PREDICTING THE FUTURE: AN ANALYSIS OF EMPLOYER'S USE OF PREDICTIVE ARTIFICIAL INTELLIGENCE IN PROFESSIONAL SPORTS

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ABSTRACT

As artificial intelligence (AI) becomes embedded in everyday life, professional sports teams are testing its limits. With predictive AI now helping teams identify athletes at risk of future injuries, sports leagues stand at the forefront of a legal and ethical dilemma. This Note explores the intersection of predictive AI and the Americans with Disabilities Act (ADA), arguing that while professional sports teams do not violate the ADA by acting on fears of future injury with healthy athletes, the principles of the ADA should lead to the opposite conclusion. Drawing on precedent cases and agency interpretations, this Note explains how the ADA protects against discrimination based on current or past impairments—but not potential future injuries. While legislative action could provide a solution, this Note recommends that player unions should pursue action through collective bargaining to set boundaries around predictive AI in their respective leagues.

INTRODUCTION

In the first game of the 2023 NFL season, two-time MVP Aaron Rodgers led his new team, the New York Jets, onto the field for the first time.[1] After fifty years of no Super Bowl wins,[2] Rodgers injected the city

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1. *See* Grant Gordon, *Jets QB Aaron Rodgers Suffered Torn Achilles vs. Bills, Will Miss the Remainder of 2023 NFL Season*, NFL (Sept. 12, 2023, 11:05 AM), https://www.nfl.com/news/jets-qb-aaron-rodgers-suffered-torn-achilles-will-miss-remainder-of-season [https://perma.cc/9AC5-86C2].

2. Rudi Schuller, *How Many Super Bowls Have the New York Jets Won? List of Championships, Appearances, Last Super Bowl Win*, DAZN (May 16, 2023), https://www.dazn.com/en-US/news/american-football/how-many-super-bowls-have-the-new-york-jets-won-list-of-championships-

and team with renewed dreams of success. However, these dreams came at a price. The Jets gave up draft picks to acquire Rodgers from the Green Bay Packers and were set to pay Rodgers a total of seventy-five million in guarantees through the 2025 season.[3] Their Super Bowl dreams were abruptly shattered when Rodgers suffered a torn Achilles after just four snaps.[4]

Sports injuries have massive financial costs for teams, leaving them searching for ways to predict and prevent player injuries. Because of this, many teams are turning to artificial intelligence (AI) when making player personnel decisions. If the Jets could have predicted Rodgers's injury using AI, would they have still signed Rodgers to a multi-year, multi-million-dollar contract?

Many sports fans have a baseline understanding of the employer-employee relationship in American sports.[5] The major American sports leagues include: the National Football League (NFL), the National Basketball Association (NBA), the National Hockey League (NHL), Major League Baseball (MLB), and Major League Soccer (MLS). Each of these organizations has member teams that contract privately with individual players. The employer-employee relationship is governed by a collective bargaining agreement (CBA) that outlines player compensation, player safety, and dispute resolution.[6]

While the term "artificial intelligence" was first used in the 1950s,[7] AI has grown in importance and interest with the 2022 launch of OpenAI's platform, ChatGPT.[8] Once deemed outlandish, AI has proven vital today.

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appearances-last-super-bowl-win/14fxa6gjrao771jwdpsqbvb1mh [https://perma.cc/M5UM-BQBA].

3. *See* Grant Gordon, *Aaron Rodgers, Jets Agree to New Two-year, $75M Guaranteed Contract*, NFL (July 26, 2023, 5:48 PM), https://www.nfl.com/news/aaron-rodgers-jets-agree-to-new-two-year-75m-guaranteed-contract [https://perma.cc/W4MZ-4Y4K].

4. *See* Gordon, *supra* note 1.

5. *See* Ryan T. Dryer, Comment, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 1, 1 (2008) ("Most sports fans have at least the limited understanding that collective bargaining agreements govern the employer-employee relationships between the owners of professional sports teams and players' associations.").

6. *See generally* NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT (2020), https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf [https://perma.cc/Y6P8-KWQ9].

7. Gil Press, *A Very Short History of Artificial Intelligence (AI)*, FORBES (Dec. 30, 2016, 9:09 AM), https://www.forbes.com [https://perma.cc/9X94-4MXL].

8. *See* Bernard Marr, *A Short History of ChatGPT: How We Got to Where We Are Today*,

AI quietly underlies our daily activities: helping people get to work faster, allowing businesses to target advertisements, and even assisting researchers in wildfire prevention.[9] AI systems and tools are increasingly being used to supplement or replace humans in important fields such as medicine, law, and human resources.

While AI presents increased convenience and lofty promises, many are concerned about its increased role in everyday life.[10] In the workplace, employers use AI systems to screen potential candidates and manage their existing employees.[11] While this application has helped employers improve efficiency, many employees fear that AI may reduce their employment duties or eliminate their jobs.[12] In the professional sports setting, it is unlikely AI will replace a beloved quarterback, but fans and athletes should still be wary of this rapidly expanding technology.

Teams[13] use AI in a multitude of ways including player performance evaluation, interactive fan experiences, and roster construction.[14] Since

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FORBES (May 19, 2023, 1:14 AM), https://www.forbes.com/sites/bernardmarr/2023/05/19/a-short-history-of-chatgpt-how-we-got-to-where-we-are-today/?sh=2d1a3b61674f [https://perma.cc/2LBH-QWZY].

9. *See 15 Powerful Applications of Artificial Intelligence Across Industries*, CAL. MIRAMAR UNIV., https://www.calmu.edu/news/applications-of-artificial-intelligence [https://perma.cc/3NQQ-8UEY].

10. *See* LEE RAINIE ET AL., PEW RSCH. CTR., AI AND HUMAN ENHANCEMENT: AMERICANS' OPENNESS IS TEMPERED BY A RANGE OF CONCERNS, at pt. 1 (2022), https://www.pewresearch.org/internet/2022/03/17/how-americans-think-about-artificial-intelligence/ [https://perma.cc/3VTV-YRCW].

11. *See* Jack Kelly, *How Companies Are Hiring and Reportedly Firing With AI*, FORBES (Nov. 4, 2023, 8:00 AM), https://www.shrm.org/topics-tools/tools/toolkits/using-artificial-intelligence-employment-purposes [https://perma.cc/Y6S7-EF76].

12. *See* Michele Lerner, *Worried About AI in the Workplace? You're Not Alone*, AM. PSYCH. ASS'N (Sept. 7, 2023), https://www.apa.org [https://perma.cc/G8Q8-9EE2].

13. For an explanation of team organizational structure, see Org Charts, Organizational Design, *Professional Sports Team Organizational Structure—How It Works & Examples*, ORGANIMI (Dec. 23, 2024), https://www.organimi.com/professional-sports-team-organizational-structure/ [https://perma.cc/P2ZM-X49D]. The source explains that professional sports teams or clubs are organized into leagues. Each team typically consists of several components including: ownership, executive management, coaches, players, business departments, and player support staff. Ownership provides the funding for the team and has the final say in strategic decisions. Executive managers implement ownership's strategy in day-to-day operations. Coaches are responsible for developing training and game strategy. Players execute the coaches' strategy and represent the team in games and off-field activities. The business departments typically reflect those you would find in a large company. Components such as marketing, human relations, and finance help the team remain financially viable. Finally, player support helps ensure players have the necessary equipment and fitness to compete. *Id.*

14. *See* Brittany Jacobs, *AI in Sports: Transforming Fan Experience and Team Strategy*, AM. MILITARY UNIV. HEALTH SCI. BLOG (Nov. 7, 2024), https://www.amu.apus.edu/ [https://perma.cc/

professional sports teams have millions riding on player contracts,[15] and sports leagues cap the number of players who can be on a roster, teams must make prudent contract decisions to ensure team success. When making contract decisions, teams often consider the player's past performance,[16] the player's positional value,[17] and the player's health.[18] High salaries and limited roster spots force teams to constantly look for cutting-edge evaluation methods to ensure their team's success. Recently, the NFL has used predictive AI to determine if a player will miss games in the coming season.[19] Companies, like Probility AI, have also created AI technology to help teams make strong roster decisions by leveraging AI injury prediction models.[20] Additionally, predictive AI can alert a given team that a certain player may need more rest or mechanical changes if an injury appears imminent.[21]

Professional sports teams are not the only employers seeking to utilize predictive AI. When employers use AI to aid in their employment decisions, they want employment decisions to be faster, fairer, and more equitable.[22] However, AI tools are not free from biases. Protective measures must be implemented. If bias is presented in the training data, the AI itself will produce biased responses.[23] For example, Amazon began building an AI

69MF-LP85].

15. The NBA had the highest average annual player salary in 2019–2020 at $8.32 million, followed by the Indian Premier League at $5.3 million. *See* Christina Gough, *Average Annual Player Salary in the Sports Industry in 2019/20, by League*, STATISTA (Apr. 23, 2024), https://www.statista.com/statistics/675120/average-sports-salaries-by-league/ [https://perma.cc/Y8NW-MUHH].

16. *See* Robert Lyons Jr. et al., *Determinants of NBA Player Salaries*, THE SPORT JOURNAL, 2015.

17. *See* Jason Fitzgerald, *Positional Value in the NFL*, OVER THE CAP (Dec. 3, 2021), https://overthecap.com/positional-value-in-the-nfl [https://perma.cc/PR4M-6GS5].

18. *See* Max Flignor, *The Impact of Injuries on Player Valuation*, THE HARDBALL TIMES (Sept. 20, 2016), https://tht.fangraphs.com/the-impact-of-injuries-on-player-valuation/ [https://perma.cc/7KC4-CRTT].

19. *See Revolutionizing Player Health and Safety with the Digital Athlete*, NFL PLAYER HEALTH & SAFETY (Jan. 12, 2024, 12:00 PM), https://www.nfl.com/playerhealthandsafety/ [https://perma.cc/6P4H-PVYM].

20. *See* PROBILITY AI, https://probility.ai/ [https://perma.cc/7P3D-J2XP].

21. *See Revolutionizing Player Health and Safety with the Digital Athlete*, *supra* note 19.

22. *See* Michael D. Schlemmer et al., *AI in the Workplace: The New Legal Landscape Facing US Employers*, MORGAN LEWIS (July 1, 2024), https://www.morganlewis.com/pubs/2024/07/ai-in-the-workplace-the-new-legal-landscape-facing-us-employers [https://perma.cc/7Q4Q-FRDX].

23. *See* K. Thor Jensen, *Yes, Machines Make Mistakes: The 10 Biggest Flaws in Generative AI*, PC MAG. (Apr. 18, 2023), https://www.pcmag.com/news/yes-machines-make-mistakes-the-10-biggest-flaws-in-generative-ai, [https://perma.cc/Q2AR-ANXN].

tool in 2014 to review job applicants' resumes. The company hoped the tool could increase the efficiency of scanning resumes for top talent.[24] Shortly after Amazon began testing, the company uncovered that its tool was unfairly penalizing women because of their gender.[25] Because Amazon's training data was based on the previous ten years, when men dominated the tech industry, its tool did not like women candidates. Therefore, the AI tool would penalize an applicant if their resume contained the word "women's," or if the applicant graduated from certain all-women colleges.[26] This discrimination caused Amazon to remove the tool from its systems and raised alarm of potential other biases that AI could exacerbate.

If an employer uses AI tools that unfairly discriminate against a marginalized group when making employment decisions, then the employer risks legal action under a theory of disparate impact. The disparate impact doctrine was codified by Congress in section 703(k) of Title VII. This doctrine makes it illegal for employers "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin."[27]

Additionally, if an employer uses AI to screen out individuals with disabilities when making an adverse employment action, they may risk violating the Americans with Disabilities Act (ADA). The ADA states that it is an unlawful employment practice for employers to take an adverse employment action against an employee because of a disability.[28] However, professional sports leagues regularly require potential signees to undergo rigorous physical testing, specifically tests for strength and potential physical ailment issues.[29] For example, before the NFL draft,[30] chosen

24. *See* Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women*, REUTERS (Oct. 10, 2018, 7:50 PM), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G, [https://perma.cc/5AYZ-YRSN].

25. *Id.*

26. *Id.*

27. 42 U.S.C. § 2000e-2(a)(2) (2023).

28. *See* 42 U.S.C. § 12112(a) (2023).

29. *See, e.g.*, *Transfer Deadline Day: The Six Stages of a Football Medical*, BBC BITESIZE, https://www.bbc.co.uk/bitesize/articles/zrmbmfr [https://perma.cc/244Y-SNJC] (soccer); Craig Calcaterra, *What Goes Into a Ballplayer's Physical*, NBC SPORTS (Feb. 25, 2016, 2:58 AM), https://www.nbcsports.com/mlb/news/what-goes-into-a-ballplayers-physical [https://perma.cc/K76N-GMMP] (baseball).

30. The NFL draft is an annual event where teams select college athletes to join their organizations.

athletes must undergo a program where various medical and physical tests allow teams to evaluate prospects.[31]

This Note explains that professional sports organizations generally do not violate the ADA when they use predictive AI to determine which players might become injured and base an adverse employment action on this finding. Part I discusses the history of the ADA in sports and courts' allowance of employers to terminate employees due to fear of a future injury. Part II evaluates whether the ADA protects players from being fired if their team believes they will be injured in the future. Part III discusses potential actions players may strive for to safeguard themselves against predictive AI. This Note concludes that players should approach their next round of collective bargaining negotiations with specific language prohibiting teams from using predictive AI to affect player personnel decisions.

I. THE HISTORY OF THE ADA IN SPORTS AND THE ALLOWANCE OF RISK OF FUTURE INJURY

Congress passed the ADA in 1990[32] to protect people with disabilities against discrimination.[33] When studying the issue, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[34] Further, Congress's stated purpose for enacting the ADA was to eradicate the isolation and the segregation many people with disabilities experience. Few would argue that professional athletes experience the same conditions other disabled Americans experience. Therefore, it may seem counterintuitive that the ADA would apply to professional athletes who are ordinarily in stellar physical shape. Nevertheless, the ADA *does* cover professional sports organizations and any professional athlete who has met the ADA's definition of disabled.[35]

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31. *See* Robert Wood, *NFL Draft Combine Testing*, TOPEND SPORTS (Sept. 2009), https://www.topendsports.com/sport/gridiron/nfl-draft.htm [https://perma.cc/G7Z5-55GM].

32. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.

33. *See Introduction to the Americans with Disabilities Act*, C.R. DIV., U.S. DEP'T OF JUST., https://www.ada.gov/topics/intro-to-ada/ [https://perma.cc/36CS-X753].

34. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(2).

35. Title I of the ADA applies to employers with fifteen or more employees and does not carve

When President George H. W. Bush signed the ADA into law on July 26, 1990, disability advocates cheered it as a major victory for people with disabilities. One commentator wrote that the Act: "is the most comprehensive piece of disability civil rights legislation ever enacted, and the most important piece of civil rights legislation since the 1964 Civil Rights Act. This legislation will transform the landscape of American society and will have a profound effect on what it means to be disabled."[36] Under the Americans with Disabilities Act, a person with a disability is statutorily defined as someone who has:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.[37]

However, the ADA has substantially changed since its enactment. In 1999, the Supreme Court issued two decisions that significantly narrowed the class of individuals covered by the ADA. In *Sutton v. United Air Lines, Inc.*,[38] the Supreme Court determined the "disabled" status under the ADA should include a person's ability to mitigate their impairment using medical devices or medicine.[39] In *Sutton*, twin sisters with poor vision were not covered under the ADA because eyeglasses corrected their vision to a perfect 20/20.[40] Congress amended the ADA ("ADA as Amended") to broaden the coverage of the ADA after *Sutton*.[41] Today, the determination of ADA disability status must be made without reference to any mitigating measures unless those mitigating measures are eyeglasses.[42] Further, the

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out an exception for professional sports organizations. *See id.* § 12111(2).

36. Arlene Mayerson, *The Americans with Disabilities Act—An Historic Overview*, 7 LAB. LAW. 1, 1–2 (1991).

37. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2).

38. 527 U.S. 471 (1999).

39. *Id.* at 482–483.

40. *See id.* at 481.

41. *See Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 25, 2011), https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008 [https://perma.cc/RW3P-TJ5C] [hereinafter *Questions and Answers*].

42. *See id.*; 29 C.F.R. § 1630.2(j)(1)(vi).

definition of disability should be broadly construed in favor of the individual.[43]

With employment protections: If an employee alleges that their employer engaged in discriminatory conduct, the employee must first complete pre-complaint counseling before filing a formal complaint with the Equal Employment Opportunity Commission (EEOC).[44] The EEOC will review the claim and either move forward or dismiss the claim (i.e., for procedural reasons).[45] If the EEOC does not dismiss the claim, it will investigate the complaint to determine whether illegal discrimination has occurred.[46] At this stage, the employee alleging discrimination can have the complaint adjudicated by the agency or have a formal hearing in front of an EEOC administrative judge. The agency or judge will make a ruling determining whether there was illegal discrimination.[47] If the decision is in favor of the employee, the EEOC will seek a voluntary settlement with the employer.[48] If a settlement cannot be reached, the EEOC may sue on the employee's behalf.[49] If the EEOC chooses not to sue the employer (or does not believe there has been illegal, discriminatory conduct), the agency will issue a Right to Sue letter allowing the employee to bring a civil suit against the employer.[50]

Employers may not subject employees or applicants with disabilities to adverse employment actions on the basis of their disability.[51] The ADA specifically prohibits employers from refusing to hire an employee or

43. *See Questions and Answers*, *supra* note 41.

44. *See Flowchart of the EEO Complaint Process*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.ftc.gov/sites/default/files/attachments/filing-complaint-discrimination-federal-trade-commission/eeocomplaint-flowchart.pdf [https://perma.cc/3B4T-QW2U].

45. *See generally What Happens to Your EEOC Charge*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/sites/default/files/migrated_files/employees/charge_status_flow_chart.pdf [https://perma.cc/EP78-B5BQ].

46. *Id.*

47. *Flowchart of the EEO Complaint Process*, *supra* note 44.

48. *See What Happens to Your EEOC Charge*, *supra* note 45.

49. *See id.*

50. *See id.* Under the ADA, an employee must usually have a Right to Sue letter before filing suit against the employer. *See What You Can Expect After You File a Charge*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/what-you-can-expect-after-you-file-charge [https://perma.cc/8UZK-9X3W] ("[Y]ou must have a Notice of Right to Sue from EEOC before you can file a lawsuit in federal court."). However, employees suing under the Age Discrimination in Employment Act or the Equal Pay Act do not need a Notice of Right to Sue. *Id.*

51. *See generally* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a).

lowering an employee's compensation on the basis of their disability.[52] Employers must also provide reasonable accommodations to employees with disabilities.[53] Accommodations vary widely and must be negotiated through an interactive process between the employer and the employee seeking accommodation.[54]

The Supreme Court first applied the ADA to professional sports in *PGA Tour, Inc. v. Martin*.[55] Plaintiff Casey Martin (a successful professional golfer) wished to compete in the Professional Golfers' Association (PGA) Tour.[56] However, a degenerative circulatory disorder caused excessive pain and tissue damage in his right leg.[57] Because of this, Martin could not walk the full eighteen-hole golf course.[58] In college, Martin requested and received a waiver from the National Collegiate Athletic Association (NCAA) and the Pacific 10 Conference to exempt him from their rules that required players to carry their golf clubs and walk the full course.[59] But when Martin made a similar waiver request to the PGA Tour, the waiver was denied.[60] A split Court ultimately held that the ADA did apply to professional golfers and that Martin was entitled to reasonable accommodations for his disability.[61]

While many disability advocates viewed *Martin* as a win, Justice Scalia's and Justice Thomas's dissent from the majority opinion raises concerns. Justices Scalia and Thomas primarily disagreed with the

52. *See generally id.*

53. Reasonable accommodations allow employees with disabilities to work without restraint despite their disability. *See Accommodations*, OFF. OF DISABILITY EMP. POL'Y, https://www.dol.gov/agencies/odep/program-areas/employers/accommodations [https://perma.cc/3YCN-ER9W] (explaining ADA requirements of reasonable accommodations to three aspects of employment: (1) equal opportunity in application process; (2) enabling qualified individual to perform essential functions; and (3) ensuring equal benefits and privileges of employment).

54. *See* C.F.R. § 1630.2(o)(3) (2023) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation.").

55. 532 U.S. 661 (2001).

56. *See PGA Tour Inc*., 532 U.S. at 669.

57. *See id.* at 668.

58. *See id*. While golf appears to be a leisurely game, the average golfer will take approximately 13,000 steps per eighteen holes. *See* Mark Townsend, *How Many Steps Do You Do in a Round of Golf?*, GOLF MONTHLY (Sept. 29, 2022), https://www.golfmonthly.com/features/how-many-steps-do-you-do-in-a-round-of-golf [https://perma.cc/7ZGD-EKW8].

59. *See PGA Tour, Inc*., 532 U.S. at 668.

60. *See id.* at 668–69.

61. *See id.* at 690–91.

majority's use of Title III of the ADA to cover independent contractors not covered by Title I.[62] The two reasoned that the ADA should not be construed to allow athletes to have equal chances to win.[63] Justice Scalia deftly summarized his views:

> Agility, strength, speed, balance, quickness of mind, steadiness of nerves, intensity of concentration—these talents are not evenly distributed. No wild-eyed dreamer has ever suggested that the managing bodies of the competitive sports that test precisely these qualities should try to take account of the uneven distribution of God-given gifts when writing and enforcing the rules of competition. And I have no doubt Congress did not authorize misty-eyed judicial supervision of such a revolution.[64]

Justice Kavanaugh holds a similar view. In *SeaWorld of Florida, LLC v. Perez*, then-Judge Kavanaugh declared that sports are inherently riskier than other professions.[65] He wrote, "some risk . . . cannot be eliminated without fundamentally altering the nature of the activity as defined within the industry."[66] Justice Kavanaugh's dissent in *Perez* indicates that athletes should be exempt from the ADA because they willingly accept the physical demands absent in traditional workplaces.

It may seem reasonable to legally treat professional athletes differently than traditional employees (such as teachers or police officers). Few professions garner as much excitement, money, or risk as professional athletes. The professional sports ecosystem is a massive industry, with revenues reaching $403 billion in 2022.[67] Revenue is expected to grow to over $681 billion by 2028.[68]

Despite this, the Supreme Court and lower courts have found no basis for treating professional athletes differently than other workers when

62. *See id.* at 703 (Scalia, J., dissenting). Title I of the ADA covers employment while Title III covers public places and commercial businesses.
63. *See id.*
64. *See id.* at 703–04.
65. 748 F.3d 1202, 1219 (2014) (Kavanaugh, J., dissenting).
66. *Id.*
67. *See* Christina Gough, *Sports Industry Revenue Worldwide in 2022, With a Forecast for 2028*, STATISCA (May 22, 2024), https://www.statista.com [https://perma.cc/79UZ-M75S].
68. *Id.*

applying federal laws.[69] For example, the Supreme Court held in *Brown v. Pro Football, Inc.* [70] that athletes should be treated the same as other organized workers in the field of anti-trust.[71] It makes little sense to carve out legal exceptions or special laws for specific industries such as professional sports. To do so would create an overly complex, piecemeal legal system that could also implicate Equal Protection issues.[72] Although athletes may make substantially more than the average U.S. worker, their income or how they earn that income should not warrant fewer legal protections. Rather, professional athletes deserve the full protection of laws such as the ADA because no amount of income can nullify their disability. The aim of the ADA must apply to athletes as well as every other niche industry.

A. State Law

Although the Supreme Court has ruled that professional athletes should not be treated differently than other workers in the labor law context, state legislatures and federal agencies have a different set of rules for professional athletes. In Texas, for example: Under the Workers' Compensation Act,[73] professional athletes are a "distinct class of employees"[74] that must choose whether to receive benefits by private contract or the Texas Workers' Compensation law.[75]

Pennsylvania and Florida state laws also classify professional athletes as a distinct class of employees under their workers' compensation laws. Under Pennsylvania law, professional athletes are limited in the amount of

69. *See, e.g.*, Indep. Ent. Grp. v. Nat'l Basketball Ass'n, 853 F. Supp. 333, 340 (C.D. Cal. 1994) (holding prohibitions of offseason play under the Sherman Act are valid); Radovich v. NFL, 352 U.S. 445, 452 (1957) (holding football is subject to antitrust laws).

70. *See* 518 U.S. 231 (1996).

71. *Brown*, 518 U.S. at 250.

72. Although several athletes have challenged state laws designed to limit their equal protection rights, these suits have been unsuccessful. *See* Rudolph v. Miami Dolphins, 447 So. 2d 284, 291–92 (Fla. Dist. Ct. App. 1983) (holding a Florida worker's compensation law exception for professional football players was not unconstitutional); Lyons v. Workers' Comp. Appeal Bd. (Pittsburgh Steelers Sports, Inc.), 803 A.2d 857, 862 (Pa. Commw. Ct. 2002) (holding a Pennsylvania state law capping professional sport players' disability compensation does not violate Equal Protection Clause).

73. *See* TEX. LAB. CODE ANN. § 406.095 (West 2025).

74. Great Divide Ins. Co. v. Fortenberry, No. 05-19-01541-CV, 2023 WL 4557623, at *5 (Tex. Ct. App. 2023).

75. *Id.* at *5–6; *see* 28 TEX. ADMIN. CODE 112.401(a) (2024).

partial disability benefits they may receive if their weekly wage is more than eight times the weekly wage of the average Pennsylvania employee.[76] Florida law is much more explicit in its prohibition on professional athletes receiving equal treatment under its workers' compensation laws. Florida's Workers' Compensation Law states that the term "employment" does not include those who are professional athletes.[77] Kansas and California workers' compensation laws allow athletes to substantively have the same rights as other workers concerning workers' compensation.[78]

Federal agencies also view professional athletes differently than "traditional" employees. The Occupational Safety and Health Administration (OSHA) was created to ensure that employees are provided with a safe work environment.[79] Sports, specifically football, are often extremely dangerous for players and produce thousands of acute injuries each year.[80] Nevertheless, OSHA has yet to assert its power over the NFL, even though it has the authority to do so.[81] So, while in theory these laws apply to professional athletes, in practice there are substantial differences.

B. Predictive AI and Sport Innovation

The ADA and AI are not typically paired together. However, recent developments have intertwined these topics and posed puzzling legal questions. Professional sports organizations have always searched for innovative ways to prepare players for games and recover their bodies postgame. Teams have started to invest heavily in AI to improve player performance and safety.[82] Many of these changes seemed outlandish at the

76. *See* 77 PA. CONS. STAT. § 565 (2024).

77. *See* FLA. STAT. § 440.02(1)(c)(3) (2024).

78. *See* KAN. STAT. ANN. § 44-508(b) (2024); CAL. LAB. CODE § 3600.5 (West 2024).

79. *See Summary of the Occupational Safety and Health Act*, EPA, https://www.epa.gov [https://perma.cc/8VQE-F793] (last updated Sept. 9, 2024).

80. For each season, between 2009 and 2015, there was an average of over 1,000 injuries in preseason practices and games. *See* CHRISTOPHER R. DEUBERT ET AL., HARV. L. SCH., PROTECTING AND PROMOTING THE HEALTH OF NFL PLAYERS: LEGAL AND ETHICAL ANALYSIS AND RECOMMENDATIONS 78–79 (2016), https://footballplayershealth.harvard.edu/wp-content/uploads/2016/11/01_Full_Report.pdf [https://perma.cc/RW6W-VF3R]. Additionally, there was an average of nearly 1,800 injuries in regular season practices and games. *Id.* In these seasons, there was an average of almost six injuries per regular season game. *Id.*

81. *See* Adam M. Finkel et al., *The NFL as a Workplace: The Prospect of Applying Occupational Health and Safety Law to Protect NFL Workers*, 60 ARIZ. L. REV. 291, 292 (2018).

82. *See* MarketsandMarkets Research Pvt. Ltd., *The Rise of AI in Sports Market: A $2.61 Billion*

time but were quickly adopted when teams saw their competitors gaining an edge.

For example, in the 1960s at the University of Florida (UF), Gator athletes were suffering in the scorching heat due to imbalances of their electrolytes, blood sugar, and/or blood volume.[83] UF kidney disease specialist Robert Cade studied the issue and created a new drink called "Gatorade" to remedy these issues.[84] This innovative drink led the Gators to an 8-2 season in 1966 and had UF's competitors searching for UF's secret "Kickapoo Juice."[85] The drink was so heavily sought after that, in 1967, Cade and his team of inventors began marketing the drink nationwide.[86]

As exemplified by Cade's invention, athletes and professional clubs continuously innovate to retain their competitive edge. As of 2021, more than fifty professional soccer clubs have implemented AI tools to help predict which players are at risk of suffering an injury.[87] The Spanish soccer club La Liga is one such organization. In its first year of implementing the AI tool, Zone7, the club's head of performance noticed an initial 40% reduction in injury volume and a 66% reduction in injury volume in the club's second year of using the technology.[88]

However, soccer is not the only sport using AI to improve player health and organizational decision-making. Teams in the MLB and the NFL are also using innovative AI technology. On an organizational level, the NFL has expressed interest in using AI to determine which plays cause the most injuries and which positions are most at risk for injury.[89] On a club level, the NFL's Seattle Seahawks have expanded their usage of AI in the drafting

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Industry Dominated by Tech Giants—Catapult Group (US) and IBM (US) | MarketsandMarkets™, YAHOO! FIN. (Dec. 18, 2024), https://finance.yahoo.com [https://perma.cc/3FGT-WUMA].

83. *See* Joe Kays & Arline Phillips-Han, *Gatorade: The Idea that Launched an Industry*, 8 EXPLORE MAG. (2003), https://research.ufl.edu/publications/explore/v08n1/gatorade.html [https://perma.cc/C6CG-DFAN].

84. *See id.*

85. *See id.*

86. *See id.*

87. *See* Mark Ogden, *Soccer Looks to AI for an Edge: Could an Algorithm Really Predict Injuries?*, ESPN (Feb. 4, 2021, 11:35 AM), https://www.espn.com/soccer/story/_/id/37613690/algorithm-really-predict-injuries [https://perma.cc/9NB5-XM6X].

88. *See id.*

89. *See* Kelly Langmesser, *Top Finishers in NFL Data Challenge Improve League's Ability to Predict Injuries on the Field Using AI*, NFL PLAYER HEALTH & SAFETY (Aug. 29, 2023), https://www.nfl.com/playerhealthandsafety/resources/ [https://perma.cc/Z87E-RZ9C].

process.[90] Patrick Ward, an executive with the Seahawks said: "With [AI technology], we can run models against all players and identify unique guys that stand out or bring people into the fold that haven't gotten the same amount of evaluation as other players—because they played at a smaller school or played in a smaller program."[91]

In the MLB, over one-third of clubs have begun using AI to predict which pitchers in the draft have the highest risk of suffering future substantial arm injuries.[92] This technology is sure to be adopted by more teams due to the striking increase in elbow injuries experienced in the 2023 season. As of June 6, 2023, elbow injuries in the MLB increased by 44% from 2022.[93]

This increase in injuries should make teams and the league more inclined to enlist the help of AI because an elbow injury experienced by a pitcher can sideline the player for nine months or more[94]—causing significant losses to teams, including financial loss. When players are sidelined for an injury, the team often continues to pay their salary.[95] Since the average starting pitcher's salary in 2023 was nearly seven million dollars per year,[96] teams have a strong incentive to properly screen players to

90. *See* Jada Jones, *Hut, Hut, Hike: How This NFL Team Uses AWS to Choose the Right Draft Pick*, ZDNET (Apr. 27, 2023, 7:01 AM), https://www.zdnet.com/article/hut-hut-hike-how-this-nfl-team-uses-aws-to-choose-the-right-draft-pick/ [https://perma.cc/4G6N-AFUY].

91. *Id.*

92. *See* Joe Lemire, *MLB to Use Uplift Labs' Motion Capture Technology for Draft, Appalachian League and Draft Combine*, SPORTS BUS. J. (June 28, 2023), https://www.sportsbusinessjournal.com/Daily/Issues/2023/06/28/Technology/mlb-uplift-labs.aspxp [https://perma.cc/L63Q-RSSF]. MLB teams use Uplift Lab's technology which analyzes a pitcher's arm angle and release to determine which players have mechanics that make their arms most at risk of an ulnar collateral ligament injury. *Id.* This injury normally requires "Tommy John" surgery (elbow reconstruction) and can cause players to miss significant periods of time. *Id.*

93. *See* Bob Nightengale, *MLB Continues to be Stricken with Nightmare Epidemic: Elbow Injuries*, USA TODAY (June 6, 2023, 7:26 AM), https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2023/06/06/mlb-elbow-shoulder-pitching-injuries-on-rise/70291730007/ [https://perma.cc/8UPW-RL6G].

94. *See Tommy John Surgery*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/treatments/25117-tommy-john-surgery [https://perma.cc/X3NN-DY5N] (last reviewed July 5, 2023). The recommended recovery time of an elbow injury, also known as a "Tommy John" injury, is at least nine months, but "probably longer." *Id.* Additionally, the injured player must wear a hinged brace, attend physical therapy, and work with their sports medicine team to monitor progress. *Id.*

95. In the 2019 MLB season, for example, roughly $318,667,058 was paid to pitchers unable to perform because of injuries. *See* Josh Myers, *The Cost of Pitching Injuries*, DVS BASEBALL (Nov. 18), https://www.dvsbaseball.com/articles/the-cost-of-pitching-injuries [https://perma.cc/KE93-GTL9].

96. *See* Sandro Azerrad, *What is the Average MLB Salary?*, GAIMDAY, https://www.gaimday.com/blog/average-mlb-salary/#t-1682427813633 [https://perma.cc/92LU-

prevent investments in high-risk players.

Although teams are grateful for the new technology assisting their multimillion-dollar personnel decisions, using AI to predict which athletes may become injured may violate the ADA. The ADA prohibits employers from discriminating against employees with disabilities. Therefore, several questions remain: What about those employees that are presently healthy but are at risk of future injury? Should the ADA protect these employees? Does it make a difference if the employee is a professional athlete?

C. The ADA in the Eleventh Circuit

While not addressing AI predictors, the Eleventh Circuit considered whether presently healthy employees are covered under the ADA/ADA as Amended in *Equal Employment Opportunity Commission v. Massage Envy-South Tampa*.[97] In 2017, the EEOC filed suit against plaintiff Kimberly Lowe's employer, Massage Envy, alleging that it violated the ADA when it terminated Lowe because Massage Envy feared she would contract Ebola[98] while visiting her sister in Africa.[99] Massage Envy previously approved Lowe's vacation request but threatened to terminate her if she went ahead with the trip.[100] Despite Massage Envy's threat, Lowe went to Africa.[101] Upon her return, Massage Envy refused to allow Lowe to resume working.[102] Lowe later filed a discrimination suit against Massage Envy claiming that it violated the ADA when it terminated her because of its fear she would become disabled.[103] The EEOC specifically posited its claims under the "regarded as" prong of the ADA as Amended's definition of disability.[104]

At trial, Massage Envy admitted it terminated Lowe solely because of

AWC5].

97. 938 F.3d 1305, 1315 (11th Cir. 2019).

98. Ebola is an infectious disease spread by contact with infected bodily fluids or infected individuals. *See Ebola Virus Disease*, PAN AM. HEALTH ORG., https://www.paho.org/en/topics/ebola-virus-disease [https://perma.cc/47GP-3547]. The current mortality rate for Ebola ranges from 55% to 60% but has been as high as 90%. *Id.*

99. *See Massage Envy*, 938 F.3d at 1311–12.

100. *See id.* at 1311.

101. *See id.*

102. *See id.*

103. *See id.* at 1311–12.

104. *See id*. at 1312.

its fear she would contract Ebola.[105] Still, the district court rejected Lowe's ADA claims.[106] The Eleventh Circuit Court of Appeals agreed with the district court and declined to expand the ADA as Amended's definition of disability to protect presently healthy workers who have the potential to become disabled.[107] The court reasoned that the correct time to determine if a plaintiff is disabled is when the adverse employment action occurs.[108] Therefore, a plaintiff must be regarded as disabled at the time of the adverse action to gain relief.[109] The Eleventh Circuit declined to allow an employer's fear of future disability, even if unfounded,[110] to be actionable under the ADA. Other courts, with similar cases before them, have followed the Eleventh Circuit's disability timing principle.[111]

D. What is a Disability?

In *EEOC v. UPS Ground Freight, Inc.*,[112] a UPS employee sued his employer, alleging that UPS violated the ADA when it prohibited the employee from resuming his job after a minor stroke.[113] According to the

105. *See id.* at 1310.
106. *See id.*
107. *See id.* at 1318.
108. *See id*. at 1316.
109. *See id*. at 1315.
110. There was not an outbreak in Ghana at the time Lowe took her trip. *See id.* at 1319. *See also WHO Ghana Ebola Viral Disease (EVD) Preparedness and Response Activities*, WORLD HEALTH ORG. (May 30, 2014), https://www.afro.who.int/news/who-ghana-ebola-viral-disease-evd-preparedness-and-response-activities [https://perma.cc/SMH5-3AWG].
111. *See generally* Shell v. Burlington N. Santa Fe Ry., 941 F.3d 331, 337 (7th Cir. 2019) (holding a company did not violate ADA when it refused to hire him because fear he would become disabled due to his obesity); EEOC v. UPS Ground Freight, Inc., 443 F. Supp. 3d 1270, 1287 (D. Kan. 2020) (holding defendant did not violate the ADA when it changed plaintiff's position to a job with reduced pay due to defendant's fear that plaintiff's past stroke would reoccur); Sharikov v. Philips Med. Sys. MR, Inc., 659 F. Supp. 3d 264, 286 (N.D.N.Y. 2023) (holding defendant did not violate the ADA when it fired plaintiff due to risk of developing COVID-19); Mishos v. McKesson Corp., No. 2:22-cv-01666, 2023 WL 5935804, at *10 (S.D. Ohio Sep. 12, 2023) (holding plaintiff was not protected by ADA when terminated due to fears she would contract COVID-19 due to her being unvaccinated); Aiken v. Station Casinos LLC, No. 2:22-cv-02108-ART-EJY, 2023 WL 4706004, at *5 (D. Nev. July 21, 2023) (holding defendant did not violate ADA when it refused to allow plaintiff into its restaurant because she was not wearing a facial covering); Earl v. Good Samaritan Hosp. of Suffern, No. 20 CV 3119 (NSR), 2021 WL 4462413, at *6 (S.D.N.Y. Sept. 28, 2021) (finding plaintiff failed to allege his employer violated ADA based on his potential to infect patients with COVID-19 because the "perception of infectiousness is not the same as perceived disability").
112. 443 F. Supp. 3d 1270 (D. Kan. 2020).
113. *See id.* at 1275.

suit, the employee worked as a road driver for UPS for several years before his stroke.[114] After his stroke, the employee sought temporary non-driving work while he recovered.[115] At the time of the employee's request, UPS policy only allowed drivers to receive non-driving reassignment for nonmedical reasons such as a DUI conviction.[116] In a later enacted collective bargaining agreement, this policy was altered to allow drivers with medical disabilities to be reassigned to non-driving duties, but at 10% less pay than drivers reassigned for non-medical reasons.[117]

The court held that the plaintiff must establish a prima facie case by showing, at the time of the adverse action, the employee was disabled as defined by the ADA as Amended.[118] The EEOC claimed that the employee was "disabled" under the ADA as Amended because UPS either regarded him as disabled or the employee had a record of a disability.[119] To show that an employee had a legally recognizable disability, they must show: "(1) [they have] an actual or perceived impairment, (2) the impairment is neither transitory nor minor, and (3) the employer was aware of and therefore perceived the impairment at the time of the alleged discriminatory action."[120] The trier of fact must determine whether an impairment is transitory or minor using an objective standard.[121] Legislatures statutorily define "transitory" as something lasting, or expecting to last, less than six months.[122] The court held, regardless of accommodations, the employee was previously qualified to perform the essential functions of the job and a genuine issue of material fact existed as to whether he was discriminated against.[123] Additionally, the court adopted the *Massage Envy* language that the impairment must be current—but remanded to determine whether the impairment was current in this case.[124]

In order to show that a plaintiff has a record of disability, they must

114. *See id.* at 1276.
115. *See id.* at 1278.
116. *See id.*
117. *See UPS Freight to Pay $75,000 to Resolve Disability Discrimination Lawsuit*, U.S. EEOC (July 29, 2020), https://www.eeoc.gov [https://perma.cc/7VE2-7CGX].
118. *See UPS*, 443 F. Supp. 3d at 1287.
119. *See id.*
120. *Id.* at 1285.
121. *See* 20 C.F.R. § 1630.15(f).
122. *See id.*
123. *UPS*, 443 F. Supp. 3d at 1285.
124. *See id*. at n.80.

show that they have a history of or have been misclassified as having an impairment that substantially limits one or more major life activities.[125] The list of major life activities includes caring for oneself, performing manual tasks, breathing, learning, communicating, and working.[126] While working *is* considered a major life activity, some courts find that an employee must do more than show their impairment prevents them from working a singular job. Rather, the employee must demonstrate the impairment limits them from working in a broad range of jobs.[127] In *EEOC v. UPS Ground Freight, Inc.*,[128] a Kansas federal district court held that, when viewed in the light most favorable to the plaintiff, there was sufficient evidence that the plaintiff's stroke substantially limited his ability to eat, write, lift, and grip, but required more evidence to decide as a matter of law whether this interference impaired them from working a broad range of jobs.[129]

E. Case Law Applied to Professional Athletes

While the preceding cases discuss the ADA's applicability to "traditional" employees, case decisions help to inform professional athletes of whether they will be protected. Suppose a hypothetical MLB pitcher enters free agency.[130] He has no record of major arm injuries, but an interested team's AI and tool flagged him as likely to be injured and elbow (or "Tommy John") surgery[131] in the coming season due to his mechanics. The team significantly discounts their salary offer due to the potential for

125. 29 C.F.R. § 1630.2(k)(1); *see also UPS*, 443 F. Supp. 3d at 1281.

126. 42 U.S.C. § 12102(2)(A) (other activities in the non-exhaustive list include: seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, reading, concentrating, thinking, and communicating).

127. *See* Nurriddin v. Bolden, 818 F.3d 751, 756–757 (D.C. Cir. 2016) (citing Duncan v. Wash. Metro. Area Transit Auth., 240 F.3d 1110, 1114 (D.C. Cir. 2001)).

128. 443 F. Supp. 3d 1270 (D. Kan. 2020).

129. *Id.* at 1284–85.

130. Once a player has completed six years of Major League service time, or is released by their team before reaching their service time, they are free to sign with any team without restrictions. *See Free Agency*, MLB, https://www.mlb.com/glossary/transactions/free-agency [https://perma.cc/TW4B-UYUU].

131. Named after an MLB pitcher of the same name, Tommy John surgery is a common procedure for MLB players. The procedure replaces a fully or partially torn ulnar collateral ligament (UCL) with a tendon from elsewhere on the player's body or from a cadaver. Players who undergo the procedure are normally given a twelve to eighteen month recovery timetable. *See Tommy John Surgery*, MAJOR LEAGUE BASEBALL, https://www.mlb.com/glossary/injuries/tommy-john-surgery [https://perma.cc/K2US-EDC9].

injury. Should the ADA protect him?

Because the hypothetical pitcher has no record of disability, he must attempt to persuade the court that he *is* disabled, or that he is regarded as disabled.[132] Unfortunately, it is unlikely either will work. The player is not currently disabled even though he was offered a lower salary for his performance. While the ADA does protect disabled employees due to the major life activity of working,[133] the plaintiff must show their impairment prevents them from working in a *wide class of jobs*.[134] The pitcher's claim is also harmed by the fact that he was offered a contract and thus *can* work as a pitcher, albeit for less money. This evidence would show that the pitcher's injury has not prevented him from working in a wide class of jobs. Rather, the contract offer is evidence that the impairment is not so great as to prevent him from pitching in the MLB.

Further, this pitcher will not be able to prove his impairment is a disability under the ADA's "regarded as" prong[135] because he was healthy when the team offered him a contract. Indeed, the pitcher had a perceived *future* injury, not a current or past injury. And the employer was aware of the perceived injury at the time it made its decision to offer a contract with a lower salary. Sadly for the pitcher, the AI tool flagged him for a potential injury even though he was not presently injured. Even if the facts are changed to show that the team knew of previous injuries and regarded the pitcher as "injury prone," the outcome remains the same. The pitcher must presently have an impairment that prevents him from working a wide class of jobs.[136] While it seems counter-intuitive that a team using AI to predict which players will be injured would not violate the ADA, we know that players who are healthy but have a *history* of injuries will not receive protections under the ADA. So why would a future prediction be treated differently than a history of injuries?

132. 29 C.F.R. § 1630.2.

133. An individual is considered disabled if their condition substantially limits their ability to work. However, if "a plaintiff's condition only leaves him unable to perform a single, specific job" they have failed to establish their condition substantially impairs their major life activity of working. *See* Woolf v. Strada, 949 F.3d 89, 94 (2d Cir. 2020).

134. 29 C.F.R. § 1630 (emphasis added).

135. *Id.* § 1630.2(l).

136. *Id.* § 1630.

II. DOES THE ADA PROTECT PLAYERS FIRED FOR PREDICTION OF FUTURE INJURY?

To most people, it does not matter if athletes are protected by the ADA. We tend not to have empathy for professionals or athletes who possess a range of privileges not held by "traditional" workers, especially when one of those privileges is incredible compensation. Five years ago, the average salary of a professional athlete in the MLB, NFL, NHL, and NBA was nearly sixty-seven times greater than the median American household income.[137] The number is likely higher now.

However, as AI begins to control more employment decisions, professional athletes will be the guinea pigs of how ADA protections apply to AI advancements. Professional sports organizations are uniquely positioned to engage AI tools to protect employee health due to the extensive physical data already collected by organizations.[138] These organizations have the funds and incentives to heavily invest in AI technology. But, AI adaptations and investments in the traditional employment context are already happening; and it is just a matter of time before AI is widely used to analyze employee health.[139] As teams and other organizations invest in AI, it will become cheaper and more accurate.[140] Employers, even those in non-physical work environments, have an incentive to hire and retain a healthy workforce. Healthy workers miss less time, are more productive, are cheaper to insure, and generally have higher

137. *See* Gough, *supra* note 15 (average American salary in 2019 was approximately $68,000); *see also* Jessica Semega et al., *Income and Poverty in the United States: 2019*, U.S. CENSUS BUREAU (Sept. 15, 2020), https://www.census.gov/library/publications/2020/demo/p60- 270.html#:~:text=The%202019%20real%20median%20earnings,2018%20ratio%20(Figure%205) [https://perma.cc/YE3G-M5WL].

138. Douglas N. Masters & Seth A. Rose, *Use of Athletes' Health Data Looms Large for Players, Leagues*, CHI. DAILY L. BULLETIN, Apr. 9, 2019.

139. *See* Grant Gamble, *AI's Role in Enhancing Wellbeing in the Workplace and Beyond*, GLOB. WELLNESS INST. (May 7, 2024), https://globalwellnessinstitute.org/global-wellness-institute-blog/2024/05/07/ais-role-in-enhancing-wellbeing-in-the-workplace-and-beyond/ [https://perma.cc/TQ7Q-5QRJ].

140. Early buyers of new goods are often willing to pay a higher price to be among the first consumers to own the product. *See* Will Kenton, *What is an Early Adopter, and How Does it Work (With Examples)?*, INVESTOPEDIA (Dec. 27, 2022), https://www.investopedia.com/terms/e/early-adopter.asp#:~:text=Early%20adopters%20in%20the%20business,first%20to%20try%20a%20product [https://perma.cc/WH6D-CFXF]. Prices generally trend down as the product becomes more mainstream. *Id.*

morale.[141]

Currently, the employer practice of using AI to predict which current or potential employees will become sick or injured cannot serve as the basis for a cognizable ADA claim.[142] However, this contravenes the very purpose of the ADA: to prevent those with impairments from facing adverse actions because of their disability. A presently healthy individual who is identified as being at risk to become disabled should receive the same protection against discrimination as those who are presently disabled. Simply, it should not matter whether the impairment is current or future. The focus should be on whether the discrimination is based on an uncontrollable physical impairment. Therefore, laws and court decisions must be analyzed to determine whether AI predictive tools should be allowed in the workplace to influence payment and retention practices related to predicted disability.

A. A Modern Approach to Disability

PGA v. Martin[143] was decided over twenty years ago when disability rights looked different than today. Since *Martin*, the United States has become more accepting of people with disabilities and more willing to challenge private companies over failure to adhere to the ADA. But, the Supreme Court's demographics also look very different since *Martin*. In *Martin*, Justice Stevens was joined in his significant majority opinion by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer.[144] All justices have since passed or retired from the Court.[145] The only justice remaining on the Court today is Justice Thomas—who joined the late Justice Scalia's dissent.[146] Further, the ideological composition of the Court changed since *Martin*. At the time of the decision: The Supreme Court was composed of three staunch conservative justices, two moderate conservative justices, and four moderately liberal justices.[147]

141. *See* Destiny Pope, *Good Health Boosts Fitness, Morale & Productivity*, INDUS. SAFETY & HYGIENE NEWS (Feb. 18, 2019), https://www.ishn.com/articles/110222-good-health-boosts-fitness-morale-productivity [https://perma.cc/PUU5-NEHW].

142. *See* EEOC v. Massage Envy, 938 F.3d 1305, 1315 (11th Cir. 2019).

143. 532 U.S. 661 (2001).

144. *See id.*

145. *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/W3TY-V2TS].

146. *See generally Martin*, 532 U.S. at 691–705.

147. *See* Michael C. Dorf, *The 2000–2001 Supreme Court Term in Review, Part II*: *Individual*

Today, the Court is composed of six conservative justices (two considered moderately conservative) and three liberal justices.[148] These changes in the ideologies could lead to a different result if *Martin* is ever revisited. Justice Kavanaugh already expressed views that athletes and performers may not have the same coverage as those in other industries under federal laws.[149] Further, today's Court is less persuaded by adhering to precedent, as evidenced by recent decisions.[150]

The implications of a Court ruling the ADA does not apply to athletes and performers would lead to sweeping changes to disability law. First, athletes would lack protection under the ADA. While players would still receive compensation for injuries if the injury is fully guaranteed, or if they have disability insurance,[151] a ruling that the ADA does not apply to athletes could lead to them being categorically excluded from other rights such as social security disability benefits or workers' compensation due to the physically intensive nature of their unique profession. Second, while the public may not care much about whether athletes are covered by the ADA, overturning *Martin* could also have implications for those who work in "traditional" but still risky professions (i.e., mining).

Even if *Martin* is not revisited, athletes are at risk of facing adverse employment decisions due to perceived or predicted injuries. Multiple circuits have aligned themselves with *Massage Envy*.[152] In this case, the court held that an employee was not regarded as disabled because the ADA does not extend to a potential future disability that a healthy person may

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Rights: How the Justices Defied Expectations, FINDLAW (July 11, 2011), https://supreme.findlaw.com [https://perma.cc/7F3S-VP4Y].

148. *See* Oriana González & Danielle Alberti, *The Political Leanings of the Supreme Court Justices*, AXIOS (July 3, 2023), https://www.axios.com/2019/06/01/supreme-court-justices-ideology [https://perma.cc/E56N-UJAB].

149. SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202, 1219 (2014) (Kavanaugh, J., dissenting).

150. *See* Michael Gentithes, *Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 86 (2020). There are three significant examples in the last three years. *See, e.g.*, Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 412 (2024) (explicitly overturning forty-year-old *Chevron* deference to federal agencies in interpreting ambiguous federal agency statutes); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 215 (2022) (overturning *Roe v. Wade* and *Planned Parenthood of Southeastern Pa v. Casey*, the cases that once established the federal rights to abortion procedures); Edwards v. Vannoy, 593 U.S. 255, 262 (2021) (overturning *Teague v. Lane*, the case that required jury unanimity).

151. *See* Irwin A. Kishner, *Legal Considerations When a Professional Athlete Is Injured*, SPORTS LITIGATION ALERT (Mar. 28, 2008), https://sportslitigationalert.com/legal-considerations-when-a-professional-athlete-is-injured/ [https://perma.cc/8XPW-69CE].

152. 938 F.3d 1305, 1315 (11th Cir. 2019).

experience.[153] Therefore, it seems likely the ADA will not protect athletes from adverse actions based on AI-predicted future injuries. To date, no circuit has found that future injuries are covered by the ADA, even if those future injuries are based on previous conditions that have subsided. Courts have simply stated that a person who is presently healthy is not protected by the ADA for decisions that are made pursuant to fears of future injury.[154]

B. Who is "Healthy"?

Defining what it means to be "healthy" is difficult and complex. The World Health Organization (WHO) Constitution states: "Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity."[155] Courts, like *Massage Envy*, seem to take a different approach. There, the Eleventh Circuit reasoned that "healthy," in the disability discrimination context, means the person does not presently have the impairment alleged to be the basis of the adverse employment action.[156]

Unlike illnesses, physical injuries have a murkier exact time of injury. For example, a COVID-19 test allows a person to know in fifteen minutes whether they have the virus.[157] However, an injury like an ACL tear is often preceded by repeated microdamage.[158] Therefore, a court tasked with defining the point when a person transitions from being healthy to becoming injured is more difficult. With COVID-19, the identification of when a person transitions from healthy to ill is aided by the date of testing or known exposure. But a court tasked with pinpointing the date of a physical injury must engage in an intensive scientific evaluation best left to trained

153. *Id.*

154. *See generally supra* note 111 (finding employers may consider potential future injuries and illnesses when making employment decisions).

155. *Health and Well-Being*, WORLD HEALTH ORG., https://www.who.int/data/gho/data/major-themes/health-and-well-being [https://perma.cc/9U3N-Y343].

156. 938 F.3d 1305, 1315 (11th Cir. 2019).

157. Katie Kerwin McCrimmon, *Free At-home COVID-19 Tests Are Available Again. How and When Should You Use Them?*, UCHEALTH (Sept. 9, 2024), https://www.uchealth.org/today/how-when-to-use-rapid-at-home-covid-19-tests/#:~:text=Usually%2C%20people%20can%20see%20their,how%20busy%20the%20labs%20are [https://perma.cc/6Z2J-EN44] (explaining how "people can see their [rapid at home] results in about 15 minutes").

158. *See* Jim Lynch, *Overuse, Or One Bad Move? New View on AC L Tears Prompt Questions on How Athletes Train*, UNIV. MICH. NEWS (July 30, 2019), https://news.umich.edu [https://perma.cc/8W5W-W2JP].

physicians. Physicians are much better equipped to determine the grade of an injury and determine whether that patient is healthy or injured. Furthermore, patients may experience different pain tolerances or discomfort levels.[159] While one person may not notice a grade one ACL injury, another patient may find that walking causes too much discomfort.

Professional sports teams commonly consider an athlete's past and present injuries when deciding whether to offer them a contract and at what salary.[160] It is an important part of the team's pre-contract diligence and plays a significant role in the pre-draft process.[161] In the NFL pre-draft, athletes undergo rigorous physical testing, including a physical to determine their athletic ability.[162] This testing, however, is intrusive on the player's medical autonomy and has been criticized as a violation of the ADA.[163] A team's consideration of a player's past injuries is inherent to the pre-draft process.[164] For example, a team may be hesitant to draft a running back in their first-round pick if the running back has a history of knee injuries. Previously injured players could see their draft stock drop due to a team's fear of re-injury. Physical analysis aside, draft position also influences how much a player will be paid.[165] Therefore, it follows that preventing teams from discriminating against players for past injuries, because these past

159. Christopher S. Nielsen et al., *Individual Differences in Pain Sensitivity: Measurement, Causation, and Consequences*, 10 J. PAIN 231, 231 (2009) (highlighting that variability of pain ratings of patients with the same disease is vast).

160. *See* Eric S. Secrist, *The Financial and Professional Impact of Anterior Cruciate Ligament Injuries in National Football League Athletes*, ORTHOPEDIC J. OF SPORTS MED., Aug. 30, 2016, at 5, https://doi.org/10.1177/2325967116663921 [https://perma.cc/S7X4-7GDJ].

161. *See* Greg Eum, *Teams That Draft Injured Players Must Predict Player Value*, THE CAMPANILE (May 18, 2016), https://thecampanile.org/10361/sports/teams-that-draft-injured-players-must-predict-player-value/ [https://perma.cc/45AQ-MTQH]. The NFL pre-draft tests prospects mental and physical attributes through various activities such as runs, jumps, and drills. *See What Is the NFL Scouting Combine and Tips on Getting Involved*, BLAZEPOD (June 27, 2024), https://www.blazepod.com/blogs/all/what-is-the-nfl-scouting-combine-and-tips-on-getting-invited [https://perma.cc/FX83-PLQQ]. This widely televised event became a public spectacle of an athlete's physical attributes. Fans watch and hope their team will draft the next superstar.

162. *See NFL Scouting Combine*, NAT'L FOOTBALL LEAGUE, https://operations.nfl.com/journey-to-the-nfl/the-next-generation-of-nfl-stars/nfl-scouting-combine/ [https://perma.cc/22G6-RC8R].

163. *See* Christopher Deubert, *Sports Leagues Face Uncertain ADA Landscape*, CONSTANGY, BROOKS, SMITH & PROPHETE, LLP (June 20, 2023), https://www.constangy.com/ [https://perma.cc/FTM9-ZFKR].

164. *See* Eum, *supra* note 161.

165. *See* Big Lead, *NFL Draft Pick Salary by Round: How Much do Rookies Make?*, THE BIG LEAD (Feb. 20, 2024, 4:40 PM), https://www.thebiglead.com/posts/nfl-draft-salary-pick-round-list-01gywhx5ahr3 [https://perma.cc/CJP2-AWGM].

injuries may not be reaggravated, is the best policy for players because it ensures that past injuries will not affect future salaries. Further, a team's intense scrutiny of past injuries could lead to players not disclosing injuries out of fear of reduced salary due to past injuries. Not disclosing injuries could lead to more serious injuries or potentially chronic conditions.

While players may rejoice if past injuries can no longer be considered when making future employment decisions, professional sports teams would be forced to alter their evaluation processes. Teams may argue that professional athletes' success and ability to compete are tied to their ability to stay healthy: that their past injuries are as much a part of their resume as their fastball speed or batting average. Further, teams may point to current Supreme Court justices' dissents as evidence that professional athletes are truly unlike any other employee because they make vast sums of money because of their physical prowess.[166]

Ultimately, Congress is in the best position to decide whether past injuries should be covered by the ADA. Congress passed the ADA and has amended it when it disagreed with court decisions.[167] Therefore, it is most logical to have them make the initial determination of whether past injuries should be covered by the ADA. Furthermore, about six percent of Americans experience an activity-limiting injury every three months.[168] This is an enormous class of Americans who may be discriminated against due to their past injuries. Protection of minorities has long been an aim of Congress. And, as the most direct representation of the people, they are best suited to decide if the ADA should expand to future injuries.[169]

While Congressional action may be the most logical, players should not wait on Congress to protect them from being discriminated against due to past or future injuries. Rather, they should use their bargaining power to prohibit teams from using this information to predict if another injury is imminent. To date, most athletes have not included a collective bargaining

166. *See* Ruben Garcia, *Judge Kavanaugh's Dissent in OSHA Case Reflects Deep Skepticism Toward Federal Agency Enforcement of Workplace Protections*, AM. CONST. SOC'Y (July 13, 2018), https://www.acslaw.org/expertforum/judge-kavanaughs-dissent-in-osha-case-reflects-deep-skepticism-toward-federal-agency-enforcement-of-workplace-protections/ [https://perma.cc/8S82-H4E8].

167. *See Questions and Answers*, *supra* note 41.

168. *See* AMY E. CHA & ZUN WANG, CTR. DISEASE CONTROL, U.S. DEP'T HEALTH & HUM. SERVS., ACTIVITY-LIMITING INJURY IN ADULTS: UNITED STATES, 2020—2021, at 1 (2023), https://www.cdc.gov/nchs/products/databriefs/db476.htm [https://perma.cc/6Z6G-CXGD].

169. *See* JOHN V. SULLIVAN, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 110–19, at 1–2 (2007), https://www.congress.gov [https://perma.cc/HM84-Y9JX].

agreement clause prohibiting teams from considering past injury.[170] Players who have not experienced multiple injuries or a significant injury would prefer that the status quo remains, as their durability can increase their salary.[171] But players who *have* suffered an injury (or injuries) have less control—the very reason ADA sought to protect workers with disabilities or injuries.[172] Ultimately, it appears injury-prone athletes have lost the battle to protect against discrimination of past or future injuries—but the war is still waging.

C. Legal Implications of Predicting Future Injuries

AI tools create significant future obstacles for athletes. Unlike past injuries, AI tools seek to predict the future by using computer models to analyze the player's physical attributes, movements, and level of fatigue.[173] Therefore, all players are at risk of being automatically flagged as a potential liability. Players should push Congress or their unions to prevent the use of AI tools from being implemented. On the other hand, because of significant investments in players, teams are incentivized to use AI.[174] Ultimately, Congress is better suited to decide what the ADA should cover. When determining whether professional sports organizations should be allowed to

170. *See*, *e.g.*, J.J. Cooper, *Details from the New 2022–2026 Collective Bargaining Agreement*, BASEBALL AM. (May 9, 2023), https://www.baseballamerica.com/stories/details-from-the-new-2022-2026-collective-bargaining-agreement/ [https://perma.cc/QPR3-AC5F] (stating past injury considerations were not included in MLB's CBA that runs through 2026).

171. *See* Secrist, *supra* note 160, at 5.

172. 42 U.S.C. § 12101(a)(1).

173. *See* Carmina Liana Musat et al., *Diagnostic Applications of AI in Sports: A Comprehensive Review of Injury Risk Prediction Methods*, DIAGNOSTICS J., Nov. 10, 2024, at 10, https://pmc.ncbi.nlm.nih.gov/articles/PMC11592714/#:~:text=AI%20in%20Team%20Sports,warnings%20based%20on%20cumulative%20impacts [https://perma.cc/WLU9-N53M].

174. The MLB, NFL, and NBA each pay over forty percent of their revenue back to their players and player associated expenses. George Drummond Evans, The Profitability of Owning a Professional Sports Team in the United States, at 15 (May 15, 2023), https://openresearch.okstate.edu/server/api/core/bitstreams/a6f97c5d-f507-4ed4-a0cd-6ffba7e1dcc4/content [https://perma.cc/H649-GPLT] (B.A. thesis, Oklahoma State University Honors College). While teams spend enormous sums of money on players, they also receive incredible returns on their investments. The average NFL team had profits of $137 million in the 2021–2022 season. Kurt Badenhausen, *Every NFL Team Sees More Profit Than Any Premier League Club*, SPORTICO (Sept. 10, 2023, 8:00 AM), https://www.sportico.com/leagues/football/2023/nfl-epl-profits-comparison-1234737931/ [https://perma.cc/9649-ZZ7W]. While the athletes have immense privilege, many injuries stay with them for life. Often athletes suffer significantly in their forties, while traditional workers of the same age live longer, healthier lives because they did not push their body to the absolute max for decades.

use AI to predict future injuries, Congress must carefully weigh the advantages and disadvantages of this practice. But there is no clear answer to this issue.

Allowing teams to use AI to predict future injuries is aligned with previous circuit court rulings on whether the ADA should cover future impairments.[175] As the courts have pointed out, the ADA only protects currently disabled individuals.[176] If the ADA is expanded to protect those who may become impaired in the future, nearly every athlete would be protected if they can point to some current ailment that might develop into a disability under the ADA as Amended. This expansive definition of "disability" follows Congress's directive to broadly construe the meaning of disabled, but it also raises slippery slope and ambiguity arguments.[177] Future injuries are not certain to occur. And even if the predicted injury *does* occur, it is not certain to result in a disability. So, courts and teams would be forced into a precarious position of determining whether a future injury is likely to occur and result in a disability.

Even if a team uses AI to predict future injuries, there is no guarantee that the use of the technology will result in players receiving reduced salaries or not being offered a contract.[178] Teams could use the information to better craft their rosters. For example, if AI predicts that a running back is likely to tear his Achilles heel at some point in the season, the team could recruit additional running backs as well-prepared alternate players. Currently, if an unexpected injury occurs, teams are left scrambling to replace the fallen athlete with a second-string player.[179] The second-string player often underperforms and, subsequently, the entire team underperforms.[180]

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175. *See generally supra* note 111 (finding employers may consider potential future injuries and illnesses when making employment decisions).

176. *See generally supra* note 109.

177. *See Questions and Answers*, *supra* note 41.

178. For example, MLB superstar Shohei Ohtani signed a record-breaking contract with the Los Angeles Dodgers even though he had an elbow injury at the time of signing. *See* Jeff Passan, *Shohei Ohtani's New Contract Is Just His Latest Feat to Shock the World*, ESPN (Dec. 10, 2023, 12:55 AM), https://www.espn.com/mlb/story/_/id/39078719/shohei-ohtani-contract-los-angeles-dodgers-passan [https://perma.cc/5LA5-4F54].

179. *Process Guide—Depth Charts*, SPORTSDATAIO, https://support.sportsdata.io/hc/en-us/articles/9916710244887-Process-Guide-Depth-Charts [https://perma.cc/YW89-LFFV].

180. *See* D. LaPlaca & J. Elliott, *The Relationship Between Injury Rates and Winning in the National Football League*, INT'L J. OF STRENGTH AND CONDITIONING, 2021, at 9, https://journal.iusca.org/index.php/Journal/article/view/62/156 [https://perma.cc/69WJ-YJ4W].

Professional sports teams' business models rest on being able to produce a high-caliber team each game day. Using AI to predict future injuries helps teams ensure that their substantial investment in players aids this production. For example, in 2018, the NFL Washington Commanders signed quarterback Alex Smith to a ninety-four-million-dollar contract extension.[181] The contract also included seventy-one million in injury protection guarantees.[182] Barely halfway through the season, Smith suffered a gruesome, season-ending leg injury.[183] Smith was sidelined for almost two years[184] and released by the team in early 2021.[185] During this time, the team had a losing record.[186] Smith's injury and the team's subsequent poor performance illustrate why teams want to be insulated from ADA claims for AI-predicted injury. Simply, "sports" is a business and teams that perform better on the field have higher franchise valuations than those that normally lose.[187] The more injuries a team faces, the more likely they are to lose games.[188] Therefore, teams are incentivized to ensure that they draft and sign players who will remain healthy. Using predictive AI can help teams achieve their goals both on and off the field; and any restriction would harm their on-field product and their bottom line. Further, there is some benefit to the players in allowing these AI predictions. If AI can predict a player

181. *See* Scooby Axson, *Report: Redskins QB Alex Smith Signs Extension; To Make $40 Million in 2018*, SPORTS ILLUSTRATED (Mar. 19, 2018), https://www.si.com/nfl/2018/03/19/washington-redskins-alex-smith-contract [https://perma.cc/5B7A-C7PJ]. Redskins is the former name of the Washington Commanders.

182. *See id*.

183. *See* Charean Williams, *Alex Smith's Compound Fracture Will Require 6–8 Month Recovery*, PRO FOOTBALL TALK (Nov. 19, 2018, 1:34 PM), https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/alex-smiths-compound-fracture-will-require-6-8-month-recovery [https://perma.cc/W4CX-FH8N].

184. *See* Stephania Bell, *Washington QB Alex Smith Cleared by His Surgical Team for Full Football Activity*, ESPN (July 24, 2020, 7:12 PM), https://www.espn.com/nfl/story/_/id/29532829/washington-qb-alex-smith-cleared-full-football-activity-broken-leg [https://perma.cc/ZF82-TFYK].

185. *See* John Keim, *Washington Football Team Releases Quarterback Alex Smith*, ESPN (Mar. 5, 2021, 9:59 AM), https://www.espn.com/nfl/story/_/id/31010113/washington-football-team-releases-quarterback-alex-smith [https://perma.cc/C9H7-4PSL].

186. *See Washington Commanders Franchise Encyclopedia*, PRO FOOTBALL REFERENCE, https://www.pro-football-reference.com/teams/was/index.htm [https://perma.cc/X8UD-UDCX] (showing the Commanders won seventeen games and lost thirty-one games while Smith was injured from 2018–2020).

187. *See* Alon Tamir, *The Value of Winning*, SPORTS ANALYTICS GRP. BERKELEY (Mar. 28, 2022), https://sportsanalytics.studentorg.berkeley.edu/articles/value-winning.html [https://perma.cc/4RHU-H58N].

188. *See* D. LaPlaca & J. Elliott, *supra* note 180, at 9.

will be injured, the team can work with the player to reduce the risk of injury. This could change the player's mechanics or increase their rest time between games. Such a proactive approach is needed to promote healthier teams and aid players and their teams in preventing injuries.

D. Why Should Players Care?

Still, players have reason to be concerned about this technology. Even if the ADA was not in place, basic fairness concerns rise if an employer is allowed to discriminate against a presently healthy athlete. An AI prediction that a player will become injured could be incorrect or the injury that is suffered could be less severe than anticipated.[189] One such AI injury prediction program could only predict non-contact ankle sprains with seventy-five percent accuracy and could not accurately predict groin or hamstring strains.[190] This particular program considered sprint time, past injuries, concussions, and body mass.[191] However, it did not consider other conditions that may affect injuries such as weather, playtime, genetics, position, or the type of cleat a player was wearing.[192] These important considerations show that, while AI can help trainers and coaches make good decisions about personalized fitness routines, it is inherently unfair to the player if they receive a reduced salary because AI predicted a future injury that never occurs—even with their high compensation. Inaccurate algorithms could cause healthy players to receive lower salaries or no offer at all simply because the AI system predicts they may become injured in the future.[193] This fundamental unfairness is exacerbated by the racial bias present in AI models.[194] Even if the technology is rigorously tested to ensure

189. *See* Seren Evans & Julian Owen, *How AI Can Predict Rugby Injuries Before They Happen*, THE CONVERSATION (Jan. 22, 2025, 7:29 AM), https://theconversation.com/how-ai-can-predict-rugby-injuries-before-they-happen-246202 [https://perma.cc/RT3Z-ZY9T].

190. *See id.*

191. *See id.*

192. *See id.*

193. *See* PROBILITY AI, *supra* note 20.

194. United States health systems routinely use commercial computer programs to help make medical decisions. *See* Ziad Obermeyer et al., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 SCI. J. 447, 452–53 (2019). A study in 2019 identified that racial bias existed in at least one of these models. *Id.* The model in question was used to determine which patients should receive access to high-risk healthcare management programs. *Id.* The bias in the system let "healthier" white patients into the programs ahead of Black patients who were considered less healthy. *Id.*

that data predictions are accurate, issues of fairness and bias remain.

And, because the ADA protects disabled people from discrimination due to their disability,[195] players who are given a reduced salary due to a fear of a future injury certainly appear to fit this purpose.[196] Some may argue that a player has a certain level of control over whether their predicted injury occurs. For example, if AI predicts that a player will tear their ACL due to their unique running style, a player could use this information to adjust their style. However, altering physical performance motions is an incredibly difficult process.[197] Further, there is no guarantee that a change is style will not present new risks.

Yet, employers do not have unbridled power to cause an adverse action based on fear of a future injury.[198] Courts would likely find that an employer's knowledge of past injuries precludes the employer from being able to discriminate based on fear of a future injury.[199] Employers may not discriminate against employees if that employee has a record of disability and that disability substantially limits at least one major life activity.[200] So, injury-prone players have more protection than injury-free players flagged by AI.

Teams commonly take past injuries into account when making contract offers or drafting a player.[201] While commonplace in all sports, the practice's effect on player compensation is difficult to quantify because of the many factors going into player compensation.[202] However, an empirical study of the relationship between an NFL player's past concussion and future compensation in the league found that players who sustained a

195. *See Americans with Disabilities Act*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/disability/ada [https://perma.cc/3X5D-6FM5].

196. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(2).

197. *See* Ross Harris, *Changing Your Running Style*, N. IRELAND PHYSIOTHERAPY & SPORTS INJURY CLINIC (July 22, 2015), https://www.niphysiotherapy.co.uk/changing-your-running-style/#:~:text=Changing%20your%20running%20style%20is,a%20few%20points%20to%20consider [https://perma.cc/PS22-R5XX].

198. *See generally supra* note 111 (finding employers may consider potential future injuries and illnesses when making employment decisions).

199. *See generally id.*

200. *See* 42 U.S.C. § 12102(1).

201. *See* Eum, *supra* note 161.

202. Aside from performance: A players age, agent, free agency status, contract signing date, and signing team all influence player compensation. *See* Tyler Wasserman, Determinants of Major League Baseball Player Salaries, at 1 (May 1, 2013) (Capstone Honors Thesis, Syracuse University Honors Program), https://surface.syr.edu/cgi/viewcontent.cgi?article=1098&context=honors_capstone [https://perma.cc/UZ57-DETG].

concussion lost $300,000 per year.[203] If teams implement AI predictive injury technology to predict similar injuries, players who have not experienced a concussion (or other injury) could still see their salaries cut or their playing career prematurely ended because of the team's fear of losing player time and revenue from injuries.

E. Caselaw and Fear of Future Injury

The vast majority of cases ruling that fear of future impairment is not covered by the ADA have done so when the future impairment is a temporary transmittable disease (normally COVID-19), not a physical injury.[204] However, every court addressing the issue concluded the ADA does not prohibit discrimination based on *future* impairments.[205] Regardless of whether the anticipated disability is an illness or an injury: This is not the same AI-injury prediction technology issue we see in the sports context.[206] Even if a non-athletic employer wishes to use AI to detect whether an employee will become sick or injured, the ADA already has safeguards in place to protect those employees.[207] Namely, an employer may only ask medical questions if the questions are job-related and consistent with business necessity.[208] And any healthcare disease-predictive-AI technology used to help patient diagnosis is likely inaccessible by a patient's employer.[209]

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203. *See* Sergio M. Navarro et al., *Short-term Outcomes Following Concussion in the NFL: A Study of Player Longevity, Performance, and Financial Loss*, ORTHOPEDIC J. OF SPORTS MED., 2017, at 4 (explaining the injury forced almost ninety percent of players out of the league within five years).

204. *See generally supra* note 111 (finding employers may consider potential future injuries and illnesses when making employment decisions, with the exeption of COVID-19).

205. *See, e.g.*, Darby v. Childvine, Inc., 964 F.3d 440, 446 (6th Cir. 2020) ("[A] genetic mutation that merely predisposes an individual to other conditions . . . is not itself a disability under the ADA."); Shell v. Burlington N. Santa Fe Ry. Co., 941 F.3d 331, 336 (7th Cir. 2019) ("[T]he [ADA's] text plainly encompasses only current impairments, not future ones."); Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1113 (8th Cir. 2016) ("[T]he ADA does not prohibit an employer from acting on some other basis, *i.e.*, on its assessment that although no physical impairment currently exists, there is an unacceptable risk of a future physical impairment.").

206. *See* Rich Buchanan et al., *Artificial Intelligence in Football: A New Frontier for Mitigating Injury Risk?*, SPORTSMITH, https://www.sportsmith.co/articles/artificial-intelligence-in-football-a-new-frontier-for-mitigating-injury-risk/ [https://perma.cc/K6QW-BYAS].

207. *See* 42 U.S.C. §12112(d)(4)(A) (2008); 29 C.F.R. §1630.14(c).

208. *See* 42 U.S.C. §12112(d)(4)(A) (2008); 29 C.F.R. §1630.14(c).

209. Exciting new research is being produced to assist doctors in recognizing illnesses before a patient develops symptoms. *See* J. Qiang et al., *Review on Facial-Recognition-Based Applications in*

III. OPTIONS FOR PLAYER PROTECTION AGAINST PREDICTIVE AI

Players have three potential options to prevent teams from employing AI to predict future injuries: collective bargaining agreements, federal legislation, and EEOC guidance. The easiest path for players to avoid the use of AI-predicted injuries is through the collective bargaining process. This process would allow the players to directly bargain with teams to limit the team's usage of injury-predictive AI.[210] Although negotiations for a collective bargaining agreement are often contentious, there have been major victories by NFL athletes to secure their rights.[211] For example, NFL players gained the right to choose their surgeon through a collective bargaining agreement.[212] This demonstrates the possibility that players can gather and bargain with their teams to ensure AI injury prediction tools are not consulted before making contract decisions.

But it seems unlikely teams will agree not to use injury-predictive AI without a compromise. For example, teams may require players to give up significant revenue-sharing percentages. Revenue sharing is very important to players because it helps fund their retirement accounts and benefits.[213] Again, players will want to push back. To decrease the adjustment in revenue-sharing percentages, players could seek to limit a team's AI use to athletic training decisions only. This would allow teams to advise and adjust player exertion or mechanics to decrease the likelihood of injury but prevent discrimination based on potential for future injury. This path allows both

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Disease Diagnosis, BIOENGINEERING J., June 23, 2022, at 1–2. However, the AI models used in this research are primarily being used to assist in diagnosing rare conditions that are not easily identified by doctors. *Id.* at 2.

210. The NFL Players Association used collective bargaining to protect player interests during the COVID-19 pandemic. *See* JC Tretter, *Even in Labor Peace, Players Must #StayReady*, NAT'L FOOTBALL LEAGUE PLAYERS' ASS'N, https://nflpa.com/posts/even-in-labor-peace-players-must-stayready [https://perma.cc/J3M7-RCTQ].

211. *See Collective Bargaining Agreements in Sports Leagues & Their Legal Scope*, JUSTIA, https://www.justia.com/sports-law/collective-bargaining-agreements-in-sports-leagues/ [https://perma.cc/CX2R-VP7Z].

212. *See What Medical Rights Do Players Have?*, NAT'L FOOTBALL LEAGUE PLAYERS' ASS'N, https://nflpa.com/faq/what-medical-rights-do-players-have#:~:text=If%20a%20player%20is%20a,made%20by%20the%20club%20physician [https://perma.cc/XZ7Z-HVA2].

213. *See* Matthew Lenz, *The History of the Current System for MLB Revenue Sharing and Luxury Tax—And What Needs Fixing*, TWINS DAILY NEWS (Jan. 30, 2025), https://twinsdaily.com/news-rumors/minnesota-twins/the-history-of-the-current-system-for-mlb-revenue-sharing-and-luxury-tax%E2%80%94and-what-needs-fixing-r17697/ [https://perma.cc/7K9V-UVR7].

parties to evaluate the effectiveness of AI tools, which learn from nuanced sports movements.

Players could also regularly review restrictions on predictive AI to determine if banning predictive AI for salary negotiations is still in their best interest. This approach could provide players with the strongest protections, but it would not come cheap. Teams are unlikely to forego technology that prevents multi-million-dollar contract blunders without asking for substantial player concessions. Regardless of collective bargaining advances, players should also seek to introduce federal legislation prohibiting employers from taking adverse employment actions against any athlete for fear of future injury. This solution would likely be met with public support and employer pushback.

The public would likely support the legislation because of the inherent fairness arguments. Federal legislation rewriting the ADA to include a prohibition against adverse actions based on fear of future impairment is aligned with the purpose of the ADA—to protect those with disabilities from being discriminated against based on an uncontrollable characteristic.[214] Furthermore, Congress has already included protections for those who have a record of previous injuries.[215] It seems counterintuitive that Congress would protect those with past injuries, but not those with future injuries because, either way, the employee is being discriminated against because of a disability. For example, suppose a worker has a record of having severe arthritis, a disability. The employer may not discriminate against that employee because of their condition.[216] There would be no ADA protection if, however, the worker had no record of having severe arthritis and the company used predictive AI to determine that the worker is likely to develop severe arthritis.[217] ADA protections should extend to all employees being discriminated against because of a disability regardless of whether the injury happened in the past or whether the injury is predicted to happen in the future.

214. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(2).
215. *See* 42 U.S.C. § 12102(1)(B).
216. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2).
217. *See, e.g.*, *supra* note 205 (circuit court cases demonstrating lack of protection for future conditions under the ADA).

A. Opposition to Legislation

Although many would support an expansion of the ADA, it would be met with fierce opposition from employers and conservatives. Even with public support, federal protections would disrupt an employer's power to take adverse actions against an employee based on fear of future illness—so employers would push back.[218] Employers are unlikely to accept this change and could argue it is an expansion of the ADA which unnecessarily limits an employer's ability to make adverse employment decisions. They have a point. Disciplinary and personnel decisions are vital to an employer's viability. Furthermore, these decisions may impact health insurance programs sponsored by an employer—a major cost employers seek to reduce. While employers can mitigate some costs and increase productivity through physical fitness and mental health programs,[219] they would benefit greatly from AI health and injury predictive screening. This would allow employers to only hire applicants predicted to be healthy or even fire existing employees predicted to become impaired.

Some conservatives may also be opposed to an expansion of the ADA to include a prohibition of discrimination based on future injury. In 2017, Republicans in the United States House of Representatives passed a bill titled the ADA Education and Reform Act of 2017.[220] This bill sought to make it more difficult for people to enforce their rights under the ADA.[221] While certainly not all Republicans would oppose such a bill, Democrats have viewed the second term of President Trump as putting the current ADA at risk.[222]

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218. While Congress cannot directly overturn cases like *Massage Envy*, Congress can enact new legislation or can change existing laws to limit factors an employer can consider when making an adverse employment decision. *See* Madison Hess, *Can Congress Overturn a Federal Court Decision?*, FINDLAW (Aug. 30, 2024), https://constitution.findlaw.com/article3/annotation07.html [https://perma.cc/7XKG-2LSK].

219. *See* Karen Pollitz & Matthew Rae, *Trends in Workplace Wellness Programs and Evolving Federal Standards*, KFF (June 9, 2020), https://www.kff.org/ [https://perma.cc/V9VM-A78M].

220. H.R. 620, 115th Cong. (2017).

221. Eliza Schultz et al., *The Quiet Attack on the ADA Making Its Way Through Congress*, AM. PROGRESS (Sept. 22, 2017), https://www.americanprogress.org/article/quiet-attack-ada-making-way-congress/ [https://perma.cc/Y2ZX-QU72].

222. Julia Métraux, *ICYMI: Trump's Project 2025 Will Dismantle Protections for Americans with Disabilities Outlined in the Americans with Disabilities Act*, AM. PROGRESS (Aug. 27, 2024), https://democrats.org/news/icymi-trumps-project-2025-will-dismantle-protections-for-americans-with-disabilities-outlined-in-the-americans-with-disabilities-act/ [https://perma.cc/5EXJ-J9Z9].

Opponents of such legislation may present several arguments. First, opponents may argue "physical impairment" is overly broad and not easily defined, sweeping in any ailment or minor harm.[223] But the ADA already has guardrails in place to ensure that minor injuries or illnesses are not protected.[224] Therefore, a disability definition including "future physical impairment" would be broad enough to include some illnesses resulting in physical impairment so long as the illness produces a physical impairment that will last longer than six months.[225] Furthermore, employers in physically demanding fields may argue their workers assumed the increased risk of potential injury and were adequately compensated for the risk. Many high-risk jobs are highly compensated.[226] The increased danger also leads to an increased paycheck. Employers may argue that any ADA expansion is unnecessary because the market has already accounted for the risk of potential injury. This argument is misleading. While the employment market may indeed compensate those in physically risky fields, higher than those in relatively safe fields, the very purpose of the ADA was to protect all people from facing discrimination due to a disability.[227] Allowing companies to preemptively terminate an employee due to a fear of future injury disrupts this balance and places the employees at a disadvantage.

Lastly, players introducing federal legislation would likely garner little support in Congress.[228] This issue is so nuanced and affects such a small group of employees that Congress is unlikely to act. While professional athletes have a stage and large public presence, Congressional leaders have much larger legislative issues to discuss. This highly controversial change will likely not be seriously considered until a major sports employment decision is explicitly made using AI. Even then, the issue would likely not

223. *See* 28 C.F.R. § 35.108.

224. *See* 29 C.F.R. § 1630.2(j)(1)(ii).

225. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(3)(B) (illnesses or injuries that do not last more than six months are considered transitory and minor and are not covered by the ADA).

226. *See Pros and Cons of High-Risk Job Industries*, MORROW & SHEPPARD (July 13, 2023), https://www.morrowsheppard.com/blog/the-pros-and-cons-of-high-risk-jobs/#:~:text=Higher%20Earning%20Potential:%20Many%20high,skill%20development%2C%20and%20career%20advancement [https://perma.cc/SQ2M-BR2E].

227. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(2).

228. When Congress legislates in sports, it is often to protect the professional leagues financial interests—not to protect player interests. *See* Frederic J. Frommer, *Play Calling by Congress, NFL and NCAA Allowed Football to Flourish on Weekends*, SPORTS BUS. J. (Dec. 16, 2021), https://www.sportsbusinessjournal.com/SB-Blogs/COVID19-OpEds/2021/12/16-Frommer.aspx [https://perma.cc/5CH4-U59D].

be big enough for federal legislation. It is likely that, while some legislators would ignore the issue altogether, others would argue that players assume the risk of injury and are handsomely compensated for their risks.[229]

While teams and leagues may feel such legislation prohibits them from considering injury-proneness when making contract decisions, they would still be allowed to consider prior injuries because those injuries do not prohibit the individual from participating in a major life activity.[230] As previously discussed, working is considered a major life activity, but only if the impairment prohibits an employee from working in a broad class of jobs.[231] Playing in a professional sports league is not a broad class of jobs, but rather a specialized employment position.[232] Players would be unable to seek ADA protection under this theory unless they could prove that their injury also prohibited them from participating in other employment fields.[233] Therefore, teams could still consider common past injuries. Furthermore, despite any proposed legislation, teams would not be prohibited from using AI to predict transitory or minor injuries a player might suffer.[234] These injuries (such as a pulled hamstring) are not protected under the ADA and are generally more indicative of a player's injury proneness than a career-halting injury.[235]

B. Suggested Legislative Language and Interpretation

Because many AI decisions (and subsequent discriminatory adverse employment actions) cannot be traced,[236] a broad reading of physical

229. *See id.*

230. *See* EEOC v. UPS Ground Freight, Inc., 443 F. Supp. 3d 1270, 1283 (D. Kan. 2020) (finding a record of a disability may not be considered only if it substantially limits a major life activity such as breathing, communicating, and eating).

231. Mora v. Univ. of Tex. Sw. Med. Ctr., 469 F. App'x 295, 297 (5th Cir. 2012) (holding plaintiff failed to establish a claim because she did not allege she could not work in a broad class of jobs, just her specific job).

232. *See* Nurriddin v. Bolden, 818 F.3d 751, 756–757 (D.C. Cir. 2016) (citing Duncan v. Wash. Metro. Area Transit Auth., 240 F.3d 1110, 1114 (D.C. Cir. 2001)) (holding an employee claiming ADA violations must prove their disability precludes them from working more than one type of job or a specialized job).

233. *Id. See also* Bartlett v. New York State Bd. of Law Exam'rs, 970 F. Supp. 1094, 1123 (S.D.N.Y. 1997) (finding professional sports is not a broad class of jobs).

234. *UPS*, 443 F. Supp. 3d at 1285.

235. *Id.* at 1286.

236. *See* Tammy Xu, *AI Makes Decisions We Don't Understand. That's a Problem*, BUILT IN (July, 19, 2021), https://builtin.com/artificial-intelligence/ai-right-explanation [https://perma.cc/92LB-

impairment is required. Meaning any adverse employment decision based on an AI-predicted future physical impairment violates the ADA. Employers would likely push for a narrow reading of any proposed statute or require the physical impairment to impact a major life activity. But these requirements are too burdensome. Employees, whether professional athletes or not, should not face adverse employment actions because an unproven technology has predicted that some physical injury "will" occur. A broad reading is aligned with the purpose of the ADA and further supports the notion that people should not be discriminated against for conditions largely outside their control.[237]

If new protective legislation is passed, all parties would benefit from using the established framework in the current ADA and Title VII.[238] Employees who believe they have been discriminated against due to a predicted future injury must file a complaint with the EEOC (which investigates the complaint and determines if there was an ADA violation). Like other employment discrimination cases, the employer is unlikely to admit their ADA violation. However, the EEOC could use enhanced technology to trace an employer's use of AI to determine if any claim of innocence is valid. In this hypothetical review process, the EEOC would receive a complaint from an employee who believes they have been discriminated against due to an employer's fear that the employee will develop a physical injury in the future. The EEOC would then investigate the claim.[239] This investigation may include witness interviews, employer interviews, and a review of employer documents and processes.[240] The employer would likely deny their ADA violation. Therefore, the EEOC would need to review any AI systems that predicted the injury. Even if legislation protecting employees from employers using AI to predict future injuries is passed, there is no guarantee that it would be upheld by the Supreme Court. The argument that players and employees in specialized labor-intensive fields assume the risks inherent to the specialty is strong.[241]

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237. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(2).

238. *See generally What You Can Expect After You File a Charge*, *supra* note 50.

239. *Id.*

240. *See Filing an EEOC Complaint for Disability Discrimination: Step-by-Step Guide*, AM. DISABILITY ACTION GRP., https://www.americandisabilityactiongroup.com [https://perma.cc/99YC-GFJZ].

241. *See* Knight v. Jewett, 834 P.2d 696, 707–08 (1992).

Further, it is supported by Justice Kavanaugh[242] and could be adopted by the current Court.

The final, but least effective, option is that players could lobby the EEOC to issue regulations on predictive AI in the workplace.[243] And while their rules would likely be worker-friendly and help guide courts, it is not binding.[244] Therefore, it would do little to protect players.[245] Furthermore, any such regulation may be rescinded or changed at any time.[246] This uncertainty may lead to false reliance.

CONCLUSION

Artificial intelligence is here to stay. Employers have already implemented AI to screen candidates, track productivity, and improve performance management.[247] Legislation is slow to address the rollout of AI technology development. Employees must be proactive to ensure their rights are not trampled by their employers, seeking to cut costs at every corner. The first battlefront will be in places where employers are willing to purchase unproven, expensive AI tools with high cost-cutting potential. Professional sports leagues already use AI to predict future injuries.[248] Leagues have even promoted this technology and have partnered with tech companies to assist in its development.[249]

242. *See* SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202, 1217–19 (D.C. Cir. 2014) (Kavanaugh, J., dissenting).

243. *What You Should Know: EEOC Regulations, Subregulatory Guidance, and other Resource Documents*, EEOC (2016), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource [https://perma.cc/VY6X-YXJC].

244. *See* Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 165 (2019); Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 412 (2024).

245. Any EEOC regulation regarding injury predictive AI in the workplace is likely to be challenged. Courts would not be required to give deference to the agency. *See* Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 412 (2024) (explicitly overturning forty-year-old *Chevron* deference to federal agencies in interpreting ambiguous federal agency statutes).

246. *See* Samuel M. Mitchell & Owen Davis, *AI and Workplace Discrimination: What Employers Need to Know After the EEOC and DOL Rollbacks*, HUSCH BLACKWELL (Feb. 7, 2025), https://www.huschblackwell.com/newsandinsights/ai-and-workplace-discrimination-what-employers-need-to-know-after-the-eeoc-and-dol-rollbacks [https://perma.cc/9PD4-SYEZ].

247. *See* Schlemmer et al., *supra* note 22.

248. *See* Lemire, *supra* note 92.

249. *See* Kayla Bailey, *NFL Revolutionizes Sports by Using AI to Prevent Injuries: 'It Will Have a Profound Impact,' SVP Says*, FOX NEWS (Feb. 11, 2024, 7:00 AM), https://www.foxbusiness.com/sports/nfl-revolutionizes-sports-using-ai-prevent-injuries-will-profound-impact

Players must be proactive to curb this trend. Unfortunately for healthy players, there is no legal remedy a court can offer to prohibit teams from using AI to predict serious future injuries.[250] Every court that has considered the issue has found that the ADA does not cover future impairments.[251] Players should be concerned about this technology and take significant and immediate steps to combat the practices and effects. The first step is to bargain with teams and lobby for federal legislation that prohibits teams from making adverse employment decisions based on fear of future injury. While teams are incentivized to use the technology, injury-predictive AI used to reduce salaries or reject applicants violates the purpose of the ADA—and no cost-saving argument should circumvent the purpose of the ADA.

Bargaining is a low-cost approach that, while limited, will have trickle-down effects in player protection and team morale. The downside is that professional sports collective bargaining occurs only every couple of years and is a very intense negotiation process. Players may find success in Congress but risk the Supreme Court finding that the ADA does not apply to those in physically demanding fields because they assume the risks of the job.[252] Any proposed protection for athletes may also fail to garner support and attention because professional sports players are not a large enough class to gain Congress's attention or public sympathy.[253] Further, legislators could face blowback from constituents who view highly paid athletes as unworthy, or a low priority, of increased protection.[254] Still, players could

[https://perma.cc/DDD4-Y8K6]; Brendan Coffey, *Liverpool Hires Astrophysicist as Teams Embrace AI to Reduce Injury*, SPORTICO (Mar. 8, 2021, 8:00 AM), https://www.sportico.com/business/tech/2021/sports-ai-mlb-epl-1234624142/ [https://perma.cc/2ZC6-MQEE].

250. While most courts, like the court in *Massage Envy*, have allowed an employer to make an adverse employment action based on fear of future *illness*, Equal Emp't Opportunity Comm'n v. Massage Envy, 938 F.3d 1305, 1315 (11th Cir. 2019), few courts have considered whether employers may make an adverse employment action based on fear of future *injury*. Shell v. Burlington N. Santa Fe Ry., 941 F.3d 331, 337 (7th Cir. 2019). However, the analysis and result are likely to be similar.

251. *See generally supra* note 205 (circuit court cases demonstrating lack of protection for future conditions under the ADA).

252. *See* SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202, 1219 (D.C. Cir. 2014) (Kavanaugh, J., dissenting).

253. *See* Frommer, *supra* note 228 (finding when Congress wades into professional sports, it is often to protect the financial interests of the sports league and not the players).

254. Although athlete protection under the ADA has not entered the public arena, most Americans support increasing taxes on people making over $1 million—including athletes. NPR/PBS NEWS HOUR, MARIST POLL NATIONAL TABLES 13 (2019), https://maristpoll.marist.edu/wp-content/uploads/2019/07/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_1907190926.pdf

force action through a league-wide strike or by using their celebrity status[255] and speech platforms to inspire the public to call for legislation that protects athletes from AI discrimination. This legislation would be aligned with the purpose of the ADA.[256]

Even with legislation, there is no guarantee a court would deem it applies to professional sports players or others who participate in dangerous jobs. The Supreme Court may hold that professional sports players, and others who partake in particularly dangerous jobs, should be held to a different legal standard when they become injured.[257] Therefore, professional athletes must push for broad language to ensure that they, as well as others who work in dangerous fields, are protected against employers using AI to predict future physical injuries.

While all proposed solutions have their flaws, collective bargaining should be immediately pursued by players to ensure that new technology does not lead to healthy players being paid less. This process allows players and teams to negotiate, leading to a more comprehensive solution. Players must evaluate the costs associated with prohibiting any injury-predictive AI use. For some, the cost may be too high. For others, their fear of injury too low to justify adjusting revenue-sharing percentages. Sports are unpredictable, and the implementation of current injury-predictive AI technology may lead to inequitable results.[258] To ensure relative financial security and stability for all athletes, player unions must collectively bargain to prohibit AI from predicting future injuries.

[https://perma.cc/TFB6-EFHT]. This could indicate that the public would view athlete protection as a low priority.

255. Athletes are often seen as celebrities, but sixty-two percent of Americans say they do not follow college or professional sports closely. *See* Jenn Hatfield & Ted Van Green, *Most Americans Don't Closely Follow Professional or College Sports*, PEW RSCH. CTR. (Oct. 17, 2023), https://www.pewresearch.org/short-reads/2023/10/17/most-americans-dont-closely-follow-professional-or-college-sports/ [https://perma.cc/8MMG-9A43].

256. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(2).

257. *See* SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202, 1219 (D.C. Cir. 2014) (Kavanaugh, J., dissenting).

258. *See* PROBILITY AI, *supra* note 20.