



Are College Athletes Employees under the Fair Labor Standards Act?

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ABSTRACT

My amicus brief, submitted to the Third Circuit Court of Appeals in *Johnson v. NCAA*, 2022 WL 2828262, draws from the research in this Article. In *Johnson*, college athletes are seeking wages under the Fair Labor Standards Act. The NCAA argues that college athletes are amateurs, not employees, under their rules. Two appellate courts have been persuaded by the NCAA's argument in similar FLSA cases: *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016), and *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019).

My research analyzes shortcomings in the appellate briefs for college athletes in *Berger* and *Dawson* and offers a better way to conceptualize the employment relationship between college athletes and schools. The *Johnson* court should apply the Supreme Court's interpretation of "work" in *Armour & Co. v. Wantock*, 323 U.S. 126, 132 (1944) to mean "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

By delving into numerous NCAA rules that meticulously cover the hours and activities of college players, I demonstrate that these are work rules, not amateur rules—and, therefore, that the work performed by college athletes for the benefit of their schools is compensable as employment.

More generally, I show that NCAA athletes are misclassified—the term that some courts use in gig-work cases—except that these athletes are classified not as independent contractors but with a fungible term called “student athletes.”

To support this view, I compare the work of dancers to the work of college athletes. Both groups are comprised of adult performers who are valued for their physical attributes; they also work under take-it-or-leave-it contracts. The NCAA and adult clubs financially penalize dancers and athletes for breaking their rules. Using a Third Circuit case, *Verma v. 3001 Castor, Inc.*, 937 F.3d 221 (3d Cir. 2019), that resulted in a \$4.5 million judgment against an adult club that misclassified its dancers under the FLSA as independent contractors, I argue for a similar analysis and result in *Johnson v. NCAA*.

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I. INTRODUCTION

A. Framing Collegiate Athletic Labor

At first glance, college athletics compares more to professional sports than to adult entertainment clubs.¹ But once the NCAA's amateurism model for athletic labor comes into focus,² the work of dancers in adult

¹ For this Article, I eschew the terms “strip club,” “exotic dancer,” and “stripper” because they may convey to some readers a derogatory meaning. In their place, I use more neutral terms: “adult entertainment club,” “adult club,” “adult club dancer,” and “club dancer.” This terminology is accurate while differentiating this type of performing from other forms of dancing for pay, as I describe in *infra* note 59.

While courts use different terminology for clubs and dancers in cases under the Fair Labor Standards Act, many have settled on “adult entertainment” or “adult entertainer” as descriptors. Recent examples include *Verma v. 3001 Castor Club, Inc.*, 937 F.3d 221, 224 (3d Cir. 2019) (“adult entertainment”); *Johnson v. Houston KP, LLC*, 2022 WL 605802, at *6 (S.D. Tex. 2022) (“adult entertainment”); *Tassy v. Lindsay Entertainment Enterprises, Inc.*, 2022 WL 801279, at *7 (W.D. Ky. 2022) (“adult entertainment”); *Mays v. Rubiano, Inc.*, 560 F.Supp.3d 1230, 1233 (N.D. Ind. 2021) (“adult entertainment” and “adult entertainer”); *Duren v. International Follies, Inc.*, 2021 WL 9274495, at *1 (N.D. Ga. 2021) (“adult entertainment” and “adult entertainer”); *Kellogg v. Fannie’s Inc.*, 467 F.Supp.3d 1296, 1313 (N.D. Ga. 2020) (“adult entertainers’ dancing”); *Betras v. Oli-Car Inc.*, 2021 WL 5239938, at *4 (W.D. Pa. 2021) (“adult entertainment clubs”); *Clay v. Showntail the Legend LLC*, 2020 WL 10727983, at *2 (N.D. Fla. 2020) (“adult entertainer”); *Becton v. WBY, Inc.*, 2020 WL 3402865, at *1 (N.D. Ga. 2020) (“adult entertainers”); *Hurst v. Youngelson*, 354 F.Supp.3d 1362, 1368 (N.D. Ga. 2019) (“adult entertainer”); *Mantooth v. Bavaria Inn Restaurant, Inc.*, 360 F.Supp.3d 1164, 1167 (D. Colo. 2019) (“adult entertainment”); *Embry v. 4745 Second Ave., Ltd.*, 2019 WL 8376264, at *2 (S.D. Iowa 2019) (“adult entertainer”); *Dean v. Billings*, 2017 WL 2063001, at *1 (W.D. Okla. 2017) (“adult entertainers”); and *Dean v. 1715 Northside Drive, Inc.*, 224 F.Supp.3d 1302, 1308 (N.D. Ga. 2016) (“adult entertainment”).

² See NAT’L COLLEGIATE ATHLETIC ASS’N, 2020-21, NCAA DIV. I MANUAL, art. 1, 1.3.1 (Basic Purpose), stating: “A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.” To make amateur competition an explicit requirement, the NCAA has promulgated these rules:

Art. 2.9 The Principle of Amateurism. Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

clubs³ offers a closer comparison for courts to rule that college athletes are employees under the Fair Labor Standards Act (FLSA).⁴ My research offers a blueprint to persuade courts to see college athletes as employees under the FLSA.

This introduction relates to *Johnson v. NCAA*, a lawsuit that seeks unpaid wages for college athletes.⁵ In this Article, I explain the evidence and reasoning in my amicus brief to the Third Circuit Court of Appeals, filed on behalf of college athletes.⁶ My Article makes this research available to a wider audience, including lawyers, academic researchers, law students, and college athletes.

Federal appeals courts failed to rule in favor of student athlete pay in similar lawsuits in *Berger v. NCAA*⁷ and *Dawson v. NCAA*,⁸ ruling that college athletes are not employees under the FLSA. But the *Johnson* litigation has already gone further in allowing athletes to pursue an FLSA action: a federal district court denied the NCAA's motion to dismiss the case,⁹ and the matter is now on appeal.¹⁰

2.13 The Principle Governing Financial Aid. A student-athlete may receive athletically related financial aid administered by the institution without violating the principle of amateurism, provided the amount does not exceed the cost of education authorized by the Association; however, such aid as defined by the Association shall not exceed the cost of attendance as published by each institution. Any other financial assistance, except that received from one upon whom the student-athlete is naturally or legally dependent, shall be prohibited unless specifically authorized by the Association.

³ For a succinct and frank discussion of the work of adult club dancers, see *Clinicy v. Galardi S. Enters., Inc.*, 808 F. Supp. 2d 1326, 1329 (N.D.Ga. 2011) (“Plaintiffs refer to Onyx as a strip club, Defendants refer to it as a nightclub, regardless of this distinction in nomenclature, Onyx is a club in Atlanta, Georgia that features ‘nude, female exotic dancers.’”).

⁴ Fair Labor Standards Act of 1938, 29 U.S.C.S. §§ 201-219 (2021) (also called FLSA).

⁵ *Johnson v. NCAA*, 556 F.Supp.3d 491 (E.D. Pa. 2021) (*Johnson I*). Johnson’s complaint seeks wages under the FLSA and state wage law for his uncompensated time playing football for Villanova University.

⁶ By the rules of the Third Circuit Court of Appeals, an amicus brief cannot exceed 6,500 words. U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT / REQUIREMENTS FOR BRIEFS. <https://www.ca3.uscourts.gov/sites/ca3/files/chart%20of%20requirements%20for%20briefs.pdf> [https://perma.cc/8RJS-36EP].

⁷ 843 F.3d 285 (7th Cir. 2016).

⁸ 932 F.3d 905 (9th Cir. 2019).

⁹ *Johnson I*, 556 F.Supp.3d 491 at 512.

In its opening brief, the NCAA worshiped the false god of collegiate amateurism. Quoting from *NCAA v. Bd. of Regents of Univ. of Oklahoma*,¹¹ the NCAA said that college athletics must continue to operate on its “revered tradition of amateurism.”¹² *Berger* was persuaded by this nostalgic argument,¹³ while *Dawson* avoided discussion of this outdated tribute.¹⁴

My Article provides a more realistic legal context for the Third Circuit and future courts. I do not suggest that the adult entertainment dance industry and college athletics are similar businesses. Adult entertainment dancers (also called club dancers in this Article) are frequently misclassified as independent contractors by their clubs, and they often prevail in FLSA lawsuits for minimum wages and overtime.¹⁵ I contend that college athletes are similarly misclassified when the NCAA regulates their labor, only the terminology differs: they are called amateurs, not independent contractors. Also, I avoid comparing college athletes to college interns, a mistake made in the appellate briefs filed on behalf of athletes.¹⁶ The better comparison is to college students who are employed by their universities as campus tour guides and cafeteria workers —jobs on campus during the school year that

¹⁰ *Johnson v. NCAA*, 2021 WL 6125453 (E.D. Pa. 2021) (*Johnson II*), granting motion by NCAA and defendant-schools to certify appeal.

¹¹ 468 U.S. 85, 120 (1984).

¹² Motion of Attended School Defendants to Dismiss First Amended Complaint at 6, *Johnson II* (2020) (No. 2:19-cv-05230-JP, document 25-1)

¹³ *Berger v. NCAA*, 843 F.3d 285, 291 (7th Cir. 2016) (“As the Supreme Court has noted, there exists ‘a revered tradition of amateurism in college sports’”) (citation omitted).

¹⁴ See *Dawson v. NCAA*, 932 F.3d 905, 910 (9th Cir. 2019) (“in the context of our preceding analysis, the revenue generated by college sports does not unilaterally convert the relationship between student-athletes and the NCAA into an employment relationship”). More generally, *Dawson* examined the functional aspects of an employment relationship, and found them lacking: “The NCAA Bylaws pervasively regulate college athletics. The complaint, however, does not allege that the NCAA/PAC-12 ‘hire and fire,’ or exercise any other analogous control, over student-athletes.” *Id.* at 910. While this improves on *Berger*’s reliance on a revered amateurism model, this functional approach has no direct relationship to the FLSA’s Section 203(g), which defines “employ” as “suffer or permit to work.” See *infra* note 163. If putative employers could avoid FLSA liabilities by simply not hiring or firing people who work for them, the law would be rendered pointless.

¹⁵ My arguments in this article draw from earlier research in Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY J. WOMEN & L. 249, 256, 264 (2017).

¹⁶ See Plaintiff App. Brief, *Berger v. NCAA*, 2016 WL 3659034 (7th Cir. Dec. 5, 2016).

fall under the FLSA. In short, the amateur label is a subterfuge to avoid an employment relationship.¹⁷

B. Contextualizing the History of Paying College Athletes

The NCAA and its predecessor have never admitted to the fact that stealthy methods are used to pay college athletes to play for schools. Speaking to the Intercollegiate Athletic Association of the United States in 1907, Captain Palmer E. Pierce of the Military Academy at West Point summarized newspaper stories that exposed sham amateurism in college athletics:

It was related in detail under what disguise money returns were given. For instance, one prominent player was said to have derived hundreds of dollars from the privilege of furnishing programs at games; another received the profit from a special brand of cigarettes named after him; a third was the ostensible head of an eating club, while others were in the employ of rich college graduates.¹⁸

Instead of allowing pay for athletes, the 1907 convention enacted seven rules for player eligibility that collectively anchored their status as amateurs.¹⁹ These principles have largely survived. Currently, in Points 3(a) and 3(b) of the NCAA's "Athletic Financial Aid Agreement," the NCAA stipulates that financial aid will be reduced or cancelled for an athlete who "[s]igns a professional sports contract for this sport," or "[a]ccepts money for playing in an athletic contest that causes him/her to exceed the cost of a full grant."²⁰

¹⁷ See *infra* note 285.

¹⁸ PROCEEDINGS OF THE SECOND ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 27 (Dec. 28, 1907), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=39&q1=professional> [<https://perma.cc/V8XC-KLJL>].

¹⁹ *Id.* at 78–79. Rule 1 required a student to take a full schedule of courses. Rule 2 required a student who serves as a trainer or instructor had not been previously paid for athletic competition. Rule 3 required a student who played in an athletic contest had not been previously paid for this activity. Rule 4 prohibited a student from competing if he had participated the four previous years. Rule 5 required a student to complete a year of instruction at his school before competing in athletics. Rule 6 required a football player to complete two out of three terms in the prior year. Rule 7 required students to complete a card with information about his previous athletic competitions.

²⁰ NCAA, *Athletic Financial Aid Agreement (Sample)*, https://ncaaorg.s3.amazonaws.com/about/d2/ed_res/D2Ed_SampFinAidAgreement.pdf [<https://perma.cc/34DN-WT8B>].

Three recent legal developments have eroded the NCAA's amateur model. First, in *O'Bannon v. NCAA*,²¹ a former UCLA basketball player prevailed in a landmark antitrust lawsuit involving the NCAA's exclusive exploitation of his name, image, and likeness (also called "NIL").²² Second, in the 2021 case *NCAA v. Alston*, the Supreme Court unanimously ruled that the NCAA violated the Sherman Act by unreasonably restricting educational benefits for college athletes.²³ Finally, by July 1, 2021, twenty-five states had adopted laws that granted NCAA athletes NIL rights to receive compensation.²⁴ The NCAA eventually yielded to this changing landscape by adopting a general policy allowing athletes to earn NIL income.²⁵ Now that athletes are permitted to earn NIL money,²⁶ why should the NCAA prevent schools from paying wages to their athletes?

C. Organizing My Analysis

I demonstrate that the NCAA and schools misclassify college athletes as amateurs, rather than employees. In addition to comparing NCAA athletic labor rules to independent contractor agreements for club dancers,²⁷ I contend that the NCAA's misclassification of athletes is part of a broader trend of wage theft by employers.²⁸

²¹ 802 F.3d 1049 (9th Cir. 2015) (Hereinafter referred to as "O'Bannon II").

²² *O'Bannon v. NCAA*, 7 F.Supp.3d 955, 963 (N.D. Cal. 2014).

²³ *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

²⁴ See Michael H. LeRoy, *Do College Athletes Get NIL? Unreasonable Restraints on Player Access to Sports Branding Markets*, 2023 U. ILL. L. REV. (forthcoming) (survey of state law NIL restrictions on athlete pay).

²⁵ Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness (NIL) Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/7HWV-6BA5>].

²⁶ Collectives are loosely structured business groups that provide NIL deals for players at schools, functioning somewhat like a booster club. William Lawrence, *The NCAA's New Guidance Regarding NIL Collectives — Will the Guidance Shut Down NIL Collectives or Affect Their Abilities to Pay College Athletes?* JDSUPRA (May 12, 2022), <https://www.jdsupra.com/legalnews/the-ncaa-s-new-guidance-regarding-nil-4436573/> [<https://perma.cc/ZY9S-MV9V>], explaining:

Following the NCAA's adoption of the Interim NIL Policy a mere 10 months ago, so-called NIL collectives have meteorically begun emerging. In less than one year, NIL collectives have fundamentally reshaped college athletics by becoming a critical component of athletic success using novel techniques to compensate college athletes for their NIL.

²⁷ My arguments in this article draw from earlier research in LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, *supra* note 15.

²⁸ My arguments also draw from earlier research in Michael H. LeRoy, *Misclassification under the Fair Labor Standards Act: Court Rulings and Erosion of the Employment*

I build on these foundations in the following arguments. In Part II, I show that NCAA athletes and club dancers are controlled by similarly restrictive contracts and rules imposed by their putative employers.²⁹ Part II.A explains how these dancers and athletes work in exploitative labor markets.³⁰ Part II.B shows how rules and work conditions provide them false autonomy.³¹ Part II.C shows how their earnings are limited by work rules.³² Part II.D demonstrates how clubs and the NCAA use financial penalties to enforce work rules.³³

Part III traces the legal history of laws and rulings that treat college athletes as employees.³⁴ Part III.A shows how college athletes were once treated by courts as employees but later excluded by a California law and court rulings.³⁵ Part III.B focuses on recent appellate rulings in FLSA cases,³⁶ and critically explains how appellate briefs failed to convince the *Berger* and *Dawson* courts to find that college athletes are employees.³⁷

Part IV is a blueprint for an appellate brief to explain why college athletes are employees.³⁸ Part IV.A presents evidence that college athletes perform work for their schools.³⁹ In Part IV.B, I show that college athletes meet all tests for employees under the FLSA's six-factor analysis.⁴⁰ Part IV.C examines how consolidation of conferences should influence courts to rule that NCAA athletes are employees.⁴¹

Part V concludes my analysis.⁴² My generalized presentations of adult entertainment and athletic labor culminate with *Verma v. 3001 Castor, Inc.*,⁴³ a Third Circuit opinion upholding a \$4.5 million judgment for club dancers who were misclassified under the FLSA. I explain how this case from 2019

Relationship, 2017 U. CHI. LEGAL F. 327, 337 (2017) (Fact Finding 1, employers have misclassified workers as independent contractors in 20 of the 22 major occupation categories defined by the U.S. Department of Labor).

²⁹ *Infra* notes 47–89.

³⁰ *Infra* notes 56–61.

³¹ *Infra* notes 62–67.

³² *Infra* notes 68–75.

³³ *Infra* notes 76–89.

³⁴ *Infra* notes 90–160.

³⁵ *Infra* notes 101–130.

³⁶ *Infra* notes 139–145; 151–160.

³⁷ *Infra* notes 131–138; 146–150.

³⁸ *Infra* notes 161–244.

³⁹ *Infra* notes 173–181.

⁴⁰ *Infra* notes 190–234.

⁴¹ *Infra* notes 235–244.

⁴² *Infra* notes 245–286.

⁴³ *Infra* notes 251–252.

applies to NCAA athletes and their schools.⁴⁴ I also explain how *Johnson's* litigation history is shaping up to resemble FLSA cases and *Alston*,⁴⁵ and how my analysis tracks closely to Justice Kavanaugh's approach in *Alston*.⁴⁶ Regardless of the outcome in *Johnson*, legal developments point to a time when college athletes will be paid for their athletic labor.

II. NCAA ATHLETES AND ADULT CLUB DANCERS: REGULATION OF THEIR WORK

My research adds a new perspective to an expansive research stream on the NCAA's (1) outdated amateurism model,⁴⁷ (2) antitrust problems,⁴⁸ (3) de facto employment of college athletes,⁴⁹ (4) creation of wealth for schools,⁵⁰ and (5) exploitation of college athletes.⁵¹

⁴⁴ *Infra* notes 253–277.

⁴⁵ *Infra* notes 278–279.

⁴⁶ *Infra* notes 280–286.

⁴⁷ See, e.g., Nicolas A. Novy, “*The Emperor Has No Clothes*”: *The NCAA's Last Chance as the Middleman in College Athletics*, 21 SPORTS L.J. 227 (2014); Daniel Lazaroff, *The NCAA In Its Second Century: Defender of Amateurism or Antitrust Recidivist?* 86 OR. L. REV. 329 (2007); Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24 (2000); Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 234 (1990) (“[I]t is disingenuous for the NCAA to rely on the Olympic ideal to justify restrictions on payments to athletes.”); and Sharon Elizabeth Rush, *Touchdowns, Toddlers, and Taboos: On Paying College Athletes and Surrogate Contract Mothers*, 31 ARIZ. L. REV. 549, 587 (1989) (“[I]t would be naive to suppose that simply the pretense of maintaining the amateur ideal is essential to continuing the current system.”).

⁴⁸ See, e.g., Sarah M. Konsky, Comment, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1602 (2003) (comparing NCAA transfer rules which deter the free movement of student-athletes among schools to restrictions on employees who could be competitive threat if left unrestricted); Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1313 (1992) (the limited compensation rule is contradicted by the fact that thirty out of thirty-three national championship basketball teams from 1952–85 violated the no-pay rule); and Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 659 n.22 (1978) (financial aid is a quid pro quo for a student's exchange of athletic skills for a package of goods and services).

⁴⁹ See, e.g., Michael H. LeRoy, *Courts and the Future of “Athletic Labor” in College Sports*, 57 ARIZ. L. REV. 475 (2015).

⁵⁰ See Craig Garthwaite et al., *Who Profits from Amateurism? Rent Sharing in Modern College Sports*, NAT'L BUREAU ECON. RSCH. (Working Paper 27734, Aug. 2020), <http://www.nber.org/papers/w27734> [https://perma.cc/SFD8-W8DR]; Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543 (2010).

I suggest that FLSA misclassification extends to college athletes in a way that compares to adult club dancers: the NCAA distorts economic realities by labeling athletes as amateurs, and clubs misapply the independent contractor title to their dancers. These forms of misclassification deprive athletes and club dancers, respectively, of minimum wages under the FLSA. The NCAA's financial aid contract is at the heart of this comparison.⁵² It binds an athlete to a strict amateurism model.⁵³ Similarly, adult clubs

⁵¹ See e.g., BILLY HAWKINS, *THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINANTLY WHITE NCAA INSTITUTIONS* (2013); Derek Van Rheenen, *Exploitation in College Sports: Race, Revenue, and Educational Reward*, 48 INT'L REV. FOR SOCIO. SPORT 550 (2012); Debra D. Burke & Angela J. Grube, *The NCAA Letter of Intent: A Voidable Agreement for Minors?*, 81 MISS. L. J. 265 (2011); Andrew B. Carrabis, *Strange Bedfellows: How the NCAA and EA Sports May Have Violated Antitrust and Right of Publicity Laws to Make a Profit at the Exploitation of Intercollegiate Amateurism*, 15 BARRY L. REV. 17 (2010); Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639 (2010); Krystal K. Beamon, *Used Goods: Former African American College Student-Athletes' Perception of Exploitation by Division I Universities*, 77 J. NEGRO EDUC. 352 (2008); Krystal Beamon & Patricia A. Bell, *Academics Versus Athletics: An Examination of the Effects of Background and Socialization on African American Male Student Athletes*, 43 SOC. SCI. J. 393 (2006); Patrick James Rishe, *A Reexamination of How Athletic Success Impacts Graduation Rates*, 62 AM. J. ECON. & SOC. 407, 415 (2003) (football graduation rate at Division I schools was 52.46%); Kirsten F. Benson, *Constructing Academic Inadequacy: African American Athletes' Stories of Schooling*, 71 J. HIGHER ED. 223 (2000); and Harry Edwards, *The Black 'Dumb Jock': An American Sports Tragedy*, 131 COLL. BD. REV. 8 (1984) (stating "[b]ut Black student-athletes are burdened also with the insidiously racist implications of the myth of 'innate Black athletic superiority,' and the more blatantly racist stereotype of the 'dumb Negro' condemned by racial heritage to intellectual inferiority.").

⁵² NCAA, *Athletic Financial Aid Agreement*, *supra* note 20.

⁵³ *Id.* stating:

3. This aid will also be reduced or canceled if the recipient:
 - a. Signs a professional sports contract for this sport.
 - b. Accepts money for playing in an athletic contest that causes him/her to exceed the cost of a full grant.
 - c. Agrees to be represented by an agent and accepts money that causes him/her to exceed the cost of a full grant.
 - d. Receives other aid that causes him/her to exceed his/her individual limit.

See also NCAA DIV. I MANUAL, *supra* note 2, art. 8.4.2.1 (Agreement to Provide Benefit or Privilege), stating:

Agreement to Provide Benefit or Privilege.

Any agreement between an institution (or any organization that promotes, assists or augments in any way the athletics interests of the member institution, including those identified per Bylaw 8.4.1) and an individual who, for any consideration, is or may be entitled under the terms of the agreement to

require their dancers to sign an independent contractor agreement.⁵⁴

I suggest this comparison as an argument in *Johnson v. NCAA*, because my recent empirical study found that adult club dancers won 93% of misclassification rulings.⁵⁵ This success rate suggests that lawyers should consider the factual and legal comparisons between college athletes and these dancers. In the remainder of Part II, I develop the dancer-to-athlete comparison.

A. *Exploitative Labor Markets*

College athletes and club dancers work in labor markets that take advantage of them. Empirical measures of these labor markets are elusive. This paucity of statistical information signifies that the exploitation of these performers is overlooked. The lack of data also suggests that the labels of amateur and independent contractor have reinforced the idea in the public's mind that student-athletes and club dancers are not employees—indeed, if there is no employment data for these workers, this reinforces the legal tautology that clubs and the NCAA advance in defending FLSA lawsuits.

any benefit or privilege relating to the institution's athletics program, shall contain a specific clause providing that any such benefit or privilege may be withheld if the individual has engaged in conduct that is determined to be a violation of NCAA legislation (emphasis added).

Art. 8.4.2.1 states: "The clause shall provide for the withholding of the benefit or privilege from a party to the agreement and any other person who may be entitled to a benefit or privilege under the terms of the agreement." *Id.*

⁵⁴ *E.g.*, *Wagoner v. N.Y.N.Y., Inc.*, No. 1:14-cv-480, 2015 WL 1468526, at *1–2 (S.D. Ohio Mar. 30, 2015) (dancers signed an independent contractor agreement stating that "the Entertainers . . . expressly disavow the existence, the intention and the desire to enter into an employment relationship, and expressly recognize that they will provide services directly to patrons in exchange for compensation by patrons."). *See also* different versions of independent contracting in *D'Antuono v. Serv. Road Corp.*, 789 F. Supp. 2d 308, 314 (D. Conn. 2011) (dancer signed "Entertainment Lease" when she began to work for the club), and *Robinson v. Taboo Gentlemen's Club, LLC*, No. 3:14-CV-123, 2015 WL 3868531, at *4 (N.D.W. Va. June 23, 2015) (referencing the club's licensing agreement). *Clinicy*, *supra* note 3, at 1329 (N.D.Ga. 2011) shows that the club presented new dancers with a packet of forms, policies, and independent contractor agreement.

⁵⁵ LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, *supra* note 15, at 260. Twenty-eight of the seventy-five cases in my database ruled that dancers were misclassified as independent contractors, rather than employees. *Id.* Compare *Becton*, 2020 WL 3402865 at *1, where a lawyer for an adult entertainment club told his client "that Follies had a five percent chance of winning a misclassification case and the best way to avoid FLSA liability would be to change its business model."

There are fragmentary ways to imply labor market value of elite college players. A recent study compared pay for elite high school-age players in the NBA's G League and another league, Overtime Elite, to extrapolate a payroll of nearly \$5 million for a college basketball team.⁵⁶ The emerging NIL market that provides third-party pay to college athletes offers another implied but imprecise valuation.⁵⁷ Perhaps the safest conclusion from these observations is that the NCAA's amateurism rules artificially limit the earning power of college athletes for their on-field performance, though the extent of that market interference cannot yet be accurately gauged.

The various labor markets for dancers have better empirical measures. The U.S. Department of Labor reports employment data for these occupations. This includes a general census code for "exotic dancers," a label that applies alike to "ballerina," "ballet dancer," "go-go dancer," "burlesque dancer," "tap dancer," and others.⁵⁸ There is an industry report on employment of dancers, but without a specific category for nude dancing.⁵⁹ It is possible that the Bureau of Labor Statistics' dancer data for "drinking places (alcoholic beverages)" is that agency's way of describing an adult entertainment club.⁶⁰ In May 2021, the average pay for dancers in these establishments was \$13.78 per hour, far below pay for other dancers.⁶¹

⁵⁶ Michael H. LeRoy, *The Professional Labor Market for Teenage Basketball Players: Disruptive Competition to the NCAA's Amateur Model*, 11 BERKELEY J. ENT. & SPORTS L. 1, 2 (2022) (salary data from elite, non-collegiate basketball leagues implies that a college would spend \$4,985,540 to employ a roster of seven elite players out of high school for the 2021–2022 season).

⁵⁷ Des Bieler & Scott Allen, *Nick Saban and Jimbo Fisher Spar as NIL Drama Overtakes the SEC*, WASH. POST (May 19, 2022) (25 members of Alabama's football team earned a total of \$3 million in 2021).

⁵⁸ U.S. BUREAU OF LABOR STATISTICS ON BEHALF OF THE OFFICE OF MANAGEMENT AND BUDGET (OMB) AND THE STANDARD OCCUPATIONAL CLASSIFICATION POLICY COMMITTEE (SOCPC) 33 (Nov. 2017, updated Apr. 15, 2020), available in https://www.bls.gov/soc/2018/soc_2018_direct_match_title_file.pdf [<https://perma.cc/E7SH-DQVA>].

⁵⁹ U.S. Bureau of Labor Statistics, *Occupational Employment and Wages, May 2021*, 27-2031 Dancers, <https://www.bls.gov/oes/current/oes272031.htm#nat> [<https://perma.cc/H4LR-JRTK>].

⁶⁰ *Id.*

⁶¹ *Id.* (reporting pay for Performing Arts Companies (\$26.57), Drinking Places (Alcoholic Beverages) (\$13.78), Spectator Sports (\$18.25), Other Schools and Instruction (\$ 29.41), and Independent Artists, Writers, and Performers (\$26.88)).

B. False Autonomy

NCAA athletes lack bargaining power because a price-fixing monopoly controls their labor market. This was true in 1995, when the NCAA's former executive director published a polemic that equated the collegiate amateur model to an "economic camouflage for monopoly practice. . . that operat[es] an air-tight racket of supplying cheap athletic labor."⁶² Recently, Justice Kavanaugh accused NCAA schools of similarly rapacious behavior at the expense of powerless athletes.⁶³

Similarly, adult clubs disingenuously serve as market intermediaries who bring fee-paying customers together with their dancers.⁶⁴ Clubs invert the employment relationship, making dancers responsible for paying co-workers.⁶⁵ These upside-down working conditions "may actually reflect 'a framework of false autonomy' that gives performers 'a coercive choice' between accruing debt to the club or redrawing personal boundaries of consent and bodily integrity."⁶⁶ False autonomy occurs when a club imposes an in-

⁶² See WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 376, 388 (1995), where the NCAA's executive director from 1951-1988 characterized the NCAA as an "economic camouflage for monopoly practice . . . that operat[es] an air-tight racket of supplying cheap athletic labor."

⁶³ See NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring):

The bottom line is that 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. 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, many of whom are African American and from lower-income backgrounds, end up with little or nothing.

⁶⁴ E.g., Johnson v. VCG Holding Corp., 845 F. Supp. 2d 353 (D. Me. 2012), where male emcees sued for FLSA violations, claiming that their pay was based on tips from dancers. VCG leased space to dance for patrons. *Id.* at 355-56. VCG also treated dancers as independent contractors. *Id.* at 361, 365. In a striking distortion of reality, "VCG sees it differently. It insists that the emcees receive their tips from customers, but that the customers are the entertainers." *Id.* at 377.

⁶⁵ See Collins v. Barney's Barn, Inc., No. 4:12CV000685 SWW, 2013 WL 1668984, at *4 (E.D. Ark. 2013) (stating that a dancer paid \$25 to \$50 to the house every night and was told to pay "tip-outs" to disc jockeys and bouncers).

⁶⁶ Terry v. Sapphire Gentlemen's, 336 P.3d 951, 959 (Nev. 2014), quoting Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization Debate Through the Lens of Strippers' Rights*, 19 MICH. J. GENDER & L. 339, 347 (2013).

dependent contractor agreement on club dancers while exerting extreme control over their conditions of work.⁶⁷

C. Limits on Earnings

The NCAA extensively regulates how much money an athlete can receive from a school. Athletes can only receive “financial aid” in the form of “funds provided to student-athletes from various sources to pay or assist in paying their cost of education at the institution.”⁶⁸ Permissible sources in-

⁶⁷ *E.g.*, *Doe Dancer I v. La Fuente, Inc.*, 481 P.3d 860, 864-65 (Nev. 2021), enumerated a comprehensive list of club rules for dancers:

Myriad written and posted limitations on the Doe Dancers’ costumes and performances met them inside the club — setting a minimum heel height of two-inches, grip strips, mandatory; prohibiting “clog type” shoes, “street clothes,” “cotton material,” “tears in your stockings or outfits,” glitter and body oil; requiring graceful stage exits; and defining appropriate body placement during performances and while interacting with customers. And, the posted rules carried on, addressing dancer manners (“Keep feet off the furniture”) and etiquette (“Working together is very important.” “PLEASE GIVE [other dancers] THE SAME RESPECT THAT YOU WOULD LIKE THEM TO GIVE YOU.”); social interactions (“[D]o not walk up to a customer and just ask him for a dance, talk to them, get to know him a little . . . leave a great and lasting impression. Sit at least one song with them first.”); personal hygiene (“A MUST”); wound care (“ALL CUTS TO BE COVERED WITH . . . BAND-AIDS.”); transportation (“CABS AND YOUR RIDE WILL PICK YOU UP AT THE DRESSING ROOM DOOR ONLY.” “Anyone giving you a ride . . . is not allowed in the club during your shift.”); and parking (“ALL NIGHT TIME ENTERTAINERS—AFTER 7PM WILL VALET PARK OR HAND KEYS OVER TO HOUSE MOM.”) . . .

and ultimately singular and seemingly intrusive limitations (“LET MANAGER KNOW OF [YOUR PRESCRIPTION] MEDICATIONS” . . .

“No boyfriends, husbands, or lovers allowed in the club while you are [w]orking.” “You MUST NOT refuse a drink or shooter from a customer.” “You MUST change costumes at least three times during a shift.”).

The club imposed “a framework of false autonomy” by setting prices the house fee and dances; requiring dancers to be in stage dances together unless they paid a fee to stay off-stage and demanding “a cut from any earned ‘funny money. . . .’” *Id.* at 869 (citations to quotes omitted).

⁶⁸ See NCAA DIV. I MANUAL, *supra* note 2, art. 16.01.1.1 (Restitution for Receipt of Impermissible Benefits), providing that:

[A] Unless otherwise noted, for violations of Bylaw 16 in which the value of the benefit is \$200 or less, the eligibility of the student-athlete shall not be affected conditioned upon the student-athlete repaying the value of the benefit to a charity of the student-athlete’s choice. The student-athlete,

clude institutional funds for athletics,⁶⁹ a separate category of institutional financial aid,⁷⁰ another category that narrowly defines aid from outside an institution,⁷¹ and other sources for incidental assistance.⁷²

however, shall remain ineligible from the time the institution has knowledge of receipt of the impermissible benefit until the student-athlete repays the benefit.

⁶⁹ See NCAA DIV. I MANUAL, *supra* note 2, art. 15.02.5.1 (Athletically Related Financial Aid), defined as “financial aid that is awarded on any basis that is related to athletics ability, participation or achievement.”

⁷⁰ See NCAA DIV. I MANUAL, *supra* note 2, art. 15.02.5.2 (Institutional Financial Aid), which includes but is not limited to “(1) Scholarships; (2) Grants; (3) Tuition waivers; (4) Employee dependent tuition benefits, unless the employee has been employed as a full-time faculty/staff member for a minimum of five years; and (5) Loans.”

⁷¹ See NCAA DIV. I MANUAL, *supra* note 2, art. 15.02.5.3 (Other Permissible Financial Aid):

- (a) Financial aid received from anyone upon whom the student-athlete is naturally or legally dependent;
- (b) Financial aid awarded solely on bases having no relationship to athletics ability;
- (c) Financial aid awarded through an established and continuing outside program as outlined in Bylaw 15.2.6.4; and
- (d) Educational expenses awarded by the U.S. Olympic and Paralympic Committee, which count against an institution’s sport-by-sport financial aid limitations and against the individual’s maximum limit on financial aid.

⁷² See NCAA DIV. I MANUAL, *supra* note 2, art. 16.11.1.6 (Miscellaneous Benefits), allowing an institution to “provide or arrange for the following benefits for a student athlete,” including:

- (a) The use of a return ticket at any time after the conclusion of a foreign tour;
- (b) Receipt of frequent flier points and/or miles earned while traveling to and from intercollegiate practice and/or competition;
- (c) Participation in receptions and festivities associated with championships, conference tournaments or all-star events hosted by and conducted on the institution’s campus;
- (d) Occasional meals to team members provided by a student-athlete’s family member at any location;
- (e) Telephone calls in emergency situations as approved by the director of athletics (or designee);
- (f) Reasonable tokens of support and transportation, housing and meal expenses in the event of injury, illness, or death of a family member or another student-athlete;
- (g) Fundraisers for student-athletes (or their family members) under the following extreme circumstances:

Similarly, dancers are financially dependent on the clubs rather than being in business for themselves.⁷³ Clubs extensively control dancers by requiring them to adhere to price lists.⁷⁴ For example, clubs regulate prices for lap dances in a VIP room.⁷⁵

D. Financial Penalties

The NCAA and adult entertainment clubs not only limit the earnings of athletes and dancers: they impose rules to take back these earnings. NCAA rules allow a school to impose financial penalties on athletes who violate amateurism rules.⁷⁶ The NCAA's standard financial agreement specifies numerous grounds for terminating aid to an athlete. These grounds include four activities that are an ordinary part of an employment relationship:

This aid will also be reduced or canceled if the recipient:

- a. Signs a professional sports contract for this sport.
- b. Accepts money for playing in an athletic contest that causes him/her to exceed the cost of a full grant.
- c. Agrees to be represented by an agent and accepts money that causes him/her to exceed the cost of a full grant.

(1) Extreme circumstances should be extraordinary in the result of events beyond the student-athlete's control (e.g., life-threatening illness, natural disaster);

(2) The proceeds must be designated for a specific purpose (e.g., payment of medical bills, purchase of medical equipment, replacement of items lost in a fire, etc.);

(3) The proceeds may be given directly to the beneficiaries, with receipt kept on file by the institution, which must include the amount of expenses incurred and the total amount received; and

(4) The excess proceeds must be given to a not-for-profit organization with the receipt kept on file by the institution.

(h) The payment of admission costs or a meal for any student-athlete being honored at a nonathletics awards ceremony.

The rule's most remarkable features are its specificity and petty value of certain allowable transactions (e.g., emergency telephone calls).

⁷³ See *Butler v. PP&G, Inc.*, No. WMN-13-430, 2012 WL 5964476, at *4 (D. Md. Nov. 7, 2013) (finding that dancers were "entirely dependent on the [club] to provide [them] with customers.")

⁷⁴ *Clincy*, 808 F.Supp.2d at 1333 (noting that house dances were priced at \$10, VIP room dances at \$20).

⁷⁵ *Id.*

⁷⁶ See NCAA DIV. I MANUAL, *supra* note 2, art. 15.02.5 (Financial Aid), which "includes all institutional financial aid and other permissible financial aid as set forth below."

- d. Receives other aid that causes him/her to exceed his/her individual limit.⁷⁷

The NCAA Financial Agreement states reasons for withdrawing aid that are defensible on grounds that all students are likely subject to similar school sanctions.⁷⁸ However, these grounds expand to include situations where a coach might induce a breach of rules. For example, some coaches pressure athletes to leave a program because they want to create a roster space for a better player.⁷⁹

More specifically, two grounds for withdrawing aid are problematic because they are vague and can be abused. These can occur, for instance, when athletes transfer in response to coaching harassment or mistreatment. One ground for withdrawing aid from an athlete—seemingly innocuous—

⁷⁷ NCAA, *Financial Aid Agreement*, *supra* note 20, Point 3.

⁷⁸ *Id.* at Point 2:

. . . .

b. Fraudulently misrepresents any information on his/her application for scholarship, application for admission, historical report, or letter of intent.

. . . .

d. Engages in serious misconduct warranting substantial disciplinary penalty. Violations of the following constitute serious misconduct or manifest disobedience:

. . . .

e. Fails to attend classes, squad or individual meetings, study hall, assemblies, tutoring of study group sessions and participate in athletic practice sessions and scheduled contests, as specified by the sport coach.

f. Does not comply with expected personal conduct, appearance and dress, both on and off the University campus, and accepted uniform for athletic contests, when such violations bring discredit to the athletic program.

. . . .

h. Engages in gambling activities on intercollegiate activities prohibited by NCAA legislation.

i. Engages in the use, possession, or traffic of an illegal drug substance, or refuses to take a drug test when requested to do so by NCAA, campus, community or departmental authority.

⁷⁹ See PETER G. LAND ET AL., FRANCZEK RADELET, INVESTIGATIVE REPORT: INJURY MANAGEMENT AND SCHOLARSHIP RENEWAL IN THE UNIVERSITY OF ILLINOIS URBANA-CHAMPAIGN DIVISION OF INTERCOLLEGIATE ATHLETICS FOOTBALL PROGRAM 3, reporting:

A total of four students relinquished their scholarships. We determined that, because of direction from football coaches, those four players agreed in early December 2014 to leave school and give up their scholarship for the spring 2015 semester against their stated wishes and without anyone telling them they had a right to a scholarship for the entire 2014-2015 academic year.

states: “Fails to adhere to training rules and regulations.”⁸⁰ In reality, some athletes are pressured to train when they are injured or medically restricted.⁸¹

In addition, the NCAA Financial Agreement fails to specify a process for withdrawing an athlete’s aid. This gray area can be abused, as shown by an episode involving the Rutgers University women’s softball team. Players were “in constant fear that they would lose their scholarships if they complained about the abuse despite NCAA rules to protect them from such retribution.”⁸² Apart from possible retaliation for reporting abuse or harassment, the second ground that can be exploited states: “Voluntar[y] with-

⁸⁰ NCAA, *Financial Aid Agreement*, *supra* note 20, at 2(g).

⁸¹ See PETER G. LAND ET AL., *supra* note 79, at 26, reporting: “Demeaning Criticism for Seeking Treatment. Coach (Tim) Beckman told us that, during practice, he called players ‘pussy,’ ‘sissy,’ or ‘soft’ when they left practice to seek assistance from an athletic trainer. See also *id.* at 4-5, with quotes from an athlete who was part of the investigation:

@coachbeckman and staff systematically removed our voices by holding scholarships over our head. . . .

I’m not the only horror story of abuse and misuse of power by @coachbeckman.

My knee had a tear in the meniscus. Takes 6 months to heal if repaired. Ask @drose Instead I was told it was no big deal. Back in two weeks. 8 months later I found out my meniscus is almost completely gone.

No MRI’s no surgery pictures for 8months (sic).

We don’t talk about how we’re mistreated because we’re then “not a team player” or “soft” but no one pays the bill when we’re gone.

. . .

This is @coachbeckman’s strategy, conform, or you’ll really hate it. I quit football because the pressure to get back on the field was too much from @coachbeckman and his staff. I was too injured to continue.

I didn’t want to come into work after my “boss” told me wasn’t given an option to have my knee repaired. my pain is in my head.

I know my body so don’t tell me your opinion when I know the truth.

. . .

The @NCAA lol doesn’t care, the @BigTenNetwork doesn’t care, and the @Illinois_Alma doesn’t care #followthemoney

WHEN @coachbeckman is fired you’ll hear plenty more stories but right now he’s dangling scholarships like a carrot.

⁸² Andy Berg, *Rutgers Softball Players Allege Abuse by Coach*, ATHLETIC BUS. (Oct. 2019), <https://www.athleticbusiness.com/civil-actions/rutgers-softball-players-allege-abuse-bycoach.html> [<https://perma.cc/K4TH-UNSN>] (Rutgers softball head coach, Coach Kristen Butler, who allegedly engaged in abusive treatment of at least seven players, attempted to revoke the scholarship of two players who eventually transferred).

draw[al]s from a sport for his/her own personal reasons.”⁸³ However, coaches can induce an athlete’s “voluntariness”⁸⁴ to gain a scholarship for a new athlete.

Likewise, adult clubs exercise control over dancers by threatening to fine them for breaking rules.⁸⁵ Clubs can fine dancers for being late to work or tardy in appearing on stage.⁸⁶ They can also charge a variety of work-related fees including a fee to appear on stage,⁸⁷ and require dancers to pay tips to “house moms,” disc jockeys, poker announcers, doormen, and bartenders.⁸⁸

III. COURT RULINGS FOR COLLEGE ATHLETES: ALTERNATING BETWEEN EMPLOYEES AND AMATEURS

College athletes should be considered employees under the FLSA. To support that conclusion, I trace the long history on this issue. In Part III.A,⁸⁹ I begin with the earliest legal treatment of college athletes, two worker’s compensation cases from nearly 70 years ago ruling that student athletes were employees.⁹⁰ The impact of these decisions was blunted—first, by a revision in California’s labor code to exclude college athletes,⁹¹ then by tort cases,⁹² and more recently by two federal appeals courts decisions that ruled on FLSA cases (*Berger v. NCAA*,⁹³ and *Dawson v. NCAA*⁹⁴).

⁸³ NCAA, *Financial Aid Agreement*, *supra* note 20, at 2(c).

⁸⁴ Kate Hairopoulos, *SMU’s Brown Trims 4 Players from Roster*, DALLAS MORNING NEWS (Apr. 22, 2012), at 2012 WLNR 9165434 (newly hired basketball coach forced out four scholarship players, saying that they would never play for him).

⁸⁵ *E.g.*, *Doe v. New Ritz, Inc.*, No. WDQ-14-2367, 2015 WL 4389699, at *1 (D. Md. 2015).

⁸⁶ *Id.*; *see also* *Harrell v. Diamond A Entm’t, Inc.*, 992 F. Supp. 1343, 1350 (M.D. Fla. 1997); *Hart v. Rick’s Cabaret Intern., Inc.*, 967 F. Supp. 2d 901 (S.D.N.Y. 2013); and *Thompson v. Linda A., Inc.*, 779 F. Supp. 2d 139, 148 (D.D.C. 2011).

⁸⁷ *E.g.*, *Smith v. Tyad, Inc.*, 209 P. 3d 228, 234 (Mont. 2009) (club-imposed stage fee for dancer is subject to the reimbursement provisions under Montana’s wage laws and is enforceable with a statutory penalty).

⁸⁸ *E.g.*, *Thornton v. Crazy Horse, Inc.*, No. 3:06-cv-002510-TMB, 2012 WL 2175753, at *4 (D. Ala. 2012).

⁸⁹ *Infra* notes 101-130.

⁹⁰ *Infra* notes 101-102.

⁹¹ *Infra* note 103.

⁹² *Infra* note 104.

⁹³ *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016).

⁹⁴ *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019).

My attention shifts in Part III.B to appellate briefs filed on behalf of college athletes in *Berger* and *Dawson*.⁹⁵ I demonstrate how these briefs failed to persuade the courts. My analysis condenses these briefs,⁹⁶ and demonstrates how court opinions rejected,⁹⁷ or ignored,⁹⁸ the athletes' arguments. I suggest that there are lessons to be learned in briefing the FLSA cases before the Third Circuit in *Johnson*.⁹⁹

A. *College Athletes: How They Were Excluded by Law as Employees*

Long before college sports mushroomed into a heavily commercialized business, courts began to recognize NCAA athletes as employees. The Colorado Supreme Court, in *Univ. of Denver v. Nemeth*, ruled that a college athlete who hurt his back during the team's football practice qualified for worker's compensation benefits because he "engage[d] in football games under penalty of losing the job and meals" and therefore "playing football was an incident of his employment by the University."¹⁰⁰ In the 1963 case *Van Horn v. Indus. Accident Comm'n*, a California appeals court ruled the widow and minor children of a college athlete, who was killed in a plane crash while returning from a game, were entitled to death benefits under the California Workmen's Compensation Act because his athletic scholarship was "consideration . . . paid for services."¹⁰¹

California lawmakers nullified *Van Horn*.¹⁰² Subsequent cases then reflected the NCAA's view that athletes are amateurs.¹⁰³ *Rensing v. Indiana*

⁹⁵ *Infra* notes 131-160.

⁹⁶ *Infra* notes 131-138; 146-150.

⁹⁷ *Infra* notes 139-142; 152-160.

⁹⁸ *Infra* note 151.

⁹⁹ *Infra* notes 161-244.

¹⁰⁰ 257 P.2d 423, 428 (Colo. 1953).

¹⁰¹ 33 Cal. Rptr. 169, 170-74 (Cal. Ct. App. 1963), superseded by statute, CAL. LAB. CODE § 3352(a)(11) (West 2018). *See also* State Comp. Ins. Fund v. Indus. Comm'n, 314 P.2d 288 (Colo. 1957) (holding that a widow of an athlete who was fatally injured on the opening play of a college football game was not entitled to a beneficiary death benefit under the Colorado Workmen's Compensation Act).

¹⁰² California Labor Code Section 3352 was amended in 1965 to exclude athletic participants as employees. *Townsend v. State of California*, 191 Cal.App.3d 1530, 1537 (1987), described the intent of this change: "[The] amendment evidenced an intent on the part of the Legislature to prevent the student-athlete from being considered an employee of an educational institution for any purpose which could result in financial liability on the part of the university."

¹⁰³ *Shephard v. Loyola Marymount Univ.*, 102 Cal. Rptr. 2d 829, 832-33 (Cal. Ct. App. 2002); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (Mich. 1983); and *Korellas v. Ohio St. Univ.*, 779 N.E.2d 1112 (Ohio 2002).

State Univ. Bd. of Trustees highlighted this deferential posture.¹⁰⁴ An Indiana State University football player, Fred W. Rensing, who signed a scholarship contract with the university, was paralyzed while covering a punt in spring practice.¹⁰⁵ His injury left him 95%-100% disabled.¹⁰⁶ An appeals court found that Rensing was an employee under the state's worker's compensation law,¹⁰⁷ but the Indiana Supreme Court reversed this ruling.¹⁰⁸ Its reasoning centered on Rensing's contract with his school, and NCAA rules that defined his status as an amateur.¹⁰⁹

Nearly forty years later, two federal appeals courts in FLSA lawsuits by college athletes mimicked the Indiana Supreme Court's deference to the NCAA. In *Berger v. NCAA*,¹¹⁰ a female track and field athlete from the University of Pennsylvania sought payment of a minimum wage for rendering athletic labor. The Seventh Circuit Court of Appeals ruled that she lacked standing to sue the NCAA, because her connection to the association was tenuous.¹¹¹ Paradoxically, the court also said that NCAA rules regulated

¹⁰⁴ 444 N.E.2d 1170 (Ind. 1983) (*Rensing II*).

¹⁰⁵ *Rensing v. Ind. St. Univ. Bd. Trs.*, 437 N.E.2d 78, 82 (Ind. 1982) (*Rensing I*).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 89.

¹⁰⁸ *Rensing II*, 444 N.E.2d at 1175.

¹⁰⁹ *Id.* at 1174, reasoning that:

While there was an agreement between Rensing and the Trustees which established certain obligations for both parties, the agreement was not a contract of employment. Since at least three important factors indicative of an employee-employer relationship are absent in this case, we find it is not necessary to consider other factors which may or may not be present.

The court also noted:

We find that the evidence here shows that Rensing enrolled at Indiana State University as a fulltime student seeking advanced educational opportunities. He was not considered to be a professional athlete who was being paid for his athletic ability. In fact, the benefits Rensing received were subject to strict regulations by the NCAA which were designed to protect his amateur status. Rensing held no other job with the University and therefore cannot be considered an "employee" of the University within the meaning of the Workmen's Compensation Act.

Id. at 1175.

¹¹⁰ *Berger v. NCAA*, 843 F.3d 285, 288 (7th Cir. 2016).

¹¹¹ *Id.* at 289, concluding that the plaintiffs' "connection to the other schools and the NCAA is far too tenuous to be considered an employment relationship," and that they "have not plausibly alleged any injury traceable to, or redressable by, any defendant other than Penn."

her athletic competitions.¹¹²

In addition, although the court acknowledged that the FLSA defines compensable work “expansively,”¹¹³ it relied instead on legislation that authorizes states to employ prisoners for less than a minimum wage even though these work arrangements could compete against private sector wage-earners.¹¹⁴ The court explained that “Congress has already struck the balance by precluding a wide range of inmate-labor competition while permitting governments to use the fruits of such labor.”¹¹⁵ Prison labor is not comparable to college athletics because unpaid college athletes do not put downward wage competition on any group of workers. Moreover, there is the absurd implication that if a state can enjoy “the fruits” of prison labor, its public universities can enjoy the fruits of college athletic labor without paying a minimum wage. This reasoning ironically supports the critical view that the NCAA’s amateur model exploits athletes more than it advances an educational mission.¹¹⁶

And while the court recognized that FLSA claims are usually judged by a multi-factor test,¹¹⁷ it concluded with cursory reasoning that Berger’s complaint did not qualify for this type of analysis.¹¹⁸ More specifically, Berger contended that her status as a student employee was governed by a multi-factor test for college interns set forth in *Glatt v. Fox Searchlight Pic-*

¹¹² Curiously, the court acknowledged that “Penn’s women’s track and field team is *regulated by the NCAA*” (emphasis added) — essentially, how employers control an employee’s time and activities. *Id.*

¹¹³ *Id.* at 290.

¹¹⁴ *Id.* citing *Vanskike v. Peters*, 974 F.2d 806, 807 (7th Cir. 1992) without a convincing justification for how a prison labor case compares to college athletics.

¹¹⁵ See *Vanskike*, 974 F.2d at 811:

Congress has already struck the balance by precluding a wide range of inmate-labor competition while permitting governments to use the fruits of such labor. That Congress drew the line where it did suggests that it considered a certain range of prison labor for the benefit of government outside the boundaries of the targeted evil.

¹¹⁶ See *HAWKINS*, *supra* note 51; Van Rheenen, *supra* note 51; Beamon, *supra* note 51; Edwards, *supra* note 51 (“But Black student-athletes are burdened also with the insidiously racist implications of the myth of ‘innate Black athletic superiority,’ and the more blatantly racist stereotype of the ‘dumb Negro’ condemned by racial heritage to intellectual inferiority.”).

¹¹⁷ *Berger v. NCAA*, 843 F.3d 285, 290 (7th Cir. 2016).

¹¹⁸ *Id.* at 291 (“The multifactor test proposed by Appellants here simply does not take into account this tradition of amateurism or the reality of the student-athlete experience.”).

tures, Inc., but the court gave this argument short shrift.¹¹⁹ Thus, the Court held that Berger failed to state a claim under the FLSA.¹²⁰

In a concurring opinion, Judge Hamilton indicated that an FLSA claim put forward by athletes who participate in “revenue sports” like Division I football and basketball would merit closer scrutiny, because in those sports, “the economic reality and the tradition of amateurism may not point in the same direction.”¹²¹ Judge Hamilton’s focus on revenue-generating sports also suggests that NCAA sports linked to the Olympics should be examined for their progress in modifying outdated definitions of amateur competition.¹²²

Dawson v. NCAA was decided along similar lines by the Ninth Circuit Court of Appeals.¹²³ Lamar Dawson, a football player at the University of Southern California (USC), alleged that the PAC-12 Conference and the NCAA were employers under the FLSA and California labor law.¹²⁴ Dawson also alleged that the NCAA and the PAC-12 acted as an employer by “prescribing the terms and conditions under which student-athletes perform services.”¹²⁵

Affirming the district court’s dismissal of Dawson’s complaint, the Ninth Circuit rejected his argument that the conference and NCAA are joint employers of college athletes.¹²⁶ The court engaged in a tautology

¹¹⁹ *Id.* at 290, citing *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2015).

¹²⁰ *Id.* at 294.

¹²¹ *Id.* setting forth this reasoning:

I am less confident, however, that our reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men’s basketball and FBS football. In those sports, economic reality and the tradition of amateurism may not point in the same direction. Those sports involve billions of dollars of revenue for colleges and universities. Athletic scholarships are limited to the cost of attending school. With economic reality as our guide, as I believe it should be, there may be room for further debate, perhaps with a developed factual record rather than bare pleadings, for cases addressing employment status for a variety of purposes.

¹²² Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL’Y REV. 118, 214, reporting on the “well-documented demise of amateurism as a major theme for the Olympics,” and proposing a “new tradition— one that takes advantages of the lessons learned by the Olympics and which recognizes the reality of college sports as big business. . . .”

¹²³ *Dawson*, 932 F.3d 905.

¹²⁴ *Id.* at 908.

¹²⁵ *Id.*

¹²⁶ *Id.* at 908, 913.

when it reasoned that, because NCAA amateurism rules prohibit any payment for athletic skill, college athletes cannot be employees.¹²⁷

Dawson also mirrored *Berger*'s acknowledgment that the FLSA broadly defines employment to mean "permit to work," but noted, however, that the FLSA has "its limits."¹²⁸ Because the NCAA has no rules for hiring or firing athletes, the "economic reality of the relationship between the NCAA/PAC-12 and student-athletes does not reflect an employment relationship."¹²⁹ Not only is this tautological reasoning, but it also ignores the fact that employment relationships are often at-will without the formalities that the court said define an employment relationship.¹³⁰ In addition, the court recounted the state of California's history of excluding college athletes from employment laws.¹³¹ The *Dawson* court, like the *Berger* court, briefly referred to a prison labor case to conclude that some types of institutionalized work fall outside the FLSA.¹³²

B. Appellate Briefs Failed to Convince Courts in *Berger* and *Dawson*

In this section, I condense the legal arguments made in the athletes' briefs in *Berger* and *Dawson*. My goal is to match arguments in the briefs with outcomes in these appellate decisions to learn how these arguments failed to persuade the courts.

¹²⁷ *Id.* at 908, citing NCAA art. 12.1.4 (financial aid is "not considered to be pay or the promise of pay for athletics skill" and art. 12.1.2 (prohibiting any payment to a student-athlete for athletic services).

¹²⁸ *Id.*

¹²⁹ *Id.* at 909, observing that NCAA rules "pervasively regulate college athletics" but say nothing about "hire and fire" or similar control over college athletes.

¹³⁰ *E.g.*, *Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th 1359, 1386 (1st Dist. 1999) ("[I]n the absence of any evidence of the duration or term of employment under a written or oral agreement, there is a statutory presumption that employment is terminable at will, and a contract of employment may be ended at any time at the option of either party."); and *Tenerelli v. Rite Aid Corp.*, 2019 WL 1755497, *4 (E.D. Cal. 2019). The fact that employers have largely unfettered power to end the employment relationship has been a concern to legal commentators for decades. *See* Janice R. Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REFORM 207 (1983) (proposing a state-by-state adoption of statutes that guarantee protection from unjust discharge); and Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) (discussing obstacles faced by employees in the employment at will context).

¹³¹ *Dawson*, 932 F.3d at 912–913.

¹³² *Id.* at 910, citing *Hale v. State of Ariz.*, 993 F.2d 1387 (9th Cir. 1993). Curiously, the court did not elaborate its reason for mentioning *Hale*.

The athletes in *Berger* argued that an employer's labeling of the work relationship does not determine a legal inference of independent contracting.¹³³ Just as an agricultural employer cannot not evade wage and hour laws by labeling workers as migrant laborers,¹³⁴ the NCAA should not be permitted to evade FLSA obligations by analogizing athletes to non-employee interns.¹³⁵ The brief centered on the multi-factor test for employment of college interns under the FLSA.¹³⁶ By this reasoning, college athletes are unlawfully excluded from FLSA coverage due to their misclassification as non-employee interns, referring to *Glatt v. Fox Searchlight Pictures, Inc.*¹³⁷ Under *Glatt*, whether college interns are classified as employees or volunteers depends on a flexible approach that weighs the "economic reality of the nature of the working relationship."¹³⁸ This approach aimed to encourage the Court to focus on whether a student's work is performed primarily for the benefit of the putative employer.¹³⁹ The brief concluded that the NCAA's labeling of a student worker as an intern should have no bearing on a determination of a college athlete's employment relationship because the FLSA does not define an "intern."¹⁴⁰

The Seventh Circuit found no merit in these arguments,¹⁴¹ persuaded instead by the NCAA's mythical depiction of college athletes.¹⁴² Without any authority, the court editorialized:

¹³³ Plaintiff App. Brief, *supra* note 16, at *5–9.

¹³⁴ *Id.* at *5–6, citing Sec'y of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987), affirming district court ruling that that farm-field workers are "employees" under the FLSA.

¹³⁵ *Id.* at *8 ("The relevant point is that there is no more any 'intern' test under the FLSA than there is any 'migrant laborer' test. There are only employee tests.").

¹³⁶ *Berger et al.*, *supra* note 133.

¹³⁷ *Id.* at *6–9, *12, citing 791 F.3d 376 (2d Cir. 2015), modified, 811 F.3d 528 (2d Cir. 2016).

¹³⁸ *Id.* at *6 (quoting Lauritzen, 835 F.2d at 1534, and Glatt, 791 F.3d at 384 (2d Cir. 2015)). The *Berger* brief—filed on June 16, 2016—mistakenly relied on the *Glatt* ruling in 2015, which was vacated on January 25, 2016, and remanded in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d. Cir 2016).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at *7.

¹⁴¹ *Berger v. NCAA*, 843 F.3d 285, 291 (7th Cir. 2016).

¹⁴² *Id.* at 291, noting: "As the Supreme Court has noted, there exists 'a revered tradition of amateurism in college sports,'" (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)). The *Berger* court continued: "That long-standing tradition defines the economic reality of the relationship between student athletes and their schools. To maintain this tradition of amateurism, the NCAA and its member universities and colleges have created an elaborate system of eligibility rules." *Id.*

Moreover, the long tradition of amateurism in college sports, *by definition*, shows that student athletes—like all amateur athletes—participate in their sports for reasons wholly unrelated to immediate compensation. Although we do not doubt that student athletes spend a tremendous amount of time playing for their respective schools, they do so—and have done so for over a hundred years under the NCAA—without any real expectation of earning an income (emphasis added).¹⁴³

The italicized portion shows that the court accepted the NCAA’s circular reasoning: college athletes are not employees because the NCAA says so.

The court also found limits to the FLSA’s expansive definition of employment, citing a prison labor case which denied the law’s coverage to incarcerated workers.¹⁴⁴ In reaching this conclusion, the court stated that the prison labor case was more relevant than the *Glatt* case.¹⁴⁵ The court also relied on case law that rejected college athlete claims for employment status,¹⁴⁶ and a Department of Labor Field Operations Handbook—no longer in effect—that provided interpretive guidance on classifying student interns.¹⁴⁷

The brief for college athletes in *Dawson* advanced similar arguments.¹⁴⁸ Broadly, the brief argued that the FLSA and California labor laws require that people are paid in exchange for working.¹⁴⁹ However, in a significant departure from the *Berger* brief, the *Dawson* brief explained that *O’Bannon* identified an exchange of athletic labor for educational benefits.¹⁵⁰ The brief concluded that the “exchange the Court described as ‘quintessentially commercial’ in *O’Bannon*—labor on the sports field for in-kind compensation—

¹⁴³ *Id.* at 293.

¹⁴⁴ *Id.* at 290, citing *Vanskike v. Peters*, 974 F.2d 806, 807 (7th Cir. 1992).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 292, citing *Shephard* 102 Cal.App.4th at 837.

¹⁴⁷ *Berger*, 843 F.3d at 293. (“Because NCAA-regulated sports are ‘extracurricular,’ ‘interscholastic athletic’ activities, we do not believe that the Department of Labor intended the FLSA to apply to student athletes. We find the FOH’s interpretation of the student-athlete experience to be persuasive.”).

¹⁴⁸ *Dawson et al., Plaintiff Appellants v. National Collegiate Athletic Association, et al.*, 2017 WL 4318972 (Appellate Brief), United States Court of Appeals, Ninth Circuit.

¹⁴⁹ *Id.* at *2, *4.

¹⁵⁰ *Id.* at *19, contending: “Indeed, in *O’Bannon*, under identical circumstances, in deciding that the NCAA’s compensation rules were not exempt from the anti-trust laws, the Court recently held that ‘the exchange they regulate — *labor for in-kind compensation* — is a *quintessentially commercial transaction*,” quoting *O’Bannon*, 802 F.3d at 1066 (emphasis in original). The brief also quoted this passage from *O’Bannon* at *2, *13.

is exactly the same exchange at issue here,”¹⁵¹ adding: “There simply is no principled basis on which to conclude that, under this Court’s decision in *O’Bannon*, the relationship between Division I FBS football players and Defendants is anything other than quintessentially commercial.”¹⁵²

In a remarkable omission, the *Dawson* opinion did not cite *O’Bannon*—a complete rejection of the athletes’ effort to call attention to a significant erosion of the NCAA’s amateur model. By ignoring *O’Bannon* entirely, the court avoided its own description of how college athletes engage in a commercial exchange of labor for the benefit of their schools.¹⁵³

Adding to this disconnect in reasoning, *Dawson* determined that the NCAA was nothing more than a “regulator” who set rules for how schools utilize college athletes.¹⁵⁴ The NCAA did not “hire and fire” as an employer would,¹⁵⁵ nor “exercise any other analogous control over student-athletes.”¹⁵⁶ *Dawson* added that “the record does not demonstrate that the NCAA and PAC-12 choose the players on any Division I football team, nor that they engage in the actual supervision of the players’ performance.”¹⁵⁷ The court referred to “student-athletes” who “allegedly render services,” not college athletes who actually render labor.¹⁵⁸

Moreover, the *Dawson* brief demonstrated how California wage law applies a four-factor test to determine an employee in *Bonnette v. California Health and Welfare Agency*.¹⁵⁹ The *Dawson* opinion, however, rejected this argument.¹⁶⁰ The court instead focused on a California statute,¹⁶¹ and case law that determined that college athletes are not employees.¹⁶²

¹⁵¹ *Id.* at *19.

¹⁵² *Id.* at *2, *13, *19, *29.

¹⁵³ *O’Bannon*, 802 F.3d at 1066.

¹⁵⁴ *Dawson v. NCAA*, 932 F.3d 905, 910 (9th Cir. 2019).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 909, 910.

¹⁵⁷ *Id.* at 910.

¹⁵⁸ *Id.*

¹⁵⁹ *Dawson* (Appellate Brief), *supra* note 148, at *17, citing *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983) (factors include the power to hire and fire the employees, supervision and control of employee schedules and conditions of work, rate and method of payment, and employment records).

¹⁶⁰ *Dawson*, 932 F.3d at 911 (“Under the *Bonnette* test, however, the NCAA and PAC-12 are clearly not *Dawson*’s employers.”).

¹⁶¹ *Id.* at 912 (citing the exclusion of student-athletes from the Workmen’s Compensation Act at Section 3352(k) of the Labor Code).

¹⁶² *Id.* at 911, stating:

Under the *Bonnette* test, however, the NCAA and PAC-12 are clearly not *Dawson*’s employers. They do not admit him to the school or pick him for the team; they cannot remove him from the team; they do not supervise

Overall, given the rulings in these cases, it appears that the briefs filed on behalf of college athletes were unpersuasive. In developing and communicating arguments, what went wrong? And what can be learned from the strategy pursued in these cases?

First, lessons emerge from the arguments that failed to persuade the courts. Neither the Seventh Circuit nor the Ninth Circuit appear to have given serious thought to the idea that college athletes are employees. Nor did the courts seriously consider that the NCAA is a joint employer who sets terms and conditions of employment under which schools and their athletes hold games and other athletic competitions. The attempt to compare college athletes to student interns who work for the benefit of a putative employer also had no traction. Similarly, the courts found that, under both the FLSA and applicable state law, no factor indicated employment for the athletes. Relatedly, the courts fully accepted the NCAA's argument that college athletes are simply students who happen to compete in athletics.

Second, though less obvious, lessons can be inferred from points the briefs failed to advance or made only superficially. The briefs could have emphasized a textual argument by narrowing the issue to the FLSA Section 203(g)'s definition of "employ."¹⁶³ In a related argument, the athletes' lawyers also could have further scrutinized the FLSA's definition of "work" in Section 203(g). Additionally, the briefs could have explored NCAA rules in more depth to demonstrate that they regulate work, not amateurism. Finally, the briefs missed an opportunity to discuss the extensive time that athletes lose in traveling to and from games and competitions. The concept of "compensable time" under the FLSA for traveling—when an employee reports to an employer's designated station where travel is an indispensable part of the primary work activity—could have been emphasized because college athletes render this form of labor.

I incorporated these lessons into my brief to the Third Circuit in *Johnson*. In Part IV, I reproduce portions of that brief, along with elaboration that goes beyond the court's 6,500-word limit.

his schedules or activities in practices or games; they do not maintain his scholastic records; and, although they put caps on what he may receive as a scholarship, they do not determine whether he gets a scholarship or in what amount.

¹⁶³ Fair Labor Standards Act, Pub. L. No. 52 Stat. 1060 (1938), codified as amended at 29 U.S.C. §203(g) (2021), stating: "'Employ' includes to suffer or permit to work."

IV. BLUEPRINT FOR AN APPELLATE BRIEF: COLLEGE ATHLETES ARE EMPLOYEES

An appellate brief should provide judges a persuasive rationale to rule in favor of an appellant or appellee.¹⁶⁴ In framing my amicus brief in *Johnson*, I used a more textual argument than the briefs in *Berger* and *Dawson*,¹⁶⁵ emphasizing the central importance of Section 203(g)'s definition of "employ" to mean "to suffer or permit to work."¹⁶⁶ Noting that the Supreme Court broadly defined "work,"¹⁶⁷ my brief extensively quoted the word "work" as it is used in the NCAA's Division I Manual.¹⁶⁸ My point is simple: the NCAA's rules constitute work rules, not amateur rules.¹⁶⁹

I relate this analysis to a common tool that courts use to determine if work qualifies as "employ" under Section 203(g). The Third Circuit has had a long-running, stable body of precedent that originates in early Supreme Court efforts to flesh out the contours of employment covered by the FLSA.¹⁷⁰ There are two simple elements to my argument. First, I frame the NCAA's use of the amateur model as just another version of an FLSA misclassification case,¹⁷¹ like cases involving gig workers, including adult club

¹⁶⁴ The Writing Center, Georgetown University Law Center, *Writing the Statement of the Case in an Appellate Brief* 1 (2020), https://www.law.georgetown.edu/wp-content/uploads/2021/04/Handout_4-Writing_the_Statement_of_the_Case_in_an_Appellate_Brief.pdf [<https://perma.cc/7A7R-B6RU>] ("Every component of an appellate brief is an opportunity to persuade the reader. . ."). Also, the guide states: "An appellate brief should provide the judges with everything they need to write an opinion in your client's favor. Therefore, striking the right balance between persuasive advocacy and credibility is crucial." *Id.* Brooke Rowland (2014) prepared the original handout, which was revised in 2020 by John Donnelly & Perry Cao. *Id.* at n.2.

¹⁶⁵ See Brief for Prof. Michael H. LeRoy as Amicus Curiae Supporting Plaintiff Appellees, *Johnson et al., Plaintiff Appellees v. National Collegiate Athletic Association, et al., Defendant-Appellants*, 2022 WL 2828262 (Third Circuit) [hereinafter *LeRoy Amicus Brief*].

¹⁶⁶ *Id.* at *8.

¹⁶⁷ *Id.* at *5, citing *Armour & Co. v. Wantock*, 323 U.S. 126, 132 (1944) ("work" does not necessarily require an employee to engage in "exertion").

¹⁶⁸ *Id.* at *7–9, and *12–13.

¹⁶⁹ *Id.* at *4 ("NCAA's rules that meticulously cover the time and activities of college players are clearly work rules—not amateur rules—and therefore, college athletes 'work' in the course of 'employment' under the FLSA.").

¹⁷⁰ *Id.* at *8, *31.

¹⁷¹ *Id.* at *2–4 ("To begin with, the NCAA, its various conferences, and its approximately 1,100 university and colleges, misclassify college athletes as amateurs."), and at *3–4, stating:

dancers.¹⁷² Second, and more specifically, I apply the six-factor test under the Third Circuit’s leading precedent, *Donovan v. DialAmerica Marketing, Inc.*¹⁷³ Again, I use the NCAA’s Division I Manual to demonstrate how these rules implicate control of the work of athletes for the financial benefit of schools.¹⁷⁴ Finally, I avoid comparing college athletes to the unpaid college interns in *Glatt*. Simply put, this comparison is wrong. The better comparison is to students who are employed by their universities in common jobs that are subject to federal and state minimum wage laws.¹⁷⁵

A. College Athletes Perform “Work” for Their Schools

The FLSA requires employers to pay a minimum wage to their employees, and overtime for workweeks beyond 40 hours.¹⁷⁶ However, the FLSA does not define “work” nor “workweek.”¹⁷⁷ In view of the remedial purposes of the FLSA,¹⁷⁸ the Supreme Court has broadly defined these terms.¹⁷⁹

Wage-theft has become widespread: employers have misclassified workers as independent contractors in 20 of the 22 major occupation categories defined by the U.S. Department of Labor. Michael H. LeRoy, *Misclassification under the Fair Labor Standards Act: Court Rulings and Erosion of the Employment Relationship*, 2017 UNIV. OF CHI. LEGAL FORUM 327, 337 (2017) (Fact Finding 1).

¹⁷² *Id.* at *3:

Strip clubs use this heavy-handed approach by requiring dancers to sign independent contractor agreements authorizing pay deductions for violating non-negotiable work regulations. Michael H. LeRoy, *Bare Minimum: Striping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY J. OF WOMEN AND THE LAW 249, 256, 264 (2017).

¹⁷³ *Id.* at *10–22.

¹⁷⁴ *Id.* at *11–15.

¹⁷⁵ *Id.* at *31 (“NCAA athletes are employees just like classmates are employees who earn a minimum wage as resident advisors, campus tour guides, teaching assistants, and cafeteria cashiers in jobs that are properly classified under the FLSA.”).

¹⁷⁶ 29 U.S.C.A. § 207(a)(1).

¹⁷⁷ *IBP Inc. v. Alvarez*, 546 U.S. 21, 25 (2005).

¹⁷⁸ *Id.*

¹⁷⁹ *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944) (travel time to remote work area is compensable); *Armour & Co. v. Wantock*, 323 U.S. 126, 132 (1944) (“work” does not necessarily require an employee to engage in “exertion”); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690–691 (1946) (“the statutory workweek” includes “all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace”); *Steiner v. Mitchell*, 350 U.S. 247, 248–249 (1956) (postliminary compensable time includes safety-related showering on premises); and *IBP, Inc.*, 546 U.S. at 35 (“donning and doffing of protective gear are compensable activities”).

Federal appellate courts have consistently applied these precedents with respect to the FLSA's coverage.¹⁸⁰

NCAA rules use language that overlaps with terminology from the FLSA and case law. For example, one rule defines how a weight coach directs an athlete's exertion.¹⁸¹ This verbiage combines elements of work, including words for "exertion" in *Armour & Co.*,¹⁸² and preliminary activities that are indispensably related to a principal activity in *IBP*.¹⁸³

The NCAA Manual allows for "workout apparel" in connection with a "conditioning program" (emphasis added).¹⁸⁴ This language literally uses the root word "work" in a way that arguably conveys the essence of FLSA coverage in *Armour & Co.*¹⁸⁵ Similarly, NCAA Manual contains FLSA's terminology related to "work."¹⁸⁶ This includes a rule for voluntary overtime, performed under an employer's supervision. The first part of the regulation recognizes that a portion of a college player's activities involve "required

¹⁸⁰ Third Circuit decisions include *Sec'y of U.S. Dep't of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420, 425 (3d Cir. 2017) (FLSA requires compensation for rest periods of short duration); *Tyger v. Precision Drilling Corp.*, 832 Fed.Appx. 108, 113 (3d Cir. 2020) (donning and doffing for basic personal protective equipment is compensable under the FLSA, provided it is an integral and indispensable aspect of primary work); and *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007) ("donning and doffing activity in this case constitutes 'work' as a matter of law" under the FLSA).

¹⁸¹ NCAA DIV. I MANUAL, *supra* note 2, art. 15.02.5, art. 11.7.4.1.1 (Weight or Strength Coach. [FBS])

A weight (strength and conditioning) coach may conduct flexibility, warm-up and physical conditioning activities prior to any game and prior to or during any practice or other organized activities without being included in the limitations on number of coaches (emphasis added)."

¹⁸² *Armour & Co.*, 323 U.S. at 132.

¹⁸³ *IBP, Inc.*, 546 U.S. at 35.

¹⁸⁴ NCAA DIV. I MANUAL, *supra* note 2, at 189, in Fig. 14.1 ("Initial Eligibility: How NCAA Legislation (Bylaw 14.3) Affects Student-Athletes During Their Initial Year of College Attendance").

¹⁸⁵ *Armour & Co.*, 323 U.S. at 132.

¹⁸⁶ NCAA DIV. I MANUAL, *supra* note 2, art. 17.02.15 ("Student-Athlete Discretionary Time. [FBS/FCS]"):

Student-athlete discretionary time is time during which a student-athlete may only participate in athletics activities at the student-athlete's discretion. There shall be no required workouts and institutions are not permitted to recommend that student-athletes engage in weight-training or conditioning activities; however, if the student-athlete opts to work out, the strength and conditioning coach may monitor the facility in use for health and safety purposes.

workouts” (emphasis added),¹⁸⁷ while the second part relates to an athlete’s discretionary time “to *work* out.”¹⁸⁸ The plain text of this regulation is consistent with case law that defines “work” performed under the FLSA.¹⁸⁹ A pertinent rule specifically applies to the FCS football team on which Trey Johnson played at Villanova University.¹⁹⁰ This rule’s labeling of coaches as certified strength and conditioning professionals shows that college athletes engage in “exertion” for the benefit of their schools,¹⁹¹ consistent with *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*.¹⁹²

In sum, the only obstacle to finding that college athletes “work” and engage in “exertion” under the FLSA is the NCAA’s definitional wizardry in mischaracterizing collegiate athletic labor as amateurism.

B. College Athletes Are Employees under the FLSA’s Six-Factor Test

Appellate courts use a six-factor test to determine whether work should be classified as employment under the Fair Labor Standards Act.¹⁹³

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Fair Labor Standards Act, Pub. L. No. 52 Stat. 1060 (1938), codified as amended at 29 U.S.C. §203(g) (2021).

¹⁹⁰ NCAA DIV. I MANUAL, *supra* note 2, art. 17.1.7.2.1.1 (“Exception—Championship Subdivision Football. [FCS]”) specifically relates to Trey Johnson’s participation: “In championship subdivision football, countable coaches who are certified strength and conditioning coaches may design and conduct specific workout programs for student-athletes, provided such workouts are voluntary and conducted at the request of the student-athlete.” FCS is the NCAA’s classification of university and college football programs in fourteen conferences: the Big Sky, Big South, CAA, Independent, Ivy, MEAC, Missouri Valley, Northeast, Ohio Valley, Patriot, Pioneer, Southern, Southland and SWAC conferences. See NCSA College Recruiting, *Full List of Division 1 Football Teams: Find the Right Fit for Your Goals*, <https://www.ncsasports.org/football/division-1-colleges#:~:text=FCS%2C%20or%20the%20Football%20Championship,Southern%2C%20Southland%20and%20SWAC%20conferences> [https://perma.cc/W63P-XT3P].

¹⁹¹ *Id.*

¹⁹² 321 U. S. 590 (1944).

¹⁹³ *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985).

- (1) the degree of the alleged employer’s right to control the manner in which the work is to be performed; (2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer’s business.

As one Third Circuit opinion noted, the “fundamental point here is that courts must look to the economic realities, not the structure, of the relationship between the workers and the businesses.”¹⁹⁴ Courts do not necessarily keep score with these factors—“neither the presence nor absence of any particular factor is dispositive and. . . courts should examine the ‘circumstances of the whole activity.’”¹⁹⁵

My analysis turns to specific rules in the NCAA Division I Manual that provide direct evidence that schools are employers under this six-factor test.¹⁹⁶

1. Degree of Control: NCAA rules expressly limit activities and countable hours for college athletes to be under the control and direction of coaches and trainers. A school can control college athletes up to these maximums.

To begin with, Article 17 (“Playing and Practice Seasons”) indicates periods for controlling the practice and competition activities of athletes.¹⁹⁷ More specifically, Article 17.02.1 (“Countable Athletically Related Activities”) shows the essential feature of work performed by athletes under the supervision of coaches and managers:¹⁹⁸

“Countable athletically related activities include any required activity with an athletics purpose involving student-athletes and *at the direction of, or supervised by, one or more of an institution’s coaching staff* (including strength and conditioning coaches) and must be counted within the *weekly and daily limitations* under Bylaws 17.1.7.1 and 17.1.7.2 (emphasis added).”¹⁹⁹

The Third Circuit has consistently applied the six-factor FLSA test. *See e.g.*, *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 142 (3d Cir. 2020); *Sec’y U.S. Dep’t. of Labor v. Am. Future Systems, Inc.*, 873 F.3d 420, 426, (3d Cir. 2017); *Moon v. Breathless Inc.*, 868 F.3d 209, 218 (3d Cir. 2017); *Safarian v. Am. DG Energy Inc.*, 622 Fed.Appx. 149, 152 (3d Cir. 2015); *In re Enterprise Rent-A-Car*, 683 F.3d 462, 467 (3d Cir. 2012); *Messmer v. Colors In Bloom, Inc.*, 67 Fed.Appx. 719, 722 (3d Cir. 2003); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir. 1991); *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987); *DialAmerica Marketing, Inc.*, 757 F.2d at 1382; *E.E.O.C. v. Zippo Mfg. Co.*, 713 F.2d 32, 36 (3d Cir. 1983); and *Zygowski v. Erie Morning Telegram, Inc.*, 298 F.2d 639, 641 (3d Cir. 1962).

¹⁹⁴ *Safarian*, 622 Fed.Appx. at 152.

¹⁹⁵ *DialAmerica Marketing, Inc.*, 757 F.2d at 1383 (quoting *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981).

¹⁹⁶ *Safarian*, 622 Fed.Appx. at 152.

¹⁹⁷ NCAA DIV. I MANUAL, *supra* note 2, art. 17.

¹⁹⁸ NCAA DIV. I MANUAL, *supra* note 2, art. 17.02.1.

¹⁹⁹ *Id.*

Article 17.1.7.1 (“Daily and Weekly Hour Limitations—Playing Season”) provides specific evidence of an institution’s control of athletes, stating: “A student-athlete’s participation in countable athletically related activities (see Bylaw 17.02.1) shall be limited to a maximum of four hours per day and 20 hours per week.”²⁰⁰ This rule indicates a half-time job relative to a full-time job for 40 hours per week. Rules regulate off-season hours, too:

Article 17.1.7.2(a) “Weekly Hour Limitations— Outside of the Playing Season (Sports Other Than Football).”

Outside of the playing season. . . , only a student-athlete’s participation in required weight training, conditioning and skill-related instruction (including film review and team meetings related to technical and tactical instruction) shall be permitted. A student-athlete’s participation in such activities per Bylaw 17.02.1 shall be limited to a maximum of eight hours per week with not more than four hours per week spent on skill-related workouts.²⁰¹

Article 17.2.6.2 suggests the possibility that college athletes are employed for most of the calendar year by their universities or colleges.²⁰² The rule is shrewdly phrased by triggering a coach’s supervision when the athlete requests this help, as if coaches do not plant this idea.²⁰³

Another NCAA rule closely regulates an athlete’s use of sports equipment with the same detail that appears in *IBP, Inc. v. Alvarez*,²⁰⁴ ruling that an employee’s time in a locker room while donning and doffing safety equipment is compensable under the FLSA.²⁰⁵ While this rule relates to a school’s commercial exploitation of its trademarks and logos as displayed by their athletes, its enumeration of equipment shows that in some sports—for example, football, hockey, lacrosse, and skiing—athletes don and doff gear in locker rooms much like meatpacking employees in *IBP* don and doff safety gear in compensable preliminary and postliminary work.²⁰⁶

²⁰⁰ NCAA DIV. I MANUAL, *supra* note 2, art. 17.1.7.1.

²⁰¹ NCAA DIV. I MANUAL, *supra* note 2, art. 17.1.7.2(a).

²⁰² NCAA DIV. I MANUAL, *supra* note 2, art. 17.2.6.2 (Vacation-Period and Summer Workout Exception) (“A coach may participate in individual workout sessions with student-athletes from the coach’s team during any institutional vacation period and/or the summer, *provided the request for the assistance is initiated by the student-athlete* (emphasis added).”).

²⁰³ *Id.*

²⁰⁴ *IBP, Inc.*, 546 U.S. at 24.

²⁰⁵ *Id.* at 37.

²⁰⁶ NCAA DIV. I MANUAL, *supra* note 2, art. 12.5.4 states, in pertinent part.

Considered as a whole, these rules show that college athletes are under the continuous supervision and control of coaches, trainers, and managers for most weeks during the academic year. *Razak v. Uber Technologies, Inc.* illustrates the legal relevance of this fact: “Actual control of the manner of work is not essential; rather, it is the right to control which is determinative.”²⁰⁷ In sum, NCAA rules show enough control over athletes to create an employment relationship.

2. Skill and Initiative: While college athletes are talented, their athletic skills do not remove them from FLSA coverage as employees. This is because “(r)outine work which requires industry and efficiency is not indicative of independence and nonemployee status.”²⁰⁸

NCAA rules regulate an institution’s employment and use of coaches, beginning with Art. 11.01.2 (“Coach, Head or Assistant”), defining this person as a “head or assistant coach. . . who is designated by the institution’s athletics department to perform coaching duties and who serves in that capacity on a volunteer or paid basis.”²⁰⁹ These rules regulate the number and type of coaches by sport. For example, Article 11.7.4 (“Bowl Subdivision Football”) provides: “There shall be a limit of one head coach, 10 assistant coaches and four graduate assistant coaches who may be employed by an institution in bowl subdivision football.”²¹⁰ These rules clearly indicate the importance of providing instruction and direction to college athletes, thereby minimizing an athlete’s independent reliance on his or her skill and initiative to excel in NCAA competitions.

A skilled therapist in *Jimenez v. Best Behavioral Healthcare, Inc.* sued a mental health provider under the FLSA and Pennsylvania Wage Payment

A student-athlete may use athletics equipment or wear athletics apparel that bears the trademark or logo of an athletics equipment or apparel manufacturer or distributor in athletics competition and pre- and postgame activities (e.g., celebrations on the court, pre- or postgame press conferences), provided the following criteria are met.

. . .

Athletics equipment (e.g., shoes, helmets, baseball bats and gloves, batting or golf gloves, hockey and lacrosse sticks, goggles and skis) shall bear only the manufacturer’s normal label or trademark, as it is used on all such items for sale to the general public. . . .

²⁰⁷ 951 F.3d at 145.

²⁰⁸ *Cherichetti v. PJ Endicott Co.*, 906 F.Supp.2d 312, 317 (D. Del. 2012), quoting *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1295 (3d Cir. 1991).

²⁰⁹ NCAA, 2021-2022 NCAA Division I Manual at 46. NCAA DIV. I MANUAL, *supra* note 2, art. 11.01.2.

²¹⁰ NCAA DIV. I MANUAL, *supra* note 2, art. 11.7.4.

Collection Law,²¹¹ alleging that he was never paid for the specific time he provided services.²¹² The court denied a motion to dismiss.²¹³ Like talented college athletes, psychotherapists have a special skill. However, the court reasoned that “an employee’s training carries less weight where. . . the company ‘controlled the terms and conditions of the employment relationship.’”²¹⁴

In short, because coaches and trainers intensively direct and supervise college athletes, these athletes do not have the skill or initiative to fall outside the employment relationship.

3. Opportunities for Profit and Loss Depending on Managerial Skill: College athletes have not been able to profit from their athletic labor until the recent enactment of state NIL laws. New Jersey²¹⁵ and Pennsylvania²¹⁶ are two such examples of states, and both are in the Third Circuit. While these laws grant economic rights for college athletes, they defer to the NCAA’s amateur athletics model by prohibiting NIL deals that pay for athletic performance.

For example, the New Jersey Fair Play Act limits a college athlete’s ability to profit only from his or her NIL. Section 4(c) allows an athlete to use “the athlete’s name, image, or likeness for a commercial purpose *when the athlete is not engaged in official team activities* (emphasis added).”²¹⁷ Section 4(d) provides that an “institutional team contract shall allow the institution, athletic association, conference, or other group or organization with authority over intercollegiate athletics to use the athlete’s name, image, or likeness for advertising and marketing purposes without additional compensation paid to the student-athlete.”²¹⁸

Similarly, Pennsylvania’s NIL law in Section 2006-k(B) forbids college athletes “to use the name, trademarks, servicemarks, logos, symbols” and

²¹¹ See 391 F.Supp.3d at 380, 384 (E.D. Pa. 2019)

²¹² *Id.*

²¹³ *Id.* at 395.

²¹⁴ *Id.* at 390. The court reasoned that “the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way.” *Id.* The court concluded: “Because BBH controlled the terms of Mr. Jimenez’s employment, including its complete control over compensation, the impact of Mr. Jimenez’s skill on the Court’s analysis is therefore minimal.” *Id.* at 390-391.

²¹⁵ See New Jersey Fair Play Act, S.B. 971, 2021 Reg. Sess. (N.J. 2021), *available at* <https://legiscan.com/NJ/text/S971/id/2209738>. [<https://perma.cc/M2A6-FT9K>].

²¹⁶ See S.B. 381, 2021 Reg. Sess. (Penn. 2021), *available at* <https://legiscan.com/PA/text/SB381/id/2420743> [<https://perma.cc/QR66-WMSY>].

²¹⁷ S.B. 971, 2021 Reg. Sess. (N.J. 2021).

²¹⁸ *Id.*

other institutional intellectual property of schools “in furtherance of the college student athlete’s opportunities to earn compensation”²¹⁹ for his or her name, image, and likeness.

In short, these laws afford college athletes new economic rights; however, they disassociate opportunities for profit or loss from athletic accomplishments and team achievements.

The astounding success of St. Peter’s men’s basketball team in the 2022 NCAA’s March Madness tournament shows how NCAA schools continue to profit from team success. In March 2021, the New Jersey school received 149 gifts totaling \$475,000; a year later, the school’s Cinderella run in the tournament coincided with 414 gifts in the same period, yielding \$2.3 million.²²⁰ St. Peter’s financial windfall demonstrates that NCAA rules for amateur athletics, in combination with New Jersey’s NIL, limit a college athlete’s opportunity to profit from their own managerial skill. NIL deals can only be a side-job for athletes,²²¹ akin to the pay arrangement in *Martin v. Selker Bros., Inc.*²²² In sum, the NCAA severely limits athletes’ opportunities for profit and loss, thereby pointing to an employment relationship.

4. Investment in Equipment and Facilities: To demarcate employment more precisely, courts consider whether a putative employer pays for equipment, tools, and facilities. When an organization provides this physical capital to enable or facilitate work, it signifies employment. NCAA schools pay for player equipment and uniforms. The Penn State University 2021 NCAA Financial Report reveals how much a major sports program pays for these essential items—here, \$3,247,919.²²³ Football equipment, uniforms, and supplies alone cost the Penn State football team \$523,724 in 2021.²²⁴

²¹⁹ S.B. 381, 2021 Reg. Sess. (Penn. 2021).

²²⁰ See Dave Caldwell, ‘People Just Sent Money In’: What Happened After St Peter’s Basketball Fairytale? THE GUARDIAN (Apr. 26, 2022), <https://www.theguardian.com/sport/2022/apr/26/people-just-sent-money-in-what-happened-after-st-peters-basketball-fairytale> [<https://perma.cc/PUZ4-C6XH>].

²²¹ See N.J. S.B. 971.

²²² See 949 F.2d 1286, 1294 (3d Cir. 1991) (holding commissioned service station operators, working as independent contractors, were employees under FLSA because “the potential for profit from these side activities does not undermine the finding . . . that the predominant money-making activity of the stations was the sale of gasoline”).

²²³ See Penn State University NCAA Membership Financial Reporting System, *Sports Equipment, Uniforms and Supplies* 55, https://s3.amazonaws.com/gopsusports.com/documents/2022/2/7/2020_21_NCAA_Report_Final.pdf. [<https://perma.cc/T95H-ECH6>].

²²⁴ *Id.*

NCAA rules also demonstrate that institutions furnish facilities for college athletes. To illustrate, Article 13.02.3 (“Competition Site”), defines a “competition site” as “the facility in which athletics competition is actually conducted, including any dressing room or meeting facility used in conjunction with the competition.”²²⁵

At Trey Johnson’s university, Villanova recently announced that its athletic director, Mark Jackson, raised \$18 million for the Andrew J. Talley Athletic Center and \$65 million for the Finneran Pavilion renovation.²²⁶ Even small colleges are investing in modern athletic facilities, including St. Vincent’s College in Latrobe, Pennsylvania.²²⁷ These examples of facilities investments are concrete evidence in support of classifying athletes as employees.²²⁸

5. Permanency of Relationship: The permanency test for employment is met even where a work arrangement is short-term or part-time. In misclassification cases, putative employers who rely on an FLSA exclusion for independent contractors frequently contend that flexible, short-term work assignments differ from permanent jobs, and therefore are excluded from the statute.²²⁹ The test for this employment factor asks whether a person “transfer[s] their services from place to place, as do independent contractors.”²³⁰

In this vein, the NCAA’s amateurism model reflects a continuing relationship between athletes and their schools of sufficient duration and sub-

²²⁵ NCAA DIV. I MANUAL, *supra* note 2, art. 13.02.3.

²²⁶ See *Villanova University Names Director of Athletics Mark Jackson to Position of Vice President*, VILLANOVA UNIV. (Jan. 13, 2020), <https://villanova.com/news/2020/1/13/general-villanova-university-names-director-of-athletics-mark-jackson-to-position-of-vice-president.aspx> [<https://perma.cc/5Q6U-VEU3>].

²²⁷ See *Saint Vincent College Announces Plans to Build New Athletic and Recreation Center by Public Relations*, SAINT VINCENT COLL.COLLEGE (Feb. 14, 2022), <https://www.stvincent.edu/news/2022/svc-announces-plans-for-new-athletic-recreation-center.html> [<https://perma.cc/6KMW-K6V8>].

²²⁸ See *Zippo*, 713 F.2d at 36 (3d Cir. 1983), tracing the origins of this factor to *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (“courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete.”).

²²⁹ See *Terry*, 336 P.3d at 960, noting that while the club contended that “[d]ancers are itinerant because they have the freedom to ply their dancing trade at a multitude of gentlemen’s clubs,” the germane point was that “the performers were like “countless workers in other areas of endeavor who are undeniably employees . . . for example, waiters, ushers, and bartenders (citations and quotes omitted).”

²³⁰ *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985).

stance to lead to high graduation rates for athletes.²³¹ Recently, the NCAA reported that the graduation rate for Division I athletes increased from 74 percent in 2002 to 90 percent in 2021.²³² These graduation rates imply that athletes meet the permanency test by providing athletic labor over a four- to five-year period.

Universities have employment contracts for similar years, even when they hire a sought-after coach. When Seton Hall University hired Shaheen Holloway—St. Peter’s head coach—to be its men’s basketball coach, the school agreed to a six-year contract.²³³

A college athlete’s years spent pursuing a degree while playing an NCAA sport is evidence in support of an employment relationship. Unlike independent contractors who have transient relationships with entities who use their labor, college athletes do not frequently transfer schools.²³⁴ Their stable relationships with schools imply the type of continuity that is found in employment.

6. The Service Rendered Is an Integral Part of the Alleged Employer’s Business:

In determining whether an employment relationship exists under the FLSA, a court inquires into the “the primary work of the defendant.”²³⁵ Education seems to be the primary work of NCAA institutions, which appears to tilt this factor away from a finding of employment for college athletes. Nonetheless, that is not how these schools justify their NCAA athletic

²³¹ NCAA, *Graduation Rates* (Nov. 19, 2013), <https://www.ncaa.org/sports/2013/11/19/graduation-rates.aspx> [<https://perma.cc/RXH2-NEKN>] (stating that the “ultimate goal of the college experience is graduation,” and to this end it “has devoted attention to researching student-athlete graduation rates for more than two decades.”).

²³² NCAA, *Crossing the Line*, (Dec. 2, 2021), <https://www.ncaa.org/news/2021/12/2/general-college-athletes-continue-to-graduate-at-record-highs.aspx> [<https://perma.cc/PR7H-TTDA>].

²³³ Mike McDaniel, *Seton Hall Hires Saint Peter’s Coach Shaheen Holloway*, SPORTS ILLUSTRATED (Mar. 30, 2022), <https://www.si.com/college/2022/03/30/seton-hall-hires-saint-peters-coach-shaheen-holloway> [<https://perma.cc/5PZA-UBJ5>].

²³⁴ For 2021, the NCAA reported that 6,475 Division I athletes entered the transfer portal, counting all sports. See NCAA, *Transfer Portal Data: Division I Student-Athlete Transfer Trends*, at <https://www.ncaa.org/sports/2022/4/25/transfer-portal-data-division-i-student-athlete-transfer-trends.aspx>. This compares to a population of approximately 187,000 D-I athletes for 2021. See NCAA, *Our Division I Members*, at <https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx#:~:text=With%20350%20member%20schools%2C%20including,in%20NCAA%20sports%20each%20year>. This means that about 3.4% of athletes attempted to transfer in 2021.

²³⁵ *DialAmerica*, 757 F.2d at 1385.

programs. Even at the smaller institutions named as defendants in *Johnson*, athletics play an integral role in a school’s identity. For example, Lafayette College’s main website advertises its football rivalry week.²³⁶ This announcement shows a football bleacher packed with people against a backdrop of a handsome, three-story press box.²³⁷ Cornell University prominently displays its football marching band.²³⁸ At Fordham University, the athletic depart-

²³⁶ See Lafayette College, *Traditions—Life on Campus*, <https://campus-life.lafayette.edu/traditions> [<https://perma.cc/LR94-EBZY>]:

RIVALRY WEEK

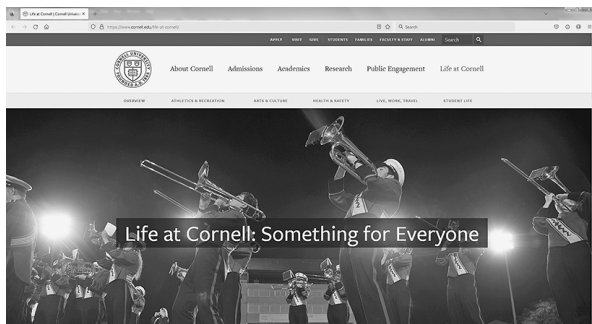
No football game is more anticipated than the one against Lehigh, the most-played football rivalry in the nation. The game always sells out months in advance and has inspired a book and a documentary narrated by the late Harry Kalas. Activities often include a pep rally, class spirit competitions, concerts, and the Midnight Breakfast.

²³⁷ See *id.* *The Leopard Leads the Crowd*:



Lafayette College is a named defendant in *Johnson v. NCAA*, 556 F.Supp.3d 491 (E.D. Pa. 2021), Docket 2:19-CV-05230.

²³⁸ *Life at Cornell: Something for Everyone*, CORNELL UNIVERSITY, <https://www.cornell.edu/life-at-cornell/> [<https://perma.cc/9ND7-7KWS>]. Cornell University is a named defendant in *Johnson v. NCAA*, 556 F.Supp.3d 491 (E.D. Pa. 2021), Docket 2:19-CV-05230.



ment's mission statement explicitly states that its mission "is to *integrate* academic and athletic experiences successfully in the Jesuit tradition" (emphasis added).²³⁹ If schools believe that NCAA sports are integral to their broader educational mission, courts in FLSA cases should be inclined to count the "integral to the business" factor as one that weighs in favor of employment for athletes.

The economic realities of highly commercialized NCAA sports drives home this point. Dreams of a "Cinderella" March Madness run fuel NCAA schools with hope to market themselves on a larger stage. As a result of St. Peter's nationally televised wins in the March Madness tournament over Kentucky, Murray State, and Purdue, and its loss to North Carolina, the school reaped a bonanza of "free media" valued at \$125–150 million.²⁴⁰

These examples demonstrate that college athletics are integral to the business of NCAA schools. This adds to evidence of an employment relationship that athletes have with their schools.

C. FLSA Implications of Conference Consolidation

In late June 2022, the Big Ten announced the addition of USC and UCLA to the conference in 2024.²⁴¹ This conference expansion will, in turn, directly affect two schools in the Third Circuit that are in the Big Ten, Penn State and Rutgers, by requiring their athletes to travel to Los Angeles and back.

The Big Ten's transcontinental conference exposes the hypocrisy surrounding the NCAA's amateur athletics model. College athletes already report that coaches and advisors limit their choice of majors.²⁴² This coast-to-coast business model is wholly unsuited for educating college students who

²³⁹ *Athletic Department's Mission, Philosophy, and Objectives*, FORDHAM SPORTS, <https://fordhamsports.com/> [https://perma.cc/993G-3WS4] ("The ultimate objective of Fordham University's Department of Intercollegiate Athletics is to integrate academic and athletic experiences successfully in the Jesuit tradition. Student-athletes are expected to benefit from the educational, professional, and cultural advantages of a university located in New York City."). Fordham University is a named defendant in *Johnson v. NCAA*, 556 F.Supp.3d 491 (E.D. Pa. 2021), Docket 2:19-CV-05230.

²⁴⁰ Caldwell, *supra* note 220.

²⁴¹ Chuck Culpepper and Glynn A. Hill, *USC and UCLA Will Join the Big Ten in 2024*, WASH. POST (June 30, 2022).

²⁴² Michael Burke, *Report: In NCAA-Mandated Interviews, Syracuse Athletes Voiced Academic Advising Concerns, Dissatisfaction with Facilities*, THE DAILY ORANGE (Sept. 7, 2017) (reports indicate that athletes were being "forced into majors they did not want").

are pursuing a baccalaureate degree. This seems likely to increase hardships for students in science majors²⁴³—majors that require intensive lab work, field work, clinical, or intern experience—as well as for students in education, psychology, speech and hearing, and fine arts such as dance, music, and theater. Going forward, Big Ten athletes may be forced to reconsider their intellectual interests with a view of gravitating to portable degree programs that can accommodate the long travels required by their sports.

Moreover, Big Ten athletes are far from alone in being road warriors. Villanova—a named defendant in this matter—subjected its men’s basketball team to a fatiguing road schedule in the 2021-2022 season with long-distance games at UCLA (2,713 miles), Baylor (1,563 miles), Creighton (1,213 miles), Marquette (849 miles), DePaul (763 miles), Purdue (709 miles), Butler (643 miles), Tennessee (625 miles), Xavier (569 miles)—and then NCAA tournament trips to Pittsburgh (305 miles), San Antonio (1,741 miles), and New Orleans (1,225 miles).²⁴⁴ These college athletes traveled a staggering 12,918 miles (one way), and 25,836 miles (roundtrip). Even smaller schools impose fatiguing schedules on their athletes. For example, Bucknell University, located in rural Pennsylvania, is a defendant in *Johnson*.²⁴⁵ Bucknell athletes compete against smaller schools that are scattered across Pennsylvania, New York, and surrounding states,²⁴⁶ suggesting

²⁴³ Raleigh Harbin, *Student-Athletes Pursue Variety of Majors, Still Some Trends within Teams*, RED & BLACK (Mar. 3, 2014) (Prof. Billy Hawkins’ survey led him to conclude that “certain majors require internships, labs or other responsibilities during the time in which sports practices are held, so the athletes are often guided towards less time-consuming majors”). In a related vein, an internal research report for the NCAA revealed that a “strong majority of student-athletes and administrators support pausing a student-athletes’ eligibility clock to allow for a study abroad or internship experience,” but this idea “garnered support from just over a third of head coaches.” NCAA, DIV. I RESEARCH, TIME DEMANDS STUDY SUMMARY OF FINDINGS 4 (Apr. 1, 2016), https://ncaaorg.s3.amazonaws.com/research/d1/2016/D1RES_TimeDemandsSummary.pdf?fbclid=IWAR3VA_t_ATzuVSzLMDw8lPJq_HLC_VQv2Oqz9MBUkn5R3ukbRUrJL1xFY4r8 [<https://perma.cc/EW7B-EEZ6>].

²⁴⁴ *Villanova Wildcats—Schedule*, CBS SPORTS, <https://www.cbssports.com/college-basketball/teams/NOVA/villanova-wildcats/schedule/regular/> [<https://perma.cc/X39S-NEUZ>]. Distances were calculated using Google’s Map and entering distances for Philadelphia and the cities where Villanova traveled for games.

²⁴⁵ See *Johnson v. NCAA*, 556 F.Supp.3d 491,494 (E.D. Pa. 2021), Docket 2:19-CV-05230.

²⁴⁶ See *Women’s Soccer 2022 Schedule*, BUCKNELL BISON, <https://bucknellbison.com/sports/womens-soccer/schedule/2022> [<https://perma.cc/PAA9-AYQA>] (showing trips to eight states and the District of Columbia with Air Force, Colorado College, Binghamton, Youngstown State, Towson, West Virginia, Navy, American, Colgate, Princeton, Holy Cross, Lafayette, Loyola, Boston University, Army, and Lehigh).

time-consuming travel in buses. To pretend that these sorts of exhausting travel schedules are part-and-parcel of a student's educational experience ignores reality.

The NCAA's research shows that college athletes want more time away from their sport. In a self-study involving athletes, coaches, and administrators across Division I schools, athletes said they spend too much time traveling to and from competitions. This survey, conducted in 2016, included responses from 44,058 Division I student-athletes. The study reported:

Travel During a Day Off

A majority of student-athletes *do not feel* that the current rule permitting travel on a day off to be appropriate, while a large majority of coaches *are comfortable* with the current rule (emphasis added).

Student-athletes indicated a preference that *an off-day not involve any form of travel, even if travel spans a two-day period (arriving after midnight)* (emphasis added).

...

A quarter to a third of student-athletes would prefer to allow the institution to count the latter day as a day off provided that student-athletes have 24 consecutive hours of time off, and administrators strongly prefer this approach as well. However, a majority of coaches would prefer to maintain the current rule allowing return travel to count as a day off (emphasis added).²⁴⁷

The dichotomy in responses from athletes and coaches recalls the reason that Congress and President Franklin D. Roosevelt enacted the FLSA: Workers wanted time off, managers wanted to maximize productivity, and Congress wanted to penalize employers who scheduled employees beyond 40 hours a week by requiring payment of a minimum wage at a time-and-a-half rate.²⁴⁸ Decades later, the Supreme Court recognized that the FLSA protects workers “from the evil of ‘overwork’ as well as ‘underpay.’”²⁴⁹

The FLSA's remedial purpose comes into sharp focus for college athletes who spend long hours traveling to away games and waiting for a game or competition to start. The Supreme Court addressed this type of situation when it ruled that an employee who is “engaged to wait” must be compensated.²⁵⁰ The “engaged to wait” doctrine is codified.²⁵¹ NCAA athletes who

²⁴⁷ DIV. I TIME DEMANDS STUDY, *supra* note 243.

²⁴⁸ See Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTH. LAB. REV. 32, 36 (Dec. 2000).

²⁴⁹ *Barrentine v. Ark. Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981).

²⁵⁰ *Armour & Co.*, 323 U.S. at 133 (“Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity.”).

²⁵¹ See 29 C.F.R. §§ 785.14–785.17.

travel long distances and wait for games should be considered to be “on the clock” for compensable time, much like truck drivers: “A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period.”²⁵²

Whether schools have major athletic programs that can support air travel or smaller programs with modest budgets centered around ground travel, their athletes are physically unavailable for many kinds of laboratory-based and experiential classes. NCAA athletes experience travel-related fatigue and stress that are atypical for other college students and conflict with pursuing a degree. These economic realities point away from an amateur role and toward an employment relationship.

V. CONCLUSIONS

As recently as 2019, the NCAA persuaded an appellate court that its rules have nothing to do with employment but merely “establish academic eligibility requirements, provide guidelines and restrictions for recruitment, impose limits on the number and size of athletic scholarships, and regulate the scheduling and conditions of practice and games.”²⁵³ This ignores evidence in NCAA rules that demonstrates an employment relationship.

So far, courts have not considered FLSA complaints by college athletes as a misclassification problem. My research demonstrates how the adult entertainment industry compares to college athletics. College athletes and club dancers operate in industries that shirk legal duties as employers by using contracts that pervasively define working conditions which fall explicitly outside an employment relationship. Powerless, exploitable performers are put in a take-it-or-leave-it position. In other industries, courts do not accept at face value an organization’s self-serving definitions of independent contracting, finding aspects of an employment relationship in FLSA lawsuits for

²⁵² 29 C.F.R. § 785.16(b).

²⁵³ *Dawson v. NCAA*, 932 F.3d 905, 907–08 (9th Cir. 2019).

ride-sharing drivers,²⁵⁴ cable installers,²⁵⁵ janitors,²⁵⁶ maids,²⁵⁷ health care workers²⁵⁸ and others.

How do the work conditions of NCAA athletes compare to club dancers? *Verma v. 3001 Castor, Inc.*,²⁵⁹ a recent FLSA case in the Third Circuit that involves these dancers, is a model for answering this question. The decision, which upheld a \$4.5 million jury verdict against the Penthouse Club in Philadelphia,²⁶⁰ provides the Third Circuit factual and legal parallels to NCAA athletes in *Johnson*.

1) **Factual Parallels to NCAA Schools:** To begin with, college coaches and the Penthouse Club's management evaluate talent for physical attributes. They recruit performers by their potential to win over fans and customers. This adult club held auditions for dancers, evaluating them on appearance and "fluid" movement.²⁶¹

NCAA schools and the Penthouse Club use their disproportionate bargaining power to set conditions for powerless performers to render labor for them. NCAA athletes are required to sign a contract that authorizes termination of their financial assistance.²⁶² The club used its superior bargaining power to require their dancers to sign an independent contractor agreement.²⁶³

Both NCAA schools and the Penthouse Club also intensively regulate their workers' bodies. College athletes are often subject to specific targets for weight and strength.²⁶⁴ Female athletes report that schools fail to accommodate their health concerns related to menstruation,²⁶⁵ while in other in-

²⁵⁴ *E.g.*, *O'Connor v. Uber Techs., Inc.*, 58 F.Supp.3d 989 (N.D. Cal. 2015).

²⁵⁵ *E.g.*, *Doucette v. DIRECTV, Inc.*, No. 2:14-cv-02800-STA-tmp, 2015 WL 2373271 (W.D. Tenn. May 18, 2015).

²⁵⁶ *E.g.*, *Harris v. Skokie Maid & Cleaning Serv., Ltd.*, No. 11 C 8688, 2013 WL 3506149 (N.D. Ill. July 11, 2013).

²⁵⁷ *E.g.*, *Quinteros v. Sparkle Cleaning, Inc.*, No. AW-07-0628, 2010 WL 3000865 (D. Md. July 26, 2010).

²⁵⁸ *E.g.*, *Barfield v. N.Y.C. Health and Hosps. Corp.*, 537 F.3d 132 (2d Cir. 2008); and *LeMaster v. Alternative Healthcare Sols., Inc.*, 726 F. Supp. 2d 854 (M.D. Tenn. 2010).

²⁵⁹ 937 F.3d 221 (3d Cir. 2019) (*Verma II*).

²⁶⁰ *Id.* at 224.

²⁶¹ *Id.* at 231.

²⁶² NCAA, *Financial Aid Agreement*, *supra* note 20.

²⁶³ *Id.* at 229-230.

²⁶⁴ *E.g.*, Peter G. Land, *supra* note 79, describing several Illinois football players who reported how their coaches created stress for them over weight management issues.

²⁶⁵ Hawa Camara, Erica Jackson, & Rachel Priest, '*Shameful*' Stigma Surrounding Athletes, *Their Periods: How Taboo Surrounding Periods Affects CisGendered Female Ath-*

stances coaches engage in period-shaming.²⁶⁶ The club exerts control over a dancer's body, including her hairstyle and makeup.²⁶⁷ The club's facility includes a salon to prepare dancers for their work.²⁶⁸

Moreover, NCAA schools and the Penthouse Club rigidly regulate schedules for their workers. The club exerts great control over a dancer's work shifts and appearance times.²⁶⁹ These performers face fines for leaving the stage or club early.²⁷⁰ The NCAA similarly regulates how coaches and trainers control their athletes' time.²⁷¹ These pervading regulations cover weekend work: the Penthouse Club requires dancers to work at least two weekends a month,²⁷² like the scheduling of football games and other competitions for weekends.

Finally, NCAA schools and the Penthouse Club use financial penalties to enforce their rules.²⁷³ The club micromanages a dancer's work to the point of designating entrances and exits apart from those used by patrons and prohibiting dancers from being seen in street clothes by patrons.²⁷⁴ The club selects a dancer's music.²⁷⁵ NCAA rules provide penalties for athletes who fail to conform to their numerous restrictions on compensation.²⁷⁶

2) **Legal Parallels to NCAA Schools:** In *Verma*, the Third Circuit applied the same six factor test as in *DialAmerica*.²⁷⁷ The club contended that its adult dancers were independent contractors because they were permitted to select their shifts. However, this was insufficient to overcome evidence of the club's "overwhelming control over the performance of their

letes, GRADY NEWSOURCE (Jun. 8, 2020), <https://gradynewsourc.uga.edu/shameful-stigma-surrounding-athletes-their-periods/> [https://perma.cc/8NA5-72S7] (athletes report discomfort and communication barriers in discussing health risks and other concerns related to athletic competition and their menstrual cycle).

²⁶⁶ Andy Berg, *Rutgers Softball Players Allege Abuse by Coach*, ATHLETICBUSINESS (Oct. 31, 2019) (coach told women players that their bus smelled like "period blood").

²⁶⁷ *Verma v. 3001 Castor, Inc.*, 2014 WL 2957453 (E.D. Pa 2014) (*Verma I*), at *2. The case began on May 31, 2013, when the case was docketed. *Id.* Filings, Docket 2:13cv03034.

²⁶⁸ *Verma I*, WL 2957453 at *2.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at *3.

²⁷¹ E.g., NCAA DIV. I MANUAL, *supra* note 2, art. 17.1.7.1.

²⁷² *Verma I*, WL 2957453 at *2.

²⁷³ NCAA, *Financial Aid Agreement*, *supra* note 20; *Verma I*, WL 2957453 at *3 (club fines imposed on dancers).

²⁷⁴ *Verma I*, WL 2957453 at *6.

²⁷⁵ *Id.* at *8.

²⁷⁶ NCAA, *Financial Aid Agreement*, *supra* note 20, Point 3.

²⁷⁷ *Verma II*, 937 F.3d at 229.

work.”²⁷⁸ While the club argued that dancers were independent contractors because they could control their profits and losses by soliciting business on social media,²⁷⁹ the court rejected the idea that dancers exercised managerial skill.²⁸⁰ On the factor of employee investment in equipment or materials required for the task, the court found that a dancer’s rental of stage time was less significant than the club’s investment in its facility and costs related to running its business.²⁸¹ The court also rejected the club’s argument that dancers provided a service that required a special skill.²⁸² The fifth factor—permanence of the relationship—was the only one where the court found evidence of an independent contractor relationship.²⁸³ However, the court found that dancers’ topless performances were integral to the business.²⁸⁴ Based on a “holistic assessment” of the factors, the court concluded that the dancers were employees of the Penthouse Club and affirmed the trial court’s judgment.²⁸⁵

What do these parallels mean for *Johnson*? The Third Circuit could use *Verma* as a precedent to return the case to the district court for more specific evidence that college athletes are employees.

Even if the district court finds that college athletes have stated a valid FLSA claim, large questions would remain, including these: is a class or collective certification appropriate beyond the current plaintiffs? Does the FLSA apply alike to both large athletic programs, such as Penn State and small Division III schools? Would backpay be appropriate if there is a finding of liability, and if so, how would liability be apportioned between the NCAA and its approximately 1,100 member schools? Would front-pay be appropriate? These matters need to be explored through discovery.

In sum, *Johnson* is shaping up like other large misclassification cases under the FLSA.²⁸⁶ It also resembles the class action lawsuit in *Alston*,²⁸⁷

²⁷⁸ *Id.* at 230.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 231.

²⁸¹ *Id.*

²⁸² *Id.* (“We refuse to recognize these as ‘special skills’ that weigh in favor of independent-contractor status. . . . (W)e do not believe ‘appearance,’ ‘social skills,’ and ‘hygiene’ qualify.”).

²⁸³ *Id.* at 231-32.

²⁸⁴ *Id.* at 232 (club’s “primary offering to customers is topless female dancers who dance on stage and give lap dances in private rooms”).

²⁸⁵ *Id.* The court concluded: “But the case before us is not a hard one. Here the dancers’ relationship to the Club falls well on the ‘employee’ side of the line. Five of the six factors weigh in favor of concluding the dancers are Castor’s ‘employees.’”

²⁸⁶ *Id.* at 231; see e.g., *Verma I* and *Verma II*, decided respectively in 2014 and 2019.

where the Supreme Court was deeply skeptical of the NCAA's amateurism model.

How would this Article be relevant if the Third Circuit rules in favor of athletes? To begin with, my analysis could be useful in guiding plaintiffs' depositions of NCAA and conferences officials, athletic directors, coaches and trainers, and college athletes. Questions could flesh out the intersections between NCAA rules, the transmission of that information to conference and school compliance efforts, and the daily experiences of college athletes while they train, practice, and compete for their schools. Depositions and documents might disclose that college athletes spend more time—or less time—directed by coaches and trainers than NCAA rules allow.

Would the arguments put forth in this article be pointless if the Third Circuit ultimately rules against athletes in *Johnson*? No. My research perspective would offer insight into recasting Trey Johnson's rejected FLSA complaint into the type of antitrust lawsuit that Justice Kavanaugh alluded to in his condemnation of the NCAA's amateur rules. His antitrust critique and my FLSA arguments significantly overlap. Indeed, Justice Kavanaugh states: "The NCAA has long restricted the compensation and benefits that student athletes may receive. And with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny."²⁸⁸ Similarly, my amicus brief frames the NCAA's amateur rules as work rules: "NCAA's rules that meticulously cover the time and activities of college players are clearly work rules—not amateur rules—and therefore, college athletes 'work' in the course of 'employment' under the FLSA."²⁸⁹

Justice Kavanaugh further writes that "[t]he NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules."²⁹⁰ Along the same lines, my brief frames the same conditions as misclassifying the labor of college athletes as non-compensable amateurism:

The NCAA's antiquated principle of amateurism cannot overcome the economic reality that NCAA institutions "employ" athletes under 29 U.S.C. § 203(g) of the FLSA when these universities and colleges "suffer or per-

²⁸⁷ NCAA v. Alston, 141 S. Ct. 2141, 2163 (2021) remarking, "while the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition. Instead, the court found, the NCAA's rules and restrictions on compensation have shifted markedly over time (citations omitted)."

²⁸⁸ *Id.* at 2166 (Kavanaugh, J., concurring).

²⁸⁹ Leroy Amicus Brief at *4.

²⁹⁰ *Alston*, 141 S. Ct. at 2167.

mit” these athletes “to work.” NCAA athletes are employees just like classmates are employees who earn a minimum wage as resident advisors, campus tour guides, teaching assistants, and cafeteria cashiers in jobs that are properly classified under the FLSA.²⁹¹

Justice Kavanaugh’s analysis parallels my approach when he writes:

Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid. In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels.²⁹²

My brief makes the same point in the context of an FLSA complaint, stating that “the only obstacle to finding that college athletes ‘work’ and engage in ‘exertion’ under the FLSA is the NCAA’s definitional wizardry in mischaracterizing collegiate athletic labor as amateur.”²⁹³

Finally, Justice Kavanaugh compares the NCAA’s price-fixing of labor to other jobs when he states: “All of the restaurants in a region cannot come together to cut cooks’ wages on the theory that ‘customers prefer’ to eat food from low-paid cooks.”²⁹⁴

In short, the NCAA has spent more than a century peddling a myth that the skilled labor it promotes in college games and competitions stems from a revered tradition of blending academics and athletics. Whether this organized form of wage theft ends with an FLSA lawsuit that finds that college athletes are employees, or ends with an antitrust lawsuit that proves that the NCAA’s amateur model is a price-fixing labor conspiracy in a Sherman Act lawsuit, or ends with federal or state legislation that creates employment rights for college athletes, the day draws near when college athletes will be paid for their athletic labor.

²⁹¹ Leroy Amicus Brief at *31.

²⁹² *Alston*, 141 S. Ct. at 2167.

²⁹³ Leroy Amicus Brief at *10.

²⁹⁴ *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring).

