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## Is Collegiate Athletics Already Professionalized While the NCAA Still Recognizes College Sports as Amateur Athletics?

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## I. Introduction

In 2023, Division 1 athletics alone generated \$17.5 billion in revenue, a 31% increase from the previous year.<sup>1</sup> Of the \$17.5 billion in revenue, 20% (\$3.5 billion) went towards coaching compensation, 17% (\$2.975 billion) went towards administrative compensation, and 17% (\$2.975 billion) went towards facilities.<sup>2</sup> In total, 54% (\$9.45 billion) of the \$17.5 billion in revenue for 2023 went towards paying coaches, administrators, or funding new facilities, but Division 1 student-athletes receive 0% of the revenue generated.<sup>3</sup> As Justice Brett Kavanaugh said in NCAA v. Alston,<sup>4</sup> “the NCAA and its member institutions are suppressing the pay of student-athletes who collectively generate billions of dollars of revenues for colleges every year.”

Everyone in and around the NCAA can monetize their services and get very wealthy, except for the players. As previously mentioned, in 2023, 20% (\$3.5 billion) of the \$17.5 billion in revenue generated by Division 1 athletics went toward coaching compensation.<sup>5</sup> Nick Saban, Dabo Swinney, and Kirby Smart are the top three highest-paid Division 1 football coaches, making \$11.4 million, \$10.9 million, and \$10.7 million annually, respectively.<sup>6</sup> The twenty-fifth highest-paid head coach makes \$6.3 million per year.<sup>7</sup> Recently, Steve Sarkisian, the head football coach for the University of Texas, signed a contract extension that nearly doubled his current salary of \$5.3 million.<sup>8</sup> Sarkisian’s deal includes a \$10.3 million base salary that increases by \$100,000 annually

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<sup>1</sup> National Collegiate Athletic Association, Division I Athletics Finances 10-Year Trends from 2013 to 2022, NCAA Research (December 2023), [ncaaorg.s3.amazonaws.com/research/Finances/2023RES\\_DI-RevExpReport\\_FINAL.pdf](https://ncaaorg.s3.amazonaws.com/research/Finances/2023RES_DI-RevExpReport_FINAL.pdf)

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> National Collegiate Athletic Association v. Alston, 594 U.S. 69, 110 (2021)

<sup>5</sup> [ncaaorg.s3.amazonaws.com/research/Finances/2023RES\\_DI-RevExpReport\\_FINAL.pdf](https://ncaaorg.s3.amazonaws.com/research/Finances/2023RES_DI-RevExpReport_FINAL.pdf)

<sup>6</sup> Amanda Christovich and Dough Greenberg, Who is the Highest-Paid Coach in College Football?, Front Office Sports (October 31, 2023), <https://frontofficesports.com/who-are-highest-paid-college-football-coaches/>

<sup>7</sup> Id.

<sup>8</sup> Mark Schlabach, Texas set to approve extension, raise for coach Steve Sarkisian, ESPN (February 17, 2024), [https://www.espn.com/college-football/story/\\_/id/39545013/texas-set-approve-extension-raise-coach-steve-sarkisian](https://www.espn.com/college-football/story/_/id/39545013/texas-set-approve-extension-raise-coach-steve-sarkisian)

and is capped at \$10.9 million in 2030.<sup>9</sup> The incentives within the contract include the possibility of earning \$1.85 million in additional salary, which can come in the form of (i) \$300,000 for winning the Southeastern Conference Championship and either (i) \$250,000 for making the college football playoff (CFP); (ii) \$500,000 for reaching the CFP quarterfinal; (iii) \$750,000 for reaching the CFP semi-final game; or (iv) \$1 million for reaching the CFP national championship game or \$1.25 million for winning a national championship.<sup>10</sup>

Furthermore, Division 1 basketball coaches are the same and reap significant monetary awards for their services. Bill Self, John Calipari, and Tom Izzo are the top three highest-paid Division 1 basketball coaches, making \$10.6 million, \$8.533 million, and \$5.73 million annually, respectively.<sup>11</sup> The twenty-fifth highest-paid head coach makes \$3.494 million per year.<sup>12</sup>

The ability for everyone in the NCAA to get a share of the revenue generated, except for the athletes, is just as Justice Kavanaugh described in Alston<sup>13</sup>, “Those enormous sums of money flow to seemingly everyone except the student-athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student-athletes who generate the revenues...end up with little or nothing.”

## II. History of the NCAA and the Amateurism Model

Historically, amateurism has been used to make the NCAA, its member institutions, coaches, administrators, etc., billions of dollars in profit.<sup>14</sup> Collegiate sports have been professionalized, except for the labor market, as former NCAA Vice President Mark Lewis describes the current

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<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> FOS staff, Who is the Highest-Paid Men’s College Basketball Coach?, Front Office Sports (March 15, 2024), <https://frontofficesports.com/highest-paid-mens-college-basketball-coaches/>

<sup>12</sup> Id.

<sup>13</sup> National Collegiate Athletic Association v. Alston, 594 U.S. 69, 110 (2021)

<sup>14</sup> [ncaaorg.s3.amazonaws.com/research/Finances/2023RES\\_DI-RevExpReport\\_FINAL.pdf](https://ncaaorg.s3.amazonaws.com/research/Finances/2023RES_DI-RevExpReport_FINAL.pdf)

state of college sports.<sup>15</sup> There is a long and expansive history regarding the development of the NCAA and the legislation that has resulted in the current amateurism model.

#### A. History

The regulatory body known as the NCAA was founded in 1906 as a means of regulating intercollegiate athletics and protecting student-athletes due to the mass amounts of football-related injuries and deaths.<sup>16</sup> Within collegiate football, players who were not students were hired and performed in-game; at this time, a drastic need for regulation permeated the intercollegiate sports landscape.<sup>17</sup> The Intercollegiate Athletic Association (IAS) was formed when sixty-two New York schools chartered its members as a regulatory body for collegiate sports, and the IAS was renamed to the NCAA in 1910.<sup>18</sup> At this time, the newly founded NCAA established the foundational elements of amateurism as it is known today.<sup>19</sup> A collegiate athlete was described as “someone who played sport purely for enjoyment as a way to develop his or her mental, physical, moral, and social skills.”<sup>20</sup> As stated in the IAS’s bylaws in 1906, “no student shall represent a college or university in any intercollegiate game or contest who is paid or receives, directly or indirectly, any more or financial assistance.”<sup>21</sup>

Athletic scholarships were implemented and utilized in the 1930s.<sup>22</sup> In 1946, the NCAA’s purity code was implemented to ensure amateurism, enforce institutional control of athletics, and

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<sup>15</sup> Julia Chaffers, The Hypocrisy of the NCAA’s Amateurism Model, Department of African American Studies Princeton University (March 4, 2020), <https://aas.princeton.edu/news/opinion-hypocrisy-ncaas-amateurism-model>

<sup>16</sup> National Collegiate Athletic Association, History (2024), <https://www.ncaa.org/sports/2021/5/4/history.aspx#:~:text=After%20World%20War%20II%2C%20the,membership%20and%20championships%20were%20growing>.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Romano, Robert J. Esq. (2022) "The Concept of Amateurism: How the Term Became Part of the College Sport Vernacular," UNH Sports Law Review: Vol. 1: Iss. 1, Article 5.

<sup>20</sup> Id. at 34-35.

<sup>21</sup> Id.

<sup>22</sup> Id. at 37.

ensure student-athletes were admitted to schools on the same standards as non-student-athletes.<sup>23</sup> The purity code was then enforced by the “sanity code,” which prohibited schools from offering financial incentives and aid to student-athletes that were unavailable to non-student-athletes.<sup>24</sup> Further, the sanity code allowed the NCAA to suspend or expel those who did not comply.<sup>25</sup> The sanity code was repealed, allowing member institutions to give student-athletes full scholarships based on athletic ability.<sup>26</sup> The form of scholarships ultimately changed from a four-year athletic scholarship to a one-year renewable scholarship.<sup>27</sup>

### **B. The NCAA’s current governance structure and Amateurism Rules**

The NCAA’s Board of Governors (BOG) is the highest-ranking regulatory body in the NCAA and makes decisions that affect all members within all divisions of the NCAA.<sup>28</sup> The responsibilities of the BOG include but are not limited to oversight of the budget, employing the NCAA’s President, and implementing NCAA-wide policies and procedures.<sup>29</sup> The BOG works alongside “Association-wide Committees,” composed of University Presidents or Chancellors, school and conference administrators, or other management council members, who can make recommendations regarding policies and procedures for the BOG.<sup>30</sup>

One of the NCAA-wide policies and procedures implemented by the NCAA, its BOG, and Association-wide Committees pertains to amateurism. In the 2023-24 Division 1 manual, only an

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<sup>23</sup> Casey E. Faucon, Assessing Amateurism in College Sports, 79 Wash. & Lee L. Rev. 3 (2022).

<sup>24</sup> Id.

<sup>25</sup> Romano, Robert J. Esq. (2022) "The Concept of Amateurism: How the Term Became Part of the College Sport Vernacular," UNH Sports Law Review: Vol. 1: Iss. 1, Article 5.

<sup>26</sup> Casey E. Faucon, Assessing Amateurism in College Sports, 79 Wash. & Lee L. Rev. 3 (2022).

<sup>27</sup> Romano, Robert J. Esq. (2022) "The Concept of Amateurism: How the Term Became Part of the College Sport Vernacular," UNH Sports Law Review: Vol. 1: Iss. 1, Article 5

<sup>28</sup> National Collegiate Athletic Association, How the NCAA Works, NCAA (2024), [https://ncaaorg.s3.amazonaws.com/champion-magazine/HowNCAAWorks/AW\\_HowNCAAWorks.pdf](https://ncaaorg.s3.amazonaws.com/champion-magazine/HowNCAAWorks/AW_HowNCAAWorks.pdf)

<sup>29</sup> Id.

<sup>30</sup> Id.

amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.<sup>31</sup> Further, it is stipulated that “The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.”<sup>32</sup> Additionally, “a grant-in-aid...is not considered to be pay pr the promise of pay for athletics skill...”<sup>33</sup> Before an athlete can participate in any form, they must be certified that they are of amateur status by an NCAA eligibility center, which reviews the activities of the prospective student-athlete before their enrollment or request for certification.<sup>34</sup>

Accordingly, a student-athlete can lose their eligibility status and be declared ineligible when they: (i) use athletic skill for pay in any form in that sport; (2) accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (iii) signs a contract or commitment of any kinds to play professional athletics; (iv) receives a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skills or participation; (v) competes on any professional athletics team even if no pay or remuneration for expenses was received; (vi) enters into a professional draft; (vii) enters an agreement with an agent.<sup>35</sup>

Accordingly, the NCAA and its members have determined that student-athletes must be amateurs and cannot accept payment from their schools or other sources. Meanwhile, as previously mentioned in the introduction of this article, the NCAA, its member schools, coaches, and administrators make billions of dollars in revenue and millions of dollars in salary from the entertaining product and demonstration of athletic skill provided by the student-athlete.

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<sup>31</sup> NCAA Division 1 2023-234 Manual, Constitution Art. 12.01.

<sup>32</sup> Id. at 12.01.2.

<sup>33</sup> Id. at 12.01.4.

<sup>34</sup> Id. at 12.1.1.1.; 12.1.1.1.1.

<sup>35</sup> Id. at 12.1.2.

### **III. Antitrust challenges to amateurism**

Section 1 of the Sherman Antitrust Act states, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal.” The NCAA’s amateurism rules have been the subject of numerous antitrust litigation lawsuits.

#### **A. O’Bannon v. NCAA**

In O’Bannon, former UCLA basketball player Ed O’Bannon was visiting a friend’s house when he saw himself depicted in a college basketball video game without his consent.<sup>36</sup> The district court held that the NCAA’s amateurism rules that disallowed student-athletes from receiving compensation were invalid under Section 1 of the Sherman Act.<sup>37</sup> On appeal, the NCAA argued: (i) Board of Regents held the NCAA’s amateurism rules are valid as a matter of law; (ii) compensation rules are not subject to Antitrust scrutiny because they are regulating commercial activity; and (iii) O’Bannon cannot sue because he has not suffered an antitrust injury.<sup>38</sup> In response, the court held the following: (i) Board of Regents did not hold NCAA amateurism rules as valid as a matter of law, but they cannot be invalidated without a Rule of Reason analysis, and (ii) amateurism rules are commercial because the rules regulate and restrict a transaction between a student-athlete and a school because “both parties to that exchange anticipate economic gain from it.”<sup>39</sup>

To survive a rule of reason analysis, the proponent must show that a particular restraint on trade or competition possesses pro-competitive effects within the relevant market, and if successful, the burden shifts to the opponent to show that the pro-competitive effect can be achieved in a less

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<sup>36</sup> O’Bannon v. National Collegiate Athletic Ass’n, 803 F.3d 1049, 1055 (9th Cir., 2015).

<sup>37</sup> Id.

<sup>38</sup> Id. at 1061.

<sup>39</sup> Id. at 1064-65

restrictive manner.<sup>40</sup> The pro-competitive effects of the amateurism rules given by the NCAA were: (i) promoting amateurism; (ii) promoting competitive balance; (iii) integrating student-athletes with their school’s academic community; and (iv) increasing output in the college education market.<sup>41</sup> Ultimately, the court accepted two of the four pro-competitive justifications for amateurism rules: (i) integrating student-athletes with their academic community and (ii) promoting amateurism preserves the character of the product to be marketed.<sup>42</sup>

### B. NCAA v. Alston

Here, plaintiffs brought suit against the NCAA, claiming amateurism rules violate Section 1 of the Sherman Act by restricting the compensation schools can offer student-athletes.<sup>43</sup> Ultimately, the plaintiffs won, but as Justice Kavanaugh points out, “this case only involves a narrow subset of the NCAA’s compensation rules – namely the rules restricting the education-related benefits...The rest of the NCAA compensation rules are not at issue here and, therefore, remain on the books.”<sup>44</sup>

The NCAA argues that horizontal agreements are necessary for the consumers if the product is to be offered and that amateurism rules are necessary to maintain the “non-commercial objective of higher education.”<sup>45</sup>

### C. Is the NCAA’s reasoning valid?

To reconcile, in O’Bannon, the Ninth Circuit Court of Appeals holds that the NCAA’s amateurism rules have a pro-competitive effect, “namely, that the amateur nature of collegiate sports increases their appeal to consumers,” or in other words, “preserves the popularity of the

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<sup>40</sup> Practical Law Antitrust, Antitrust Rule of Reason, Thompson Reuters (2024), <https://us.practicallaw.thomsonreuters.com/9-522-6396>

<sup>41</sup> O’Bannon v. National Collegiate Athletic Ass’n, 803 F.3d 1049, 1074 (9th Cir., 2015).

<sup>42</sup> Id.

<sup>43</sup> National Collegiate Athletic Association v. Alston, 594 U.S. 69, 73 (2021).

<sup>44</sup> Id. at 108.

<sup>45</sup> Id. at 94.



NCAA's product."<sup>46</sup> Additionally, in O'Bannon, integrating student-athletes with their academic community was a pro-competitive effect that allowed the NCAA to continue enforcing its amateurism rules.<sup>47</sup> In Alston, the NCAA again argued that amateurism was necessary for the product's character and the "non-commercial objective of higher education."<sup>48</sup> However, is any of the reasoning above valid? Do consumers care that the product involves amateur athletes?

i. **Amateurism is not necessary for the product's character.**

Data says that consumers do not care that collegiate athletics involves amateurs. A poll commissioned by Sportico shows that 67% of American adults believe the school should pay student-athletes alongside what they can achieve through name, image, and likeness (NIL).<sup>49</sup> A poll commissioned by Seton Hall Sports Poll found that 55% of those polled believe student-athletes should be financially compensated, with 71% of avid fans and 62% of sports fans believing student-athletes should be compensated in addition to their scholarships.<sup>50</sup>

Ultimately, NIL and other forms of student-athlete financial compensation have not hurt the NCAA's bottom line or product since being implemented in 2019 because people are still watching. The 2023-24 CFP was the most watched since 2018, with 23.6 million viewers and 15% year-over-year audience growth across all games.<sup>51</sup> The National Championship game alone delivered 25 million viewers.<sup>52</sup> Furthermore, the New Year's Six Bowls (Rose Bowl, Sugar Bowl, Orange Bowl,

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<sup>46</sup> O'Bannon v. National Collegiate Athletic Ass'n, 803 F.3d 1049, 1074 (9th Cir., 2015).

<sup>47</sup> *Id.* at 1074.

<sup>48</sup> National Collegiate Athletic Association v. Alston, 594 U.S. 69, 73 (2021).

<sup>49</sup> Dan Wolken, Survey shows most people want college athletes to be paid. You hear that, NCAA?, USA Today (August 17, 2023), <https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2023/08/17/ncaa-wake-up-college-athletes-paid-majority-survey/70613517007/>

<sup>50</sup> Michael Ricciardelli and Marty Appel, More Than Half of Americans Say 'Yes' to Student-Athlete Payments for Revenue Generating Sports; Number Rises to 62 percent for Sports Fans, Stillman School of Business at Seton Hall University (March 22, 2023), <https://www.shu.edu/business/news/sports-poll-public-favors-student-athlete-pay.html>

<sup>51</sup> Amanda Brooks, ESPN Delivers Record Viewership Across College Football Playoff and New Year's Six, ESPN Press Room (January 10, 2024), <https://espnpressroom.com/us/press-releases/2024/01/espn-delivers-record-viewership-across-college-football-playoff-and-new-years-six/#:~:text=The%202023%2D24%20New%20Year's,%25%20year%2Dover%2Dyear.>

<sup>52</sup> *Id.*

Cotton Bowl, Peach Bowl, and Fiesta Bowl) recorded their best audience since 2019, averaging 13.5 million viewers, and viewership is up 5% from the previous year.<sup>53</sup> This is part of why the NCAA reached an eight-year broadcast agreement with ESPN worth \$920 million.<sup>54</sup>

Justice Kavanaugh noted, "...it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes."<sup>55</sup> This becomes especially true when the data shows that college sports generate more viewers than ever in an era where athletes can profit from their NIL.

ii. **Amateurism does not integrate student-athletes with the student body or promote higher education.**

The other reason for the NCAA's amateurism rules is that it focuses on integrating student-athletes with their academic community and the "non-commercial objective of higher education."<sup>56</sup> Amid the COVID-19 pandemic, the NCAA was forced to cancel one of its most profitable events, the March Madness Tournament<sup>57</sup>, which, for reference, generated \$1.3 billion in revenue in 2022-23.<sup>58</sup> The NCAA considered implementing a controlled bubble environment similar to the National Basketball Association (NBA).<sup>59</sup> This solution would remove student-athletes from classes and their campuses.<sup>60</sup> While the NCAA claimed it would "give our young

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<sup>53</sup> Id.

<sup>54</sup> Meghan Durham Wright, ESPN and NCAA Reach New, Eight-Year Media Rights Agreement, NCAA (January 4, 2024), <https://www.ncaa.org/news/2024/1/4/media-center-espn-and-ncaa-reach-new-eight-year-media-rights-agreement.aspx>

<sup>55</sup> National Collegiate Athletic Association v. Alston, 594 U.S. at 110-11.

<sup>56</sup> O'Bannon, 803 F.3d at 1074; Alston, 594 U.S. at 74.

<sup>57</sup> Taylor A. Story, Deflating Amateurism, Mississippi Sports Law Review Vol. 10. (2021).

<sup>58</sup> Associated Press, NCAA generates nearly \$1.3 billion in revenue for 2022-23, ESPN (February 1, 2024), [https://www.espn.com/college-sports/story/\\_/id/39439274/ncaa-generates-nearly-13-billion-revenue-2022-23](https://www.espn.com/college-sports/story/_/id/39439274/ncaa-generates-nearly-13-billion-revenue-2022-23)

<sup>59</sup> Deflating Amateurism, University of Mississippi law review

<sup>60</sup> Id.

people the chance to play the game they love,”<sup>61</sup> they also would receive \$771 million from their then-existing broadcast contract and approximately \$1.6 million per commercial during the National Championship game.<sup>62</sup> It can be argued that the focus of the NCAA was not education nor integrating student-athletes with the student body; instead, it planned to remove students from campus to ensure their most profitable event could continue.

Furthermore, the NCAA’s actions during COVID-19 show that its focus is not on ensuring student-athletes are integrated with the student body but on the bottom line. However, an argument can be made that with schools being shut down and most classes being online, creating a bubble for March Madness does not compromise the goal of student-athlete integration. However, the student-athlete experience during non-COVID times is more telling. Kain Colter, the former quarterback for Northwestern University, detailed that he was advised against taking classes that conflicted with practice, putting him behind his pre-med major.<sup>63</sup> Colter ultimately switched from the major he wanted to pursue to a more manageable one to satisfy his obligation to football.<sup>64</sup> Colter is just one of many Division 1 athletes who have had to compromise their academic performance for their sport. Yet, the NCAA claims that “athletic programs are designed to be an integral part of the educational program”.<sup>65</sup>

A study conducted in 2015 of more than four hundred Pac-12 athletes showed: (i) athletes spend an average of fifty hours per week on athletics during the season, which causes them to miss class and not have time for homework, studying, and sleeping; (ii) athletes feel that they do not have the time to succeed academically; (iii) 54% of athletes do not have time to study for tests;

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<sup>61</sup> Spencer Parlier, NCAA’s Dan Gavitt: We” deliver a March Madness tournament in 2021, NCAA (August 14, 2020), <https://www.ncaa.com/news/basketball-men/article/2020-08-12/ncaas-dan-gavitt-well-deliver-march-madness-tournament-2021>

<sup>62</sup> Deflating Amateurism, University of Mississippi law review

<sup>63</sup> Northwestern University, 362 NLRB 1350, 1361 (2015).

<sup>64</sup> Id.

<sup>65</sup> NCAA Division 1 2023-234 Manual, Constitution Art. 12.01.2.

(iv) 80% of athletes have missed class for competition.<sup>66</sup> Thus further demonstrating how the reality of collegiate athletes is not conducive to athletics “being an integral part of the educational program”. Furthermore, numerous studies were cited in the complaint of McCants v. NCAA that claimed student-athletes at the University of North Carolina Chapel Hill deprived students of a “meaningful education.”<sup>67</sup> In the complaint, a 2010 survey showed that men’s basketball averages 39.2 hours per week on athletic activities, FBS and FCS football average 43.3 and 41.6 hours per week, baseball averages 42.1 hours per week, women’s basketball averages 37.6 hours per week, and all other women's sports average 33.3 hours per week.<sup>68</sup>

The NCAA rules are conducive to allowing student-athletes to go above and beyond the mandated maximum of twenty hours per week and four hours per day while in-season.<sup>69</sup> Competition days are counted as three hours “regardless of the actual duration of these activities.”<sup>70</sup> This means that activities such as watching films, getting treatment, shootarounds, team meetings, etc., are not counted on game days and can comprise much more than 3 hours. Further, one day off must be required per week during the playing season<sup>71</sup>. However, a travel day for competition may be considered a day off as long as there are no athletically related activities.<sup>72</sup> Countable athletically related activities are “a required activity with an athletics purpose involving student-athletes and at the direction of, or supervised by, one or more an institution’s coaching staff...administrative activities shall not be considered.”<sup>73</sup> The previously cited Pac-12 survey

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<sup>66</sup> Penn Schoen Berland, Student-Athlete Time Demands (April 2015). Data gathered from 409 Pac-12 student-athletes from nine different universities and across all Pac-12 sports to assess the time demands placed on student-athletes.

<sup>67</sup> Peter Jacobs, Here’s The Insane Amount Of Time Student-Athletes Spend On Practice, Business Insider (January 27, 2015), <https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1>

<sup>68</sup> Id.

<sup>69</sup> NCAA Division 1 2023-234 Manual, Constitution Art. 17.1.7.1.

<sup>70</sup> Id. at 17.1.7.3.2.

<sup>71</sup> Id. at 17.1.7.4.

<sup>72</sup> Id. at 17.1.7.4.1.

<sup>73</sup> Id. at 17.02.1.

showed that an additional twenty-nine hours are spent on other activities, including voluntary activities, treatment, and traveling.<sup>74</sup> While voluntary activities are not counted within the NCAA's weekly calculation, many athletes feel that these activities are required due to feeling pressured by the coaches, the perception of being uncommitted to teammates and coaches, and fear that coaches will punish them for skipping.<sup>75</sup>

As demonstrated, student-athletes dedicate more than twenty hours per week to their sport, and the NCAA rules are conducive to allowing such commitment. The NCAA argued in numerous lawsuits that amateurism rules allowing student-athletes athletes to be integrated with their academic community and the "non-commercial objective of higher education" cannot be true when such a time commitment is spent on athletics. Such dedication to athletics has decreased the social experience of many athletes. In the previously cited Pac-12 study, 66% of athletes claimed that athletics prevents them from participating in extracurricular activities, and another 70% stated that athletics prevents athletes from studying abroad.<sup>76</sup> Further, many student-athletes claim to not feel like regular college students.<sup>77</sup> This weakens the pro-competitive justifications of integrating student-athletes with the student body and promoting higher education put forth by the NCAA. This demonstrates how the reality of collegiate sports and what the NCAA calls amateurism are at odds with one another.

iii. **The NCAA's structure is conducive to education not being prioritized.**

The reasoning behind the data in the above section is because the NCAA incentivizes schools to prioritize profit. In Division I basketball, most of the revenue earned by the NCAA comes from

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<sup>74</sup> Penn Schoen Berland, Student-Athlete Time Demands (April 2015), *supra* note 64

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

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

the March Madness tournament.<sup>78</sup> The revenue from the tournament is distributed directly to the conferences.<sup>79</sup> The amount of revenue from the NCAA tournament to be distributed depends on how many games the teams within the conference play, with each game played earning the conference one “unit.”<sup>80</sup> The more units the conference earns, the more money it will receive and distribute to its member schools. The estimated unit value for 2023 is about \$2 million.<sup>81</sup> The unit will be distributed over six years.<sup>82</sup> This structure emphasizes winning. The better a team can perform and the more games a team can play in the tournament, the more money that team can make for the conference. The more money a team can make for the conference, the bigger the distribution the individual schools will receive, and winning just one game provides a distribution over the next six years. For example, in 2022, the Atlantic Coast Conference (ACC) had five teams in the March Madness tournament who combined to play 18 games.<sup>83</sup> Those 18 games generated \$36.4 million for the conference, which will be distributed to all ACC teams through 2028.<sup>84</sup> In 2023, the Southeastern Conference (SEC) had eight teams participate in March Madness, which combined to play 17 games and generated \$34 million.<sup>85</sup> Teams can’t win games and millions of dollars for those games if the players they compete with are subpar.

Inevitably, the money generated by a program directly affects the head coach's salary. In most cases, coaches’ salaries are tied to the revenue generated by the program and are typically a

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<sup>78</sup> National Collegiate Athletic Association, Division I Finances, NCAA (2024), <https://www.ncaa.org/sports/2021/5/11/division-i-finances.aspx>

<sup>79</sup> Id.

<sup>80</sup> Eben Novy- Williams, March Madness 2023: Eliminated Early, SEC Nabs Tournament-High \$34 Million, Sportico (March 27, 2023), <https://www.sportico.com/leagues/college-sports/2023/march-madness-2023-unit-payouts-1234717368/>

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> Eben Novy- Williams, March Madness Daily: ACC, Big Ten Earn \$36.4 Million From Tourney, Sportico (March 28, 2022), <https://www.sportico.com/leagues/college-sports/2022/ncaa-tournament-units-2022-1234669771/>

<sup>84</sup> Id.

<sup>85</sup> *Supra* Footnote 79.

function of the overall budget for that particular sport.<sup>86</sup> This directly affects the amateur student-athlete because the success and salary of the coach are directly tied to their performance. The better the team and their athletes, the more games they can win. The more games they can win, the more revenue can be generated. The more revenue that can be generated, the higher the salary for a coach. As previously stated, a conference and, subsequently, a team can receive millions of dollars for one game played in the NCAA March Madness tournament.

Furthermore, as stated in the introduction of this article, Bill Self, John Calipari, and Tom Izzo are the top three highest-paid Division 1 basketball coaches, making \$10.6 million, \$8.533 million, and \$5.73 million annually, respectively.<sup>87</sup> Bill Self and the University of Kansas won the March Madness tournament in 2022, and soon after that, Kansas gave him a new contract that made him the highest-paid coach in college basketball.<sup>88</sup> The University of Kansas Athletic Director noted that the basketball program's success under Bill Self has increased revenues, and the reward of a new contract is “a direct reflection of those outcomes.”<sup>89</sup>

Football is no different. Each conference receives \$300,000 for each school that qualifies for post-season participation.<sup>90</sup> Conferences then receive \$6 million for each team selected for the CFP and \$4 million for each team that plays in a non-playoff bowl game.<sup>91</sup> Furthermore, as referenced in the introduction of this article, college football coaches like Nick Saban, Dabo Swinney, and

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<sup>86</sup> Tom Schad and Steve Berkowitz, Why college football is king in coaching pay – even at blue blood basketball schools, USA Today (October 3, 2023), <https://www.usatoday.com/story/sports/ncaaf/2023/10/03/college-football-coach-pay-is-soaring-even-at-basketball-schools/70924373007/>

<sup>87</sup> FOS staff, Who Is The Highest-Paid Men’s College Basketball Coach?, Front Office Sports (March 15, 2024), <https://frontofficesports.com/highest-paid-mens-college-basketball-coaches/>

<sup>88</sup> Cameron Salerno, Kansas’ Bill Self signs new \$53 million contract making him college basketball’s highest paid coach, CBS (November 7, 2023), <https://www.cbssports.com/college-basketball/news/kansas-bill-self-signs-new-53-million-contract-making-him-college-basketballs-highest-paid-coach/>

<sup>89</sup> Tom Schad and Steve Berkowitz, Bill Self’s contract has him atop basketball coaches pay list. What to know about deal, USA Today (March 13, 2024), <https://www.usatoday.com/story/sports/ncaab/2024/03/13/bill-self-kansas-contract/72941991007/>

<sup>90</sup> Business of College Sports, College Football Playoff Payouts 2023-2024, Business of College Sports (March 21, 2024), <https://businessofcollegesports.com/college-football-playoff-payouts/>

<sup>91</sup> Id.

Kirby Smart are the top three highest-paid Division 1 football coaches, making \$11.4 million, \$10.9 million, and \$10.7 million annually, respectively.<sup>92</sup> University of Texas Head Coach Steve Sarkisian has incentives within his contract that offer the possibility of earning \$1.85 million in additional salary if he wins the conference championship, bowl games, makes the CFP, and more.<sup>93</sup> This further demonstrates that it pays to win, and teams cannot win and generate mass amounts of revenue for their programs, conferences, and coaches if their players are subpar. Coaches and programs are incentivized with high dollar amounts to ensure their players are the best in the country. They are incentivized to ensure players are focused solely on performing their best because the schools, the conferences, and the coaches have a lot of money riding on it. As previously mentioned, the NCAA's bylaws allow coaches to go above and beyond the maximum hour requirement to get their players and programs to the level of performance needed to win games and generate millions of dollars. The nature and reality of the business of collegiate athletics are again at odds with the NCAA's justifications for amateurism.

#### **D. Conclusion**

Under Sherman's Antitrust analysis, there must be pro-competitive justifications in the relevant market to survive the burden-shifting within the Rule of Reason analysis.<sup>94</sup> Given the evidence and data described above, amateurism is not needed to promote the product of collegiate athletics. Amateurism is not essential to consumers because viewership data and subsequent broadcast contracts show fans still watch, even when athletes monetize their NIL. Further, amateurism is not pro-competitive when evidence demonstrates that the structure and motivation of the NCAA are commercial in nature and not a vehicle to integrate student-athletes into the student body or

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<sup>92</sup> *Supra*, note 6

<sup>93</sup> *Supra*, note 8

<sup>94</sup> Practical Law Antitrust, Antitrust Rule of Reason, Thompson Reuters (2024), <https://us.practicallaw.thomsonreuters.com/9-522-6396>



beneficial for the “non-commercial objective of higher education.”<sup>95</sup> As a result, the justifications for amateurism should not carry the day in an antitrust analysis because the pro-competitive effects are not present or justified. Similar to how Justice Kavanaugh noted in his concurrence in Alston when he stated, “...the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification”.<sup>96</sup> Instead, the NCAA should embrace a professional sports model because that is the product they sell; they just call it amateur athletics. Many athletes and legal actions are beginning to question the NCAA for their justifications for amateurism because, as Justice Kavanaugh noted, “The NCAA’s business model would be flatly illegal in almost any other industry in America.”<sup>97</sup>

#### **IV. Under Labor Law, collegiate sports are professional sports**

##### **A. Dartmouth Men’s Basketball NLRB decision**

The National Labor Relations Board (NLRB) defined common-law employment as “requires that the employer have the right to control the employee’s work, and that that work be performed in exchange for compensation.”<sup>98</sup> Further, the definition of employee does not exclude students.<sup>99</sup> This means that if the Dartmouth Men’s Basketball Team meets the definition of an employee, they are a statutory employee regardless of whether the employer is a school and the employees are students.<sup>100</sup> Additionally, it is essential to note that the decision of the NLRB was not dependent on the profitability of the business, or in this case, the athletic department, because “the profitability of a business does not affect the employee states of the individuals who perform work for that business.”<sup>101</sup>

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<sup>95</sup> National Collegiate Athletic Association v. Alston, 594 U.S. 69, 94 (2021).

<sup>96</sup> *Id.* at 109.

<sup>97</sup> *Id.*

<sup>98</sup> Trustees of Dartmouth College, at 14.

<sup>99</sup> *Id.* at 18.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

The decisions stated that Dartmouth exercises control over the student-athletes' work.<sup>102</sup> The decision highlights that the student-athlete handbook acts as an employee handbook, and rules and regulations are made explicitly for student-athletes.<sup>103</sup> Furthermore, the school and coaches determine when players will practice, play, review film, or participate in team-related activities.<sup>104</sup> Additionally, the school and coaches determine when and where players will travel, eat, and sleep for away games.<sup>105</sup> The decision notes that these levels of control are not placed on any other type of student other than the student-athletes.<sup>106</sup>

Next, the decision highlights the men's basketball team players working in exchange for compensation. The NLRB notes that Ivy League schools do not receive athletic scholarships like most Division I programs.<sup>107</sup> However, they do receive early admission into the school and receive thousands of dollars worth of free equipment and apparel, tickets to games, meals, lodging, and athletic care and training.<sup>108</sup> The exchange of payment to constitute employment comes in the form of the athlete completing his duties, practicing, and playing games.<sup>109</sup>

The NLRB further observed that employment status is also found where there is an economic relationship.<sup>110</sup> The board notes that economic compensation "includes payment intended as reimbursement for work-related purposes."<sup>111</sup> The NLRB found that players receive "fringe benefits" such as academic support, career development, sports psychology, sports nutrition, strength and conditioning training, sports medicine, and more.<sup>112</sup> Furthermore, the decision notes

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<sup>102</sup> Id. at 19.

<sup>103</sup> Id.

<sup>104</sup> Id.

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id. at 20.

<sup>110</sup> Id.

<sup>111</sup> Id.

<sup>112</sup> Id.

that the size of the compensation is immaterial to the analysis.<sup>113</sup> What is dispositive is whether the economic compensation was received.<sup>114</sup>

Therefore, because Dartmouth and its coaches control the manner and means of the work performed by the men’s basketball team, and the players perform in exchange for compensation, they are employees and engaged in employment with the school.

**B. The control and compensation analysis in the Dartmouth Men’s Basketball case further damages the NCAA’s reasoning for amateurism.**

A study done by the NCAA Eligibility Center detailed what student-athletes should expect when they accept an offer to play collegiate athletics and listed activities that do not count towards countable hours for athletes. Activities included academic meetings, nutritionist sessions, media activities, treatment, community service, and compliance meetings.<sup>115</sup> Furthermore, as detailed earlier in this article, game days are counted as three hours “regardless of the actual duration of these activities.”<sup>116</sup> The NCAA Eligibility Center notes that game days for Division 1 Athletes can be anywhere from four to nine hours.<sup>117</sup> Athletes are not allowed to miss game days as part of their commitment to the team. The earlier referenced Pac-12 study detailed that athletes spend 50 hours or more, which is more than that of a full-time employee working from 9 a.m. – 5 p.m., on athletics.<sup>118</sup> Athletes detailed that traveling for games is one of the most stressful aspects that forces them to miss class and significantly reduces the time for studying and sleeping due to it occupying

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<sup>113</sup> Id.

<sup>114</sup> Id.

<sup>115</sup> NCAA Eligibility Center, Time Management, NCAA (2023), [http://fs.ncaa.org/Docs/eligibility\\_center/Student\\_Resources/Time\\_Management\\_DI\\_DII\\_DIII.pdf](http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/Time_Management_DI_DII_DIII.pdf)

<sup>116</sup> NCAA Division 1 2023-234 Manual, Constitution Art. 17.1.7.3.2.

<sup>117</sup> NCAA Eligibility Center, Time Management, NCAA (2023), [http://fs.ncaa.org/Docs/eligibility\\_center/Student\\_Resources/Time\\_Management\\_DI\\_DII\\_DIII.pdf](http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/Time_Management_DI_DII_DIII.pdf)

<sup>118</sup> Penn Schoen Berland, Student-Athlete Time Demands (April 2015), *supra* note 64.

an additional twenty-two hours above the NCAA's twenty-hour weekly limit.<sup>119</sup> Coaching staffs and directors of team operations formulate the schedule for the athletes and their travel.

To illustrate this point, the Dartmouth Men's Basketball team showed their itinerary for traveling to play against Princeton University. The team's travel day from Dartmouth to Princeton began at 8 a.m. and did not end until 7 p.m. The team's game against Princeton the following day starts at 9:40 a.m. and does not end until they arrive back on Dartmouth's campus at 10 p.m. Furthermore, players cannot deviate from the itinerary.<sup>120</sup> In this example, twenty-three hours and twenty minutes spanning two days were dedicated to one game. Of these twenty-three hours and twenty minutes, only three were counted as countable team activities, and players could not deviate from any of the directions provided by the coaching staff. The Northwestern case detailed a similar occurrence when the Northwestern Football Team had an away game at the University of Michigan. The travel day began at 8:20 a.m., ended at 6 p.m., and included traveling to the away university, walk-throughs at the stadium, and position meetings.<sup>121</sup> On game day, the players were woken up at 7:30 a.m. and required to meet for breakfast.<sup>122</sup> The team then went to the stadium, warmed up, played a game that went into overtime, and traveled back to Northwestern University, where the day ended at 10 p.m. Twenty-four hours and ten minutes spanning two days were spent by players of Northwestern University's football team for one game. Only three were counted as countable team activities of these twenty-four hours and ten minutes.

This further demonstrates the point made in §II(C)(ii) of this article: amateurism does not integrate college athletes with the student body or prioritize education considering how much time is spent traveling to one game and similar schedules being arranged for home competition. Players'

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<sup>119</sup> Trustees of Dartmouth College, at 9.

<sup>120</sup> Id. at 10.

<sup>121</sup> Northwestern University, 362 NLRB 1350, 1359 (2015).

<sup>122</sup> Id.

work and schedules are controlled for twenty-three to twenty-four hours per game or ten to twelve-hour days on travel and game days. Division I basketball players can play anywhere from twenty-nine to forty games in a season.<sup>123</sup> If half of those games are away games, then throughout a season, Division I basketball players are amassing around 350 hours *for away games* (23.33 hours multiplied by 15 games) if they follow the Dartmouth Men's basketball travel schedule detailed above and play twenty-nine total games. If teams play forty games, players amass around 466.6 hours (23.33 hours multiplied by 20 games) in a season spent *only on away games*.

As detailed in the Dartmouth case, the only compensation received is free basketball, lifting, and travel shoes, backpacks, hoodies, sweatshirts, sweat suits, jackets, and coats, valued at \$2,950 per player, and tickets valued at \$1,200.<sup>124</sup> Collective compensation totals \$4,150. In 2023-24, the college basketball season spanned six months, or twenty-three weeks, beginning in early November and ending in early April.<sup>125</sup> Athletes in the Pac-12 study purported to spend around fifty hours per week on athletics during the season.<sup>126</sup> If a team were to make it to the National Championship game in early April and have a season-spanning all twenty-three weeks of the season, and they spent fifty hours per week on athletics during this time, then the total amount of hours spent on athletics for the season is 1,150 hours. If a team spending 1,150 hours on athletics is compensated to the same degree as the Dartmouth Men's Basketball Team, collectively \$4,150, then their hourly wage would be \$3.60 (\$4,150 divided by 1,150 hours). If a team does not make the NCAA tournament and spends fifty hours per week on athletics during the season, they play for twenty weeks, and their total hours decrease to 1,000. A team spending 1,000 hours on athletics

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<sup>123</sup> Andy Wittry, How many games are in a college basketball season? It depends, NCAA.com (October 29, 2020), <https://www.ncaa.com/news/basketball-men/article/2020-10-27/how-many-games-are-college-basketball-season>

<sup>124</sup> Trustees of Dartmouth College, at 11.

<sup>125</sup> Chase Kiddy, When Does the College Basketball Season Start?, BETMGM (March 27, 2024), <https://sports.betmgm.com/en/blog/ncaab/when-does-the-college-basketball-season-start-bm06/>

<sup>126</sup> Penn Schoen Berland, Student-Athlete Time Demands (April 2015), *supra* note 64.

being compensated to the same degree as the Dartmouth Men’s Basketball Team will make an hourly wage of \$4.15 (\$4,150 divided by 1,000 hours). These numbers become problematic because the Fair Labor Standards Act (FLSA) regulates the federal minimum wage to \$7.25.<sup>127</sup> However, the NCAA does not need to comply with the standards in the FLSA, given that student-athletes are not considered employees.

Additionally, Division I athletes are similar to professional athletes. Professional athletes generally work more than forty hours per week, practicing, traveling, and competing.<sup>128</sup> As mentioned *supra*, student-athletes have purported to be engaged in sport-related activities (practice, training, lifting, film study, etc.) for forty to fifty hours per week during the season. The only difference between a student-athlete and a professional athlete schedule-wise is that student-athletes have to go to class in addition to their commitment to athletics.

The calculated hourly wages above become even more significant when you see how much money student-athletes make for the NCAA and how much coaches, athletic directors, and athletic conference commissioners make in salary compared to the “compensation” student-athletes receive. As highlighted earlier in this article, everyone in and around the NCAA can monetize their services and get very wealthy, except for the players. Of the \$17.5 billion in revenue generated by Division I athletics in 2023, 20% (\$3.5 billion) went towards coaching compensation, 17% (\$2.975 billion) went towards administrative compensation, and 17% (\$2.975 billion) went towards facilities.<sup>129</sup> Furthermore, in 2022, the Atlantic Coast Conference (ACC) made \$617 million, the Big 12 Conference made \$480.6 million, the Big Ten Conference made \$845.6 million, the Pac-

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<sup>127</sup> U.S. Department of Labor, Minimum Wage, U.S. Department of Labor (2024), <https://www.dol.gov/agencies/whd/minimum-wage>

<sup>128</sup> U.S. Bureau of Labor Statistics, Athletes and Sports Competitors, Work Environment, (2024), <https://www.bls.gov/ooh/entertainment-and-sports/athletes-and-sports-competitors.htm#tab-3>

<sup>129</sup> National Collegiate Athletic Association, Division I Athletics Finances 10-Year Trends from 2013 to 2022, NCAA Research (December 2023) [ncaaorg.s3.amazonaws.com/research/Finances/2023RES\\_DI-RevExpReport\\_FINAL.pdf](https://ncaaorg.s3.amazonaws.com/research/Finances/2023RES_DI-RevExpReport_FINAL.pdf)

12 Conference made \$580.9 million, and the Southeastern Conference (SEC) made \$802 million.<sup>130</sup> The per-school distribution for each conference ranged between \$37 million to \$58.8 million.<sup>131</sup> The Conference Commissioners made salaries ranging from \$1.8 million to \$4.05 million.<sup>132</sup>

### C. **Conclusion**

The billions of dollars made by the NCAA, the hundreds of millions made by the conference, and the millions of dollars made by coaches are a product of the players, their talent, and their marketability. The landscape of the NCAA is just as Justice Kavanaugh described it, “the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes.”<sup>133</sup> This reality becomes even more amplified and problematic if student-athletes get recognized as employees and are only compensated with a couple thousand dollars worth of apparel when they spend forty to fifty hours per week traveling, practicing, and performing their sport, similar to that of professional athletes, under the direction, control, and supervision of the coaches and university.

### V. **Problems with Unionizing**

A labor union is an organized group that unites to make decisions and negotiate with the employer about employees' working conditions, pay, benefits, etc..<sup>134</sup> There are many benefits to being associated with and represented by a Union, such as having a stronger voice, better benefits,

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<sup>130</sup> Steve Berkowitz, NCAA's Power Five Conferences are cash cows. Here's how much schools made in fiscal 2022, USA Today (May 19, 2023), <https://www.usatoday.com/story/sports/college/2023/05/19/power-5-conferences-earnings-billions-2022/70235450007/>

<sup>131</sup> Id.

<sup>132</sup> Id.

<sup>133</sup> National Collegiate Athletic Association v. Alston, 594 U.S. at 110.

<sup>134</sup> What is a Union?, Union Plus (2024), <https://www.unionplus.org/page/what-union>

higher pay, and collective power as a bargaining tool.<sup>135</sup> While some benefits of being represented by a union may apply in the student-athlete context, others do not.

The union structure does not benefit college athletics. Unions that represent professional athletes involve all athletes of that sport. For example, all NBA players are part of the National Basketball Players Association (NBPA), and all NFL players are part of the National Football League Players Association (NFLPA). There are significantly more collegiate and basketball players here than professional football and basketball players. For example, the NBA has thirty teams, with fifteen players on each roster. This means that there are a total of 450 NBA players, all of whom are part of the NBPA. Compare this to collegiate basketball, where in the 2022-2023 season, there were 19,213 participants.<sup>136</sup>

Furthermore, there are over 300 schools at the Division I level, all of which are spread across the country, in different conferences, and all have different needs.<sup>137</sup> As previously mentioned, part of the benefit of unionizing is the collective voice of all employees. In the collegiate athletic context, this benefit is only possible if a giant union is established that represents the student-athletes collectively. However, this would not be ideal given the vastly different circumstances of athletes across sports and even athletes in the same sports but in different conferences and playing on different levels. Multiple smaller unions representing athletes within a particular sport and specific conferences could be established, but that would also imply that schools and conferences are negotiating a collective bargaining agreement with numerous union entities, and each

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<sup>135</sup> Benefits of Union Membership, Union Plus (2024), <https://www.unionplus.org/page/benefits-union-membership>

<sup>136</sup> Men's Basketball: Probability of competing beyond high school, NCAA (2024), <https://www.ncaa.org/sports/2015/3/6/men-s-basketball-probability-of-competing-beyond-high-school.aspx>

<sup>137</sup> Laura Bailey, Would college athlete unions be effective?, The University of Michigan School of Kinesiology (February 19, 2024), <https://record.umich.edu/articles/qa-would-college-athlete-unions-be-effective/>



collective bargaining agreement supplies different terms of employment. This would be an extreme burden for athletic departments, universities, and conferences.

Additionally, another benefit of unionizing is the collective voice employees carry and their ability to strike if an employer is acting unfairly or terms of collective bargaining cannot be met. The power and ability to strike are not as widely available for student-athletes as they are for professionals. Student-athletes only have a set amount of time they can play in the collegiate ranks. Striking would take away the limited time collegiate athletes have to compete, meaning that their bargaining and striking power would be significantly limited. As of 2023, the percentage of collegiate players who make the professional ranks was 1.1% for men's basketball, 1.5% for football, and 0.9% for women's basketball.<sup>138</sup> This means that if student-athletes were to strike, most student-athletes who will not be playing professionally would miss out on the limited time they have to monetize their athletic ability. This also means that student-athletes who wish to be professionals but are not consensus number-one overall picks, lottery picks, etc., will miss games and opportunities for scouts to watch them compete.<sup>139</sup>

Therefore, from a student-athlete perspective, unionization may not be the answer to the amateurism problem. The answer may lie in distinguishing the amateurism model altogether and allowing student-athletes to receive compensation as free agents, similar to how student-athletes obtain NIL money, rather than bargaining as a collective.

## **VI. Problems surrounding the implementation of a professional model**

Where would the money to pay the athletes come from if a professional model were implemented? If schools had to pay athletes, and the money came from the program's budget,

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<sup>138</sup> Estimated Probability of competing in professional athletics, NCAA (2024), <https://www.ncaa.org/sports/2015/3/6/estimated-probability-of-competing-in-professional-athletics.aspx>

<sup>139</sup> Laura Bailey, Would college athlete unions be effective?, The University of Michigan School of Kinesiology (February 19, 2024), <https://record.umich.edu/articles/qa-would-college-athlete-unions-be-effective/>

numerous parties, including the student-athletes, would be impacted. Part of a coach's salary is tied to the revenue generated by the program and is typically a function of the overall budget for that particular sport.<sup>140</sup> If part of the budget now goes toward athletes being paid, then coaches will be negatively impacted because there is a potential that their salaries decrease. Alternatively, the student-athletes become impacted because if part of the overall budget for the sport or the athletic department as a whole goes towards paying student-athletes for their services, then the budget to build the lavish facilities that student-athletes have become used to could be negatively impacted. For example, Clemson Football built a new \$55 million football complex with an indoor slide, bowling alley, basketball court, putting green, mini-golf course, wiffle ball field, new lockers, swimming pools, and more.<sup>141</sup> Louisiana State University (LSU) built a brand new locker room that cost \$28 million and was designed to replicate pods in a first-class airline that included sleeping pods, charging stations, and numerous forms of state-of-the-art technology.<sup>142</sup> Luxurious facilities like those mentioned may no longer be available if athletic budgets go towards paying the student-athletes.

Furthermore, there could also be a possibility of schools having more power over the student-athlete. Currently, student-athletes, particularly in revenue-generating sports like football and basketball, have the luxury of the transfer portal and can switch schools relatively freely. However, suppose student-athletes are employees of the athletic department or school. In that case, the school may be able to exercise more control in the form of employment contracts for longer than one

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<sup>140</sup> Tom Schad and Steve Berkowitz, Why college football is king in coaching pay – even at blue blood basketball schools, USA Today (October 3, 2023), <https://www.usatoday.com/story/sports/ncaaf/2023/10/03/college-football-coach-pay-is-soaring-even-at-basketball-schools/70924373007/>

<sup>141</sup> Julia Chaffers, The Hypocrisy of the NCAA's Amateurism Model, The Department of African American Studies at Princeton University (March 4, 2020), <https://aas.princeton.edu/news/opinion-hypocrisy-ncaas-amateurism-model>

<sup>142</sup> Alexandra Licata, LSU football unveiled its state-of-the-art \$28 million locker room, complete with luxury sleep pods, Business Insider (July 23, 2019), <https://www.businessinsider.com/lsu-football-new-locker-room-college-football-2019-7>

season. This means that student-athletes may not be able to leave or will be in breach of their employment contract if they do. The NCAA may be encouraged by this result if being an employee restricts player movement. The university and coaches may be encouraged by this result because the transfer portal becomes less substantial, and coaches get to keep their players. Recent coaches, such as Nick Saban, have been critical of the transfer portal because of the extreme amount of player movement and having to re-recruit his own players. Either way, there may be a possibility of schools and universities having more control over student-athletes than they currently do and the implementation of a professionalized model impacting everyone in and around college athletics.

## **VII. The legal and practical benefits of utilizing a professional sports model.**

To recap, the NCAA's procompetitive justifications for amateurism are that it is needed to ensure the product's character, that amateurism integrates the student-athlete with the student body, and that it promotes higher education. Numerous sources and data in this article highlight the weaknesses of those justifications for amateurism within an antitrust rule of reason analysis. However, the transition to a professional model may allow the NCAA to avoid continuing to violate antitrust laws and substantiate its antitrust reasoning. Furthermore, the most recent decision by the NLRB shows that student-athletes can be categorized as employees due to the control and compensation they receive. The number of hours put into athletics by student-athletes and the compensation they receive in return for their services is well below federal minimum wage laws. This can become problematic for the NCAA as more student-athletes attempt to fight for equality. If student-athletes are considered employees, implementing a professional model will allow the NCAA to comply with federal employment law standards.

A. **A professional model is better for the athletes and makes the NCAA's procompetitive justifications more persuasive.**

Many Division I athletes aspire to make it to the professional ranks, but most will not. As of 2023, the percentage of collegiate players who make the professional ranks was 1.1% for men's basketball, 1.5% for football, and 0.9% for women's basketball.<sup>143</sup> Furthermore, the average career in the National Basketball Association (NBA) spans 4.5 years, the average National Football League (NFL) career spans 3.3 years, and the average Women's National Basketball Association (WNBA) career spans about five years.<sup>144</sup> The reality is that most Division I athletes won't be able to monetize their athletic ability past the collegiate ranks. Athletes will not be as publicized as they are playing college sports. Establishing a pay-for-play professional model will benefit student-athletes because they can monetize their athletic ability, and, for most, it'll be the only opportunity they get to do so.

Furthermore, a professional model will incentivize players who are not lottery picks and household-name prospects to stay in school while getting paid. Many athletes are not Zion Williamson, Anthony Davis, Anthony Edwards, John Wall, or Kyrie Irving, who did not take much risk when declaring for the NBA draft. For most, the draft is a high-risk, high-reward decision. It could be a decision that makes millions of dollars or leads to players going overseas, the NBA G-league, or foregoing the pursuit of the NBA altogether. A professional model gives student-athletes more reasons to stay in school; there are already examples of student-athletes staying longer because of NIL. Drew Timme was a star center for Gonzaga's Men's Basketball team. He decided to stay in college and forego the NBA draft for a year because his NIL money was comparable to

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<sup>143</sup> Estimated Probability of competing in professional athletics, NCAA (2024), <https://www.ncaa.org/sports/2015/3/6/estimated-probability-of-competing-in-professional-athletics.aspx>

<sup>144</sup> Paulana Lamonier, The Business Of Being A WNBA Player, Forbes (July 2, 2018), <https://www.forbes.com/sites/plamonier/2018/07/02/the-business-of-being-a-wnba-player/?sh=3cef28145af1>

what he was projected to receive in the NBA.<sup>145</sup> Armando Bacot is a current University of North Carolina's (UNC) Men's Basketball Team star. Bacot reported making \$500,000 from NIL in 2022 and did not explore the possibility of entering the draft because he could stay in school, pursue a degree, and make money.<sup>146</sup> NIL has shown that star players will remain in school. Suppose players like Timme and Bacot were unable to profit from their NIL. In that case, they might have been forced to forego any remaining college eligibility and stop the pursuit of a degree to pursue the only path that would pay them for their athletic ability. This is where the NCAA's procompetitive justifications for amateurism fall short yet again because many players leave school pre-maturely to pursue a professional career that will pay them for their athletic ability, and, as stated above, the percentage of players making the professional ranks is less than 1.5%. With the implementation of a professional model, student-athletes won't be forced out the door to get paid for athletics, and they can continue their education while monetizing the athletic ability that brought them to school in the first place.

In Alston and O'Bannon, the NCAA argued that it was not violating antitrust laws because amateurism is necessary for the product, integrates the student-athlete with the student body, and promotes higher education. It can be argued, perhaps more convincingly, that a professional model accomplishes those procompetitive justifications more than an amateurism model does. The examples of Timme and Bacot above are just the most recent examples of how paying athletes can make their decisions easier. The upper-echelon talent will not be persuaded, but the other 98.5% of athletes who will make less money overseas and in the G-league will be persuaded. They will be able to monetize their talent and finish pursuing a degree. This is more in-line and persuasive

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<sup>145</sup> Amanda Christovich, Men's Basketball Players Are Staying In School Longer Thanks to NIL, Front Office Sports (July 26, 2023), <https://frontofficesports.com/nil-impact-on-the-nba-draft/>

<sup>146</sup> Id.

towards the pro-competitive justification of promoting higher education. The NCAA may be worried about commercializing higher education, but student-athletes are not paid for being students; they would be paid for being athletes. Similar to the average student who can get paid for an on-campus job. A professional model would be no different. The student-athletes, like the non-athlete student-worker, would be paid for a service they provide outside the classroom. Similarly, if student-athletes stay in school longer, this would help the NCAA's pro-competitive justification for integrating the student-athlete with the student body. While their schedules may not allow student-athletes to have the social life, opportunities, etc., that a typical student has, a professional model would at least lend itself towards accomplishing the goal of keeping student-athletes on campus as students rather than pre-maturely jumping to the professional ranks because it their only means of monetizing their athletic talent.

Additionally, with a professional model, the NCAA will be able to avoid any violations of employment law that would occur if student-athletes are recognized as employees. It may be only a matter of time before collegiate athletes are considered employees, and most, if not all, will continue fighting for the fairness student-athletes desire. If student-athletes are recognized as employees by the NLRB, then the NCAA and its member schools would be violating federal and state employment and minimum wage laws based on the number of hours athletes spend in their sport and the little compensation they receive from it, as detailed supra. A professional model allows the NCAA to comply with federal and state employment and wage laws because student-athletes will be compensated monetarily and not just in free apparel.

### **VIII. Conclusion**

The NCAA provides unparalleled entertainment in the world of collegiate athletics. The NCAA has given the world of sports access to thousands of talented athletes, from freshman phenoms to

seniors and graduate students who have cemented their names as some of the greatest athletes to represent some of the most prestigious universities. The NCAA has given the sports world some of the greatest moments, from Christian Laettner's game-winning shot against Kentucky to Kris Jenkins' buzzer-beater to win the 2016 National Championship to Tua Tagovailoa's game-winning touchdown pass to Devonta Smith to win the 2018 CFP National Championship. The commonality between the entertainment that fans associate with collegiate athletics and the moments etched into sports history is the players. The NCAA's entertainment value is derived from the athletes. The unparalleled entertainment derived from the athletes has generated billions of dollars for the NCAA, with the athletes receiving none.

The reality of collegiate sports and the NCAA's model of promoting collegiate athletics as amateur athletics do not coincide. Billions of dollars of revenue are generated yearly, coaches, administrators, athletic conferences, and athletic conference commissioners all profit millions of dollars and professionalize collegiate sports, but NCAA governance continues to refer to collegiate athletes as amateurs. Student-athletes spend forty to fifty-plus hours per week on their respective sports. This is no different from the millions of Americans who dedicate forty-hour work weeks towards salaried jobs and the hundreds of professional athletes who dedicate comparable time to their sports as student-athletes do. The reality is that collegiate athletics is a form of professional sport that allows everyone around it to profit from it, except for the players who put the time and effort into performing and generating billions of dollars.

The NCAA was initially founded to regulate intercollegiate athletics and protect student-athletes.<sup>147</sup> Implementing a professional model allows the NCAA to accomplish its original purpose of protecting and advocating for the best interests of student-athletes by enabling them to

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<sup>147</sup> *Supra*, note 16.

develop and monetize their athletic abilities while pursuing higher education and degrees that will last long after their playing days are over.