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Pro Bono Publico: For the Public Good – How Student Athletes Have Worked for the Public Good—And How That Must Change

I. Introduction

If you're not loaded down with reasons why something won't work,

the reasons why it can work become much clearer.

Mike Leach, Head College Football Coach

College football in America began with little fanfare, as Rutgers and New Jersey—known today as Princeton—played to a 6-4 Rutgers victory in front of only 100 fans in 1869.[1] Seven years later, representatives from Colombia, Harvard, Princeton, and Yale gathered at the Massasoit House in Springfield, Massachusetts to codify the first set of rules for the sport.[2] College Football, which began without aplomb, is now a multi-billion dollar national enterprise – the Power Five conferences, soon to become the Power Four, combined to bring in more than $3.3 billion in revenue in 2022.[3]

The Big Ten, the most financially successful of those conferences, brings in over

[1] Sam Richmond. *1st college football game ever was New Jersey vs. Rutgers in 1869*. NCAA. (6 Nov. 2023) https://www.ncaa.com/news/football/article/2017-11-06/college-football-history-heres-when-1st-game-was-played

[2] Spencer Parlier. *College football history: Notable Firsts and milestones*. NCAA. (4 Aug. 2023) https://www.ncaa.com/news/ncaa/article/2023-08-04/college-football-history-notable-firsts-and-milestones.

[3] Dean Straka. *Big Ten leads Power Five conferences with $845.6 million in revenue in 2022 fiscal year*. CBS Sports. (19 May 2023) https://www.cbssports.com/college-football/news/big-ten-leads-power-five-conferences-with-845-6-million-in-revenue-in-2022-fiscal-year-per-report/.

$800 million each year.[4] This revenue comes primarily from television networks, who pay the Big Ten for the right to televise the conference's games. These games, of course, involve "student-athletes" competing for their universities. I use the term "student-athletes" lightly, because the designation, in my opinion, does not properly describe these young men and women. These athletes see none of the millions that they generate for their universities, their conferences, and the NCAA. Some, including previous versions of the Supreme Court, argue that the education these students receive is beyond valuation, and more than fair for the contribution made on the field by these student-athletes. This reasoning fails to pass even the slightest application of logic. Jimbo Fisher, a national championship winning head coach, was recently fired by Texas A&M. He had a fully guaranteed contract with the university and is owed $76 million because he was fired without cause.[5] Any justification to not pay these student-athletes based on economic grounds is entirely void of the truth.

College football is the second most viewed and followed sport in the United States, behind only the National Football League. In late November, a regular season game between the University of Michigan and the Ohio State University averaged over nineteen million viewers.[6]

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[4] *Id.*

[5] Pete Thamel. *Jimbo Fisher fired by Texas A&M, to receive record buyout*. ESPN. (12 Nov. 2023). https://www.espn.com/college-football/story/_/id/38880082/jimbo-fisher-expected-fired-texas-sources-confirm. (stating that Texas A&M will pay Jimbo Fisher $19.2 million within 60 days of his termination, and then $7.2 million annually through 2031. Unlike most coach contracts, Fisher's had no offset language, so this money is due regardless of any other coaching or media money he may receive from future contracts.)

[6] Ian Casselberry. *Michigan-Ohio State Draws the Highest College Football TV Audience of 2023*. Sports Illustrated. (29 Nov. 2023). https://www.si.com/college/2023/11/29/michigan-ohio-state-draws-highest-college-football-tv-audience 2023#:~:text=The%20game's%20TV%20viewership%20fulfilled,football%20broadcast%20of%20the%20season.

The 2023 NBA Finals averaged around eleven million, and the 2023 MLB World Series averaged just over nine million viewers.[7] Athletes in those sports, at the top of their profession, bring in millions each year. No one would argue that they do not deserve to be paid, yet those same people have argued that student-athletes do not deserve to be compensated for their athletic achievements.

Based on NLRB guidance and legal precedent, student-athletes are employees of their universities. Although there are hundreds of student-athletes at every large university deserving of NLRA protection, there is a much smaller number that contribute to generating revenue for the university. As a result, athletes should be grouped by sport and competition level, not university.

This paper will argue that football student-athletes within the Big Ten conference should be categorized as employees and should receive a share of revenue generated from their contributions. This narrow focus will not create the perfect solution, because there are significant Title IX and other equitable concerns, but it will improve the current model, where young men and women are taken advantage of by contributing to a product that they receive no compensation for.

II. Background and History of the Employee Movement in College Football

This paper will focus primarily on the history, development, and financial aspects of the

[7] Statista. *Average Viewership of NBA Finals games in the United States from 2002 to 2023*. (17 Oct. 2023). https://www.statista.com/statistics/240377/nba-finals-tv-viewership-in-the-united-states/#:~:text=NBA%20Finals%20TV%20viewership%20in%20the%20U.S.%202000%2D2023&text=The%202023%20NBA%20Finals%20were,the%20Boston%20Celtics%204%2D2; Josh Sim. *MLB World Series 2023 is least watched on record*. (3 Nov. 2023). https://www.sportspromedia.com/news/mlb-world-series-2023-tv-ratings-viewership-fox-texas-rangers/#:~:text=The%20five%2Dgame%20series%20won,9.11m%20viewers%20on%20Fox.&text=The%202023%20Major%20League%20Baseball,9.11%20million%20viewers%20on%20Fox.

Big Ten but will also outline the changing dynamics of the greater college football landscape. This section begins with a discussion of the Big Ten Conference and its growth to national preeminence in a financial aspect. Much of this transformation emerged as the result of influential and determinative Supreme Court decisions outlined in Subsection B. Finally, this section discusses the Northwestern football team's unionization attempt.

A. History of the Big Ten Conference

In 1896, the Universities of Chicago, Michigan, Illinois, Purdue, Minnesota, Northwestern, and Wisconsin gathered to join the Big Ten conference.[8] Their first action was to "restrict eligibility for athletics to bonafide, full-time students who were not delinquent in their studies."[9] This restriction laid out during the first ever meeting of the Big Ten conference remains true today, at least in most regards. Three years working for a prominent Big Ten football program dispelled the myth that these young men are students first and athletes second. It is certainly the other way around. In fact, it is difficult, if not nearly impossible, to be a "bonafide" student when most of a college football athlete's waking hours are spent studying film, working out, and practicing with the team, not to mention traveling every other weekend during the fall to compete on Saturdays. However, these athletes must go to classes—in person or online—and must maintain good enough grades to be eligible to compete for their team and their university.

In 1955, the Big Ten created their revenue-sharing model, through which the Big Ten conference—a private entity—would distribute revenues from media rights and bowl payouts to the primarily public institutions in the conference.[10] This revenue-sharing model remains in place

[8] Big Ten. *Big Ten History*. (May 2023). https://bigten.org/sports/2018/6/6/trads-big10-trads-html.aspx

[9] *Id.*
[10] *Id.*

today, with the Big Ten distributing nearly $60 million to each of their 14—soon to be 18—member universities.[11] The conference spans from the East Coast to the West Coast, providing participation opportunities in college athletics for more than 11,000 students.[12] However, these students, outside of their scholarships and minimal stipends, see none of the millions that they generate for the conference. They are not employees but are given the special and legally insignificant title of "student-athlete."

B. Major Supreme Court Decisions on College Athletics

For much of the NCAA's history, the organization ruled college athletics without input from its member institutions. This system was first severely threatened by the Supreme Court decision in *NCAA v. Board of Regents*.[13] From 1953 until the case was decided in 1984, the NCAA controlled and regulated the ability of schools to televise their football games.[14] This was driven, in part, by previous reports that televised games negatively impacted in-person attendance at the NCAA's member institutions.[15] The NCAA chose to hold the media rights to football games played by its member institutions, negotiating television deals that those institutions could not escape.[16]

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[11] Dean Straka. *Big Ten leads Power Five conferences with $845.6 million in revenue in 2022 fiscal year*. CBS Sports. (19 May 2023) https://www.cbssports.com/college-football/news/big-ten-leads-power-five-conferences-with-845-6-million-in-revenue-in-2022-fiscal-year-per-report/.

[12] Big Ten. *Big Ten History*. (May 2023). https://bigten.org/sports/2018/6/6/trads-big10-trads-html.aspx

[13] *National Collegiate Athletic Association v. The Board of Regents of the University of Oklahoma and The University of Georgia Athletic Association*. 468 U.S. 85 (1984).

[14] *Id.*

[15] *Id.*

[16] *Id.*

The Boards of Regents from the Universities of Oklahoma and Georgia sued the NCAA, asserting that its television scheme violated the Sherman Antitrust Act.[17] The Supreme Court ruled for the Universities, finding that the NCAA had created a monopoly over live television coverage of college football games and allowing universities to negotiate television deals themselves for the first time in three decades.[18] Despite the loss, the NCAA received a blessing from the Court: "In order to preserve the character and quality of the "product" [college football], athletes must not be paid, must be required to attend class, and the like."[19] This statement, from Justice Stevens, further perpetuated the notion that collegiate athletics was unlike any other form, and must receive disparate treatment to maintain its inherent "character" and "quality."[20]

The NCAA's amateurism model came under further scrutiny in two subsequent cases: first in *O'Bannon v. NCAA*, and more recently, in *Alston v. NCAA*. Ed O'Bannon was a former UCLA basketball player and national champion who filed a lawsuit against the NCAA and the Collegiate Licensing Company.[21] O'Bannon alleged that his likeness had been used in video games without consent or compensation.[22] Although the figure in the game was unnamed, it matched O'Bannon's height, weight, baldness, skin tone, jersey number, and left-handed shot.[23] A ruling from Judge

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

[22] *Id.*

[23] *Id.*

Claudia Wilken in the Northern District of California, affirmed by the Ninth Circuit, once again held that the NCAA had violated the Sherman Antitrust Act, dealing another blow to their outdated amateurism model.[24] Although many believe that the later *Alston* decision was the advent of collegiate Name, Image, and Likeness, it is this earlier decision that carries greater weight.

Finally, in 2021, the Supreme Court heard *Alston v. NCAA*, and this time, the Court did not offer the association the same courtesies that the previous Court did in *Board of Regents*.[25] The *Alston* case was rather narrowly focused. It did not discuss the issue of employment, or the legality of Name, Image, and Likeness payments. Rather, *Alston* focused solely on NCAA compensation rules which limited student-athletes' education-related benefits.[26] The plaintiffs sued, and prevailed, under the Sherman Antitrust Act once again.[27] The Court was unanimous, and Justice Kavanaugh's scathing concurrence offers great examples of the issues with the NCAA's business model.[28]

Justice Kavanaugh wrote that "there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny."[29] He ended his concurrence with a powerful remark about college athletics, punctuated by stating that "[t]he

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[24] *Id.*

[25] *Alston v. NCAA*, 141 S.Ct. 2141 (2021).

[26] *Id.*

[27] *Id.* (finding that the NCAA's rules limiting student-athlete compensation involved anti-competitive price fixing in violation of section 1 of the Sherman Act, and that the NCAA's limits unreasonably restrained trade.)

[28] *Id.* (Kavanaugh, J., concurring)

[29] *Id.*

NCAA is not above the law."[30] Kavanaugh points to the circular logic used by the NCAA to justify their lack of athlete compensation: "[n]owhere else in America can businesses get away with not agreeing to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate."[31] It is this circular logic that forces student-athletes to find other routes of compensation, and is precisely why they must be recognized as employees under the NLRA.

C. Northwestern Unionization Attempt

In early 2014, the Northwestern football team submitted signed union cards to the NLRB as evidence of their intention to unionize.[32] Northwestern players sought the protections and laws of the National Labor Relations Act ("NLRA"), forming the College Athletes Players Association on the same day they submitted their signed union cards.[33] Unsurprisingly, Northwestern refused to recognize the players as employees, and a hearing was scheduled for February 2014. The

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[30] *Id.*

> To be sure, the NCAA and its member colleges maintain important traditions that have become part of the fabric of America—game days in Tuscaloosa and South Bend; the packed gyms in Storrs and Durham; the women's and men's lacrosse championships on Memorial Day weekend; track and field meets in Eugene; the spring softball and baseball World Series in Oklahoma City and Omaha; the list goes on. But those traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.

[31] *Id.*

[32] Joe Nocera & Ben Strauss. *Fate of the Union: How Northwestern football union nearly came to be*. (24 Feb. 2016). https://www.si.com/college/2016/02/24/northwestern-union-case-book-indentured

[33] *Id.*

athletes argued that they were already employees for several reasons: their pre-existing scholarships, the control of the school and the coaches, and the risk of loss of their scholarships.[34] The NLRB regional director sided with the players, finding for the first time that they were employees of their university:

> The players spend 50 to 60 hours per week on their football duties during a one-month training camp prior to the start of the academic year and an additional 40 to 50 hours per week on those duties during the three- or four-month football season […] Not only is this more hours than many undisputed full-time employees work at their jobs, it is also many more hours than the players spend on their studies.[35]

However, Northwestern University requested and was granted review from the National Labor Relations Board.[36] In a unanimous decision, the five-member Board refused to assert jurisdiction in the case. [37] The Board mentioned that college football resembles a professional sport in several relevant ways, including the substantial revenues that the teams and conferences receive.[38] Most importantly, perhaps, the Board found it difficult to assert jurisdiction over a single team, when all NLRB cases in the past involved league-wide bargaining units.[39] It is precisely this reason that this

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[34] *Id.*

[35] *Northwestern University and College Athletes Players Association (CAPA)*, 13-RC-121359 (NLRB 2015).

[36] *Id.*

[37] *Id.* ("[N]othing in our precedent requires us to assert jurisdiction in this case. Given the absence of any controlling precedent, we find it appropriate to consider whether the Board should exercise its discretion to decline to assert jurisdiction in this case, even assuming the Board is otherwise authorized to act.")

[38] *Id.*

[39] *Id.*

paper argues that future issues on student-athlete employee status be done at the conference level; here, that is the Big Ten.

III. Analysis of Student-Athletes as Employees Under the NLRA and Common Law

Section A describes the traditional methods of employee designation, including introducing the ten common law factors most often used for that determination. Section B looks at the inconsistencies in application from the National Labor Relations Board, which is settled for now through *Atlanta Opera*. Finally, Section C looks specifically at student workers and the NLRB General Counsel's position to emphasize that student-athletes are, and should be, employees under the Act.

A. Understanding the NLRB Approach to Student-Athlete Employee Designation Through Pre-Existing Precedent

Employees and Employers have a historically tenuous relationship, predicated upon their differing interests. This is easily described, from an economic standpoint, as the Principal-Agent dilemma. The Principal—in this situation the employer—has interests and motivations primarily focused on (1) profit and (2) maximization of their time. Everyone regards their time as valuable, and that constraint encourages these Principals to outsource more menial work to an Agent. The Principal desires many things from this agent, primarily that the Agent completes the work, and that they cost the Principal as little as possible. The Agent has different, conflicting motivations. From a purely economic view, the Agent desires to work as little as possible while making as much as possible. In short, the Principal desires more work and less pay, and the Agent desires less work and more pay. This dichotomy of interests leads to (1) agency costs, which could be the Principal's cost of monitoring the work of the Agent and (2) shirking, where the Agent, through laziness, lack

of motivation, or more profitable enterprises, does not fully accomplish what the Principal assigned them to.

It is this Principal-Agent dilemma that remains at the heart of every employer-employee relationship. Employers, as the more powerful group, historically took advantage of their employees, subjecting them to low pay, long hours, and harsh working conditions. One key piece of legislation that permanently changed this relationship was the National Labor Relations Act. In 1935, President Franklin Roosevelt, in a period of economic turmoil at the end of the Great Depression, signed the Wagner Act—or National Labor Relations Act ("NLRA")—into law.[40] This Act, for the first time in the United States, guaranteed protections for employees. These protections included "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection."[41] At its core, the Act was created to protect the interests of the workers through encouraging their collective action—after all, when faced with a more powerful employer, the sole employee would stand no chance, but the collective voice would be heard.

In 1944, the Supreme Court ruled on *NLRB v. Hearst Publications*, in which the publishers of four newspapers refused to bargain with a union representing the newspaper distributors.[42] The publishers contended that the "newsboys" were not employees under the NLRA, which had failed to accurately define an employee.[43] The Court rejected the publishers' argument, finding that

[40] National Labor Relations Act. (1935)

[41] *Id.*

[42] *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111 (1944).

[43] *Id.*

employee carried a broad definition on purpose and was to be determined on a fact-specific basis for each case.[44] In response, Congress passed the Taft-Hartley Act in 1947, amending the Wagner Act and contracting the greater NLRA to specifically exclude independent contractors from the Act's protection.[45] The Supreme Court continued to contract this employee definition in *NLRB v. United Insurance Company*, holding that the correct way to determine employee status was through the use of general agency principles (invoking the Principal-Agent dilemma once again) and the common law right-of-control test.[46] The Court relied heavily on the Second Restatement of Agency § 220, which lists ten factors to determine the vicarious liability of the principal: (1) the extent the master controls the details of the work, (2) how distinct the work or business is, (3) whether the work is done under direct supervision, (4) the skill required to do the work, (5) whether the master supplies the tools necessary to do the work, (6) the length of employment, (7) whether the payment is by time worked or by job, (8) how regular the work is, (9) whether the parties see themselves as in a master/servant relationship, and (10) whether the master runs a business.[47]

B. The NLRB's Inconsistent Application of the Common Law Factors and the Recent Decision in *Atlanta Opera* to Govern Current Disputes

The NLRB has continued to apply these ten non-exhaustive factors when determining Employee status, but their application, and that of the courts, has swayed and changed over the years. The D.C. Circuit Court, in *Local 777, Democratic Union Organizing Committee, Seafarers*

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[44] *Id.* at 129 ("In this light, the broad language of the Act's definitions…leaves no doubt that its applicability is to be determined broadly.")

[45] Labor Management Relations Act of 1947. (1947).

[46] *National Labor Relations Board v. United Ins. Co. of Am*., 390 U.S. 254 (1968).

[47] Restatement (2d) of Agency § 220 (1958).

International Union v. National Labor Relations Board, stated that the most important element in employee determination is the extent to which the supervisor exercises oversight and control of the "means and manner" by which the worker completes the task.[48] This "means and manner" test became, for a time, the determinative factor over employee status.

The D.C. Circuit later moved away from this "means and manner" test in *Corporate Express Delivery Systems v. National Labor Relations Board*.[49] In the opinion, the court upheld a decision from the National Labor Relations Board which looked instead to whether the workers have a "significant entrepreneurial opportunity for gain or loss."[50] Seven years later, the same court clarified their reasoning and the definition of a "entrepreneurial opportunity" in *FedEx Home Delivery v. NLRB* (*FedEx I*).[51] The court presumed to weigh all relevant common law factors, but placed the most importance on the workers' entrepreneurial opportunities. Because the FedEx workers took on the risk and the benefits associated with their enterprise, they were found to be independent contractors. This view, that the entrepreneurial opportunity available to a worker is the primary factor in employee determination, did not last long.

In 2014, the NLRB heard a startlingly similar case, in *FedEx Home Delivery* (*FedEx II*).[52] Faced with nearly identical facts, the Board determined that FedEx workers were, in fact,

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[48] *Local 777, Democratic Union Organizing Committee, Seafarers International Union v. NLRB*, 603 F.2d 862, (D.C. Cir. 1978).

[49] *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002).

[50] *Id.*

[51] *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

[52] *FedEx Home Delivery and International Brotherhood of Teamsters, Local Union No. 671*, 361 N.L.R.B. 610 (N.L.R.B 2014).

employees.[53] In its decision, the NLRB declared that the list of common law factors was non-exhaustive, and that no one factor was dispositive.[54] Adopting the D.C. Circuit's interpretation would have led to a "broader exclusion" from the NLRA's protections than Congress intended.[55] Through choosing the right-to-control determination—allowing all listed factors, and more, to be considered—the NLRB maintained expansive coverage under the NLRA.

The Board was not settled yet, discussing the issue once again in 2019 by hearing arguments on *SuperShuttle DFW*.[56] This case overturned *FedEx II* and returned to the *FedEx I* status quo, in which the entrepreneurial opportunity factor is preeminent in employee determination. The drivers were found to be independent contractors, rather than employees, because control and entrepreneurial opportunity are inversely related. As the employer has more control, the employee has less entrepreneurial opportunity. The opposite is also true: as the employer exerts less control, the employee has greater entrepreneurial opportunities. The *SuperShuttle DFW* Board believed that *FedEx II* unfairly treated the entrepreneurial opportunity of workers, and once again placed it as the most important factor.

Finally, in June 2023, the Board heard *Atlanta Opera*, which reversed the decision in *SuperShuttle DFW*, returning the Board to *FedEx II*-style reasoning.[57] The Board cited a lack of Supreme Court precedent to oppose the common-law factors listed in the Restatement, finding the

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[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338*, 367 N.L.R.B. No. 75 (2019).

[57] *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798*, Case 10-RC-276292 (2023).

prior Board's decision in *SuperShuttle* to be entirely arbitrary. "In sum, the Board's decision in *FedEx II* represented a carefully calibrated, precedent-based effort to both reaffirm the Board's commitment to common-law principles—as required by the Supreme Court—and to align the Board's prior approach to assessing entrepreneurial characteristics with those principles."[58] After decades of changes and shifts, the Board's current approach focuses not on the opportunities afforded to the employee, but on the control exerted by the employer. Returning to the Principal-Agent example, it makes more sense, from a practical standpoint, to encourage the Principal to operate effectively than the Agent. After all, the Principal is receiving most of the benefit, exerting less work, and has the power to entirely control the Agent if no protections are properly placed.

C. Prior Applications to Student Workers and Student-Athletes, and Current Guidance from the NLRB's General Counsel

Board precedent on student employees, just like the Board's precedent on standard employees, has changed over the years. In *New York University*, the Board overturned twenty-five years of precedent when it determined that graduate assistants were employees.[59] The university argued that because graduate assistants were "predominately students," they were not statutory employees.[60] The Board rejected this argument, finding the graduate students deserving of the protections of the Act.[61] Only four years later, however, the Board overturned this decision in *Brown University*.[62] In doing so, the Board looked favorably upon the argument that graduate

[58] *Id.* at 4.

[59] *New York Univ.*, 332 N.L.R.B. 1205 (2000).

[60] *Id.*
[61] *Id.*

[62] *Brown Univ.*, 342 N.L.R.B. 483 (2004)

assistants were primarily students, and that their relationship with the university was not primarily an economic relationship, but rather, and educational one.[63] This changed once again in *Colombia University*, when the Board found that *Brown University* unduly removed the academic world from the economic world.[64] The decision unified the common law and statutory definitions of an employee as applied to graduate assistants.[65]

The Board's precedent directs that graduate assistants—working students—are employees protected by the NLRA, but does not extend these protections to student-athletes as seen in *Northwestern University*. However, the NLRB's current General Counsel, Jennifer Abruzzo, firmly supports this interpretation.[66] Although the 2021 memorandum does not provide Board precedent, it presents the correct determination that student-athletes (at certain universities) are employees protected under the NLRA.[67] "Where appropriate, I will allege that misclassifying [employees under the Act] as mere "student-athletes," and leading them to believe that they do not have statutory protections is a violation of Section 8(a)(1) of the Act."[68] Abruzzo pointed to the decision in *Northwestern University*, where the Board declined jurisdiction, as evidence that nothing in the decision itself precludes finding that scholarship football players are employees under the Act. As the argument section will further explain, "it is my position that the scholarship

[63] *Id.*

[64] *Colombia Univ.*, 364 N.L.R.B. 1080 (2016).

[65] *Id.*

[66] Jennifer A. Abruzzo, *N.L.R.B. GC Memorandum 21-08*, (2021).

[67] *Id.*

[68] *Id.*

football players at *Northwestern University*, and similarly situation Players at Academic Institutions, are employees under the Act."[69]

IV. Student-Athletes are Similarly Situated to Graduate Workers and Their Economic Benefit to Their Conferences and Universities is Evidence of Their Employee Status

I want them to be treated with the respect and dignity that they deserve. What I don't understand is how the NCAA, television networks, conferences, universities, and coaches can continue to pull in millions, and in some cases, billions, of dollars of revenue off the efforts of college student-athletes across the country without providing enough opportunity to share in the ever-increasing revenues.

Jim Harbaugh, Head College Football Coach

A. Student-Athletes, under *Atlanta Opera* and *Colombia University* are Protected Employees

The *Atlanta Opera* and *Colombia University* decisions from the National Labor Relations Board both support a finding that student-athletes are employees. There is, however, one primary impediment that must be acknowledged. The Board has statutory jurisdiction over *private sector* employers whose activity in interstate commerce exceeds a minimum amount.[70] This presents a glaring weakness to the case of most student-athletes in the Big Ten conference. When the NLRB declined jurisdiction in *Northwestern University*, it did so, in part, because Northwestern

[69] *Id.*

[70] NLRB. *Jurisdictional Standards.* https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/jurisdictional-standards

was the only private institution in the Big Ten Conference.[71] When the conference expands to 18 universities in 2024, Northwestern will welcome USC as another private institution, but that does not change the fact that the overwhelming majority of universities in the conference are public universities, receiving federal funding and outside the jurisdiction of the NLRB.

Currently, USC is the subject of an NLRB complaint, but the complaint implicates two other entities as joint employers.[72] In October 2023, the NLRB issued its Final Rule addressing the standard for determining joint-employer status under the NLRA.[73] Under the Final Rule, an entity is a joint employer of a group of employees if each entity has an employment relationship with the employees and they share or codetermine one or more of the employees' essential terms and conditions of employment.[74] This joint-employer standard is crucial to the finding that student-athletes are employees of their universities, and more importantly, of their greater conferences. These conferences, unlike most of the universities that make up their membership, are private sector employers. Classifying the Big Ten conference as a joint employer of football players at its member universities provides the jurisdictional hook necessary for the Board to rule that those athletes are employees.

A common law analysis of all relevant factors, as described in *Atlanta Opera*, would result in the finding that football players are employees of their conferences. Evidence presented

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[71] *Northwestern University and College Athletes Players Association (CAPA)*, 13-RC-121359 (NLRB 2015).

[72] Valerie K. Jackson. *NLRB General Counsel Files Complaint Demanding College Reclassify its Student-Athletes as Employees*. Littler. (22 May 2023). https://www.littler.com/publication-press/publication/nlrb-general-counsel-files-complaint-demanding-college-reclassify-its

[73] NLRB. *Board Issues Final Rule on Joint-Employer Status*. (26 Oct. 2023). https://www.nlrb.gov/news-outreach/news-story/board-issues-final-rule-on-joint-employer-status

[74] *Id.*

in *Northwestern University* further suggests that these students meet the common law factors presented. Once again, these factors are: (1) the extent the master controls the details of the work, (2) how distinct the work or business is, (3) whether the work is done under direct supervision, (4) the skill required to do the work, (5) whether the master supplies the tools necessary to do the work, (6) the length of employment, (7) whether the payment is by time worked or by job, (8) how regular the work is, (9) whether the parties see themselves as in a master/servant relationship, and (10) whether the master runs a business.[75] In *Alston v. NCAA*, the Supreme Court is clear that college football is a massive enterprise generating profit for those at the top.[76] The President of the NCAA earns $4 million a year, top conference commissioners make between $2 and $5 million, and head football coaches bring in over $10 million each and every year.[77] These are the aforementioned "masters" of college football players, and in every regard, they control those players. Players are required to attend mandatory practices, games, and film sessions, as well as "optional" position group meetings, mealtimes, and recovery treatments. In all, college football players spend more time at their practice facilities than most full-time workers do at their job each week.

At the University of Michigan, a flagship Big Ten institution, football players are provided a private shuttle—with a police escort—to a private airport facility, where the chartered Delta planes wait to take the team to their weekend game. After the game, the team receives another police escort back to the airport and return to school within a few hours. On Sunday and Monday, there are mandatory recovery sessions for all those who played in the games and

[75] Restatement (2d) of Agency § 220 (1958).

[76] *Alston v. NCAA*, 141 S.Ct. 2141 (2021).

[77] *Id.*

mandatory practices for those players that did not. From Tuesday to Thursday, players spend over eight hours each day practicing, in team meetings, watching film, and working out. On Friday, they board the shuttle to start the week over once again. Big Ten Football is not the National Football League, but it has more in common with the NFL than it does with nearly all other major Division I sports. To say that Big Ten college football players are not controlled by their universities and conferences would be irresponsible and ignorant. General Counsel Abruzzo was correct: "The definition of 'employee' in Section 2(3) of the NLRA is broadly defined to include 'any employee' subject to only a few, enumerated exceptions. Those exceptions do not include university employees, football players, or students."[78] For the purposes of the NLRA, football players at Big Ten universities are employees.

B. Current Solutions That Hide the Truth

Shortly after the Supreme Court's *Alston* decision, the NCAA released interim guidance for Name, Image, and Likeness ("NIL") opportunities for college athletes. Name, Image, and Likeness laws are state-specific, and outline the ability of student athletes to enter endorsement deals. As seen in *O'Bannon*, the NCAA does not entirely control the Name, Image, and Likeness of student-athletes. Athletes, just like professionals, are allowed to enter endorsement deals to profit off their popularity. Many of these deals are beneficial, not only for the athletes, but for the communities they live in. Blake Corum, a running back at the University of Michigan, uses profits from his NIL deals to donate Thanksgiving meals in nearby Ypsilanti, Michigan. There are countless examples of deals with charity organizations and underserved communities, showing the goodness of NIL activities. However, there are also "fake" NIL deals. Because students do not receive revenue sharing from universities, university-focused collectives have

[78] Jennifer A. Abruzzo, *N.L.R.B. GC Memorandum 21-08*, (2021).

stepped in to make large payments to those athletes. A collective, which must remain independent of the university under the NCAA's NIL guidelines, pools donations from university boosters and distributes that money to student athletes. At Villanova, every scholarship basketball player is guaranteed $40,000 each year from the Villanova-focused collective. These payments are made in place of a "base salary" coming from revenue sharing but have few legal protections. As a result, payments from collectives are often used to entice players to transfer, with deals of up to $2 million or more rumored to be offered to current quarterbacks. Replacing these collectives with a proper revenue-sharing model would remove the ability for collectives to manipulate the market and unfairly tamper with players and teams.

C. The Final Solution to Revenue Sharing in Big Ten Football

When Big Ten football players are recognized as employees, they will have the ability to collectively bargain for their rights. Players in the National Football League have done this for decades, through the NFL Players' Association or NFLPA. All players join the NFLPA, which bargains for revenue sharing, medical and health issues, and pensions, among other benefits. Under the most recent NFL collective bargaining agreement, players receive at least 48.8% of NFL revenue. The NFL provides free healthcare for the players and their families, and there are many health and safety and pension benefits from years of negotiation.

Although Big Ten Football players are unlikely to be able to demand a revenue share matching that of the NFL, they must recognize that college football would not be possible without their participation and agreement. Using the Big Ten as the bargaining unit allows for uniformity amongst the conference, which eases concerns presented by the Board in *Northwestern University*. In *Northwestern*, the Board noted that their decision was "primarily premised on the finding that, because of the nature of sports leagues (namely the control

exercised by leagues over the individual teams) and the composition and structure of FBS football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction," it would not be proper to assert jurisdiction because it would not promote stability.[79] Allowing all athletes from Big Ten football teams to collectively bargain would remove this premise. Athletes should focus their bargaining on the following key topics: (1) revenue sharing, (2) health and safety protections, and (3) eligibility and continuing educational aid.

Athletes must demand proper revenue sharing. The Big Ten's television contract delivers hundreds of million in revenue to the conference each year, and most of that revenue is attributed to football. The game which attracts millions of viewers and millions of dollars would not be possible without the players. Even a 20% share in revenue would guarantee each football player over $100,000 annually. Football is an inherently dangerous game, with short careers and a large risk of traumatic head injury. These athletes must be covered by the conference for the risks they take on the fields. Without proper health and safety measures, the players—who receive no money for their product—would take on all risks of major life-altering injuries. Finally, students must seek protection of their scholarships and educations. As noted in *Board of Regents*, it is the education that the athletes receive that differentiates collegiate athletics. Because most collegiate athletes, even high-level college football players, do not play at the professional level, these educations are truly priceless.

Through work man must earn his daily bread and contribute to the

continual advance of science and technology and, above all,

[79] *Northwestern University and College Athletes Players Association (CAPA)*, 13-RC-121359 (NLRB 2015).

to elevating unceasingly the cultural and moral level of the society within which he lives in community with those who belong to the same family.

Pope John Paul II, *Laborem Exercens*

These athletes have earned their daily bread. It is time for the universities, conferences, and the NCAA to give it to them.