

2023

## Change is Growth: The Future of The NCAA and College Athletics

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### Recommended Citation

Poulin, Conner (2023) "Change is Growth: The Future of The NCAA and College Athletics," *UNH Sports Law Review*. Vol. 2: Iss. 1, Article 6.

Available at: <https://scholars.unh.edu/unhslr/vol2/iss1/6>

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The University of New Hampshire Sports Law Review

Volume 2 | Number 1 | Article 6

8-19-2023

**CHANGE IS GROWTH: THE FUTURE OF  
THE NCAA AND COLLEGE ATHLETICS**

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## CHANGE IS GROWTH: THE FUTURE OF THE NCAA AND COLLEGE ATHLETICS

2 U.N.H. Sports L. Rev. 145 (2023)

**ABSTRACT.** The NCAA is unlike any other sports league. Throughout its existence, the NCAA has held true to its idea of amateurism to ensure that the world knows the difference between college and professional sports. The NCAA has spent years building up its reputation, changing and modifying itself to remain in control of college athletics. Over the years, the NCAA has lobbied and legally battled its way into strengthening its grasp on college athletics and the college athletes it represents.

Being on the winning side of a legal battle against the NCAA was once a dream, but now, it has become a reality. Ed O'Bannon spearheaded this change in 2014 and brought a lawsuit to the Ninth Circuit Court of Appeals. While this was not a true victory for O'Bannon, the challenge trailblazed the fight for college athlete rights. As cases continued to barrage the NCAA's doors, one finally broke through and began the siege inside the NCAA's walls. *Alston v. NCAA* instantly caused havoc within the NCAA. After its 9-0 loss in *Alston*, the NCAA eliminated its policies barring students from using their name, image, and likeness for monetary gain. College sports are entering a new era and the NCAA faces another challenger. Now, Trey Johnson is attempting to prove that all student-athletes are employees of their schools and the NCAA. What other changes lie in store for the NCAA and college athletics? Only time will tell.

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## INTRODUCTION

As the landscape of college athletics continues to change, the NCAA will have to choose whether it will adapt to new challenges or perish. Recently, the NCAA has battled to keep amateurism intact to prevent college athletes from being paid for their name, image, and likeness (NIL). The NCAA has fought these issues in the courts and the public eye. These suits have related to antitrust violations, whether college athletes are employees, and sports gambling.

While the NCAA continues to exercise complete control over college athletics, it has not been a favorable organization in the public eye, including former and current NCAA athletes. During a radio interview in 2016, Aaron Rodgers, a former college and current professional quarterback, noted, "The NCAA makes so much money off of their kids, and they put ridiculous, absolutely ridiculous restrictions on everything that they can do."<sup>1</sup> Back in 2018, Stan Van Gundy, the former NBA head coach for the Detroit Pistons, said, "The NCAA is one of the worst organizations, maybe the worst organization, in sports. They certainly do not care about the athlete."<sup>2</sup> Jay Williams, a former college basketball player at Duke, even compared the situation of college athletes to modern-day slavery. In response to a question regarding whether he believed college athletes would ever receive payments, in 2016 Williams said, "I see the NCAA holding off as long as possible to continue to make money off of its players. It's almost like modern-day slavery."<sup>3</sup>

The NCAA makes most of its money in two ways, as listed on its financial page: television and marketing rights for March Madness, the annual men's Division I college basketball tournament, and ticket sales for the other college athletics championships.<sup>4</sup> The NCAA gives away sixty percent of its revenue to Division I schools and conferences. In comparison, Division II only receives around 4.37%, and

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<sup>1</sup> Will Brinson, *Aaron Rodgers Blasts 'Absolutely Ridiculous' NCAA, Bowl Games Restrictions*, CBS SPORTS (Dec. 21, 2016, 5:37 PM), [cbssports.com/nfl/news/aaron-rodgers-blasts-absolutely-ridiculous-ncaa-bowl-games-restrictions/](https://www.cbssports.com/nfl/news/aaron-rodgers-blasts-absolutely-ridiculous-ncaa-bowl-games-restrictions/) [<https://perma.cc/WN8X-LSGQ>].

<sup>2</sup> Khadrice Rollins, *Stan Van Gundy on the NCAA: 'Maybe the Worst Organization in Sports'*, SPORTS ILLUSTRATED (Feb. 25, 2018), [si.com/nba/2018/02/25/stan-van-gundy-ncaa-maybe-worst-organization-sports-pistons](https://www.si.com/nba/2018/02/25/stan-van-gundy-ncaa-maybe-worst-organization-sports-pistons) [<https://perma.cc/Y5CR-2NCW>].

<sup>3</sup> Dana Scott, *Jay Williams Compares the Plight of College Athletes to 'Modern Day Slavery'*, COMPLEX SPORTS (Nov. 22, 2016), <https://www.complex.com/sports/2016/11/jay-williams-college-athletes-modern-day-slavery> [<https://perma.cc/9SAM-8SN8>].

<sup>4</sup> *Finances*, NCAA, <https://www.ncaa.org/sports/2021/5/4/finances.aspx> [<https://perma.cc/A9SR-LJ5B>] (last visited Apr. 17, 2023).

Division III receives 3.18%.<sup>5</sup> Furthermore, around 15% goes into funding Division I championships.<sup>6</sup> As made clear by the NCAA's financial statement from this past year, the NCAA has made well over \$1,000,000,000 in revenue each of the past two years, with around \$900,000,000 coming from television and marketing rights.<sup>7</sup> Most of this money comes from the television rights for March Madness, with the NCAA set to make around \$770,000,000 in each of the next two years.<sup>8</sup> These numbers grow starting in 2025 until the end of the NCAA's contract with CBS and Turner Sports, in 2032, where the NCAA will be making around \$1.1 billion in just March Madness broadcast rights.<sup>9</sup> With numbers like these, it is easy to see why college athletes want a piece of the action. Without college basketball players, the NCAA would lose a significant amount of money yearly. So, why should brands and the NCAA not have to pay college athletes? What is the difference between university-paid college students that usher at sports events and college athletes? Will college athletes ever unionize? Will the NCAA adapt to remain in control of college athletics, or, like a Dirk Nowitzki shot, will they fade away?<sup>10</sup>

## I. THE NCAA

### A. History

Those outside the sports world often view football as barbaric.<sup>11</sup> This idea was especially true in the early 1900s when there were hundreds of severe injuries and

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<sup>5</sup> See *id.*

<sup>6</sup> *Id.*

<sup>7</sup> National Collegiate Athletic Association, *Consolidated Financial Statements*, NCAA, [https://naaorg.s3.amazonaws.com/ncaa/finance/2021-22NCAAFIN\\_FinancialStatement.pdf](https://naaorg.s3.amazonaws.com/ncaa/finance/2021-22NCAAFIN_FinancialStatement.pdf) [<https://perma.cc/WPU6-9BAH>] (last visited Apr. 17, 2023).

<sup>8</sup> Eben Novy-Williams, *March Madness Daily: The NCAA's Billion-Dollar Cash Cow*, (Mar. 26, 2022, 9:00 AM), [sportico.com/leagues/college-sports/2022/march-madness-daily-the-ncaas-billion-dollar-cash-cow-1234668823/](https://sportico.com/leagues/college-sports/2022/march-madness-daily-the-ncaas-billion-dollar-cash-cow-1234668823/) [<https://perma.cc/7KGS-Q66A>].

<sup>9</sup> See *id.*

<sup>10</sup> Andy Bailey, *Dirk Nowitzki's One-Legged Fadeaway and 25 Most Unstoppable Moves in NBA History*, BLEACHER REPORT (June 13, 2011), <https://bleacherreport.com/articles/730928-dirk-nowitzkis-one-legged-fadeaway-and-25-most-unstoppable-moves-in-nba-history> [<https://perma.cc/E8FK-FMDB>].

<sup>11</sup> *History*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> [<https://perma.cc/C6W2-LCS5>] (last visited Apr. 17, 2023).

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multiple deaths on the field.<sup>12</sup> Outraged by these tragedies, the public urged for change or to dissolve the sport.<sup>13</sup> In October of 1905, President Theodore Roosevelt met with the then-powerhouse schools, such as Harvard and Yale, and told them to stop the rampant football-related injuries and deaths.<sup>14</sup> After the next season, the football-related injury and death rates remained unchanged.<sup>15</sup> This caused Henry M. MacCracken, the NYU chancellor at the time, to hold a meeting between thirteen different schools to reform the rules of football.<sup>16</sup> Later that year, sixty-two universities became the first members of the Interscholastic Athletic Association of the United States (IAAUS).<sup>17</sup> In 1910, the IAAUS changed its name to the National Collegiate Athletic Association (NCAA) and hosted its first collegiate championship in track and field a decade later.<sup>18</sup> The NCAA gained traction in the first part of the twentieth century adding in numerous National Collegiate Championships and growing its member school base.<sup>19</sup>

The NCAA has continuously changed and modified its rules to improve the conditions it provides to its athletes. The NCAA adopted the "Sanity Code" to oversee financial aid, recruiting, and academic standing.<sup>20</sup> The Sanity Code was meant to support the idea of amateurism by allowing schools to award scholarships to its athletes, but that was the only type of payment that college athletes could receive.<sup>21</sup> The NCAA soon decided it needed someone at the top to monitor its changes.<sup>22</sup> Walter Byers, the first NCAA president, took over in 1951 and continued his role for three and a half decades.<sup>23</sup> As president, Byers established a system to investigate NCAA

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<sup>12</sup> *See id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See History, NCAA, supra note 11.*

<sup>21</sup> Ken Pendleton, *The Sanity Code*, SPORTS CONFLICT INSTITUTE, <https://sportsconflict.org/the-sanity-code/> [<https://perma.cc/JP52-42BE>] (last visited Apr. 26, 2023).

<sup>22</sup> *See History, NCAA, supra note 11.*

<sup>23</sup> *See Id.*

violations and enforce penalties on the schools and coaches that broke the rules.<sup>24</sup> Byers also spent his time growing the NCAA brand by negotiating television deals that turned March Madness into the lucrative tournament it is today.<sup>25</sup> In 1952, the NCAA made its first March Madness deal with the National Broadcasting Company (NBC).<sup>26</sup> This was a one-year, \$1.14 million deal, and was for a restricted slate of games.<sup>27</sup> The revenue generated from this deal and March Madness gave the NCAA the ability to purchase its first headquarters located in Kansas City.<sup>28</sup>

In the early 1970s, the NCAA split sports into three divisions, later splitting Division I into subdivisions.<sup>29</sup> In the 1970s, the NCAA was forced to adopt Title IX, a federal law prohibiting sex discrimination in education, causing a rise in female college athletics.<sup>30</sup> In the 1980s, female college athletics continued to grow, and the NCAA added nearly thirty championships across all three divisions.<sup>31</sup> This finally brought female athletes into the NCAA and expanded the NCAA's viewership by adding more championships and an entire gender.

### **B. Structure**

The NCAA is a non-profit organization controlled by the NCAA's Board of Governors.<sup>32</sup> The Board of Governors consists of presidents and chancellors from each Division and two independent members.<sup>33</sup> The NCAA states that its legal governance

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<sup>24</sup> Karen Given, *Walter Byers: The Man Who Built The NCAA, Then Tried To Tear It Down*, WBUR (Oct. 13, 2017), <https://www.wbur.org/onlyagame/2017/10/13/walter-byers-ncaa> [https://perma.cc/YW7S-2YF6].

<sup>25</sup> *See id.*

<sup>26</sup> Bruce Weber, *Walter Byers, Ex-N.C.A.A. Leader Who Rued Corruption, Dies at 93*, The New York Times (May 27, 2015), <https://www.nytimes.com/2015/05/28/sports/walter-byers-ex-ncaa-leader-who-rued-corruption-dies-at-93.html> [https://perma.cc/AHX3-9YAP].

<sup>27</sup> *See id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See History, NCAA, supra* note 11.

<sup>30</sup> *See Given, supra* note 24.

<sup>31</sup> *See History, NCAA, supra* note 11.

<sup>32</sup> *See Finances, NCAA, supra* note 4.

<sup>33</sup> *See id.*



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structure consists of volunteers from member schools.<sup>34</sup> As a non-profit, the NCAA puts its money back into college athletics and distributes the money it makes as an organization back into the divisions and member schools, as stated above.<sup>35</sup> As a non-profit organization, the IRS excuses the NCAA from federal tax liability.<sup>36</sup> As an incorporated non-profit, the leaders of the organization bear no legal liability with respect to lawsuits, debts, and other liabilities of that nature.<sup>37</sup> Unlike for-profit organizations, non-profit organizations use the extra money they receive to further their missions.<sup>38</sup> The NCAA's mission involves being a member-led organization with the goal of "cultivating an environment that emphasizes academics, fairness, and well-being across college sports."<sup>39</sup> The NCAA's website further explains the terms academics, fairness, and well-being.<sup>40</sup> In relation to fairness, the NCAA explains that it is focused on improving the experience of each student-athlete.<sup>41</sup> It claims to do this by providing an environment that is "fair, inclusive and fulfilling" while also giving student-athletes a "voice in the decision-making process."<sup>42</sup>

Since the NCAA and its member institutions do not pay their college athletes, the salaries of head coaches have grown at an exponentially high rate.<sup>43</sup> The average salary of a head football coach at one of the top football universities grew by 87<sup>0</sup>% from

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<sup>34</sup> *Governance*, NCAA, <https://www.ncaa.org/sports/2021/2/9/governance.aspx> [https://perma.cc/GX84-Q2AK] (last visited Apr. 17, 2023).

<sup>35</sup> *See id.*

<sup>36</sup> Shoshanna Delventhal, *The Pros And Cons Of Being A Nonprofit*, INVESTOPEDIA (Dec. 26, 2022), <https://www.investopedia.com/articles/investing/110215/pros-and-cons-being-nonprofit.asp> [https://perma.cc/LAS3-7VGJ].

<sup>37</sup> *See id.*

<sup>38</sup> Dr. Kevin Blue, *Rising Expenses In College Athletics And The Non-Profit Paradox*, ATHLETIC DIRECTOR U, <https://athleticdirector.u.com/articles/kevin-blue-rising-expenses-in-college-athletics-and-the-non-profit-paradox/> [https://perma.cc/L6WW-A5NQ] (last visited May 1, 2023).

<sup>39</sup> *Mission and Priorities*, NCAA, <https://www.ncaa.org/sports/2021/6/28/mission-and-priorities.aspx> [https://perma.cc/24GV-93CG] (last visited, May 16, 2023).

<sup>40</sup> *See id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See Blue, supra* note 38.

2010-2017 and continues to grow.<sup>44</sup> This does not seem to promote the fairness portion of the NCAA's mission.

### **C. Contrast to Professional Sports Leagues**

#### **i. Amateurism**

Unlike the American professional sports leagues, the NCAA is an association. NCAA Bylaw 2.9 focuses on amateurism in college sports.<sup>45</sup> Bylaw 2.9 states that student-athletes are amateurs in their sport and that they should be motivated by the education they are receiving and the benefits that can be derived from their participation in the sport, including physical, mental, and social benefits.<sup>46</sup> Furthermore, the bylaw states that participation is a hobby and that these student-athletes "should be protected from exploitation by professional and commercial enterprises."<sup>47</sup> This language sounds like it is protecting against third-party exploitation of college athletes. However, the NCAA takes this principle and decides that "protecting" college athletes means barring them from making any money from "professional and commercial enterprises" like themselves.<sup>48</sup>

One can formally define amateurism as someone who engages in a sport as a pastime rather than as a job or an athlete who has never accepted any money given to them for playing their respective sport.<sup>49</sup> This is the main difference between the NCAA and the American professional sports leagues. Professional athletes like LeBron James receive payments from their respective teams as they are considered employees. On the other hand, amateur athletes, like C.J. Stroud, former quarterback at The Ohio State University, do not receive payments from the schools they play for or from the NCAA.<sup>50</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Bylaw 2.9*, NCAA, <https://web3.ncaa.org/lstdbi/bylaw?bylawId=2470&division=1&adopted=0> [<https://perma.cc/8JA9-9RAS>] (last visited Apr. 17, 2023).

<sup>46</sup> *See id.*

<sup>47</sup> *Id.*

<sup>48</sup> *See Bylaw 2.9*, *supra* note 45.

<sup>49</sup> *Amateurism*, THEFREEDICTIONARY, <https://www.thefreedictionary.com/amateurism> [<https://perma.cc/9Y8W-5AUC>] (last visited Feb. 24, 2023).

<sup>50</sup> *2022 Ohio State Buckeyes Football Roster*, ON3, <https://www.on3.com/college/ohio-state-buckeyes/football/2022/roster/> [<https://perma.cc/E9EY-AZGF>] (last visited Apr. 5, 2023).

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The NCAA has ingrained the idea of amateurism in college athletics since its inception. However, in the past decade, the NCAA has faced substantial public backlash due to its steadfast belief in amateurism.<sup>51</sup> In this century, the NCAA has defended its model of amateurism in *O'Bannon v. NCAA*, and, more recently, *Johnson v. NCAA*.<sup>52</sup>

Ed O'Bannon offered the first real challenge to the NCAA and its amateurism rules when he sued the NCAA and the Collegiate Licensing Company for exploiting his name, image, and likeness in a video game produced by EA Sports.<sup>53</sup> This video game allowed players to play college basketball virtually where the avatars the player used looked similar, if not the same, as the college athletes that played for their respective schools in real life.<sup>54</sup> O'Bannon sued the NCAA under Section 1 of the Sherman Antitrust Act, stating that the restrictions placed on college athletes to prevent them from proper compensation for their name, image, and likeness was an illegal restraint on their rights of publicity.<sup>55</sup> The Ninth Circuit ruled in favor of O'Bannon; however, this was still not a full-fledged win. While the Ninth Circuit increased the compensation cap to the full amount of tuition of the schools which the athletes attend, they stated that they would not allow college athletes to receive payments as that would defeat the idea of amateurism.<sup>56</sup> This caused the NCAA to adhere to the Ninth Circuit and increase the scholarship compensation cap. However, the NCAA won in the sense that it still did not have to compensate college athletes in other ways outside of scholarships.

The NCAA created the term "student-athlete" in the 1950s when battling in court to create a distinction between student-athletes and employees.<sup>57</sup> The term developed in a legal battle against the NCAA for the death benefits of an athlete who

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<sup>51</sup> Emily Adams, *NCAA Uses Amateurism to Exploit Athletes' Likeness*, THE ITHACAN (Apr. 29, 2021), <https://theithacan.org/columns/ncaa-uses-amateurism-to-exploit-athletes-likeness/> [https://perma.cc/PD63-KFPA].

<sup>52</sup> Michael McCann, *NCAA Faces Long Odds in Convincing Congress to Bail Out Amateurism*, YAHOO SPORTS (Jan. 19, 2023), <https://sports.yahoo.com/ncaa-faces-long-odds-convincing-105500594.html> [https://perma.cc/4NZY-QV78].

<sup>53</sup> *O'Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015).

<sup>54</sup> See *O'Bannon v. NCAA*, *supra* note 53.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1079.

<sup>57</sup> Molly Harry, *Abolish the Term "Student-Athlete"*, DIVERSE EDUCATION (July 29, 2020), <https://www.diverseeducation.com/sports/article/15107434/abolish-the-term-student-athlete> [https://perma.cc/YQK5-WK6S].

perished while playing football for an NCAA member school.<sup>58</sup> The NCAA argued that since the football player was a student-athlete, he could not be an employee and thus was not eligible for death benefits.<sup>59</sup> Later, Walter Byers, the president of the NCAA at the time of the case, admitted that the NCAA developed the term "student-athlete" to deny not only the death benefits to college athletes, but to deny future athletes workers' compensation benefits and to avoid pay-to-play.<sup>60</sup>

The term "pay-to-play" is defined as something that relates to an illegal, or unethical, act where payment is made in order to receive certain privileges or advantages, commonly in areas such as sports or politics.<sup>61</sup> This has been one of the main reasons for the NCAA's heavy pushback on NIL and paying college athletes in general. Its other pushback stems from wanting to keep its amateurism model intact.<sup>62</sup> It is well known that the NCAA does not think that the college athletes who play under its flag deserve to be paid more than the value they receive through their scholarships.<sup>63</sup> However, with all of the lawsuits that have been continuously brought over the last decade, it is more clear than ever that the NCAA does not want to reach into its own pocket to pay these athletes.<sup>64</sup> Naturally, the NCAA claims that it does not want its member institutions to have to pay its athletes because the NCAA worries that doing so would create a pay-to-play environment.<sup>65</sup> While there have always been thoughts that payments occurred under the table, with NIL now in place, there have already been reports of players choosing schools based on money over merit.<sup>66</sup>

Recently, a five-star recruit made the decision to attend the University of Georgia instead of The Ohio State University because the offers from the Ohio State

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<sup>58</sup> *See id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Pay-To-Play*, DICTIONARY.COM, <https://www.dictionary.com/browse/pay-to-play> [<https://perma.cc/279U-H5LG>] (last visited May 1, 2023).

<sup>62</sup> *See Adams, supra* note 51.

<sup>63</sup> *See id.*

<sup>64</sup> *Id.*

<sup>65</sup> Leonard Armate, *Pay For Play is Alive in College Sports and Free Agency Has Arrived*, FORBES (Dec. 16, 2022), <https://www.forbes.com/sites/leonardarmato/2022/12/16/pay-for-play-is-alive-in-college-sports-and-its-time-to-realize-that-free-agency-has-arrived/?sh=6c7bbf5b638e> [<https://perma.cc/UM5A-GLM2>].

<sup>66</sup> *See id.*

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boosters for various NIL appearances only amounted to \$750,000 instead of the \$1,800,000 offered by the Georgia boosters.<sup>67</sup> It seems unfair that an athlete could bring in millions of dollars to their school and the NCAA and not see a single cent. For example, sports economist David Berri said ex-Duke basketball star Zion Williamson was worth around \$5,000,000 to Duke.<sup>68</sup> However, there were no requirements for either Duke or the NCAA to give Williamson any more than the cost of tuition, which he used for one year before joining the NBA.<sup>69</sup> While some collegiate athletes are of a similar caliber to professional athletes, the NCAA has done as much as possible to ensure a substantial difference between amateur and professional sports.

### *ii. Structure*

There are numerous differences between how the NCAA and professional sports leagues conduct themselves. The NCAA is an association which possesses authority over its numerous member schools across three divisions.<sup>70</sup> In contrast, the NFL, NBA, and other professional sports leagues are essentially franchises.<sup>71</sup> A franchise occurs when a larger party grants a smaller party the right to conduct a certain business under the larger party's umbrella.<sup>72</sup>

With the NFL operating in this way, people like Robert Kraft, the owner of the New England Patriots, are simply franchise owners, similar to a McDonald's franchise owner.<sup>73</sup> Kraft hires coaches to help run his team, while the McDonald's franchise owner hires a manager to help run the restaurant.<sup>74</sup> However, unlike the

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<sup>67</sup> *Id.*

<sup>68</sup> Kurt Streeter, *Zion Williamson's Year in College Was Worth More Than He Got*, NY TIMES (May 7, 2021), <https://www.nytimes.com/2021/05/07/sports/ncaabasketball/zion-williamson-adidas-lawsuit.html> [<https://perma.cc/7498-7HWR>].

<sup>69</sup> *See id.*

<sup>70</sup> *See Governance, NCAA, supra* note 34.

<sup>71</sup> *It's True: NFL Teams Really Are Franchises*, BUSINESS OPPORTUNITIES (Oct. 20, 2013), <https://www.business-opportunities.biz/2013/10/20/nfl-teams-are-franchises-too/> [<https://perma.cc/TU83-44ZG>].

<sup>72</sup> *Franchise*, THE LAW DICTIONARY, <https://thelawdictionary.org/franchise/> [<https://perma.cc/9FM8-5MR8>] (last visited May 1, 2023).

<sup>73</sup> *See It's True, supra* note 71.

<sup>74</sup> *See It's True, supra* note 71.

New England Patriots as a franchise of the NFL, a member university could leave the NCAA whenever it likes.<sup>75</sup>

Another difference between the NCAA and professional sports leagues is that the NCAA is a non-profit organization.<sup>76</sup> A non-profit organization, by definition, does not generate any private financial gains and, instead, uses its excess money to help certain people or entities as stated in its mission.<sup>77</sup> A non-profit organization qualifies for certain tax exemptions because its mission is for a public benefit.<sup>78</sup> Non-profits are also not allowed to distribute any profits for any purpose outside of bettering the organization.<sup>79</sup> In contrast, leagues like the MLB and the NBA are for-profit organizations.<sup>80</sup> As a for-profit organization, leagues like the NBA aim to generate revenue and make a profit.<sup>81</sup> Pro sports leagues can be non-profit organizations; however, the NBA has always been a for-profit organization, and the MLB and NFL gave up their non-profit statuses in 2007 and 2015, respectively.<sup>82,83</sup> While there are numerous differences between the NCAA and professional sports leagues, these are the essential differences worth noting when attempting to predict how the NCAA may change over the next decade.

## II. NAME, IMAGE, AND LIKENESS (NIL)

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<sup>75</sup> *Id.*

<sup>76</sup> *See Finances, NCAA, supra* note 4.

<sup>77</sup> *Nonprofit*, THE LAW DICTIONARY, <https://thelawdictionary.org/nonprofit/> [<https://perma.cc/FYY3-GUPC>] (last visited May 1, 2023).

<sup>78</sup> Emily Heaslip, *Nonprofit vs. Not-for-Profit vs. For-Profit: What's the Difference?*, U.S. CHAMBER OF CONGRESS (Feb. 6, 2023), <https://www.uschamber.com/co/start/strategy/nonprofit-vs-not-for-profit-vs-for-profit> [<https://perma.cc/C6BX-LGX2>].

<sup>79</sup> *See id.*

<sup>80</sup> Susanna Kim, *Renewed Spotlight on Why the National Football League Is a Nonprofit Group*, ABC NEWS (Sept. 17, 2014, 9:13 AM), <https://abcnews.go.com/Business/renewed-spotlight-nfl-nonprofit-tax-status/story?id=25535798> [<https://perma.cc/F9TQ-EH5J>].

<sup>81</sup> *For-Profit Corporation Definition*, ACCOUNTINGTOOLS (July 7, 2022), <https://www.accountingtools.com/articles/for-profit-organization> [<https://perma.cc/AT6H-KCLN>].

<sup>82</sup> *See Kim, supra* note 80.

<sup>83</sup> Justin L. Heather, *NFL Gives Up Tax-Exempt Status*, AMERICAN BAR ASSOCIATION (Apr. 30, 2015), <https://www.americanbar.org/groups/litigation/committees/young-advocates/practice/2015/nfl-gives-up-tax-exempt-status/> [<https://perma.cc/P89H-UVYW>].

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### A. *What is NIL?*

NIL stems from the right of publicity.<sup>84</sup> Each state has its own right of publicity which allows a person to control the use and commercialization of their name, image, likeness, and other recognizable parts of a person's persona.<sup>85</sup> Thus, each state has had to pass its own NIL bills to allow athletes to capitalize on this recent change. NIL stands for Name, Image, and Likeness. Essentially, NIL allows people to monetize themselves via their names, likenesses, sounds, catchphrases, and the like.<sup>86</sup>

"Pigs get fed, hogs get slaughtered," said former Ohio State basketball player Mark Titus when speaking about the NCAA.<sup>87</sup> Titus continued by saying, "The reason it became a problem is because coaches went from making \$1 million a year to making \$8 million. And there's a certain point that the general public started seeing how many people are getting not just rich, but like filthy rich, like generational wealth, while the athletes are getting punished for getting a free sandwich."<sup>88</sup> This public push is one of the reasons that the NCAA adopted NIL rules in the first place, with some help from the United States Supreme Court. Now, college athletes may profit from their NIL as a result from *Alston*.

In *NCAA v. Alston* (2014), a group of Division I athletes sued the NCAA in the Northern District of California for violating the Sherman Antitrust Act.<sup>89</sup> Initially, the Northern District of California granted a permanent injunction and ordered the NCAA to amend its rules to allow more leeway regarding financial compensation for college athletes.<sup>90</sup> Naturally, the NCAA appealed; the Ninth Circuit affirmed, and so did the U.S. Supreme Court.<sup>91</sup> The Supreme Court ruled 9-0 against the NCAA, and Justice

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<sup>84</sup> *Publicity*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/publicity> [<https://perma.cc/9B6H-X9KX>] (last visited Feb. 26, 2023).

<sup>85</sup> *See id.*

<sup>86</sup> *Id.*

<sup>87</sup> Seth Sommerfeld, *How New NIL Rules for NCAA Sports Are Finally Letting Inland Northwest Collegiate Stars Cash In*, INLANDER (Jan. 12, 2023), <https://www.inlander.com/spokane/how-new-nil-rules-for-ncaa-sports-are-finally-letting-inland-northwest-collegiate-stars-cash-in/Content?oid=25264551> [<https://perma.cc/WQE2-ZNKK>].

<sup>88</sup> *See Sommerfeld, supra note, 87.*

<sup>89</sup> Cate Charron, *Everything We Know About NIL Law & Policy (So Far)*, (Feb. 22, 2023), SPLC, <https://splc.org/2023/02/everything-we-know-about-nil-law-policy-so-far/> [<https://perma.cc/3SHY-5VD7>].

<sup>90</sup> *See id.*

<sup>91</sup> *Alston v. NCAA*, 141 U.S. 2141 (2021).

Kavanaugh stated in his concurring opinion that he believes the NCAA and the member colleges not paying student-athletes is "highly questionable..."<sup>92</sup>

Alston's argument was that the NCAA unreasonably restrained trade which violated the Sherman Antitrust Act.<sup>93</sup> The district court applied a full rule-of-reason analysis.<sup>94</sup> The rule-of-reason is a judicial doctrine derived from antitrust law that a court uses to evaluate if a practice is an unreasonable restraint of trade.<sup>95</sup> After review, the District Court, The Ninth Circuit Court of Appeals, and the Supreme Court all agreed that the NCAA could adopt rules that were less restrictive and still promote collegiate athletics appropriately while still implementing the idea of amateurism successfully.<sup>96</sup>

In *Alston*, the NCAA relied on the idea of amateurism to support its campaign to prevent both itself and other entities from paying college athletes.<sup>97</sup> In short, this change allows people, companies, and other third parties outside of an athlete's university to pay them for their name, image, and likeness. Those athletes, however, are still not allowed to receive any compensation from the schools where they play.<sup>98</sup> College athletes may now accept payments for endorsements, autographs, and any way they can think of to monetize themselves, but college coaches may not pay athletes to play at their school.<sup>99</sup>

On June 30, 2021, all three NCAA divisions adopted a temporary uniform policy that suspended the current NCAA rules banning college athletes from making money off of their name, image, or likeness until Congress enacts a federal policy.<sup>100</sup> This decision happened a few weeks after the U.S. Supreme Court ruled that the NCAA

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<sup>92</sup> *Id.*; *Alston v. NCAA*, 141 U.S. 2141, 2168 (2021) (Kavanaugh, J., concurring).

<sup>93</sup> *Alston*, *supra* note 91 at 2147.

<sup>94</sup> *Id.* at 2151.

<sup>95</sup> *Rule of Reason*, THE LAW DICTIONARY, <https://thelawdictionary.org/rule-of-reason/> [<https://perma.cc/P9BD-N42A>] (last visited May 1, 2023).

<sup>96</sup> *See Alston*, *supra* note 93.

<sup>97</sup> *See Publicity*, *supra* note 84.

<sup>98</sup> *See id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Name, Image and Likeness*, NCAA, <https://www.ncaa.org/sports/2021/2/8/about-taking-action.aspx> [<https://perma.cc/22Z3-4G97>].



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could not stop colleges from making education-related payments to its athletes.<sup>101</sup> Justice Brett Kavanaugh added in his concurring opinion that he believes that "[t]he NCAA's business model would be flatly illegal in almost any other industry in America."<sup>102</sup>

### *B. NIL's Effect on the NCAA*

The floodgates have opened. Now, people and entities can commercially compensate players for who they are, something that schools and the NCAA have been exploiting for years. Schools like Alabama are beginning to learn that money, indeed, can talk and can be a significant advantage when it comes to recruiting. Earlier this year, Alabama announced that it is building a facility specifically for NIL activities, and they are calling it "The Advantage Center."<sup>103</sup> The center will include staff to help student-athletes with NIL opportunities, and it will be "a location to showcase successful local and national NIL relationships."<sup>104</sup>

NIL has also started shifting players' mindsets to stay in college for one more year to improve their chances of being drafted higher. These players have this opportunity because NIL has diminished the financial pressures for many collegiate athletes. For example, there was speculation that Ohio State's quarterback, C.J. Stroud, might have stayed in college for another year despite likely being a top-ten NFL draft pick. If a team were to select Stroud as the tenth pick or earlier in the NFL draft, Stroud could expect to secure somewhere between twelve and twenty-four million dollars as a signing bonus, but there were still whispers that he might stay due to him receiving multiple lucrative NIL deals.<sup>105</sup> Five years ago, there was no chance a player of Stroud's caliber would remain in school, but these recent changes have quickly changed this easy decision into a slightly more difficult one. Stroud's projected NIL value last season

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<sup>101</sup> Joseph Rios, *What Is NIL in College Sports? The NCAA Rules Explained.*, BEST COLLEGES (Jun. 30, 2022), <https://www.bestcolleges.com/news/analysis/what-is-nil-in-college-sports/> [https://perma.cc/SR2A-KD3N].

<sup>102</sup> See *Alston*, *supra* note 91 at 2167.

<sup>103</sup> Andy Wittry, *Alabama Announces Plans for NIL Hub Called The Advantage Center*, ON3 (Jan. 24, 2023), <https://www.on3.com/nil/news/alabama-crimson-tide-nil-deals-collective-name-image-likeness-learfield-the-advantage-center/> [https://perma.cc/GX29-NH5B].

<sup>104</sup> See *id.*

<sup>105</sup> Mike Renner (@PFF\_Mike), TWITTER (Jan. 13, 2023, 4:20 PM), [https://twitter.com/PFF\\_Mike/status/1614009439626862592?ref\\_src=twsrc%5Etfw](https://twitter.com/PFF_Mike/status/1614009439626862592?ref_src=twsrc%5Etfw) [https://perma.cc/TB52-6S6K].

was just shy of \$3,000,000 dollars.<sup>106</sup> Also, players like Arch Manning and Bronny James, both currently have multi-million dollar NIL valuations while still in high school.<sup>107</sup> These numbers will likely continue to climb as more people and companies become more familiar and comfortable with the idea of NIL, especially through college boosters who can influence college recruiting.<sup>108</sup>

To understand NIL collectives, one must first understand what a booster is. The NCAA defines a booster as someone, or a business entity, that promotes a school's athletics program by monetary means.<sup>109</sup> Often times, university boosters spearhead NIL collectives by making one-time or subscription-based payments to the collective, which then go to the athletes they represent.<sup>110</sup> While a school still cannot pay its athletes, many of these collectives are now part of the recruiting process. Boosters used to operate only in the shadows or under the table, but thanks to the new NIL rules, boosters for their respective schools can now work by way of NIL collectives. One year after the NCAA implemented its new NIL rules, NCAA member schools created over 100 collectives and began advocating and creating deals for their school's athletes.<sup>111</sup> These NIL collectives are entirely independent of a university and typically only represent athletes from one specific school.<sup>112</sup> In a survey completed by Lead1, 90% of athletic directors stated a concern that NIL collectives would improperly induce athletes throughout the recruiting process.<sup>113</sup> These athletic directors are concerned that boosters and NIL collectives will use money to sway athletes to choose

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<sup>106</sup> CJ Stroud, ON3, <https://www.on3.com/db/cj-stroud-23666/nil/> [https://perma.cc/F5MK-XW6S] (last visited Feb. 26, 2023).

<sup>107</sup> On3 NIL 100, ON3, <https://www.on3.com/nil/rankings/player/nil-100/> [https://perma.cc/6FJU-YXCL] (last visited Feb. 26, 2023).

<sup>108</sup> Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting> [https://perma.cc/VTU5-AFDY].

<sup>109</sup> See *id.*

<sup>110</sup> *Id.*

<sup>111</sup> Pete Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3 (Jul. 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/> [https://perma.cc/32EU-Y74B].

<sup>112</sup> See *id.*

<sup>113</sup> Lead1 Association, *LEAD1 Survey Reveals 90% of FBS Athletic Directors Polled Are Concerned NIL Used as Improper Recruiting Tool*, LEAD1 ASSOCIATION (May 4, 2022), <https://lead1association.com/lead1-survey-reveals-90-of-fbs-athletic-directors-polled-are-concerned-nil-used-as-improper-recruiting-tool/> [https://perma.cc/RUP6-QZ4L].

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one school over another thus creating a system where the rich get richer and the gap between the top teams and the next tier grows exponentially.<sup>114</sup>

These are no longer just concerns, as we have seen over the past two years. On3 completed a survey of eighty-five of the top-200 2023 high school football recruits.<sup>115</sup> The goal was to receive unfiltered answers from them on the impact of NIL deals and collectives.<sup>116</sup> When asked how important NIL deals were in their recruiting process, 57% ranked NIL as a five out of ten or higher, with around 15% giving NIL deals a seven and nearly 11% giving it an eight.<sup>117</sup> Furthermore, 30% of the surveyed athletes said they would consider attending a school offering a better NIL deal than a perfect academic or athletic fit.<sup>118</sup> These two statistics prove that NIL deals and the collectives that offer them already have a prominent role in college recruiting. James Franklin, the head coach of Penn State Football, suggested that college coaches cannot compete with large NIL deals.<sup>119</sup> Franklin said, "It's such a factor now you could do everything right... but you can lose a guy because of the NIL opportunities."<sup>120</sup> As NIL is still in its infancy, there is still much we do not know about how it will continue to shape college athletics.

### III. ARE "STUDENT-ATHLETES" EMPLOYEES OF THE NCAA AND THEIR SCHOOLS?

The NCAA has fought off challengers to its amateurism model for decades, and was batting a thousand (1.000) until *O'Bannon* stepped on the mound, and *Alston* later came in as a reliever. After the Supreme Court's unanimous ruling in *Alston*, college athletes were hopeful this would be a turning point and lead them into a new era of collegiate sports. However, now that third parties can finally pay student-

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<sup>114</sup> See *LEAD1 Survey*, *supra* note 113.

<sup>115</sup> Jeremy Crabtree, *On3 Exclusive: Top Recruits Open up About NIL's Influence*, ON3 (July 26, 2022), <https://www.on3.com/nil/news/on3-exclusive-survey-top-recruits-open-up-about-nils-influence/> [<https://perma.cc/D6P5-S73A>].

<sup>116</sup> See *id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Jeremy Crabtree, *Does NIL Trump Perfect Recruiting Pitch? Coaches Across Country Weigh in*, ON3 (May 6, 2022), <https://www.on3.com/nil/news/does-nil-trump-perfect-recruiting-pitch-coaches-across-country-weigh-in/> [<https://perma.cc/BU99-B43A>].

<sup>120</sup> See *id.*

athletes, some students are asking the world to view them as athletes *and* employees. The NCAA wishes to put an end to this idea as quickly as possible and ensure that its core principle of amateurism remains intact.

The Seventh and the Ninth Circuits have both formally decided these athletes are not simultaneously athletes and employees through their decisions in *Berger v. NCAA* and *Dawson v. NCAA*, respectively.<sup>121, 122</sup> In *Berger*, two former women's track and field athletes from the University of Pennsylvania sued the NCAA claiming that they, and all student-athletes, were employees under the Fair Labor Standards Act (FLSA).<sup>123</sup> The Seventh Circuit disagreed with the athletes, stating that the tradition of amateurism in college athletics created the economic relationship between athletes and their schools and hinged its decision on the fact that these athletes were amateurs and should not be paid.<sup>124</sup> Furthermore, the Court believed that the athletic activities the athletes participated in did not qualify as "work" under the FLSA.<sup>125</sup> Once again, the NCAA won by means of using the only argument they have – amateurism.<sup>126</sup> Similarly, in *Dawson*, a former football player at the University of Southern California brought an action against the NCAA and the PAC-12 Conference for violating the FLSA and the California Labor Code.<sup>127</sup> The Ninth Circuit held that Dawson did not have standing to bring the suit because, as a student-athlete, he was not an employee of the NCAA or the Pac-12 Conference under the definition of "employee" in U.S.C.S. § 203 of the FLSA.<sup>128</sup> The Ninth circuit also stated that Dawson did not have standing as an employee under the meaning in Section 3352 of the California Labor Code.<sup>129</sup> Accordingly, the Court dismissed this case, and the NCAA's amateurism argument chalked up another win.<sup>130</sup>

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<sup>121</sup> *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 288 (7<sup>th</sup> Cir. 2016).

<sup>122</sup> *Dawson v. Nat'l Collegiate Athletic Ass'n*, 932 F.3d 905, 907 (9<sup>th</sup> Cir. 2019).

<sup>123</sup> *Berger*, *supra* note 121.

<sup>124</sup> *Id.* at 291.

<sup>125</sup> *Id.* at 293.

<sup>126</sup> *Id.*

<sup>127</sup> *Dawson*, *supra* note 122.

<sup>128</sup> *Id.* at 908-09.

<sup>129</sup> *Dawson*, *supra* note 122 at 912-13.

<sup>130</sup> *Id.* at 913.

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Justice Kavanaugh had some things to say regarding athletes as employees in his concurring opinion in *Alston v. NCAA*, countering the decisions of the Seventh and Ninth Circuit courts. Justice Kavanaugh began his concurrence by stating that the Court's course correction of the NCAA is "important and overdue."<sup>131</sup> Justice Kavanaugh continues by expressing three major points worth discussing from the majority opinion.<sup>132</sup> He begins by stating that while the Court does not discuss the NCAA's other compensation rules, the majority opinion establishes how those other rules should be analyzed.<sup>133</sup> The majority opinion states that the *Board of Regents* case no longer influences the current rules and that the rules should be analyzed under ordinary "rule of reason" scrutiny.<sup>134</sup> Furthermore, Justice Kavanaugh voices his doubt that the NCAA's other compensation rules may not be able to pass this form of scrutiny.<sup>135</sup> The NCAA admitted its market control over student-athletes and that the current compensation rules undervalue student-athlete labor.<sup>136</sup> Additionally, Justice Kavanaugh asserts that the NCAA's amateurism argument is "circular and unpersuasive" and compared the situation to that of various other industries.<sup>137</sup> The comparisons led to statements such as it being illegal for restaurants in the same region to join together to lower employee wages on the theory that their customers would prefer to eat from underpaid cooks; thus, why should the NCAA be able to continue to win with this dated argument?<sup>138</sup>

If Justice Kavanaugh is correct and either some or all of the NCAA's current compensation rules violate antitrust law, numerous difficult questions result for the NCAA - questions such as whether just some or all students could receive compensation and what would be a fair way of compensating around 180,000 Division I student-athletes.<sup>139</sup> As questions like these arise, the resolution could come from litigation, legislation from Congress, or even a collective bargaining agreement

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<sup>131</sup> *Alston v. NCAA*, 141 U.S. 2141, 2166 (2021) (Kavanaugh, J., concurring).

<sup>132</sup> *See id.* at 2166-67.

<sup>133</sup> *Id.* at 2167.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Alston*, 141 U.S. at 2167.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 2168.

between the NCAA, the member institutions, and the student-athletes.<sup>140</sup> Justice Kavanaugh made waves with his concurring opinion stating that the NCAA is not above the law and that they should have to pay student-athletes a fair market rate.<sup>141</sup> While no other Justice formally supported this opinion, it seems clear where at least one Supreme Court Justice stands regarding this new and challenging question.

#### A. *Johnson v. NCAA*

The case of *Johnson v. NCAA* is the next challenger to the NCAA's amateurism model. In 2019, former Villanova football player Trey Johnson filed a complaint in the Eastern District Court of Pennsylvania seeking recognition of college athletes as employees under the Fair Labor Standards Act (FLSA).<sup>142</sup> If college athletes were recognized as employees under the FLSA, the NCAA, and potentially the schools the athletes attend, would be required by law to pay the athletes at least the Federal minimum wage for their time.<sup>143</sup> This would mean the end of the NCAA's amateurism model as we know it and could potentially cause athletics departments across the country to consider what sports are worth keeping as operating costs grow.<sup>144</sup> This could also grow the already vast divide between larger and smaller schools and cause the NCAA to change its ways entirely, or even disappear completely.<sup>145</sup> Johnson chose to sue the NCAA and over twenty universities stating that not only are the athletes employees of the schools they play for but that the NCAA is a joint employer.<sup>146</sup> The case began with Judge Padova refusing to grant the NCAA's motion to dismiss and has worked its way up to the Third Circuit through an interlocutory appeal. The NCAA

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<sup>140</sup> *Id.*

<sup>141</sup> Fei Gao & John Wolohan, *Johnson v. NCAA Latest Cast to Challenge College Sports Amateurism Model*, ATHLETIC BUSINESS (Sep. 27, 2022), <https://www.athleticbusiness.com/operations/legal/article/15296747/johnson-v-ncaa-latest-case-to-challenge-college-sports-amateurism-model> [<https://perma.cc/RP28-KRPH>].

<sup>142</sup> Nicole Auerback & Mike Vorkunov, *Understanding Johnson v. NCAA, the Next Case That Could Upend the College Sports Model*, THE ATHLETIC (Aug. 12, 2022), <https://theathletic.com/3497617/2022/08/12/johnson-v-ncaa-college-athletes-employees/> [<https://perma.cc/N8V4-XKA9>].

<sup>143</sup> *Breaking Down Johnson V. NCAA: Student Athletes Make A Strong Case To Be Paid As Employees*, HUTCHINSON, BLACK, AND COOK, LLC, (Mar. 14, 2023), <https://www.hbcboulder.com/news-media-archive/2023/3/14/breaking-down-johnson-v-ncaa-student-athletes-make-a-strong-case-to-be-paid-as-employees>.

<sup>144</sup> *See id.*

<sup>145</sup> *Id.*

<sup>146</sup> *See Auerback & Vorkunow, supra note 142.*

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filed an interlocutory appeal for the Third Circuit to decide whether someone could consider college athletes employees, not necessarily whether they are or are not.<sup>147</sup>

The Third Circuit heard oral arguments on February 15, 2023, and the NCAA had a troublesome day in court to say the least. The panel of three judges jumped on the NCAA's lawyer, Steven Katz, and did not let up.<sup>148</sup> The NCAA focused its argument, not surprisingly, on the idea of amateurism and wanted to make it clear to the Court that these athletes are amateurs because there is no expectation of compensation.<sup>149</sup> One judge stated to Katz that the NCAA's argument was essentially that the athletes are amateurs because the NCAA says they are.<sup>150</sup>

Katz also mentioned that if college athletes were to become employees, lower revenue-generating sports, especially women's sports, would likely be in jeopardy of being discriminated against and cut.<sup>151</sup> The panel did not buy into this argument either, citing various recent references that show the NCAA, among others, already causes discrimination.<sup>152</sup> While Katz used the slippery slope argument to show that it would create more problems than it would solve by ruling against the NCAA, the athletes turned towards the idea of control.<sup>153</sup>

The athlete's attorney, Michael Willemin, countered the NCAA by saying that the money an athlete makes or expects to make is not what makes them an employee; instead, the control exercised by the NCAA over the athletes is what makes them employees.<sup>154</sup> The NCAA controls many aspects of athletes' lives during their time in

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<sup>147</sup> *See id.*

<sup>148</sup> Amanda Christovich, *Federal Judges Blast NCAA's Amateurism Model*, FRONT OFFICE SPORTS (Feb. 15, 2023), [frontofficesports.com/federal-judges-blast-ncaas-amateurism-model/](https://frontofficesports.com/federal-judges-blast-ncaas-amateurism-model/) [<https://perma.cc/JAZ9-VV98>].

<sup>149</sup> Eric Prisbell, *Johnson v. NCAA: Why College Sports Fans Need to Pay Attention to This Court Case*, ON3 (Feb. 21, 2023), <https://www.on3.com/news/johnson-v-ncaa-why-college-sports-fans-need-to-pay-attention-to-this-court-case/> [<https://perma.cc/F73Q-HTBT>].

<sup>150</sup> The Free Law Project, *Ralph Trey Johnson v. National Collegiate Athletic Association*, 22-1223, COURT LISTENER, 22:00-22:06, (Feb. 16, 2023), <https://www.courtlistener.com/audio/85257/ralph-trey-johnson-v-national-collegiate-athletic-association/> [<https://perma.cc/R47D-YLS4>].

<sup>151</sup> *See id.*

<sup>152</sup> *Id.*

<sup>153</sup> *See Christovich, supra* note 148.

<sup>154</sup> *Id.*

college, including how many hours they practice, what courses they can take, and even what they can major in.<sup>155</sup>

**B. Counterargument: Athletes should not be paid**

While many believe that the blood, sweat, and tears athletes contribute to their universities through athletics are reason enough for them to be paid, others believe that the free education the athletes receive provides adequate compensation.<sup>156</sup> Nowadays, the top college athletes receive full scholarships, which include the full cost of tuition at the school they go to, along with other perks such as free food or snacks, medical services for athletic injuries, school apparel, tickets to games, and oftentimes even more.<sup>157</sup> For many sports fans, this compensation is more than enough for these athletes because the value of everything an athlete may receive can be worth over \$100,000 per year.<sup>158</sup> A Division I athletic director even stated that the benefits received by a D-I athlete could total anywhere between \$70,000 and \$120,000.<sup>159</sup>

Jay Paterno, a former college football player and coach, argues that college athletes should not be paid and describes how their lack of compensation actually benefits them.<sup>160</sup> Paterno begins his argument by laying out the NCAA-mandated

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<sup>155</sup> See *The Free Law Project: Johnson v. NCAA*, *supra* note 150.

<sup>156</sup> Sam C. Ehrlich, "But They're Already Paid": *Payments In-Kind, College Athletes, and the FLSA*, 123 W. Va. L. Rev. 1.

<sup>157</sup> See *id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Protecting the Integrity of College Athletics Before the S. Comm. on the Judiciary*, 116th Cong. 2 (2020) (statement of Dan Radakovich, Athletic Director, Clemson University), <https://www.judiciary.senate.gov/imo/media/doc/Radakovich%20Testimony.pdf> [<https://perma.cc/896B-FWSL>].

<sup>160</sup> Jay Paterno, *Jay Paterno: Pay Student-Athletes? They're Already Getting a Great Deal*, STATE COLLEGE (June 2, 2011), <https://www.statecollege.com/articles/local-news/jay-paterno-pay-student-athletes-theyre-already-getting-a-great-deal/> [<https://perma.cc/7BY5-QKBU>].



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time limits for athletes.<sup>161</sup> Athletes are limited to twenty hours per week for twenty-one weeks, with one mandatory day off every week and no more than eight hours a week for another twenty-three weeks.<sup>162</sup> For just the cost of tuition that the athletes receive, Paterno states that in-state athletes would be paid around fifty-six per hour, and if they are an out-of-state athlete, almost eighty-five dollars an hour.<sup>163</sup> It is unlikely that the NCAA or its member schools would pay any of their athletes wages that high, and these students could lose their scholarships in their quest to become paid athletes.<sup>164</sup>

There are, of course, other arguments to be made, such as the inability of all schools to pay all their athletes.<sup>165</sup> This may force universities to pick and choose which athletic programs to keep and which ones to cut, which could cause significant Title IX difficulties.<sup>166</sup> This would create a separate issue as there is a strong possibility that most schools would cut any program that was not considered “profitable.”<sup>167</sup> Furthermore, there are a lot of concerns about the introduction of the “pay-to-play” model to college athletics since some schools would be able to pay significantly more for players than others.<sup>168</sup>

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<sup>161</sup> *See id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> William Boor, *College Athletes Do Not Deserve to Be Paid, Now or Ever*, BLEACHER REPORT (June 7, 2011), <https://bleacherreport.com/articles/725981-college-athletes-do-not-deserve-to-be-paid-now-or-ever> [<https://perma.cc/7KBR-KX97>].

<sup>165</sup> Liam Wood, *Why College Athletes Should Not Be Paid*, BFA MERCURY (Mar. 9, 2022), <https://bfamercury.org/5566/opinion/5566/> [<https://perma.cc/Y327-SKZL>].

<sup>166</sup> *See id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

The term “pay-to-play” is exactly what it sounds like and translates to school, or entities directly associated with the school, paying athletes to compete for their university instead of other universities.<sup>169</sup> There have already been reports of this happening with NIL deals, and it is possible this will only worsen if schools are allowed to pay players directly.<sup>170</sup> As previously stated, athletic directors already harbor worries about the NIL landscape creating a “pay-to-play” environment, and actually allowing, or forcing, the NCAA and its member schools to pay their athletes would only grow that concern.<sup>171</sup>

Lastly, where will we, as a society, draw a line?<sup>172</sup> If we allow college athletes to be paid, what about high school athletes?<sup>173</sup> Are high school athletes now amateurs and college athletes professionals?<sup>174</sup> As this disagreement continues to create a divide between sports fans, at some point, there may need to be intervention from a higher legal power to finally put an end to these issues.

### C. *What's Next?*

While the oral argument took place in the middle of February, it is unlikely that the Third Circuit will issue an opinion anytime soon. However, we can make an assumption based on the judges' reactions and questions. The Court will likely find for Johnson with comments from panel Judge Theodore McKee indicating that he did not

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<sup>169</sup> Leonard Armate, *Pay For Play Is Alive in College Sports and Free Agency Has Arrived*, (Dec. 16, 2022), <https://www.forbes.com/sites/leonardarmato/2022/12/16/pay-for-play-is-alive-in-college-sports-and-its-time-to-realize-that-free-agency-has-arrived/?sh=6c7bbf5b638e> [https://perma.cc/V5CM-DHLU].

<sup>170</sup> *See id.*

<sup>171</sup> *See LEAD1 Survey, supra* note 113.

<sup>172</sup> Alexandra Laurence, *Student-athletes should not be paid by their universities*, BAYLOR LARIAT (Aug. 31, 2021), <https://baylorlariat.com/2021/08/31/student-athletes-shouldnt-be-paid-by-their-universities/> [https://perma.cc/KDV6-HLF7].

<sup>173</sup> *See id.*

<sup>174</sup> *Id.*

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understand how athletes could not be employees.<sup>175</sup> While this would not change anything at present, this would be a huge step backward for the NCAA. If the Court were to rule for Johnson, it would likely remand the case back to the District Court for discovery and trial. The NCAA could then choose to take Johnson head-on in a trial or take their interlocutory appeal directly to the Supreme Court. After the most recent decision by the Supreme Court in *Alston*, it seems unlikely that the NCAA would bring this up to the Supreme Court, especially considering Justice Kavanaugh's concurring opinion.

If the NCAA lost the trial in the District Court and the Third Circuit, this would create a circuit split. The decisions of the Seventh and Ninth Circuits, ruling in favor of the NCAA, and the Third Circuit, ruling against the NCAA, would create that split. Such a split would increase the likelihood of the Supreme Court hearing the Johnson case and deciding whether or not to set a new controlling precedent in college sports. A final decision on this case will not be upon us for at least another year or two. Even so, we will all have to wait patiently for a final resolution from the courts or hope that Congress intervenes and answers the question for the Courts.

In his open letter to NCAA president Charlie Baker, Michael McCann wrote that the NCAA should get ahead of this as quickly as possible.<sup>176</sup> However, the NCAA waited and prolonged a decision in *O'Bannon* and *Alston*, and neither case went well for it.<sup>177</sup> The NCAA needs to consider the idea of paying college athletes, and it needs to do so quickly.<sup>178</sup> McCann touches on a model that the NCAA should consider in which only a select few student-athletes are employees based on tests derived from traditional labor and employment law.<sup>179</sup> While it makes sense to differentiate a Division I football player from a Division III swimmer, there is no easy way to do that. Along with Marc Edelman and John T. Holden, McCann dives into how this can be done.<sup>180</sup> This paper dives into the intricacies of labor law and concludes that a court

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<sup>175</sup> See *Christovich*, *supra* note 148.

<sup>176</sup> Michael McCann, *An Open Letter to Incoming NCAA President Charlie Baker*, SPORTICO (Feb. 23, 2023), <https://www.sportico.com/law/analysis/2023/charlie-baker-ncaa-president-open-letter-1234710521/> [<https://perma.cc/6UGH-5J9C>].

<sup>177</sup> See *id.*

<sup>178</sup> *Id.*

<sup>179</sup> Edelman, Marc and McCann, Michael A. and Holden, John, *The Collegiate Employee-Athlete*, pg. 39, (February 16, 2023). University of Illinois Law Review, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=4360802>.

<sup>180</sup> See *id.*

should look at three factors when determining if student-athletes are employees of their schools and which factors should apply.<sup>181</sup> The three (3) factors include the “Meaningful Revenue Test,” the “Public Relations Goodwill Test,” and the “Windfall Coaching Salaries Test.”<sup>182</sup>

In order to pass these tests, the team must first meaningfully contribute to the revenue of the school.<sup>183</sup> Second, the athletic participation needs to enhance the goodwill of the college or university in a nonmonetary and unquantifiable manner.<sup>184</sup> Third, the proceeds that are derived from the team are given to administrators and coaches by means of an above-market salary.<sup>185</sup> These tests are consistent with current labor and employment law tests and would differentiate Division I basketball and football players from Division III swimmers and smaller sport athletes.<sup>186</sup> Under these tests, a Division I basketball or football player would likely pass with flying colors as the contribution they make to the institution would meaningfully contribute to the school’s revenue, enhance the school’s goodwill, and most top-tier universities pay their coaches an above-market salary. In contrast, a Division III swimmer is unlikely to grow their school’s revenue by a meaningful amount or contribute to the school’s goodwill. Furthermore, even if a swimmer did those two things, it is even more unlikely that their coach would be paid an above-market salary in a way that would pass the third test. This is just one of the numerous possibilities that a court, Congress, or even the NCAA could take when attempting to answer this question.

While there are plenty of viable steps and choices that the NCAA could make to mitigate the potential damages they may face from an unwanted outcome in *Johnson*, one route that the NCAA could take is to treat student-athletes as tipped employees under the Fair Labor Standards Act (FLSA). Under the FLSA, employers do not have to pay tipped employees, such as servers or bartenders, the typical federal

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 39.

<sup>184</sup> *Id.* at 40.

<sup>185</sup> See *Edelman, McCann, and Holden*, *supra* note 179 at 41-42.

<sup>186</sup> *Id.* at 39.

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minimum wage of \$7.25.<sup>187</sup> Instead, employers can pay a minimum cash wage of \$2.13<sup>188</sup> as long as three requirements are met.<sup>189</sup>

First, the hourly wage and the tips must combine to equal at least the federal minimum wage.<sup>190</sup> Second, the employee must retain all tips.<sup>191</sup> Third, the employee must receive more than thirty dollars (\$30) monthly in tips.<sup>192</sup> While this same system would not work because student-athletes do not receive tips, the NCAA could modify this idea and make it more practical, potentially hitting two birds with one stone. The NCAA and many people around the sports world were, and still are, worried about NIL and the changes it will make to college sports. There are many concerns about the pay-to-play model, and those individuals want to avoid it as best they can. While the NCAA and its member schools attempt to track every NIL deal, that is likely impossible since it governs hundreds of thousands of student-athletes. So, what if the NCAA were to classify all student-athletes as employees and pay them minimum wage? Here is the catch: the NCAA and the member schools, similarly to restaurants, would only have to pay athletes as much as it would take to get their pay up to the federal minimum wage. NIL deals would, at least partially, cover many athletes, and quite a few would make over the federal minimum wage. The NCAA and the athletes' schools would cover those who make under minimum wage from their NIL deals if they have any.

Let us look at a hypothetical with three separate athletes. Athlete A is a Division I basketball player and makes \$50,000 a year in NIL deals. Athlete B is a Division I soccer player who makes around \$4,000 annually in NIL deals. Finally, Athlete C, a Division III swimmer, makes no money from NIL deals. For this hypothetical, assume that all three athletes spend twenty hours per week on their sport for twenty-one weeks a year and another eight hours per week, twenty-three weeks a year. Looking at the federal minimum wage, if an athlete makes, on average

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<sup>187</sup> U.S. Department of Labor, *Minimum Wages for Tipped Employees*, <https://www.dol.gov/agencies/whd/state/minimum-wage/tipped> (last visited Feb. 26, 2023).

<sup>188</sup> *See id.*

<sup>189</sup> U.S. Department of Labor, *Fair Labor Standards Act Advisor: What Is the Minimum Wage for Workers Who Receive Tips?*, WEB APPS <https://webapps.dol.gov/elaws/faq/esa/flsa/002.htm> [<https://perma.cc/P7GY-JRE6>] (last visited Feb. 26, 2023).

<sup>190</sup> *See id.*

<sup>191</sup> *Id.*

<sup>192</sup> *See* U.S. Department of Labor, *Fair Labor Standards Act Advisor: What Is the Minimum Wage for Workers Who Receive Tips?*, *supra* note 189.

less than \$7.25 an hour, then the NCAA and the athlete's school would have to cover the difference. Considering these hours, the NCAA must cover anything under \$4,739 annually. So, the NCAA would owe athlete A nothing, athlete B \$739, and athlete C all \$4,739. Of course, the minimum wage may be different in each state. However, this is just one option for the NCAA; a court or Congress could set a college-athlete minimum wage that all schools would have to follow.<sup>193</sup> While this plan is not perfect, lower division athletes with little to no NIL deals would still receive payment, the NCAA would not have to pay every single athlete, and the NCAA may be able to account for more NIL deals.

## CONCLUSION

Many changes are on the horizon in college sports. If the NCAA continues to play flat-footed, it may not be ready for what comes next. In the coming years, the NCAA has numerous items that it will need to address both in the eye of the public and in the courtroom to remain in control of college athletics. The NCAA has been known to fight every litigation until the end and refuse to settle; however, after suffering several legal defeats in a row, it may be time to handle business outside of the courtroom.<sup>194</sup> This may allow the NCAA to control its public perception, receive its desired outcome, and avoid more expensive litigation.<sup>195</sup> However, that seems quite unlikely given the NCAA's history of choosing to live and die by the decisions of the courts.<sup>196</sup>

Not only should the NCAA choose to litigate less but it may finally be time to let go of the amateurism model and adopt something that more closely relates to professional sports leagues. While this model may not be what the NCAA wants, it would still be able to avoid antitrust issues, as other professional sports leagues have in the past, while maintaining control over collegiate athletics.<sup>197</sup> The business model used by the NFL and NBA works well and could provide a solid framework for the NCAA to use in its transition away from its amateurism model and from being a non-

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<sup>193</sup> U.S. Department of Labor, *Consolidated Minimum Wage Table*, <https://www.dol.gov/agencies/whd/mw-consolidated> (last visited Apr. 6, 2023).

<sup>194</sup> See *McCann*, *supra* note 176.

<sup>195</sup> Buffington Law Firm, PC, *Why most business litigation lawsuits settle*, (May 31, 2017), <https://www.buffingtonlawfirm.com/blog/2017/05/why-most-business-litigation-lawsuits-settle/>

<sup>196</sup> See *McCann*, *supra* note 176.

<sup>197</sup> See *Kim*, *supra* note 80.

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profit.<sup>198</sup> Based on the oral arguments, it seems likely that *Johnson* will create a circuit split regarding the issue of student-athletes being employees under the FLSA. If the court creates a circuit split, there is a higher probability that the Supreme Court may grant certiorari. This would generate a chance that the NCAA would be at the mercy of the Court.<sup>199</sup> Furthermore, based on Justice Kavanaugh's concurring opinion, and the nine to zero (9-0) outcome in *Alston*, the Supreme Court's decision may differ from the NCAA's desired outcome.

Additionally, the NCAA needs to be more proactive regarding NIL; otherwise, it may grow out of control. Moreover, the NCAA must decide how it can become more proactive, instead of reactive, in relation to college athletics, its recent developments, and any future issues that *Johnson* and the determination of student-athletes being employees may cause. If the NCAA does not change or refuses to become a proactive organization, the NCAA may find itself digging its way out of a deeper hole than necessary. Frankly, college athletes bring in too much money to their schools, and to the NCAA, for them not to get a piece of it.

While this paper discusses a few options and ways that the NCAA could proceed, there are plenty of other options. Based on the evidence provided in this paper, one situation seems to be more likely than any other. The Third Circuit will likely rule in favor of *Johnson* and create a circuit split. The Supreme Court has already shown its distaste for the NCAA as an organization and may jump at this opportunity quickly to force the NCAA's hand and elicit some change before Congress addresses the issues.<sup>200</sup> Based on the outcome in *Alston*, it would be unsurprising if the NCAA were to lose again and face a Supreme Court ruling determining that at least some, if not all, student-athletes are employees of the NCAA and their respective institutions. This would force the NCAA to dissolve its amateurism principle and potentially even oblige it to change the structure of its organization to become for-profit. While the NCAA has the opportunity to get ahead of all of this and settle *Johnson* outside of court, it seems more likely that the NCAA will continue to sit back and wait for changes to be forced upon it instead of finally being ahead of the game.<sup>201</sup> Unquestionably, the NCAA needs to spend less time in the courtroom and more time fulfilling its mission of creating the best possible environment for "student-athletes" to thrive.

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<sup>198</sup> See *id.*

<sup>199</sup> See *The Free Law Project*, *supra* note 150; See *Alston*, *supra* note 91.

<sup>200</sup> See *Alston*, *supra* note 91.

<sup>201</sup> See *McCann*, *supra* note 176.