THREE STRIKES, YOU'RE OUT!: THE NCAA'S STRUGGLE TO KEEP THE LABOR LAW LEAD OVER COLLEGE ATHLETES

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INTRODUCTION

Historically, the National College Athletic Association (NCAA) has fought to intentionally strip labor rights from players at academic institutions[1] (PAIs) to control the wealth and revenue generated by college sports.[2] The power dynamic is reflected in the history of the phrase "student-athlete." In the 1950s, the NCAA coined the well-known term "student-athlete" to suggest that PAIs were simply students engaging in "amateur" gameplay.[3] By designating PAIs as "amateurs," the NCAA distinguished PAIs from professional athletes, stripping them of federal labor protections.[4] The "student-athletes" and "amateurs" classifications allowed the NCAA to restrict PAIs' compensation and day-to-day activities without violating federal labor statutes.[5] Recently, however, this power dynamic drastically shifted when PAIs were granted protection under the National Labor Relations Act (NLRA).[6]

On September 29, 2021, Jennifer Abruzzo, the General Counsel of the National Labor Relations Board (NLRB or "Board"), released Memorandum GC 21-08 ("GC 21"), which classified PAIs as employees protected under the NLRA.[7] GC 21 dispels the myth that PAIs are "amateur student-athletes"

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1. This paper will adopt General Counsel Jennifer Abruzzo's description of "student-athletes" as "Players at Academic Institutions" because the term "student-athletes" was "created [by the NCAA] to deprive those individuals of workplace protections." NAT'L LAB. RELS. BD., OFF. OF THE GEN. COUNS., GC 21-08, STATUTORY RIGHTS OF PLAYERS AT ACADEMIC INSTITUTIONS (STUDENT-ATHLETES) UNDER THE NATIONAL LABOR RELATIONS ACT 1 n.1 (2021).

2. *See infra* Part I.A.

3. The term "student-athlete" was first used to deny a college football player's widow workers' compensation for the death of her husband, resulting from an injury he received during a game. *See* Molly Harry, *A Reckoning for the Term "Student-Athlete"*, DIVERSE: ISSUES IN HIGHER EDUC. (Aug. 26, 2020), https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete [https://perma.cc/27BS-FSKE].

4. *Id.*; *see infra* Parts I.B–D.

5. *See infra* Parts I.A–D.

6. 29 U.S.C. § 151; *see infra* Parts I.B–D.

7. NAT'L LAB. RELS. BD., supra note 1, at 3–4 (GC 21).

by defining PAIs as employees under the control of their employer, the NCAA.[8] GC 21, however, is a culmination of a long-standing Board controversy regarding PAIs' status under the NLRA. Abruzzo's reasoning in GC 21 largely relies on a previously released General Counsel Memorandum, GC 17-01 ("GC 17").[9]

On January 31, 2017, then-NLRB General Counsel Richard F. Griffin, Jr., released GC 17, exacerbating the NCAA and PAI controversy.[10] GC 17 was published shortly after the Board's decision in *Northwestern University*.[11] In *Northwestern*, the Board declined to decide whether Division I (D1) football players at Northwestern University were employees, citing jurisdictional restraints.[12] After the decision, GC 17 proclaimed the General Counsel's view that the Northwestern football players were employees protected under the NLRA.[13] Although no official decision had been reached, GC 17 argued that had *Northwestern* gone forward, the record would contain enough evidence to classify players as employees under the NLRA.[14] GC 17, however, would not last long.

On December 1, 2017, then-General Counsel Peter Robb's Memorandum GC 18-02 ("GC 18") rescinded GC 17.[15] Robb interpreted the NLRA to effectively strip PAIs' employee status without explanation.[16] GC 18, however, would later be rescinded by GC 21. The release of GC 21 reinstated GC 17, rekindling the controversy between PAIs and the NCAA.[17] Currently, the NLRB considers PAIs to be employees under the NLRA.[18] This Essay discusses the validity of GC 21 by analyzing the treatment of PAIs through the NLRA and various other federal labor statutes. Part I discusses the history of the NCAA's policies in relation to PAIs. It outlines the treatment of PAIs under the NLRA, the Sherman Antitrust Act ("Sherman Act"), and the Fair Labor Standards Act (FLSA). Part II argues for the Board's formal adoption of GC 21 and discusses why the NCAA's "amateur" defense should be abolished. It also suggests that employees protected under the Sherman Act and FLSA should be protected under the NLRA, granting PAIs protection under the broader federal labor law framework.

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8. *See id.* at 1 n.1.

9. *Id.* at 3–4.

10. *See generally* NAT'L LAB. RELS. BD., OFF. OF THE GEN. COUNS., GC 17-01, GENERAL COUNSEL'S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT (2017).

11. Northwestern Univ., 362 N.L.R.B. No. 167 (Aug. 17, 2015).

12. *See id.* at 1355.

13. NAT'L LAB. RELS. BD., supra note 10, at 16–21 (GC 17); *see infra* Part I.B.3.

14. NAT'L LAB. RELS. BD., supra note 10, at 16–21 (GC 17).

15. NAT'L LAB. RELS. BD., OFF. OF THE GEN. COUNS., GC 18-02, MANDATORY SUBMISSIONS TO ADVICE (2017).

16. *See id.* Robb simply stated, "New General Counsels have often identified novel legal theories that they want explored through mandatory submissions to Advice. I have not yet identified any such initiatives, but I have decided that the following memos shall be rescinded . . . ." *Id.* at 4.

17. NAT'L LAB. RELS. BD., supra note 1, at 3–4 (GC 21).

18. *See id.*

I. THE NCAA, PAIS, AND PROTECTED CLASSES UNDER LABOR LAW STATUTES

Two questions are particularly important when thinking about employee protections under federal labor laws: (1) who qualifies for protection under the NLRA, Sherman Act, and FLSA, and (2) how do these statutes relate to one another, if at all? Before analyzing the laws, it is helpful to discuss the relationship between PAIs and the NCAA. After an overview of the NCAA's policies in Part I.A, Part I.B discusses how the Board and courts determine who is protected by the NLRA, Sherman Act, and FLSA, and the status of PAIs under each statute.

A. The NCAA's History, Practices, and Policies Regarding PAIs

For the last century, the NCAA has controlled the entirety of college sports, growing into a "sprawling enterprise" consisting of 1,100 colleges and universities, separated into three divisions.[19] D1 sports feature the most competitive athletes and include roughly 350 schools divided into thirty-two conferences.[20] D1 football and basketball generate the most revenue, with the NCAA's March Madness basketball tournament broadcasting contract generating $1.1 billion annually.[21] Overall, college sports is a multi-billion dollar industry and the NCAA has no other market competitors.[22] The NCAA's board members and university coaches receive yearly salaries in the millions.[23] Despite the massive amount of revenue and high-paying executive and coaching salaries, the NCAA prohibits PAIs from receiving financial compensation.

Although the NCAA was initially created to protect the health and safety of athletes,[24] it quickly became a mechanism to limit PAIs' compensation.[25] Before the NCAA's inception, PAIs enjoyed independent revenue from endorsements and monetary compensation for their play.[26] Players could receive paid vacations, dinners, and even job offers in exchange for their athletic performance.[27] When the NCAA formed, however, it enacted a policy which would restrict "tramp athletes" who "roamed the country making cameo athletic appearances" from receiving "directly or indirectly, any money, or financial concession."[28] Despite this rule, players continued to receive unrestricted compensation as a result of increased revenue and

19. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2150 (2021).
20. *Id.*
21. *Id.*
22. *See id.*
23. *Id.* at 2151 (discussing the salaries of NCAA board members and college coaching positions, ranging from $2 to $11 million per year).
24. Lindsay J. Rosenthal, Comment, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA Is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 SETON HALL J. SPORT L. 321, 322–23 (2003).
25. *Id.* at 323–24; *Alston*, 141 S. Ct. at 2148.
26. *Alston*, 141 S. Ct. at 2148.
27. *Id.*
28. *Id.* (citation omitted).

marketing for college sports throughout the twentieth century.[29] In 1956, however, the NCAA voted to only allow compensation in the form of educational benefits such as tuition, room, board, books, and fees.[30] Any other form of compensation received by a player could lead to suspension or expulsion from their school and the NCAA.[31] Since then, the NCAA's restrictions on PAI activities and compensation have only increased.

In addition to restricting compensation, the NCAA's policies largely control players' day-to-day lives and activities through its bylaws.[32] The bylaws mandate PAIs to participate in Countable Athletic Related Activities (CARAs), which are recorded by timesheets.[33] CARAs include mandatory practices, competitions, and meetings, which PAIs are required to attend.[34] Additionally, non-CARAs, such as traveling, meals, physical rehabilitation, dressing, and showering, are imposed on PAIs.[35] Overall, CARAs and non-CARAs total thirty to forty hours of a D1 athlete's weekly schedule.[36] Further, the bylaws require PAIs to engage in Required Athletically Related Activities (RARAs) such as fundraising and community service programs.[37] Failure to participate in CARAs, non-CARAs, and RARAs can lead to disciplinary action by the school and NCAA, such as suspension or expulsion from the team or school.[38] Oftentimes, PAIs must forego certain majors or classes to satisfy the bylaw requirements or else face disciplinary action.[39] Thus, not only do the NCAA's policies restrict compensation, they also dominate players' daily lives.

The NCAA justifies their policies by stating that PAIs are "amateurs," not professionals like National Basketball Association or National Football League players.[40] It claims that the "amateur" relationship has been the set policy for a century and this long-standing tradition defines the economic reality of the relationship between students and schools.[41] To receive protections under the NLRA, Sherman Act, and FLSA, PAIs must overcome the "amateurism" defense to distinguish themselves as employees.

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29. *Id.* at 2149.
30. *Id.*
31. *Id.*
32. Johnson v. Nat'l Collegiate Athletic Ass'n, 556 F. Supp. 3d 491, 496–97 (E.D. Pa. 2021).
33. *Id.*
34. *Id.* at 497.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. Harry, *supra* note 3; *see* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2152 (2021); *Johnson*, 556 F. Supp. 3d at 500–01.
41. *Johnson*, 556 F. Supp. 3d at 501 (citing Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 291 (7th Cir. 2016)).

B. Defining "Employee" Under the NLRA: A History of Student Employee Status

On July 5, 1935, Congress passed the NLRA, guaranteeing rights for workers to unionize and engage in collective bargaining.[42] The NLRA's codified policy is to:

> [M]itigate and eliminate [certain substantial obstructions to the free flow of commerce] . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[43]

Congress accomplished this policy, not through statutory law, but by granting workers the right to organize and collectively bargain.[44] The NLRA also authorizes the Board to "arbitrate deadlocked labor-management disputes, guarantee democratic union elections, and penalize unfair labor practices by employees."[45] The NLRB essentially serves as a referee between union and employer disputes.[46] The Board regularly releases guidance documents to clarify existing rules promulgated through adjudication.[47] Notably, guidance documents are exempt from the rulemaking requirements of the Administrative Procedure Act,[48] and therefore they are not binding on parties under the NLRA but provide insight into adjudicative rules.[49] Importantly, the NLRA only applies to "employees."[50]

1. Statutory and Common Law Determinations of "Employee" Status

Defining "employee" has proven to be one of the most litigated issues under the NLRA.[51] The struggle begins with the NLRA's statutory definition, which defines "employee" as "any employee . . . unless the Act

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42. 29 U.S.C. § 151. *See generally* Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 9 (1988); *National Labor Relations Act (1935)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/national-labor-relations-act [https://perma.cc/P5C9-3ETX] (last visited May 1, 2023).

43. 29 U.S.C. § 151.

44. Summers, *supra* note 42, at 9.

45. *See National Labor Relations Act (1935)*, *supra* note 42.

46. *See id.*

47. *See, e.g.*, NAT'L LAB. RELS. BD., supra note 10 (GC 17); NAT'L LAB. RELS. BD., supra note 15 (GC 18); NAT'L LAB. RELS. BD., supra note 1 (GC 21).

48. *See* 5 U.S.C. § 553. The rulemaking process for agencies to create binding rules requires notice-and-comment hearings or adjudications. *Id.* § 553(b)–(c). Guidance involves neither of these processes and is therefore nonbinding. *See id.* § 553(b)(3)(A).

49. *See, e.g.*, NAT'L LAB. RELS. BD., supra note 1 (GC 21) (providing guidance on whether PAIs are employees under the NLRA).

50. 29 U.S.C. § 151.

51. *See* Michael Pego, *The Delusion of Amateurism in College Sports: Why Scholarship Student Athletes Are Destined to Be Considered Employees Under the NLRA*, 13 FIU L. REV. 277, 284 (2018) ("'[Few] problems in the law have given greater variety of application and conflict in results than [in] cases arising' from the question of who is an employee." (quoting NLRB v. Hearst Publ'g, Inc., 322 U.S. 111, 121 (1944))).

explicitly states otherwise."[52] The broad definition of "employee" is accompanied by an exhaustive list of excluded workers, such as independent contractors, domestic hospitality workers, agricultural laborers, and supervisors.[53] Absent a distinct definition of "employee," courts look to the common law.

Federal courts have the power to review Board decisions regarding employee status.[54] Because reliance on the broad definition alone proves to be a difficult task, courts have adopted the common law doctrine of agency power to determine who is an employee under the NLRA.[55] In 1989, the U.S. Supreme Court in *Community for Creative Non-Violence v. Reid*[56] adopted thirteen factors to determine whether a person is an "employee," with a particular reliance on the employer's right to control the manner and means of production.[57] Through an examination of these factors, federal courts began using the common law agency test to determine who was an "employee" under the NLRA.[58]

Since *Community for Creative Non-Violence*, federal courts have expounded the use of the common law agency test and relevant factors. In 1995, the Supreme Court signaled its intention to expand the inclusiveness of the term "any employee." In *NLRB v. Town & Country Electric, Inc.*,[59] the Court found that applicants for employment were considered "employees" under the NLRA.[60] The Court reached this decision by creating a three-part test out of the common law agency test and the Board's definition of "employee."[61] The *Town & Country* agency test found the plaintiff was an "employee" if they satisfied three indicia: (1) when a servant performs services for another, (2) under the other's control or right of control, and (3) in return for payment.[62] The Court found not only that an applicant is covered by the agency test, but also that protecting a job applicant is well

52. 29 U.S.C. § 152(3).
53. *Id.*
54. *See id.* § 160(e)–(f).
55. Pego, *supra* note 51, at 285 n.44, 286 n.47.
56. 490 U.S. 730 (1989).
57. *Id.* at 751–52. The thirteen factors are: (1) the hiring party's right to control the manner and means by which the product is accomplished, (2) the skill required, (3) the source of the instruments and tools, (4) the location of the work, (5) the duration of the relationship between the parties, (6) whether the hiring party has the right to assign additional projects to the hired party, (7) the extent of the hired party's discretion over when and how long to work, (8) the method of payment, (9) the hired party's role in hiring and paying assistants, (10) whether the work is part of the regular business of the hiring party, (11) whether the hiring party is in business, (12) the provision of employee benefits, and (13) the tax treatment of the hired party. *Id.*
58. *See* Pego, *supra* note 51, at 285–86.
59. 516 U.S. 85 (1995).
60. *See id.* at 88.
61. *See id.* at 90–91.
62. *See id.*

within the purpose of the NLRA[63] and the Court's precedent.[64] The Board then adopted the *Town & Country* test for its own "employee" analysis.[65] Thus, the broad statutory definition of "employee" and simplistic agency test has the potential to protect a large group of workers under the NLRA.

2. Classifying Students as "Employees" in Academic Institutions

At the turn of the twenty-first century, the Board expanded NLRA protections to students employed by universities. In *Boston Medical Center Corp.*[66] and *Trustees of Columbia University in the City of New York*,[67] the Board used the broad definition of "employee" and the *Town & Country* agency test to designate student workers as employees.[68] Because PAIs are also students, the *Boston Medical* and *Columbia* decisions are crucial in analyzing PAIs' employee status.

In 1999, the Board in *Boston Medical* designated medical student assistants as employees, overturning previous precedent in *Cedars-Sinai Medical Center*.[69] The Board in *Cedars-Sinai* held that medical residents were primarily students because their work was required for their degree, and therefore they were not employees.[70] In *Boston Medical*, the Board adopted the dissent in *Cedars-Sinai* that reasoned student status should not affect employee status.[71] The Board found that granting medical residents employee protections would advance the policies of the NLRA: to protect those who perform services for another.[72] The Board found medical residents fall within the definition of "any employee."[73] Applying the *Town & Country* agency test, the Board found that the students perform acts under the control of an employer and are compensated by an hourly wage.[74] This analysis for medical students would later be applied to other student workers.

In 2000, the Board in *New York University*[75] cited the *Boston Medical* decision in holding that NYU student research assistants are employees. The *NYU* decision overturned a nearly thirty-year precedent. In 1974, the Board in *The Leland Stanford Junior University*[76] held student research assistants were not employees because they were not under the control of the

63. *Id.*
64. *Id.* at 91; *see* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185–86 (1941) (holding that the statutory term "employee" should apply to applicants because the § 8 prohibition on "discrimination in regard to hire" would "serve no function").
65. *See infra* Parts I.B.2–3.
66. 330 N.L.R.B. 152 (1999).
67. 364 N.L.R.B. No. 90 (Aug. 23, 2016).
68. *Bos. Med.*, 330 N.L.R.B. at 160; *Columbia Univ.*, 364 N.L.R.B. at 4–5.
69. 223 N.L.R.B. 251 (1976); *see Bos. Med.*, 330 N.L.R.B. at 152.
70. *See Cedars-Sinai*, 223 N.L.R.B. at 253.
71. *Bos. Med.*, 330 N.L.R.B. at 160.
72. *Id.*
73. *Id.*
74. *Id.*
75. 332 N.L.R.B. 1205 (2000).
76. 214 N.L.R.B. 621 (1974).

university.[77] Further, although financial aid could be seen as compensation, the students were ultimately receiving credit for their work, and, therefore, were considered students first.[78] In *NYU*, however, the Board stated student status should not affect employee status.[79] Applying the *Town & Country* agency test and the *Boston Medical* holding, the Board found the university administration controls graduate assistants and expects them to perform to a certain caliber in exchange for taxable income.[80] In 2004, the Board in *Brown University*[81] reverted to *Stanford*, reasoning the denial of students' employee status comports with the "overall purpose and aim of the Act . . . to remove the burden on interstate commerce caused by *industrial* unrest."[82] The Board opined that the principles developed in the industrial setting "cannot be imposed blindly on the academic world."[83] The *Brown Univ.* decision set the precedent for students until *Columbia*.

The Board's 2016 decision in *Columbia* reverted back to *NYU*.[84] The Board found that all student-petitioners, consisting of undergraduate, Masters, and PhD student assistants, qualified as "employees" under the NLRA through the common law agency test, stating "[t]eaching and research occur with the guidance of a faculty member or under the direction of an academic department."[85] The Board also denied Columbia's defense that payments are merely "financial aid" because students are required to work to receive the assistance and the pay is taxable income.[86] Further, the Board stated that students who are working to advance their degree "could not negate an employment relationship."[87] Thus, not only did the Board reinstate *NYU*'s holding in *Columbia*, they did so with the added breadth allowed by the statutory definition of "employee" and the common law agency test.

The *Boston Medical* and *Columbia* decisions help conceptualize how the Board uses the statutory definition of "employee" and the common law agency test. These decisions also demonstrate the issues that materialize when applying them to student employees. The next sections will discuss the recent developments on the employee status of PAIs and the Board's reliance on *Boston Medical* and *Columbia*.

77. *Id.* at 622–23 (explaining that students were able to research topics of their own choice and work during their own hours).
78. *Id.* at 622.
79. *NYU*, 332 N.L.R.B. at 1217–18.
80. *Id.*
81. 342 N.L.R.B. 483 (2004).
82. *Id.* at 487 (emphasis added).
83. *Id.* (quoting NLRB v. Yeshiva Univ., 444 U.S. 672, 680–81 (1980)).
84. *See* Trs. of Columbia Univ. in the City of N.Y., 364 N.L.R.B. No. 90, 4 (Aug. 23, 2016).
85. *Id.* at 13.
86. *Id.* at 13–15.
87. *Id.* at 17.

3. Northwestern University Football Players' Petition for Union Status

In 2014, scholarship players on Northwestern University's football team petitioned their regional board of the NLRB for union recognition.[88] The regional board used the statutory definition and agency test to determine whether the scholarship athletes were protected by the NLRA.[89] It concluded the players were employees under the NLRA, reasoning the athletes performed athletic services for and were controlled by the NCAA and Northwestern, and received scholarships as compensation, despite NCAA bylaws prohibiting PAIs from receiving compensation.[90] Their decision detailed the numerous hours of meetings, practices, traveling, training camps, and press conferences the scholarship football players were required to attend to retain their scholarship.[91] The regional board recognized the unit and granted an election for the Northwestern football players.[92]

Northwestern appealed the regional board's decision to the NLRB.[93] Upon review, the Board declined to determine whether the football players were "employees" because the NLRA failed to grant the Board jurisdiction to hear the case.[94] The Board stated that "because of the nature of sports leagues . . . and composition and structure of [D1 Football Bowl Subdivision] (in which the overwhelming majority of competitors are public colleges), it would not promote stability in labor relations to assert jurisdiction in this case."[95] This punt[96] on whether to classify scholarship football players as "employees" was later answered in GC 17.

4. The Aftermath of the *Northwestern* Board's Indecision and the Issuance of GC 21

In 2017, the Board responded to the *Northwestern* decision by releasing GC 17. The guidance used the reasoning in *Columbia* and *Boston Medical* to officially adopt the regional board's decision in *Northwestern*.[97] General Counsel Richard Griffin stated the Northwestern football players were employees under the statutory and common law term "because they perform services for their college and the NCAA, subject to their control, in return for

88. Northwestern Univ., 362 N.L.R.B. No. 167, at 1350 (Aug. 17, 2015).
89. *Id.*
90. *See id.* at 1363.
91. *Id.* at 1358.
92. *Id.* at 1367–68.
93. *See id.* at 1350.
94. *Id.* at 1352.
95. *Id.*
96. Many journal and news articles playfully refer to the Board's nondecision in *Northwestern* as a "punt," an action taken in a football game to transfer possession to the other team. *See, e.g.*, *NLRB Punts on Northwestern Union*, INSIDE HIGHER ED (Aug. 17, 2015), https://www.insidehighered.com/news/2015/08/18/national-labor-relations-board-declines-assert-role-northwestern-football-union#:~:text=Board%20says%20it%20won't,You%20have%20%2F5%20articles%20left [https://perma.cc/358G-KTKD].
97. *See generally* NAT'L LAB. RELS. BD., supra note 10 (GC 17).

compensation."[98] Griffin went on further to state this decision was not precluded by the Board's decision to deny jurisdiction over the initial petition, therefore establishing Northwestern scholarship football players as "employees."[99] Although Griffin narrowed his decision to designate only D1 scholarship football players at Northwestern as employees, the logic could be applied to any scholarship PAI. The victory for PAIs, however, was short-lived.

In December 2017, General Counsel Peter Robb, appointed by President Donald Trump, would rescind GC 17 not a year after its release.[100] The recission, announced in GC 18, gave no explanation for Robb's decision to unwind the previous policy.[101] Employer-side legal experts praised the reversion, claiming Robb was correcting "an agency determined to advance a [sic] extreme ideological framework regardless of the practical consequences to stakeholders."[102] But the effect of GC 18 would be brief.

GC 21 rescinded GC 18 and reinstated GC 17 with added teeth. General Counsel Abruzzo not only reverted back to GC 17 regarding the Northwestern players' employee status, but also went further, asserting that public institutions could be subject to the Board's jurisdiction through the joint-employer theory.[103] The joint-employer theory posits "where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are considered joint employers for the purposes of the Act."[104] Abruzzo contends the NCAA and athletic conferences (e.g., the Atlantic Coast Conference), which are private institutions created by a mixed group of public and private institutions, fall within the NLRA's jurisdiction as joint employers and could be held liable for violations of the act.[105] Further, Abruzzo made it a separate NLRA violation for employers to misclassify PAIs as "student-athletes."[106] Thus, not only has GC 21 reinstated PAIs as employees under the NLRA, but it held the door wide open to impose jurisdiction on public institutions and created a new violation.

Abruzzo justified her decision in GC 21 by citing to the current activity of PAIs engaging in unprecedented levels of collective action, the reasoning in *Columbia* and *Boston Medical*, and the Supreme Court's recent unanimous

98. *Id.* at 19.
99. *Id.* at 20.
100. *Id.*
101. The rescission was given a single-line explanation: "I have not yet identified any such [novel legal theories I want to explore], but I have decided that the following memos shall be rescinded." NAT'L LAB. RELS. BD., supra note 15, at 5 (GC 18).
102. Eric C. Stuart, *Newly-Appointed NLRB General Counsel Moves to Roll Back Agency Overreach and Activism*, OGLETREE DEAKINS, https://ogletree.com/insights/newly-appointed-nlrb-general-counsel-moves-to-roll-back-agency-overreach-and-activism/ [https://perma.cc/AX9A-KS79] (Dec. 5, 2017).
103. NAT'L LAB. RELS. BD., supra note 1, at 9 n.34 (GC 21).
104. Jonathan Fox Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future*, 13 N.Y.C. L. REV. 107, 120 (2009) (quoting TLI, Inc., 271 N.L.R.B. 798, 798 (1983)).
105. NAT'L LAB. RELS. BD., supra note 1, at 9 n.34 (GC 21).
106. *Id.* at 3–4.

decision in *NCAA v. Alston*.[107] Notably, *Alston* is a case regarding a violation of the Sherman Act, and Part I.C of this Essay discusses what the Sherman Act is, whom it protects, and how it relates to PAIs and the NLRA.

C. PAI Protections Under the Sherman Act

In 1890, Congress passed the Sherman Act to protect consumers against any "monopoliz[ation] . . . attempt[ed] . . . monopoliz[ation], or combin[ation] or conspir[acy] . . . to monopolize."[108] Section 1 promotes this purpose by outlawing "[e]very contract, combination . . . , or conspiracy, in restraint of trade."[109] The Sherman Act grants a civil cause of action for § 1 violations.[110] To prevail, a plaintiff must show: (1) an agreement exists between two or more business entities, and (2) such an agreement would unreasonably restrain competition in some economic market.[111] Although there is no statutory definition of "employee" in the Sherman Act, it inherently protects employees by removing restrictive policies and granting greater autonomy in the labor market.

Originally, § 1 actions were used by employers to gain greater advantage in the market by restricting or dismantling their market competitors. Recently, however, employees utilize § 1 litigation to obtain more favorable terms of employment and economic freedom.[112] For example, employees are currently claiming that noncompete and antipoaching agreements place a restriction on market competition by preventing employees from working intra-franchise or at other companies within their industry.[113] If noncompete and no-poach agreements are found to violate § 1, employees within those industries would be granted greater market autonomy. Notably, PAIs are using § 1 to dismantle the NCAA's monopsony on college sports.

In 2021, the Supreme Court decided *NCAA v. Alston*, sending a shockwave throughout the nation. In the district court, PAI-plaintiffs successfully argued that the NCAA's cap on compensation restricted the PAIs' market autonomy.[114] In analyzing whether the restraint was unreasonable, the district court applied the "rule of reason" test, which requires: (1) a plaintiff

107. *Id.* at 2–3, 5–7.
108. 15 U.S.C. § 2.
109. *Id.* § 1.
110. *See The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/MHD2-XB9X] (last visited May 1, 2023).
111. Michael Iadevaia, *Poach-No-More: Antitrust Considerations of Intra-Franchise No-Poach Agreements*, 35 A.B.A. J. LAB. & EMP. L. 151, 156 (2020).
112. *Id.* at 152–53.
113. *See id.* at 153. Recently, President Biden, the Department of Justice, and the Federal Trade Commission have expressed their intent to pursue criminal charges against companies that engage in fixing salaries and no-poach agreements. *See* Colin Kass, David A. Munkittrick & Reut N. Samuels, *It's Not a Threat, It's a Promise: Timeline of the DOJ's Statements and Actions Against Wage Fixing and No Poach Agreements*, PROSKAUER (Apr. 7, 2022), https://www.mindingyourbusinesslitigation.com/2022/04/its-not-a-threat-its-a-promise-timeline-of-the-dojs-statements-and-actions-against-wage-fixing-and-no-poach-agreements/ [https://perma.cc/A2MG-5GAP].
114. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2152 (2021).

to prove the restraint has a substantial anticompetitive effect, (2) the defendant to show a procompetitive rationale for the restraint, and (3) the plaintiff to show the procompetitive goals could be acquired through different anticompetitive means.[115] The PAIs satisfied the first element, showing the NCAA enjoys "near complete dominance of, and exercise[s] monopsony power in, the relevant market . . ." and had the "power to restrain student-athlete compensation in any way and at any time they wish."[116] In response, the NCAA claimed the procompetitive justification for the restraints was that their "rules preserve amateurism, which in turn widens consumer choice by providing a unique product."[117] The NCAA failed to prove classifying PAIs as "amateurs" and capping their compensation would affect consumer demand.[118] The PAIs then asked for compensation unrelated to education, but were denied.[119] Instead, the Court only lifted the cap on *education-related* compensation and benefits.[120] Thus, although PAIs were not allowed to receive monetary compensation akin to athletes in professional leagues, they were able to receive more education-related benefits.

The outcome in *Alston* was marred by the "education-related" qualifier. The Court justified their decision using the NCAA's "amateur" argument, reasoning that allowing PAIs access to "professional-level cash payments . . . could blur the distinction between college sports and professional sports."[121] In his concurrence, Justice Kavanaugh rejected the "amateur" argument, stating the idea "that colleges may decline to pay student athletes because the defining feature of college sports . . . is that student athletes are not paid . . . is circular and unpersuasive."[122] In response, Justice Kavanaugh offered a different solution. He suggested the ill-effects of unfair compensation could be resolved by "engag[ing] in collective bargaining."[123] Thus, Justice Kavanaugh endorsed the idea that Sherman Act violations can be resolved through NLRA solutions.

Justice Kavanaugh's concurrence is the most groundbreaking development in the pursuit for PAI protections under the NLRA. Not only did he explicitly suggest NLRA protections as a solution to § 1 violations, he also rejected the "amateur" argument as "circular and unpersuasive."[124] In rejecting the NCAA's historically oppressive "amateur" argument, Justice Kavanaugh effectively dismantled the NCAA's greatest tool in denying guaranteed protection under labor law statutes. The next section will discuss

115. *Id.* at 2160 (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).
116. *Id.* at 2151–52.
117. *Id.* at 2152.
118. *Id.*
119. *Id.* at 2154.
120. *Id.*
121. *Id.* at 2153 (quoting *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1104 (N.D. Cal. 2019)).
122. *Id.* at 2167 (Kavanaugh, J., concurring).
123. *Id.* at 2168.
124. *Id.* at 2167–69.

the impact of Justice Kavanaugh's concurrence on PAI protections under the FLSA, and how this relates to PAI protections under the NLRA.

D. PAI Protection and Employee Status Under the FLSA

In 1938, Congress granted more protections to employees through the FLSA.[125] The FLSA's preamble states its intent to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[126] Because the NLRA only granted *procedural* protections, like the right to collective bargaining, employees were often still the weaker party in negotiations.[127] Thus, where collective bargaining fails to protect the weaker party, the FLSA became the guardian.[128] The FLSA resolved this issue by creating "basic floors on workplace conditions," such as guaranteed minimum wage, which gave union workers a starting point for negotiations.[129] The FLSA's statutory protections offers a safety net for unions, but only for "employees."

The FLSA defines "employee" as "any individual employed by an employer," subject to limited exclusions.[130] Like the NLRA, the broad definition encouraged courts to adopt common law tests to determine employee status. Currently, circuit courts are split between two tests. The U.S. Courts of Appeals for the Seventh and Ninth Circuits use the economic reality test, which analyzes the relationship between the plaintiff and defendant within the totality of the circumstances with an emphasis on the "right to control."[131] The U.S. Court of Appeals for the Second Circuit uses the primary beneficiary test, outlined in *Glatt v. Fox Searchlight Pictures, Inc.*,[132] which analyzes the relationship using seven factors.[133] No one factor is dispositive, but the weight of factors combined is used to determine the

125. Harris, *supra* note 104, at 107–08.
126. *Id.* at 123 (citing 29 U.S.C. § 202(a)).
127. *See* Summers, *supra* note 42, at 10.
128. *See id.*
129. Harris, *supra* note 104, at 123–24.
130. 29 U.S.C. § 203.
131. *See* Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 290–91 (7th Cir. 2016); Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 909–10 (9th Cir. 2019).
132. 811 F.3d 528 (2d Cir. 2016).
133. There are seven factors: (1) the extent to which the intern and the employer clearly understand that there is no expectation of compensation, with any promise of compensation, express or implied, suggesting that the intern is an employee—and vice versa; (2) the extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions; (3) the extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit; (4) the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar; (5) the extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; (6) the extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and (7) the extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship. *Id.* at 536–37.

plaintiff's employee status.[134] Recently, there has been a dispute as to whether PAIs are protected under the FLSA.

The Seventh and Ninth Circuits do not recognize PAIs as employees under the FLSA. In *Berger v. NCAA*,[135] the court used the economic reality test and found that the relationship between PAIs and the NCAA is too tenuous for an employee-employer relationship.[136] The *Berger* court refused to use *Glatt*'s primary beneficiary test, claiming it failed to consider the longstanding relationship of "amateurism" between the PAIs and the NCAA that is essential to PAIs' existence.[137] The Ninth Circuit reached a similar decision in *Dawson v. NCAA*, and found the NCAA was a regulator, not an employer.[138] The *Dawson* court refused to apply the *Glatt* primary beneficiary test because it was used to discuss employee status of student interns receiving course credit in exchange for work, not for PAIs.[139] Thus, the Seventh and Ninth Circuits have found that PAIs are not protected under the FLSA. The U.S. District Court for the Eastern District of Pennsylvania in *Johnson v. NCAA*,[140] however, reached a different outcome using both tests.

In 2021, the district court in *Johnson* used both the economic reality test and *Glatt*'s primary beneficiary test to find PAIs were employees under the FLSA.[141] Under the primary beneficiary test, the court found more factors weighed in PAIs' favor than against.[142] For the third and fourth factors, the court found sports were not tied to a students' formal education program,[143] and PAIs were not accommodated; their commitment of thirty-plus hours a week actually burdens PAIs, placing limits on which courses PAIs can take and what majors they can pursue.[144] For the sixth factor, the court found PAIs received no educational benefit (e.g., academic credit) for their participation, and the amount of time required for athletics interfered with and inhibited their ability to keep up with classes.[145] Under the economic reality test, the court rejected the NCAA's argument that the "long-standing tradition of amateurism in NCAA interscholastic athletics . . . defines the economic reality of the relationship."[146] Thus, the court held PAIs were employees. More importantly than the decision itself, however, is the court's reliance on *Alston*.

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134. *Id.*
135. 843 F.3d 285 (7th Cir. 2016).
136. *Id.* at 290.
137. *Id.* at 290–91.
138. Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 911 (9th Cir. 2019).
139. *Id.*
140. *See* Johnson v. Nat'l Collegiate Athletic Ass'n, 556 F. Supp. 3d 491, 506, 509 (E.D. Pa. 2021).
141. *See id.* at 509.
142. *Id.* at 512 (explaining that three of seven factors weighed in favor of PAI-plaintiffs, two were neutral, and one weighed in favor of the NCAA).
143. *Id.* at 511.
144. *Id.* at 511–12.
145. *Id.*
146. *Id.* at 501.

The district court reached its decision by relying on Justice Kavanaugh's concurrence in *Alston*.[147] In *Johnson*, the NCAA claimed PAIs were "amateurs," and not employees entitled to wages under the FLSA.[148] The court rejected the NCAA's "amateur" defense, stating it was "circular and unpersuasive."[149] The court's reliance on *Alston* in an FLSA case demonstrates how different labor law statutes interact with one another. A finding in one case can affect a finding in another case. The *Johnson* case is ongoing as an interlocutory appeal is pending.[150]

The *Johnson* decision marks an important step toward PAI protection under the FLSA and a departure from *Berger* and *Dawson*. On a larger scale, *Johnson* demonstrates another avenue for PAIs to receive protection from the restrictive policies of the NCAA. More importantly, it grants protection for PAIs using the same reasoning as in *Alston* and GC 21.[151]

II. PAIS DESERVE PROTECTION UNDER FEDERAL LABOR STATUTES

There is undoubtedly a movement toward granting PAIs protections under federal labor laws. PAIs are seeking multiple avenues to relieve themselves from the restrictive NCAA policies, and *Alston*, *Johnson*, and GC 21 are all steps in the right direction. This section begins by discussing why GC 21 was correct in classifying PAIs as employees. Then, it offers another way to discredit the NCAA's "amateur" defense. Finally, it argues employees protected under the Sherman Act and FLSA should be guaranteed protection under the NLRA.

A. The Reasoning in GC 21 Should Be Upheld to Protect PAIs Under the NLRA

The importance and weight of General Counsel Memoranda cannot be understated. The NLRB General Counsel has "extensive, unreviewable discretion in the issuance of complaints and is the gatekeeper in determining which cases advance to the Board for decision."[152] Furthermore, although guidance documents are not binding law,[153] the General Counsel is responsible for setting national policy in the regional districts, giving their guidance documents broad weight.[154] Analyzing the purpose of the NLRA, the statutory definition of "employee," the common law test, and recent Board decisions, Abruzzo's guidance granting PAIs employee status comports with the purpose of the NLRA, and should be adopted by the Board.

147. *Id.*
148. *Id.* at 500–01.
149. *Id.* at 501.
150. Peter Hayes, *NCAA Battling from Behind in Student Athlete Employee Suit*, BLOOMBERG L. (Jan. 17, 2022, 3:23 PM), https://news.bloomberglaw.com/litigation/ncaa-battling-from-behind-to-upend-student-athlete-employee-suit [https://perma.cc/29K9-DQ5E].
151. *See supra* Parts I.B–C.
152. Stuart, *supra* note 102.
153. *See supra* Part I.B.
154. *See* Stuart, *supra* note 102.

The original purpose behind the NLRA is to empower workers to organize and negotiate for fair employment terms and conditions.[155] In a world where corporations held significant power over an employee's conditions of employment, the NLRA created a solution by granting employees the right to collectively bargain for fair compensation and working conditions.[156] The NCAA's total control of PAIs' work environment, restriction on day-to-day activities, and unfair compensation is the exact type of relationship Congress sought to remedy.[157] The NCAA receives billions of dollars of revenue, but the players responsible for the revenue receive a fraction of the share and yet are under the complete control and mercy of the NCAA's bylaws and policies.[158] Although hundreds of thousands of dollars in college tuition may seem fair, tuition is artificially inflated by university racketeering practices, and therefore it cannot be deemed fair compensation.[159] The heart of the NLRA is to empower employees who otherwise have no control over their terms of employment.[160] PAIs fit this narrative.[161] Thus, PAIs should be allowed the right to collectively bargain and negotiate their terms of employment to fulfill the purpose of the NLRA.

PAIs fit well within the statutory definition of "employee" under the NLRA. Defining "employee" as "any employee" grants the right to organize and collectively bargain to anyone who works for an employer. Additionally, Congress added an exhaustive list of workers excluded from the protections of the NLRA.[162] The list does not include PAIs despite the NCAA-PAI relationship existing before the NLRA's passage.[163] If Congress intended to exclude PAIs from the NLRA, it would have added them to the list of excluded workers. Additionally, if the current Congress wished to exclude PAIs, it could amend the NLRA to include them in the list, like it did for supervisors.[164] Congress's initial decision not to exclude PAIs and its continued inaction strongly supports that PAIs are employees under the statutory definition.

PAIs are also employees under the common law agency test in *Town & Country*. PAIs must meet three criteria to satisfy the agency test: (1) someone performs an act for another (2) under the other's control or right of control (3) in return for payment.[165] First, PAIs perform for the NCAA by

155. *See supra* Part I.B.
156. *See supra* Part I.B.
157. *See supra* Part I.A.
158. *See supra* Part I.A.
159. *See* Stephanie Saul & Anemona Hartcollis, *Lawsuit Says 16 Elite Colleges Are Part of Price-Fixing Cartel*, N.Y. TIMES (Jan. 10, 2022), https://www.nytimes.com/2022/01/10/us/financial-aid-lawsuit-colleges.html [https://perma.cc/M4J4-A2XN].
160. *See supra* Part I.B.
161. *See supra* Part I.A.
162. *See supra* Part. I.B.
163. *See supra* Parts I.A–B.
164. *See* Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-100, § 101, 61 Stat. 136, 138 (codified as amended at 29 U.S.C. § 152(3)) (adding supervisors and independent contractors to the list of excluded employees).
165. *See supra* Part I.B.1.

competing, practicing, training, and attending press conferences.[166] Second, PAIs are under the control of the NCAA bylaws through mandatory CARAs, non-CARAs, and RARAs.[167] Third, PAIs receive payment in the form of tuition.[168] Because PAIs satisfy all three criteria of the common law agency test, they are employees under the NLRA.

Furthermore, GC 21 was correct in applying the Board's reasoning from *Columbia* and *Boston Medical*. Even though PAIs are enrolled as students, their student status does not negate their role as employees for the NCAA.[169] The *Columbia* Board noted student researchers were under the control and expectations of professors and university administration.[170] PAIs are controlled not only by universities, but by the NCAA, a sprawling corporate entity.[171] Second, PAIs do not even receive academic credit for their work nor is their work helping them advance toward a degree.[172] Therefore, PAIs vastly surpass the *Columbia* and *Boston Medical* benchmark for student employee protection under the NLRA, and GC 21 should remain the standing precedent.

B. The NCAA's Malicious Misclassification of PAIs as "Amateurs" Must End

Historically, the NCAA has used an "amateur" defense to justify their restrictive control over PAIs and deny them labor law protections.[173] The NCAA's bylaws offer no definition of "amateur" or "amateurism."[174] However, historically, the Supreme Court has adopted the NCAA's argument that the "revered tradition of amateurism in college sports" allows them to create an "elaborate system of eligibility rules."[175] "Amateurism," like "student-athlete,"[176] is just another tactic used by the NCAA to denigrate the nature of the PAIs' employee status and deny PAIs employee protections.[177] The "amateur" defense is inaccurate and should not be used by courts or the Board to evaluate the employment relationship between PAIs and the NCAA.

Although this Essay agrees with Justice Kavanaugh's concurrence regarding the circular reasoning of "amateurism,"[178] it proposes a textual analysis to dismiss the argument. Absent an NCAA definition of "amateur" or "amateurism," the dictionary definition becomes relevant. The Oxford

166. *See supra* Part I.A.
167. *See supra* Part I.A.
168. *See supra* Part I.A.
169. *See supra* Part I.B.2.
170. *See supra* Part I.B.2.
171. *See supra* Part I.A.
172. *See supra* Part I.D.
173. *See supra* Parts I.C–D.
174. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2152, 2163 (2021).
175. *See* Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 291 (7th Cir. 2016) (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984)).
176. *See* NAT'L LAB. RELS. BD., supra note 1, at 1 n.1 (GC 21).
177. *See supra* Parts I.A–D.
178. *See supra* Part I.C.

dictionary defines "amateur" as "a person who engages in a pursuit, especially a sport, on an unpaid rather than professional basis" or a "person who is incompetent or inept at a particular activity."[179] PAIs do not fit either of these descriptions. First, PAIs are paid through education-related benefits.[180] Second, PAIs are not incompetent nor inept in their chosen sport. Personally, I dedicated my life to my sport, diving at least fifteen hours a week since age nine under the instruction of Olympians Greg Louganis and Andy Kwan. Such dedication and expertise is typical of scholarship recipients, many of whom compete in the Olympics during their enrollment in college[181] or forego graduating to compete in professional leagues.[182] Defining PAIs' level of skill as "amateur" is not only incorrect by definition, but, when used by a monolithic business entity to deny PAIs statutory rights and protections, it is intentionally malicious. PAIs are essentially professional athletes. Therefore, there is no valid argument that PAIs should not be afforded employee protections due to their "amateurism," and the legal world must dispel this false narrative once and for all.

C. The NLRA, FLSA, and Sherman Act Should Be Read Together to Protect PAIs

The statutory protections offered by the Sherman Act, NLRA, and FLSA are mutually inclusive and form a lattice framework woven to protect vulnerable employees in the United States. Thus, those who are protected by the Sherman Act or FLSA should be protected by the NLRA, unless explicitly excluded in the statutes themselves or through case law.

1. Protection Under the Sherman Act Requires Protection Under the NLRA

Although the Sherman Act was not created specifically in conjunction with the NLRA,[183] these acts share similar goals. The Sherman Act's purpose is to prohibit restraints on free trade.[184] Similarly, the NLRA's purpose is to allow for "the free flow of commerce."[185] The Sherman Act achieves this purpose by removing restrictive policies from the market through § 1 violations and the NLRA protects free trade by allowing employees to negotiate for protection. The mechanisms used to achieve these purposes are

179. *Amateur*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/6041?redirectedFrom=amateur#eid [https://perma.cc/TC7C-B6SF] (last visited May 1, 2023).

180. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2164 (2021); *see also* NAT'L LAB. RELS. BD., supra note 1 (GC 21).

181. *See, e.g.*, Julia Elbaba, *Meet the College Athletes Competing for Team USA at the Olympics*, NBC N.Y. (Feb. 13, 2022), https://www.nbcnewyork.com/news/sports/beijing-winter-olympics/ncaa-student-athletes-represented-2022-winter-olympics/3550322/ [https://perma.cc/4LRE-WY8L].

182. *See, e.g.*, Steven Lassan, *2021 NFL Draft: College Football Players Leaving Early for NFL*, ATHLON SPORTS (Dec. 28, 2020), https://athlonsports.com/college-football/2021-nfl-draft-college-football-players-leaving-early-nfl [https://perma.cc/N3ZF-K32Q].

183. *See supra* Part I.C.

184. *See* 15 U.S.C. § 1.

185. 29 U.S.C. § 151.

closely related. For example, if courts find noncompete agreements are illegal, then employees can organize and collectively bargain with potential employers under the NLRA (assuming they are not excluded by the act). By removing the restrictive noncompete agreements, courts grant employees the ability to exercise their NLRA rights. So, although the Sherman Act does not provide a statutory definition of "employee," it inherently protects employees' ability to bargain in the free market.[186] However, this only works if employees are granted protection under the NLRA.

Justice Kavanaugh's concurrence in *Alston* highlights the relationship between the Sherman Act and NLRA protections in the free market.[187] The majority opinion, however, exposed a major flaw: what good is uncapped compensation if the employee cannot negotiate higher compensation? In other words, *Alston* granted PAIs the right to receive more compensation with no way to guarantee it. Because PAIs were not considered employees under the NLRA, they were unable to engage in collective bargaining to guarantee higher compensation. Naturally, without any perceptible labor law consequences, the NCAA has no incentive to raise PAIs' compensation. Justice Kavanaugh's concurrence suggests if the PAIs were protected under the NLRA, they could negotiate for higher compensation, therefore guaranteeing the rights granted to them by the *Alston* decision.[188] It makes sense for employees protected under the Sherman Act to receive NLRA rights to collectively bargain. NLRA protections ensure that employees can exercise the rights granted to them through Sherman Act litigation.

The Board's actions support the mutual inclusivity of Sherman Act and NLRA protections. GC 21 granted PAIs the right to collectively bargain.[189] Abruzzo used Justice Kavanaugh's concurrence to justify her decision to grant PAIs NLRA protections.[190] Now that PAIs have the right to organize and collectively bargain, they can take steps to secure higher compensation from the NCAA. Additionally, if PAIs achieve higher compensation through collective bargaining, both acts' purposes are fulfilled. The Sherman Act's purpose is fulfilled by abolishing restrictive price-fixing practices, thus granting free market autonomy to PAIs. The NLRA's purpose is satisfied by protecting the right for PAIs to organize and negotiate the fair terms and conditions of employment. Therefore, Abruzzo's reliance on *Alston* was correct, and the Board should continue to rely on Sherman Act decisions to grant employee status to PAIs going forward.

186. *See supra* Part I.C.
187. *See supra* Part I.C.
188. *See supra* Part I.C.
189. *See supra* Part I.B.4.
190. *See supra* Part I.B.4.

2. The FLSA Was Created Specifically to Assist Employees Protected by the NLRA

The FLSA was specifically created to work with the NLRA as a floor for bargaining for working conditions and wages.[191] Although the FLSA grants protection to a larger pool of employees, such as public employees, there is overlap between the two.[192] The similar purposes of the NLRA and FLSA, their statutory definitions of "employee," as well as common law tests support the idea that employees protected under the FLSA should be protected under the NLRA, unless explicitly excluded in statutory language or case law.

Both the NLRA and FLSA were created to protect employee working conditions. The FLSA protects employees by setting a "minimum standard for labor conditions necessary for health, efficiency, and general well-being of workers."[193] Similarly, the NLRA grants protections to employees by "encouraging the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[194] Additionally, both preambles mention the intent to allow for "the free flow of commerce."[195] The difference between the two acts is the way that employees receive protections. The FLSA grants substantive statutory rights, like minimum wage and working hours,[196] while the NLRA grants procedural rights, leaving the onus on employees to collectively bargain for protections.[197] Although the acts offer protection through different mechanisms, the intent to protect employees is a common thread. The parallel purposes of the acts suggest employees under one act are protected under the other, unless stated otherwise.

The NLRA and FLSA have similar statutory definitions of "employee." The FLSA defines "employee" as "any individual employed by an employer."[198] The NLRA defines "employee" as "any employee."[199] Both definitions are broad because the purpose of both acts is to protect all employees unless explicitly excluded in the act.[200] Congress rarely acts without purpose, so the fact that it created a broad definition in both acts signals an understanding that someone who is considered an "employee" under one act is protected under the other act unless specifically excluded. Thus, by statutory definition, employees protected under the FLSA should be protected under the NLRA.

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191. *See supra* Part I.D.
192. *See, e.g.*, *NLRA & FLSA: What Do They Cover?* LAWINFO, https://www.lawinfo.com/resources/labor-law/ [https://perma.cc/5WTH-P93L] (last visited May 1, 2023).
193. *See supra* Part I.D.
194. *See supra* Part I.B.
195. *See supra* Parts I.B, I.D.
196. *See supra* Part I.D.
197. *See* Harris, *supra* note 104, at 123.
198. *See supra* Part I.D.
199. *See supra* Part I.B.
200. *See supra* Parts I.B, I.D.

The common law tests used in FLSA and NLRA litigation consider similar factors to determine who is an "employee." The NLRA agency test asks whether the plaintiff is someone who performs an act for another, under the control or right of control, in return for payment.[201] Although the applications are different, both the FLSA's *Glatt* and economic reality tests focus on compensation and the right to control.[202] These factors are also present in the NLRA's *Town & Country* agency test used in *Columbia*, *Boston Medical*, GC 17, and GC 21.[203] All three tests are consistent. All three examine the working relationship between the plaintiff and defendant, considering factors such as control and compensation. Therefore, the similarities in the common law tests suggest employees protected under the FLSA should be protected under the NLRA.

Taking the similarities into consideration, if PAIs are protected under the FLSA, they should also be protected by the NLRA. In other words, if *Johnson* is upheld in the U.S. Court of Appeals for the Third Circuit, the Board should use the case to further support PAIs' employee status. The overall reasoning used in *Johnson* and GC 21 are nearly identical. Thus, the NLRA should use *Johnson* to further support their decision that PAIs are employees under the NLRA and should use FLSA decisions as guidance to determine who is an employee under the NLRA.

CONCLUSION: MOVING FORWARD WITH GC 21

The American legal system is finally catching up to the reality that PAIs deserve protection under federal labor laws. Considering the NCAA's restrictive policies and malicious tactics used to oppress PAIs, it is only reasonable for the NLRB and the courts to intervene and offer relief. GC 21, along with *Alston* and *Johnson*, grant specific federal protections under the NLRA, Sherman Act, and FLSA. When combined, these statutory protections will help PAIs overcome the NCAA's vice grip on compensation and working conditions. The battle, however, is not yet over. GC 21 is only as strong as the last memorandum and can be rescinded with the appointment of a new General Counsel. To ensure PAIs receive protections under the NLRA, they will need to organize quickly and petition regional boards for union certification and adoption of GC 21. Recently, PAIs attending the University of Southern California (USC) successfully petitioned against the NCAA, the Pacific-12 Conference, and USC claiming that they had been falsely identified as "student-athletes" instead of "employees," and the Los Angeles Regional Board will now file unfair labor charges against the organizations in administrative court.[204] Thus, all eyes are on the LA

201. *See supra* Parts I.B.2–4.

202. *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T LAB., https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship [https://perma.cc/D7AB-L2LQ] (Mar. 2022).

203. *See supra* Part I.B.1.

204. *See* Dan Murphy, *NLRB to Pursue Unlawful Labor Practices Against USC, Pac-12, NCAA*, ESPN (Dec. 15, 2022), https://www.espn.com/college-

Regional Board and the *Johnson* case as PAIs close in on full federal labor protections. Regardless of the outcomes, there has never been a more exciting time in history to watch PAIs on and off the field.

football/story/_/id/35259868/nlrb-pursue-unlawful-labor-practices-usc-pac-12-ncaa [https://perma.cc/X4E3-CDUT].