College Sports*, The Atlantic (Oct 1, 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> (discussing the details of the first collegiate athletic broadcasting deal). [↑](#footnote-ref-3)
4. *See supra* note 1 (explaining how the difference in school budgets led to a split of the NCAA into three divisions). [↑](#footnote-ref-4)
5. *See* New York Times, *ABC Signs 4‐Year Pact With College Football*, New York Times (Jun. 12, 1977), <https://www.nytimes.com/1977/06/12/archives/abc-signs-4year-pact-with-college-football.html> (detailing the specific figures from the NCAA’s $118 million partnership with ABC). [↑](#footnote-ref-5)
6. *See* Oyez, *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, Oyez (Jun. 27, 1984), <https://www.oyez.org/cases/1983/83-271> (detailing the facts and opinion of the case). [↑](#footnote-ref-6)
7. *See* John Riker and Syd Large, *Current College Sports Television Contracts*, Business of College Sports (Aug. 28, 2023), <https://businessofcollegesports.com/current-college-sports-television-contracts/> (listing current broadcasting deals for major athletic conferences). [↑](#footnote-ref-7)
8. *See* David K. Li, *Meet the Man Who Thinks He 'Screwed Up' College Football with a Supreme Court Win*, NBC News (Aug. 26, 2023), <https://www.nbcnews.com/news/us-news/college-football-season-kicks-meet-man-says-screwed-ncaa-sport-rcna101266> (discussing the changes within college athletics following the Board of Regents decision). [↑](#footnote-ref-8)
9. *See* Brown University, 342 N.L.R.B. 483 (2004) (finding that graduate student assistants were not statutory employees within the meaning of Section 2(3) of the NLRA; Leland Stanford Junior University, 214 N.L.R.B. 621 (1974) (ruling that graduate student research assistants were not statutory employees within the meaning of Section 2(3) of the NLRA); The Trustees of Columbia University, 364 N.L.R.B. No. 90 (2016) (overruling Brown and Leland Stanford and holding that graduate and undergraduate teaching assistants are statutory employees within the meaning of Section 2(3) of the NLRA). [↑](#footnote-ref-9)
10. *See* Northwestern University & College Athletes Players Association, 362 N.L.R.B. No. 167 (2015) (ruling that the NLRB does not have the jurisdiction to determine whether Northwestern’s student athletes are employees). [↑](#footnote-ref-10)
11. *See* Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players’ Union Bid*, New York Times (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html> (explaining the implications of the decision for the NCAA’s amateurism model). [↑](#footnote-ref-11)
12. *See* Santul Nerkar, *Union Push by Dartmouth Athletes Is Distinct From Previous Failed Efforts*, New York Times (Sep. 15, 2023), <https://www.nytimes.com/2023/09/15/sports/ncaabasketball/union-dartmouth-basketball.html> (noting that because Dartmouth competes in the Ivy League, a conference with all private institutions, the NLRB cannot rely on their reasoning from the failed Northwestern petition). [↑](#footnote-ref-12)
13. *See* Jimmy Golen, *Dartmouth Tells NLRB that Basketball Players are Students - For Real - Not Employees*,

Associated Press (Oct. 5, 2023), <https://apnews.com/article/dartmouth-basketball-union-employees-47e3269d1af0e8164614bb644046eda0> (detailing that Dartmouth’s attorneys argued at the hearing that their student athletes should not be recognized as employees). [↑](#footnote-ref-13)
14. *See* Jennifer Abruzzo, *Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act*, Memorandum GC 21-08 (Sep. 29, 2021) (highlighting the General Counsel’s position that student athletes should be classified as employees under Section 2(3) of the NLRA); NLRB Office of Public Affairs, *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, NLRB (Sep. 29, 2021), <https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of> (detailing how General Counsel Abruzzo’s position has been bolstered by Supreme Court decisions such as NCAA v. Alston). [↑](#footnote-ref-14)
15. *See* National Collegiate Athletic Association v. Alston et al., 141 S. Ct. 2141 (2021) (ruling that the NCAA violated Section 1 of the Sherman Act by limiting education-related compensation for student athletes). [↑](#footnote-ref-15)
16. *See* *NCAA v. Alston*, 135 Harv. L. Rev. 471 (2021) (summarizing the Alston case and its future implications on the NCAA’s amateurism model). [↑](#footnote-ref-16)
17. *See supra* note 14 (detailing what restricted compensation the Supreme Court ruled was in violation of the Sherman Act). [↑](#footnote-ref-17)
18. *See*Veronica Roseborough and Caleigh Kelly, *Congress Looks to Rein in College Sports: What to Know About the Legislation*, The Hill (Aug. 5, 2023), <https://thehill.com/homenews/house/4133853-congress-looks-to-rein-in-college-sports-what-to-know-about-the-legislation/> (outlining the NCAA’s NIL interim policy and efforts to establish federal legislation). [↑](#footnote-ref-18)
19. *See* Errol Brown and CJ Donald, *NCAA Issues First NIL-Era Penalties for Recruiting Violations*, Haynes Boone (Mar. 3, 2023), <https://www.haynesboone.com/news/alerts/ncaa-issues-first-nil-era-penalties-for-recruiting-violations> (explaining the violations and subsequent punishment issued to the University of Miami in their recruitment of the Cavinder twins to their women’s basketball program). [↑](#footnote-ref-19)
20. *See* Jason Fuller, *Welcome to the Portal — Where College Athletes Can Risk It All for a Shot at Glory*, NPR (May 19, 2023), <https://www.npr.org/2023/05/19/1173134544/college-football-transfer-portal-ncaa-student-athlete> (highlighting the rise in student athletes entering the transfer portal in search of more lucrative NIL deals). [↑](#footnote-ref-20)
21. *See* Greg Johnson, *2022 Transfer Trends Released for Divisions I and II*, NCAA (Feb. 21, 2023), <https://www.ncaa.org/news/2023/2/21/media-center-2022-transfer-trends-released-for-divisions-i-and-ii.aspx> (listing trends in transfer data among NCAA student athletes between 2021 and 2022). [↑](#footnote-ref-21)
22. *See* Steve Berkowitz, *NIL Hearing Shows Desire to Pass Bill to Help NCAA. How it Gets There is Uncertain*, USA Today (Oct. 17, 2023), <https://www.usatoday.com/story/sports/college/2023/10/17/nil-hearing-congress-pass-ncaa-bill/71219709007/> (explaining the Senate Judiciary Committee hearing on NIL and the future of college sports and the various bills that have been proposed). [↑](#footnote-ref-22)
23. *See* Steve Berkowitz, *California Assembly Passes Bill Allowing College Athletes to be Paid by Schools*, USA Today (Jun. 1, 2023), <https://www.usatoday.com/story/sports/college/2023/06/01/college-athletes-revenue-sharing-bill-california-assembly/70258000007/> (detailing California’s College Athlete Protection Act). [↑](#footnote-ref-23)
24. *See* Richard Hewlett and Jessica Visser, *California Assembly Approves the College Athlete Protection Act*, Varnum Law (Jun. 21, 2023), <https://www.varnumlaw.com/insights/california-assembly-approves-the-college-athlete-protection-act/> (detailing California’s College Athlete Protection Act and how California was the first state to pass NIL legislation before Alston was decided). [↑](#footnote-ref-24)
25. *See* Ross Dellenger, *Significant NLRB Move Will Aid Pursuit of College Athletes Becoming Employees*, Sports Illustrated (Dec. 15, 2022), <https://www.si.com/college/2022/12/15/nlrb-college-athletes-employees-pursuit> (explaining how the NLRB’s Los Angeles region plans to pursue unfair labor practice charges against the named parties as joint employers of FBS football players and men’s and women’ basketball players). [↑](#footnote-ref-25)
26. *See* Dan Murphy, *National Labor Relations Board Files Complaint for Unfair Labor Practices vs. NCAA, Pac-12, USC*, ESPN (May 18, 2023), <https://www.espn.com/college-sports/story/_/id/37680838/national-labor-relations-complaint-ncaa-pac-12-usc-unfair-labor-practices> (highlighting the position of the NLRB and General Counsel Abruzzo). [↑](#footnote-ref-26)
27. *See* Steve Berkowitz, *NCAA, Pac-12, USC Cite First Amendment in Forceful Pushback Against Labor Complaint About Athletes*, USA Today (Jun. 1, 2023), <https://www.usatoday.com/story/sports/college/2023/06/01/ncaa-pac-12-usc-push-back-against-nlrb-employee-complaint/70280017007/> (detailing the counter arguments made by the NCAA, Pac-12, and USC against the NLRB). [↑](#footnote-ref-27)
28. *See supra* note 14 (noting that General Counsel Abruzzo followed through on her prior statements regarding future student athlete misclassification cases). [↑](#footnote-ref-28)
29. *See* *supra* note 16 (explaining how the use of bargaining may aid the NCAA in being viewed more favorably under antitrust law by federal courts). [↑](#footnote-ref-29)
30. *See* Federal Baseball Club of Baltimore, Inc. *v.* National League of Professional Baseball Clubs et al., 259 U.S. 200 (1922) (ruling that professional baseball was exempt from antitrust laws under the Sherman Act); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (upholding the Federal Baseball ruling that baseball was exempt from antitrust laws and Congress was best-suited to conclude otherwise). [↑](#footnote-ref-30)
31. *See* Ronald Blum, *MLB Settles Lawsuits from Minor League Teams, Avoids Possible Antitrust Challenge at Supreme Court*, Associated Press (Nov. 2, 2023), <https://apnews.com/article/mlb-antitrust-suit-settled-01ac3549586a7b98fce7361d00073062> (detailing how two minor league teams were challenging the MLB’s antitrust exemption in federal court and how settlement avoided the issue reaching the Supreme Court). [↑](#footnote-ref-31)
32. *See* *supra* note 22 (noting that some members of Congress are wary of intervening in the NCAA’s issues). [↑](#footnote-ref-32)
33. *See supra* note 10 (quoting the NLRB’s reasoning for denying Northwestern’s union petition). [↑](#footnote-ref-33)