CASH ME IF YOU CAN: THE NIL HUSTLE AND THE CASE FOR COLLEGIATE ATHLETE UNIONIZATION

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ABSTRACT

When do the rules of the past become obsolete? For the National Collegiate Athletics Association (NCAA), it came sooner rather than later. The advent of social media has made it seamless for athletes to build their brand throughout their college careers. Despite this money-making opportunity, the NCAA has had a vested interest in protecting the "amateurism" of college sports and prohibiting college athletes from profiting from their Name, Image, and Likeness (NIL). NIL refers to the rights of college student-athletes to earn money from their personal brand through endorsements, social media platforms, and appearances. By keeping college athletes from profiting from their NIL, the NCAA wanted to preserve athletes' focus on their education and prevent abuse and exploitation.

This prohibitive rule brought many a critique: how can the NCAA truncate athlete autonomy and profitability in an evolving legal landscape where athlete performance and lucrativeness is inevitable? In due course, legislators and athlete advocates pushed back against the NCAA's goal to maintain "amateurism" for a reality where the athlete can build a brand and profit from their stellar athletic performances. This shift in philosophy by the NCAA does not come without challenges: the NIL landscape can lead to athlete abuse and exploitation, especially in an arena without streamlined regulation and a patchwork of state-by-state policies. This Note advocates for the implementation of collective bargaining and the unionization of athletes. The creation of a National College Players Association (NCPA) will alone ensure that student-athletes fully benefit from these new NIL

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opportunities without risking exploitation, from a top-performing school to a lower-revenue program. This Note analyzes the evolution of NIL's legal history and establishment, draws parallels to current professional athletic unions, and evaluates the potential and challenges that unionization can face on the NIL marketplace. With a look toward the future, this Note assesses the viability of defining college athletes as "employees" of their respective universities and colleges, a further legal protection of the students behind the sport.

INTRODUCTION

For over a century, the National Collegiate Athletic Association (NCAA) has served as the primary governing body for college athletics in the United States.[1] The NCAA "was founded in 1906 to regulate the rules of college sports and protect young athletes."[2] For much of its existence, the NCAA's core mission was to preserve the "amateurism" of collegiate athletics which resulted in strict prohibitions on compensating college athletes beyond academic scholarships.[3] To put it more succinctly, "the preservation of 'amateurism'—was the reason that the NCAA was created."[4]

To protect amateur collegiate athletes from abuse and exploitation, the NCAA had a strict prohibition on student-athlete compensation.[5] The restrictions imposed significant limitations on student-athletes, specifically preventing them from profiting off of their marketability and skills.[6] This was especially true when it came to capitalizing on their name, image, and likeness (NIL), despite the fact that the college sports industry was evolving into a lucrative, multi-billion dollar business.[7] Historically, the NCAA

1. *See generally History*, NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx [https://perma.cc/H5FD-RVER] (last visited Oct. 28, 2024).

2. *Id.*

3. *See* Robert Litan, *The NCAA's Amateurism Rules: What's in a Name?*, MILLIKEN INST. REV. (Oct. 28, 2019), https://www.milkenreview.org/articles/the-ncaas-amateurism-rules [https://perma.cc/4D45-HLH4].

4. *Id.*

5. *See* NCAA v. Alston, 594 U.S. 69, 74–81 (2021).

6. *See* Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Sep. 1, 2021, at 10:59 ET), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate [https://perma.cc/SNS8-GXS2].

7. *See* Associated Press, *NCAA Generates Nearly $1.3 Billion in Revenue for 2022–23*, ESPN (Feb. 1, 2024, at 21:35 ET), https://www.espn.com/college-sports/story/_/id/39439274/ncaa-generates-

justified these restrictions under the guise of protecting athletes' educational experiences.[8] The organization argued that compensating student-athletes or allowing them to enter into sponsorship agreements would diminish the integrity of amateur sports.[9]

NCAA amateurism rules included a specific prohibition on athletes' ability to profit from their NIL.[10] However, as platforms like TikTok, Instagram, X (formerly Twitter), and YouTube became major revenue sources for influencers, a cultural shift highlighted the growing disconnect between NCAA policies and the modern digital economy.[11] Social media has become one of the most accessible ways for young people to generate income, as anyone with a cellphone can create content, build a following, and monetize their platform through advertisements, brand partnerships, and sponsored posts.[12]

Many student-athletes have amassed a large social media following, a phenomenon largely driven by their athletic performances and the visibility and popularity of collegiate sports.[13] Their on-field achievements often attract significant attention, allowing them to connect with fans and build a substantial online presence.[14] Despite these tremendous opportunities for capturing revenue from their social media popularity, NCAA rules forbade them from monetizing their audience engagement. The prohibition extended beyond social media, barring student-athletes from endorsing products, launching businesses, or otherwise leveraging their personal brands for profit.[15] In recent years, these restrictions faced growing scrutiny from both the public and the courts—with advocates for NIL rights arguing that given the significant time demands placed on student-athletes and the revenue

nearly-13-billion-revenue-2022-23 [https://perma.cc/6NHN-EAL9].

8. *See* Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/ [https://perma.cc/SS79-U5XH] ("Athletes may be receiving degrees, but many examples show that pockets of athletes are not receiving a quality education.").

9. Audrey C. Sheetz*, Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 875–76 (2016).

10. 594 U.S. at 74–81; Litan, *supra* note 3.

11. *See* Stasia Skalbania, *Advising 101 for the Growing Field of Social Media Influencers*, 97 WASH. L. REV. 667, 667–68 (2022).

12. *Id.*

13. *Top College Athletes on Instagram*, IZEA (Apr. 29, 2024), https://izea.com/resources/college-athletes-instagram/ [https://perma.cc/QDW3-GH4A].

14. *Id.*

15. 594 U.S. at 74–81; Litan, *supra* note 3.

generated by their performances, denying them a share of the profits derived from their own identities is nothing short of modern-day indentured servitude.[16]

The shift towards allowing NIL compensation became inevitable as athletes, advocates, and legislators pushed back against the NCAA's restrictive policies.[17] As the legal landscape around NIL continues to evolve, the long-standing prohibitions on athlete compensation seem increasingly out of touch with the realities of college sports. What began as a principled effort to uphold the integrity of amateur athletics has now been torn down as an outdated barrier on collegiate athletes' autonomy and profitability. However, the progress made so far is just the start: NIL also opens new avenues for the potential exploitation of student-athletes by collectives taking advantage of patch-work state regulations and potentially economically vulnerable student-athletes.[18] To ensure student-athletes fully benefit from these new NIL opportunities, implementing collective bargaining between athletes and schools and establishing a National College Players Association (NCPA) are essential steps forward.

Part I of this Note examines the history of the legal battles leading to NIL reforms and the establishment of NIL. This section specifically highlights two critical cases: *O'Bannon v. NCAA* and *Alston v. NCAA* which provide a necessary background to the development of NIL rights in the twenty-first century.

Part II of this Note discusses the current NIL landscape and the challenges arising from the lack of a unified regulatory framework. This Part also discusses how collectives, often for-profit organizations funded by alumni and other wealthy supporters, have raised concerns about unfair compensation practices. To address these issues and ensure more equitable treatment, this Note suggests that athletes should consider unionization, allowing them to collectively bargain for fair NIL agreements and protect their interests against exploitation.

Part III examines the history of collective bargaining through the

16. *See* Jennifer A. Shults, *If at First You Don't Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for "Employee" Status*, 56 COLUM. J.L. & SOC. PROBS. 452, 464 (2023).

17. *See* Amy Piccola & Levi Schy, *NIL in College Athletics: a 2024 Update*, SAUL EWING LLP (July 15, 2024), https://www.saul.com/sites/default/files/documents/2024-07/NIL%20in%20college%20athletics_%20a%202024%20update%20-%20World%20Trademark%20Review.pdf [https://perma.cc/5WCD-6MXZ].

18. Shults, *supra* note 16, at 464.

National Basketball Players Association (NBPA) and its potential as a model for college athletes seeking unionization. This Part aims to demonstrate that unionization of collegiate athletes would allow them to standardize NIL contracts, prevent exploitation, and ensure more equitable treatment across all sports, including lower-revenue programs.

Part IV of this Note argues that unionization could protect student-athletes from exploitation and power imbalances in the NIL marketplace. This part also discusses how the path to unionization is not without challenges. A significant hurdle is determining whether student-athletes can be classified as employees. If athletes are classified as employees, they would gain the right to unionize and collectively bargain. To forward this argument, parallels are drawn between student-athletes and medical residents. Finally, Part IV also considers the challenges of classifying student-athletes as employees.

Part V briefly touches on how the Third Circuit's recent decision in *Johnson v. NCAA*. While remanded back to the trial court for additional fact finding, *Johnson* may constitute a legitimate path forward for NCAA athletes' attempts to secure employee status.

I. LEGAL BATTLES LEADING TO NIL REFORMS

A. The Road to O'Bannon v. NCAA *and* Alston v. NCAA

Since its inception in the twentieth-century, the NCAA has had a long history of being opposed to compensating collegiate athletes and insisting upon amateurism.[19] Over the years, numerous challenges have targeted the NCAA's amateurism model, frequently through antitrust lawsuit claims that the NCAA restricted fair compensation for college athletes' labor.[20] Two of the most high-profile challenges which paved the way to the establishment of NIL rights for collegiate athletes were *O'Bannon v. NCAA* and *Alston v. NCAA*.

19. *See* James Finnegan, *The Only Ten I See: Why Congress Should Follow Tennessee's Lead and Pass NIL Legislation Allowing Collectives to Work Directly with Schools*, 54 SETON HALL L. REV. 855, 858 (2024).

20. *Id.* at 859.

B. The Starting Line: O'Bannon v. NCAA[21]

O'Bannon v. NCAA, filed in 2009, was a groundbreaking challenge to the NCAA's restrictions on compensating student-athletes for the use of their NIL rights.[22] Led by former all-American UCLA basketball player Ed O'Bannon, the claim stemmed from popular video game maker Electronic Arts (EA) Sports' use of his likeness in its NCAA basketball video game without his consent and without compensation.[23] O'Bannon sued the NCAA claiming that their amateurism rules, which prevented student-athletes from receiving compensation for the use of their name, image, and likenesses, were an illegal restraint on trade in violation of Section 1 of the Sherman Act.[24]

In 2014, the United States District Court of California ruled in favor of O'Bannon holding that the NCAA's amateurism rules, including agreement among colleges to limit the compensation for recruits to a full-tuition scholarship, constituted a restraint of trade in the market for recruits' athletic services.[25] The decision was a landmark moment because a federal court held for the first time that the NCAA could not justify its amateurism rules under federal antitrust law.[26] On appeal, the Ninth Circuit affirmed in part and held that the NCAA's practice unlawfully restrained trade by limiting what college athletes could earn from their own NIL.[27] However, the Ninth Circuit limited the District Court's remedy that students athletes could receive NIL cash payments (in the form of $5000 per year in deferred compensation) untethered to their education expenses.[28] Instead, the Ninth Circuit held that under federal antitrust law, schools must compensate athletes up to the cost of attendance; however, cost of attendance was the maximum compensation student-athletes could receive.[29] *O'Bannon* marked a pivotal shift in public opinion and legal momentum for the movement to allow college athletes to be compensated for their NILs.[30]

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21. *See generally* O'Bannon v. NCAA, 802 F. Supp. 3d 1049 (9th Cir. 2015).
22. *See generally id.*
23. *Id.* at 1055.
24. *Id.*
25. *See generally* O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014).
26. *See generally id.*
27. *See generally* O'Bannon v. NCAA, 802 F. Supp. 3d 1049 (9th Cir. 2015).
28. *Id.* at 1079.
29. *Id.*
30. *See* Finnegan, *supra* note 19, at 860 (explaining that public support for NIL payments

C. Picking Up Momentum: Alston v. NCAA[31]

Alston v. NCAA, decided in June of 2021, marked "perhaps the most significant judicial blow to the NCAA's amateurism model" when the Supreme Court held that the NCAA's restrictions on educational benefits for athletes violated antitrust laws.[32] The case arose when college athletes challenged NCAA rules limiting athletes from realizing "education related benefits."[33] These benefits included scholarships for graduate school, vocational school, and lucrative post-graduate internships.[34] The Supreme Court unanimously upheld a lower court's ruling that the NCAA's restrictions on education-related benefits violated antitrust law, increasing the pressure for broader reforms in athlete compensation and allowing student-athletes to receive education-related benefits.[35] While the decision was narrowly focused on education-related benefits, it reaffirmed that the NCAA is subject to antitrust law.[36] The *Alston* decision also set the stage for broader challenges to its more restrictive compensation rules. Justice Kavanaugh's concurrence signaled continued skepticism about the NCAA's amateurism model and his inclination to potentially find NCAA rules limiting compensation of student-athletes entirely illegal.[37] This pivotal decision not only challenged the NCAA's traditional model but, through Justice Kavanaugh's concurrence, signaled that future comprehensive changes to the NCAA's historical model may be possible.

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increased from 31% in 2014 to 74% by 2023, signaling growing public discontent with NCAA amateurism polices).

31. *See generally* NCAA v. Alston, 594 U.S. 69 (2021).
32. Finnegan, *supra* note 19, at 862.
33. 594 U.S. at 103–04.
34. *Id.* at 73–74, 84.
35. *Id.* at 69, 107.
36. *Id.*
37. *See id.* at 112 (Kavanaugh, J., concurring).

> [T]here are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. . . . Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why [collegiate] sports should be any different.

Id. at 109, 112.

II. CURRENT NIL LANDSCAPE AND THE VACUUM OF DEREGULATION

The emergence of NIL rights spurred by *O'Bannon* and *Alston* transformed the collegiate sports landscape, allowing athletes to profit from their personal brand, marking a significant shift from traditional rules prohibiting such earnings.[38] This change has led to both opportunities and challenges for student-athletes.[39] A primary concern has been the absence of a unified federal NIL framework. The current patchwork of state-level regulation has created inconsistences and difficulties for athletes, schools, and third parties to navigate the new NIL environment.[40] However, a lack of uniform regulation has also paved the way for industries to re-engage with college sports and sponsorship of collegiate athletes in innovative ways.

A. The Return of the NCAA College Football Video Game

One such example is the highly anticipated return of the NCAA College Football video game, a development made possible by the evolving NIL landscape.[41] In 2024, EA Sports announced the return of their popular NCAA men's college football game, which had been discontinued in the early 2010s amid the legal fallout of the *O'Bannon* case.[42] The game's revival is a direct result of the expanding NIL landscape which now allows athletes to be compensated for the use of their likenesses in video games.[43] For years, the game was beloved by fans, yet controversial for its use of real players' likenesses without compensation, a practice in conflict with federal

38. *See* Maureen A. Weston, *Off the Guardrails: Opportunities and Caveats for Name, Image, and Likeness and the Student-Athlete Influencer*, 11 TEX. A&M L. REV. 911, 912–16 (2024).

39. *Id.* at 913. Speaking of 'opportunity,' take for example Colorado star quarterback Shedeur Sanders who drives a Mercedes Maybach around campus (worth $200k) and is expected to bring in $10 million in NIL endorsements over the course of his college career. *Id.*

40. *See* Finnegan, *supra* note 19, at 858–59 (the NCAA has called for Congress to pass federal legislation that would provide a comprehensive national guide for NIL implementation).

41. *See* The Associated Press, *EA Sports Announces Over 10,000 Athletes Have Accepted NIL Deal for its College Football Video Game*, ASSOCIATED PRESS (Mar. 4, 2024), https://apnews.com/article/ea-sports-college-football-nil-f9e6fef31a283d7c0b4de8c821c543f2 [https://perma.cc/6P5U-7AMZ].

42. *Id.*

43. *Id.*

antitrust law under the *O'Bannon* ruling.[44]

The new 2024 edition of the game includes a framework for compensating college athletes whose likenesses are used.[45] EA's re-entry into the market reflects the changing legal and cultural climate surrounding college sports. By compensating athletes, the game serves as an example of how NIL rights allow student-athletes to financially benefit from their talents beyond athletic scholarships. This shift in the gaming industry mirrors the broader revolution that is currently taking place in collegiate sports, where increasing recognition of NIL rights is reshaping the financial landscape for student-athletes.

B. Legislative Progress

Along with the *O'Bannon* and *Alston* decisions, several legislative acts laid the groundwork for NIL rights including early congressional initiatives and state-level movements.

One of the earliest legislative attempts to address NIL compensation emerged in March 2019 with the introduction of House Bill 1804 (the Bill), known as the "Student-Athlete Equity Act," in the 116th Congress.[46] The Bill was a landmark law that allowed college athletes to sign endorsement deals, which catalyzed the push for NIL reform across the nation.[47] The Bill marked a significant and critical shift in how congressional lawmakers viewed collegiate athletics and compensation, signaling that NIL rights were moving from the courts into the cross-hairs of legislative power.[48]

Additionally, days after the *Alston* ruling was delivered, the NCAA introduced an Interim NIL Policy (the Policy).[49] The Policy stated that athletes would not lose eligibility or face the type of punitive sanctioning

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44. O'Bannon v. NCAA, 802 F. Supp. 3d 1049, 1053 (9th Cir. 2015).

45. *See* Margaret Fleming, *EA Sports Puts a Price on College Football Game Appearance: $600 and Some Swag,* FRONT OFF. SPORTS (Feb. 22, 2024), https://frontofficesports.com/ea-sports-will-give-players-600-for-new-college-football-game/#:~:text=The%20video%20game%20is%20slated,%2C%20image%2C%20and%20likeness%20deals [https://perma.cc/4GXW-DGDK] ("[C]ollege football players can opt into the deal—if they are chosen by EA, they will get $600, a free version of the game, and the chance to make more money from other EA Sports name, image, and likeness deals.").

46. Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).

47. *Id.*

48. Andrew Weiss, *The California Fair Pay to Play Act: A Survey of the Regulatory and Business Impacts of a State-Based Approach to Compensating College Athletes and the Challenges Ahead*, 16 RUTGERS BUS. L. REV. 259, 270 (2020).

49. *See* Finnegan, *supra* note 19, at 863–64.

that athletes had previously faced[50] if they engaged in NIL activity.[51] This constituted a seismic shift in NCAA policy, as for the first time, according to the NCAA's own policy, student-athletes would be allowed to engage in NIL activities while maintaining their amateur status.[52] However, the Policy was deemed interim in nature, "until such time that either federal legislation or new rules are adopted"[53] and it stipulated that "the organization would not monitor for compliance with state law," seemingly opening up the door for collectives to sweep in to the regulatory black hole and take advantage of the lack of oversight.[54]

C. The Current System and the Role of Collectives

Collectives, often funded by boosters, have become key players in the NIL space, facilitating deals but also raising concerns about conflicts of interest and exploitation of student-athletes.[55] Boosters are often wealthy businesspeople who are alumni or otherwise affiliated with the school who have the clear priority of seeing their alma matter succeed athletically.[56] The fact that many collectives are for-profit organizations, which operate with minimal transparency or oversight, creates incentives for self-serving

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50. *See* Chuck Schilken, *Q&A: Why did Reggie Bush lose his Heisman Trophy? How did the former USC star get it back?,* L.A. TIMES (Apr. 25, 2024), https://www.latimes.com/sports/story/2024-04-25/why-did-reggie-bush-lose-his-heisman-trophy-how-did-former-usc-star-get-it-back [https://perma.cc/2A9F-HRS7].

> In 2006, the NCAA launched an investigation into reports that Bush and his family received cash, travel expenses and a rent-free home from two prospective sports agents while at USC, which were against NCAA polices at the time. Four years later, the NCAA issued severe sanctions against USC. The Trojans vacated their 2004 national title and 14 games Bush took part in, and the university disassociated from its former player . . . .

Id.

51. Press Release, NCAA, Interim NIL Policy 1 (2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [https://perma.cc/K8QW-DLXN].

52. *Id.*

53. *Id.*

54. *Id.*

55. Pete Nakos, *What Are NIL Collectives and How Do they Operate?*, ON3NIL (July 6, 2022), https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/ [https://perma.cc/TC52-VNSD].

56. *See* Finnegan, supra note 19, at 865–66 ("[T]he first collective created, the 'Gator' formed to support the University of Florida Gators, typifies the predominate collective business model of pooling together cash from boosters to provide for student-athletes . . . .").

practices at the expense of student-athletes.[57] These for-profit collectives are typically structured as limited liability corporations (LLCs).[58] Being structured as an LLC allows the collective to prioritize securing high-profile athletes to not only enhance the competitiveness of the university's athletic programs, but also the commercial success of the booster's businesses.[59] However, the collective's goal can run contrary to the promotion of fair and equitable NIL deals for all athletes.[60] For example, this focus can lead to uneven compensation structures with star players receiving deals for millions of dollars[61] while less prominent athletes are overlooked.[62]

To ensure a more equitable landscape moving forward, the best protection for collegiate athletes is to assemble their own 'collective' power and collectively bargain for fair NIL agreements and equitable treatment. This is best achieved through unionization. By organizing, athletes would gain the ability to negotiate on a more even footing with universities, brands, and other stakeholders, insuring transparency, standardized contract terms, and protections against exploitative practices.[63]

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57. *Id.* at 866 (discussing how some collectives are categorized as nonprofits (claiming §501(c)(3) status as charitable organizations), many have student-athletes pick a charity to provide their services to in return for NIL payments). *See also* Jacob L. Kaplan & M. Nicole Brown, *Federal Tax / Exempt Organizations Advisory: The IRS's Latest Play on NIL Collectives: Tax-Exempt Status on the Defensive*, ALSTON & BIRD (Oct. 18, 2023), https://www.alston.com/en/insights/publications/2023/10/the-irss-latest-play-on-nil-collectives [https://perma.cc/8TR4-8APK].

58. *Id.*

59. *Name, Image and Likeness (NIL Collectives)*, TAXPAYER ADVOC. SOC'Y (Mar. 7, 2023), https://www.taxpayeradvocate.irs.gov/get-help/general/nil/nil-collectives/ [https://perma.cc/44WT-Q5FU] ("[F]or-profit LLCs may facilitate NIL arrangements for student-athletes such as merchandising or endorsement deals that promote commercial activities.").

60. *Id.*

61. *See* Matt Lounsberry, *Michigan Presents $5 Million NIL Offer to 5-Star QB Bryce Underwood*, SPORTS ILLUSTRATED (Oct. 29, 2024), https://www.si.com/college/michigan/football/report-michigan-presents-5-million-nil-offer-to-5-star-qb-bryce-underwood-01jbcjnz91g9#:~:text=1%20overall%20player%20in%20the,next%20three%20to%20four%20years [https://perma.cc/J33U-DBWE].

62. *See NIL Assist Data Dashboard*, NCAA, https://nilassist.ncaa.org/data-dashboard/?utm_source=Sailthru&utm_medium=email&utm_campaign=On3%20NIL%20and%20Sports%20Business%20Newsletter%20-%2008-12-2024&utm_term=On3%20NIL%20and%20Sports%20Business%20News [https://perma.cc/7889-TQN5] (last visited Jan. 10, 2024) (53.1% of all NIL deals are concentrated in Football and Men's Basketball).

63. *See* Celine McNicholas et al., *Why Unions Are Good for Workers—Especially in a Crisis Like Covid-19: 12 Policies That Would Boost Worker Rights, Safety, and Wages*, ECON. POL'Y INST. (Aug. 25, 2020), https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/ [https://perma.cc/QD4F-AFNN].

The current NIL system, dominated by boosters and for-profit collectives, prioritizes profit over fairness, leaving athletes vulnerable to exploitation.[64] Unionization offers a direct path for collegiate athletes to wrestle control away from these intermediaries and put decision-making power back in the hands of athletes. Without organization and collective bargaining, the NIL landscape will continue to be dominated by those with deep financial pockets rather than those with actual athletic talent. While collegiate athletes seeking fair NIL treatment face an uphill battle in establishing their own collective power, they can look to the struggles of professional NBA basketball players in their battle to organize and fight for their rights through the formation of the NBPA.[65] The NBPA's success demonstrates that collective action can transform an inequitable system, proving that athletes voices' are strongest when unified in pursuit of equity and a fair share of the profits their talents create.

III. COLLECTIVE BARGAINING AND THE HISTORY OF THE NBPA

The NBPA is the union that represents all current professional basketball players in the NBA.[66] It was formed in 1954, but did not secure full recognition from the NBA until 1964.[67] The early years of the organization were marked by struggles for basic rights, including pensions, higher salaries, and better working conditions.[68] In 1964, NBA players staged a protest, threatening to boycott the All-Star Game[69] unless the league agreed to provide certain benefits, which eventually led to

64. TAXPAYER ADVOC. SOC'Y, *supra* note 59.

65. *See generally* Matthew Epstein, *Ball Never Lies: How Guaranteed Contracts Provide NBA Players More Security than NFL Players to Advocate for Social Justice*, 93 U. COLO L. REV. 1 (2022).

66. *See About*, NBAPA, https://www.nbpa.com/about [https://perma.cc/MPL4-XX65] (last visited Jan. 10, 2025).

67. *Overview and History*, NBAPA, https://www.nbpa.com/about [https://perma.cc/MPL4-XX65] (last visited Oct. 30, 2024).

68. *Id.* ("Before the union's inception, NBA players did not receive the wide-ranging privileges and protections that exist today. There was no pension plan, no per diem, no minimum wage, no health benefits and the average player salary was $8,000.").

69. *See generally NBA 2025 All-Star*, NBA, https://www.nba.com/allstar/2025 [https://perma.cc/HZ3H-C7A8] (last visited Nov. 10, 2025) (The NBA All-Star Game is an annual exhibition matchup that showcases the league's top players highlighting their talent and entertainment value).

recognition of the NBPA as the players' official representative.[70] Since then, the NBPA has negotiated collective bargaining agreements with league owners, counsel players on benefits, and advocates on behalf of the interests of all NBA players.[71]

Additionally, over the years, the NBPA continued to fight for enhanced rights and benefits for players, leading to the establishment of free agency in 1976.[72] Free agency allows professional athletes to sign a contract with any team once their contract expires which gives them greater control over their careers, salaries, and mobility between teams.[73] *Oscar Robertson v. National Basketball Association* was a pivotal antitrust lawsuit which helped to dismantle NBA's reserve clause, establishing free agency, and granting players more control over their careers and mobility between teams.[74] Today's NCAA transfer portal bears some similarities to professional free agency as a record-breaking 3,843 players entered the college football transfer portal in 2023–24, surpassing the previous high of 3,502, which was set in 2022–23.[75]

However, unlike professional free agency, the transfer portal operates without the structure and protections provided by collective bargaining. For example, Matthew Sluka, the starting quarterback at the University of Nevada, Las Vegas, opted to sit out the rest of the 2024 college football season after not receiving a $100,000 NIL payment he said was promised to him by a collective after he agreed to transfer to the Rebels in 2023.[76]

One current recourse for athletes in NIL disagreements is to enter the

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70. *Id.*

71. *Id.*

72. *Id.*

73. *See generally* Scott Bukstein, *Implementing a Franchise Player Designation System in the National Basketball Association*, 6 HARV. J. SPORTS & ENT. L. 345 (2015). Free agency is a player-friendly option because it empowers athletes to choose the best opportunities for themselves, whether that means pursuing higher pay, joining a championship-contending team, or finding a better personal fit. Free agency shifts bargaining power toward the player, allowing them to benefit from their talent and market value rather than being bound to restrictive team contracts. *See generally id.*

74. *See generally* Robertson v. National Basketball Ass'n, 556 F.2d 682 (2d Cir. 1997).

75. *See* Chris Hummer, *College Football Transfer Portal Takeaways From the 2024 Cycle, Including a Record-Setting Number of Entries*, 247 SPORTS (May 1, 2024), https://247sports.com/article/college-football-transfer-portal-takeaways-from-the-2024-cycle-including-a-record-setting-number-of-entries-231268813/#:~:text=There%20are%20currently%203%2C843%20names,spring%20practice%20for%20many%20programs [https://perma.cc/XQ6L-2NGK].

76. *See* Jason Page, *The Supreme Court Created a Wild West for College Athletes. Matt Sluka Proves it*, MSNBC (Sep. 28, 2024, at 9:00 ET), https://www.msnbc.com/opinion/msnbc-opinion/unlv-fresno-state-qb-football-saturday-sluka-rcna173100 [https://perma.cc/HD42-MVNM].

NCAA Transfer Portal, effectively using the threat of transfer to renegotiate or seek more favorable contract terms.[77] For example, before the start of the 2022 college basketball season, University of Miami player Isaiah Wong threatened to leave the team unless his NIL compensation was increased.[78] Isaiah Wong had signed an NIL deal with LifeWallet but reportedly felt undercompensated compared to his high-profile transfer teammate, Nijel Pack, who secured a two-year $800,000 NIL deal with the same sponsor.[79] Isaiah Wong's agent publicly stated that he would enter the transfer portal unless his NIL compensation was increased.[80] Ultimately, Isaiah Wong decided not to transfer after receiving assurances from Miami's boosters that he would receive additional NIL opportunities.[81] Isaiah Wong's situation illustrates how athletes may leverage the portal as a bargaining tool, but doing so represents only an unstable solution that does not address the broader need for more uniform protections of athletes' NIL rights.

Without oversight, the transfer portal can lead to instability, a lack of transparency, and inequitable results for student-athletes. Collective bargaining could introduce standardized rules, safeguards against tampering, and clearer guidelines to ensure athletes, universities, and collectives operate on a level, better-regulated playing field. By advocating for collective bargaining and establishing a union—like the NBPA—NCAA athletes could reshape the portal into a tool that promotes equity and opportunity rather than chaos and imbalance.

A. NBPA as a model for the NCPA

The NBPA plays a crucial role in protecting NBA players' interests by collectively bargaining with the league.[82] The collective bargaining

77. *See* Jonathan Givony & Jeff Borzello, *NIL Agent Says Miami Hoops Star Isaiah Wong Will Enter Transfer Portal if NIL Compensation Isn't Increased*, ESPN (Apr. 28, 2022, at 22:25 ET), https://www.espn.com/mens-college-basketball/story/_/id/33823826/nil-agent-says-miami-hoops-star-isaiah-wong-enter-transfer-portal-nil-compensation-increased# [https://perma.cc/U695-KXNX].

78. *Id.*

79. *Id.*

80. *Id.*

81. *See* Jonathan Givony & Jeff Borzello, *Miami Hurricanes Guard Isaiah Wong Backtracks, Will Not Enter Transfer Portal*, *Will Keep Current NIL Deal*, ESPN (Apr. 29, 2022, at 17:14 ET), https://www.espn.com/mens-college-basketball/story/_/id/33827526/miami-hurricanes-guard-isaiah-wong-backtracks-not-enter-transfer-portal-keep-current-nil-deal [https://perma.cc/979J-ANFR].

82. *Collective Bargaining Agreement (CBA)*, NBAPA, https://nbpa.com/cba#:~:text=The%20Collective%20Bargaining%20Agreement%20between,the%20NBA%2C%20and%20the%20

agreement governs key issues like salary caps, player contracts, free agency, health benefits, and working conditions.[83] The NBPA negotiates standardized contracts that establish minimum salaries, maximum contract lengths, and guaranteed compensation for all players, which helps prevent exploitative deals between players and teams.[84] Similarly, unionization among collegiate athletes could address similar issues and provide a framework for collective protections.[85]

For example, if all collegiate athletes were to unionize under an organization such as the NCPA,[86] one of its primary challenges would be addressing the financial disparities in NIL sponsorship deals between high-revenue sports like football or basketball and less lucrative sports such as swimming, rowing, and track and field.[87] To ensure equitable treatment, the NCPA could adopt a profit-sharing model where a portion of the revenue generated by high-profile sports is distributed to support athletes in other programs. By modeling rules after the NBPA's compensation standards, collegiate athletes could also benefit from a baseline financial guarantee.

For instance, just as the NBA implements a minimum salary rule to ensure that all players receive a baseline level of compensation,[88] the NCPA could negotiate a collegiate athlete minimum salary that would guarantee

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NBPA [https://perma.cc/BR32-2K3K] (last visited Oct. 30, 2024).

83. *Id.*

84. *Id.*

85. *See* McNicholas et al., *supra* note 63.

86. *See United For Change, Because College Athletes Deserve Equal Rights and Freedom*, NCPA, https://www.ncpanow.org [https://perma.cc/9AHL-TGW3] (last visited Jan. 11, 2025) ("[T]he National College Players Association (NCPA) is a 501(c)(3) nonprofit advocacy association, made up of current and former college athletes . . . ."). *See also* Cole Forsman, *National Collegiate Players Association Pushes Back on $2.8 Billion NCAA-House Settlement*, SPORTS ILLUSTRATED (Aug. 29, 2024), https://www.si.com/college/gonzaga/basketball/national-college-players-association-pushes-back-on-2-8-billion-ncaa-house-settlement-01j6fmpndbqz [https://perma.cc/S7CE-62EU].

87. NCAA, *supra* note 62.

88. Ryan Phillips, *What's the Minimum NBA Salary for 2024–25?*, SPORTS ILLUSTRATED (Sep. 11, 2024), https://www.si.com/nba/what-minimum-nba-salary-2024-25 [https://perma.cc/6XE6-PYA4].

> The minimum NBA salary during the 2024-25 season depends based on that player's experience. For a player with no years of experience, the salary is $1,157,153, and it increases from there based on the years of service in the league. A player with one year of experience will make $1,862,265, a player with two years of experience will make $2,087,519, a player with three years of experience will make $2,162,606 and so on, all the way up to a player with 10 or more years of experience making $3,303,771 per year.

Id.

financial benefits for athletes in less commercially popular sports. This system would ensure that all athletes receive a fair share of the profits derived from the broader athletic program. Unionization could also empower athletes to negotiate protections beyond financial considerations alone. The NCPA could function similarly to the NBPA, allowing athletes to collectively bargain for standardized NIL contracts that protect them from predatory booster collectives and universities.[89] By following the NBPA model, the NCPA could ensure that college athletes have access to transparent, enforceable NIL agreements, a share of revenue generated by their athletic performance, and protections against financial manipulation or broken promises from third-party entities.[90]

IV. UNIONIZATION CAN SECURE BENEFITS AND PROTECTIONS AGAINST EXPLOITATION

Just as the NBPA secured player rights through collective bargaining, a more widespread NCPA could safeguard student-athletes from the exploitation and power imbalances that currently exist in the NIL marketplace. By introducing a unified voice for athletes, unionization would provide a structured framework to address inequities and better protect the interests of collegiate athletes. Unionization would also introduce a formal mechanism to resolve disputes—providing athletes with recourse if they are not paid as promised. This would give collegiate athletes more power to enforce their contractual rights without having to rely solely on filing their individual grievances. By following the NBPA model, the NCPA could ensure that college athletes have access to transparent, enforceable NIL agreements, a share of revenue generated by their athletic performance, and protections against financial manipulation or broken promises from third-party entities. These protections would help level the playing field for athletes who currently lack leverage in NIL negotiations.

89. *See* Finnegan, *supra* note 19, at 881–82 (discussing how many athletes sign deals with no professional representation).

90. *See* NCPA, *supra* note 86. While the "NCPA has been pivotal in bringing forth essential reforms, including state laws guarantees freedom to receive NIL compensation . . . [and] more transfer freedoms," the author of this Note envisions a more comprehensive union that all NCAA athletes would mandatorily be a member of. *See generally id.*

A. The Right to Contract in the NIL Ecosystem

The NIL ecosystem grants athletes a powerful new control over their personal brand, but the current lack of sufficient legal safeguards is problematic, creating issues with contract transparency and enforceability.[91] Without a standardized framework, athletes are vulnerable to unfair terms and exploitative practices. The current system exposes student-athletes to potentially exploitative practices including the "practice of including exclusivity terms in NIL contracts, which effectively strips unwitting student-athletes of their NIL rights."[92] Athletes, many of whom are young and therefore navigate the complex terrain of contracting for the first time, often face challenges in understanding the details of their contracts.[93] This knowledge gap puts athletes at a distinct disadvantage during negotiations. The situation calls for a more structured approach to NIL contracts to ensure fairness, transparency, and enforceable protections for student-athletes.

B. The Case for Unionization and Collective Bargaining (the NCPA)

Recent developments demonstrate that student-athlete unionization is becoming an increasingly viable option. For instance, a National Labor Relations Board regional manager recently ruled the Dartmouth men's basketball team could vote to form a union.[94] This landmark decision set a precedent for broader efforts to organize college athletes and secure their rights. Unionization could address power imbalances in NIL negotiations and protect athletes from predatory contracts. By collectively negotiating the terms of NIL agreements, athletes would no longer face the burden of navigating these complex deals on their own and would have the backing of the NCPA whenever they faced exploitative tactics. Furthermore, unionization would eliminate the role of exploitative third parties, such as for-profit collectives, which often act as middlemen between players and

91. *See* Finnegan, supra note 19, at 881–82 (explaining that around 90% of college athletes do not have agents or professional representation for NIL deal, oftentimes a licensed attorney never lays eyes on the NIL contract).

92. *Id.* at 882.

93. *Id.*

94. *See* Dennis Dodd, *How a Ruling that Dartmouth Basketball Players Are School Employees, Can Join Union May Change College Sports*, CBS SPORTS (Feb. 6, 2024, at 1:36 ET), https://www.cbssports.com/college-basketball/news/how-a-ruling-that-dartmouth-basketball-players-are-school-employees-can-join-union-may-change-college-sports/ [https://perma.cc/NJC7-TGLD].

universities but have their own economic self-interest and not the player's priorities in mind when organizing NIL deals with athletes.[95]

C. Challenges to Collective Bargaining and Unionization

Despite the clear benefits of unionization and collective bargaining, including increased power at the negotiating table, protections against exploitative tactics, and a more equitable profit-sharing model that would benefit all collegiate athletes from top to bottom; the path towards collective bargaining is not immune from difficulties that both athletes and universities would have to overcome. For example, under a collective bargaining agreement, athletes would likely become employees of the school.[96] In labor law, the classification of a worker as an employee is critical to determining whether they have the right to collectively bargain under the National Labor Relations Act (NLRA).[97] If athletes are classified as employees, they would gain certain rights, including the ability to unionize and collectively bargain. But as employees, they would be more directly accountable to university administrators. Additionally, their schools may be subject to new legal obligations, significant financial burdens, and legal risks.

The Dartmouth men's basketball unionization ruling suggests that athletes who contribute substantial time and effort toward their sports, particularly revenue-generating ones, can technically be considered employees.[98] But such a determination is not uniform across all institutions and sports, and it raises complex questions about how the law should balance athletes' status as both students and employees.[99] Fortunately, there is a comparative example that provides some guidance and a path forward for collegiate athletes and universities if they decide to enter the realm of collective bargaining.

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95. TAXPAYER ADVOC. SOC'Y, *supra* note 59.

96. *See generally* Charles Grantham, *It Is Time to Share Revenue with Collegiate Athletes*, HARV. J. SPORTS & ENT. L. (2020).

97. *See generally* Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP & LAB. L. 223 (2005).

98. *See* Dodd, *supra* note 94.

99. *See generally* Grantham, *supra* note 96.

D. Medical School Residents as University Employees?

While the path toward collective bargaining presents both benefits and challenges, understanding how courts have approached similar dual-role scenarios can provide valuable insight. The classification of "students" as employees is not without precedent in other educational contexts.[100] Notably, legal rulings involving medical residents, individuals who simultaneously fulfill dual roles as students and workers, offer a useful comparative framework. These cases demonstrate that the National Labor Relations Board (NLRB) has been willing to recognize employee rights in contexts where individuals provide substantial labor, even if they are also engaged in educational endeavors.[101]

Suits brought by resident medical students against hospitals or universities illustrate how institutions can navigate the complex interplay between educational missions and labor rights, suggesting a possible path forward for collegiate athletics.[102] By examining these precedents, it becomes possible to better understand how student-athletes might achieve employee status. These cases could provide a 'play-book' for universities and athletes alike, potentially resolving some of the tensions inherent in the shift toward collective bargaining.

Case law addressing similar questions in educational settings provides insight into how courts may treat student-athletes. For example, in *St. Clare's Hospital & Health Center*, which was later overturned by *Boston Medical Center Corporation*, the NLRB initially held that medical interns and residents were primarily students, not employees.[103] This earlier ruling reflected the traditional view that their educational role outweighed the economic value of their work, effectively denying them employee status and collective bargaining rights.[104] The Court held that the interests of the students and educational institution in the services being rendered by the medical residents were academic, rather than economic.[105] However, this

100. *See generally* Bos. Med. Ctr. Corp., 330 NLRB 152 (1999).
101. *See generally id.*
102. *See generally id.*
103. *See generally* St. Clare's Hosp. & Health Ctr., 229 NLRB 1000 (1977).
104. *See generally id.* The court reasoned that "since the individuals are rendering services which are directly related to-and indeed constitute an integral part of their educational program, they are serving primarily as students and not primarily as employees." *Id*. at 1002.
105. *See generally id.*

perspective shifted in subsequent years, ultimately allowing medical residents to unionize.

In *Boston Medical Center*, medical residents sought to unionize and claimed that they were employees due to the work they performed as part of their medical training.[106] The NLRB agreed, concluding that residents were indeed employees entitled to the full scope of labor protections, including the right to unionize and bargain collectively.[107] In the *Boston Medical* decision, the NLRB stated that "as a policy matter, we do not believe that the fact that [residents] are also students warrants depriving them of collective-bargaining rights . . . ."[108] The board reasoned that while residents were engaged in educational activities, the substantial services they provided to the hospital were akin to those of traditional employees.[109]

These cases highlight the evolving understanding of dual-role individuals: those who balance educational commitments with significant economic contributions to their institution's operations. Moreover, the story of medical residents' quest to gain recognition as employees reveals that dual roles as students and employees do not inherently preclude unionization. Following the decision in *Boston Medical Center* and other similar NLRB decisions, effective progress has been made for medical residents in their efforts to unionize.[110]

Today, approximately 20% of medical residents in the United States are unionized, with the majority of unionized residents having representation through organizations like the Service Employees International Union and its Committee of Interns and Residents.[111] These unions advocate for fair wages, improved working conditions, and other labor protections while

106. *See generally* Bos. Med. Ctr. Corp., 330 NLRB 152 (1999).

107. *Id.* at 161, 162 (medical residents "clearly are individuals who have completed a course of specialized intellectual instruction" and "are performing related work under the supervision of a professional to qualify' to be a professional," therefore fitting within the statutory definition of employee).

108. *Id.* at 164.

109. *Id.* at 155 ("For example, surgical residents spend eight to ten hours a day in the operating room on the days they perform surgery . . . perform[ing] increasingly more complicated surgery as their experience increases.").

110. *Committee of Interns and Residents*, SEIU HEALTHCARE, https://www.cirseiu.org/ [https://perma.cc/23NM-GZ56] (last visited Nov. 6, 2025) ("CIR is the largest house staff union in the United States representing over 33,000 house staff . . . empower[ing] resident physicians to have a stronger voice within their hospitals.").

111. *Id.*

acknowledging residents' role as students.[112] This precedent offers a suitable roadmap for collegiate athletes seeking to assert their labor rights without undermining the educational mission of their institutions. If medical residents can successfully navigate their dual role as students and workers to secure meaningful labor protections, there is no reason that collegiate athletes cannot do the same.

The shift from *St. Clare's Hospital* to *Boston Medical Center* underscores a willingness to recognize employee rights, even within educational settings. Applying this reasoning to collegiate athletes, courts should increasingly view student-athletes as employees due to the significant revenue they generate for universities, particularly in high profile sports like football and basketball.[113] The NLRB's reasoning in *Boston Medical Center*, that residents can be considered employees and therefore have the right to collectively bargain, supports the argument that collegiate athletes should also be allowed to engage in collective bargaining.[114] Like medical residents, collegiate athletes provide substantial services to their institutions, not only through their athletic performances but also by generating immense revenue and enhancing the university's brand.[115]

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112. *Id. See also* Stacy Weiner, *Thousands of Medical Residents Are Unionizing. Here's What that Means for Doctors, Hospitals, and the Patients they Serve*, AAMC NEWS (June 7, 2022), https://www.aamc.org/news/thousands-medical-residents-are-unionizing-here-s-what-means-doctors-hospitals-and-patients-they [https://perma.cc/QG94-EF68] (writing that unionization empowers residents to advocate for better pay, improved working conditions, and greater control over their demanding work lives while giving them avenues to address work-life balance, safety, and fairness in hospital policies).

113. Associated Press, *NCAA Generates Nearly $1.3 Billion in Revenue for 2022-2023. Division I Payouts Reach $669 Million*, U.S. NEWS AND WORLD REP. (Feb. 1, 2024), https://www.usnews.com/news/sports/articles/2024-02-02/ncaa-generates-nearly-1-3-billion-in-revenue-for-2022-23-division-i-payouts-reach-669-million [https://perma.cc/2VSH-AZSH]. *See also* Tina Pamintuan, *College Sports: How Winning Impacts Revenue*, THE JOURNALIST'S RES. (Sep. 12, 2016), https://journalistsresource.org/education/college-sports-how-winning-impacts-revenue/ [https://perma.cc/62XA-KVTM] ("Some top schools make up to $200 million from their football and basketball programs annually.").

114. *See generally* Bos. Med. Ctr. Corp., 330 NLRB 152 (1999).

115. Doug J. Chung, *How Much Is a Win Worth? An Application to Intercollegiate Athletics*, HARV. BUS. SCH. (Aug. 2015), https://www.hbs.edu/ris/Publication%20Files/How%20much%20is%20a%20win%20worth_MgtSci_Final_2015_0812_5d8e67f6-cf0e-428f-bb03-7c292ecd6049.pdf [https://perma.cc/7854-JQ93] (explaining that for some schools, a single additional win during the football seasons could mean as much as a $3 million increase in athletic department revenue). *See generally* Trevor Collier et al., *The "Cinderella Effect": The Value of Unexpected March Madness Runs As Advertising for Schools*, 21 J. SPORTS ECON. 1 (2020) ("[W]e find that freshman enrollments increase for private schools two academic years after a Cinderella run . . . [meaning that] a Cinderella run is worth approximately $7.3 million in 2012-dollars.").

The parallels between athletes and residents are clear: while student-athletes participate in educational activities, their contributions to the university's athletic programs are virtually indistinguishable from those of professional athletes in terms of effort, time commitment, and public exposure.[116] Similarly, medical residents' contributions to the operation of a hospital system are often indistinguishable from those of actual physicians in terms of hours worked, patients treated, and economic contributions to the hospital system.[117] The rationale in *Boston Medical Center* suggests that courts and regulatory bodies should adopt a more progressive interpretation of a student-athletes' role in the university system and affirm that the educational aspect of collegiate sports should not negate athletes' rights to labor protections and collective bargaining.

These cases are instructive to student-athletics because they involve the dual roles of education and work. Courts may be hesitant to classify athletes as employees, fearing that it could transform the nature of college athletics and undermine the educational mission of universities. As with medical residents, classifying student-athletes as employees would impose financial burdens on schools, which could be required to offer wages, benefits, and workers' compensation to athletes.

The cons of classifying athletes as employees involve schools possibly being subjected to additional legal obligations, including minimum wage laws, overtime pay, and liability for workplace injuries. This may result in a significant financial burden, particularly for smaller schools or those with less profitable athletic programs. Moreover, schools could be exposed to increased legal risks, such as liability for injuries sustained by athletes during training or competition.

Another challenge is the potential shift in the nature of college sports.

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116. Press Release, The Drake Group, Position Statement: Excessive Athletics Time Demands Undermine College Athletes' Health and Education and Require Immediate Reform 7–8 (2016), https://www.thedrakegroup.org/wp-content/uploads/2019/06/position-statement-time-demands-8-1.pdf [https://perma.cc/XJE5-DD6U].

> Participants in revenue-producing sports at the most competitive levels exceed 40 hours per-week of athletic related activities during the school year. The 2015 NCAA GOALS study revealed that FBS football players reported the highest in-season time commitments with a median of 42 hours per week, more time than the Fair Labor Standards Act requires before workers can receive overtime pay.

Id.

117. Bos. Med. Ctr. Corp., 330 NLRB 152, 155 (1999).

If athletes are classified as employees, the traditional model of amateurism, which has been a cornerstone of college athletics, would be fundamentally altered. Schools may have to restructure their athletic programs to accommodate new labor laws, which could reduce opportunities for athletes in non-revenue sports. Furthermore, some stakeholders fear that the commercialization of college athletics through unionization or employment contracts could diminish the emphasis on education.

Despite these challenges, the legal evolution exemplified by these cases suggests that recognizing student-athletes is not only feasible but also consistent with broader labor law principles. By viewing student-athletes as employees, universities would be incentivized to provide more equitable support structures to athletes, including guaranteed minimum compensation, healthcare, and mechanisms to address grievances related to NIL contracts or working conditions.

In essence, the recognition of student-athletes as employees under the *Boston Medical Center* framework could usher in a transformative era of collegiate sports, ensuring athletes are better protected as workers who contribute to the billion-dollar industry of collegiate athletics.

V. RECENT DEVELOPMENTS

In the middle of 2024, the Third Circuit Court of Appeals in *Johnson v. NCAA* opened the door to college athletes being classified as employees under the Fair Labor Standards Act, rejecting the NCAA's traditional "amateur" status argument and establishing a new "economic realities" test.[118] While the case was remanded back to the trial court for additional

118. *See generally* Johnson v. National Collegiate Athletic Association, 108 F.4th 163 (3d Cir. 2024). *See also* Micah B. Schwartz & Yiorgos L. Koliopoulo, *Appellate Court Rules that NCAA Athletes May Qualify as Employees Under the Fair Labor Standards Act*, WILLIAMS MULLEN (July 23, 2024), https://www.williamsmullen.com/insights/news/legal-news/appellate-court-rules-ncaa-athletes-may-qualify-employees-under-fair-labor [https://perma.cc/A73V-QZ38].

> [T]he Third Circuit developed its own "economic realities" test to determine whether the relationship between an athlete and the college or university constitutes employment within the meaning of the FLSA. Under this new test, college athletes may be considered employees under the FLSA when "(a) they perform services for [the college], (b) necessarily and primarily for the [the college]'s benefit, (c) under [the college]'s control or right of control, and (d) in return for express or implied compensation or in-kind benefits." The Third Circuit specifically stated that they will not take the "frayed tradition of amateurism" into account when defining the economic reality of an athlete's relationship with the

fact finding, the decision, nevertheless shows that it is feasible for NCAA athletes to receive federal minimum wage and overtime protections, potentially reshaping college sports exactly in the fashion that is proposed in this Note.[119]

As of mid-2025, there have been no further published decisions in *Johnson* following the Third Circuit Court of Appeals' 2024 ruling. The case remains pending in the United States District Court for the Eastern District of Pennsylvania for additional fact-finding to determine whether college athletes qualify as employees under the Fair Labor Standards Act.[120] Lower court decision delays in *Johnson* highlight the broader uncertainty surrounding college athletes' employment status.

While the judiciary continues to grapple with the legal framework for classifying college athletes as employees under federal labor laws, the political landscape has shifted in ways that may hinder efforts toward greater labor protections. The stalled progress in *Johnson* reflects a larger pattern of resistance to recognizing college athletes' labor rights, a challenge that has only been exacerbated by recent political developments.

A. Changing Political Landscape

Recent political developments underscore the challenges facing college athlete unionization efforts, particularly under the current administration. In December 2024, the Dartmouth men's basketball team withdrew their unionization petition, a move widely attributed to the anticipated shift in the

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> NCAA and their affiliated school. The Third Circuit has now returned the case to the district court to apply this test.

Id. (alterations in original).

119. *Id.*

120. *See generally* Harv L. Rev., *Third Circuit Creates Test to Assess College Athlete Employment Status Under the Fair Labor Standards Act*, 138 HARV. L. REV. 1145 (2025).

> It is unlikely that courts applying the *Johnson* test will find that all Division I athletes are employees. . . . Division I football and men's basketball players are probably the only college athletes that generate enough revenue to satisfy all four *Johnson* prongs. Both are comparable to a profit-seeking business and essential to the NCAA and universities' athletic departments. If the district court finds these players are employees, the FLSA would mandate the NCAA and universities to pay athletes competing in those sports. However, it is unlikely that female college athletes would qualify as employees under *Johnson*. Paying only male athletes could implicate Title IX.

Id. at 1150–51.

NLRB's stance following President Trump's re-election.[121] This decision effectively halted the first successful college athlete unionization effort in the nation.

The Trump administration has also rescinded Biden-era guidance that mandated equitable distribution of NIL payments among male and female athletes.[122] This action has raised concerns about potential disparities in compensation and the undermining of gender equity in collegiate sports.

These policy reversals reflect a broader trend of the current administration's approach to labor rights, which has been characterized by actions perceived as anti-worker and anti-union.[123] Such an environment presents significant obstacles for college athletes seeking to organize and advocate for improved working conditions and compensation, as well as for the working class in America more generally.[124]

In light of these challenges, proponents of college athlete unionization may need to explore alternative strategies, such as pursuing legislative changes, to secure the rights and protections that collective bargaining can offer. Against this backdrop of stalled unionization efforts and political resistance, another significant development has emerged through the courts.

B. The House v. NCAA *Settlement: A New Era*

A landmark NIL development emerged in summer 2025: the *House v. NCAA* settlement, which arguably brings the most sweeping changes to college-athlete compensation to date.[125] On June 6, 2025, Judge Claudia Wilken approved the settlement which delivers nearly $2.8 billion in retroactive compensation to current and former Division I athletes, covering

121. *See* Daniel Wiessner, *Dartmouth Basketball Union Bid Withdrawn Ahead of Trump's Second Term*, REUTERS (Dec. 31, 2024, at 21:49 ET), https://www.reuters.com/legal/litigation/dartmouth-basketball-union-bid-withdrawn-ahead-trumps-second-term-2024-12-31/ [https://perma.cc/M5M8-FJKE].

122. *See* Juan Perez Jr., *Trump Administration Rescinds Biden-Era College Athlete Pay Guidance*, POLITICO (Feb. 12, 2025, at 14:08 ET), https://www.politico.com/news/2025/02/12/trump-administration-biden-era-college-athlete-pay-guidance-00203778 [https://perma.cc/N2AB-E76L].

123. *See Trump Vowed to Champion US Workers - the Reality Has Been a Relentless Assault*, THE GUARDIAN (Feb. 16, 2025), https://www.theguardian.com/us-news/2025/feb/16/trump-anti-worker-actions-unions [https://perma.cc/K2DL-T88K].

124. *See id.*

125. *See* Eddie Pells, *Federal Judge Approves $2.8B Settlement, Paving Way for US Colleges to Pay Athletes Millions*, ASSOCIATED PRESS (June 6, 2025, at 23:02 ET), https://apnews.com/article/ncaa-settlement-4355c0db8bb2eaa4248650594f157053 [https://perma.cc/F6M7-CDT5].

those who competed from approximately 2016 through 2024.[126] Equally historic was the settlement's authorization of direct revenue sharing: Division I schools that opt in may begin sharing revenue with current athletes, on top of scholarships and NIL income, starting July 1, 2025.[127]

However, the *House* settlement does not classify athletes as employees, and no withholdings are made from payments meaning that athletes must manage taxes on their own.[128] While the *House* settlement marks a dramatic shift away from the NCAA's amateurism model, it also highlights the limits of settlement as a vehicle for broader labor protections which sets the stage for considering how policymakers can achieve a more sustainable and equitable framework.

CONCLUSION

The future of NIL must focus on finding a more equitable balance between profit and protecting the rights of student-athletes; collective bargaining provides the best avenue for doing so. The current NIL landscape is ripe with disparities, where top athletes reap significant benefits while others are left navigating unclear and often exploitative systems.[129] Without the structure of collective power, all athletes are at the mercy of booster-backed collectives, third-party agents, and patchwork state regulations that fail to prioritize their best interests.[130]

Building on the lessons of *House* and the shortcomings of the existing NIL system, collective bargaining emerges as the most promising solution.

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126. *Id*.

127. *See* Aaron L. Pawlitz, *Settlement of the House Case*, LEWIS RICE (June 23, 2025), https://www.lewisrice.com/publications/settlement-of-the-house-case/ [https://perma.cc/GH8H-2BD9].

> [T]wo of the settlement's terms are especially noteworthy: first, the settlement provides nearly $2.8 billion in back payments to student-athletes who competed from 2016 through 2024 and were previously barred to varying degrees under NCAA regulations from earning NIL money; second, the settlement allows NCAA member institutions to share up to approximately $20.5 million in revenues annually with current student-athletes starting July 1, 2025, with that amount growing year-to-year.

Id.

128. *See* Austin Reid & Andrew Smalley, *What the NCAA Settlement Means for Colleges and State Legislatures*, NCSL (June 9, 2025), https://www.ncsl.org/state-legislatures-news/details/what-the-ncaa-settlement-means-for-colleges-and-state-legislatures [https://perma.cc/ES6A-XYV2].

129. NCAA, *supra* note 62.

130. *See* Finnegan, *supra* note 19, at 858–59.

Collective bargaining would allow student-athletes to enter into more fair and transparent agreements, set enforceable standards for contracts, and reshape the currently inequitable structure by allowing all collegiate athletes to economically benefit from NIL.

Moreover, collective bargaining could address broader issues, such as regulating the transfer portal to create uniformity while preserving athletes' mobility rights. By negotiating as a unified group, collegiate athletes could secure financial stability through guaranteed minimum NIL deals, more equitable distribution of revenue, and safeguards for athletes transferring schools.

Collective bargaining would also equip collegiate athletes with more persuasive power to demand transparency from schools, brands, and collectives regarding NIL agreements, ensuring that athletes have the representation to not only understand the terms they are entering into but also to hold third-party groups accountable when these groups fail to deliver on their promises.[131] By securing these rights, collegiate athletes would no longer face the daunting task of negotiating in an unregulated environment on their own, but would instead have the full backing of a well-organized entity.

Taken together, the path forward lies not simply in piecemeal settlements or incremental reforms, but in empowering athletes with collective bargaining rights. Ultimately, implementing collective bargaining in collegiate sports would not only be a step towards economic fairness, but also a means of restoring autonomy and power to collegiate athletes, allowing them to thrive in the ever-evolving world of collegiate sports.

131. *See, e.g*, The Athletic College Basketball Staff, *Six Former FSU Basketball Players Sue Coach Leonard Hamilton, Alleging Unpaid NIL Compensation*, THE ATHLETIC (Dec. 30, 2024), https://www.nytimes.com/athletic/6027174/2024/12/30/florida-state-leonard-hamilton-nil-lawsuit/ [https://perma.cc/JJ77-K5GQ] (The former players claim Coach Hamilton failed to keep a promise to pay them each $250,000 in NIL money).