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ESSAY

STANDING SHOULDER PAD TO SHOULDER PAD: COLLECTIVE BARGAINING IN COLLEGE ATHLETICS

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Responding to the professionalization of their billion-dollar industry, college athletes have embraced collective bargaining as an avenue for addressing their grievances with universities and the National Collegiate Athletics Association (NCAA). The movement toward unionization has culminated in two cases: an unfair labor practice charge from the University of Southern California's (USC) football and basketball teams and a representation petition from Dartmouth College's men's basketball team. These filings with the National Labor Relations Board (NLRB) will determine whether college athletes are "employees" under the National Labor Relations Act (NLRA). If the NLRA covers them, then they will be able to unionize and collectively bargain under federal law. This Essay advances the debate surrounding college athletes' status by arguing that the NLRB should exercise its rulemaking power to establish a comprehensive standard

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for determining whether particular athletes qualify as "employees." It arrives at this conclusion after demonstrating how USC's and Dartmouth's athletes likely pass the statutory test for employee status. Since the NLRB explicitly considers policy concerns as it decides when to extend jurisdiction, the Board will need to determine whether the NLRA should cover college athletes and, if so, how coverage should be delineated. Given the need to protect athletes while promoting stability in labor relations, the NLRB should craft clear guidelines through rulemaking instead of piecemeal adjudication. The Essay concludes by offering a model rule that illustrates how the NLRB could formulate and implement a framework that Board agents can apply to athletes across NCAA divisions and sports.

INTRODUCTION

Far attenuated from its original status as an extracurricular activity, college athletics has evolved into an industry that increasingly eschews amateurism for professionalization. In 2019, Division I universities' revenue exceeded $15 billion.[1] Billion-dollar television deals have replaced traditional rivalries with new conferences that span the country.[2] Deion Sanders and other coaches treat their athletes like professional free agents, using the transfer portal to unilaterally force transfers and overhaul rosters.[3] Meanwhile, in *NCAA v. Alston*,[4] the Supreme Court ruled that the NCAA cannot cite "amateurism" as a justification for its evasion of antitrust law and its compensation restrictions.[5] In his concurrence, Justice Brett Kavanaugh rejected the traditional conception of college athletics, asserting that "the NCAA cannot avoid the

[1] See Andrew Zimbalist, Analysis: Who Wins With College Sports?, Econofact (Jan. 22, 2023), https://econofact.org/who-wins-with-college-sports [https://perma.cc/W9KG-3V42].

[2] See Billy Witz, Conferences Are Changing. The Sport Is, Too., N.Y. Times (Sept. 1, 2023), https://www.nytimes.com/2023/09/01/sports/ncaafootball/college-football-preview-realignment-big12-bigten-acc-pac12-bigten.html [https://perma.cc/W9KG-3V42].

[3] See Mike McDaniel, Colorado Players in Transfer Portal Detail Troubling Team Dynamic Under Deion Sanders, Sports Illustrated (Apr. 26, 2023), https://www.si.com/college/2023/04/26/colorado-players-transfer-portal-detail-troubling-team-dynamic-under-deion-sanders [https://perma.cc/N2PN-2VMY].

[4] 141 S. Ct. 2141 (2021).

[5] See id. at 2162–63 ("Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. But none of that means a party can relabel a restraint as a product feature and declare it 'immune from § 1 scrutiny.'" (internal citation omitted) (quoting Am. Needle, Inc. v. NFL, 560 U.S. 183, 199 n.7 (2010)).

consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product."[6] The NCAA and universities have responded to the Court's rebuke by adopting name, image, and likeness (NIL) policies that further diminish amateurism as college sports' lodestar.[7]

As college athletics has become more professionalized, players' grievances with their universities and the NCAA remain entrenched and unaddressed. Even though football and basketball players' performances generate revenue for "Power Five" conference schools, those institutions effectively divert any potential compensation for players toward coaches and administrators.[8] Annual wage estimates for these athletes exceed six figures, highlighting the amount of wealth players are denied despite their labor and athletic performance.[9] Some athletes may secure name, image, and likeness (NIL) deals that alleviate their lack of compensation. However, the median NIL deal in 2021 was worth only $53 per athlete.[10] Although NCAA leaders are planning to permit some form of direct compensation,[11] these policies fail to address players' health and safety concerns. Like workers in other industries, football players and other athletes have highlighted the lack of proper medical care and insurance benefits as top reasons for organizing.[12] The formation of transcontinental

[6] See id. at 2168–69 (Kavanaugh, J., concurring) (arguing that the Court's ruling should be extended to strike down the NCAA's entire apparatus of compensation restrictions).

[7] See Andrew Brandt, Business of Football: The Supreme Court Sends a Message to the NCAA, Sports Illustrated (June 29, 2021), https://www.si.com/nfl/2021/06/29/business-of-football-supreme-court-unanimous-ruling [https://perma.cc/N2PN-2VMY].

[8] See Craig Garthweite, Jordan Keener, Matthew J. Notowidigdo & Nicole F. Ozminkowski, Who Profits From Amateurism? Rent-Sharing in Modern College Sport 4–6, 26–28 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27734, 2020), https://www.nber.org/papers/w27734 [https://perma.cc/QL9N-F9NV].

[9] See id. at 6, 49–50.

[10] See Erica Hunzinger, One Year of NIL: How Much Have Athletes Made?, Associated Press (July 6, 2022, 4:57 PM), https://apnews.com/article/college-football-sports-basketball-6a4a3270d02121c1c37869fb54888ccb [https://perma.cc/6ZZ4-XSAV].

[11] See Ralph D. Russo, NCAA President Charlie Baker Calls for New Tier of Division I Where Schools Can Pay Athletes, Associated Press (Dec. 5, 2023, 4:48 PM), https://apnews.com/article/ncaa-baker-nil-c26542c528df277385fea7167026dbe6 [https://perma.cc/D6A7-YAL8]. Virginia also amended its NIL laws in April 2024 to facilitate direct compensation by universities for the "use" of a student-athlete's "name, image, or likeness," which could spur further policy changes by the NCAA and other states. Act of Apr. 17, 2024, ch. 837, 2024 Va. Legis. Serv. 837 (West).

[12] See Taking the Buzzer Beater to the Bank: Protecting College Athletes' NIL Dealmaking Rights: Before the Subcomm. on Innovation, Data, & Com. of the H. Comm. on Energy & Com., 118th Cong. 2–7 (2023) (written testimony of Jason Stahl, Executive Director, College

athletic conferences will only heighten these burdens on athletes across all sports, as the new travel requirements will likely hinder athletes' recovery, academic performance, and mental health.[13] Athletes are thus suffering from decisions that universities, athletic conferences, and the NCAA made without player input.

Collective bargaining has emerged as a mechanism for players to advocate for improved conditions and participation in policymaking. Groups of current and former athletes, like the National College Players Association (NCPA) and College Football Players Association (CFBPA), have worked alongside labor unions to organize teams.[14] In *Northwestern University*,[15] the NLRB declined to hold an election for Northwestern's football players by refusing to extend jurisdiction over them,[16] yet the Board did not categorically exclude college athletes from NLRA coverage.[17] As a result, momentum toward unionization has accelerated. The CFBPA emerged from player-driven advocacy in 2020 with the goal of organizing chapters at different universities to advocate for collective bargaining.[18] Congressional representatives introduced legislation in 2021 to codify the right for college athletes to collectively bargain,[19] and even athletic directors have endorsed some form of bargaining power for players.[20]

Football Players Association) [hereinafter Taking the Buzzer Beater]; see also The Real News Network, College Football Is Dangerous. Unions Can Fix It., YouTube (Sept. 20, 2023) (featuring Stahl describing the primacy of health and safety concerns among football players—from 12:59–14:19), https://www.youtube.com/watch?v=GoCnmzewbdg [https://perma.cc/K326-FC5M].

[13] See Amanda L. Paule-Koba, It Affects Everything We Do: Collegiate Athletes' Perceptions of Sport-Related Travel, J. Study of Sports & Athletes in Educ. 1, 11–14 (Dec. 2021), https://doi.org/10.1080/19357397.2021.2018637 [https://perma.cc/4FX9-E468].

[14] See About the NCPA, Nat'l Coll. Players Ass'n, https://www.ncpanow.org/about-us [https://perma.cc/3NJS-WWSE] (last visited Mar. 25, 2024); Taking the Buzzer-Beater, supra note 12, at 2–6, 10.

[15] 362 N.L.R.B. 1350 (2015).

[16] See id. at 1352.

[17] See id. at 1355.

[18] See Taking the Buzzer-Beater, supra note 12, at 2–6, 10; The Real News Network, supra note 12.

[19] See College Athlete Right to Organize Act, S. 1929, 117th Cong. (2021).

[20] Name, Image, and Likeness and the Future of College Sports: Before the S. Comm. on Jud., 118th Cong. 3–4 (2023) (written testimony of Jack Swarbrick, Vice President & James E. Rohr Director of Athletics, University of Notre Dame).

Years of organizing and advocacy have coalesced into two pending cases that could establish coverage for student athletes under the NLRA.[21] In 2023, the NLRB issued an unfair labor practice complaint against USC, the Pac-12 athletic conference, and the NCAA on behalf of USC's football and basketball players.[22] Meanwhile, the men's basketball team at Dartmouth filed for a union election.[23] After the NLRB regional director ruled in February 2024 that the Dartmouth election could proceed,[24] the players voted 13-2 to unionize.[25] Dartmouth has appealed the official's determination, setting the stage for the Board to consider the issue.[26] If the NLRB upholds this decision and finds that these athletes are "employees" under the NLRA, the Board would extend the Act's protections to college athletes and enable unionization under federal law.

Commentators have long argued about whether college athletes, particularly football players, are "employees" under the NLRA.[27] Some

[21] On April 18, 2024, the College Basketball Players Association filed an unfair labor practice charge with the NLRB on behalf of players at the University of Notre Dame. This matter could develop in another case, pending the NLRB regional office's investigation and subsequent proceedings. Unfair Labor Complaint Filed Against Notre Dame Over Athletes, Associated Press (Apr. 18, 2024, 10:07 PM), https://apnews.com/article/notre-dame-labor-complaint-athletes-c8db80b033bae8c930a32f2b21bf312d [https://perma.cc/U6H2-75NU]. Although other charges and matters relating to college athletes may be pending in NLRB regional offices, this Essay only addresses the two central cases in front of the Board and its administrative judges.

[22] See Complaint & Notice of Hearing, Univ. of S. Cal., Case No. 31-CA-290326 (NLRB Div. of Judges argued Nov. 7, 2023).

[23] See Signed RC Petition, Trs. of Dartmouth Coll., Case No. 01-RC-325633 (filed Sept. 13, 2023).

[24] See Decision & Direction of Election at 22, Trs. of Dartmouth Coll., Case No. 01-RC-325633 (NLRB Reg'l Dir. decided Feb. 5, 2024) [hereinafter Decision and Direction of Election].

[25] See Jesse Dougherty, After a Historic Union Vote at Dartmouth, What's Next for College Sports?, Wash. Post (Mar. 5, 2024, 1:20 PM), https://www.washingtonpost.com/sports/2024/03/05/dartmouth-mens-basketball-union/ [https://perma.cc/253M-5XWF].

[26] See Trs. of Dartmouth Coll.'s Request for Rev. of the Reg'l Dir.'s Decision and Direction of Election at 1, Trs. of Dartmouth Coll., Case No. 01-RC-325633 (NLRB Reg'l Dir. decided Feb. 2024) [hereinafter Trs. of Dartmouth College's Request for Review]. Sian Beilock, President of Dartmouth College, has also declared that Dartmouth will "go all the way to the Supreme Court if that's what it takes" to "prevent this misguided development." Sian L. Beilock, Opinion, Dartmouth Will Oppose Its Basketball Team Union, Wall St. J. (Apr. 12, 2024, 1:47 PM), https://www.wsj.com/articles/dartmouth-will-bust-its-basketball-union-college-sports-labor-5eb1fc1e [https://perma.cc/BRJ2-FRMX].

[27] See, e.g., Joshua Hernandez, The Largest Wave in the NCAA's Ocean of Change: The "College Athletes are Employees" Issue Reevaluated, 33 Marq. Sports L. Rev. 781, 783 (2023) (arguing that college athletes are statutorily "employees" but cautioning against coverage on policy grounds); César F. Rosado Marzán & Alex Tillett-Saks, Work, Study,

scholars have even addressed the issue post-*Alston*.[28] However, scholarship has not accounted for these new cases and the questions they raise for *all* college athletes. Increasing momentum toward "employee" status warrants a forward-looking analysis of *whether* the NLRB should expand coverage to college athletes across all sports and divisions and *how* it could establish a comprehensive standard for the industry.

This Essay answers these questions by advocating for the NLRB to issue a formal rule that establishes a comprehensive standard for determining the NLRA's coverage of athletes across all sports and divisions. This proposal emerges from an analysis of current cases before the Board and the challenge of establishing a clear rule through the adjudication of these disputes. Part I briefly summarizes the arguments presented by the parties in each case. Part II then applies the NLRA's statutory test and concludes that each group of athletes qualifies as employees under the Act's language. Part III considers the NLRB's policy approach to labor law coverage and demonstrates that policy considerations do not warrant coverage exemptions in these cases. However, these policies also show how difficult it will be to develop a comprehensive standard—one that can apply to all athletes—through the adjudication of these cases. Part IV highlights this challenge and argues that the NLRB should exercise its rulemaking authority to establish a standard that can apply to all athletes. Part V concludes the Essay by presenting a model rule that extends coverage to athletes who need NLRA protections.

Organize!: Why the Northwestern University Football Players Are Employees Under the National Labor Relations Act, 32 Hofstra Lab. & Emp. L.J. 301, 305–06 (2015) (arguing that the NLRB should permit the Northwestern football players' representation election to proceed because they are "employees" under the NLRA); Stephen L. Willborn, College Athletes as Employees: An Overflowing Quiver, 69 U. Miami L. Rev. 65, 65 (2014) (asserting that an affirmative finding of employee status under the NLRA or other employment statutes is "inevitable" due to the numerosity of interested parties and applicable laws).

[28] See, e.g., Hernandez, supra note 27, at 796–97; Amanda L. Jones, The Dawn of a New Era: Antitrust Law vs. the Antiquated NCAA Compensation Model Perpetuating Racial Injustice, 116 Nw. U. L. Rev. 1319, 1324–26 (2022) (advocating for Congress to pass legislation to permit college athletes to collectively bargain); John Wolohan, A Reexamination of College Athletes: Are Athletes Students or Employees?, 53 U. Mem. L. Rev. 835, 838 (2023) (applying the "economic reality" test to college athletes in light of *Alston* and recent General Counsel memos); Jennifer A. Shults, If at First You Don't Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for "Employee" Status, 56 Colum. J.L. & Soc. Probs. 451, 483 (2023) (arguing that *Alston* has helped bridge the gap between college athletes and employee status under the Fair Labor Standards Act and the NLRA).

I. SETTING THE TERMS OF DEBATE: HOW ARE PARTIES ARGUING FOR AND AGAINST "EMPLOYEE" STATUS?

The positions taken by the government officials, athletes, and universities involved in the USC and Dartmouth cases reflect the two sides of the debate over NLRA coverage. First, the arguments over statutory interpretation highlight diverging conceptions of the relationship between college athletes and their universities. Second, they illustrate the underlying policy dispute on whether collective bargaining should govern these relations.

In 2021, NLRB General Counsel Jennifer Abruzzo endorsed the position that scholarship football players "and other similarly situated 'Players at Academic Institutions'" are employees under the NLRA.[29] Building upon prior NLRB decisions that extended employee status to student interns and assistants,[30] Abruzzo applied the NLRB's "common law" test to assert that college athletes are employees.[31] Athletes perform services that generate revenue and other benefits for their "colleges and the NCAA," receive scholarships and travel stipends as "consideration," and follow strict rules governing their daily itineraries and behavior.[32] Since these observations suggest that a college athlete "perform[s] services for another and [is] subject to the other's control or right of control," a college athlete thus qualifies as an employee under the NLRB's test.[33] Abruzzo buttressed her statutory argument by citing *Alston* and the new NIL regulations, arguing that the transformation of college athletics heightens the need for the NLRB to regulate relations between players, their universities, and the NCAA.[34] Board attorneys in the USC proceedings have since adopted Abruzzo's arguments, encouraging the administrative law judge overseeing the proceedings to exercise jurisdiction over USC's players.[35]

[29] See NLRB, Off. of the Gen. Couns., Opinion Letter on the Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act, No. GC 21-08, at 3 (Sept. 29, 2021) [hereinafter Statutory Rights of Players].

[30] See Bos. Med. Ctr. Corp., 330 N.L.R.B. 152, 160–61 (1999); Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1083–92 (2016).

[31] See Statutory Rights of Players, supra note 29, at 3.

[32] Id.

[33] Id.

[34] See id. at 5–6.

[35] See Couns. for the Gen. Couns.'s Opposition to Respondents' Motions to Dismiss at 17–34, Univ. of S. Cal., Case No. 31-CA-290326 (NLRB Div. of Judges argued Nov. 7, 2023) [hereinafter Opposition to Respondents' Motions to Dismiss].

The Dartmouth men's basketball team has expanded upon these arguments, advocating for the extension of employee status to athletes who do not receive athletic scholarships. Unlike USC, Dartmouth currently does not provide athletic scholarships to its recruits.[36] The athletes assert that Dartmouth nevertheless provides consideration via the "early read" admission process, a program through which players can receive counseling from coaches, reduced academic criteria for admission, and early notice of financial aid.[37] Each player also receives $19,802 worth of equipment, game tickets, travel, meals, and additional room and board.[38] They argue that these benefits are given in exchange for playing basketball, a service that generates revenue and prestige for Dartmouth.[39] Since they must follow strict rules governing their athletic and personal conduct, including the assignment of their NIL rights to Dartmouth, the players assert that the college controls them just as an employer does under the common law test.[40] Their program is not like an extracurricular club sport, which does not generate revenue or benefit from the "early read" program.[41] This distinction highlights the players' underlying policy argument: despite the absence of monetary consideration, their relationship with Dartmouth has become sufficiently "economic" in nature to warrant NLRA coverage.

The NLRB regional director's decision on the Dartmouth case illustrates how skepticism toward colleges' practices and policies could influence the Board's decision to exercise jurisdiction. The director repeatedly cited Dartmouth's participation in its conference television deal with ESPN, as well as its employment of "specialized individuals to monitor funds and brand management," to rebuke the notion that the

[36] See Post-Hearing Brief of the Petitioner at 25–26, Trs. of Dartmouth Coll., Case No. 01-RC-325633 (NLRB Reg'l Dir. decided Feb. 2024).

[37] See id. at 14–16, 24–26. According to the players, the academic criteria (the "Academic Index" (AI)) that they must satisfy is "lower than the general student population by one standard deviation of the College's overall average AI." See id. at 14. While they are not expressly guaranteed admission during the early read process, Dartmouth's coach noted during the hearing that "he does not recall any recruit" being denied admission after receiving a letter of interest from Dartmouth's staff. Decision and Direction of Election, supra note 24, at 6. The players explicitly receive letters of interest from Dartmouth "because of their basketball abilities." Id. at 19.

[38] See Post-Hearing Brief of the Petitioner, supra note 36, at 27.

[39] See id. at 17–18, 24.

[40] See id. at 30–33.

[41] See id. at 29–30.

basketball program is not an "economic" venture.[42] She also found that Dartmouth exercises sufficient control over its athletes, emphasizing the College's constraints on players' ability to play basketball elsewhere and its "strict" supervision of players during travel.[43] Her decision rejected the idea that Dartmouth's program is not an economic venture because the school does not monetarily compensate its players.[44] Conversely, the "early read" admission process and "fringe benefits" were sufficient consideration to qualify as compensation, even if those benefits amounted to a value less than a "living wage."[45] Finally, the decision dismissed Dartmouth's emphasis on potential externalities and subsequent legal conflicts; since the Ivy League's members are all private institutions, there are no federal or state law conflicts that could arise.[46] Although specific to the unique facts in the Dartmouth case, these arguments reflect broader considerations underlying the proponents' assertion of employee status.

In contrast, universities assert that college athletes are not employees under the NLRA, and that the NLRB should not regulate their relations with players. In *Northwestern University*, the university argued that its football players were not employees under the common law test because its athletic scholarships were not "compensation" contingent on athletic performance or services provided.[47] Instead, the scholarships were only financial aid covering tuition and education-related costs.[48] Northwestern also contended that it did not "control" football players as an employer, since its rules were inherent to an academic environment and applied equally to "walk-on" athletes who voluntarily joined the team.[49] Furthermore, the university cited the divide between scholarship and "walk-on" players to assert that the former group did not perform "services," as both sets of athletes engage in "activities" oriented around personal goals, not the school's financial objectives.[50] Although an

[42] See Decision and Direction of Election, supra note 24, at 2, 3, 18–19, 21.
[43] See id. at 19.
[44] See id. at 19–20.
[45] See id. (quoting Seattle Opera Ass'n, 331 N.L.R.B. 1072, *enforced*, 292 F.3d 757 (D.C. Cir. 2002)).
[46] See id. at 22.
[47] See Reply Brief to the Bd. at 10–12, Nw. Univ., 362 N.L.R.B. 1350 (2015) (Case 13-RC-121359).
[48] See id. at 11–12.
[49] See id. at 13–15.
[50] See id. at 15–16.

administrative law judge rejected untimely pre-hearing motions for dismissal by USC and its co-respondents,[51] their answers and affirmative defenses indicate that they will likely adopt the basic framework of Northwestern's arguments.[52]

Dartmouth's approach further highlights how universities will focus on the absence of scholarships and the unprofitability of teams to undermine employee status. The college asserts that it has not formed a "fundamentally economic relationship between employers and employees" with its players.[53] Instead, the lack of athletic scholarships and the annual net loss of "hundreds of thousands of dollars" indicate that the basketball program is not an economic venture.[54] Although Dartmouth provides equipment to players, the college claims that this is not a form of compensation. From the college's perspective, players receive these items "in order to" participate in an extracurricular activity, not "in exchange for" performing an economic service.[55] Meanwhile, academic coursework overrides basketball commitments, and players voluntarily submit to team rules like their peers in theater and other school-sponsored activities.[56] According to Dartmouth, their authority over players is thus different from the control exercised by an employer.[57] Beyond its statutory analysis, Dartmouth has distanced itself from "Power Five" universities, arguing that *Alston*'s skepticism of amateurism does not apply to Ivy League members and their "non-scholarship" sports programs.[58] These policy appeals illustrate how some universities will

[51] See Alex Lawson, NCAA Can't Derail Labor Board's College Athlete Push, Law360 (Oct. 23, 2023, 5:06 PM), https://www.law360.com/employment-authority/articles/1735915/ncaa-can-t-derail-labor-board-s-college-athlete-push [https://perma.cc/AWR4-RX9K].

[52] The respondents have also asserted that classifying "student-athletes" as "employees" would compel speech in violation of the First Amendment. See, e.g., Respondent Univ. of S. Cal.'s Answer to Complaint, Additional and Affirmative Defs. at 12–13, Univ. of S. Cal., Case No. 31-CA-290326 (NLRB Div. of Judges argued Nov. 2023).

[53] See Dartmouth Coll.'s Post-Hearing Brief at 33, Trs. of Dartmouth Coll., Case No. 01-RC-325633 (NLRB Reg'l Dir. decided Feb. 5, 2024) (citing WBAI Pacifica Found., 328 N.L.R.B. 1273, 1275 (1999)) [hereinafter Dartmouth College's Post-Hearing Brief].

[54] See id. at 32–34; Trs. of Dartmouth College's Request for Review, supra note 26, at 14, 33–35.

[55] Dartmouth College's Post-Hearing Brief, supra note 53, at 50–52; Trs. of Dartmouth College's Request for Review, supra note 26, at 29–31.

[56] See Dartmouth College's Post-Hearing Brief, supra note 53, at 40–43.

[57] See id. at 44; Trs. of Dartmouth College's Request for Review, supra note 26, at 35–37.

[58] See Dartmouth College's Post-Hearing Brief, supra note 53, at 56–57; see also Trs. of Dartmouth College's Request for Review, supra note 26, at 39–40 (arguing that the Regional Director erred in exercising jurisdiction because Dartmouth's men's basketball program is not

emphasize unprofitability and the primacy of academics to push back against the characterization of their programs as "economic" and thus subject to the NLRA.

II. THE NLRA LIKELY COVERS USC'S AND DARTMOUTH'S ATHLETES BECAUSE THEY PARTICIPATE IN REVENUE-GENERATING ACTIVITIES, UNDER SCHOOL CONTROL, IN EXCHANGE FOR TANGIBLE BENEFITS

Based on recently established case law for student-employees, the current Board will likely determine that the college athletes involved in the USC and Dartmouth cases statutorily qualify as "employees." Profitability varies from USC's football program to Dartmouth's basketball team, yet both institutions generate revenue from their athletes' performances. Informed by NCAA and conference policies, they also direct and control their players' behavior inside and outside of their athletic commitments. While USC and Dartmouth diverge on how they financially support athletes, these universities offer benefits and forms of compensation in exchange for continued team membership and athletic performance.

Under *Trustees of Columbia University*,[59] the NLRA covers students employed by universities. The Act's definition of "employee" includes "any employee" except for a few categories,[60] none of which includes students.[61] Although the relationship between students and their universities may be primarily academic, this fact does not preclude coverage, as "the extent of any required 'economic' dimension to an employment relationship is the payment of tangible compensation."[62] Under the NLRB's discretion, the statute thus applies to students who satisfy the "common law test" for employment: the performance of economic services for another, while under their "right of control," in "return for payment" or "compensation."[63] In the university context, services can include instruction and research, as they constitute "revenue-producing activities."[64] Student-employees can also demonstrate

analogous to a professional sports team, a "significant" consideration for granting jurisdiction over Northwestern football players in the *Northwestern* decision).

[59] Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1080 (2016).

[60] 29 U.S.C. § 152(3); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984).

[61] See *Columbia*, 364 N.L.R.B. at 1083.

[62] Id. at 1085.

[63] Id. at 1081–83, 1095.

[64] Id. at 1095–96.

university "control" in a variety of ways, from the power to terminate to the assignment of objectives.[65] "Payment" is interpreted in a similarly broad manner, as compensation includes externally funded grants if universities condition them on "the performance of defined tasks."[66] However, these payments must extend beyond an "unconditional scholarship" or mere "financial aid."[67]

Applying the common law test to student-employees also implicates broader NLRB case law on employee status. The NLRA's coverage of nonprofit employers indicates that neither the services provided by employees nor their relationship with their employer must orbit around profit generation.[68] However, the relationship must involve some "remuneration for services rendered."[69] Unpaid staff or volunteers are thus not "employees" under the NLRA, despite "occasional" reimbursements for organizational expenses, if they primarily receive "personal enrichment" for their work.[70] At the same time, the form of remuneration does not have to be wages. It could also come in the form of some type of "financial or other compensation."[71] Both the Board and the courts have refused to treat W-2 forms or tax payments as dispositive proof, highlighting the scope of compensation considered for employee determinations.[72] As the Board considers these issues, the burden of proof rests with the party seeking the statutory exception to justify it on a factual basis or to persuade the Board not to exercise jurisdiction.[73]

Given the contours of the employee test, USC's football and basketball players likely qualify as employees under the NLRA. USC earns over $82 million in direct revenue from its football and basketball programs

[65] See id. at 1094–96.

[66] Id. at 1096–97.

[67] Id. at 1094, 1096–97.

[68] Lighthouse for the Blind of Hous., 244 N.L.R.B. 1144, 1145 (1979) (extending § 2(3) coverage to employees of charitable organizations).

[69] WBAI Pacifica Found., 328 N.L.R.B. 1273, 1274 (1999) (quoting Compensation, Black's Law Dictionary (6th ed. 1990)).

[70] Id. at 1275–76.

[71] NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 90 (1995) (quoting The American Heritage Dictionary of the English Language 604 (3d ed. 1992)); see also Seattle Opera v. NLRB, 292 F.3d 757, 762, 765 (D.C. Cir. 2002) (extending coverage to auxiliary choristers who receive $214 in flat fees for their work on productions).

[72] *Seattle Opera*, 292 F.3d at 763 n.8.

[73] NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 711–12 (2001) (upholding burden of proof on party seeking statutory exception for supervisors); Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1081 n.7 (2016).

alone.[74] The university also received $34.4 million in 2022 for the television rights to its athletic events and expects millions more in television revenue once it joins the Big Ten athletic conference.[75] By playing games that generate revenue for their university, the relationship between USC and its athletes is sufficiently "economic." USC also controls its athletes' behavior through strict policies ranging from prohibitions on wearing blue clothing in the weight room to restrictions on social media posts.[76] USC directs its athletes to follow nutritional guidelines and seek travel excuse letters "for the classes they *will* be missing while on the road."[77] Violating these rules may result in suspension from a team, the loss of an athletic scholarship, or both.[78] USC's direction of athlete conduct, combined with its power to terminate and suspend athletic scholarships, reflects the regulation of student activity for the sake of institutional goals, which is akin to the control identified in *Columbia*.[79]

The compensation that its athletes receive beyond "personal enrichment" illustrates how USC will struggle to defeat a finding of employee status, let alone meet its burden of proof to justify an exception. Many players receive scholarships dependent on active team status and participation in team activities.[80] This aid is akin to the compensation received by research assistants' work versus the "unconditional" support that does not trigger employee status.[81] Both scholarship and "walk-on" athletes also receive exclusive benefits, healthcare services, and access to

[74] U.S. Dep't of Educ., Off. of Secondary Educ., Equity in Athletics Data Analysis—University of Southern California, Revenues and Expenses, https://ope.ed.gov/athletics/#/institution/details [https://perma.cc/TD7J-DRY5] (last visited Mar. 25, 2024) (search institution by name "University of Southern California"; select "University of Southern California"; select "Continue"; then navigate to "Revenues and Expenses" tab).

[75] Alex Ben Block, The Story Behind USC and UCLA's Shift to the Big 10, L.A. Mag. (July 21, 2022), https://lamag.com/news/the-story-behind-usc-and-uclas-shift-to-the-big-10 [https://perma.cc/G7DR-XXYA].

[76] Univ. of S. Cal., USC Athletics Student-Athlete Handbook 2021–2022, at 32–39, https://saas.usc.edu/ [https://perma.cc/B5LH-W7F8] [hereinafter USC Athletics Handbook] (last visited Mar. 25, 2024); see Opposition to Respondents' Motions to Dismiss, supra note 35, at 4–15.

[77] See USC Athletics Handbook, supra note 76, at 12, 28–29 (emphasis added).

[78] See id. at 39, 41–42; Opposition to Respondents' Motions to Dismiss, supra note 36, at 6.

[79] See Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1094–97 (2016).

[80] See USC Athletics Handbook, supra note 76, at 41–42.

[81] See *Columbia*, 364 N.L.R.B. at 1094, 1096–97.

specialized facilities.[82] While USC does not directly engage in NIL,[83] the university sponsors a collective that arranges NIL opportunities for "current USC student-athletes."[84] They are not "pay-to-play" arrangements,[85] yet NIL contracts are similar to the externally funded research grants that the NLRB identified as compensation.[86] They provide outside funding to "current" players, implying the condition that recipients must participate in USC athletics and follow USC's directives to receive that deal. Facing the burden of proof, USC will struggle to argue that the forms of compensation provided to USC athletes, combined with their revenue generation and the control exercised over them, do not warrant an affirmative finding of employee status.

Applying this test to the Dartmouth case affirms the regional director's decision and illustrates how college athletes may fall under the statutory definition even when their programs do not function like semi-professional "Power Five" operations. Although Dartmouth asserts that it has never generated *profit* from its men's basketball team,[87] its hearing exhibits indicated that it received $538,873 in *revenue* due to the basketball program.[88] This is on top of the revenue that Dartmouth receives from the Ivy League's television deal with ESPN, which broadcasts every Ivy League basketball game.[89] As previously stated, the NLRB has extended coverage to employees of nonprofit institutions;[90] thus, the lack of profit does not preclude a finding of employee status.

[82] See USC Athletics Handbook, supra note 76, at 10–13, 17, 21–22, 26, 28–29, 31–33.

[83] Univ. of S. Cal., Athletics Student—Name, Image, and Likeness (NIL) Policy (Dec. 6, 2021), https://policy.usc.edu/usc-athletics-student-athlete/ [https://perma.cc/HZ6S-KRYM].

[84] FAQs, House of Victory, https://www.houseofvictory.com/pages/faqs [https://perma.cc/38C7-HKBH] (last visited Mar. 25, 2024).

[85] See id.

[86] See *Columbia*, 364 N.L.R.B. at 1096–97.

[87] See Dartmouth College's Post-Hearing Brief, supra note 53, at 2–3, 33.

[88] See Post-Hearing Brief of the Petitioner, supra note 36, at 17. This exhibit data seems to "contradict" the revenue figure that Dartmouth reported to the Department of Education in 2022, which was $1,274,426. See U.S. Dep't of Educ., Off. of Secondary Educ., Equity in Athletics Data Analysis—Dartmouth College, Revenues and Expenses, https://ope.ed.gov/athletics/#/institution/details [https://perma.cc/TD7J-DRY5] (last visited Mar. 25, 2024) (search institution by name "Dartmouth College"; select "Dartmouth College"; select "Continue"; navigate to "Revenues and Expenses" tab).

[89] See Ivy League Enhances Exposure, Fan Experience with Long-Term ESPN Agreement, The Ivy League (Apr. 4, 2018, 1:00 PM), https://ivyleague.com/news/2018/4/4/general-ivy-league-enhances-exposure-fan-experience-with-long-term-espn-agreement.aspx?path=general [https://perma.cc/K6WK-GQM4].

[90] See Lighthouse for the Blind of Hous., 244 N.L.R.B. 1144, 1145 (1979).

Dartmouth's policies also indicate direction and control over their players. College officials asserted during the representation hearing that their athletes are free to prioritize academics over athletics and face restrictions on conduct akin to those faced by student theater participants,[91] undermining the notion that the college treats them like other university employees. However, the players follow a suite of institutional rules governing summer employment, social media use, and conduct, which are realms that are typically unregulated for students involved in theater and other non-varsity extracurricular activities.[92] In particular, the coaches' regulation of off-the-court behavior, their unchecked disciplinary authority, and the college's informal constriction of NIL activity illustrate the extent of the college's direction of athletes' lives.[93] These policies reflect the degree of control over activity and power to punish that the NLRB has identified as an element of the employment relationship.[94]

Given their burden of proof, Dartmouth will also struggle to justify a Board exception on the grounds of insufficient compensation. Unlike USC, Dartmouth does not offer athletic scholarships.[95] Athletes receive the same need-based aid as non-athletes,[96] akin to the "unconditional scholarship" identified in *Columbia* as non-compensation.[97] However, this observation alone does not justify an inference that these athletes are volunteers who primarily derive "personal enrichment" from their services. Under "early read," players receive special support from Dartmouth staff and easier academic requirements—one standard deviation below the college's average standards—all in exchange for a

[91] See Dartmouth College's Post-Hearing Brief, supra note 53, at 40–43.

[92] See Dartmouth Sports, Dartmouth Athletics Student-Athlete Handbook 2021–2022, at 6–8, 17–18 (Sept. 2021), https://dartmouthsports.com/documents/2021/9/30//2021_2022_Dartmouth_Athletics_Handbook_Website_Copy.pdf?id=16784 [https://perma.cc/978H-DVK3]; Post-Hearing Brief of the Petitioner, supra note 36, at 32–33.

[93] See Post-Hearing Brief of the Petitioner, supra note 36, at 11–13, 30–32.

[94] See Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1094–97 (2016). Dartmouth claims that many of its rules simply implement Ivy League and NCAA policies. See Dartmouth College's Post-Hearing Brief, supra note 53, at 14–19, 43. However, multiple sources of authority may evince those organizations' joint employer status rather than Dartmouth's lack of control over its players. See infra notes 115–19 and accompanying text.

[95] See Dartmouth College's Post-Hearing Brief, supra note 53, at 10–13, 32; Trs. of Dartmouth College's Request for Review, supra note 26, at 10.

[96] See Dartmouth College's Post-Hearing Brief, supra note 53, at 10–13; Trs. of Dartmouth College's Request for Review, supra note 26, at 10–11.

[97] See *Columbia*, 364 N.L.R.B. at 1096; Dartmouth College's Post-Hearing Brief, supra note 53, at 32; Trs. of Dartmouth College's Request for Review, supra note 26, at 23–24.

binding commitment to attend Dartmouth and an expectation to play.[98] Many players, particularly those with below-average scores, may have been admitted only due to a "positive early read."[99] This tangible benefit thus represents a non-monetary form of compensation for a promise to perform services on behalf of Dartmouth.[100] The players also receive exclusive access to academic tutoring, athletic facilities, and nearly $20,000 worth of goods.[101] While some of these perks only enable participation,[102] the gear, tickets, and programs offered indicate that Dartmouth accounts for the opportunity cost of playing for them, as opposed to playing for another college or not playing at all. The sum of benefits provided to players thus resembles compensation to induce the performance of "defined tasks" related to economic services,[103] undermining the primacy of "personal enrichment" and supporting a finding of employee status.

[98] See Post-Hearing Brief of the Petitioner, supra note 36, at 13–16, 24–26.

[99] See id. at 14–15, 26.

[100] Dartmouth asserts that the "early read" program does not qualify as compensation because it is a benefit provided to "high school students" that is "superseded" by the financial aid that a student receives once they engage in services for Dartmouth. See Trs. of Dartmouth College's Request for Review, supra note 26, at 26–27 (emphases omitted). However, the core element of the "early read" admissions process is the demonstrably greater probability of admission for basketball recruits. Unlike other students, Dartmouth recruits are nearly guaranteed admission for their commitment to attend Dartmouth and their promise to play basketball. See Post-Hearing Brief of the Petitioner, supra note 36, at 13–16, 24–26; see also Decision and Direction of Election, supra note 24, at 6 ("Coach McLaughlin testified that he does not recall any recruit receiving a 'likely letter' and then being rejected by the Office of Admissions."). The college does not strongly contest these facts, as it only asserts that "admission decisions" do not "have anything to do with a recruit's athletic talent" because recruits undergo the same admissions process as other students. Trs. of Dartmouth College's Request for Review, supra note 26, at 9–10. This assertion ignores how recruit status, not athletic talent, unlocks additional support from Dartmouth officials and reduced admission standards. The mere "recruit" designation results in a near-certain probability of admission to Dartmouth and a subsequent Ivy League education, a benefit granted in exchange for a promise to play basketball and enjoyed while performing the service.

[101] See Post-Hearing Brief of the Petitioner, supra note 36, at 27–28. The regional director emphasized in her decision that each player annually receives basketball shoes that can exceed $1,000 in value, more than what one of the players earned from his on-campus jobs. See Decision and Direction of Election, supra note 24, at 11 n.18, 19.

[102] See Dartmouth College's Post-Hearing Brief, supra note 53, at 51–52.

[103] See Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1097 (2016).

III. THE BIGGER QUESTION: *SHOULD* THE NLRA EXTEND COVERAGE TO THESE ATHLETES AND BEYOND?

Analyzing the USC and Dartmouth cases under the common law test demonstrates the potential breadth of coverage across college athletics, raising the question of whether the NLRB should set any boundaries. The NLRB's refusal to cover Northwestern football players exemplifies the Board's power to withhold jurisdiction, regardless of statutory analysis, if the extension of coverage "would not effectuate" "uniformity," "stability in labor relations," or other NLRA principles.[104] However, the burden of proof for justifying a policy determination against coverage rests on the party seeking the exception of employee status.[105] Since universities bear the responsibility to produce evidence and persuade the Board to exempt their players, the strength of their arguments will vary across divisions and sports. The divergence in results from these policy considerations ultimately highlights the challenges of adjudicating a coherent, let alone uniform, standard for college athletes' coverage under the NLRA.

For USC and other private universities in the "Power Five" conferences,[106] the circumstances surrounding their multibillion-dollar industry justify athlete coverage, and their arguments fail to prove otherwise. Both college athletics and federal labor law have transformed since the NLRB refused to extend jurisdiction in 2015. Back then, there was no transfer portal or NIL compensation.[107] Since then, the influx of television revenue and NIL compensation has transformed college athletics and exacerbated tensions between players, their coaches, and universities.[108] The relationships between players and coaches like Deion

[104] See Nw. Univ., 362 N.L.R.B. 1350, 1352–54 (2015).

[105] See NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 711–12 (2001).

[106] The NLRA does not cover public colleges and universities, as they are owned and operated by governmental bodies. See 29 U.S.C. § 152(2) ("The term 'employer' . . . shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . ."); Pa. Virtual Charter Sch., 364 N.L.R.B. 1118, 1120 (2016) (noting that an employer is exempt if it is created directly by the state or if it is directly responsible to elected officials or voters); *Northwestern*, 362 N.L.R.B. at 1352. So, none of the analysis on the NLRA's coverage applies to athletes at public universities.

[107] See Jason Fuller, Welcome to the Portal—Where College Athletes Can Risk It All for a Shot at Glory, NPR (May 19, 2023, 5:00 AM), https://www.npr.org/2023/05/19/1173134544/college-football-transfer-portal-ncaa-student-athlete [https://perma.cc/FNC5-FFMA].

[108] See supra notes 1–13 and accompanying text.

Sanders, who happily jettison their rosters without academics in mind,[109] reflect the transactional dynamic between workers and management. The NCAA's latest effort to compensate certain players further demonstrates the growing recognition that, as Justice Kavanaugh noted in his *Alston* concurrence, universities cannot have it both ways.[110] If they hope to professionalize college athletics, then they invite Justice Kavanaugh—and NLRB attorneys—to suggest "collective bargaining" as a solution for "resolv[ing]" disputes between players and universities.[111] Universities and commentators alike have argued that "employee" status could upend schools' athletic budgets or jeopardize their compliance with Title IX.[112] However, these arguments fail to recognize that the NLRA does not guarantee any policy, nor does it require parties to agree to specific collective bargaining terms.[113] The NLRB could therefore extend coverage to "Power Five" athletes without mandating particular compensation agreements or other substantive mandates.

Meanwhile, *Northwestern* is no longer persuasive case law. The NLRA now applies to student-assistants,[114] so the academic context does not preclude an application of the NLRA's broad statutory test. Plus, the NLRB's expansion of joint employer coverage addresses the Board's concern in *Northwestern* about extending bargaining obligations to the

[109] See McDaniel, supra note 3.

[110] See Russo, supra note 11; NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

[111] *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring); Statutory Rights of Players, supra note 29, at 5.

[112] See, e.g., Pac-12 Statement on NLRB Complaint, Pac-12 Conf. (May 18, 2023), https://pac-12.com/StatementNLRB [https://perma.cc/USV4-7BEK] ("Ignoring the many important educational benefits that come with participation in college sports, the NLRB General Counsel would have USC treat its football and basketball players as workers who must be paid a wage, not students who receive scholarships or who desire to participate in extracurricular sports on a voluntary basis. The impact of such a monumental change in the law would affect not just the football and basketball programs at USC targeted by the NLRB General Counsel, but the more than 20 different sports in the Conference that all operate under the same rules and academic principles."); Kenneth Jacobsen, Employee Athletes Would Lead to Seismic Shift in College Sports, Bloomberg L. (Nov. 14, 2023, 9:30 AM), https://news.bloomberglaw.com/us-law-week/employee-athletes-would-lead-to-seismic-shift-in-college-sports [https://perma.cc/4XHC-P47Y].

[113] See H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (holding that the NLRB cannot order implementation of specific contract terms); NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 409 (1952) (ruling that employers may insist on strong management clauses if done in good faith, as the NLRA does not compel any agreement or outcome).

[114] See Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1095–96 (2016) (overturning case law excluding student assistants from NLRA coverage).

NCAA and athletic conferences.[115] Replacing a prior rule that based joint employer status on whether an entity "exercised" control over employees, the new standard extends employer status to any entity with "reserved" control, "whether or not such control is [directly or indirectly] exercised."[116] The NCAA and its athletic conferences openly exercise control over athletes through policies and regulations,[117] "codetermin[ing]" the "terms and conditions" of their athletic activity.[118] While these organizations are likely joint employers under either rule, the Board's liberalization of the standard indicates a willingness to extend joint employer status to previously uncovered employers. Furthermore, the Act has long covered collegiate athletic conferences despite their inclusion of public universities, as their membership does not render a conference "governmental in nature" and exempted as a public employer.[119] The NLRB thus possesses the doctrines it needs to cover large swaths of the industry. In the face of the professionalization of "Power Five" programs and changes in relevant law, USC and its peer institutions will struggle to convince the Board to withhold jurisdiction over their athletes.

However, the variety of college programs may warrant limits on the extent of jurisdiction across college sports. Consider a cross country runner at a Division III university. Unlike most of Division I, their colleges cannot provide them with an athletic scholarship.[120] Many Division III schools, like the Massachusetts Institute of Technology, also provide zero "early reads" or special treatment for prospective runners in the admissions process.[121] Some programs generate revenue, yet the revenue pales in comparison to the amount generated by "Power Five"

[115] See Nw. Univ., 362 N.L.R.B. 1350, 1353–54 (2015).

[116] Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946, 73948 (Oct. 27, 2023); 29 C.F.R. § 103.40 (2020).

[117] See Dartmouth College's Post-Hearing Brief, supra note 52, at 14–19, 43; Post-Hearing Brief of the Petitioner, supra note 36, at 31–32.

[118] 29 C.F.R. § 103.40(a) (2020).

[119] Big E. Conf., 282 N.L.R.B. 335, 341 (1986); Opposition to Respondents' Motions to Dismiss, supra note 35, at 24–27. In *Northwestern*, the Board emphasized that extending coverage to Northwestern's football players was not appropriate given Northwestern's status as the only private university in the Big-10 conference. See *Northwestern*, 362 N.L.R.B. at 1352. This is no longer the case, as USC will join the conference in 2024. See Witz, supra note 2.

[120] Willborn, supra note 27, at 71.

[121] Tim Casey, How MIT Became an NCAA Division III Cross Country Powerhouse, FloTrack (Nov. 30, 2023), https://www.flotrack.org/articles/11554842-how-mit-became-an-ncaa-division-iii-cross-country-powerhouse [https://perma.cc/J2JN-2CL2].

football and basketball programs.[122] Major television networks do not even broadcast their competitions; for example, ESPNU broadcasted the 2023 Division I championship race, while the Division III championship aired on the NCAA's website.[123] The average Division III track athlete also spends at least twelve fewer hours per week on their sport than football players at Division I universities.[124] While these athletes may face NCAA and university policies, the lighter time commitment indicates less institutional control over their lives. Together, these observations intimate that some college athletics are not "economic" like "Power Five" football and basketball programs. For teams that do not operate like enterprises with labor relations to regulate, their universities may meet their burden of proof to convince the NLRB to withhold jurisdiction regardless of statutory analysis.

Between "Power Five" football and Division III cross country, the NLRB will struggle to determine the boundaries of jurisdiction solely through the two cases in progress. On the one hand, the Dartmouth election seemingly presents an opportunity, when appealed, for the Board to determine jurisdiction outside of the context of "Power Five" football and basketball. Like Division III universities, Dartmouth cannot offer athletic scholarships.[125] However, its basketball team nevertheless benefits from a television deal and can qualify for March Madness, a billion-dollar event.[126] While Dartmouth basketball does not operate like

[122] Compare U.S. Dep't of Educ., Off. of Postsecondary Educ., Equity in Athletics Data Analysis—Wesleyan University, Revenues and Expenses, https://ope.ed.gov/athletics/#/institution/details [https://perma.cc/TD7J-DRY5] (last visited Mar. 25, 2024) (search institution by name "Wesleyan University"; select "Wesleyan University"; select "Continue"; navigate to "Revenues and Expenses" tab) (reporting $216,615 and $234,100 in "all track combined" team revenue for men and women, respectively), with Equity in Athletics Data Analysis—University of Southern California, supra note 74 (reporting $69,910,492 in revenue from USC football, $7,241,439 from USC men's basketball, and $5,687,731 from USC women's basketball).

[123] 2023 NCAA Division I Men's and Women's Cross Country Championships Qualifiers Announced, NCAA (Nov. 11, 2023), https://www.ncaa.com/news/cross-country-men/article/2023-11-11/2023-ncaa-division-i-mens-and-womens-cross-country-championships-qualifiers [https://perma.cc/5YHZ-MRJP]; Joe Harrington, How to Watch NCAA D3 Cross Country Championships 2023, FloTrack (Nov. 18, 2023), https://www.flotrack.org/articles/11351526-how-to-watch-ncaa-d3-cross-country-championships-2023 [https://perma.cc/284U-K43G].

[124] DIII Results, GOALS Study (presented at the 2020 NCAA convention), NCAA, https://www.ncaa.org/sports/2014/2/24/division-iii-research.aspx [https://perma.cc/BC73-AHWK] (last visited Mar. 25, 2024).

[125] See Post-Hearing Brief of the Petitioner, supra note 36, at 25.

[126] See Ivy League Enhances Exposure, supra note 89; Andrew Lisa, The Money Behind the March Madness NCAA Basketball Tournament, Yahoo! Fin. (Mar. 20, 2023), https://fin

USC football, it may be sufficiently entwined with the NCAA's "product" for the NLRB to follow the *Alston* siren call and regulate the operation. It is thus unclear how the extension of jurisdiction in both the USC and Dartmouth cases could establish a standard for Division II or III programs. The focus on football and basketball will even complicate the application of these cases to other programs at these universities. The variance in universities' likelihood of meeting their burden of proof to justify exceptions thus complicates the extension of jurisdiction to athletes via adjudication.

IV. THE NLRB SHOULD EXERCISE ITS RULEMAKING POWER TO ESTABLISH A COMPREHENSIVE FRAMEWORK FOR COLLEGE ATHLETES' COVERAGE

Since case-by-case deliberations could result in a patchwork of jurisdiction that unsettles labor relations in college athletics, the NLRB should exercise its rulemaking authority to establish uniform standards for college athletes' employee status. The NLRB has exercised its rulemaking power to determine jurisdictional issues for decades, including its extension of coverage to universities.[127] Arguments for rulemaking generally fall into three buckets: it generates "more [and] better information," promotes "forward-looking lawmaking," and facilitates greater "stability" than adjudication.[128] These three appeals apply to the issue of college athletes' employee status.

Establishing a rule that will not confuse athletes and universities alike will require the Board to solicit information from the public at large, not just from its amici. Rulemaking can facilitate public comment and testimony from a greater number of parties than adjudication, particularly when perspectives vary beyond dueling positions in a case.[129] With athletes, unions, universities, athletic conferences, and the NCAA weighing in on employee status, the vast array of facts and arguments will overwhelm the amici curiae process. Plus, parties can only file amici briefs after they move for permission in a proceeding or after a public

ance.yahoo.com/news/money-behind-march-madness-ncaa-173857122.html [https://perma.cc/8C69-S5LL].

[127] See 29 C.F.R. § 103.1 (1970).

[128] See Charlotte Garden, Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication, 64 Emory L.J. 1469, 1474–77 (2015).

[129] See id. at 1475; Jeffrey M. Hirsch, Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals, 5 FIU L. Rev. 437, 457 (2010).

invitation from the Board.[130] Many athletes may lack counsel to help them navigate the NLRB's adjudicative process, let alone draft a brief. Public comments, by contrast, do not require such an intervention and are much easier to write, especially for individuals without legal writing skills. By utilizing the conventional public comment apparatus,[131] rulemaking would allow more parties to voice their opinions and outline their circumstances. With a wider array of comments and testimony, the NLRB can utilize the information to craft a multifaceted rule that responds to all stakeholders' concerns.

An emphasis on "forward-looking" policymaking is also appropriate for determining the novel issue of college athletes under the NLRA. Unlike adjudication, rulemaking allows the NLRB to establish rules before disputes arise from an unfair labor practice or an election.[132] Since the process focuses on the policy itself and not a particular dispute, rulemaking can also produce a stronger "explanation" of the policy for parties and Board agents to follow.[133] USC football and Dartmouth basketball are programs with unique qualities, so the establishment of a standard through these cases will only fuel further litigation over the boundaries of coverage. Rulemaking would conversely allow the Board to consider more data on sports, revenue levels, divisions, and other factors that could determine the appropriateness of employee classification for different groups of athletes. Instead of placing the burden on regional offices to iron out the standard through hearings and investigations, the NLRB could use rulemaking to establish a policy that addresses these specific issues before they arise in a proceeding.

By engaging in a deliberative process focused on public input, the NLRB could further improve the legitimacy of its standard and increase the odds that appellate courts will uphold it. Unlike the independent contractor test, an issue that the Board has adjudicated for decades,[134] there is no prior case law to ground a college-athlete rule crafted through

[130] NLRB Off. of the Exec. Sec'y, Guide to Board Procedures 37 (2023), https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/guide-to-board-procedures-2023.pdf [https://perma.cc/8ACY-PSAJ]; Invitation to File Briefs, NLRB (updated Jan. 18, 2022), https://www.nlrb.gov/cases-decisions/filing/invitations-to-file-briefs [https://perma.cc/22FX-PPV5].

[131] See Garden, supra note 128, at 1485.

[132] See id. at 1475.

[133] See Hirsch, supra note 129, at 457.

[134] See Atlanta Opera, Inc., 372 N.L.R.B. No. 95, 2 (June 13, 2023) (reversing previously adjudicated rule on determining independent contractor status under Section 2(3)).

litigation. While adjudication enables the Board to enact policies under the guise of fact-finding,[135] rulemaking encourages the sort of explanation that later can prove useful to courts.[136] Plus, the role of notice and public comment heightens the "stare decisis gravitas" behind rulemaking.[137] If more athletes, universities, and organizations can weigh in through rulemaking, the Board will have greater authority to assert that the rule advances stability in labor relations and thus warrants deference. In response, proponents of adjudication might cite recent judicial interventions as evidence that rulemaking does not produce more durable rules.[138] However, college athletes' employee status may not invite an aggressive appeal because *Alston* established an overarching skepticism of the NCAA's "amateurism" defense.[139] Justice Kavanaugh's concurrence even recognized the prospect of collective bargaining.[140] The Court's criticism of the NCAA's business model may deter parties from testing a final rule in court and instead encourage them to lobby for an acceptable rule.

V. DRAWING THE (GOAL) LINE: WHAT THE RULE COULD LOOK LIKE

The model rule outlined below illustrates how the NLRB could draw upon its statutory test to craft a multi-factor rule that applies to college athletes at private colleges and universities across NCAA divisions and sports.[141] Importantly, it is not a test to determine whether these programs

[135] See Hirsch, supra note 129, at 456–57.

[136] See id. at 457–58 (hypothesizing that courts will be more likely to defer to the Board if it provided more explanation than an adjudicated decision).

[137] William B. Gould IV, New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?, 70 La. L. Rev. 1, 43 (2009).

[138] For decades, critics have called for the NLRB to exercise its rulemaking powers instead of adjudicating cases. See Garden, supra note 128, at 1473–77. When the Board tried to reform notice-posting and election procedures through rulemaking during the Obama Administration, industry groups swiftly tied up the rules in litigation. See id. at 1477–84, 1493–94. This saga seemingly bolsters the notion that adjudication can delay judicial review and better advance the NLRB's policy in the short-term. But see Catherine L. Fisk & Deborah C. Malamud, The NLRB in Administrative Exile: Problems with Its Structure and Function and Suggestions for Reform, 58 Duke L.J. 2013, 2016–17, 2068, 2078–85 (2009) (recognizing this concern about short-term policymaking yet ultimately calling for a shift towards rulemaking due to the need for greater judicial review of policy decisions).

[139] See NCAA v. Alston, 141 S. Ct. 2141, 2162–63 (2021).

[140] See id. at 2168 (Kavanaugh, J., concurring).

[141] As discussed above, the NLRB cannot directly regulate labor relations at public colleges and universities. See supra note 105. Given the importance of public universities in college athletics, an alternative solution for these institutions is necessary. For example, states could

are employers. The NLRB has already established jurisdiction over most private nonprofit colleges and universities.[142] It may also assert jurisdiction over the NCAA and college athletic conferences, as these are private entities unquestionably engaged in a billion-dollar interstate industry.[143] Finally, the NLRB's jurisdiction over these entities in cases involving college athletes is best handled under the joint employer test.[144] Instead, the rule adapts the tripartite test for employee coverage outlined in *Trustees of Columbia University*[145]: performance of a revenue-generating activity,[146] university control over athlete performance,[147] and "tangible compensation" for athlete performance.[148] The standard thus adapts the statutory test to direct the Board's analysis of college athletes, recognize policy concerns, and remove possible grounds for arbitrary adjudication.

Model Rule: NLRA Coverage of College Athletes
Regardless of sport, conference, or division, a group or team of athletes at a private, nonprofit college or university is covered by the NLRA if: 1. They participate in a "revenue-generating activity" that generates at least $50,000 in revenue for the college or university. 2. Their athletic activity is controlled by their university, and they are subject to discipline for violating university directions. Rules, regulations, and policies indicating employment-like control may include: a. Reserved university power to suspend athletic scholarship (if received); b. Power to discipline, suspend, or expel from the team; c. Assignment of objectives and control over schedule and athletic performance; d. Direction of activity during practice and non-practice time; e. Reserved rights to require travel or disrupt academic coursework; f. Rules controlling behavior that do not apply to students who are not

adopt the model rule outlined in this Essay in their statutes or regulations that govern labor relations at public institutions of higher education.

[142] See 29 C.F.R. § 103.1 (1970) (asserting jurisdiction over private nonprofit colleges and universities with gross annual revenues exceeding $1 million).

[143] See Zimbalist, supra note 1.

[144] See supra notes 115–18 and accompanying text.

[145] Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1080–81 (2016).

[146] Id. at 1095–96.

[147] See id. at 1094–97.

[148] Id. at 1085.

Model Rule: NLRA Coverage of College Athletes

employed by the university (e.g., social media policies); or
   g. Regulation of NIL, summer employment, and other income-generating activities.

3. They receive some form of compensation, whether or not monetary, for their performance or promise of performance. Forms of compensation may include:
   a. Athletic scholarship aid;
   b. Assistance with the admissions process or reduced standards for admission;
   c. Exclusive facility access;
   d. Goods and services (e.g., shoes, game tickets, housing accommodations, etc.); or
   e. Support from an NIL collective that is conditioned on their active status with a particular athletic program, including NIL deals arranged through the collective.

The college or university bears the burden of proof in demonstrating that the college athlete(s) seeking coverage are disqualified.[149]

By setting a revenue threshold for the athletes' programs, the rule establishes a baseline metric for determining whether the athletes' activity generates sufficient revenue to justify jurisdiction. The first prong adopts the $50,000 figure from the NLRB's jurisdictional standard for most non-retail businesses.[150] Universities may contest this figure as being too low, yet recent data on median generated revenue per sport at Division I FBS (Football Bowl Subdivision) schools indicates that this threshold could preclude coverage for dozens of programs in skiing, fencing, and other niche sports.[151] The standard thus narrows jurisdiction to athletes whose activity affects commerce. Additionally, the delineated threshold will allow players to quickly determine whether they are covered under the

[149] This adopts the NLRB's approach to weighing evidence and arguments seeking statutory exceptions. See NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 711–12 (2001) (upholding burden of proof on party seeking statutory exception for supervisors); *Columbia*, 364 N.L.R.B. at 1081 n.7.

[150] See Siemons Mailing Serv., 122 N.L.R.B. 81, 81–82 (1958) (establishing $50,000 threshold for non-retail businesses); see also 29 U.S.C. § 152(6) (specifying that the NLRA only regulates employers and labor disputes that involve interstate "commerce").

[151] NCAA Rsch., Revenues and Expenses of NCAA Division I Intercollegiate Athletics Programs Report 26 (Daniel L. Fulks ed., 2017), https://ncaaorg.s3.amazonaws.com/research/Finances/2017D1RES_D1RevExpReportFinal.pdf [https://perma.cc/HZW7-8NYX] [hereinafter Revenues and Expenses].

NLRA. The Department of Education maintains a public database containing annual revenue figures for individual teams across college sports,[152] as colleges and universities must publicly report generated revenue under the Equity in Athletics Disclosure Act.[153] Building upon existing legal frameworks, the first prong establishes a simple baseline to determine whether an athlete is engaging in "revenue-generating" activity, on behalf of their university, via their team membership and performance.

The second prong also expands upon previously adopted tests to outline an expansive standard for determining university control over athletes. First, it adopts the points of emphasis in *Columbia*. As noted earlier, the Board highlighted the powers to terminate a student's status as a research assistant and to assign their work as key evidence of universities' control over student workers.[154] However, the powers to discipline and direct are not the only indicators of employment status. The non-exhaustive list of potential rules and policies adds onto to these identified practices, highlighting policies that would distinguish student-athletes from students who do not have an employment relationship with their university. By listing a series of factors oriented around direction of athletes' behavior and performance, the prong mirrors the NLRB's multifaceted test to distinguish between covered "employees" and unprotected independent contractors.[155] The approach towards schools' control over their athletes thus falls in line with the NLRB's current approach to employer control in the university context and beyond.

Finally, the rule's broad definition of "compensation" accounts for athletes who may receive material benefits for their performance even if their schools do not offer them athletic scholarships. As discussed earlier, the NLRB has interpreted "compensation" to include forms of payment

[152] Equity in Athletics Data Analysis Cutting Tool, U.S. Dep't of Educ. Off. of Postsecondary Educ., https://ope.ed.gov/athletics/#/ [https://perma.cc/TD7J-DRY5] (last visited Mar. 25, 2024).

[153] See 20 U.S.C. § 1092(g)(1)(F), (I). "Revenue" that can be "allocable to a sport" includes "gate receipts, broadcast revenues, appearance guarantees and options, concessions, and advertising." 20 U.S.C. § 1092(g)(1)(I)(ii).

[154] See *Columbia*, 364 N.L.R.B. at 1094–97.

[155] See Roadway Package Sys. Inc., 326 N.L.R.B. 842, 843 (1998); see also Atlanta Opera, Inc., 372 N.L.R.B. No. 95, 15–18 (June 13, 2023) (establishing a multi-factor test for determining whether workers are "employees" covered by the NLRA or independent contractors that are exempted from the Act).

beyond conventional income.[156] Goods and services provided to athletes, regardless of their scholarship status, should consequently qualify as compensation in exchange for athletic performance. Recognizable forms of compensation ought to include admissions assistance as well. This special consideration qualifies as a material benefit granted to an athlete based on a promise of future participation. Although NIL deals are not "pay to play" arrangements, exclusive arrangements through NIL collectives may also qualify as compensation under the Act. The above analysis of the USC case illustrates how the dependency of deals on participation with a particular team effectively ties the benefit to one's performance for a university.[157] Akin to the external grants recognized in *Columbia*,[158] arrangements through an NIL collective should qualify as compensation under the Act, and the rule accounts for these benefits.

Applying this rule to the teams discussed throughout this Essay illustrates its efficacy as a framework for classifying college athletes in varying contexts. As discussed above, USC football and basketball players are probably employees under the Act, and this rule would confirm the result.[159] The model rule would also affirm the employee status of Dartmouth's basketball players in accordance with the analysis in Part II.[160] In contrast to these cases, MIT could meet its burden of proof to demonstrate that its cross country runners are not employees under the Act. Both men's and women's teams meet the revenue threshold, as they generated $83,135 and $85,439 respectively in 2021.[161] Although runners must follow their coach's directives, MIT's athlete handbook does not include policies governing alternative forms of employment, facility use, academic work, and conduct like those found in USC's and Dartmouth's

[156] See supra notes 71–72 and accompanying text (highlighting key findings in *Seattle Opera v. NLRB*, 292 F.3d 757, 762–63 (D.C. Cir. 2002)).

[157] See supra notes 83–86 and accompanying text.

[158] See *Columbia*, 364 N.L.R.B. at 1096–97.

[159] See supra notes 74–87 and accompanying text (noting that USC's football and basketball programs generate more than $50,000 in revenue, their athletes are subject to control and direction of their athletic activities, and those athletes receive athletic scholarships and tangible benefits in exchange for their participation and performance on the team).

[160] See supra notes 87–102 and accompanying text (observing that Dartmouth's men's basketball program generates more than $50,000 in revenue, their athletes are subject to control and direction of their athletic activities (unlike Dartmouth's control over non-employed students), and those athletes receive tangible benefits and goods in exchange for their participation and performance on the team).

[161] See Off. of Postsecondary Educ., U.S. Dep't of Educ., Equity in Athletics Data Analysis—Massachusetts Institute of Technology, https://ope.ed.gov/athletics/#/institution/details [https://perma.cc/TD7J-DRY5] (last visited Mar. 25, 2024).

handbooks.[162] Finally, the prior discussion of MIT cross country indicated that their runners do not receive athletic scholarships or support in the admissions process for their promise to perform on behalf of MIT.[163] They thus receive far less in benefits than the USC and Dartmouth athletes who have filed cases. This truncated analysis exemplifies how the model rule can guide the NLRB's considerations of athletes' coverage under the Act regardless of their sport or NCAA division.

Both athletes and schools will likely voice dissatisfaction with aspects of the model rule. Athletes and unions may contend that the rule's revenue threshold disproportionately impacts athletes in smaller sports, and it could result in disparate coverage between men's and women's teams.[164] While a university could run afoul of the NLRA if they cut a women's program or low-revenue sport in response to athletes' organizing or bargaining efforts,[165] schools may also be hesitant to support programs that barely cross the revenue threshold due to the potential bargaining obligation. The NLRB should strive to enact policies that ameliorate, not worsen, existing inequities in college athletics. At the same time, the threshold builds upon the agency's longstanding approach to determining whether a private entity and its workers engage in sufficient commercial

[162] Compare Mass. Inst. of Tech, MIT Engineers 2021–22 Student Athlete Handbook 9–13, https://mitathletics.com/documents/2021/11/2/2021_22_Student_Athlete_Handbook.pdf [https://perma.cc/PLG9-N6JN] (last visited Mar. 25, 2024) (outlining policies regulating MIT's athletes), and Mass. Inst. of Tech, Guide to New NCAA Action (revised Sept. 23, 2021), https://mitathletics.com/documents/2022/10/20/MIT_NIL_Policy___Guidance.pdf [https://perma.cc/QZ46-9NZS] (detailing MIT's approach to NIL), with USC Athletics Handbook, supra note 76, at 27–49 (providing policies regulating USC's athletes), and Dartmouth Athletics Student-Athlete Handbook, supra note 92, at 6–8, 17–18 (outlining policies regulating Dartmouth's athletes).

[163] See supra note 121 and accompanying text.

[164] See Revenues and Expenses, supra note 151, at 26 (illustrating median revenue generated by college teams in Division I sports, categorized by sport and sex).

[165] In this "leveling down" scenario, in which a school shuts down a program covered under the model rule, athletes could have a claim that the school engaged in an unlawful partial closure or retaliation against athletes for exercising their Section 7 rights. Under the model rule, covered athletes would be able to challenge any program shutdown under these doctrines if there is evidence that the shutdown violated Section 8(a)(3)'s prohibitions. See Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268 (1965) (holding that employers cannot partially close their business in response to Section 7 activity and establishing test for determining unlawful partial closures); see also Wright Line, 251 N.L.R.B. 1083, 1087 (1980), *enforced*, 662 F.2d 899, 900 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The U.S. Supreme Court endorsed this view the following year. NLRB v. Trans. Mgmt. Corp., 462 U.S. 393, 403 (1983) (establishing burden-shifting framework for unlawful retaliation and other acts prohibited by Section 8(a)(3) of the NLRA).

activity to justify regulation.[166] Meanwhile, schools will complain about the broad multi-factor tests in the second and third prongs. They will argue that colleges will struggle to meet their burden of proof when the definitions of "control" and "compensation" are expansive. However, these concerns ignore how colleges and universities have skirted labor laws for decades under the guise of "amateurism."[167] Typical forms of control and compensation cannot be expected for athletes who have been improperly treated as non-employees for decades. Therefore, interpreters must read these conditions of coverage broadly and analyze them through multi-factor tests that can account for a variety of school policies and practices.

Despite these concerns, the model rule establishes a widely applicable standard that will accelerate Board proceedings and advance labor stability more effectively than a patchwork of adjudicated holdings. Given the variety of sports, conferences, and divisions, a standard established in one case will not provide a clear answer for how athletes in a different sport should proceed. It would likely require dozens of cases for a coherent approach to athletes' coverage to emerge, placing the onus on regional directors and administrative law judges to revisit the coverage issue for each college team that comes before them. Adopting the model rule would avoid years of appeals and debates, as the framework would help NLRB officials determine employee status for athletes and move on to the underlying issues in their petitions or charges. The rule will consequently expedite Board elections and proceedings, serving both athletes and schools as they navigate labor disputes. It would also help athletes better evaluate their own protections under the NLRA, even if their circumstances widely differ from their counterparts at USC or Dartmouth. In addition to increased stability in labor relations, the model rule could better serve athletes who need to determine whether they can address the challenges they face through the NLRA and Board proceedings.

[166] See Siemons Mailing Serv., 122 N.L.R.B. 81, 83–84 (1958) ("[I]t is the impact on commerce of the totality of an employer's operations that should determine whether or not the Board will assert jurisdiction over a particular employer.").

[167] See NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

CONCLUSION

The USC and Dartmouth cases present an opportunity for the NLRB to protect players who advocate for healthcare, compensation, and bargaining power amidst college athletics' transformation. Analyzing these programs through the statutory test indicates a finding of employee status in these proceedings. However, jurisdiction is ultimately a policy decision. As the Board considers whether it should extend coverage, it has a responsibility to determine how it could do so without destabilizing labor relations across the industry. Crafting a rule through the adjudication of these cases without greater public input could produce a standard that will confuse parties and encourage judicial intervention. This would disserve the athletes who need concrete NLRA protections to organize and end years of exploitation by the NCAA and universities. Alternatively, rulemaking could provide clear answers for athletes and universities more quickly than a piecemeal adjudication process. A rule, such as the proposal outlined above, would help parties assess athletes' coverage under the NLRA, regardless of arbitrary considerations like sport and division. Determining coverage through rulemaking thus presents the strongest, most comprehensive approach to establishing NLRA protections for athletes in professionalized programs.