STATEMENT OF MATTHEW J. MITTEN

UNITED STATES HOUSE OF REPRESENTATIVES
EDUCATION AND THE WORKFORCE COMMITTEE

Subcommittee on Health, Employment, Labor, and Pensions, and Subcommittee on Higher Education and Workforce Development Joint Hearing

"Safeguarding Student-Athletes from NLRB Misclassification"

March 12, 2024

Introduction

I am a Professor of Law and the Executive Director of the National Sports Law Institute and the LL.M. in Sports Law program for foreign lawyers at Marquette University Law School in Milwaukee, Wisconsin. I served as the Law School's Associate Dean for Academic Affairs from July 2002 to June 2004. I currently teach Amateur Sports Law, Professional Sports Law, Sports Sponsorship Legal and Business Issues Workshop, Antitrust Law, and Torts. I am the author of *Sports Law in the United States* (Wolters Kluwer 2011, 2d. ed. 2014, 3d. ed. 2017, 4th ed. (forthcoming in 2024)) and co-author of a law school textbook, *Sports Law and Regulation: Cases, Materials, and Problems* (Aspen/Wolters Kluwer 2005, 2d. ed. 2009, 3d. ed. 2013, 4th ed. 2017, 5th ed. 2020, 6th ed. 2024), and an undergraduate and graduate textbook, *Sports Law: Governance and Regulation* (Wolters Kluwer 2013, 2d. ed. 2016, 3d. ed. 2020, 4th ed. 2024).

I formerly served on the NCAA Scholarly Colloquium on College Sports' Advisory Board (October 2006-January 2011) and the *Journal of Intercollegiate Sport*'s editorial board (January 2007-January 2011). I was a member of the NCAA's Committee on Competitive Safeguards and Medical Aspects of Sports (CSMAS) from August 1999-July 2005, and chaired this committee from September 2002-July 2005.

I served as the president of the Sports Lawyers Association from May 2015-May 2017 and am a current member of its Board of Directors who co-presents the Year in Review summary of current legal developments at its annual conference. My bio and CV, which have been submitted to the Committee, include additional information about my general sports law background and legal experience as an attorney before my academic career.

As a sports law professor, I have been studying and writing about various college sports issues for approximately 35 years, including several articles focusing on NCAA internal governance and external federal and legal regulation. My individual and co-authored scholarship provides guidance for Congressional consideration of the historical legal status of intercollegiate athletes as "student-athletes" at their respective colleges or universities as well as whether it is

appropriate to now re-characterize them as "employees" engaged in minor league professional sports. *See, e.g.*, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 Ore. L. Rev. 837 (2014) (with Stephen F. Ross); *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 San Diego L. Rev. 779 (2010) (with James L. Musselman & Bruce W. Burton); *Why and What Federal NIL Rights Legislation is Needed*, 41 Cardozo Arts & Entertainment L. J. 771 (2023).

NCAA Amateur/Education Model for Intercollegiate Athletics: 1906-Present

A) Origin and Historical Perspective

In October 1905, President Theodore Roosevelt summoned officials from Harvard, Yale, and Princeton to the White House to request that they use their influence and leadership toward restoring ethical conduct and eliminating dangerous play in college football. He did "not object to a sport because it is rough" and noted that "preparatory schools are able to keep football clean," stating that "[t]here is no excuse whatever for colleges failing to show the same capacity." Pres. Roosevelt's Address, In Union of Saturday on Questions of Local and National Interest, The Harvard Crimson (February 25, 1907), available at https://www.thecrimson.com/article/1907/2/25/pres-roosevelts-address-ptheodore-roosevelt-80/. Roosevelt's admonition motivated the 1906 founding of the Intercollegiate Athletic Association of the United States ("IAAUS"), which subsequently was renamed the National Collegiate Athletic Association ("NCAA") by 39 member colleges and universities.

More broadly, President Roosevelt believed that the "college athletic spirit is essentially democratic"; it is important "to encourage in every way a healthy rivalry which shall give to the largest possible number of students the chance to take part in vigorous outdoor games"; and "it is not healthy for either students or athletes if the teams are mutually exclusive." In his view, intercollegiate athletics should be "a means in life" rather than "the end of life": "It is first-class healthful play, and is useful as such. But play is not business, and it is very poor business indeed for a college man to learn nothing but sport." (*Id.*). Roosevelt's attitude that intercollegiate sports teams should be comprised of student-athletes was enshrined in the NCAA's founding principles: "No student shall represent a college or university in any intercollegiate game or contest . . . who has at any time received, either directly or indirectly, money, or any other consideration." Article VII (1), IAAUS By-Laws, Proceedings of the First Annual Meeting at p. 34.

From 1906 to the present, college athletes have been full-time students participating in a variety of sports as extracurricular activities at NCAA colleges and universities, not paid professional athletes. "The competitive athletics program of member institutions are designed to be a vital part of the educational system" with "the athlete as an integral part of the student body." 2021-22 NCAA Division I Manual, Constitution, Section 1.3.1. This historical amateur/educational

model of college sports is a uniquely American national system of athletic competition that does not exist anywhere else in the world.

Since 1906, NCAA educational institutions (currently almost 1,100 nonprofit private and public four-year colleges and universities organized into three NCAA divisions based on the philosophy and competitiveness of their athletic programs) have provided over 5 million educational and athletic participation opportunities to female and male intercollegiate student-athletes from all socio-economic backgrounds in a variety of sports. NCAA Division I, which has 118 private and 234 public member schools, is the most competitive level of intercollegiate sports. It is divided into the Football Bowl Subdivision (FBS) and Football Championship Subdivision (FCS). Division I FBS consists of the five Autonomy Conferences (Atlantic Coast Conference (ACC), Big Ten Conference, Big 12 Conference, Pac-12 Conference, and Southeastern Conference (SEC)) and five Group of Five Conferences, which collectively produce the College Football Playoff national championship. Division II has 150 private and 153 public member schools. Division III has 350 private and 83 public member schools. In 2023, NCAA educational institutions sponsored 20,122 teams in championship and emerging sports, which provided 527,935 intercollegiate sports participation opportunities for their student-athletes. They participated in 36 championship sports (17 women's championship sports, 16 men's championship sports, 3 co-ed championship sports) and 5 emerging sports for women. 44% of current NCAA student-athletes are female and 38% are non-White (16% Black, 7% Latinx, 5% international, 5% multiracial, 3% unknown, 2% Asian, <1% American Indian, <1% Native Hawaiian/Pacific Islander).

Only a very small number of NCAA member schools' intercollegiate athletic programs and sports teams generate sufficient revenues to pay for their expenses. For example, in 2022, only 28 NCAA member school athletic departments (approximately 2.5%; all are Division I FBS Autonomy Conference universities) generated positive net revenues. NCAA Research, *Division I Athletics Finances 10-Year Trends from 2013 to 2022* (December 2023) *available at* PowerPoint Presentation (ncaaorg.s3.amazonaws.com). Division I FBS Autonomy Conference football teams (69) and Division I men's basketball teams (and some women's basketball teams) generally are the only intercollegiate sports with the extensive fan support and commercial appeal to have the economic capacity to generate net positive revenues, which cross subsidize some of the costs of nonrevenue generating intercollegiate sports at their respective universities (which individually pay the costs of their athletic departments operating at a deficit). Only 2.6% of NCAA member schools' 527,935 student-athletes participate in Division I FBS Autonomy Conference football (8,402) or Division I men's basketball (5,516). Division I women's basketball has 5,065 student-athletes.

Educational and athletic participation opportunities provided by the NCAA's member institutions have enabled millions of American student-athletes to earn a college degree and to

develop the discipline, knowledge and skills, perseverance, self-confidence, and teamwork to "go pro" in a wide variety of careers and professions other than their respective intercollegiate sports. A December 2023 NCAA research report, *Trends in NCAA Division I Graduation Rates*, found that the Graduation Success Rate (GSR) for all NCAA Division I student-athletes who matriculated in 2016 and graduated within six years was 91%. This is the highest overall GSR during the 20 years it has been calculated for Division I student-athletes. The men's GSR was 86%, and the women's GSR was 95%. "Notable increases in single-cohort [GSR] over the 20 years of calculating this rate in Division I: • Overall student-athletes — 74% to 91%. • Black student-athletes — 56% to 82%. • Hispanic/Latino student-athletes — 64% to 89%. • Black FBS football student-athletes — 54% to 81%. • Black men's basketball student-athletes — 46% to 83%." (p. 7).

A 2020 Gallup report commissioned by the NCAA concluded:

> Compared to U.S. college athletes who did not participate in NCAA athletics, former NCAA student-athletes are more likely to be thriving in all but one element of wellbeing—financial wellbeing, where athletes and nonathletes mirror one another. NCAA student-athletes are most likely to excel beyond their non-athlete peers in physical wellbeing, followed by social wellbeing, while they show slight advantages on community and purpose wellbeing.

Gallup Inc., *A Study of NCAA Student-Athletes: Undergraduate Experiences and Post-College Outcomes* 7 (2020).

B) Federal and State Judicial and Legislative Recognition of Intercollegiate Sports Amateur/Education Model

In *NCAA v. Bd of Regents of the University of Oklahoma*, 468 U.S. 85, 101-02 (1984), former U.S. Supreme Court Justice John Paul Stevens explained: "[T]he NCAA seeks to market a particular brand of football—college football. The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball." Similarly, former Justice Byron "Whizzer" White, an All-American University of Colorado football player and 1937 Heisman Trophy runner-up, recognized that, in contrast to professional sports, intercollegiate athletics is not "a purely commercial venture in which colleges and universities participate solely, or even primarily, in the pursuit of profits." *Id.* at 121. He noted that the NCAA "exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity." *Id.* at 122.

More recently, in *NCAA v. Alston*, 141 S. Ct. 2141 (2021), although the Supreme Court held that NCAA bylaws limiting the in-kind and cash educational benefits NCAA schools could provide to student-athletes violated federal antitrust law, it stated that this ruling did not constitute judicial "product redesign" of intercollegiate sports and noted "the social benefits associated with amateur athletics. *Id.* at 102 and 107. In his concurring opinion, Justice Kavanaugh stated: "Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing." *Id.* at 110.

Consistent with the Supreme Court's recognition and acknowledgement that NCAA intercollegiate sports and student-athletes (full-time students at nonprofit institutions of higher education) are fundamentally different from professional sports and athletes (full-time employees paid cash compensation by for-profit league clubs), federal and state appellate courts have rejected assertions that college athletes are university employees under the federal Fair Labor Standards Act, *Berger v. NCAA*, 843 F.3d 285, 293 (7th Cir. 2016), or state worker's compensation laws. *See, e.g., Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170 (Ind. 1983); *Waldrep v. Texas Employers Insurance Ass'n*, 21 S.W.3d 692 (Tex. Ct. App. 2000).

For purposes of worker's compensation insurance coverage, no state legislatures have characterized college athletes as university employees. Some states expressly exclude intercollegiate athletes from coverage under their worker's compensation laws. See, e.g., Cal. Labor Code § 3352(a)(7) ("employee" excludes "[a] person, other than a regular employee, participating in sports or athletics who does not receive compensation for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, or other expenses incidental thereto").; N.Y. Workers' Comp. Law §2(4) (McKinney 2022) ("'employee' shall not include persons who are members of a supervised amateur athletic activity operated on a non-profit basis"). Notably, without characterizing intercollegiate athletes as "employees," Nebraska has legislatively mandated that the University of Nebraska "establish an insurance program which provides coverage to student athletes for personal injuries or accidental death while participating in university-organized play or practice in an intercollegiate athletic event." Neb. Rev. St. § 85-106.05 (West's 2024).

C) 2022 NCAA Constitution Modernizes the Historical Amateur/Education Model By Recognizing Student-Athletes' NIL Rights While Maintaining the Educational Primacy of Intercollegiate Sports and Facilitating Student-Athletes' Well-Being

The current NCAA Constitution (adopted by its members in January 2022 and effective in August 2022) retains the historical and inclusive amateur/educational model of college sports by prohibiting "pay for play," while permitting "pay for publicity" from the commercialization of intercollegiate athletes' Name, Image, and Likeness ("NIL") rights. The constitution's preamble and core principles as well as NCAA divisional bylaws maintain the unique brand of national

athletic competition among NCAA member institutions, which historically have provided higher education learning and athletic participation opportunities for more than 5 million student-athletes since 1906.

NCAA Constitution, Preamble:

> The [NCAA is] committed to the well-being and development of student-athletes, to sound academic standards and the academic success of student-athletes, and to diversity, equity and inclusion. Member institutions and conferences believe that intercollegiate athletics programs provide student-athletes with the opportunity to participate in sports and compete as a vital, co-curricular part of their educational experience.

NCAA Constitution, Article 1 ("Principles"):

> A ("The Primacy of Academic Experience")
> "Intercollegiate student-athletes are matriculated, degree-seeking students in good standing with their institutions who choose voluntarily to participate in NCAA sports. It is the responsibility of each member institution to establish and maintain an environment in which a student-athlete's activities are conducted with the appropriate primary emphasis on the student-athlete's academic experience. Intercollegiate athletics programs shall be maintained as a vital component of each institution's broader educational program. The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution."
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> B ("The Collegiate Student-Athlete Model")
> "Student-athletes may not be compensated by a member institution for participating in a sport, but [they] may receive educational and other benefits in accordance with guidelines established by their NCAA division."
>
> C ("Integrity and Sportsmanship")
> "It is the responsibility of each member to conduct its athletics program in a manner that promotes the ideals of higher education, human development and the integrity of intercollegiate athletics."

All incoming student-athletes have the freedom and right to initially choose their respective NCAA member educational institutions. Pursuant to a federal district court order, all NCAA student-athletes currently are permitted to transfer to other NCAA schools multiple times with immediate intercollegiate athletics eligibility if academically eligible to do so. *Ohio v. NCAA*, 2023 U.S. Dist. LEXIS 221953 (N.D.W.V.).

The Division I, II, and III Operating Bylaws establish several requirements to maintain the educational primacy of intercollegiate sports, sound academic standards, and the academic success of student-athletes as well as to ensure that all NCAA member institutions establish and maintain an environment in which a student-athlete's activities are conducted with a primary emphasis on the student-athlete's academic experience. To be academically eligible to participate in intercollegiate athletics, a student-athlete is required to be enrolled in a full-time program of studies, be in good academic standing, and maintain progress toward a baccalaureate degree at an NCAA member institution. (Bylaw 14.01.2). Each NCAA educational institution's academic authorities are required to determine whether an individual student-athlete is in good academic standing with the standard for its determination "at least as demanding as the institutional standard applied to all students to participate in extracurricular activities" and subject to applicable athletic conference regulations. (Bylaw 14.01.2.1). NCAA Constitution, Article 2 D 1b requires each NCAA member college and university to "[a]nnually submit documentation demonstrating compliance with [its] division's academic program and publish progress-toward-degree requirements for student-athletes."

Division I Autonomy Conference member schools are required to "make general academic counseling and tutoring services available to all student-athletes" and are permitted to fund other academic support services and to provide benefits "that support or are incidental to the academic success of student-athletes." (2023-24 NCAA Division I Manual, Bylaw 16.3.1.1). Autonomy conferences and schools are permitted to provide student-athletes with education-related benefits such as computers, science, equipment, and musical instruments; tutoring; expenses for studying abroad; and paid post-intercollegiate athletics eligibility internships. (Bylaw 16.3.4).

NCAA Constitution, Article 2 B 4 requires each NCAA division to "establish guidelines regarding student-athlete benefits, including commercialization of [NIL]." Uniform interim NCAA divisional guidelines, which have been in effect since July 1, 2021, permit all intercollegiate athletes to receive fair market value cash and in-kind NIL rights compensation (i.e., "pay for publicity") from third parties other than their respective schools. These guidelines maintain the historical amateur/educational model of intercollegiate sports by prohibiting NCAA member educational institutions and athletic conferences from providing student-athletes with "pay for play" by executing NIL rights contracts with them. A Tennessee federal district court recently enjoined any NCAA enforcement of the divisional guidelines' prohibition against using NIL contracts to recruit student-athletes to a particular NCAA school because it would limit intercollegiate athletes' "negotiating leverage" in NIL rights deals with its boosters or a collective of boosters. *Tennessee v. NCAA*, 2024 U.S. Dist. LEXIS 32050 (E.D. Tenn.) at *10. It implicitly upheld the NCAA's amateur/educational model of intercollegiate sports by stating the NIL guidelines prohibiting "athletic performance as consideration and compensation directly from member institutions are arguably more effective in preserving amateurism than the NIL-recruiting ban." *Id.* at *12.

NCAA Constitution, Article 1 D ("Student-Athlete Well-Being") provides that "Intercollegiate athletics programs shall be conducted by the Association, divisions, conferences and member institutions in a manner designed to protect, support and enhance the physical and mental health and safety of student-athletes," who "shall not be discriminated against or disparaged because of their physical or mental health."

Article 2 D 1d imposes the following specific obligations and requirements on each NCAA member educational institution to protect their student-athletes' health and safety:

> Establish an administrative structure that provides independent medical care for student-athletes, affirms the autonomous authority of primary athletics health care providers, and implements NCAA guidance, rules and policies based on consensus of the medical, scientific, sports medicine, and sport governing communities. The physicians and health care staff at each member institution have the ultimate decision-making authority over the health and welfare of student-athletes. Consistent with the member institutions' primary obligation with respect to student-athlete health and safety, member institutions will make NCAA guidance, rules and policies available to student-athletes. Member institutions shall be responsible for the oversight and administration of coach, administrator and staff education on relevant student-athlete physical and mental health topics, prevailing consensus for engaging student-athletes about physical and mental health, how to most effectively support student-athlete physical and mental health, and appropriate resources on campus or in the local community. Member institutions are responsible for regulating practice schedules, taking into consideration the health of student-athletes and their academic success."

The NCAA as well as its member educational institutions and athletic conferences may provide medical services and/or pay for the costs for student-athletes. (Bylaw 16.4). An NCAA Division I Autonomy Conference educational institution is required to provide medical care to a student-athlete "for an athletically related injury incurred during [their] involvement in intercollegiate athletics for the institution" for at least two years after either graduation or separation from the institution, as well as to provide mental health services and resources. (2023-24 Division I Manual, Bylaws 16.4.1 and 16.4.2). Since August 1, 1992, the NCAA has provided catastrophic athletic injury insurance covering all student-athletes who suffer serious injuries while participating in intercollegiate athletics at member institutions. This insurance plan, which provides for a maximum lifetime benefit of $20 million, compensates for educational benefits and lost earnings, as well as lifetime rehabilitation, medical costs, and dental expenses. NCAA, *NCAA Catastrophic Injury Insurance Program*, https://ncaaorg.s3.amazonaws.com/ncaa/insurance/INS_NCAACatastrophicBenefitSummary.pdf

Subject to any applicable legislative limits of its division (Division III educational institutions do not award athletic scholarships to their student-athletes) or conference (Ivy League schools do not award any athletic scholarships to any of their student-athletes, including those participating in Division I sports such as basketball) and any sport-specific athletic scholarship limits, the NCAA amateur/education model of intercollegiate athletics permits an NCAA member school to award multi-year tax-free financial aid to student-athletes, thereby providing them with a low debt or debt-free college education. See IRS Revenue Ruling 77-263, 1977-2 C.B. 47.

Division I educational institutions may award a full costs of attendance scholarship to its student-athletes based on their athletics ability, including tuition and fees, room and board, required course-related books, and all other expenses related to student attendance at the educational institution. (2023-24 Division I Manual, Bylaw 15.2). An athletics scholarship may not be reduced or canceled during the period of its award: "a) On the basis of a student-athlete's athletics ability, performance or contribution to a team's success; (b) Because of an injury, illness, or physical or mental medical condition . . .; or (c) For any other athletics reason. (Bylaw 15.3.4.3). A Division I Autonomy Conference athletics scholarship must be awarded for a period of at least one academic year and may be awarded for multiple years during a student-athlete's five-year period of eligibility to participate in intercollegiate sports. (Bylaw 15.3.3.1). If a student-athlete has been accepted for admission and awarded financial aid, the institution is required to honor an athletics scholarship for the term of the original award, "even if the student-athlete's physical condition prevents participation in intercollegiate athletics." (2023-24 Division I Manual, Bylaw 15.3.2.1).

Another significant education-related benefit provided to intercollegiate athletes by the 2022 NCAA Constitution is a commitment to gender equity. Article 1 G ("Gender Equity") provides that the "[a]ctivities of the Association, its divisions, conferences and member institutions shall be conducted in a manner free of gender [discrimination]" with a commitment "to preventing gender bias in athletics activities and events, hiring practices, professional and coaching relationships, leadership and advancement opportunities."

Unlike professional team sport athletes who do not have representation on their respective league governing bodies, NCAA student-athletes have voting representatives on the NCAA Board of Governors (the Association's highest authority) as well as the highest divisional governing bodies (i.e., Division I Board of Directors; Divisions II and III Presidents Councils). (Article 2 E 1). The president or chancellor of each NCAA member institution is required to appoint and support a faculty athletics representative [FAR] to whom student-athletes "can report any action, activity or behavior by anyone associated with the athletics program inconsistent with the [NCAA] constitution's principle of student-athlete health and well-being." (Article 2 E 2). "In this role, the FAR is a reporting contact for student-athletes independent of the institution's athletics department [and] shall report directly to the member institution's president or

chancellor." (*Id.*). Each NCAA educational institution must establish a student-athlete advisory committee, with student-athletes constituting a majority of its members. (Article 2 D 1g).

Legal Implications of Characterizing Intercollegiate Student-Athletes as "Employees" and Resulting Adverse and Socially Undesirable Consequences

During President Barak Obama's Democratic administration, in *Northwestern University*, 362 NLRB 1350 (2015), the National Labor Relations Board (Board or NLRB) rejected a petition to unionize NCAA Division I FBS Northwestern University football players because "it would not effectuate the policies of the [National Labor Relations Act (NLRA)] to assert jurisdiction in this case, even if we assume, without deciding, that the grant-in-aid scholarship football players are employees within the meaning of Section 2(3) [of the NLRA]." *Id.* at 1350. It observed that whether to assert jurisdiction in a case involving "college athletes of any kind" requires consideration of "novel and unique circumstances," which are different from those involving professional athletes": "scholarship players are unlike athletes in disputedly professional leagues, given that scholarship players are required, inter alia, to be enrolled full time as students and meet various academic requirements." *Id.* at 1352-1352.

The Board recognized "there is an inherent asymmetry of the labor relations regulatory regimes applicable to individual teams" within a national intercollegiate sports association because only private universities are "employers" within Section 2(2) of the NLRA subject to the Board's jurisdiction. *Id.* at 1354. Public university teams are established by state educational institutions, which are "subject to state labor laws governing public employees" that may not permit their unionization (e.g., Michigan and Ohio). *Id.* Because the majority of Division I FBS football teams are fielded by state public institutions and Northwestern is the only private university in the 14-university Big Ten Conference, the Board concluded that "asserting jurisdiction in this case would not promote stability in labor relations." *Id.*

The Board noted that future changes adversely affecting the "terms and conditions" and "treatment of scholarship players" at private universities "could outweigh the considerations" for its decision not to permit intercollegiate athletes to unionize:

> As an additional consideration, we observe that the terms and conditions of Northwestern's players have changed markedly in recent years and that there have been calls for the NCAA to undertake further reforms that may result in additional changes to the circumstances of scholarship players. For example, the NCAA's decision to allow FBS teams to award guaranteed 4-year scholarships, as opposed to 1-year renewable scholarships, has reduced the likelihood that scholarship players who become unable to play will lose their educational funding, and possibly their educational opportunity. We note that our decision to decline jurisdiction in this case is based on the facts in the record before us, and that subsequent changes in the treatment of scholarship players could outweigh the considerations that motivate our decision today.

Id. at 1354-55.

Since 2015, NCAA rules changes have been beneficial (not detrimental) to intercollegiate athletes, who now are permitted to earn fair market value NIL income and currently have greater rights and protections under the 2022 NCAA Constitution. It is undisputed that student-athletes' receipt of NIL income from third parties does not constitute the payment of "wages" (one characteristic of "employment") for playing intercollegiate sports by their respective educational institutions. NCAA member institutions currently do not exercise any greater degree of control over their respective student-athletes than they did in 2015.

There are no post-2015 federal or state labor law statutes or Supreme Court precedent supporting the recent view of the current NLRB general counsel and some regional office directors that NCAA student-athletes now should be re-characterized as "employees" permitted to unionize, with the resulting professionalization of intercollegiate sports. *Alston* expressly noted "we do not pass on" whether NCAA limits on the size of institutional athletic scholarships and prohibitions on cash awards "untethered to education" (i.e., "pay for play") violate federal antitrust law. (141 S. Ct. at 2154.) Although Justice Kavanaugh suggested these limits "raise serious questions under the antitrust laws," none of the other eight justices joined his concurring opinion. (*Id.* at 2166.) The National Association of Intercollegiate Athletics (NAIA)'s 250 member colleges and universities enacted legislation in October 2020 permitting their student-athletes to earn NIL income, no NAIA intercollegiate athletes have claimed to be employees of their respective educational institutions who are entitled to unionize.

Nevertheless, in *Dartmouth College*, Case 01-RC-325633 (February 5, 2024), the NLRB Regional Director determined that "because Dartmouth has the right to control the work performed by the men's varsity basketball team, and because the players perform that work in exchange for compensation, [its] basketball players are employees within the meaning of the [NLRA]." *Id.* at 2. This conclusion was based on *Columbia University*, 364 NLRB 1080, 1081 (2016), which held "it is appropriate to extend statutory coverage to students working for universities covered by the Act [e.g., student research and teaching assistants] unless there are strong reasons *not* to do so" (italics original). and the following findings. Dartmouth "exercises significant control over" the provision of their basketball playing services ("work"), which benefits the educational institution by generating alumni engagement, financial donations, and publicity, despite a "factual dispute as to how much revenue is generated by the men's basketball program and whether [it] is profitable." Although none receive athletic scholarships or any money in exchange for voluntarily playing their intercollegiate sport, the men's basketball receives "compensation" in the form of "early read" admission to Dartmouth; basketball playing apparel, equipment, and shoes; free tickets to their own home and away basketball games (which cannot be sold); away game travel, lodging, and meals; and the benefits of Dartmouth's Peak Performance program for its intercollegiate athletes. *Id.* at 18-20. Factually distinguishing

Northwestern University, the Regional Director determined that all players on Dartmouth men's varsity basketball team is the appropriate bargaining unit and that asserting jurisdiction would not create instability in labor relations because the "Ivy League, unlike the Big Ten Conference, consists only of private universities" and "the Board's concerns about potentially conflicting state labor laws do not apply." *Id.* 22.

Recognizing that "[t]o the extent that this decision is inconsistent with *Berger v. NCAA*," which ruled that track and field athletes at another Ivy League educational institution (the University of Pennsylvania) are not university employees under the federal Fair Labor Standards Act, the Regional Director effectively ignored this federal appellate court precedent by simply stating "I am not bound by [this] decision." Moreover, the Regional Director did not consider the interrelated issues of the material differences between university student academic research/teaching assistants (who are not participants in an extracurricular competitive athletic contest against student-athletes at other universities) and non-athletic scholarship intercollegiate athletes for purposes of determining whether they are employees under the Act and whether "there are strong reasons *not* to do so" in the case of the later students. *Columbia University*, 364 NLRB at 1081.

Without any consideration of whether the unique features of a national system of college sports competition among American college and universities provide strong reasons not to do so, *Dartmouth College* broadly characterizes student-athletes without athletic scholarships as "employees" because they receive other in-kind "compensation" for their "work" (i.e., voluntary intercollegiate sports participation) even if the particular sport does not generate net revenues. If the regional director's determination is subsequently affirmed by the NLRB and federal appellate courts, this one-size-fits all federal labor law decision and direction of election effectively opens the door for the student-athlete members of approximately 10,000 intercollegiate teams at 618 NCAA member private educational institutions nationwide (and NAIA private schools) to unionize and collectively bargain with their respective colleges or universities. Doing so would undermine the historical amateur/education model of NCAA intercollegiate sports promoted by President Theodore Roosevelt, including its modernized model, which permits all student-athletes to commercialize their NIL rights as well as provides higher education opportunities to all intercollegiate athletes. *Dartmouth College* seriously threatens the current and future viability of the uniquely American model of higher education and national sports competition that has developed and grown significantly during the past 118 years, enabling the NCAA's approximately 1,100 member colleges and universities to currently provide intercollegiate athletics participation opportunities at different and multiple levels of competition for more than 525,000 female and male student-athletes with different relative levels of athletic ability in more than 35 sports.

On March 5, 2024, the Dartmouth men's basketball team voted 13-2 to be represented by the Service Employees International Union, which also represents Dartmouth undergraduates who work in the college's dining halls. As a result, federal labor law requires Dartmouth College to collectively bargain with the union for its 15 men's intercollegiate basketball team members concerning mandatory subjects of collective bargaining.

Dartmouth College, a nonprofit educational institution, now has the same legal duty under §8(d) of the NLRA, 29 U.S.C. §158(d) to bargain in good faith regarding its men's intercollegiate basketball team members' "wages, hours, and other terms and conditions of employment" as the for-profit National Basketball Association (NBA) does with the NBA Players Association, the union for NBA players. Dartmouth also has a contractual obligation to comply with the NCAA Constitution, including Article 1 B ("Student-athletes may not be compensated by a member institution for participating in a sport"), which is the pillar of the amateur/education model adopted by the NCAA's founding member institutions in 1906. If the union for the Dartmouth men's basketball team demands the payment of wages or other terms and conditions for playing college basketball that constitute "pay for play" (e.g., compensation based on the team's performance), Dartmouth College would be in an untenable position. If it agrees to professionalize its basketball team by providing its members with "pay for play" in violation of Article 1B, it is subject to sanctions such as the exclusion of its men's basketball team (if it otherwise qualifies) from participation in the NCAA's March Madness basketball tournament. If Dartmouth College refuses to collectively bargain about providing any "pay for play" to its intercollegiate athletes, it risks the filing of an unfair labor practice claim alleging a breach of its §8(d) obligation to bargain in good faith.

In addition to threatening to destroy the amateur/education model of intercollegiate sports, characterizing student-athletes at private universities as "employees," which permits them to unionize and to collectively bargain their "wages, hours, and other terms and conditions of employment" raises numerous complex and unprecedented federal labor law issues that currently are and will continue to generate litigation as well as actual and potential conflicts with other federal laws and their judicial interpretation.

1) Is the appropriate bargaining unit for a private university, all its intercollegiate athletes; only those playing the same sport; if so, should it include both men's and women's team members or do the different teams have the right to choose different unions? If the same union collectively represents both the men's and women's basketball team members, the union has a federal labor law duty to fairly represent all of them and a conflict may arise because of materially different economic and noneconomic factors affecting the respective bargaining leverage of the men's and women's team members. If the same or a different union individually represents the men's and women's basketball teams and negotiates a separate collective bargaining agreement (CBA) for each team with materially different wages, hours, and/or other terms and conditions of

employment, there is an apparent conflict between a union's federal labor duty to collectively bargain the best deal for the members of each team and the university's federal duty under Title IX of the Educational Amendments of 1972, 20 U.S.C. §§1681-1688, to provide equal benefits and treatment to members of its female and male intercollegiate sports teams.

2) It is currently unclear who is the "employer" of the members of an intercollegiate sports team (i.e., only its sponsoring college or university, or also the athletic conference and/or the national association in whose games or athletic events the team competes?). In *Northwestern University*, the Board observed:

> "[A]s in other sports leagues, academic institutions that sponsor intercollegiate athletics have banded together and formed the NCAA to, among other things, set common rules and standards governing their competitions. . . . As in professional sports, such an arrangement is necessary because uniform rules of competition and compliance with them ensure the uniformity and integrity of individual games, and thus league competition as a whole. There is thus a symbiotic relationship among the various teams, the conferences, and the NCAA. As a result, labor issues directly affecting only an individual team and its players would also affect the NCAA, [athletic conference], and the other member institutions."

362 NLRB at 1353-54.

In *Dartmouth College*, it was not necessary for the Regional Director to consider this issue because neither party asserted that "the NCAA and/or the Ivy League are joint employers of the [university's] basketball players." (p. 16, n. 21). There is a pending NLRB case in California in which an administrative law judge (ALJ) will determine if the University of Southern California (USC), the Pac-12 Conference, and the NCAA are joint employers of USC's Division I men's and women's basketball players and FBS football players. An affirmative ruling by the ALJ would conflict with a California-based federal appellate court's ruling that Division I FBS football student-athletes are not employees of either the NCAA or the Pac-12 Conference under the federal Fair Labor Standards Act or California Labor Code who are entitled to be paid minimum wages and overtime for playing an intercollegiate sport that generates net revenues. In *Dawson v. NCAA*, 932 F.3d 905, 909 (9th Cir. 2019), the 9th Circuit held that "the economic reality of the relationship because between the NCAA/PAC-12 and student-athletes does not reflect an employment relationship because neither the NCAA nor Pac-12 provided intercollegiate athletes with an athletic scholarship or compensation, had the power to hire or fire them, or "exercise[d] any other analogous control," or "engage[d] in the actual supervision of the players' performance." *Id.* at 910. An NLRB ALJ determination that a private entity such as the NCAA or athletic conference is a joint employer under the NLRA would potentially permit intercollegiate athletes at NCAA member public universities to unionize under the NLRA in

conflict with state laws prohibiting employees of state educational institutions or their student-athletes from unionizing.

3) The broad scope of mandatory subjects of collective bargaining (i.e., "wages, hours, and other terms and conditions of employment") between a union representing intercollegiate athletes and their respective educational institutions and possibly others (e.g., athletic conference and/or national governing body) potentially includes: a) a sport-specific player draft, which would result in the loss of or restrictions on intercollegiate student-athletes' current individual freedom to initially chose to attend a particular educational institution; b) collectively bargained wages, which are less than the value of a full costs of attendance scholarship and other cash and in-kind educational benefits permitted under current NCAA rules; c) more restrictive limits on student-athletes' NIL earning capacity; for example, the collectively bargained NBA Uniform Player Contract ¶13(a)(b) prohibits all players from "sponsor[ing] commercial products without the written consent of the Team, which shall not be withheld except in the reasonable interests of the Team or the NBA; d) reduced team size limits (e.g., the current maximum of 85 football scholarships for each Division I FBS team is 30 more than the maximum 55 players for NFL team rosters); and e) contract and free agency restrictions resulting in student-athletes' lost or limited current freedom to transfer schools (even if a coach leaves or despite intolerable conditions).

In *Alston*, Justice Kavanaugh identified some of the "difficult policy and practical questions [that] would undoubtedly ensue" if all or some intercollegiate sports are professionalized:
How would paying greater compensation to student athletes [other than and in addition to educational benefits] affect non-revenue raising sports? Could student athletes in some sports but not others receive compensation? How would any compensation regime comply with Title IX? If paying student athletes requires something like a salary cap in some [professional] sports in order to preserve competitive balance, how would that cap be administered? 141 S. Ct. at 111.

4) Absent applicable CBA protections, intercollegiate athletes legally characterized as unionized employees who are *de facto* professional athletes generally could be fired with resulting loss of wages and/or other adverse economic consequences for unsatisfactory athletic performance or simply the coach's desire for replacements who will play better. For example, St John's University men's basketball coach Rick Pitino, who was very upset with his team's February 17, 2024 loss to Seton Hall University, publicly characterized his players as "weak", "unathletic", and lacking toughness, describing them as being the "antithesis" of his coaching style. Karl Rasmussen, Rick Pitino Callously Rips "Weak" St. John's Team: "Most Unenjoyable Experience of My Lifetime" (Feb. 18, 2024) available at Rick Pitino Callously Rips 'Weak' St. John's Team: 'Most Unenjoyable Experience of My Lifetime' - Sports Illustrated. NCAA Division I Bylaw 15.3.4.3, which prohibits an athletics scholarship from being reduced or canceled during the period of its award "[o]n the basis of a student-athlete's athletics ability,

performance or contribution to a team's success," precluded Pitino from "firing" any members of the basketball team. If they were unionized St. John's employees who receive "pay for play," he may not have been constrained by this contractual protection for Division I student-athletes.

5) During a labor dispute, a college or university employer has the right to lockout unionized intercollegiate athletes and to hire temporary or replacement players as well as to unilaterally impose the proposed (and union rejected) terms and conditions of their employment if it bargains in good faith to "impasse" with their union. *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

The legal characterization of private university student-athletes as "employees" and their unionization under the NLRA results in adverse economic consequences to them under federal intellectual property law. Most courts have ruled that the Copyright Act preempts professional athletes' claims that media broadcasts of games or athletic competitions in which they participate violate their state law NIL or publicity rights. See, e.g., *Dryer v. NFL*, 814 F.3d 938 (8th Cir. 2016); *Ray v. ESPN*, 783 F.3d 1140 (8th Cir. 2015); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986); *Somerson v. McMahon*, 956 F. Supp.2d 1345 (N.D. Ga. 2012).

Intercollegiate athlete employee status and unionization resulting in collectively bargained "pay for play" also raise important federal income tax issues. According to the Internal Revenue Service, "whether an individual is treated as an employee for labor law purposes is not controlling of whether the individual is an employee for federal tax purposes." "The treatment of scholarships for federal income tax purposes is governed by the Internal Revenue Code," specifically "Section 117 of the Code allows a taxpayer to exclude a 'qualified scholarship' from gross income." "[A]thletic scholarships can qualify for exclusion from income under section 117." Pursuant to Revenue Ruling 77-263, "where the student athlete is expected to participate in the sport, and the scholarship is not cancelled in [the] event the student cannot participate and the student is not required to engage in any other activities in lieu of participating in the sport," the athletics scholarship "is primarily to aid the recipients in pursuing their studies and, therefore, is excludable under section 117." April 9, 2014 Letter from Office of Chief Counsel, Internal Revenue Service, to Senator Richard Burr. This letter also states that pursuant to Section 117(c) "a qualified scholarship does not include that portion of any amount which represents payment for . . . other services by the student required as a condition of receiving the qualified scholarship." Based on Revenue Ruling 77-263 and Section 117(c), it is uncertain whether some or all of the value of a unionized college athlete's athletic scholarship conditioned on playing an intercollegiate sport would be excludable from their gross income. Moreover, the Internal Revenue Service could change its historically favorable tax treatment of athletic scholarships if intercollegiate sports is professionalized.

Concluding Summary

During my June 9, 2021 Senate Commerce Committee testimony regarding the immediate need for a uniform federal NIL law for intercollegiate sports, Senator Roger Wicker asked me what happens if Congress does not enact federal legislation. I said that "the cat's out of the bag." He then asked how you put the cat back in it, and my response was that I didn't think it could be done.

If all private college and university intercollegiate student-athletes, including those who do not have athletic scholarships and participate in sports that do not pay their costs to produce, are permitted to unionize and college sports are professionalized, another cat will jump out of the bag and the NCAA member educational institutions' 118-year-old amateur/education model for intercollegiate sports will be destroyed to the likely detriment of most current and future prospective intercollegiate athletes.

Characterizing college athletes as "employees" permitted to unionize and to collectively bargain "pay for play" wages and other terms and conditions of their "employment" by their respective colleges and universities (as well as their athletic conferences and national associations if they are characterized as joint employers) will increase the costs of producing intercollegiate sports (probably substantially). A very significant adverse and socially undesirable consequence likely would be the elimination of many of the current 20,122 intercollegiate sports teams fielded by NCAA member institution or their downgrading to club sports with a corresponding significant reduction in the presently 527,935 intercollegiate sports participation and college education opportunities for their student-athletes. Nonrevenue generating intercollegiate teams, most of which are Olympic sports, are the ones most likely to be eliminated or downgraded by Division I, II, and III colleges and universities other than the approximately 2.5% of the almost 1,100 NCAA member educational institutions whose athletic program generated net revenues in 2022. Therefore, "there are strong reasons *not* to do so."