# The NCAA as Joint Employer? Let's Be Real

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## INTRODUCTION

For over sixty-five years, athletes receiving grants-in-aid have been seeking compensation from their universities. Over that same timeframe, scholars from a variety of disciplines have been writing about college athlete compensation, and there is a comprehensive body of literature on the topic of college athlete labor rights. In 2017, I wrote a lengthy piece addressing college athletes' peculiar status as neither employees of universities nor independent contractors.[1] In concluding

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1. *See* Richard T. Karcher, *Big-Time College Athletes' Status as Employees*, 33 ABA J. LAB. & EMP. L. 31 (2017).

that Football Bowl Series (FBS) football and Division I men's basketball players who participate in exchange for compensation in the form of grants-in-aid are statutory employees of their universities, I discussed similarities between professional and college players and analyzed National Labor Relations Board (NLRB) decisions on the collective bargaining rights of student assistants and college athletes under the National Labor Relations Act (NLRA), which applies only to private employers. I also explained how NLRB precedent supports finding these college athletes to be employees under state workers' compensation statutes as well as the Fair Labor Standards Act (FLSA), which applies to both private and public sector employees. For purposes of this Article, I make the assumption that FBS football and Division I men's basketball players who receive grants-in-aid are statutory employees.

Within two years of my prior article's publication, the Ninth Circuit in *Dawson v. NCAA* ruled (unsurprisingly) that the NCAA and the Pac-12 are not "joint employers" of FBS football players and, thus, denied a claim that they failed to pay wages under the FLSA.[2] But on September 22, 2021, the Eastern District of Pennsylvania, in *Johnson v. NCAA*,[3] ruled (surprisingly) that college athletes at Villanova University, Fordham University, Sacred Heart University, Cornell University, and Lafayette College–who have claimed violations of the FLSA–have sufficiently alleged that the NCAA is a joint employer with the universities they attend.[4] One week later, NLRB General Counsel Jennifer Abruzzo, in a nine-page memorandum, made public her "position that the scholarship football players at issue in Northwestern University, and similarly situated Players at Academic Institutions, are employees under the [NLRA]."[5] In a footnote on the last page of the memorandum, Abruzzo wrote:

2. 932 F.3d 905, 907 (9th Cir. 2019).

3. 561 F. Supp. 3d 490 (E.D. Pa. 2021).

4. *Id.* at 506–08. Throughout its opinion, the district court referred to college athletes as "student-athletes." *See, e.g.*, *id.* at 493.

5. *See Memorandum*, Jennifer A. Abruzzo, General Counsel, NLRB, *Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act* (Sept. 29, 2021), at 9, https://www.akingump.com/a/web/fj79W4f637mkQupWaocC8V/3beRb3/memorandum.pdf.

> Because Players at Academic Institutions perform services for, and subject to the control of, the NCAA and their athletic conference, in addition to their college or university, in appropriate circumstances I will consider pursuing a joint employer theory of liability. . . . Similarly, it may be appropriate for the Board to assert jurisdiction over the NCAA and an athletic conference, and to find joint employer status with certain member institutions, even if some of the member schools are state institutions.[6]

On May 27, 2021, Senator Chris Murphy introduced Senate Bill 1929 titled, the "College Athlete Right to Organize Act" (CARO Act),[7] which I helped craft with his legislative staff. Abruzzo mentioned the CARO Act in her memorandum, in a footnote with very little explanation.[8] Short and sweet, but highly impactful to the college athletes' labor rights movement, the CARO Act is designed to fix the primary legal hurdles confronting the organization of college athletes as a certified labor union by making three key revisions to the NLRA. First, it provides that:

> Any individual who participates in an intercollegiate sport . . . and is enrolled as a student . . . shall be considered an employee of the institution if the individual receives any form of direct compensation, including grant-in-aid, from the institution of education, and any terms and conditions of such compensation require participation in an intercollegiate sport."[9]

Second, it gives the NLRB jurisdiction over public universities pertaining to employment matters involving college athletes, including

6. *Id.*

7. College Athlete Right to Organize Act, S. 1929, 117th Cong. [hereinafter CARO Act] (as introduced to Senate, May 27, 2021), https://www.congress.gov/bill/117th-congress/senate-bill/1929/text?q=%7B%22search%22%3A%5B%22college+athletes%22%5D%7D&r=4&s=1.

8. Abruzzo, *supra* note 5, at 5 n.20.

9. CARO Act, *supra* note 7, at § 3(a)(2).

the certification of a collective bargaining unit of college athlete employees.[10] Third, it provides that the NLRB shall recognize multiple schools within a conference as a "multiemployer bargaining unit" if consented to by the employee representatives of the collective bargaining unit.[11] These three revisions are key to supporting the formation of labor unions among college athletes.

On December 15, 2022, the Los Angeles Regional Director of the NLRB "found 'merit' in the unfair labor practice charges filed . . . in February 2022 by the National College Players Association, a nonprofit advocacy organization."[12] The National College Players Association "alleged that USC, the Pac-12, and the NCAA misclassified college athletes as 'non-employees,' and suppressed their Section 7 rights under the [NLRA], including the right to speak about compensation and working conditions."[13] Based on Abruzzo's prosecutorial directive, the Regional Director's decision to issue a complaint is not all that surprising. If a settlement is not reached, there will likely be a hearing before an administrative law judge who will address the employee status of college athletes under the NLRA and whether the conference and/or the NCAA can be held liable under a joint employer theory. The administrative law judge's decision can be appealed to the NLRB. The losing party can then appeal to the U.S. Court of Appeals for the Ninth Circuit and, ultimately, seek

10. *Id.* § 3(a)(c) ("[T]he Board shall exercise jurisdiction over institutions of higher education and college athlete employees of such institutions in relation to all collective bargaining matters under this Act pertaining to such employees, including any representation matter, such as recognizing or establishing a bargaining unit for such employees and any labor dispute involving such institutions and employees[.]").

11. *Id.* § 3(b) ("[F]or the purpose of establishing an appropriate bargaining unit for college athlete employees at institutions of higher education in an intercollegiate athletic conference, the Board shall recognize multiple institutions of higher education within an intercollegiate athletic conference as a multiemployer bargaining unit, but only if consented to by the employee representatives for the intercollegiate sports bargaining units at the institutions of higher education that will be included in the multiemployer bargaining unit[.]").

12. Salvatore et al., "*Fight On"; NLRB's Regional Office Pursuing Unfair Labor Practice Charges on Behalf of College Athletes Against USC, Pac-12, and NCAA*, NAT'L L. REV. (Dec. 20, 2022), https://www.natlawreview.com/article/fight-nlrb-s-regional-office-pursuing-unfair-labor-practice-charges-behalf-college.

13. *Id.*

review by the U.S. Supreme Court. Needless to say, resolution of this matter could take a while.

The title of the symposium is "(How Much) Should We Pay Them?" From a pure labor rights perspective, arguably it is inappropriate for *us* to answer that question because the players should be the ones answering how much their universities should pay them. The CARO Act would put public universities under the NLRB's umbrella and, if athletes in a particular conference chose to exercise their collective bargaining rights, prevent their universities and conferences from refusing to bargain by claiming they are bound by NCAA bylaws. In this Article, I articulate why the joint employer theory to make the NCAA an employer of college athletes is a flawed analysis and should not be used as a tool to give the NLRB jurisdiction over the actual employers that are not covered by the NLRA. Part I of this Article will address the joint employer rule under federal labor law principles. Part II will discuss the application of the joint employer rule to the NCAA's organizational model and governance structure of institutional control. Part III will explain the multiemployer bargaining unit phenomenon in league sports and why a conference, not the NCAA, would be an appropriate unit.

## I. JOINT EMPLOYER STATUS UNDER FEDERAL LABOR LAW

Neither the NLRA nor the FLSA defines "joint employer" or "joint employment." The NLRA defines an "employer" to include "any person acting as an agent of an employer, *directly or indirectly*."[14] Further, the NLRA provides that the "term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless [the NLRA] explicitly states otherwise.'"[15] The FLSA defines "employer" to include "any person acting *directly or indirectly* in the interest of an employer in relation to an employee."[16] While both acts are silent as to joint employer status, there is a long history of NLRB and federal court precedent applying common law agency principles to determine if one or more entities share or

14. 29 U.S.C. § 152(2) (emphasis added).

15. *Id.* § 152(3).

16. *Id.* § 203(d) (emphasis added).

codetermine those matters that govern essential terms and conditions of employment of a particular group of employees.[17]

According to the Third Circuit in *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc.*:[18]

> [W]here two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute "joint employers" within the meaning of the NLRA.[19]

Applying that standard, the Third Circuit found that the operator of a refuse site, BFI, was a joint employer of drivers directly employed and supplied by its trucking contractors. The court recognized that BFI possessed and exercised the right to hire and fire the drivers at issue, and BFI and the trucking contractors "together determined the drivers' compensation and shared in the day-to-day supervision of the drivers."[20]

More recently, the NLRB has made it clear that "[t]he common-law definition of an employment relationship establishes the outer limits of a permissible joint-employer standard under the [NLRA]."[21] In *Browning-Ferris Industries of California, Inc.*,[22] the NLRB decided that one company could be deemed a joint employer of another company's employees based *exclusively* on either (1) a never-exercised contractual reservation of right to control one or more essential terms

17. Nearly sixty years ago, in *Boire v. Greyhound Corp.*, the Supreme Court held the question of whether Greyhound "possessed sufficient control over the work of the employees [of its cleaning contractor] to qualify as a joint employer" was "essentially a factual issue" for the NLRB to determine. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964). Thereafter, the NLRB found, and the Fifth Circuit affirmed, that Greyhound and the cleaning contractor were joint employers of the employees at issue because they "share[d], or codetermine[d], those matters governing essential terms and conditions of employment." *Greyhound Corp.*, 153 N.L.R.B. 1488, 1495 (1965), *enforced*, NLRB v. Greyhound Corp., 368 F.2d 778 (5th Cir. 1966).

18. 691 F.2d 1117 (3rd Cir. 1982), *enforcing* 259 N.L.R.B. 148 (1981).

19. *Id.* at 1124.

20. *Id.* at 1120, 1124–25.

21. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 1599, 1613 (2015).

22. *Id.*

and conditions of employment or (2) its indirect control of or influence over such terms and conditions; provided the evidence demonstrates that "the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."[23]

On appeal, the United States Court of Appeals for the District of Columbia Circuit denied enforcement of the NLRB's decision.[24] The D.C. Circuit held that, although the common law supported the Board's holding that indirect control and a contractually reserved right to control are relevant to the joint-employer inquiry, the Board had "overshot the common-law mark" by "failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions" of employment from evidence of "indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships."[25] In remanding the case to the Board, the court emphasized the importance of the "common-law principle that the joint employer's control–whether direct or indirect, exercised or reserved–must bear on the 'essential terms and conditions of employment' . . . and not on the routine components of a company-to-company contract."[26] The D.C. Circuit also criticized the Board for failing to "meaningfully apply" the requirement in its own standard—that there is evidence which demonstrates "the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining."[27] Finally, the D.C. Circuit did not affirm the Board's decision that indirect control, or a contractually reserved right to control, can establish joint-employer status absent evidence of exercised direct and immediate control; it left those issues undecided.[28]

23. *Id.* at 1600.

24. Browning-Ferris Indus. of Cal., Inc. v. N.L.R.B., 911 F.3d 1195, 1200 (D.C. Cir. 2018).

25. *Id.* at 1216, 1222.

26. *Id.* at 1221 (citation omitted). An example of "routine components of a company-to-company contract" that should not be given any weight in a joint employer analysis would be the fact that Browning-Ferris had "control[led] the basic contours of a contracted-for service—such as requiring four lines' worth of employee sorters plus supporting screen cleaners and housekeepers." *Id.* at 1220–21.

27. *Id.*

28. *Id.* at 1213, 1218, 1232.

The D.C. Circuit also recognized a distinction between the common law independent contractor and joint employer standards:

> [T]he independent-contractor and joint-employer tests ask different questions. The independent-contractor test considers who, if anyone, controls the worker other than the worker herself. The joint-employer test, by contrast, asks how many employers control individuals who are unquestionably superintendent.[29]

To that end, the D.C. Circuit further explained that "a rigid focus on independent-contractor analysis omits the vital second step in joint-employer cases, which asks, once control over the worker is found, *who* is exercising that control, *when*, and *how*.[30] According to the D.C. Circuit, "using the independent-contractor test exclusively to answer the joint-employer question would be rather like using a hammer to drive in a screw: it only roughly assists the task because the hammer is designed for a different purpose."[31]

The D.C. Circuit's holding in *Browning-Ferris* is not far removed from earlier NLRB administrative decisions concerning the joint employer rule. In *Greyhound Corp.*,[32] for example, the NLRB gave some weight to provisions in the business contract between Greyhound and a cleaning contractor that granted Greyhound the right to (1) "specify the exact manner and means" through which the [employees'] work w[ould] be accomplished[,]" (2) control their wages, (3) set their schedules, and (4) "assign employees to perform the work[.]"[33] However, the NLRB noted that "[t]he joint employer finding herein is premised on the common control *exercised* by Greyhound and [the cleaning contractor] over the employees."[34] In addition, the NLRB explained that Greyhound had "reserved to itself, both as a matter of express contractual agreement *and in actual practice*, rights over these employees which are consistent with its status as their employer along with [the

29. *Id.* at 1214.
30. *Id.* at 1215 (emphasis in original).
31. *Id.*
32. 153 N.L.R.B. 1488 (1965), *enforced*, 368 F.2d 778 (5th Cir. 1966).
33. *Id.* at 1495–96.
34. *Id.* at 1492 (emphasis added).

cleaning contractor]."[35] Thus, joint employer status, as determined by the courts and the NLRB, is premised on the exercise of actual control.

The NLRA provides some guidance in assessing what terms and conditions of employment are deemed essential to permit meaningful bargaining. Section 8(d) requires employers to negotiate with unions over certain mandatory subjects of bargaining defined as "wages, hours, and other terms and conditions of employment."[36] This requirement is referred to as the duty to bargain.[37] NLRB decisions have found mandatory subjects of bargaining to include, among other things, the scheduling of work breaks,[38] dress codes,[39] grievance and arbitration procedures,[40] work rules,[41] parking,[42] health and safety issues,[43] paid lunch periods,[44] overtime pay,[45] workplace meal prices,[46] paid

35. *Id.* at 1495 (emphasis added). Specifically, the NLRB relied on the fact that Greyhound had actually engaged in "detailed supervision" of the employees on a day-to-day basis regarding the "manner and means" of their performance. *Id.* at 1495–96. The NLRB also relied on the fact that Greyhound had "prompted the discharge" of one of the contractor's employees whom Greyhound had felt was "unsatisfactory." *Id.* at 1491 n.8.

36. 29 U.S.C. § 158(d).

37. *Id.*

38. El Paso Elec. Co., 355 N.L.R.B. 428, 451 (2010), *enforced.* 681 F.3d 651, 658–59 (5th Cir. 2012).

39. Medco Health Sols. of Las Vegas, Inc., 357 N.L.R.B. 170, 172 (2011), *enforced in relevant part*, 701 F.3d 710, 718 (D.C. Cir. 2012).

40. Healthcare Workers Union, Local 250, 321 N.L.R.B. 382, 384 (1996); NLRB v. Ind. Stave Co., 591 F.2d 443, 446 (8th Cir. 1979), *enforcing as modified* 233 N.L.R.B. 1202, 1205 (1977).

41. Toledo Blade Co., Inc., 343 N.L.R.B. 385, 387 (2004).

42. United Parcel Serv., 336 N.L.R.B. 1134, 1134 (2001).

43. NLRB v. Am. Nat. Can Co., 924 F.2d 518, 524 (4th Cir. 1991), *enforcing* 293 N.L.R.B. 901, 904 (1989).

44. Van Dorn Plastic Mach. Co., 286 N.L.R.B. 1233, 1233–34 (1987), *enforced*, 881 F.2d 302, 307 (6th Cir. 1989).

45. Care Ambulance, Inc., 255 N.L.R.B. 417, 422 (1981), *enforced*, 692 F.2d 762 (9th Cir. 1982) (unpublished table decision).

46. Ford Motor Co., 230 N.L.R.B. 716, 718 (1977), *enforced*, 571 F.2d 993, 1002 (7th Cir. 1978), *aff'd*, 441 U.S. 488, 503 (1979).

vacations,[47] and the provision of group health insurance plans.[48] Further, Section 9(a) refers to a chosen union as the exclusive representative of employees "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."[49]

The Restatement (Second) of Agency, which courts historically have deemed persuasive authority for construing the common law definition of "employer," provides some additional guidance on essential terms and conditions. It emphasizes the importance of a putative employer's control of the "physical conduct" of an employee "in the performance of the service" to the employer.[50] Further, in clarifying what distinguishes an employee from an independent contractor, it emphasizes the "extent of control" an employer "may exercise over the details of the work" and also considers employment tenure and the "length of time for which the person is employed" to be relevant.[51] Thus, the Restatement suggests that essential terms and conditions of employment include work rules and directions related to determining the manner, means, or methods of work performance.

The D.C. Circuit's holding in *Browning-Ferris* is also consistent with other judicial decisions that have confirmed that indirect control, including control exercised through an intermediary, is relevant to the existence of an employer-employee relationship under common law. The significance of indirect control is also recognized by the Restatement (Second) of Agency with its statement that "the control or right to control needed to establish the relation of master and servant may be very attenuated" as well as its discussion of the "subservant" doctrine, which addresses cases where one employer's control may be exercised indirectly while a second entity directly controls employees.[52]

47. Jimmy-Richard Co., 210 N.L.R.B. 802, 808 (1974), *enforced*, 527 F.2d 803 (D.C. Cir. 1975).

48. W.W. Cross & Co., 77 N.L.R.B. 1162, 1163 (1948), *enforced*, 174 F.2d 875 (1st Cir. 1949).

49. 29 U.S.C. § 159(a).

50. RESTATEMENT (SECOND) OF AGENCY § 2(1) (AM. L. INST. 1958); *see also id.* § 220(1) (defining "servant" as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control").

51. *Id.* § 220(2)(a), (f).

52. *Id.* § 220(1) cmt d; *id.* § 5(2) cmt e–f, illus. 6; *see also id.* § 226 cmt. a.

In addressing the applicability of the joint employer rule to the NCAA (Part III of this article), it is important to keep in mind the underlying purpose of the joint employer rule articulated by the D.C. Circuit in *Browning-Ferris*: "[T]he common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship."[53] Ignoring relevant evidence of indirect control over essential terms and conditions of employment would, in the words of the D.C. Circuit, "allow manipulated form to flout reality."[54] To that end, the joint employer rule typically applies to businesses that are involved in the exchange of employees or operational control. The categories of entities subject to joint employer status generally consist of contractors/subcontractors, temporary help service suppliers and users, parent corporations, and franchisors. The NCAA's organizational structure and governance system are both relevant when considering if, in fact, intermediaries or controlled third parties are being used to avoid the creation of a master-servant relationship.

## II. APPLYING THE JOINT EMPLOYER RULE TO THE NCAA

This Section addresses whether the NCAA is a joint employer of college athletes. A proper assessment requires consideration of the NCAA's business model and relationship with its member institutions to determine if, in fact, the NCAA shares or codetermines with each member institution those matters that govern essential terms and conditions of employment of college athletes (or a particular group of college athletes).[55] To do so, this section first describes the NCAA's organizational structure. Next, this section addresses the NCAA's governance and regulatory system specifically in relation to college athletes. This section then engages in a critical analysis of the Eastern District of Pennsylvania's ruling in *Johnson v. NCAA*.[56] Finally, this

53. Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195, 1217 (D.C. Cir. 2018) (citing Nicholson v. Atchison, T. & S. F. Ry. Co., 147 P. 1123, 1126 (Kan. 1915), for the proposition that "putative master's use of 'branch company' as a 'mere instrumentality' 'did not break the relation of master and servant existing between the plaintiff and the [putative master]'" (alteration in original)).

54. *Id.* at 1219.

55. *See infra* part C.

56. 561 F. Supp. 3d 490 (E.D. Pa. 2021).

section addresses why North American Soccer League,[57] in which a professional soccer league was determined to be a joint employer, is not dispositive of the NCAA's joint employment status.

### *A. NCAA Organizational Structure*

The NCAA comprises over 1,100 member schools that have joined together to create the rules and regulations associated with intercollegiate athletics. For several decades, it has been divided into three divisions: Division I, Division II, and Division III. Division I is composed of the major athletic powers in the country, as well as many other institutions that choose to compete at the major college level. Revenue sharing is hugely disproportionate, as Division II receives 4.37% and Division III receives 3.18% of all operating revenue sources.[58] Approximately 60% of the athletes in each of Division I and Division II receive athletic financial aid, and Division III does not offer any athletic financial aid.[59] Division I has approximately 360 schools, Division II has a little more than 300 schools, and Division III has the most with close to 450 schools.

Division I is divided into Football Bowl Series and Football Championship Series for purposes of regulating football. Due to changes initiated in 2014, there is a further delineation of members within the Football Bowl Series that is divided between the Power Five conferences and the Group of Five conferences. The Power Five includes the Atlantic Coast Conference, the Big 10 Conference, the Big 12 Conference, the Pac-12 Conference, and the Southeastern Conference. The Group of Five includes the American Athletic Conference, Conference USA, the Mid-American Conference, the Mountain West Conference, and the Sunbelt Conference. The 2014 changes gave the Power Five and the University of Notre Dame a level of legislative autonomy never before seen in intercollegiate athletics. The new model granted flexibility to schools in the Power Five to change rules for

57. 241 N.L.R.B, 1225 (1978), *enforced*, 613 F.2d 1379 (5th Cir. 1980).

58. NAT'L COLLEGIATE ATHLETIC ASS'N, 2022–23 NCAA DIVISION I MANUAL (2022), art. 3, at 8 [hereinafter NCAA DIVISION I MANUAL], https://www.ncaapublications.com/productdownloads/D123.pdf.

59. *The Differences Between NCAA Divisions*, NCSA COLL. RECRUITING, https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions (last visited Apr. 9, 2023).

themselves in a list of specific areas within Division I. Most of the topic areas are related to the potential for enhanced benefits for college athletes. "Legislation" enacted under this structure by the Power Five "may be applied" by the non-Power Five Division I members "at each conference's discretion, which may include delegation of such discretion to its member institutions."[60] The new model expanded the Division I Board of Directors and created a new body known as the Division I Council that is responsible for day-to-day operations of the division.

The new governance structure had an immediate impact on the Division I landscape as the Power Five moved quickly to adopt new rules for their group. In January 2015, for example, the group passed legislation allowing for schools to provide grants-in-aid that cover the full cost of attendance. This produced an increase in the value of an athletic scholarship of $2,000–$4,500 per year, depending upon the particular institution involved. It also left the schools with the determination of which sports to include. Legislation was also enacted that allows athletes to borrow money based upon future earning power, mandates the development of concussion management protocols, and prohibits schools from terminating scholarships for athletic performance reasons.

In early 2022, the NCAA membership approved a new constitution for the governance of all 1,100 member schools.[61] The new constitution reduces the size of the Board of Governors to nine members and includes a student voting member.[62] It also shifts much of the decision making to the three divisions and the conferences. The Division I Board of Directors (in conjunction with the recently formed Transformation Committee) adopted new rules by revising a variety of NCAA bylaws, including rules related to the infractions process and transfer restrictions. It is fairly apparent that the Division I Board of Directors is asserting much greater authority over changes to the NCAA bylaws, including the adoption of the NIL "interim policy" in 2021, which historically had been within the purview of the membership pursuant to the procedures of the legislative process set forth in the Division I Manual.

60. NCAA DIVISION I MANUAL, art. 9.2.2.1.2.2., at 15.

61. Corbin McGuire, *NCAA Members Approve New Constitution*, NCAA (Jan. 20, 2022), https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx.

62. *Id.*

*B. NCAA Governance: The "Institutional Control" Principle*

The bedrock principle of the NCAA governance system is institutional control. This governance principle is set forth in three sections of the NCAA Division I Manual. In the "Principles" section it states:

> E. Institutional Control. It is the responsibility of each member institution to monitor and control its athletics program and to provide education and training to ensure compliance with the rules established by the [NCAA], its division and conference. It is the responsibility of each member institution to report all rules violations to its NCAA division and conference in a timely manner and to cooperate fully with enforcement matters. Responsibility for maintaining institutional control ultimately rests with the institution's campus president or chancellor.[63]

In the "Constitution" section of the Division I Manual, the institutional control principle states, in pertinent part:

> A. The control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself and the division and conference of which it is a member. A member institution's president or chancellor has ultimate responsibility and final authority for the conduct of the intercollegiate athletics program and the actions of any board in control of that program.[64]

The institutional control principle is repeated a third time in the "Operating Bylaws" section of the Division I Manual, which states, in pertinent part:

> 8.01.1 Institutional Control. The control and responsibility for the conduct of intercollegiate athletics

63. NCAA DIVISION I MANUAL, art. 1, at 2.

64. NCAA DIVISION I MANUAL, art. 6, at 11.

> shall be exercised by the institution itself and by the conference(s), if any, of which it is a member. Administrative control or faculty control, or a combination of the two, shall constitute institutional control.[65]
>
> 8.01.2 Responsibility for Control. It is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the Association. The institution's president or chancellor is responsible for the administration of all aspects of the athletics program.[66]
>
> . . .
>
> 8.1.1 President or Chancellor. A member institution's president or chancellor has ultimate responsibility and final authority for the conduct of the intercollegiate athletics program and the actions of any board in control of that program.[67]

The NCAA's institutional control principle applies to the entire Division I Manual, which consists of more than 450 pages. As it pertains to a college athlete's eligibility—i.e., whether the athlete is permitted to play in games or participate in athletic events—it is the obligation of member *institutions* to immediately withhold an athlete from competition if the *institution* determines that the athlete is ineligible under NCAA bylaws.[68] In making the determination, an institution can request a staff interpretation of NCAA rules,[69] and, if an interpretation has been issued that results in the ineligibility of an athlete, the institution must apply the rule to the eligibility of the athlete.[70] If an institution makes an ineligibility determination, *the institution* may immediately appeal to the Committee on Student-Athlete Reinstatement for "restoration" of the athlete's eligibility, "provided the institution concludes that the circumstances warrant restoration of eligibility."[71]

65. NCAA DIVISION I MANUAL, art. 8.01.1, at 12.
66. NCAA DIVISION I MANUAL, art. 8.01.2, at 12.
67. NCAA DIVISION I MANUAL, art. 8.1.1, at 12.
68. NCAA DIVISION I MANUAL, art. 12.11.1, at 71.
69. NCAA DIVISION I MANUAL, art. 9.3.1.2, at 20.
70. NCAA DIVISION I MANUAL, art. 12.11.3, at 71.
71. NCAA DIVISION I MANUAL, art. 12.11.2 and art. 12.12.1, at 71.

On appeal, if the reinstatement committee decides that the "circumstances clearly warrant restoration,"[72] it then determines the number of games or events the athlete must sit out from competition (i.e., the conditions of reinstatement). The conditions of reinstatement do not affect the athlete's grant-in-aid. The standard of review on appeal is akin to a "clearly erroneous" standard, which is not only a highly unusual standard for a reviewing panel charged with analyzing facts, but it also requires the committee to (1) defer to the member institution's original findings of fact and determination of ineligibility and (2) make a determination that the institution's findings of fact and eligibility determination was clearly in error.[73]

If an athlete challenges an ineligibility determination and successfully obtains a court order (temporary injunction) that puts the ineligibility determination on hold, the institution has a choice: either allow the athlete to compete in compliance with the order or continue to withhold the athlete from competition. If the institution allows the athlete to compete and the court's order is vacated, stayed, or reversed on appeal, the NCAA's "restitution rule" provides that the NCAA *could* impose sanctions on the *institution* for allowing an ineligible player to compete.[74]

To illustrate, imagine if your kid was excessively speeding in order to get to class on time, and the law required *you* to report it to the police, suspend your kid from playing sports for the rest of the year, and then ask the police for a reduction of the suspension you imposed—which is a final and binding decision on your kid. In response, your kid sues you, sues the police, and convinces a judge to grant a temporary injunction so that he can continue playing sports. Assume there is also a law called "restitution" which says that if you, the parent, comply with the judge's order and it later gets overturned on appeal, the police could fine you or limit your number of vehicles because you complied

72. NCAA DIVISION I MANUAL, art. 12.12.3, at 71–72.

73. *See* Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infraction Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 286 (2010) ("[T]he Reinstatement Committee and staff neither conduct investigations nor engage in independent fact finding. Instead, they assess a student-athlete's responsibility based on information that his institution provides and then decide whether—and, if so, how—he may be reinstated to eligibility.").

74. NCAA DIVISION I MANUAL, art. 19.13, at 370–71.

with the judge's order and decided not to suspend your kid. So, you do the cost-benefit analysis and decide it makes most sense for you to put your kid in "time out" and ask the police for a reduced suspension, which they always give.

A real-life example of this is James Wiseman in 2019. Based upon a staff interpretation that Wiseman was "likely ineligible," the University of Memphis was planning to withhold him from competition, but, that same day, Wiseman obtained an order from a judge that put that determination on hold.[75] As a result, Memphis decided to allow him to play that night.[76] Six days later, however, Memphis decided to withhold him from further competition and apply for reinstatement.[77] One week after making that decision, the reinstatement committee decided that Wiseman's conditions of reinstatement were a sit out of twelve games total and a $11,500 payment to a charity of his choice.[78]

In a more recent example involving another NBA draft prospect at the University of Illinois, the university determined that his sale of apparel and memorabilia over the internet was an NCAA rule violation because the sales were *before* the effective date of new "NIL" regulations that, according to Illinois' interpretation, would have made the sale permissible. Arguably, selling personal property of which an athlete possesses legal title is not even NIL activity nor an "extra benefit" because the entire student body receives money for property that they sell over the internet, too. Nevertheless, Illinois withheld the athlete from competition, applied for reinstatement, and the reinstatement committee decided his conditions of reinstatement were a three-game

75. Ben Pickman, *Memphis' James Wiseman Ruled Ineligible by NCAA, Plays Anyway After Court Order*, SPORTS ILLUSTRATED (Nov. 8, 2019), https://www.si.com/college/2019/11/08/james-wiseman-memphis-ineligible-ncaa.

76. *Statement from University of Memphis Athletics on James Wiseman*, UNIV. MEMPHIS (Nov. 8, 2019), https://gotigersgo.com/news/2019/11/8/mens-basketball-statement-from-university-of-memphis-athletics-on-james-wiseman.aspx; *see also* Pickman, *supra* note 75.

77. *Statement from University of Memphis Athletics on James Wiseman's Lawsuit*, UNIV. MEMPHIS (Nov. 14, 2019), https://gotigersgo.com/news/2019/11/14/mens-basketball-statement-from-university-of-memphis-athletics-on-james-wisemans-lawsuit.aspx.

78. *James Wiseman NCAA Ruling: Memphis Athletics Releases Statement After Suspension Issued*, COM. APPEAL (Nov. 20, 2019), https://www.commercialappeal.com/story/sports/college/memphis-tigers/basketball/2019/11/20/james-wiseman-university-memphis-statement-appeal-ncaa/4254398002/.

sit out and the donation of the profit from the sales to a charity of his choice.[79]

In January 2010, I provided expert testimony on behalf of James Paxton at a hearing on his motion for temporary injunction against the University of Kentucky.[80] Paxton was selected in the 2009 Major League Baseball draft in the summer following his junior year at Kentucky, but he decided not to sign a professional contract and returned to Kentucky for his senior year. When he returned to school that fall, NCAA staff notified Kentucky's athletic department that they wanted to interview him about a journalist's blog post, which had suggested that Paxton's lawyer may have had communications with the MLB club that drafted him.[81] When Paxton refused to participate in the interview with the NCAA, Kentucky informed him that it would be withholding him from competition on the basis that his failure to participate in an NCAA interview constituted a violation of the "Unethical Conduct" rule.[82] Paxton was seeking an order requiring Kentucky to make a determination, as it is obligated to do under NCAA bylaws, on whether he violated the NCAA's "no agent" rule, but Kentucky was apparently not willing to do so based solely upon a blog post. Nevertheless, the judge denied Paxton's motion, and he left the university without any determination of his eligibility status.[83]

The foregoing eligibility matters involving high profile college athletes demonstrate that the NCAA member institutions have created an eligibility dispute resolution process that lacks fundamental fairness. The NCAA's status as a voluntary association gives college athletes legal standing to challenge an NCAA rule, or the application of a rule, as arbitrary and capricious or against public policy under private association law principles. Moreover, in my view, even though as of this

79. Associated Press, *Illini's Cockburn to Sit 3 Games for Selling Items Too Early*, USA TODAY (Nov. 21, 2021), https://www.usatoday.com/story/sports/ncaab/2021/11/01/illinis-cockburn-to-sit-3-games-for-selling-items-too-early/49310333/.

80. Paxton v. Univ. of Ky., No. 09-CI-6404 (Ky. Cir. Ct. Jan. 15, 2010).

81. NCAA Bylaw 12.3.2.1 prohibits an athlete from having a lawyer engage in *any* communications with professional club personnel, including for the purpose of negotiating a professional contract. NCAA DIVISION I MANUAL, art. 12.3.2.1, at 51.

82. *Paxton*, No. 09-CI-6464.

83. *Id.*; *see also Paxton Leaves UK Baseball Team*, KY. KERNEL (Feb. 27, 2010), https://kykernel.com/77117/sports/paxton-leaves-uk-baseball-team/.

date the challenge has not been made, there is a credible argument that the NCAA's eligibility dispute resolution process violates the Federal Arbitration Act.[84] However, the NCAA's athlete eligibility procedures that lack fundamental fairness as well as its arbitrary and capricious rules and behavior—which its member institutions have created and are complicit in—are not indicia of employer-like control on the part of the NCAA, and thus, are not sufficient to confer joint employer status on the NCAA.

### *C. The District Court's Ruling in* Johnson v. NCAA

The NCAA's putative joint employer status was most recently addressed by the Eastern District of Pennsylvania in *Johnson v. NCAA*.[85] The district court applied the four factors of the Third Circuit's "Enterprise" test, which essentially focuses on the extent of the putative joint employer's authority to directly control the employees' essential terms and conditions of employment by considering:

> 1) the alleged employer's authority to hire and fire the relevant employees; 2) the alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment; 3) the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and 4) the alleged employer's actual control of employee records, such as payroll, insurance, or taxes.[86]

The district court found that each of the four factors was satisfied. Applying the first factor, the court found that the NCAA's authority to hire and fire comes from recruiting rules, rules that limit the

84. *See* Stephen F. Ross, Richard T. Karcher & Baker Kensinger, *Judicial Review of NCAA Eligibility Decisions: Evaluation of the Restitution Rule and a Call for Arbitration*, 40 J. COLL. & UNIV. L. 79, 100–02 (2014).

85. Johnson v. NCAA, 561 F. Supp. 3d 490 (E.D. Pa. 2021).

86. *In re* Enter. Rent-A-Car Wage & Hour Emp. Practices Litig., 683 F.3d 462, 469–70 (3d Cir. 2012) (citing Bonnette v. Ca. Health and Welfare Agency, 704 F.2d 1465, 1469–70 (9th Cir. 1983)).

total number and value of the grants-in-aid provided by Division I schools, rules pertaining to certifying the eligibility of athletes as a condition to participation in intercollegiate competitions, rules that require institutions to withhold from competition (i.e., suspend) ineligible athletes, and rules governing the enforcement process against an institution for its failure to comply with the foregoing rules.[87] The court concluded that the second factor was met because the NCAA, through its bylaws, "issues work rules" and "imposes conditions . . . on the payment of compensation and other benefits" as well as the amount of time spent on intercollegiate athletic activities.[88] The court also concluded that the third factor was met because "the NCAA promulgates rules used in disciplining student athletes, has some involvement in the discipline of student athletes, can instigate investigations that result in discipline, and has some control over what discipline is issued to student athletes."[89] Finally, the court concluded the fourth factor was met due to "the NCAA's control of the records of student athletes who participate in NCAA sports."[90]

The district court's ruling on the NCAA's joint employer status deviates from two prior federal courts of appeals decisions, *Berger v. NCAA*[91] and *Dawson v. NCAA*,[92] that addressed the question of whether college athletes are employees of the NCAA under the FLSA. The plaintiff in *Dawson*, a former college football player for the University of Southern California, alleged that "the NCAA and the Pac-12, as joint employers, failed to pay wages, including overtime pay," to him and to putative class members.[93] The plaintiff did not allege that he was an employee of USC.[94] The district court in *Johnson* acknowledged the Ninth Circuit's finding that the plaintiff had no expectation of a scholarship or other compensation from the NCAA and that there was no evidence "the NCAA rules were 'conceived or carried out' to evade the law."[95] It also acknowledged the Ninth Circuit's determination that,

87. *Johnson*, 561 F. Supp. 3d at 500–01.
88. *Id.* at 502.
89. *Id.* at 503.
90. *Id.* at 504.
91. Berger v. NCAA, 843 F 3d 285 (7th Cir. 2016).
92. Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019).
93. *Id.* at 908.
94. *Id.* at 907.
95. *Johnson*, 561 F. Supp. 3d at 499 (quoting *Dawson*, 932 F.3d at 909–910).

"while the complaint alleged that '[t]he NCAA [b]ylaws pervasively regulate college athletics,' it did not allege that the NCAA hired or fired 'or exercise[d] any other analogous control, over student-athletes,' or that the NCAA "cho[se] the players on any Division I football team,' or 'engage[d] in the actual supervision of the players' performance.'"[96] Rather, as the Ninth Circuit noted, the complaint merely alleged that "the NCAA functions as a regulator, and that the NCAA member schools, for whom the student-athletes allegedly render services, enforce regulations."[97] However, the district court distinguished *Dawson* by saying the two complaints were not "identical" and, therefore, it was required to "engage in [its] own independent analysis" of the complaint.[98] It did not distinguish *Berger*.[99]

The district court essentially viewed the NCAA bylaws as an agreement among the member institutions that gives the association joint authority over employment-related decisions, without explaining whether and how the NCAA's control is direct, indirect, or a contractually reserved right to control.[100] Moreover, even though the Third Circuit in *Enterprise* expressly recognized that the imputed joint employer "must exercise 'significant control,'"[101] the district court found the NCAA exercised "significant" control only with the first factor relating to the hiring and firing of college athletes.[102] The district court's analysis suggests that it views the NCAA as playing an active role, either alone or in collaboration with its member institutions, in setting college athletes' essential terms and conditions of employment via the association's operating bylaws.[103] Perhaps the NCAA's operating bylaws are more appropriately deemed indicia of indirect control that

96. *Id.* (quoting *Dawson*, 932 F.3d at 910).

97. *Id.* (quoting *Dawson*, 932 F.3d at 910).

98. *Id.*

99. *Id.* at 498–99.

100. *See supra* Part I (discussing legal definitions of employer, employee, and joint-employer).

101. *Johnson*, 561 F. Supp. 3d at 498 (quoting *In re Enter. Rent-A-Car Wage & Hour Emp. Practices Litig.*, 683 F.3d 462, 468 (3d Cir. 2012)).

102. *Id.* at 500–04.

103. *See id.* at 501 (concluding that the NCAA has "significant control" over the hiring and firing of student athletes).

bears on "the routine components of a company-to-company contract" as opposed to essential terms and conditions of employment.[104]

However, *NCAA* control is the antithesis of *institutional* control. In *Dawson*, the Ninth Circuit's analysis of the "economic reality" of the relationship led it to conclude the NCAA is a regulatory body, not an employer of college athletes under the FLSA.[105] Notwithstanding the NCAA's designation as a regulatory body and not an employer, its unique regulatory framework of institutional control makes NCAA employment-like control even more tenuous. The NCAA bylaws are more appropriately viewed as an agreement of institutional *self*-regulation that only gives the NCAA (through the infractions committee) authority to impose institutional penalties if and when an institution breaches its obligation to self-regulate.

The imposition of institutional penalties is not the equivalent of a contractual right to control the conduct of the institution's college athletes or the performance of their work either directly, by assigning particular athletes their individual work schedules, positions and tasks, or even indirectly, by setting a schedule for completion of tasks or describing the work or performance to be accomplished. More specifically, no member institution has given the NCAA the right to control any of the institution's decisions regarding the athletes to recruit and to award grants-in-aid, including, for example, (1) which athletes are recruited by, or are on the rosters of, the institution's teams; (2) which athletes at the institution receive grants-in-aid and for how much and for how many years; or (3) whether any of the institution's athletes' grants-in-aid will be terminated or reduced. Only the institution has the ability and authority to make such decisions. The NCAA cannot reduce or "take away" a grant-in-aid from a college athlete; it can only reduce the total number of grants-in-aid an institution's athletic program is allowed to give, if the institution breaches its obligation to self-regulate.

The elephant in the room here is the district court's avoidance of the question why the NCAA *needs* to be jointly liable for minimum wages of *all* college athletes who perform services exclusively for their imputed employers that are NCAA institutional members in Division

104. *See* Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195, 1221 (D.C. Cir. 2018); *see also supra* notes 25–26 and accompanying text (discussing the D.C. Circuit's view of indirect control of employment).

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

I.[106] Assuming the 360 Division I universities are the employers, what is the basis for applying a joint employer analysis to determine if the NCAA should be an employer along with them? To that end, the district court bypassed any discussion of the types of business relationships that are subject to joint employment analysis.

First, the NCAA does not resemble the business model present in a "vertical" joint employer situation.[107] In a vertical joint employment relationship, "a company has contracted for workers who are directly employed by an intermediary company."[108] Vertical joint employment cases also involve franchisor-franchisee[109] and parent-subsidiary relationships. In *In Re Enterprise Rent-A-Car*, the parent was the sole shareholder of thirty-eight domestic subsidiaries that rented and sold vehicles and conducted other business under the

106. The *Johnson* ruling only refers to "D1 member schools" and references the bylaws in the NCAA Division I Manual. Johnson v. NCAA, 561 F. Supp. 3d 490, 500–04 (E.D. Pa. 2021).

107. *See, e.g.*, *Hamm* v. *Acadia Healthcare Co.*, No. 20-1515, 2021 WL 1212539, at *5–6 (E.D. La. Mar. 31, 2021) (reciting Fifth Circuit's vertical joint employment analysis); *Zhao* v. *Ke Zhang Inc.,* No. 18-CV-6452 (EK) (VMS), 2021 WL 1210369, at *4–6 (E.D.N.Y. Mar. 31, 2021); *Gil* v. *Pizzarotti LLC*, No. 1:19-cv-03497-MKV, 2021 WL 1178027, at *4–13, *6 n.2 (S.D.N.Y. Mar. 29, 2021) (applying Second Circuit's vertical joint employment analysis); *Blan* v. *Classic Limousine Transp., LLC*, No. 19-807, 2021 WL 1176063, at *8 (W.D. Pa. Mar. 29, 2021); *Williams* v. *Bob Evans Rest.'s, LLC*, No. 2:18-cv-01353, 2020 WL 4692504, at *4–6 (W.D. Pa. Aug. 13, 2020) (applying Third Circuit's vertical joint employment analysis); *Yela* v. *Trending Media Grp., Inc.*, No. 19-21712-CIV, 2020 WL 6271047, at *5–7 (S.D. Fla. Sept. 18, 2020) (applying Eleventh Circuit's vertical joint employment analysis); *Tombros* v. *Cycloware, LLC*, No. 8:19-cv-03548-PX, 2020 WL 4748458, at *2–3 (D. Md. Aug. 17, 2020), *Elsayed* v. *Fam. Fare LLC*, No. 1:18-cv-1045, 2020 WL 4586788, at *4–8 (M.D.N.C. Aug. 10, 2020); *Pontones* v. *Los Tres Magueyes, Inc.*, No. 5:18-CV-87-FL, 2021 WL 1430793, at *3–10 (E.D.N.C. Apr. 15, 2021) (applying Fourth Circuit's vertical joint employment analysis).

108. Chao v. A-One Med. Serv., Inc., 346 F.3d 908, 917 (9th Cir. 2003). The Department of Labor has stated that vertical "joint employment may . . . exist when an employee of one employer . . . is also, with regard to the work performed for the intermediary employer, economically dependent on another employer." U.S. Dep't of Lab., Wage & Hour Div., Opinion Letter on Fair Labor Standards Act (FLSA), 2016 WL 284582, at *4 (Jan. 20, 2016).

109. *See, e.g.*, Singh v. 7-Eleven, Inc., No. C-05-04534RMW, 2007 WL 715488, at *3, *7 (N.D. Cal. Mar. 7, 2007).

"Enterprise" brand name.[110] In finding that the parent was not a joint employer, the Third Circuit noted that the *Enterprise* test factors "provide a useful analytical framework and may generally serve as the starting point for a district court's analysis, . . . especially in the parent-subsidiary context."[111] In *Bonnette v. California Health and Welfare Agency*,[112] relied upon by the Third Circuit in *Enterprise*, the Ninth Circuit found that state and county social services agencies were the joint employers of chore workers who provided in-home care to disabled public assistance recipients because they (1) paid the workers, (2) "exercised considerable control over the structure and conditions of employment by making the final determination, after consultation with the recipient, of the number of hours each chore worker would work and exactly what tasks would be performed" and (3) "had periodic and significant involvement in supervising the chore worker's job performance."[113]

Also, the NCAA is not in a "horizontal" joint employer relationship with its member institutions. Horizontal joint employment involves an arrangement between two employers to share employee services; *e.g.*, one employer employs a worker for one set of hours in a workweek and the other employer employs that same worker for a separate set of hours in the same workweek. The Department of Labor has described a horizontal joint employment to exist when:

> two (or more) employers each separately employ an employee and are sufficiently associated with or related to each other with respect to the employee. . . . [T]here is typically an established or admitted employment relationship between the employee and each of the employers, and often the employee performs separate work or works separate hours for each employer. Thus, the focus of a horizontal joint employment analysis is

110. *In re Enter. Rent-A-Car Wage & Hour Emp. Practices Litig.*, 683 F.3d 462, 465 (3d Cir. 2012).

111. *Id.* at 469.

112. 704 F.2d 1465 (9th Cir. 1983).

113. *Id.* at 1470. *Bonnette* indicated that joint employment must be assessed "based upon the circumstances of the whole activity." *Id.* (quoting Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947)).

> the relationship between the two (or more) employers.[114]

Essentially, there are three horizontal employment situations:

> (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; *or*
>
> (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; *or*
>
> (3) *Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.*[115]

While "the legitimacy of a business relationship between putative joint employers . . . [is] not dispositive of whether entities constitute joint employers[,]"[116] it is noteworthy that the NCAA's organizational structure and business model are unlike any other organization or business entity found to be a joint employer by the NLRB or any court. The NCAA is legally characterized as a joint venture in the form of a voluntary association that operates as a regulatory body and conducts intercollegiate athletics championships in multiple sports, except Football Bowl Series football, for its 1,100 members. It is an association of independently operated public and private higher education institutions that compete against each other both on- and off-the-field in a variety of sports and that are classified by three divisions based on

114. U.S. Dep't of Lab., Wage & Hour Div., Opinion Letter on Fair Labor Standards Act (FLSA), 2016 WL 284582, at *4 (Jan. 20, 2016). Examples of such a relationship "may include separate restaurants that share economic ties and have the same managers controlling both restaurants" or "where a farmworker picks produce at two separate orchards and the orchards have an arrangement to share farmworkers." *Id*. at *4–5.

115. Chao v. A-One Med. Serv.'s, Inc., 346 F.3d 908, 917–18 (9th Cir. 2003) (referencing 29 C.F.R. § 791.2(b)).

116. *See* Salinas v. Com. Interiors, Inc., 848 F.3d 125, 129 (4th Cir. 2017).

levels of athletics competition and athletically related financial aid. The NCAA's business model does not resemble the traditional type or structure where the joint employer rule has been applied. Historically, the rule has involved the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship. The NCAA and its member institutions do not exchange or share employees or operational control in a contractor-subcontractor relationship, supply or use temporary help service workers, nor operate in either a parent-subsidiary or franchisor-franchisee relationship. Franchising involves a method of distributing products or services in which a franchisor lends its trademark or trade name and a business system to a franchisee, which pays a royalty and often an initial fee for the right to conduct business under the franchisor's name and system.[117] A franchisor generally exercises some operational control over its franchisees and a franchisor is a separately-owned business entity that creates the rules; it is not a voluntary association comprised of franchisees who create the rules.[118] Simply, the NCAA does not contract colleges and universities to do work for it and the NCAA does not indirectly supervise college athletes by communicating through colleges and universities.

### *D. The Inapplicable North American Soccer League Case*

In 1978, the NLRB in *North American Soccer League* addressed a professional sport league model's status as a joint employer. The North American Soccer League (NASL) Players' Association petitioned the NLRB for a representation election among all professional soccer players employed by the NASL and its constituent member clubs operating soccer teams throughout the United States and Canada. Similar to other professional leagues, the individual teams selected, compensated, traded, and released their own players and league rules governed individual team-player contracts. The NASL's position was "that each individual club franchise is an autonomous entity, and, that it is each club alone which is the employer of its own players."[119] The NLRB found the NASL and its clubs to be in a joint employer relationship and directed an election within a bargaining unit comprised of all

117. *See* INT'L FRANCHISE ASS'N, *FAQs About Franchising*, https://www.franchise.org/faq (last visited Apr. 9, 2023).

118. *See id.*

119. N. Am. Soccer League, 236 N.L.R.B. 1317, 1317 (1978).

the soccer players of the U.S. member clubs in the league.[120] The Canadian clubs were excluded from the unit because the NLRB concluded it did not have jurisdiction over those clubs as employers.[121]

The NASL and its member clubs appealed the order to the Fifth Circuit, which concluded the following:

> Notwithstanding the substantial financial autonomy of the clubs, the Board found they form, through the League, an integrated group with common labor problems and a high degree of centralized control over labor relations. In these circumstances the Board's designation of a leaguewide bargaining unit as appropriate is reasonable, not arbitrary or capricious. In making its decision, the Board expressly incorporated the reasons underlying its finding of a joint employer relationship. The Board emphasized in particular both the individual clubs' decision to form a League for the purpose of jointly controlling many of their activities, and the commissioner's power to disapprove contracts and exercise control over disciplinary matters. Under our "exceedingly narrow" standard of review, no arguments presented by petitioners require denial of enforcement of the bargaining order. Thus the facts successfully refute any notion that because the teams compete on the field and in hiring, only team units are appropriate for collective bargaining purposes. Once a player is hired, his working conditions are significantly controlled by the League. Collective bargaining at that source of control would be the only way to effectively change by agreement many critical conditions of employment.[122]

*North American Soccer League* is not persuasive authority to establish the NCAA's joint employer status for three primary reasons. First, it was a representation case involving a petition filed by an

120. *Id.* at 1319.

121. *Id.* at 1319–20.

122. N. Am. Soccer League v. NLRB, 613 F.2d 1379, 1383 (5th Cir. 1980).

association of players seeking an election in a single leaguewide bargaining unit. The players association was neither (1) a few individual players seeking class certification in a civil case and league joint employer status for the purpose of making the league responsible for payment of minimum wages under the FLSA, nor (2) an advocacy group filing an unfair labor charge in order to give the NLRB jurisdiction over a substantial majority of the league members that are not subject to the NLRB's jurisdiction.[123] Indeed, the NLRB even excluded the Canadian clubs from its exercise of jurisdiction in the case.[124] In the NLRB's decision in *Big East Conference,*[125] it asserted jurisdiction over an athletic conference where only two of nine member institutions were state institutions because—unlike the NCAA where a substantial majority of member institutions are state institutions—"their designated representatives on the board cannot control the operations of the [conference]."[126] The conference was not even found to be a joint employer with its member schools (nor a multiemployer bargaining unit) because the member schools did not "select or contract with the officials whose representative status [was] at issue;" the schools were "thus not employers of the referees, joint or otherwise."[127] Rather, the conference, which was refusing to bargain with the referees, was their employer because the conference contracted with, selected, assigned, and supervised them.[128]

Second, each of the 30–32 clubs (or club owners) in a professional sport league have a much more significant role in the management of the league as a whole than each of the 1,100 member schools has in the management of the NCAA.[129] Moreover, unlike the NCAA's *institutional* control governance framework, a professional sport league

123. *See* Rohith A. Parasuraman, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 745 (2007) (noting that "[b]ecause of the complex issues involved in imposing labor law on college athletics, if a change as drastic as unionizing college athletes were to occur, it should come about by an act of Congress, and not by the whim of a federal agency such as the NLRB").

124. *N. Am. Soccer League*, 236 N.L.R.B. at 1319.

125. 282 N.L.R.B. 335 (1986).

126. *Id.* at 341.

127. *Id.*

128. *Id.* at 341–42.

129. *See* Livers v. NCAA, No. 17-4271, 2018 WL 2291027 at *12 (E.D. Pa. May 17, 2018).

exercises a significant degree of control over essential aspects of each club's labor relations; for example, an annual amateur draft that gives each club exclusive negotiating rights to its selected players, standard player contracts, and player discipline for off-field misconduct. As the district court in *Johnson* even recognized, the NCAA, unlike the NASL, does not have a commissioner elected and compensated by the institutional members nor a board of directors comprised of one representative of each club.[130] Additionally, unlike the NASL, the NCAA does not have a member-elected commissioner with "best interest of the League" authority to void or disapprove athlete transfers or athlete-university contracts or the authority to resolve disputes between a university and an athlete.[131]

Third, intercollegiate athletics essentially has two tiers of governance; the conference level (the first tier) and the NCAA level (the second tier). Applying *North American Soccer League* to intercollegiate athletics, a conference in relation to the soccer players on its member teams is comparable to the NASL in relation to the soccer players on its member teams (first tier), and the NCAA in relation to each conference is what the United States Soccer Federation (USSF) was in relation to the NASL (second tier). A conference is a member of the NCAA, which acts as the governing body of Division I, II and III intercollegiate athletes in the United States; the NASL was a member of USSF, which acts as the national governing body for the game of soccer in the United States.

Does this imply that a conference is a joint employer of its member institutions' Football Bowl Series football and D-I men's basketball players under *North American Soccer League*? Not necessarily. *North American Soccer League*, at its core, was a battle over the appropriate bargaining units in organized league sport: whether it should be a single leaguewide unit comprised of the players employed by all of the league's clubs (referred to as a "multiemployer bargaining unit") or separate team units comprised of the players employed by that team.[132]

130. *See* Johnson v. NCAA, 561 F. Supp. 3d 490, 506 (E.D. Pa. 2021) (distinguishing N. Am. Soccer League v. NLRB, 613 F.2d 1379, 1382 (5th Cir. 1980)).

131. *Id.* at 505 (citing *N. Am. Soccer League*, 613 F.2d at 1382).

132. *See* PAUL WEILER ET AL., SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS 138–39 (7th ed. 2023) (noting that "labor law must decide whether the center of gravity in the union's bargaining relationship is to be with each individual

As noted by the NLRB in *Big East Conference*, "[t]he specific purpose of a multiemployer association is to permit member employers to band together in order to deal with a union or unions that represent their employees on a single-employer basis."[133] As discussed in the next section, a multiemployer bargaining unit at the conference level arguably satisfies a "community of interest" analysis in determining the appropriate units. While the NCAA arguably fails the control test for joint employer status, for the reasons already discussed, it also arguably fails the community of interest test for bargaining unit purposes, for the reasons stated in the next section.

## III. THE CONFERENCE AS A MULTIEMPLOYER BARGAINING UNIT

In determining an appropriate bargaining unit, the NLRB and federal courts have applied the "community of interest" test, which considers a wide variety of factors so that employees may grouped with other employees with whom they share common interests and concerns regarding terms and conditions of employment. Those factors include the following:

> 1) similarity in skills, training, or experience;
> 2) similarity in job functions or job classifications;
> 3) similarity in wages, wage scale, or method of determining compensation;
> 4) similarity in fringe benefits;
> 5) similarity in work hours;
> 6) similarity in work clothes or uniforms;
> 7) similarity of job situs or geographical proximity of employees;
> 8) interchangeability of employees or job assignments;
> 9) common supervision;
> 10) centralization of employer's personnel and labor policies;
> 11) integration of employer's production processes or operation;

club or with the entire league" and that "[t]he answer was rendered in a certification petition for players in the North American Soccer League").

133. Big E. Conf., 282 N.L.R.B. 335, 342 (1986).

> 12) similarity of relationship to employer's administrative or organizational structures;
> 13) common history of bargaining with employer;
> 14) reflection of industry bargaining pattern;
> 15) expressed desires of employees; and
> 16) employees' organizational framework or extent of union organization.[134]

The Fifth Circuit in *North American Soccer League* held that the NLRB properly determined that a collective bargaining unit comprised of all NASL players on league clubs based in the United States was appropriate, notwithstanding the fact that individual teams competed with each other on the field and in selecting players, essentially because collective bargaining at the league-wide level was the only way to effectively change many critical conditions of employment.[135] Hence, the unique nature of league sport, which requires uniform rules regarding essential terms and conditions of the players' employment in order to produce a viable commercial sport product. As scholars have noted, "no one has challenged the assumption that the appropriate unit in professional sports is comprised of *only* the league's players (thus excluding all other employees of the clubs and players in other leagues) and of *all* the league's players (thus not distinguishing higher-priced positions such as quarterback from lower-priced positions such as defensive back)."[136] On the management side, teams in a league together negotiate a collective bargaining agreement with the players' union that applies equally to players on all teams. Thus, the collective bargaining process is "necessarily a multi-party phenomenon[;] [n]either labor nor management is internally monolithic."[137]

While conferences are multi-sport, they operate in a similar fashion to single-sport professional leagues. A conference can be viewed as a portfolio of brands; it packages the brands of its members and sells it to networks, licensors and sponsors. The activity of the

134. Francis M. Dougherty, Annotation, "*Community of Interest" Test in NLRB Determination of Appropriateness of Employee Bargaining Unit*, 90 A.L.R. Fed. 16, at * 2 (1988).

135. *N. Am. Soccer League*, 613 F.2d at 1380.

136. WEILER ET AL., *supra* note 132, at 138–39 (emphasis in original).

137. RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 421 (9th ed. 2020).

institution's athletic teams is carried out jointly by the teams in the conference and there is no "product" without direct interaction and cooperation among the various teams within the conference. Similar to a professional sport league, a conference has a brand identity and it markets and sells a product of league sport, e.g., SEC Football and Big Ten Basketball. The Power Five conferences even distribute their product on their own media networks. Like a professional sport league, a conference has a commissioner selected by and answerable to the conference members who controls the internal affairs of the conference and essentially serves in the role of a centralized administrative authority. Commissioners are responsible for ensuring that scheduling, championship play, rules compliance, officiating, statistics, and dispute resolution are handled efficiently and fairly to the conference members.

Conferences have also been described as "orbits of competition"[138] in which member schools must simultaneously cooperate and compete; "[t]hey compete for wins in games, for media attention, for prospective student-athletes and coaching personnel, and for revenues and resources to run their programs."[139] As noted by one scholar, conferences have "meaning that extends beyond the playing field. Institutions generally desire to compete against others that are similar in profile, including their approach to athletics. . . . The commonalities between and among institutions in a conference create a peer group useful in benchmarking, one that might even heighten competition between and among members."[140] This intra-league competition among conference members results in athletes on teams within a conference sharing common interests and concerns regarding terms and conditions of employment. The success of a conference's sport product requires uniformity on matters that can impact competitive balance and that touch what would be considered mandatory subjects of collective bargaining, including (1) drug testing policies and suspensions for violations, (2) athlete time demands related to practices, workouts and travel, (3) athlete transfers, (4) discipline for off-field misconduct, and

138. WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES (2003).

139. DANIEL COVELL & SHARIANNE WALKER, MANAGING INTERCOLLEGIATE ATHLETICS 62 (2d ed. 2016).

140. Kyle V. Sweitzer, *Institutional Ambitions and Athletic Conference Affiliation*, 2009 NEW DIRECTIONS FOR HIGHER EDUC. 55 (2009).

(5) limitations on pay for athletic performance and recruiting inducements.

A conference comprises a group of schools with similar identities and philosophies, and their interests tend to be aligned competitively, economically, and educationally. Indeed, the daily "business" of college sport is, for the most part, handled at the institutional-conference level (the first tier) and operates in an environment consisting of intra-league competition among the schools in the conference as well as inter-league competition. Conferences compete against each other for national championships, viewership (broadcast contracts), sponsors and members (conference realignment). This inter-conference competition exists primarily among conferences at the same level of financial resources and competition. For example, the conferences in the Power Five are in competition with one another but they do not compete with the Group of Five conferences; the Group of Five conferences are in competition with one another, but they do not compete with the Football Championship Series conferences.

Let's be real—the college athletes who would benefit from collective bargaining are the ones who are financially exploited by the universities in the commercialized and profit-generating sports of Power Five football and men's basketball, which make up only 5.8 percent (65 out of 1,118) of the NCAA member institutions. There are such varied levels of competitive, economic, and educational diversity between the NCAA's three divisions, as well as between the Power Five and Group of Five within Division I, that the NCAA does not have a "community of interest" for it to be an appropriate multiemployer bargaining unit.[141] The number of employers would also make an NCAA-wide bargaining unit impractical. One only needs to look at the complexity of professional sport league collective bargaining with units of 30 to 32 employers to realize that a unit of 1,100 employers would simply be unworkable.

A conference makes an appropriate multiemployer bargaining unit because the profit-athletes would be able to most effectively negotiate with the parties that exert significant control over the terms and conditions of their work and most effectively reach agreements, either by individual sport or across all athletics programs, that maintain

141. *See supra* note 134 and accompanying text (introducing the "community of interest" test).

uniform conference-wide rules and policies for all schools in the conference. Inter-conference competition should properly incentivize conferences to bargain in good faith, which would effectuate the policies of the NLRA. Moreover, non-uniformity of NCAA eligibility rules that would result from conference-wide collective bargaining agreements is hardly a concern in the modern era of commercialized college sport, where there already exists a huge divide between the "haves" (the Power Five) and the "have nots" (everyone else) and a handful of schools that dominate the competition. Indeed, in recent years there has even been discussion about the possibility of one or more of the Power Five conferences breaking away from the NCAA which could result in the formation of a thirty-two-school Super Conference or three twenty-school Super Conferences.[142]

## RECOMMENDATION AND CONCLUSION

In determining the NCAA's status as a joint employer of college athletes, courts and the NLRB should address the key issues/questions that no court has addressed. First, they should answer whether and how the NCAA's control is direct, indirect, or a contractually reserved right to control. The district court in *Johnson* seemed to view the NCAA bylaws as an agreement among the member institutions that gives the association joint authority over employment-related decisions.[143] Second, they should consider whether the NCAA's operating bylaws more resemble indicia of indirect control that bears on "the routine components of a company-to-company contract" as opposed to essential terms and conditions of employment.[144] Third, they should address and explain the NCAA's governance system of "institutional control" and how that translates to NCAA control.[145] The Ninth Circuit in *Dawson* merely noted the complaint alleged that "the NCAA functions as a regulator, and that the NCAA member schools, for whom the student-

142. Kent Smith, *Who's in, Who's out When Super Conferences Finish Forming*, FANNATION (July 8, 2022), https://www.si.com/college/arkansas/hogs-football/college-football-realignment-ncaa-sports.

143. *See* Johnson v. NCAA, 561 F. Supp. 3d 490 (E.D. Pa. 2021).

144. *See* Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195, 1221 (D.C. Cir. 2018).

145. *See supra* part B.

athletes allegedly render services, enforce regulations."[146] Finally, they should answer why the NCAA *needs* to be jointly liable for minimum wages of the187,000 college athletes who perform services exclusively for their imputed employers that are Division I members and how it would achieve the joint employer rule's purpose. To that end, they should consider whether the NCAA resembles any of the types of business relationships that are typically subject to joint employer analysis.

In conclusion, the NCAA is not the real employer. If the objective is to give the NLRB jurisdiction over all NCAA member institutions, joint employer theory is not the solution. Claiming the NCAA is a joint employer in a FLSA lawsuit or an unfair labor charge so that its public institutional members are covered by the NLRA is sloppy analysis; it's like claiming an insured defendant in a tort lawsuit is responsible for damage caused by its business partners that are not "insured persons" under the insurance policy. The appropriate avenue is a revision of the NLRA to give it jurisdiction over public universities in the limited context of athlete-university relations pertaining to intercollegiate athletics—which is what the CARO Act does.[147] The CARO Act also places college athletes and their institutional employers into the most appropriate multiemployer bargaining units in the event college athletes want to exercise their right to collectively bargain. The NCAA, sometimes called "the evil empire," is the least desirable entity on earth that should be deemed an employer of college athletes and not the entity that players should be bargaining with.

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

147. *See supra* notes 7–11 and accompanying text.