TESTIMONY BEFORE THE
HOUSE COMMITTEE ON EDUCATION AND WORKFORCE SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS, AND SUBCOMMITTEE ON HIGHER EDUCATION AND WORKFORCE DEVELOPMENT JOINT HEARING

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Chairmen Good and Owens, Ranking Members DeSaulnier and Wilson, and members of the Subcommittees:

Thank you for the opportunity to testify before you today. My name is Mark Gaston Pearce. I am the Executive Director of the Workers' Rights Institute at Georgetown Law and the former Chair of the National Labor Relations Board. I have spent nearly half of my 43 year long career working with the Board first as a lawyer, then ultimately as Board Member and Chairman.

The NCAA makes billions in profits each year while exploiting unpaid collegiate athletes. In 2023, the NCAA recorded nearly $1.3 billion in revenue. Big-time college sports generate massive amounts of revenues for universities, television networks, and the NCAA itself.[1] Yet, since its creation in 1906, the NCAA has barred collegiate athletes from receiving compensation for their labor.[2] Athletes may accept scholarships up to the full cost of attendance in their current educational program, but may not receive funding for future courses of study (such as graduate programs) or other education or cost of attendance expenses including meal stipends, housing accommodations, or laptops.[3] Until recently, athletes were even barred from monetizing their

[1] *See, e.g.*, Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (October 2011),
[2] *Id.*
[3] *See, e.g.*, Alex Kirshner, *The Supreme Court Might be Ready to Smack Down the NCAA*, SLATE (March 31, 2021)

name, image, and likeness ("NIL") rights.[4] The National Labor Relations Board, to this point, has passed on the question of whether certain college athletes, based on their relationship with the universities they play for, can organize as employees. In 2015, the NLRB declined to assert jurisdiction over whether Northwestern University football players were employees.

Despite the NCAA's decades of legal success, trends seem to be increasingly turning towards defining college athletes in a different way. Last year legendary Alabama football coach Nick Saban endorsed college football players unionizing. Strong signals have been sent from as far up as the Supreme Court. In 2021, Justice Kavanaugh, appointed by former President Trump, wrote "colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges". The perspectives from those charged with interpreting and enforcing labor laws in this country also appear to be changing. On February 5, 2024, NLRB Regional Director Laura Sacks held that Dartmouth men's basketball players are employees under the National Labor Relations Act. On March 5, those basketball players overwhelmingly voted to unionize. This is a rapidly changing area of law, and while I am happy to share my opinions today, I want to clarify that I do not speak for the NLRB or for the Biden Administration.

Exploitation and the Myth of "Amateurism" and the "Student-Athlete"

For decades the NCAA has attempted to justify its position on the cornerstone concepts of "amateurism" and the "student-athlete." The NCAA argues that the unique appeal of college sports is driven by amateurism: audiences are drawn to athletes participating in elite competition for the "love of the game" and a pure commitment to their sport untainted by financial reward.[5] After all,

[4] Press Release, NCAA, NCAA adopts interim name, image, and likeness policy (June 30, 2021)
[5] *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. (2021).

as the common refrain goes: collegiate athletes are students first, athletes second. But the seemingly innocuous term "student-athlete" was coined by the NCAA's president and legal team in the 1950s as part of a legal strategy designed to avoid paying a worker's compensation claim to the widow of a football player who died after an injury sustained in a game.[6] The public relations angle was clear: if the public thought of a collegiate athlete as a student first, how could they also be an employee? The phrase "student first, athlete second" is a common refrain in legal strategies executed by the NCAA and member universities to avoid legal liability in the decades since.[7] In 1974, a Texas Christian University football player named Kent Waldrep was paralyzed after an on-field injury.[8] Through the 1990s, he filed suits seeking worker's compensation until an appeals court finally ruled he was not an employee because among other bases, he could have kept his financial aid even if he had quit football and that the school had recruited him as a student not an athlete.[9] The term persists in NCAA and universities legal strategies today.[10] The concept of amateurism serves a similar function. The NCAA first promoted the concept of amateurism at the same time they popularized "student athlete," urging member schools to mention "amateurism" in all grant-in-aid scholarships.[11]

The rosy picture that the NCAA paints is far from reality. While some athletes may receive large scholarships, many struggle to scrape by. A recent survey found that nearly a quarter of

[6] Molly Harry, *A Reckoning for the Term "Student-Athlete,"* DIVERSE ISSUES IN HIGHER EDUCATION (Aug. 26, 2020); Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (October 2011), *Supra*.
[7] *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015); Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. (2021).
[8] Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (October 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.
[9] *Id.*
[10] *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015); Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. (2021).
[11] Jay D. Lonick, Note, *Bargaining With the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 140 (2015).

Division I college athletes experienced food insecurity in the last 30 days and almost 14 percent experienced homelessness in the previous year.[12] Some elite college athletes proceed to professional sports leagues, however, most college athletes never make the step to the next level and are left with little to no benefit from their playing days.[13] This is particularly true in dangerous sports like football, where athletes place their physical health and future livelihood on the line with every practice and game.[14]

The NCAA's dynamic is also heavily racialized.

Graduation rates are lower among student-athletes of color than their white counterparts. A recent study showed that just over 55 percent of black male college athletes graduated within six years, compared with 60 percent of all black undergraduate men.69 percent of all college athletes graduate within six years compared to 76 percent of all undergraduate students.[15]

Racism drives public opposition to paying college athletes. A 2015 study conducted by Tatishe Nteta, a UMass Amherst professor, found that negative racial views about Black people were the single most important predictor of white opposition to paying college athletes.[16] For decades, the NCAA and collegiate sports have ignored a perception of the industry prevalent in

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[12] SARA GOLDRICK-RAB, BRIANNA RICHARDSON & CHRISTINE BAKER-SMITH, HUNGRY TO WIN: A FIRST LOOK AT FOOD AND HOUSING INSECURITY AMONG STUDENT-ATHLETES 2 (The Hope Center 2020), https://hope4college.com/wp-content/uploads/2020/04/2019_StudentAthletes_Report.pdf.

[13] The NCAA estimates that fewer than 2% of NCAA athletes go on to play professional athletics. NCAA, NCAA Recruiting Facts, https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf.

[14] For example, football player Marcus Lattimore was projected as a potential professional before suffering multiple knee injuries while playing at the University of South Carolina, and Stanley Doughty was similarly expected to succeed at a professional level before suffering a serious spinal injury. Tom Dart, *College athletes are unpaid. What if injury ruins their chance of turning pro?*, The Guardian (Sept. 6, 2021), https://www.theguardian.com/sport/2021/sep/06/college-athletes-are-unpaid-what-if-injury-ruins-their-chance-of-turning-pro. This dynamic was also exposed in college basketball when superstar Zion Williamson's shoe broke during a nationally televised game, causing a knee injury. While Williamson healed and ultimately entered the NBA, the incident exposed the risk college athletes face in subjecting themselves to potential injury prior to professional play. Marc Tracy & Kevin Draper, *A Star's Shoe Breaks, Putting College Basketball Under a Microscope*, N.Y. TIMES (Feb. 21, 2019) https://www.nytimes.com/2019/02/21/sports/zion-nike-shoe-ncaa.html.

[15] https://news.usc.edu/138228/leading-sports-schools-black-athletes-graduation-rates-lower/

[16] https://www.washingtonpost.com/news/monkey-cage/wp/2015/12/30/race-affects-opinions-about-whether-college-athletes-should-be-paid-heres-how/

many communities of color—a "plantation dynamic," in which predominantly white institutions (the NCAA and universities) extract value from Black athletes to pad their own pockets.[17]

The Northwestern Football Players Election

In 2014, football players at Northwestern attempted to form a union. The NLRB Regional Director Peter Sung Ohr, ruled that the players were employees under the NLRA.[18] The players' weekly schedule included "40 to 50 hours per week on football-related activities while only spending about 20 hours per week attending classes."[19] He described the relationship between players and the university as "an economic one that involves the transfer of great sums of money to the players in the form of scholarships," noting the school spends between $61,000 and $76,000 per year per athlete, totaling more than $5 million per year.[20] Ohr ordered a union election.

While I was Chairman, the NLRB ultimately declined jurisdiction over the election in a 5-0 decision.[21] That decision effectively stopped the football team's organizing in its tracks. That decision only applied to the facts of that case. The Board reasoned that asserting jurisdiction would not serve the Act's goal of promoting stability in labor relations.[22] The Board does not have authority over public colleges and universities which comprise the majority of teams in Division I Football.[23] Northwestern is the only private university in its conference.[24]

Since the Northwestern decision, there have been several major decisions by the NLRB

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[17] *See e.g.*. Jerry Brewer, *The difference between a plantation and college sports: A plantation didn't pretend*, WASHINGTON POST (March 11, 2021), https://www.washingtonpost.com/sports/2021/03/11/greg-mcdermott-plantation-ncaa-basketball/; William C. Rhoden, *College players are no longer settling for being on the sports plantation*, THE UNDEFEATED (March 19, 2021), https://theundefeated.com/features/college-players-are-no-longer-settling-for-being-on-the-sports-planation/.

[18] Northwestern University and College Athletes Players Association (CAPA) 13-RC-121359; 362 NLRB 1350 at 1364 (2015)

[19] *Id.* at 1358.

[20] *Id.* at 1365.

[21] *Id.* at 1355.

[22] *Id.* at 1350.

[23] *Id.*

[24] *Id.*

and Supreme Court. Soon after the Northwestern case was decided, the Board issued the Browning-Ferris Industries decision[25] which expanded the criteria by which joint-employer status is determined. The next year, the NLRB decided *Columbia University*[26], ruling that graduate students were employees under the Act.

Following *Northwestern University* and *Columbia University*, then-NLRB General Counsel Richard Griffin issued a memo asserting that "scholarship football players at Northwestern and other Division I football players at private universities are employees under the NLRA ."[27]

Recent Legal Developments

On June 21, 2021, the Supreme Court decided *NCAA v. Alston* – holding that the NCAA's rules restricting certain education-related benefits for college athletes violate federal antitrust laws.[28] Now, schools may offer these types of benefits to their athletes, though they are still not allowed to compensate athletes directly.[29]

The *Alston* decision leaves the NCAA's core argument for its existence – the concept of "amateurism" – on shaky ground. The NCAA argues that consumers value "amateurism" in sports, and that this quality creates a unique product that gives college sports its appeal.[30] In order to maintain this quality, the NCAA argues it must adopt these anti-competitive rules.[31] Justice Kavanaugh wrote that "there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny," noting that the NCAA's model would

[25] 362 NLRB No. 186 (August 27, 2015)
[26] Columbia University, 364 NLRB No. 90 (August 23, 2016)
[27] *Id.*
[28] *Alston*, 594 U.S.
[29] *Id.* at 2166.
[30] Brief for Petitioner in No. 20-512, at 29-31.
[31] *Id.*

be clearly illegal in any other industry.[32] As mentioned earlier, Justice Kavanaugh noted that collective bargaining and unionization could resolve some of the NCAA's issues.

Building on this momentum, in 2021 National Labor Relations Board General Counsel Jennifer Abruzzo issued a memo stating that certain NCAA athletes are employees under the NLRA.[33] The memo argued that athletes perform services for, and are subject to the control of, both the NCAA and their athletic conference in addition to their college or university.[34] As such, the General Counsel will consider pursuing a joint employer theory of liability in appropriate circumstances.[35] Further, the General Counsel stated that she will consider pursuing charges against an athletic conference or association even if some member schools are state institutions.[36] The memo asserted that where an athletic conference is an "independent, private entity, created by the member schools," exerting jurisdiction over the conference is appropriate even where some member institutions are public.[37]

Name, Image, and Likeness Legislation and Rule Changes

In tandem with these developments, legislation has proliferated at the state level affecting how NCAA athletes can profit from their Name, Image, and Likeness (NIL) rights. The law allows college athletes to secure endorsements and scholarships without losing scholarship eligibility and

[32] "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. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood." *Alston*, 594 U.S. at 2167.

[33] Memorandum GC18-02, Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act (Sept. 29, 2021) at 1.

[34] *Id.*

[35] *Id.* at n. 34.

[36] *Id.*

[37] *Id.*

largely provides control over the use of NIL rights.[38]

In response to the changing state laws and ongoing athlete activism, the NCAA took proactive action to update their draconian name, image, and likeness rules. Starting July 1, 2021 college athletes were allowed to make money from their NIL without losing eligibility.[39] This change marked the first time that the NCAA will have to adjust their business model that has for so long denied even the smallest amounts of cash to the players at the heart of this multi-billion dollar industry.

Players have been allowed to monetize their NIL for over a year, and we've seen a full season of Division I sports with these new rules in place. It has not impacted the quality of the on-field product. Some suggest that these changes have resulted in athletes deciding to extend their college playing careers rather than going professional. For one example, basketball player Armando Bacot, a UNC center that starred in the 2022 national championship game was projected to be a top NBA draft pick but opted for another couple of seasons at UNC. His mother who acts as his manager has stated that his portfolio of NIL deals totals at least $500,000.

These legal developments, from the NLRB decisions on joint employers and graduate students, the Supreme Court's statements on the NCAA's business model, the new NIL rules, and multiple General Counsel's statements make the legal landscape very different now from 2015.

The Dartmouth Decision

This year, a NLRB Regional Director held that the Dartmouth men's basketball team players were employees. After a union election, the players voted overwhelmingly to unionize.

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[38] Liz Clarke, *State-by-state rating system gives college recruits road map to evaluate NIL laws*, THE WASHINGTON POST (Oct. 21, 2021), https://www.washingtonpost.com/sports/2021/10/21/name-image-likeness-laws-state-rankings/.

[39] Press Release, NCAA, NCAA adopts interim name, image, and likeness policy (June 30, 2021) https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

Dartmouth plays in the Ivy League which only includes private schools, unlike the Big Ten for Northwestern. Ivy League athletes do not receive sports scholarships. Many other student workers at Dartmouth are unionized with the same union. Director Sacks concluded that the Dartmouth players were employees due to their compensation and Dartmouth's control over them. That compensation includes early admission before other students, tickets to games, room and board for part of the year, apparel, access to nutrition and medical professionals, and academic support and more. The control was demonstrated by the Student Athlete handbook, and the player's mandatory participation in alumni events, practices, games, and other events. The school controls when the athletes travel, eat, and sleep during road games. Players cannot even get a haircut without asking permission! Analogizing to the graduate students held to be employees in *Columbia University,* Sacks held that the players perform work that benefits Dartmouth economically. Unlike the school's other extracurriculars, the basketball team generates revenue, and the Athletic department has a marketing department which promotes the team and works to maximize its revenue. Sacks' decision was in the four corners of the law and reflected the numerous significant changes in the law and the NCAA since the *Northwestern* decision.

Pac 12, the University of Southern California and the NCAA

In another matter an NLRB administrative law judge is currently considering whether the NCAA, the Pac-12 Conference, and the University of Southern California are all jointly the employers of student football and basketball players at USC, and whether they violated federal law by misclassifying those athletes as non-employees. The agency litigation stems from NLRB

charges[40] filed by the National College Players Association. According to an attorney for the NLRB, these institutions exercise extensive control over the athletes ranging from health and safety to their social media posts and attire. The organizations "have consistently challenged progress" to improve conditions for their players.[41]

Former University of Southern California football players testified that USC officials retained rigid control over their lives almost year-round including fingerprint scanning players to mark their presence at daily meals and conducting hydration testing and weigh-ins multiple times a week. USC hired other students to check that the athletes went to class. One former football player testified that there was so much pressure to attend practices that he would rather study into the wee hours of the night than miss practice.[42] The former players also detailed the perks of being on the team, which included receiving free gear, meals, university apparel, and gifts for making it to the playoffs.

Additionally, the prospect of the NCAA as a joint employer is not restricted to NLRB matters. In ***Johnson v. NCAA***,[43] currently pending before the United States Court of Appeals for the Third Circuit, several named colleges and the NCAA are alleged to be joint employers of Division I college athletes under the Fair Labor Standards Act (FLSA). The FLSA guarantees minimum wage and overtime pay. The athletes argued that if the colleges are paying their work-study classmates, some of whom are similarly on scholarship, for work at athletic events, the college athletes

[40] College Athlete Pay Complaints Tee Up Case for U.S. Labor Board; Ian Kullgren, Bloomberg News, February 9, 2022
[41] NCAA Abuses 'Student-Athlete' Term to Deny Rights, NLRB Alleges; Josh Eidelson, Bloomberg News December 18, 2023
[42] NLRB Targets College Athletes' Busy Schedules in NCAA Trial, Parker Purifoy, Bloomberg Law December 19, 2023
[43] 19-5230 - JOHNSON v. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION et al

"laboring in those games" ought to be paid as well. The FLSA has its own test for joint employment that differs from that of the NLRA and does not determine organizing bargaining units.

Conclusion

Although the path forward is unclear, the status quo simply cannot persist and it will not. The NCAA is reading the writing on the wall. So much so that in December of last year (2023) NCAA president Charlie Baker sent a letter to Division 1 members proposing the creation of a new subdivision whose schools would be required to provide significantly greater compensation for their athletes than current association rules allow.[44]

Current conditions are unsustainable and unjust. It is worth considering the ideal process through which to address the challenges facing college athletics. A collective bargaining relationship could be the most effective means of doing so. As opposed to an adversarial approach, collective bargaining ensures that athletes have a seat at the table in creating a new institutional structure for college athletics. Instead of the NCAA and universities unilaterally deciding the outcomes for these crucial issues, athletes will have an opportunity to flex their collective power and have a say in their compensation and working conditions. As Justice Kavanaugh alluded, this approach has promise in creating a more just and workable outcome for all parties involved. I welcome your questions.

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[44] NCAA President Charlie Baker proposing new subdivision that will pay athletes via trust fund; Steve Berkowitz, USA Today, December 5, 2023, https://www.usatoday.com/story/sports/college/2023/12/05/ncaa-pr