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The FLSA and the NCAA's Potential Terrible, Horrible, No Good, Very Bad Day

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THE FLSA AND THE NCAA'S POTENTIAL TERRIBLE, HORRIBLE, NO GOOD, VERY BAD DAY

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The NCAA is at a crossroads with student-athlete compensation. Over the past few decades, the NCAA and its partners have faced lawsuits from several different angles with essentially one consistent argument: Student-athletes deserve to be compensated for what they provide to colleges and universities.

In two such lawsuits—*Dawson v. NCAA* and *Livers v. NCAA*—the plaintiffs have attempted a new strategy: arguing that revenue sport student-athletes are employees under the Fair Labor Standards Act ("FLSA"). These cases have gained some traction, and the distinctive protections granted to employees under the FLSA present unique challenges worth exploring.

This Article analyzes the potential results of a plaintiff victory in a FLSA case on the landscape of collegiate sports. To that end, this Article explores the unique benefits and challenges the FLSA presents, and how intercollegiate sports would be shifted by a plaintiff victory on this front.

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I. INTRODUCTION

The National Collegiate Athletic Association ("NCAA") is at a crossroads with student-athlete compensation. In the past few decades, the NCAA and its partners have faced court cases from a variety of different angles and legal theories all with essentially one argument: Student-athletes deserve to be compensated for the value they provide to the NCAA and its member colleges and universities.[1] As college sports continue to grow and produce more revenue for those with the means to exploit it, the call to give student-athletes their fair share has only intensified.[2]

Although attempts in court to force change in college athletics have been slow, they have had some positive effects. In *O'Bannon v. NCAA*, student-athlete plaintiffs initially won increased scholarship compensation to the tune of the full cost of attendance as well as a $5,000 per year stipend.[3] The Ninth Circuit, however, took that stipend back on appeal.[4] More recently, *In re NCAA Grant-In-Aid Cap Antitrust Litigation* (and its companion cases *Jenkins v. NCAA* and *Alston v. NCAA*), an antitrust challenge to the NCAA's caps on compensation that comprise the lynchpin of its amateurism rules that keep student-athletes from receiving compensation beyond scholarships survived a motion for summary judgment and is slated for trial in late 2018.[5] These cases are notable due to their attempt to "attack[] the NCAA's

1. Such claims have ranged, for example, from the NCAA's licensing of student-athlete names and likenesses in video games; Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.), 72 F.3d 1268 (9th Cir. 2013); Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013); Brown v. Elec. Arts, Inc., 724 F.3d 1235 (9th Cir. 2013); O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015); to caps on compensation allowable in athletic scholarships (Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012)); and the rights of student-athletes to pursue endorsement deals (Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004)).

2. *See, e.g.*, Allen R. Sanderson & John J. Siegfried, *The Case for Paying College Athletes*, 29 J. OF ECON. PERSP. 115, 116 (2015). *See generally* Andrew Steckler, *Time to Pay College Athletes? Why the O'Bannon Decision Makes Pay-for-Play Ripe for Mediation*, 17 CARDOZO J. CONFLICT RESOL. 1071 (2015); Caroline Kane, *The NCAA Is Dropping the Ball: Refining the Rights of Student-Athletes*, 65 DEPAUL L. REV. 171 (2015).

3. *O'Bannon*, 802 F.3d at 1049; O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014). *See* Nicholas Kitko, *The Law May Cave, But Economics Will Not: The Road to Paying Student Athletes is Longer Than We Think*, 85 U. CIN. L. REV. 319, 335 (2017).

4. *O'Bannon*, 802 F.3d at 1049.

5. Eleanor Tyler, *Know Your Judge: Claudia Wilken Putting NCAA Amateur Rules to a Jury*, BLOOMBERG LAW (July 13, 2018), https://biglawbusiness.com/know-your-judge-claudia-wilken-putting-ncaa-amateur-rules-to-a-jury/ [https://perma.cc/4EHV-PDY7]; Michael McCann, *NCAA Amateurism to Go Back Under Courtroom Spotlight in Jenkins Trial*, SPORTS ILLUSTRATED

cap on [its] grant-in-aid itself, rather than merely the association's restrictions on sharing [National Letter of Intent] revenue."[6]

Beyond *Jenkins*, however, there are at least two additional challenges to NCAA amateurism restrictions based on the Fair Labor Standards Act ("FLSA"), a federal law granting employees both minimum wage and overtime protections.[7] These cases—*Dawson v. NCAA* and *Livers v. NCAA*—are still in their early stages and have several flaws in their pleadings that may inhibit their ability to effect change on a major scale.[8] However, in at least one of these cases, the court has shown a willingness to entertain the idea that student-athletes are employees under the FLSA's exceedingly broad definition of that term.[9]

In many ways, the plaintiffs' actions in the FLSA suits mirror the attempts by minor league baseball players to use federal employment law to circumvent the longstanding exemption from antitrust scrutiny in Major League Baseball ("MLB").[10] Like the MLB, the NCAA has shown remarkable resilience against the Sherman Antitrust Act.[11] To date, amateurism rules have survived despite serving to depress salaries of top collegiate athletes to bare minimums, even in light of record-shattering revenues in college

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(Apr. 2, 2018), https://www.si.com/college-football/2018/04/02/ncaa-amateurism-trial-judge-wilken-martin-jenkins-scholarships [perma.cc/DS2W-3M3H].

6. In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., No. 14-md-02541-CW, 2018 U.S. Dist. LEXIS 52230, at *24 (N.D. Cal. Mar. 28, 2018).

7. *See* Dawson v. NCAA, 250 F. Supp. 3d 401 (2017); Livers v. NCAA, No. 17-4271, 2018 U.S. Dist. LEXIS 124780 (E.D. Pa. July 25, 2018). *See also* Berger v. NCAA, 843 F.3d 285, 290 (7th Cir. 2016) (finding that non-scholarship track-and-field athletes were not employees under the FLSA but provoking a concurrence where one judge theorized that he was "less confident" that the holding would extend to "so-called revenue sports like Division I men's basketball and FBS football.").

8. *See infra* Part II.C.

9. *See Livers*, 2018 U.S. Dist. LEXIS 124780, at *17 ("[T]his Court cannot at this stage say that Plaintiff was not an FLSA employee as a matter of law during his football career as a Scholarship Athlete at Villanova.")

10. *See* Sam C. Ehrlich, *Minor Leagues, Major Effects: What if Senne Wins?*, 6 MISS. SPORTS L. REV. 23, 23–24 (2016).

11. *See* Thomas A. Baker III, Marc Edelman & Nicholas Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 4, 4 (publication forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3072641 [https://perma.cc/AK9X-Z6KU].

football and college basketball.[12] Just as the *Senne v. Office of the Commissioner of Baseball* suit threatened to force change to minor league baseball by judicial decree even without the protection of the Sherman Antitrust Act, *Dawson* and *Livers* threaten to serve as an alternate path to paying student-athletes should the antitrust challenges to amateurism fail to accomplish such dramatic changes.[13]

As with minor league baseball players, it remains to be seen whether antitrust is the best avenue to challenge amateurism restrictions on student-athlete compensation. Since *Jenkins* was filed in 2014, legal scholars have assessed its merits through a variety of different legal lenses, coming to various conclusions about how the case will fare at the district court and eventually the Ninth Circuit on appeal.[14] Even in a best-case scenario for student-athletes, however, *Jenkins* will only serve to increase compensation beyond the cost-of-attendance, perhaps giving student-athletes a small stipend to help pay for expenses beyond tuition and housing. A win on FLSA grounds, on the other hand, would seemingly assure college athletes minimum wage and time-and-a-half for any time worked over forty hours.[15]

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12. *Id.*

13. *See O'Bannon*, 802 F.3d at 1049. In *Senne*, a group of current and former minor league baseball players have challenged MLB's set payment scheme for minor league players—which in some cases pay players as little as $3,000 per year—by claiming that these wages are below the minimum wage afforded by federal law. Ehrlich, *supra* note 10, at 24. While *Senne* is currently being litigated at the time of publication, its potential to affect future change has been legislated away by Congress through the "Save America's Pastime Act," a change to the FLSA buried within a 2,232-page omnibus bill passed in March 2018 that specifically exempted minor league players from FLSA application. *See* Nathaniel Grow, *The Save America's Pastime Act: Special-Interest Legislation Epitomized*, 90 U. COLO. L. REV. 1, 5–6 (forthcoming 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3169957 [http://perma.cc/BE27-7YDF].

14. *See generally*, David J. Berri, *Paying NCAA Athletes*, 26 MARQ. SPORTS L. REV. 479 (2016); William W. Berry III, *Employee-Athletes, Antitrust, and the Future of College Sports*, 28 STAN. L. & POL'Y REV. 245 (2017); Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319 (2014); Marc Edelman, *How Antitrust Law Could Reform College Football: Section 1 of the Sherman Act and the Hope for Tangible Change*, 68 RUTGERS U. L. REV. 809 (2015); and William B. Gould IV, Glenn M. Wong & Eric Weitz, *Full Court Press: Northwestern University, a New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1 (2014).

15. *See generally Minimum Wage*, UNITED STATES DEPARTMENT OF LABOR, http://www.dol.gov/whd/minimumwage.htm [https://perma.cc/R6YJ-WSNS]; Doug Hass, *"Half-Time" Overtime: The Fair Labor Standards Act's Fluctuating Workweek Method*, INSTITUTE FOR APPLIED MANAGEMENT & LAW (Apr. 17, 2015), https://iaml.com/blog/half-time-overtime-fair-labor-standards-acts-fluctuating-workweek-method [http://perma.cc/7CJF-DUX9].

But even beyond the benefits of minimum wage and overtime protections, unlike in the minor league baseball case where minor league baseball players are indisputably employees of their respective teams, the use of the FLSA in *Dawson* and *Livers* has significant power beyond what antitrust cases can offer simply by the threat of a court deciding that student-athletes are indeed "employees" for the purposes of federal employment law. The word "employee" has significant power in federal law. A ruling granting student-athletes these rights would give them a variety of legal protections within the employment and labor law spheres that could potentially spiral and either completely change the nature of college athletics or threaten its very existence.

This Article seeks to explore the scope and potential effects of a court ruling in favor of student-athlete employment under the FLSA on a variety of different legal facts and issues. Part II provides background to the *Dawson* and *Livers* cases and analyzes the plaintiffs' chances of success in each suit. Part III explores the potential effects of a victory by either plaintiff—or a victory in a future FLSA case that overcomes the weaknesses inherent in *Dawson* and *Livers*' respective cases—by analyzing the scope of such a victory in terms of the sports and schools affected, the ripple effects that create protections, and the various challenges presented through other federal employment law statutes. Lastly, Part IV analyzes the possibility that a FLSA victory could open the door to unionization previously closed by the National Labor Relations Board ("NLRB").[16] Part IV also theorizes that, should these lawsuits gain momentum, unionization by student-athletes may actually be the saving grace for the NCAA moving forward.[17]

II. A BRIEF HISTORY OF *DAWSON* AND *LIVERS*

A. Precursor to Dawson and Livers: Berger

The first foray by college athletes into the world of FLSA claims was by Gillian Berger and Taylor Hennig, two former track-and-field stars at the University of Pennsylvania ("Penn").[18] In their complaint, the plaintiffs

16. *See* Nw. Univ. & Coll. Athletes Players Ass'n (CAPA), 362 N.L.R.B. 167 (N.L.R.B. Aug. 17, 2015). *See also infra* Part III.

17. *Id.*

18. Complaint, Berger v. Nat'l Collegiate Athletic Ass'n, 162 F. Supp. 3d 845 (S.D. Ind.), *aff'd*, 843 F.3d 285 (7th Cir. 2016). Student-athletes' rights under the FLSA has been debated within the sports law scholarship in the form of a student-note published in 2017. Geoffrey J. Rosenthal, *College Play and the FLSA: Why Student-Athletes Should Be Classified as "Employees"*

sought to receive class-action status to sue not only Penn, but also the NCAA and all 123 NCAA Division I member schools.[19] In doing so, Berger and Hennig claimed that "[a]ll current and former NCAA Division I student athletes, on women's and men's sports rosters" legally functioned as employees within the contexts of the work provided to their respective schools.[20] Berger and Henning compared the role of student-athletes to work-study students who are considered employees under the FLSA and other federal and state employment statutes.[21] The two argued that student-athletes, who "perform longer, more rigorous hours" and "are subject to stricter, more exacting supervision by full-time staff of NCAA Division I Member Schools," meet the

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Under the Fair Labor Standards Act, 35 HOFSTRA LAB. & EMP. L.J. 133, 136 (2017). Some college athletes had previously attempted to gain legal employment status in the early 1980s for student-athletes through state workers' compensation laws with little success. *See* Coleman v. W. Mich. Univ., 125 Mich. App. 35 (1983), *leave to appeal denied*, 418 Mich. 872 (1983) (finding that a football student-athlete is not an employee within the meaning of Michigan's Worker's Disability Compensation Act because football was not an integral part of the university's business); Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170, 1172 (Ind. 1983) (finding that a football student-athlete was not an employee of his university because there was no intent by the university to enter into an employment contract with the student); Graczyk v. Workers' Comp. Appeals Bd., 184 Cal. App. 3d 997 (1986) (affirming the California worker's compensation board's ruling that a college football player at Cal State Fullerton was not an employee of the university). *See generally* Shaun Loughlin, *Workers' Compensation and Student-Athletes: Protecting the Unpaid Talent in the Profit-Making Enterprise of Collegiate Athletics*, 48 CONN. L. REV. 1737 (2016). Another novel—but unsuccessful—claim in this area involved a student-athlete who attempted to argue for personal immunity as an employee of his (public) university. Korellas v. Ohio State Univ., 779 N.E.2d 1112, 1113 (Ct. Cl. 2002). Finally, student-athletes at Northwestern University attempted to gain employment status through labor law and the National Labor Relations Act (NLRA) through a petition to the National Labor Relations Board (NLRB) for unionization rights that was declined by the NLRB on jurisdictional grounds. Nw. Univ. & Coll. Athletes Players Ass'n (CAPA), *supra* note 16. *See also infra* Part IV.

19. Berger Complaint, *supra* note 18, at 1–10. The original complaint included Samantha Sakos, a former soccer player at the University of Houston, as the lead plaintiff. *Id.* However, Sakos was later replaced by Berger and Hennig due to the fact that Sakos attended a public school. Steve Berkowitz, *Judge Dismisses NCAA Wage Lawsuit Involving Penn Track Athletes*, USA TODAY (Feb. 16, 2016, 10:03 PM), https://www.usatoday.com/story/sports/college/2016/02/16/ncaa-wage-hours-lawsuit-samantha-sackos-penn-track-fair-labor-standards-act/80482630/ [http://perma.cc/KA4H-2T98]. As discussed later in this Article, many public schools—including the University of Houston, a public school in Texas—may be exempt from FLSA claims due to sovereign immunity. *See* Alden v. Maine, 527 U.S. 706, 812 (1999) (holding that states are immune from FLSA claims under the Eleventh Amendment unless the state legislature specifically waives that immunity).

20. Berger v. NCAA, 162 F. Supp. 3d 845, 847 (S.D. Ind.), *aff'd*, 843 F.3d 285 (7th Cir. 2016).

21. Berger Complaint, *supra* note 18, at 10 (emphasis omitted).

FLSA's employment criteria "as much as, if not more than, work study participants."[22]

Berger and Henning's attempt to claim employment status for student-athletes under the FLSA did not go well. In February 2016, the United States District Court for the Southern District of Indiana dismissed the FLSA claims in their entirety without leave to amend, ruling that student-athletes cannot be considered employees of their respective schools.[23] About ten months later, the Seventh Circuit Court of Appeals affirmed this decision on the basis that "student-athletic 'play' is not 'work,' at least as the term is used in the FLSA."[24]

In dismissing Berger and Hennig's claims, both the District Court and the Seventh Circuit relied heavily on the "economic reality" test.[25] This test allowed the courts to reject the traditional multifactor tests generally used to determine employment status, and instead permitted them to not only look at the economic reality of the situation, but also what the plaintiffs should be expecting based on the relationship between the parties.[26] Specifically, the

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22. *Id.*

23. *Berger*, 162 F. Supp. 3d at 857. The claims against the more than 120 other NCAA schools and the NCAA were dismissed out of hand on standing grounds, as the court ruled that the plaintiffs' "connection to the other schools and the NCAA is far too tenuous to be considered an employment relationship." Berger, 843 F.3d at 289.

24. *Berger*, 843 F.3d at 293.

25. *Id.* at 290. *See* Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992) ("Because status as an 'employee' for purposes of the FLSA depends on the totality of circumstances rather than on any technical label, courts must examine the 'economic reality' of the working relationship."); Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 32–33 (1961) (rejecting the use of any common law tests to determine whether the plaintiffs were employees, as "[t]here is no reason in logic why [the plaintiffs] may not be employees" and that "if the 'economic reality' rather than 'technical concepts' is to be the test of employment, [the plaintiffs] are employees); Brock v. Mr. W Fireworks, 814 F.2d 1042, 1042 (5th Cir. 1987) (stating that factor tests are only relevant to the determination of FLSA employment status "to the extent that they mirror 'economic reality'"); Karr v. Strong Detective Agency, Inc., Div, of Kane Servs., 787 F.2d 1205, 1207 (7th Cir. 1986) (stating that the main purpose of FLSA employment tests is "on the 'economic reality' of the situation).

26. The "economic reality" test stands in contrast to other common law tests that courts have created to delineate employment status under the FLSA in various circumstances. *See e.g.*, United States v. Silk, 331 U.S. 704, 715 (1947) (defining the first five-factor test for determining employment status under the FLSA); Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 1 (Cal. 2018) (defining the "ABC" test as used in California to classify workers as employees or independent contractors under the FLSA and California's wage orders); Sec'y of Labor, United States Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1535 (7th Cir. 1987) (defining six factors for determining whether a migrant worker is an employee under the FLSA); Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534–535 (2d Cir. 2015) (defining a six part test for determining

courts found that there exists a "tradition of amateurism in college sports" that governs the relationship between universities and student-athletes.[27] The various multifactor tests proposed by the plaintiffs "simply [did] not take into account this tradition of amateurism or the reality of the student-athlete experience."[28] This confirmed the court's holding that student-athletes cannot be considered employees under the FLSA and that no facts existed to show that such a relationship exists.[29]

While the *Berger* plaintiffs may have lost both in the District Court and in the Seventh Circuit, the concurring opinion by Judge Hamilton has, in some ways, opened the door for future FLSA claims against the NCAA and member schools. In this concurrence, Judge Hamilton noted that as student-athletes at an Ivy League university, Berger and Hennig did not receive athletic scholarships from the university due to the Ivy League's longstanding ban on athletic scholarships.[30] According to Judge Hamilton, this severely hurt Berger and Hennig's appeal to overturn the court's longstanding protections for NCAA student-athlete amateurism rules.[31] Even more troubling for Berger and Hennig was that their claims seemed to be an imperfect case for student-athlete employment from the very start. As Judge Hamilton noted, the plaintiffs were track-and-field athletes, which "is not a 'revenue' sport at Penn or any other school" for that matter.[32]

While Judge Hamilton believed that Berger and Hennig's claims were "mistaken" for the aforementioned reasons, he stated that he was "less confident" that a similar decision would "extend to students who receive athletic scholarships to participate in so-called revenue sports such as Division I

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whether an intern is an employee under the FLSA). *See also* Donovan v. Dialamerica Mktg., Inc., 757 F.2d 1376, 1382 (3rd Cir. 1985) (adopting a six-factor test to determine employee status under the FLSA).

27. *Berger*, 843 F.3d at 291 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 120 (1984)).

28. *Id.*

29. *Id.* at 294.

30. *Id.* (Hamilton, J., concurring). *See also Prospective Athlete Information*, THE IVY LEAGUE (July 7, 2017), https://ivyleague.com/sports/2017/7/28/information-psa-index.aspx [https://perma.cc/Z2YD-H8L7].

31. *Berger*, 843 F.3d at 294.

32. *Id.*

men's basketball and Football Bowl Subdivision ["FBS"] football," as "[t]hose sports involve billions of dollars of revenue for colleges and universities."[33] In those cases, Judge Hamilton believed that the "economic reality and the tradition of amateurism may not point in the same direction" and thus "there may be room for further debate, perhaps with a developed factual record rather than bare pleadings, for cases addressing employment status for a variety of purposes."[34] Judge Hamilton's concurrence became a guiding light for future plaintiffs seeking employment status for their participation in college athletics, including the plaintiffs in *Dawson* and *Livers*—the two cases discussed in this Comment.

B. Dawson and Livers: What Has Happened So Far?

1. Dawson v. NCAA

As *Berger* made its way through the courts, former collegiate football player Lamar Dawson filed his own FLSA lawsuit claiming that his status as a Division I football player at the University of Southern California ("USC") created an employment relationship with the NCAA and the Pacific 12 Conference ("Pac-12").[35] Notably, however, Dawson did not include USC within the complaint, despite the fact that the court in *Berger* found that the plaintiffs' "connection to the other schools and the NCAA [was] far too tenuous to be considered an employment relationship."[36] Instead, Dawson argued that the Pac-12 and the NCAA were both his employers under the FLSA's joint employment doctrine,[37] basing this argument on language in the Pac-12's handbook stating that the conference was organized "[t]o provide its members with a jointly governed body for sponsoring, supervising and regulating intercollegiate athletics as a conference member of the

33. *Id.*

34. *Id.*

35. Complaint, Dawson v. NCAA, 250 F. Supp. 3d 401, No. 3:2016-CV-05487 (N.D. Cal. Sept. 26, 2016).

36. *Id.*; *Berger*, 843 F.3d at 289.

37. 29 C.F.R. § 791.2 (1958). *See* Falk v. Brennan, 414 U.S. 190, 190 (1973) (finding a joint employment situation between an apartment management company and the building owners for the apartment building maintenance workers).

[NCAA] in accordance with the principles, policies, constitution and bylaws of the NCAA."[38]

Despite this unique argument, Dawson's case was dismissed by the United States District Court for the Northern District of California in April 2017.[39] As in *Berger*, the court rejected the idea of using a multifactor test to examine whether the relationship between the NCAA and football players constituted an employment relationship.[40] Here, the court found *Berger*'s reasoning to be persuasive enough to show that the economic reality of the relationship between the student-athlete and the university is not indicative of an employment relationship.[41] The court's decision was not supported by Judge Hamilton's concurrence, which was believed to be not persuasive enough to overrule the majority's reasoning of the case.[42] Ultimately, the court rejected Dawson's argument that Division I football's status as a revenue generator distinguished his case from *Berger*, citing several cases to prove that revenue generation was not enough to determine employment status.[43]

At the time this Article was being composed, Dawson appealed to the Ninth Circuit, with oral arguments scheduled for October 15, 2018.[44] On

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38. Dawson Complaint, *supra* note 35, at 7. *See* Pac-12 Conference, *Pac-12 2016-17 Handbook 6* (Aug. 20, 2016), http://championships.pac-12.org/wp-content/uploads/2014/09/2016-17-P12-Handbook.v3.pdf [https://perma.cc/7FQ6-CJPB]. The reason for USC's omission is unknown (the issue is not addressed in any of plaintiff's filings), and it was not corrected prior to the court's rendered decision. As a private school, USC would not be held under sovereign immunity. One conceivable explanation for USC's absence from the claim is that Dawson did not want to harm his alma mater and instead wanted only to go after the governing conference and the NCAA. Regardless of the reason, USC's absence from the case is a major deficiency with Dawson's claim that will likely harm his chances at the Ninth Circuit, though a narrow decision that merely dismisses the claim on standing grounds could mitigate the damage for future plaintiffs with similar claims. *See infra* Part III.C.

39. Dawson v. NCAA, 250 F. Supp. 3d 401, 409 (N.D. Cal. 2017).

40. *Id.*

41. *Id.*

42. *Id.* at 406.

43. *Id.* at 407. *See* Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983); Jochim v. Jean Madeline Educ. Ctr. of Cosmetology, Inc., 98 F. Supp. 3d 750, 759 (E.D. Pa. 2015); Townsend v. California, 191 Cal. App. 3d 1530, 1532 (1987).

44. *See* Opening Brief of Plaintiff-Appellant, Dawson v. NCAA, No. 17-15973 (9th Cir. 2018); Notice of Oral Arg., Dawson v. NCAA, No. 17-15973 (9th Cir. Aug. 5, 2018) (No. 43). Oral arguments were in fact held on October 15, 2018, with the judges focusing the vast majority of the

appeal, Dawson, in part, has argued that the District Court erred by not properly considering the "striking breadth" of the FLSA's definition of "employee,"[45] and the purportedly even broader scope of the definition of the term under California employment law which allows statutory wage and hour provisions "to be liberally construed with an eye to promoting such protection [of employees]."[46] Dawson also argued extensively that the District Court did not give proper weight to Judge Hamilton's concurrence in *Berger*, claiming that Hamilton's concurrence "makes it abundantly clear that, far from requiring dismissal of Plaintiff's Complaint, the "nature of the relationship" test favored by the majority in *Berger* actually supports a determination that Division I FBS football players are employees."[47] The latter argument would be echoed on the other side of the country in *Livers* but ultimately treated far differently by the Pennsylvania District Court.

2. Livers v. NCAA

Lawrence "Poppy" Livers was a football player for Villanova University ("Villanova"), an NCAA Division 1-AA institution in the Colonial Athletic Association ("CAA").[48] Similar to Dawson, Berger, and Hennig before him, Livers sued Villanova, the NCAA, and all other universities within the jurisdiction of the Court of Appeals for the Third Circuit, claiming that his work as a football player for Villanova constituted employment.[49] Like

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discussion on the joint employer issue and whether the NCAA and Pac-12 conference could in fact be held to be Dawson's employer, rather than on whether Dawson was a legal employee under the FLSA. *See* Oral Argument, Dawson v. NCAA, No. 17-15973 (9th Cir. Oct. 15, 2018), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014440. *See also* Sam C. Ehrlich (@samcehrlich), TWITTER (Oct. 15, 2018, 4:16 PM), https://twitter.com/samcehrlich/status/1051929780009009153 (narrating and commenting on the *Dawson* oral arguments in real-time.)

45. Opening Brief of Plaintiff-Appellant, *Dawson*, No. 17-15973 at 15 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992)).

46. *Id.* at 38 (quoting Indus. Welfare Comm'n v. Super. Ct. of Kern Cty., 27 Cal. 3d 690, 702 (1980)).

47. Opening Brief of Plaintiff-Appellant, *Dawson*, No. 17-15973 at 25 (emphasis omitted).

48. Livers v. NCAA, No. 17-4271, 2018 U.S. Dist. LEXIS 83655, at *2 (E.D. Pa. May 17, 2018).

49. *Id.* Livers' lawsuit gained some unexpected notoriety during the pleading stage of the defendants' motion to dismiss, as some members of the online press picked up on the NCAA's use of Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992), a case where prisoners unsuccessfully argued that their work for their respective prisons constituted employment, as "evidence" that the

Dawson (and unlike Berger), Livers argued that his circumstances constituted a joint employment situation with both Villanova and the NCAA together serving as his employers under the FLSA.[50]

Citing both *Berger* and *Dawson* as persuasive authority, the United States District Court for the Eastern District of Pennsylvania originally dismissed Livers' claim for a variety of reasons, including a failure to meet the statute of limitations.[51] On the FLSA claim, however, the court took a somewhat different approach than both the Seventh Circuit and the District Court for the Northern District of California. Whereas in *Berger* and *Dawson*, the courts declined to use a multifactor test to determine employment status based on the economic reality test, the Pennsylvania District Court noted that the Third Circuit has, in some circumstances, "involved a multi[]factor test to evaluate the economic realities of employment relationships for the purpose of determining FLSA rights."[52] The court noted that Livers did not

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NCAA was comparing student-athletes to prisoners. *See e.g.*, Shaun King, *The NCAA Says Student-Athletes Shouldn't Be Paid Because the 13th Amendment Allows Unpaid Prison Labor*, THE INTERCEPT (Feb. 22, 2018, 11:33 AM), https://theintercept.com/2018/02/22/ncaa-student-athletes-unpaid-prison/ [https://perma.cc/H5CZ-6EWC]; Elie Mystal, *NCAA Doubles Down On Comparing Student Athletes To Prisoners*, ABOVE THE LAW (Feb. 23, 2018, 1:01 PM), https://abovethelaw.com/2018/02/ncaa-doubles-down-on-comparing-student-athletes-to-prisoners/ [https://perma.cc/BJ6B-UBJ3]; Kevin Gannon, *Black Labor, White Profits, and How the NCAA Weaponized the Thirteenth Amendment*, THE TATTOOED PROFESSOR (Feb. 23, 2018), http://www.thetattooedprof.com/2018/02/23/black-labor-white-profits-and-how-the-ncaa-weaponized-the-thirteenth-amendment/ [https://perma.cc/MYS7-LYCG]. This notoriety was likely prompted in part by the move by Livers' attorneys to file for sanctions against the NCAA for relying on the *Vanskike* case, allegedly in violation against the Thirteenth Amendment's prohibition against involuntary servitude and narrow exemption for prison labor. Plaintiff's Motion for Sanctions, Livers v. NCAA, No. 2:17-cv-04217, 2018 U.S. Dist. LEXIS 83655, at *12 (E.D. Pa. Jan. 29, 2018). Predictably, this motion was denied by the court, as the court recognized that the NCAA and member schools' use of *Vanskike* was merely to demonstrate the economic reality test, not to compare NCAA student-athletes to prisoners. *See supra* note 25 and accompanying text.

50. 29 C.F.R. § 791.2(a). *See supra* notes 37–38 and accompanying text.

51. *Livers*, 2018 U.S. Dist. LEXIS 83655, at *25–30. The statute of limitations for FLSA claims is two years for inadvertent violations and three years for "willful" violations. *Id.* at *21–22. Based on when he completed his career as a student-athlete at Villanova, Livers' claim was filed right in the middle of these two rules, meaning that he had to show that the NCAA and other defendants' violation of the FLSA regarding his claim was "willful," meaning that they "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA." *Id.* at *25–26 (quoting Brock v. Richland Shoe Co., 799 F.2d 80, 81 (3d Cir. 1986)). While it was clear from the start that Livers' claim of a willful FLSA violation was weak, he was able to conquer this deficiency with his complaint by adding a new plaintiff in early 2019. *See infra* note 69.

52. *Id.* at *38. *See* Donovan v. Dialamerica Mktg., Inc., 757 F.2d 1376, 1382 (3rd Cir. 1985) (adopting a six-factor test to determine employee status under the FLSA).

assert enough facts in his complaint to overcome this burden, and accordingly dismissed the complaint against Villanova and the NCAA without prejudice, which allowed Livers to submit an amended complaint that focused more narrowly on the *Donovan* factors.[53]

After Livers filed his amended complaint to address the court's concerns, the NCAA once again moved to dismiss on similar grounds.[54] This time, however, the court denied the NCAA's motion to dismiss, finding that, based on the facts and legal theories added to the pleadings by Livers, the court "[could not] at this stage say that [the] plaintiff was not an FLSA employee as a matter of law during his football career as a Scholarship Athlete at Villanova."[55] While the court was still hesitant to give Livers a full victory due to the problems with meeting the statute of limitations, the court found that the "additional facts regarding the economic reality of the relationship between [the] [p]laintiff, in his capacity as a Scholarship Athlete with the Villanova football team, and Villanova and the NCAA" were enough to allow the claim to proceed to limited discovery.[56] Notably, the court explicitly declined to follow the prior rulings in *Berger* and *Dawson*, determining that those cases "are not controlling," and even if they were, they "proceed on slightly different facts and theories" than those brought in *Livers*.[57]

C. Can the Plaintiffs Win?

By declining to dismiss Livers' claim, the District Court has opened a narrow path to a successful FLSA claim by student-athletes against the

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53. *Livers*, 2018 U.S. Dist. LEXIS 83655, at *47–50. The claims against the other schools within the Third Circuit's jurisdiction were dismissed with prejudice, as the court ruled that the plaintiff did not have standing to sue schools that he did not attend. *Id.* at *30–37. However, in a departure from *Berger*, the court allowed the claim against the NCAA to be dismissed without prejudice with Villanova, finding that there may be a claim against the NCAA under a joint employment theory as the NCAA exerted "significant control" over the plaintiff. *Id.* at *33–35. *See also* In re. Enter. Rent-A-Car Wage & Hour Emp't Practices Litig., 683 F.3d 462, 469 (3d Cir. 2012) (identifying four factors to evaluate an alleged employer-employee relationship in the joint employment context).

54. *See* Amended Complaint, Livers v. NCAA, No. 2:17-cv-04271-MMB (E.D. Pa. May 30, 2018); Motion to Dismiss Amended Complaint, Livers v. NCAA, No. 2:17-cv-04271 (E.D. Pa. June 13, 2018).

55. *Livers*, 2018 U.S. Dist. LEXIS 124780, at *17.

56. *Id*. at *16–18.

57. *Id.* at *17 n.3.

NCAA where student-athletes are considered employees of their respective universities. Similarly, the Ninth Circuit could conceivably overrule the District Court's decision in *Dawson*, though given the same court's actions to substantially alleviate an athlete-favorable District Court decision in favor of the NCAA amateurism rules in *O'Bannon*, such a ruling is perhaps unlikely.[58]

At the same time, however, both *Dawson* and *Livers* have significant flaws in their individual claims that will likely, if not undoubtedly, impede a plaintiff's ability to cause a change to the current amateurism model. For example, *Dawson*, even in the best-case scenario, suffers from a standing issue, since the plaintiff inexplicably failed to include USC, the entity that would be his most direct "employer" should a court decide he was an employee of anyone, in his suit.[59] For this same reason, the NCAA and the other universities were dismissed from *Berger* before the Seventh Circuit even took on the FLSA issues because the FLSA merely allows employees to allege claims that are "only traceable to, and redressable by, those who employed them."[60]

On the other hand, *Livers* will likely fail despite the clear progress made in the amended complaint, due to the plaintiff's failure to file prior to the expiration of the two-year statute of limitations for inadvertent violations of

58. O'Bannon v. NCAA, 802 F.3d 1049, 1076 (9th Cir. 2015). *See* Matthew J. Mitten, *Why and How the Supreme Court Should Have Decided O'Bannon v. NCAA*, 62 ANTITRUST BULL. 62, 62 (2017) (discussing the uncertainty that the Supreme Court created by refusing to grant certiorari in *O'Bannon* to clear up inconsistent application of *NCAA v. Board of Regents*).

59. *See* Dawson Complaint, *supra* note 35. Indeed, the plaintiff of the parallel suit, Livers, *did* include his school in his claim and alleged that his school functioned as a joint employer with the NCAA, and for that reason *was* successful at keeping the NCAA in his claim. *Livers*, 2018 U.S. Dist. LEXIS 124780, at *15–17. *See supra* note 38 and accompanying text.

60. *Berger*, 843 F.3d at 289 (quoting Roman v. Guapos III, Inc., 970 F. Supp. 2d 407, 412 (D. Md. 2013)). While Dawson's claim involving only the regulatory agencies involved with college sports (i.e. the conference and NCAA) is certainly novel and stands as a way to distinguish his claim against the NCAA from *Berger*, his inexplicable failure to include USC as one of the joint employers will likely stand in his way at the Ninth Circuit, as of all of the potential employers of Dawson, USC was the entity with the most direct control over Dawson's activities even if they were hamstrung and directed by NCAA and Pac-12 rules and regulations. Indeed, at oral argument the Ninth Circuit judges focused most of their questioning on the viability of the joint employment claim and focused very little on the actual question of whether student-athletes are actually FLSA employees. *See supra* note 44.

the FLSA.[61] In its initial motion to dismiss, the NCAA argued that by not paying student-athletes, it was following the guidelines of the United States Department of Labor Field Operations Handbook ("FOH"), which states, in relevant part:

> As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and interscholastic athletics and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by section 3(g) of the Act and do not result in an employer-employee relationship between the student and the school or institution.[62]

These guidelines—which were also cited by the *Berger*[63] and *Dawson*[64] courts as persuasive to their shared conclusion that student-athletes are not employees—were accepted by the *Livers* court as persuasive evidence that the NCAA and its member institutions "acted reasonably in making the judgment that they need not compensate student athletes pursuant to the FLSA" and therefore "did not willfully violate the FLSA," which would allow for a

61. *See supra* note 51 and accompanying text. As mentioned earlier, Livers was ultimately able to conquer this deficiency by adding a new plaintiff to the claim in early 2019. *See infra* note 69.

62. *Livers*, 2018 U.S. Dist. LEXIS 83655, at *27–28; Field Operations Handbook § 10b03(e), UNITED STATES DEPARTMENT OF LABOR (Mar. 31, 2016), https://www.dol.gov/whd/FOH/FOH_Ch10.pdf [https://perma.cc/R5DW-VURR] The FOH was first written in 1993 as "an operations manual that provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance." Wage and Hour Division, *Field Operations Handbook (FOH)*, UNITED STATES DEPARTMENT OF LABOR (Aug. 31, 2017), https://www.dol.gov/whd/foh/ *[https://perma.cc/U2QZ-6CU8*] As the Seventh Circuit noted in *Berger*, the FOH guidelines "are not dispositive, but they certainly are persuasive." *Berger*, 843 F.3d at 292.

63. *Berger*, 843 F.3d at 292–293; *Berger*, 162 F. Supp. 3d at 856–57.

64. *Dawson*, 250 F. Supp. 3d at 406–07.

more generous three-year statute of limitations.[65] While the court allowed Livers to refile with "facts plausibly establishing willfulness" by the NCAA and Villanova to violate the FLSA, the court was clear that this would be an extremely difficult hurdle for the plaintiff to overcome, as he would be required to "address the FOH guidelines and allege either facts or cite law to support the conclusion that Defendants willfully violated the FLSA despite reliance on the FOH guidance" to be successful on their second attempt.[66] The court refused to grant the NCAA's motion to dismiss the amended complaint as it was not totally convinced by the plaintiff's new arguments regarding the willfulness element.[67] The court stated that while the amended complaint "include[d] sufficient additional factual allegations to state a plausible willful FLSA violation," it would only allow for sixty days of targeted abbreviated discovery "limited to the issue of willfulness."[68] This, therefore, required the plaintiff to show the willfulness element before full discovery would be warranted.[69]

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65. *Livers*, 2018 U.S. Dist. LEXIS 83655, at *28–30.

66. *Id.* at *30.

67. *Livers*, 2018 U.S. Dist. LEXIS 124780, at *13, *17. In the amended complaint Livers argued mainly that the full extent of the NCAA and Villanova's reliance on the FOH guidelines was a question of fact that could not be resolved at the motion to dismiss stage and that the similarity between scholarship football players and work-study students—who are considered employees by the FOH—suggested a "reckless disregard of the alleged duty" by the NCAA and Villanova to pay student-athletes a minimum wage. *Id.* at *8–13. Specifically, Livers argued that "over the course of the decade-plus public debate" over student-athlete pay, the NCAA nor any college administrators had never "professed reliance on Section 10b03(e) as one such justification" not to pay student-athletes. *Id.* at *12. The court found those arguments persuasive, stating that Livers' allegations to this effect created "a plausible inference that Defendants did not rely on the FOH guidance in making" the decision not to pay student-athletes, and that "at the Motion to Dismiss stage it remains an open fact question what impact, if any, the FOH guidance had on Defendants' thought process and reasoning behind the decision not to pay [Livers] and other student athletes." *Id.* at *12–13.

68. *Id.*

69. *Id.* As the body text of this Article is only current as of October 2018, the author would like to note that the statute of limitations issue in *Livers* was resolved in November 2018 when the court granted the plaintiffs' motion to substitute and join Taurus Phillips as the new named plaintiff in the suit and denied a new motion to dismiss by the NCAA. Pretrial Order at 1–2, Livers v. NCAA, No. 2:17-cv-04271, 2018 U.S. Dist. LEXIS 83655 (E.D. Pa. Nov. 27, 2018) (granting Livers' motion to substitute and join Taurus Phillips as a party plaintiff and ordering the parties to "to discuss merits discovery *now that the statute of limitations issue is no longer in the case*") (emphasis added). Phillips also played at Villanova but graduated in 2018, thereby making his claim well within the standard two-year statute of limitations for non-willful FLSA violations. Plaintiff's Motion to Proceed Based Upon the Joined Claim of Taurus Phillips at 3, Livers v. NCAA, No. 2:17-cv-04271, 2018 U.S. Dist. LEXIS 83655 (E.D. Pa. Nov. 9, 2018). As such, in January 2019 the court ordered the parties to engage in limited discovery on "the threshold issue of whether Plaintiff

Further, the general idea of an FLSA claim by a student-athlete against the NCAA and member universities has problems that mitigate the potential of the overall impact of such a case on the amateurism scheme. Both *Dawson* and *Livers*—and presumably any future claims alleging that the NCAA has committed FLSA violations—are forced to rely heavily on Judge Hamilton's concurrence in *Berger*, which, while academically interesting, potentially persuasive, and extremely helpful to the conceptualization of a revenue sport athlete's claim, is merely dicta and certainly cannot be considered binding in any respect.[70] Unfortunately for the plaintiffs, Judge Hamilton never concretely stated that he believed that revenue sport student-athletes could maintain a solid claim against the NCAA.[71] Instead, he merely stated that he would be "less confident" that the Seventh Circuit's line of reasoning would extend to football and men's basketball players.[72] In fact, the District Court in *Dawson* considered Judge Hamilton's separate opinion in its analysis, but found that the divergence was simply made "in passing" and "did not purport to represent an alternative line of legal analysis," noting that the Seventh Circuit denied an *en banc* rehearing in *Berger*.[73]

Recent history has shown that courts are wary about overturning any portion of NCAA rules by judicial decree.[74] Perhaps most famously, after

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is an 'employee'" under the FLSA as to either or both of Villanova and the NCAA, with the first dispositive motions on this issue due by June 14, 2019. Scheduling Order at 1-2, Livers v. NCAA, No. 2:17-cv-04271, 2018 U.S. Dist. LEXIS 83655 (E.D. Pa. Jan. 9, 2019).

70. *Berger*, 843 F.3d at 294.

71. *Id.*

72. *Id.*

73. *Dawson*, 250 F. Supp. 3d at 401, 406. The *Livers* district court decision did not mention Judge Hamilton's concurrence, likely because the concurrence was inexplicably never mentioned in Livers' complaint or brief in opposition to the defendants' initial motion to dismiss. *See Livers*, 2018 U.S. Dist. LEXIS 83655; Complaint, Livers v. NCAA, No. 2:2017-CV-04271, 2018 U.S. Dist. LEXIS 83655 (E.D. Pa. Sept. 26, 2017); Plaintiff's Memo. In Oppo. To Def.'s Motion to Dismiss, Livers v. NCAA, No. 2:17-cv-04271, 2018 U.S. Dist. LEXIS 83655 (E.D. Pa. 2018). The amended complaint did not attempt to cure this deficiency. *See* Livers Amended Complaint, *supra* note 54.

74. Various courts have declined to overturn the NCAA's amateurism regulations in a variety of different topic areas. *See, e.g.*, Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356 (D. Ariz. 1983) (declaring that the NCAA's general use of regulatory authority to issue amateurism rules and issue sanctions for violations is not a violation of antitrust law); Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992); (upholding that the NCAA's regulations disqualifying student-athletes that hire agents or enter the draft); Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004) (upholding the NCAA's regulations disqualifying student-athletes that receive endorsement

the District Court for the Northern District of California enjoined the NCAA from preventing student-athletes from collecting the full cost of attendance, plus an additional $5,000 stipend, as part of their athletic scholarships in *O'Bannon*,[75] the Ninth Circuit, on appeal, removed the $5,000 stipend from that decision, stating that "[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap."[76] Given the Ninth Circuit's statement in *O'Bannon* concerning the "quantum leap" between educational expenses and payment, it seems difficult to imagine that the court would make such a dynamic change to the model of collegiate sports through a judicial opinion to allow for dramatically increased student-athlete pay, let alone to legally classify them as "employees" as would be required to afford them FLSA protection.

Nevertheless, there is still a chance that a student-athlete's FLSA claim could prove successful in a future case—if not in *Dawson* or *Livers*. The decision in *Livers* to dismiss the original complaint without prejudice, for example, provided the plaintiff a roadmap to bring a claim worthy of surviving a motion to dismiss by basing such a claim on the employment test adopted by the Third Circuit in *Donovan*.[77] The *Donovan* test features six factors:

> (1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
> (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;

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deals); Deppe v. NCAA, 893 F.3d 498 (7th Cir. 2018) (upholding the NCAA's "year-in-residence" rule that requires student-athletes to sit out a year after transferring schools). *But see* Oliver v. NCAA, 920 N.E.2d 203 (Ct. Com. Pl. 2009) (finding that the NCAA rule punishing a college baseball player for retaining an attorney while weighing a professional offer was arbitrary and a violation of the covenant of good faith and fair dealing).

75. O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

76. *O'Bannon*, 802 F.3d 1049 at 1078–79, *cert. denied*, 137 S. Ct. 277 (2016).

77. *Livers*, 2018 U.S. Dist. LEXIS 83655, at *38–40; *Donovan*, 757 F.2d at 1382 (adopting a six-factor test to determine employee status under the FLSA). Several jurisdictions have differing tests for distinguishing between employers and independent contractors; *Donovan* functions as the Third Circuit's test. *See* Razak v. Uber Techs., Inc., No. 16-573, 2018 U.S. Dist. LEXIS 61230 (E.D. Pa. Apr. 11, 2018) (noting that *Donovan* is the "seminal case in this Circuit for determining whether a worker is an employee under the FLSA.").

> (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
> (4) whether the service rendered requires a special skill;
> (5) the degree of permanence of the working relationship;
> (6) whether the service rendered is an integral part of the alleged employer's business.[78]

As the Eastern District of Pennsylvania noted in *Livers*, the *Donovan* test was adopted primarily to distinguish between employees and independent contractors.[79] However, the court has also found cases that have applied the *Donovan* test to "the question of whether particular workers who receive monetary compensation for their work, under varying conditions and circumstances, are in fact "employees" entitled to FLSA coverage."[80] At the same time, the court found that based on the original complaint, one of the more important facets to this application—the need for the workers to "receive monetary compensation for their work"—was not applicable here, since academic and athletic scholarships do not count as "compensation" under the FLSA.[81]

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78. *Livers*, 2018 U.S. Dist. LEXIS 83655, at *38–39 (citing *Donovan*, 757 F.2d at 1382).

79. *Id.* at *38–40.

80. *Id.* at *39 (emphasis omitted).

81. *Id.* at *6. Here, the court's finding that scholarships were not compensation for athletic work was based partially on the fact that they were "not taxable income as applied to qualified education expenses required for enrollment and attendance." *Id. See* Letter from John A. Kroskinen, Office of Chief Counsel, Internal Revenue Serv., to Richard Burr, Senator, DEPARTMENT OF THE TREASURY (Apr. 9, 2014) (https://www.irs.gov/pub/irs-wd/14-0016.pdf) [https://perma.cc/W86Y-WP25] (ruling that qualified athletic scholarships from gross income as "the athletic scholarship awarded by the university is primarily to aid the recipients in pursuing their studies" and is thus excludable under § 177 of the IRS Code). *See also* Justin Morehouse, *When Play Becomes Work: Are College Athletes Employees?*, TAX ANALYSTS (Apr. 3, 2015), http://www.taxhistory.org/www/features.nsf/Articles/0473CF3877C2DB9C85257E1B004D63C5 [https://perma.cc/93TU-HSXB] (discussing the tax status of athletic scholarships in light of the since-overturned NLRB regional board decision ruling that Northwestern University football student-athletes are employees under the NLRA.) If student-athletes receive compensation beyond "tuition, fees, books, supplies, and equipment required for enrollment and attendance for courses," however, these scholarships could lose their qualified tax-exempt status, potentially opening the doors to a change in the calculus on this element. *Id.*; Kathryn Kisska-Schulze & Adam Epstein, *Northwestern, O'Bannon and the Future: Cultivating a New Era for Taxing Qualified Scholarships*, 49 AKRON L. REV. 771, 773–74 (2016); Marc Edelman, *From Student-Athletes to Employee-Athletes: Why a Pay for Play Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable*, 58 B.C. L. REV. 1137, 1138 (2017) (debating whether deeming student-athletes employees would convert the scholarship 'compensation' they receive into taxable income).

Nonetheless, the *Livers* court left a window open for Livers to jump through. Citing *Tony & Susan Alamo Foundation v. Secretary of Labor*,[82] the court told Livers that in the amended complaint he would have to show that he and other student-athletes "relied on the benefits" of their scholarship and scholarship funds "to the same extent as the workers in *Tony & Susan Alamo Foundation*, who were 'entirely dependent upon the Foundation for long periods'" for their livelihood.[83] The court stated that this would show "an 'economic reality,' which the Supreme Court held reflected an employment relationship."[84] Demonstrating such a level of dependence should not be difficult; in fact, a number of both legal and non-legal scholars have already done so in academic articles.[85] For example, in a 2006 article, Professors McCormick and McCormick discussed student-athletes' economic dependence on their universities within the context of the common law test for the term "employee," arguing that student-athletes' "primary requirements for survival—food and shelter—are met by their university-employers through grants-in-aid" scholarships, and that interviews and secondary sources show that "many athletes come from impoverished or humble backgrounds and cannot afford school, food, or lodging without the grant-in-aid."[86] As such, student-athletes would be dependent on their scholarships to provide them access to higher education—or even food and housing—in

82. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).

83. *Id.* at 293.

84. *Id.*

85. *See, e.g.*, Ray Yasser, *Are Scholarship Athletes at Big-Time Programs Really University Employees? You Bet They Are!*, 9 THE BLACK L.J. (UCLA) 65, 77 (1984); Billy Hawkins, *The Black Student Athlete: The Colonized Black Body*, 1 J. OF AFRICAN AMER. MEN 23 (1995); Jason Gurdus, *Protection Off of the Playing Field: Student Athletes Should Be Considered University Employees for Purposes of Workers' Compensation*, 29 HOFSTRA L. REV. 907, 916 (2000); Justin C. Vine, *Leveling the Playing Field: Student Athletes Are Employees of Their University*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 235 (2013).

86. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 117 (2006). *See* Irvin Muchnick, *Welcome to Plantation Football*, LA TIMES (Aug. 31, 2003), http://articles.latimes.com/2003/aug/31/magazine/tm-athletes35 [https://perma.cc/WSW6-VQ7J] (discussing interviews with student-athletes about their financial situations while in school and the hardships they face in trying to pay for necessities like rent, utilities, and medical care as a result of NCAA restrictions).

similar fashion to the dependence of the employees in *Tony & Susan Alamo Foundation*.[87]

McCormick and McCormick further argue that it is even easier to show that student-athletes are dependent on their schools since "NCAA rules forbid players from accepting cash or other gifts from non-family members, and even gifts from family and guardians are limited to an amount which, when combined with any grant-in-aid, covers only the cost of attendance."[88] While the authors note that the NCAA allows student-athletes to take outside employment while in school—a change from prior NCAA policy that prohibited student-athletes from taking employment in all cases—employment cannot be based on "the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability."[89]

To this point, Livers did include in his amended complaint some further information about his alleged dependence on Villanova and the NCAA, citing a *Delaware County Daily Times* article about him, which described his inability to stay in school or find a place to eat until he was able to gain a scholarship from the Villanova football team.[90] In spite of the statute of limitations issue, the court found this additional information to satisfy the *Tony & Susan Alamo Foundation* test, ruling that Livers adequately showed "his personal economic dependence on his scholarship while attending Villanova."[91]

Even if Livers himself cannot take advantage of this decision due to an inability to prove the willfulness needed to overcome his ostensibly late filing,[92] the Eastern District of Pennsylvania's decision to refuse to dismiss the NCAA's motion to dismiss has in turn provided a clear roadmap for future

87. *Id.*; 471 U.S. 290, 293 (1985). *See supra* notes 82–84.

88. McCormick & McCormick, *supra* note 86, at 118. *See generally*, NAT'L COLLEGIATE ATHLETIC ASS'N, *2017-2018 NCAA Division I Manual*, Art. 16.11 (Effective August 1, 2017), http://image.cdnllnwnl.xosnetwork.com/attachments1/files/11600/628372.pdf?DB_OEM_ID=11600 [https://perma.cc/SQ8J-Z5CK].

89. McCormick & McCormick, *supra* note 86, at 118; 2017-2018 NCAA Division I Manual, *supra* note 88, at Art. 12.4.1.1.

90. Livers Amended Complaint, *supra* note 54; Terry Toohey, *Livers Took Long Way to the Field at Villanova*, DEL. CTY. DAILY TIMES (Oct. 10, 2013), http://www.delcotimes.com/article/DC/20131010/SPORTS/131019920 [https://perma.cc/S5AP-PTMC].

91. *Livers*, 2018 U.S. Dist. LEXIS 124780, at *6.

92. *See supra* note 51 and accompanying text.

plaintiffs in front of the same court to get a favorable ruling in support of a FLSA claim to employment by their respective universities. According to the court, a football student-athlete plaintiff who is within the statute of limitations can find success by adapting the six *Donovan* factors to the economic reality of big-money college athletes, including showing that the student-athlete is economically dependent on his or her athletic scholarship.[93] While another judge (or the Third Circuit) may not agree with that particular judge's reading of the issue, the *Livers* decision still provides some measure of a chance for a future plaintiff down the road. Similarly, if Dawson were to receive a narrow ruling at the Ninth Circuit that affirmed the dismissal of his claims, based on both standing and the absence of USC within the claim—but reversed the lower court's absolute statement that "there is simply no legal basis for finding [Division I FBS college football players] to be 'employees' under the FLSA"—such a ruling could also open the door for future claims by other plaintiffs.[94]

Furthermore, it is conceivable that the efforts of Dawson and Livers to show that revenue sport student-athletes are employees could get a boost through a plaintiff victory in the corresponding antitrust cases, including *In re NCAA Grant-In-Aid Cap Antitrust Litigation*.[95] As mentioned, a principal reason why the court in *Livers* found that student-athletes are not employees was the fact that grant-in-aid scholarships cannot count as compensation under the FLSA, which the court found necessary to show an employment relationship.[96] The antitrust cases could change the calculus on this element, as a plaintiff victory in this case could open the doors to schools giving students grant-in-aid compensation beyond the cost of attendance.[97] The *Livers* decision was primarily based on the lack of taxable income received by these students, but as commentators analyzing the tax implications of paying student-athletes have noted, the tax code limits the tax exemption for qualified

93. *Livers*, 2018 U.S. Dist. LEXIS 83655, at *39; *Livers*, 2018 U.S. Dist. LEXIS 124780, at *5.

94. *Dawson*, 250 F. Supp. 3d at 408.

95. *See* In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., No. 14-md-02541-CW, 2018 U.S. Dist. LEXIS 52230, *23 (N.D. Cal. Mar. 28, 2018). *See also supra* note 5 and accompanying text.

96. *Livers*, 2018 U.S. Dist. LEXIS 83655, at *6. *See supra* note 81.

97. *In re NCAA Ath. Grant In-Aid Cap Antitrust Litig.*, 2018 U.S. Dist. LEXIS 52230, at *19.

scholarships to just "tuition, fees, books, supplies, and equipment required for enrollment and attendance for courses."[98]

While this has no bearing on Livers himself, as Livers did not and will not play in this hypothetical environment, the *Livers* precedent finding that student-athletes can conceivably find relief under the FLSA could have a strong bearing on future student-athletes.[99] To this end, a ruling in the anti-trust cases that allows for colleges and universities to pay student-athletes beyond these elements could lead a future court relying on *Livers* to decide that a future plaintiff who receives grant-in-aid beyond qualified expenses does receive compensation from his or her "employer" and thus is an employee under the FLSA.

While it seems unlikely that Dawson and Livers will be able to advance their individual claims, it is possible that future plaintiffs who learn from these two cases could have a strong chance of prevailing in the near future. As such, the effects of such a decision must be considered to determine how collegiate athletics—and the NCAA itself—would be affected by the conversion of student-athletes to legal employees under federal law.

III. THE POTENTIAL EFFECTS OF A *DAWSON* OR *LIVERS* VICTORY

A. The Possible Circuit Split Between Berger and Dawson/Livers

The first major effect of a victory by a "revenue sport" athlete like Dawson or Livers can be inferred from the circuit split created by *Dawson*/*Livers* and *Berger*.[100] Both *Dawson* and *Livers* are outside of the Seventh Circuit—*Dawson* is in the Ninth Circuit while *Livers* is in Third Circuit—therefore, if *Dawson* or *Livers* were to win, there would be conflicting precedent. *Dawson* and *Livers* would declare that some student-athletes are employees, while *Berger* would state that other student-athletes are not.

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98. Morehouse, *supra* note 81. *See also* Kisska-Schulze & Epstein, *supra* note 81. *But see* Edelman, *supra* note 81, at 1161–63 (arguing that it is possible to keep the qualified status of athletic scholarships even in a "pay for play" environment for student-athletes.)

99. *See Livers*, 2018 U.S. Dist. LEXIS 124780, at *17.

100. *See* Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring). While the specific deficiencies in the *Dawson* and *Livers* cases are certainly acknowledged, this Article refers to a hypothetical winning FLSA claim by a Division I football or men's basketball player in line with Judge Hamilton's concurrence as "*Dawson"* or "*Livers*," despite the fact that *Dawson* and *Livers* are somewhat unlikely to prevail in their own individual claims.

Barring resolution by the Supreme Court, the resulting circuit split could be resolved by the courts in one of three ways.[101] First, future courts may go by the "earliest-decided rule," leaving *Berger* as controlling law.[102] Second, future courts interpreting these decisions could simply interpret the rulings along circuit jurisdictional lines, where student-athletes within the Ninth Circuit or within the Third Circuit's jurisdiction would legally be employees, while student-athletes in the Seventh Circuit's jurisdiction would not be considered employees.[103]

Each of the first two options seem unlikely, however, as a third panel hearing a FLSA case involving student-athletes would likely be able to reconcile the previous cases and place the new case alongside either *Berger* or the winning case based on the significant differences between *Berger* and either *Dawson* or *Livers*.[104] Presumably, a decision in *Dawson* or *Livers* would rely at least in part on the vast revenue differences between the plaintiffs in the three cases in finding a way to distinguish *Berger*.[105] Division I

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101. *See* Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeals*, 2008 FED. CTS. L. REV. 1, 3–4 (2008), http://www.fclr.org/articles/html/2008/fedctslrev1.pdf [https://perma.cc/EDZ4-CBCB].

102. *Id.* at 3–4.

103. *Geographic Boundaries*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf [https://perma.cc/4RRM-S4WJ].

104. Duvall, *supra* note 101, at 3.

105. Judge Hamilton's concurrence in *Berger* may be the guiding light in this regard, though it is important to remember that the *Livers* court—which was the most receptive to a FLSA claim by a student-athlete—did not rely on Judge Hamilton's concurrence in deciding to give Livers a second chance to file a worthy complaint. *See supra* note 73. Since *Berger* was decided, however, the use of revenue-generation as a determinative factor for employment status appears to be disfavored, specifically by the *Dawson* court. The *Dawson* court specifically noted that revenue-generation is not a sole determining factor of employment status, citing Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983), where the Ninth Circuit declined to apply a different standard to public social service agencies than the standard applied to profit-seeking employers. Dawson v. NCAA, 250 F. Supp. 3d 401, 407 (N.D. Cal. 2017). However, the Ninth Circuit in *Bonnette* found that the public social service agency *was* an employer despite the lack of profit- or revenue-generation capacity in comparison to "profit-seeking employers." *Bonnette*, 704 F.2d at 1470. In line with how the Ninth Circuit cited *Bonnette*—to show that revenue-generation has little bearing on a determination of whether someone is acting as an employee—the precedential split between *Berger* and *Dawson*/*Livers* would likely be based more on the four factors proffered by *Bonnette*—power to hire and fire, levels of supervision and control, control over the rate and method of pay, and the maintenance of employment records—rather than which sports make more money. *Id.* If this is the case, then college baseball would likely be included with basketball and football, as these programs exhibit a much higher level of control over student-athletes than non-scholarship track-and-field programs like that at Penn in *Berger*.

football players (and possibly men's basketball players, depending on how the decision is written) would be considered employees, while non-scholarship track-and-field student-athletes would not.

These vast differences would not necessarily help courts in other cases however, as the precedent created would be extremely wide, making it difficult to determine where other sports are placed on that spectrum. For example, while most college baseball programs are still falling short of making a profit, the sport has come into its own as a revenue-generator for athletic departments, especially in the Southeastern Conference ("SEC").[106] If other programs and conferences follow the "SEC Blueprint" and continue to grow college baseball, would college baseball be considered closer to football than to track-and-field?[107] The plaintiff classes in the ongoing college athletics antitrust lawsuits include women's basketball players—would women's basketball student-athletes have to be included, therefore, with their male colleagues as employees under Title IX or the Equal Pay Act?[108] Furthermore,

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106. *See generally* Frank P. Jozsa Jr., *College Baseball Economics*, SEAMHEADS (July 18, 2012), http://seamheads.com/blog/2012/07/18/college-baseball-economics/ [perma.cc/JN5R-JH7X]; Michael L. Owens, *When It Comes to College Sports Revenue, Even A Powerhouse Like UVa Can't Compete*, THE DAILY PROGRESS (June 6, 2014), https://www.dailyprogress.com/news/local/when-it-comes-to-college-sports-revenue-even-a-powerhouse/article_29eb808c-edd8-11e3-9f88-0017a43b2370.html [https://perma.cc/3KTU-R9WA]; Laurie Gallagher, *Following the SEC Baseball Blueprint to a Third Revenue Sport*, COLLEGE AD (Feb. 4, 2016), http://collegead.com/following-the-sec-baseball-blueprint-to-a-third-revenue-sport/ [https://perma.cc/3W2M-TGF7].

107. Jozsa, *supra* note 106. The likely answer is yes, assuming that employment status would be determinative on the nature of the student-athletes' work, the level of control that universities have over the student-athletes, and the student-athletes' reliance on scholarships rather than pure revenue-generation. *See supra* note 105.

108. *See, e.g.*, Jenkins v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), No. 14-md-2541 CW, 2016 U.S. Dist. LEXIS 103703 (N.D. Cal. Aug. 5, 2016). The question of whether female student-athletes would have to be considered employees alongside their male counterparts is a complicated question that deserves its own study. On one hand, the Supreme Court has afforded Title IX "a sweep as broad as its language" and has subsequently applied its effect to employees at educational institutions, leading to the possibility that a court could determine that calling male student-athletes statutory employees while calling female student-athletes in the same sport simply students could constitute discrimination under Title IX. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982). *See also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175 (2005) ("'Discrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach."). On the other hand, the Equal Pay Act—an amendment to the FLSA—only applies to employees, and revenue generating student-athletes (largely men) could be considered an entirely different class under these statutes than the student-athletes who are left as simply student-athletes; after all if the goal of the Equal Pay Act is "equal pay for equal work" and men's basketball players are generating a profit for their schools

there is a huge difference between *Dawson* and *Livers*: *Livers*, the case seemingly closest to a plaintiff victory, involves a Division I-AA school (Villanova) rather than a major "blue blood" institution like USC.[109] This further complicates matters; if Division I-AA football programs do not receive nearly the same revenue as Division I-A programs, that opens the door to many more programs due to the much lower comparative revenues of Division I-AA programs like Villanova.[110]

Ultimately, if a court were to find student-athletes to be employees, that court would have to be careful to delineate which student-athletes are employees and which are not. Otherwise, it will be difficult for future courts—and athletic departments—to determine where exactly the line is. Regardless, if such a ruling were to occur, it would likely take years of litigation—or substantial compromise by the NCAA of its governing ethics—to determine the true scope of the FLSA's impact on college sports.

B. Which Universities Would Be Covered? The Private vs. Public University Distinction

It is notable that *Berger*, *Dawson*, and *Livers* all have one important similarity: All three suits involve student-athletes who played at private schools—Penn, USC, and Villanova, respectively.[111] This similarity is likely not coincidence nor accident, as the FLSA has particular quirks in terms of the public/private distinction in colleges and universities. While according to the Department of Labor ("DOL"), public employers are generally held to the FLSA's minimum wage and overtime requirements,[112] the Supreme Court in *Alden v. Maine* ruled that under the Eleventh Amendment, state

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while women's basketball players are not, a court could interpret this as unequal work. *See generally* Cty. of Wash. v. Gunther, 452 U.S. 161 (1981). Regardless, this legal issue is one where speculation is difficult—if not impossible.

109. *See* Ben Kercheval, *Numbers Show Revenue Gap Between FBS and FCS Widening*, COLLEGE FOOTBALL TALK (June 16, 2011, 8:00 AM), https://collegefootballtalk.nbcsports.com/2011/06/16/ncaa-numbers-reveal-widening-financial-gap-in-d1/ [http://perma.cc/VV5B-RLPE].

110. *Id.*

111. As discussed earlier, the original plaintiff in *Berger* was a student-athlete at a public school who had to be replaced by Berger and Hennig as a result. *See supra* note 19.

112. Wage and Hour Division, FACT SHEET #7: STATE AND LOCAL GOVERNMENTS UNDER THE FAIR LABOR STANDARDS ACT (FLSA), U.S. DEP'T. OF LABOR (2011), https://www.dol.gov/whd/regs/compliance/whdfs7.pdf [https://perma.cc/MY5L-PB6Q].

colleges and universities are generally immune to FLSA suits under the principles of sovereign immunity unless the states specifically waive that immunity via statute.[113]

Private universities like Villanova, USC, and Penn are not state actors, and therefore not entitled to sovereign immunity protections.[114] However, this creates another gap between athletic programs that would be covered by a ruling in favor of student-athletes against universities—only private schools would be covered by the court ruling.[115] Even if student-athletes' attempts to argue that the athletic departments of public universities are separate entities and private actors, athletic departments of public universities have generally been found to be state actors in the sovereign immunity context as merely a part of the public university.[116]

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113. Alden v. Maine, 527 U.S. 706, 712 (1999). *See generally* Wells v. Texas A&M Univ. Sys., No. 06-04-00001, 2004 Tex. App. LEXIS 8512 (Sept. 24, 2004), *pet. denied*, No. 04-1011, 2005 Tex. LEXIS 81 (Tex. 2005), *cert. denied*, 546 U.S. 814 (2005) (finding that the Texas legislature had not waived their sovereign immunity against FLSA claims, and that sovereign immunity applied to FLSA claims against public universities). *Alden* has been applied within the collegiate athletics context in Cockrell v. Bd. Of Regents of N.M. State Univ., 132 N.M. 156 (2002) (finding that a college basketball coach could not recover overtime wages due to New Mexico State's unwaived constitutional immunity from FLSA suits) and Mehus v. Emporia State Univ., 295 F. Supp. 2d 1258 (D. Kan. 2004) (holding the defendant university immune from the plaintiff women's volleyball coach's claim that the university violated the Equal Pay Act in failing to provide similar pay and benefits to the male coaches, but allowing the plaintiff's claims under Title IX to proceed).

114. *See, e.g.*, *Scott*, 1999 U.S. Dist. LEXIS 2815 at *1 (finding that a private university's police department was not entitled to sovereign immunity under the Eleventh Amendment because private universities are not state actors); Leigh J. Jahnig, *Under School Colors: Private University Police as State Actors under § 1983*, NW. U. L. REV. 249, 282 (2015); *see also* Neal Ternes, *Everywhere a Sign: ESPN College GameDay and the First Amendment*, 17 TEX. REV. ENT. & SPORTS L. 159, 162–63 (2016). *But see* Univ. of the Incarnate Word v. Redus, 518 S.W.3d 905, 911 (Tex. 2017), *remanded to* No. 04-15-00120, 2018 Tex. App. LEXIS 1702 (2018) (finding that a private university could be entitled to sovereign immunity protection, but only in regards to the operation of the university police department as allowed by the state legislature). *Scott* and *Univ. of the Incarnate Word* represent the sole way in which private universities can possibly be considered state actors entitled to sovereign immunity protections: the operation of a state-sanctioned university police force.

115. *See* Complaint, Livers v. NCAA, No. 2:2017-CV-04271, 2018 U.S. Dist. LEXIS 83655 (E.D. Pa. Sept. 26, 2017) (filing against only private and semi-public universities within the Third Circuit's purview, as "[t]he private and semi-public NCAA Division I member schools identified . . . have either not asserted, or not been granted, *Eleventh Amendment* immunity to suit under federal statutes in other litigation.").

116. *See, e.g.*, Peirick v. Ind. Univ.–Purdue Univ. Indianapolis Athletics Dep't, 510 F.3d 681, 694 (7th Cir. 2007) ("At the outset, we note that the Athletics Department is not a legal entity apart from the University. It is merely a division of the University that is not capable of being sued."); Shriver v. Athletic Council of Kansas State Univ., 222 Kan. 216, 219 (1977) ("The Athletic Council is thus completely dominated by and is operated as an integral part of the University. In

At the same time, it seems extremely unlikely that the NCAA would allow for such a gap to occur. As much as the NCAA is clearly interested in not allowing for the payment of players, it would similarly be unwilling to allow for some schools to pay players while others cannot. Such a decision would allow for serious competitive balance issues, as private schools would have an inherent recruiting advantage over public schools. For example, if USC is required by law to pay their football players, while archrival University of California Los Angeles ("UCLA") is not, recruits deciding between the two schools will likely be influenced heavily by the fact that USC can pay them beyond their athletic scholarship, while UCLA cannot. Such a motivator seems like it would be antithetical to the NCAA's goals in policing recruitment, and thus the NCAA will likely require all schools to pay student-athletes the same amount.

Furthermore, the public/private debate may be irrelevant if the NCAA is found to be liable as an employer under the FLSA. The NCAA was dismissed as a defendant in *Berger* on standing grounds as having "too tenuous" a connection to the track-and-field student-athletes to constitute an employment relationship.[117] The *Livers* Court, on the other hand, refused to adopt similar reasoning, stating that the joint employment relationship that Livers alleged existed between his school and the NCAA "must be evaluated in a

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fulfilling the duties entrusted to it, and in its every activity and function, it is subject to the policy and control of the University.") This protection likely even applies when a public university creates a private corporation to manage its athletic departments, as some public schools—particularly those in the state of Florida—have done to avoid record disclosure laws. *See* Deborah Strange, *Public Nonprofits with Private Information Grow*, THE GAINESVILLE SUN (May 29, 2018, 8:24 PM), http://www.gainesville.com/news/20180529/public-nonprofits-with-private-information-grow [https://perma.cc/QUR6-WCLH]. In a wrongful death suit involving a University of Central Florida football player who collapsed and died during conditioning drills, the Fifth District Court of Appeal of Florida wrote: "[W]e find that UCFAA primarily acts as an instrumentality of UCF. While UCFAA is a private corporation, it is not an autonomous and self-sufficient entity. Rather, UCF created UCFAA in order to take advantage of a privatized athletics program and to accept private donations on behalf of the university from donors who wish to remain anonymous. UCFAA is wholly controlled by and intertwined with UCF, in that UCF created it, funded it and can dissolve it, in addition to oversee its day-to-day operations as much or as little as it sees fit. UCFAA certainly does not possess the power or ability to shut UCF out of its decision-making completely. UCFAA's sole function is to receive, hold, invest, and administer property and to make expenditures to or for the benefit of UCF. Namely, the purpose of UCFAA is to promote education and science and to encourage, stimulate, and promote the health and physical welfare of the students of UCF by encouraging, conducting, and maintaining all kinds of intercollegiate athletics, games, contests, meets, exhibits, and field sports at UCF and other places in the state." UCF Athletics Ass'n v. Plancher, 121 So. 3d 1097, 1109 (Fla. Dist. Ct. App. 2013).

117. *Berger*, 843 F.3d at 289.

fact-intensive inquiry that is not ripe for determination on a motion to dismiss."[118] This is certainly by no means a finding that the NCAA is an employer of student-athletes, but it is an indication that the NCAA itself is not fully exempt from liability as of yet. The NCAA would also not be able to claim sovereign immunity, even though it counts public schools among its ranks, thanks, ironically, to what might be its biggest judicial victory: the Supreme Court's finding in *NCAA v. Tarkanian* that the NCAA is not a state actor.[119]

Regardless, as controlling as *Alden* is on the principle that public schools would not be held to the same level of liability as private schools in the event of a *Dawson* or *Livers* victory, this potential unravelling effect on college athletics is unlikely to come to any practical fruition. Even if the NCAA is not itself held liable as a joint employer of college athletes—which at this point is still something of a possibility—competitive balance and the NCAA's desire to control recruiting will almost certainly rule the day and cause all student-athletes in any affected sports to receive FLSA protection.

C. The FLSA and the Full-Time Student Exemption

One final consideration in regard to the scope of a *Livers* or *Dawson* victory is in the various exemptions to the FLSA that serve to either fully exempt certain types of employees or employers from the FLSA,[120] or give employers the ability to pay certain employees less than the minimum wage under certain circumstances.[121] While none of the latter exceptions will

118. Livers v. NCAA, No. 17-4271, 2018 U.S. Dist. LEXIS 124780, *23 (E.D. Pa. July 25, 2018). In *Dawson*, the District Court for the Northern District of California also did not dismiss the NCAA on standing like the Seventh Circuit did in *Berger*. Furthermore, the *Dawson* court did not address joint employment at all in its decision, instead the court based its dismissal on its finding that Dawson was not an employee under the FLSA in general. *Dawson*, 250 F. Supp. 3d at 404–05.

119. NCAA v. Tarkanian, 488 U.S. 179, 196 (1988) ("Just as a state-compensated public defender acts in a private capacity when he or she represents a private client in a conflict against the State . . . the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university.") (citation omitted).

120. 29 U.S.C. § 213 (1938). For example, the newly-created FLSA exemption for minor league baseball players. *See* Sam C. Ehrlich, *Minor Leagues, Major Effects: What if Senne Wins?*, 6 MISS. SPORTS L. REV. 23, 23–24 (2016).

121. 29 C.F.R. § 541 (2015); *see also* Wage & Hour Division, *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair*

likely apply to student-athletes,[122] if student-athletes are deemed FLSA employees they will likely fit into the full-time student exemption, an exemption created for full-time students "employed in retail or service stores, agriculture, or colleges and universities."[123]

Per the Full-Time Student Exemption, eligible employers, including colleges and universities, can apply for and obtain a certificate from the DOL that allows the student to be paid "not less than 85% of the minimum wage."[124] However, in order to retain eligibility under this exemption, the students' work is limited to eight hours per day and no more than twenty hours a week.[125] Perhaps coincidentally, these restrictions line up exactly with the restrictions placed on Division I teams by the NCAA for in-season activities, with the limits dropping to eight hours per week during the offseason for all sports except for football.[126]

The NCAA and member schools, however, would still have to make major changes to reconcile with the DOL's guidelines under the Full-Time Student Exemption for in-season hours. According to the NCAA in-season

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Labor Standards Act (FLSA), U.S. DEP'T OF LABOR (Jan 2018), https://www.dol.gov/whd/overtime/fs17a_overview.pdf [https://perma.cc/YFB5-3ZJH] [hereinafter "Fact Sheet #17A"].

122. A case could be made—and presumably will be made by the NCAA if it gets that far—that college football teams are exempted from FLSA under the seasonal entertainment establishment exemption, which exempts employers who do not operate for more than seven months in any calendar year. 29 U.S.C. § 213 (1938); *see also* Bridewell v. Cincinnati Reds, 155 F.3d 828, 832 (6th Cir. 1998) (finding that a major league baseball team is not a season entertainment establishment in regards to the eligibility of stadium cleaning crew for FLSA protection because the team receives income during the offseason); *see also* Jeffery v. Sarasota White Sox, 64 F.3d 590, 596 (11th Cir. 1995) (finding that a minor league baseball team is a season entertainment establishment in regards to the eligibility of groundskeepers for FLSA protection because while the establishment is open year-round, it is only used by the defendant on a seasonal basis). Intercollegiate football players likely fit more into *Bridewell* than *Jeffery* as while the length of the season (four-five months) plus training camp (two months) is right around the seven-month cutoff point for this exemption, NCAA programs do still exert a substantial amount of control over student-athletes during the offseason, including over academics and training regimens.

123. Wage and Hour Division, *Questions and Answers About the Minimum Wage*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/minwage/q-a.htm#full [perma.cc/6ZAE-TSJ3].

124. *Id.*

125. *Id.*

126. Steve Berkowitz, *Newly Proposed NCAA Rules Would Help Fix Time Loopholes for Student Athletes*, USA TODAY (Nov. 2, 2016), https://www.usatoday.com/story/sports/college/2016/11/02/ncaa-rules-student-athletes-time-academics/93164832/ [https://perma.cc/G7JN-NAE8].

time restrictions, game day activities—including warmups, travel, meetings, and the game itself—count as a blanket three hours of "work," and all travel days that include no athletic activities count as no time, and can even count as the one day off per week required during the season.[127] Under the FLSA, however, travel time on special one day assignments in another city—which could include away games—counts as work time for the purposes of minimum wage and overtime recordkeeping.[128]

If the NCAA can even conceivably manage to engineer its time limitations to fit the student-worker exemption, this rule would not fully exempt schools from having to pay student-athletes—it would merely function as a cost-cutting measure to avoid having to pay the full minimum wage. Thus, if *Dawson* or *Livers* does lead to FLSA applicability to student-athletes, the NCAA damages and the potential effects of this new world of college athletics. The way to do this may be in a battle the NCAA previously fought—collective bargaining.

IV. FLSA, EMPLOYMENT, AND UNIONIZATION

Of course, *Dawson* and *Livers* are not the first time that student-athletes' rights as potential employees have been debated on employment grounds. While *Dawson* and *Livers* (and *Berger*) stand alone as the first challenges to the NCAA based on the FLSA, the NLRB has previously debated whether student-athletes are employees of their schools in response to a petition filed by football players at Northwestern University who argued that they were employees under the National Labor Relations Act ("NLRA") and thus deserve the right to unionize under federal labor law.[129]

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127. *Id.*

128. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) (establishing the continuous workday doctrine); Order Granting Stay Pending Appeal at *69–72, Senne v. Kansas City Royals Baseball Corp., No. 14-cv-00608-JCS, 2017 U.S. Dist. LEXIS 69337 (N.D. Cal. May 5, 2017); *see also* Wage and Hour Division, *Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LABOR (July 2008), https://www.dol.gov/whd/regs/compliance/whdfs22.pdf [https://perma.cc/C7WH-BYXT] [hereinafter "Fact Sheet #22"]. This particular issue has not yet been litigated for professional athletes (as most professional athletes make more than the minimum wage) but is a central issue in *Senne* on appeal at the Ninth Circuit, as the lower court's use of the "continuous workday" rule in support of its conclusion that the players' claims are addressable in a class wide basis is a central issue of MLB's appeal.

129. *See* Nw. Univ. & Coll. Athletes Players Ass'n (CAPA), 362 N.L.R.B. 167 (N.L.R.B. Aug. 17, 2015).

At the inception of the Northwestern case, the Northwestern student-athletes briefly won these rights after a regional board of the NLRB found in their favor in March 2014.[130] Shortly thereafter, this decision was appealed to the entire NLRB who "punted" the case, declining to assert jurisdiction based on fears that its influence would destroy the "symbiotic relationship along the various teams, the conferences, and the NCAA" and create chaos in the labor relationship between student-athletes, schools, and the NCAA.[131] Still, the board noted that its decision to decline jurisdiction in the Northwestern case "does not preclude a reconsideration of the [student-athlete employment] issue in the future" should circumstances change.[132] The NLRB, however, has not yet taken another case to definitively decide the student-athlete employment issue once and for all, despite a NLRB report issued by the NLRB general counsel referring to student-athletes' relationship with their school as an employment relationship in other contexts.[133]

As far as the courts in *Dawson* and *Livers* are concerned, the NLRB's rulings on the issue having little bearing on student-athletes' rights under the FLSA.[134] In fact, in *Dawson*, the court specifically declined to adopt the 2014 NLRB Regional Board's decision that student-athletes are employees, both because the decision was not adopted by the NLRB and because the

130. Nw. Univ. & Coll. Athletes Players Ass'n (CAPA), No. 13-RC-121359, 2014 NLRB LEXIS 221 (Mar. 26, 2014).

131. *See* Nw. Univ. & Coll. Athletes Players Ass'n (CAPA).

132. *Id.* at 29. *See generally* Todd A. Cherry, *Declining Jurisdiction: Why Unionization Should Not be the Ultimate Goal for Collegiate Athletes*, 2016 U. ILL. L. REV. 1937 (2016).

133. N.L.R.B. ADV. MEM. Case No. 13-CA-157467 (Sept. 22, 2016) (finding that Northwestern's social media policy for football student-athletes was unlawful under the NLRA while calling Northwestern "the Employer" and noting that even while noting that Northwestern is "still maintaining that athletic scholarship football players are not employees under the NLRA," the university still "modified the rules to bring them into compliance with the NLRA and sent the scholarship football players a notice of the corrections, which sets forth the rights of employees under the NLRA"); N.L.R.B. GEN. COUNS. MEM. GC 17-01, at 20 (Jan. 31, 2017) ("Accordingly, FBS scholarship football players clearly satisfy the broad Section 2(3) definition of employee and the common-law test."); *see* Jake New, *NLRB Chips Away at Athlete Amateurism*, INSIDE HIGHER ED (Feb. 2, 2017), https://www.insidehighered.com/news/2017/02/02/nlrb-general-counsel-says-private-college-football-players-are-employees [http://perma.cc/VXH4-FLVZ]. *See generally* Roger M. Groves, *Memorandum from Student-Athletes to Schools: My Social Media Posts Regarding My Coaches or My Causes are Protected Speech—How the NLRB is Restructuring Rights of Student-Athletes in Private Institutions*, 78 LA. L. REV. 71 (2018).

134. Dawson v. NCAA, 250 F. Supp. 3d 401, 406 (N.D. Cal. 2017).

decision "involve[d] a different statute and different types of parties" than the Dawson case did.[135]

The same, however, may not be true in reverse. A finding in *Dawson* or *Livers* that student-athletes are employees could give the NLRB another opportunity to revisit the Northwestern issue. The NLRB was clear in the Northwestern decision that its decision to decline jurisdiction in the employment dispute between Northwestern and their football team has no predictive value on "what the Board's approach might be to a petition for all FBS scholarship football players (or at least those at private colleges and universities)."[136] In fact, it is worth noting that the NLRA and the FLSA have the same scope in terms of which colleges and universities they affect.[137] Just as this Article has established that a *Dawson* or *Livers* ruling in favor of student-athlete employment rights under the FLSA would only apply to private colleges and universities, the NLRA does not apply to public employers like public colleges and universities.[138] As such, a finding by the courts that private school student-athletes are employees could trigger a renewed effort by

135. *Dawson*, 250 F. Supp. 3d at 406. Oddly, the *Dawson* decision in this regard goes against Supreme Court precedent which has stated that the statutory definition of "employee" in the FLSA is significantly broader than definitions of "employee" in other statutes. *See* United States v. Rossenwasser, 323 U.S. 360, 363 n.3 (1945) (noting that then-Senator, and future Supreme Court justice, Hugo Black stated in Congress that the FLSA definition of employee is "the broadest definition that has ever been included in any one act"); *see also* Rutherford Food Corp. v. McComb, 331 U.S. 722, 728–29 (1947) (noting that the FLSA's definition of "employ" is broad); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (noting that the FLSA definition of employee "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles). The First Circuit has noted the broad scope of the FLSA's definition of employee in comparison to the NLRA, finding that the Congress later amended the NLRA to narrow the scope of its definition of an employee to "only persons acting as agents of an employer" in contrast to the significantly broader definition under the FLSA. Donovan v. Agnew, 712 F.2d 1509, 1512 (1st Cir. 1983) (citation omitted). The NLRB's propensity to call student-athletes "employees" under the NLRA—though the student-athletes have not yet officially become employees—should be persuasive to the courts; in this regard, the *Dawson* court's reasoning seems out of line with prior precedent.

136. *Id.*

137. *See supra* Part III.B.

138. 29 U.S.C. § 152 (2012). Some states do allow their public college and university employees to unionize, but those rights are granted by state statute, not by the NLRA. NLRB v. Yeshiva Univ., 444 U.S. 672, 704 n.17 (1980) (noting that "[a]lthough the NLRA is not applicable to any public employer," as of 1976 "22 States had enacted legislation granting faculties at public institutions the right to unionize and requiring public employers to bargain with duly constituted bargaining agents") (citation omitted).

student-athletes even beyond those at Northwestern to unionize and collectively bargain employment terms with their schools and the NCAA.

Obviously, the NCAA would likely adamantly oppose allowing student-athletes to collectively bargain. However, collective bargaining in college athletics may not be as big of a problem as some scholars have theorized.[139] In fact, collective bargaining may be a way for the NCAA to solve many of the problems introduced in this Article. Collective bargaining could allow the NCAA to work with student-athletes directly to negotiate a system that fits with college athletics while still complying with the FLSA.[140] This would allow the NCAA to work with the players to create rules in line with the minimum wage and overtime laws while affording itself protection from antitrust laws through the non-statutory labor exemption to protect against future antitrust lawsuits like *In re NCAA Grant-in-Aid Antitrust Litigation*.[141] It has been noted that the purpose of the non-statutory labor exemption is to allow protection for both workers and employers in collective bargaining, which allows the two sides to come together and set terms and conditions of employment that fit the specific needs of their industry without worry of antitrust scrutiny.[142]

Similarly, the NCAA could work with college athletes to design an employment scheme that best mirrors the positive attributes of the current amateurism scheme in college sports while still allowing for the payment the student-athletes would be due under the FLSA. The NCAA need not look

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139. *See, e.g.*, Cherry, *supra* note 132.

140. Unlike antitrust laws under the non-statutory labor exemption, no collective bargaining exemption exists for the FLSA; on the contrary, the Supreme Court has held on multiple occasions that "FLSA rights cannot be abridged by contract or otherwise waived," as allowing FLSA rights to be collectively bargained away "would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728, 740 (1981); *see also* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945) ("No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the [FLSA]."); D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 116 (1946); Walling v. Helmerich & Payne, Inc., 323 U. S. 37, 42 (1944); Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 577 (1942).

141. *See* Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676 (1965) (finding that collectively bargained employment terms were exempt from antitrust laws and thus creating the non-statutory labor exemption). *See also, e.g.,* Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976); Brown v. Pro Football Inc., 518 U.S. 231 (1996); Clarett v. NFL, 369 F.3d 124 (2nd Cir. 2004) (applying the non-statutory labor exemption within the context of professional sports); Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339 (1989).

142. *See, e.g.*, Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1053 (1994).

far for an example of how this may work, as collective bargaining already exists within the student-employment framework with graduate assistants for doctoral students.[143] In a typical graduate assistant collective bargaining agreement, graduate assistants are afforded stipends and tuition waivers in exchange for hours worked as course instructors, teaching or research assistants, office assistants, or other assigned tasks.[144] However, to receive their stipend and tuition waiver, graduate assistants are required to retain a certain credit load and meet exact requirements of their academic program.[145] While the graduate assistants' stipends are typically below minimum wage, this is allowed due to the student worker exemption of the FLSA.[146] In this regard, graduate assistants still have their academic progress prioritized, but are given the compensation they deserve under federal and state laws. Such a model might be optimal for the NCAA, should student-athletes gain compensation or employment rights under the FLSA or through antitrust law.

V. CONCLUSION

As this Article established, student-athletes have several major hurdles to clear before they can be deemed employees under the FLSA. Indeed,

143. *See* Gordon J. Heweitt, *Graduate Student Employee Collective Bargaining and the Educational Relationship Between Faculty and Graduate Students*, 29 J. COLLECTIVE NEGOTS. 153, 154 (2000); *see also* Grant M. Hayden, *The University Works Because We Do: Collective Bargaining Rights for Graduate Assistants*, 69 FORDHAM L. REV. 1233, 1234 (2000) (noting that graduate assistants at many schools have had collective bargaining rights since the 1970s). Graduate assistants were recently found to be employees under the NLRA in December 2017, reversing a prior decision that found otherwise. Trs. of Columbia Univ. in the City of N.Y. & Graduate Workers of Columbia-GWU, No. 02-RC-143012, 2017 N.L.R.B. LEXIS 620, *3 (Dec. 16, 2017) (certifying a union of graduate assistants at Columbia University); Brown Univ. & Int'l Union, 342 N.L.R.B. 483, 488-91 (2004) (finding that the primary relationship of graduate assistants to their purported employer was educational, not economic, and thereby declining to certify a union of these graduate assistants); Lucas Novaes, *It's Time to Stop Punting on College Athletes' Rights: Implications of Columbia University on the Collective Bargaining Rights of College Athletes*, 66 AM. UNIV. L. REV. 1533, 1536 (2017) (examining the implications of the *Colum. Univ.* decision on college athletes' efforts to unionize).

144. *See, e.g.*, *Collective Bargaining Agreement*, FLORIDA STATE UNIVERSITY & UNITED FACULTY OF FLORIDA FLORIDA STATE UNIVERSITY GRADUATE ASSISTANTS UNITED 1, 10, 28, 43 (Sept. 10, 2015), http://hr.fsu.edu/pdf/2015-2018FSU-BOT_GAU_CBA.pdf [https://perma.cc/QM8S-HZJ7].

145. *Id.* at 28.

146. Wage and Hour Division, *supra* note 128; *see supra* Part III.C.

given the procedural issues facing both Dawson and Livers in their respective claims,[147] it is likely that any successful challenge to NCAA amateurism rules will come from a different case down the road. However, given the leniency that the *Livers* court has given Livers's claim[148] and the roadmap provided in that court's order to dismiss with leave to amend, the NCAA should prepare for the possibility that a court could rule that student-athletes have rights as employees under the FLSA, even if that possibility is narrow and a long way away.

Moving forward, the NCAA is at a crossroads. It can continue to fight these claims—along with the antitrust cases[149]—and even look to the example set by MLB and lobby Congress for an amendment to the FLSA that specifically exempts student-athletes from FLSA protection even if deemed employees under that statute's broad definition.[150] Given how staunchly the NCAA has defended amateurism to date, this seems the most likely scenario. However, the NCAA can also be proactive in creating a new amateurism model based on the example set with graduate assistantships, where student-athletes are afforded protections under the FLSA and collective bargaining rights while still being held to educational commitments as students of their respective universities.[151]

The NCAA will likely fight any comparison between student-athletes and graduate assistants with all of its might. As this Article establishes, however, if it does not take the looming threat of the FLSA seriously, a court decision in this regard against it could be far more damaging than any antitrust action could ever be in the sheer logistic and competitive balance mess that granting student-athletes FLSA employment status could create. Proactive action can allow the NCAA to get ahead of this issue, and proactive action that allows student-athletes to help set the terms of employment alongside the NCAA and their schools could help the NCAA get past the student-

147. *See supra* Part II.C.

148. *See* Livers v. NCAA, No. 17-4271, 2018 U.S. Dist. LEXIS 83655 (E.D. Pa. May 17, 2018); *see supra* notes 55–57 and accompanying text.

149. *See* In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., *supra* note 6.

150. *See generally* Nathaniel Grow, *The Save America's Pastime Act: Special-Interest Legislation Epitomized*, 90 U. COLO. L. REV. (forthcoming 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3169957 [http://perma.cc/BE27-7YDF]. *See* Ehrlich, *supra* note 10.

151. *See generally* Lucas Novaes, *It's Time to Stop Punting on College Athletes' Rights: Implications of Columbia University on the Collective Bargaining Rights of College Athlete*s, 66 AM. UNIV. L. REV. 1533 (2017); *see supra* Part IV.

compensation for good, while granting student-athletes the rights they may well deserve under federal law.