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ABOUT THE JOURNAL

The *University of Denver Sports and Entertainment Law Journal* is edited by law students of the Sturm College of Law at the University of Denver. It publishes scholarly articles on relevant issues in the sports and entertainment industries.

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UNIVERSITY OF DENVER SPORTS AND ENTERTAINMENT LAW JOURNAL

VOLUME XXVI

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EDITOR'S NOTE

The *University of Denver Sports and Entertainment Law Journal* is proud to complete its twenty-sixth volume. Over the past eighteen years, the Journal has strived to contribute to the academic discourse surrounding legal issues in the sports and entertainment industry by publishing scholarly articles and related content.

Volume XXVI features four articles that propose solutions for pressing issues in the sports and entertainment industries. These articles, in particular, focus on vulnerable and underserved groups and seek to provide a means of legal recourse.

The first article, written by Sophia Ruff, examines the recent unionization efforts of Minor League Baseball players and proposes solutions to empower Minor League players and support international player development.

The second article, written by William Duffield, dives into the rising trend of admitting rap lyrics into evidence in RICO prosecutions, examining why this pattern is problematic under the First Amendment and for broader cultural reasons.

The third article, written by Spencer Darling, looks at the unique challenges of applying Title VII of the Civil Rights Act of 1964 to workplaces with staged intimacy, particularly on movie and television sets that sparked the infamous #MeToo movement.

The final article, written by myself, critically analyzes the current landscape of college athlete unionization and offers a legal roadmap around commonly raised barriers to unionizing NCAA athletes.

We are proud and excited to present Volume XXVI of the University of Denver Sturm College of Law's Sports and Entertainment Law Journal. I would like to thank all of the authors for their hard work and valuable contributions to this publication. I would also like to thank our wonderful faculty advisor, Suzanna Moran, and our dean, Bruce Smith, for their unwavering support.

I would like to extend a very special thank you to the Volume XXVI editorial board, non-editorial board, and staff editors. This publication would not be possible without your hard work and commitment to publishing quality scholarship in fields that each of you are passionate

about. Behind the scenes, this has been a year of momentous growth for our Journal that I could not be more proud to have overseen. I leave this journal in the capable hands of Carley Walstad, a dear friend and tremendous scholar, who I know will lead another outstanding year of the *University of Denver Sports and Entertainment Law Journal*.

Finally, I would like to thank my parents, Ron and Vernita, my sister, Jordan, and my grandparents, Roger and Catherine, who have supported me throughout law school and without whom this publication would not be possible. I am forever grateful to all those who have been by my side throughout this journey.

ASHLYN HARE
EDITOR-IN-CHIEF (ACADEMIC YEAR 2022-2023)
DENVER, COLORADO
SPRING 2023

EMPOWERING MINOR LEAGUE BASEBALL PLAYERS AND SUPPORTING INTERNATIONAL PLAYER DEVELOPMENT

Sophia Ruff[*]

INTRODUCTION

In 2021, the lowest valued Major League Baseball (MLB) Club, the Miami Marlins, was valued at $980 million.[1] The New York Yankees Club, which is the most valuable MLB Club, was valued at five billion dollars.[2] Despite the wealth in professional baseball, Minor League Baseball (MiLB) players have historically earned salaries that are insufficient to survive.[3] Additionally, although the future of the MLB and the globalization of baseball depends on player development, the international amateur player system in Latin America and the Caribbean severely undervalues international players and places the players in dangerous and vulnerable situations.[4] Although signing a professional baseball contract is an opportunity for many Latin American players to improve their lives, the League's system for international amateur player development and acquisition exploits young players trying to escape poverty.[5]

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[*] J.D., Michigan State University College of Law. I would like to thank Professor Chen for his guidance on this project and the students on the *University of Denver Sports and Entertainment Law Journal* that worked on my article. I would also like to thank my family for their constant support and encouragement.

[1] *See* Daniel Ryan Axelrod, *Note*, *Baseball's Minor Leaguers Call Foul: How the Save America's Pastime Act Strikes Out Within State Lines*, 49 HOFSTRA L. REV. 499, 528–29 (2021) (indicating MLB revenue and MLB Club value).

[2] *See id.* at 528 (indicating New York Yankees franchise value).

[3] *See* Garrett R. Broshuis, Note, *Touching Baseball's Untouchables: The Effect of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51, 54 (2013) (explaining that MiLB salaries are much lower than MLB and MiLB players often cannot afford to live alone); Kevin Togami, Case Comment, *Bottom of the Ninth Circuit:* Senne v. Kansas City Royals Baseball Corporation, 40 LOY. L.A. ENT. L. REV. 311, 315 (2020) (discussing how MLB Club employers do not pay MiLB player employees during spring training).

[4] *See* Timothy Poydenis, *The Unfair Treatment of Dominican-Born Baseball Players: How Major League Baseball Abuses the Current System and Why It Should Implement a Worldwide Draft in 2012*, 18 SPORTS L.J. 305, 315 (2011) (discussing MLB recruiting practices in Latin America).

[5] *See id.* at 315–17 (discussing how players in Latin America and the Caribbean are trying to escape poverty through a career in baseball and MLB Clubs offer them lower signing bonuses compared to American players of equal skill).

Most MiLB players earn annual salaries below the single person threshold of $12,880, and all MiLB players earn salaries below the two person threshold of $17,420.[6] Since 1975, the average household income has risen by 450%, the average MLB player income has risen by 3,400%, but the average MiLB player income has risen by only sixty-nine percent.[7] In American sports, the MLB and the National Hockey League (NHL) have the most extensive minor league systems, which are used to train and develop players at a professional level before they play at the highest level of professional competition.[8] In 2019, the MLB grossed $10.7 billion in revenue, and the NHL grossed $5.09 billion in the 2018–2019 season.[9] The NHL minor league season is seventy-six games and the salary minimum is $52,000,[10] while the average is about $90,000.[11] In contrast, the MiLB season is 144 games and the average annual salary among the most elite players is $14,700.[12] The MiLB players in the lowest competition level annually earn $10,500.[13]

MLB's suppression of wages and its failure to pay a livable salary to its employees contradict fundamental rights protected by American

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[6] *See* Ryan Fagan, *Even After Overdue Salary Bump, Baseball's Minor Leaguers Still Paid Far Below NBA, NHL Counterparts*, SPORTING NEWS (Feb. 12, 2021), https://www.sportingnews.com/us/mlb/news/even-after-overdue-salary-bump-baseballs-minor-leaguers-still-paid-far-below-nba-nhl-counterparts/1gpql94asy7a10uo5nvc3yp4k (listing the MiLB salaries); *2021 U.S. Federal Poverty Guidelines*, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs-poverty-guidelines-federal-register-references/2021-poverty-guidelines#threshholds (last visited Feb. 24, 2022).

[7] *See* Robert Pannullo, *The Struggle for Labor Equality in Minor League Baseball: Exploring Unionization*, 34 A.B.A. J. LAB. & EMP. L. 443, 443 (2020) (explaining that MiLB salaries have not kept up with inflation).

[8] *See generally id.* at 465 (comparing the NHL's player development system and that of the MLB).

[9] *See, e.g.*, Axelrod, *supra* note 1, at 506 (indicating that the MLB holds more wealth than the NHL).

[10] *See* Fagan, *supra* note 6 (stating that the minimum annual salary at the highest level of the hockey minor leagues is $52,000).

[11] *See* Brian McPherson, *Minor League Hockey Players Benefit from NHL Relationship*, PROVIDENCE J. (Feb. 21, 2015, 10:15 PM), https://www.providencejournal.com/story/sports/2015/02/22/minor-league-hockey-players-benefit/35135167007/.

[12] *E.g.*, David Williams, *Major League Baseball's Indentured Class: Why the Major League Baseball Players Association Should Include Minor League Players*, 53 U.S.F. L. REV. 515, 535 (2019) (stating that the MiLB season is 144 games); Fagan, *supra* note 6 (indicating MiLB Triple–A annual salary is $14,700).

[13] *See* Fagan, *supra* note 6 (stating that the MiLB Low–A and High–A annual salary is $10,500); Pannullo, *supra* note 7, at 475 (indicating that the federal poverty line for an individual in 2020 was $12,488).

labor law and antitrust law.[14] The MLB's treatment of MiLB players escapes antitrust law scrutiny because the Supreme Court in 1922 declared that the business of baseball is not subject to federal antitrust law in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs*.[15] In this case, the Court permitted employers to monopolize the professional baseball industry without antitrust scrutiny, which allows employers to collude and suppress salaries.[16]

Since that decision, the Supreme Court and Congress have continued to protect the interests of MLB Clubs to the detriment of the MiLB player employees for a century.[17] Congress passed the Save America's Pastime Act (SAPA) in 2018.[18] This legislation excludes MiLB player employees from the Fair Labor Standards Act (FLSA) which means they are not entitled to overtime pay, minimum wage, or any wages at all for labor hours in mandatory training.[19] In 2017, the Supreme Court refused to hear two cases challenging the baseball antitrust exemption.[20] Additionally, in October 2022, the Southern District Court of New York dismissed a suit challenging the antitrust exemption.[21]

Despite these actions by Congress and the courts, more recent developments in the minor leagues and the American sports law landscape support a movement to improve MiLB compensation and work

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[14] *See* Axelrod, *supra* note 1, at 506–07 (stating the MLB revenue and comparing that to MiLB compensation).

[15] 259 U.S. 200, 208–09 (1922) (asserting that the business of baseball is an intrastate activity and cannot violate the Sherman Act).

[16] *See id.* (permitting employers to monopolize which leads to collusion and wage suppression).

[17] *See generally* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (stating that *Federal Baseball* holding is still valid and players cannot challenge reserve clause in contract); Flood v. Kuhn, 407 U.S. 258, 282 (1972) (holding that antitrust exemption is still valid and players cannot shop employers on the market); Save America's Pastime Act, Pub. L. No. 115-141, § 201, 132 Stat. 1126, 1126–27 (2018) (creating an exception to FLSA for MiLB player compensation).

[18] *See* Save America's Pastime Act § 201.

[19] *See id.* (creating exception to the FLSA).

[20] *See* Wyckoff v. Off. of the Comm'r of Baseball, 705 F. App'x 26 (2d Cir. 2017), *cert. denied,* 138 S. Ct. 2621 (2018); Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC, 870 F.3d 682 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 2621 (2018). These cases did not pertain to MiLB compensation, although they did pertain to the baseball antitrust exemption. *See* Save America's Pastime Act § 201.

[21] *See* Nostalgic Partners, LLC v. Off. of the Comm'r of Baseball, No. 21-cv-10876, 2022 WL 14963876, at *1 (S.D.N.Y. Oct. 26, 2022) (stating that although the Supreme Court may be ready to eliminate what remains of the antitrust exemption, the league was shielded from this suit).

conditions.[22] The Supreme Court recently addressed the principle of economic justice for the labor of athletes in *National Collegiate Athletic Ass'n v. Alston*.[23] The Court indicated that the National Collegiate Athletic Association (NCAA) should not limit what athletes earn, nor should employers be absolutely protected from antitrust scrutiny.[24]

Additionally, the class action suit *Senne v. Office of the Commissioner of Baseball* was filed by former MiLB in 2014 and settled in 2022 for $185 million.[25] The Plaintiffs in *Senne* were MiLB players fighting for application of the FLSA.[26] This application would have allowed the MiLB players to be paid according to minimum wage laws.[27] The Plaintiffs asserted that MLB failed to pay minimum wage for all hours worked, failed to pay overtime wages, and failed to pay the player employees any wages at all for their labor hours in training.[28] *Senne* also brought state minimum wage law claims under California, Arizona, and Florida minimum wage and labor laws.[29] All MLB Clubs have training facilities in one of these states.[30] The most important development supporting the movement to improve minor league labor conditions is that the minor league players are now represented by the MLBPA and as

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[22] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2166 (2021) (allowing college athletes to be paid for name, image, and likeness connected to their amateur athletic careers); Amended Complaint & Demand for Jury Trial at 3, Nostalgic Partners LLC v. N.Y. Yankees P'ship, 151 N.Y.S.3d 862 (2021) (No. 656724/2020) [hereinafter Nostalgic Partners Complaint] (suggesting reinterpretation and elimination of the baseball antitrust exemption is just); Complaint at 4, Senne v. Off. of the Comm'r of Baseball, No. 3:14-CV-00608, 2021 WL 3129460 (N.D. Cal. 2014) [hereinafter Senne Complaint] (alleging FLSA violations by MLB and seeking backpay for former MiLB players).

[23] *See Alston*, 141 S. Ct. at 2166 (discussing ongoing debate about value that student athletes bring to universities and how that affects legal analysis of student athlete's rights).

[24] *See id.* at 2159–60 (refusing to grant NCAA antitrust exemption like the Court did in *Federal Baseball*).

[25] *See* Senne Complaint, *supra* note 22, at 1 (indicating filing of lawsuit in 2014); R.J. Anderson, *MLB To Pay $185 Million To Settle Federal Class-Action Lawsuit Filed by Minor-League Players*, CBS SPORTS (Aug. 30, 2022), https://www.cbssports.com/mlb/news/mlb-to-pay-185-million-to-settle-federal-class-action-lawsuit-filed-by-minor-league-players-per-report/.30, 2022).

[26] *See* Second Consolidated Amended Complaint for Violations of Federal and State Wage and Hour Laws at 26, Senne v. Off. of the Comm'r of Baseball, Nos. 3:14-cv-00608 and 3:14-cv-03289, 2021 WL 3129460 (N.D. Cal. 2014) [hereinafter Senne Consolidated Complaint] (listing former MiLB player Plaintiffs).

[27] *See id.* at 5–13.

[28] *See id*. at 26 (indicating failure to pay for all hours, failure to pay overtime, and failure to pay any wage at all for some labor hours).

[29] *See id.* at 84–94 (asserting state law claims against MLB and MLB Clubs).

[30] *See id.* at 4, 4 n.12.

early as 2023 will work under a collectively bargained agreement.[31] The MLB voluntarily recognized the MLBPA to represent the minor league players, possibly in part due to the factors described above that supported the movement to organize.[32] While these developments have altered minor league baseball overall, the international player development system has remained unchanged and minor league players that play in Dominican Academies are not yet union members.[33] Thus, the treatment of amateur and minor league players from Latin America needs to be addressed because most Latin American players begin their minor league careers in Dominican Academies.[34]

Several unique legal mechanisms and regulatory structures have prevented MiLB players from enjoying rights that other American workers enjoy.[35] This note proposes legal strategies to improve MiLB compensation and work conditions and specifically, how to better protect and value international amateur free agents from Latin America.[36] To improve MiLB player compensation and work conditions, (1) the baseball antitrust exemption should be eliminated entirely through legislation resembling the Curt Flood Act,[37] (2) Congress should repeal SAPA so that the FLSA applies to MiLB players' labor,[38] and (3) the MiLB bargaining unit should engage collective bargaining to reform the salary structure and labor conditions, and compound this solution with reform to international amateur player acquisition because this will improve the condition of players while they are in the minor leagues.[39]

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[31] Evan Drellich, *Minor League Baseball Union Creates Massive Change Nearly Unthinkable 3 Years Ago*, THE ATHLETIC (Sept. 14, 2022), https://theathletic.com/3593689/2022/09/14/minor-league-union-mlbpa/ (discussing the formation and recognition of the union).

[32] *See id.*

[33] *See id.* (explaining that players in the Dominican Academies, although minor league players, currently are not members of the new bargaining unit).

[34] *See* Poydenis, *supra* note 4, at 315.

[35] *See* Phillip J. Closius & Joseph S. Stephan, *Myth, Manipulation, and Minor League Baseball: How a Capitalist Democracy Engenders Income Inequality*, 89 U. CIN. L. REV. 84, 96 (2020) (detailing how antitrust exemption and legislation prevent MiLB players from enjoying rights other American workers have).

[36] *See, e.g.*, Pannullo, *supra* note 7, at 451 (explaining that only players signed to MLB contracts are represented by the union which excludes MiLB and international amateur interests).

[37] *See* Closius & Stephan, *supra* note 35, at 98–99 (discussing how Congress failed to protect MiLB players in the 1998 Curt Flood Act which subjects the MLB to antitrust law regarding MLB player employment).

[38] *See* Axelrod, *supra* note 1, at 528–29 (asserting that MLB should not be permitted to avoid paying minimum wage to employees).

[39] *See* Pannullo, *supra* note 7, at 466, 471–72 (asserting that MiLB players should collectively bargain for compensation and work conditions based on the PHPA negotiated CBA for AHL players); Matt Kalthoff, Note, *Out of Sight, Out of Mind:*

Part I of this note describes the MiLB salary structure and the effect it has on American and international MiLB players.[40] Part II examines how baseball and professional sport fit within American labor and antitrust law.[41] Part III examines the legal forces that operate to suppress MiLB compensation, specifically the baseball antitrust exemption and SAPA.[42] Part IV analyzes how to best approach the issues of minor league baseball compensation and work conditions and proposes a three part solution which consists of eliminating the antitrust exemption, applying the FLSA and state wage laws, and improving the conditions of minor league players through reform to the salary structure compounded with reform to the international amateur player acquisition system to protect the players when they enter the minor leagues and during their professional careers[43]

I. MILB BACKGROUND: STRUCTURE AND MILB PLAYER HARDSHIPS

Early in 2021, MLB restructured the Minor League model.[44] The restructuring involved forming a Professional Development League (PDL) that consists of 120 of the 160 Minor League teams that existed prior to the 2021 restructuring.[45] The 120 teams in the PDL operate exactly like they used to before 2021.[46] The key changes are that the employment is more competitive, some unspecified MiLB players will receive MLB provided housing, travel demands are reduced, and all players received raises.[47] The financial raises still leave many players at or below multiple state minimum wage laws and far below the salaries

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Confronting the Legal, Economic, and Social Issues Raised by Major League Baseball's Peculiar Treatment of Foreign Talent, 29 CONN. J. INT'L L. 353, 364–65 (2014) (explaining how amateur players from Latin America and the Caribbean often sign contracts for bonuses below their market value and are taken advantage of by MLB personnel).

[40] *See* discussion *infra* Section I.

[41] *See* discussion *infra* Section II.

[42] *See* discussion *infra* Section III.

[43] *See* discussion *infra* Section IV.

[44] *See, e.g.*, Nostalgic Partners Complaint, *supra* note 22, at 7 (discussing the result of 2021 restructuring).

[45] *See, e.g.*, Fagan, *supra* note 6 (stating that forty MiLB teams were cut out of the MLB player development structure).

[46] *See id.* (discussing how the purpose of player development is the same after restructuring).

[47] *See id.* (discussing raises and reduced travel); Dayn Perry, *MLB to Provide Housing for Minor-League Players Starting in 2022 Season*, CBS SPORTS (Oct. 18, 2021, 10:41 AM), https://cbssports.com/mlb/news/mlb-to-provide-housing-for-minor-league-players-starting-in-2022-season/ (stating that housing will begin in 2022).

earned by players in the NHL and National Basketball Association (NBA) development leagues.[48] Additionally, raising MiLB compensation in 2021 should not overshadow the fact that MLB lobbied to pass the SAPA[49] and settled the *Senne v. Commissioner of Baseball* class action lawsuit to avoid a possible court ruling ordering it to pay livable salaries to MiLB player employees.[50]

A. Compensation Structure and the Uniform Player Contract

The purpose of MiLB is to allow players to train and develop their craft at a professional level before they begin to work and compete at the highest level which maintains the MLB.[51] The MiLB consists of different levels based on talent and performance as follows: (1) Triple–A, (2) Double-A, (3) High–A, and (4) Low–A.[52] Low–A is the lowest performance level of professional baseball and Triple–A is the closest to the MLB level of performance.[53] Teams at each level have between twenty–five to thirty players.[54] Each MLB Club has one affiliate MiLB team at each of the four MiLB levels and pays those players' salaries.[55]

MLB Clubs acquire amateur players from the U.S. (including Puerto Rico) and Canada through the Player Draft while international amateur players, most often from Latin America, are acquired through free agency.[56] International amateur free agents from Latin America can

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[48] *See* Fagan, *supra* note 6 (detailing current compensation after raises); Axelrod, *supra* note 1, at 516–18 (asserting that MiLB players earn wages below minimum wage laws in several states, including Arizona and Minnesota).

[49] *See* Axelrod, *supra* note 1, at 511–12 (discussing how MLB has been lobbying for amendments to FLSA and state minimum wage law since 2014).

[50] *See* Anderson, *supra* note 25.

[51] *E.g.*, Williams, *supra* note 12, at 530 (explaining function of MiLB in business of MLB).

[52] *See, e.g.*, Fagan, *supra* note 6 (detailing the different levels of the MiLB in current structure).

[53] *See id.*

[54] *See* Pannullo, *supra* note 7, at 476.

[55] *See* William Boor, *Tracking New Minor League Affiliates for 2021*, MLB NEWS (May 3, 2021), https://www.mlb.com/news/new-minor-league-affiliates-for-2021 (explaining how MiLB teams are all connected to a parent MLB Club).

[56] *See* OFF. OF THE COMM'R OF BASEBALL, MAJOR LEAGUE RULES 66-67 (2021), https://registration.mlbpa.org/pdf/majorleaguerules.pdf (explaining the first-year player draft for domestic players); Kalthoff, *supra* note 39, at 357–58 (discussing how most international amateur players are from Latin America and the Caribbean because the Japanese and Korean players that come to the US come from their nation's professional leagues).

sign with any team that they want.[57] MLB Clubs also acquire many players from Japan and South Korea.[58] But unlike the players from Latin America, the Japanese and Korean players are not amateur players, they are released from their nation's professional league.[59] The system of acquiring players from Japan and Korea is monitored by the MLBPA and the player unions in Japan and Korea; thus, those players are better protected and appropriately valued compared to the players from Latin America.[60] All players, regardless of the method of acquisition, sign the MiLB Uniform Player Contract (UPC) at the same minimum salary.[61] The UPC ties players to the team that initially signed them for seven years through a reserve clause even though the club employer can terminate the contract at any time.[62] Under the UPC, MiLB players are only paid during the Championship Season, which is about five months long, even though they perform labor for their employer most of the year.[63] Minor league players lack individual bargaining power to challenge the salary and terms of the UPC.[64] Minor league players must sign the UPC or sacrifice their career before it even begins.[65]

In 2020, the MLB restructured the MiLB–MLB Club affiliate relationship.[66] The National Association of Professional Baseball Leagues formed a joint venture between the MLB and the MiLB in 1903 in the Professional Baseball Agreement (PBA).[67] The PBA expired in

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[57] *See* Kalthoff, *supra* note 39, at 357–58 (discussing how international amateur players sign as free agents, but professional international players have their MLB contracts negotiated by their nation's professional league).

[58] *See* Keiji Kawai & Matt Nichol, *International Sports Law Perspective: Labor in Nippon Professional Baseball and the Future of Player Transfers to Major League Baseball*, 25 MARQ. SPORTS L. REV. 491, 524–25 (2015).

[59] *See id.*

[60] *See id.* (discussing how practices of MLB Clubs push the boundaries of what is ethical in player development and recruiting in Latin America).

[61] *See* Bernadette Berger, *Shut Up and Pitch: Major League Baseball's Power Struggle with Minor League Players in* Senne v. Kansas City Royals Baseball Corp., 28 JEFFERY S. MOORAD SPORTS L.J. 53, 69 (2021) (explaining how all players must sign the UPC, but cannot negotiate terms).

[62] *See id.* (discussing how MiLB players cannot take their talent to the market, but employers can terminate the contract).

[63] *See* Fagan, *supra* note 6 (stating that the MiLB Championship Season is five months and any labor performed the rest of the year goes unpaid).

[64] *See, e.g.*, Berger, *supra* note 61, at 69 (explaining that Minor League players are not included in the MLBPA until they sign a contract to play on the parent club MLB team roster).

[65] *See, e.g.*, *id.* (explaining how minor leaguers must sign the UPC in order to work).

[66] *See, e.g.*, Nostalgic Partners Complaint, *supra* note 22, at 9 (discussing how the MiLB restructured).

[67] *See, e.g.*, *id.* at 7 (discussing former structure of the MLB–MiLB relationship and past agreement that operated).

September of 2020 and the MLB let the joint venture between MLB and the MiLB end in order to form a new structure that gives MLB more control over the minor leagues.[68] Forty MiLB teams were cut as MLB affiliates, which means that the MLB Clubs terminated about 1,000 players.[69] The restructuring falsely makes it appear that MLB could only afford to give modest raises to MiLB player employees if it first cut the jobs of roughly 1,000 players.[70]

In the restructuring, the MLB created the Domestic Reserve List which imposes a limit on how many MiLB players an MLB Club can employ.[71] The limit is 180 in the Championship Season and 190 in the off season.[72] Prior to 2020, there was no limit on MiLB player roster sizes.[73] In current CBA negotiations with the MLBPA, the MLB proposed cutting the maximum roster size to 150.[74] This would terminate about 900 MiLB players.[75] Although the MLBPA indicated its intent to reject this proposal, the proposal demonstrates how MiLB players lack control over terms of their employment.[76] Another aspect of the 2020 restructuring of the MiLB was raising the wages of all MiLB player employees effective in 2021.[77]

After the raise to MiLB compensation in 2021, High–A and Low–A player employees earn $500 per week.[78] Over the twenty-one weeks of the Championship Season, this equals an annual salary of $10,500, a

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[68] *See id.* at 9.

[69] *See id.* (discussing action that MLB took after the PBA expired and how MLB took greater control over minor leagues and organized professional baseball).

[70] *See* Conduct Detrimental: THE Sports Law Podcast, *E63: SCOTUS and Baseball Law, Garrett Broshuis Breaks Down the MiLB Lawsuit* (Oct. 8, 2020) (downloaded using Spotify) (discussing prior to the restructuring how MLB could afford to give raises to all MiLB players).

[71] *See, e.g.*, Dan Gartland, *MLB Goes After Minor Leagues (Again)*, SPORTS ILLUSTRATED (Feb. 15, 2022), https://www.si.com/mlb/2022/02/15/mlb-lockout-minor-league-reserve-list-limits (discussing the formation of the Domestic Reserve List).

[72] *See id.*

[73] *See id.*

[74] *See id.* (discussing how MiLB roster limit is being negotiated as part of the MLB CBA negotiations between the MLBPA and MLB).

[75] *See id.*

[76] See, e.g., Anthony Franco, *MLB's CBA Proposal Included Ability Reduce Number of Available Minor League Roster Spots; MLBPA Planning to Reject*, MLB TRADE RUMORS (Feb. 14, 2022), https://www.mlbtraderumors.com/2022/02/mlbs-cba-proposal-included-ability-to-reduce-number-of-available-minor-league-roster-spots.html (discussing MLB's proposal to cut MiLB player jobs).

[77] *See* Fagan, *supra* note 6 (stating that all MiLB got raises in 2021, but players still struggle to pay for housing and necessities).

[78] *See id.*

seventy-two percent raise from $6,090.[79] Players often begin mandatory training and conditioning in February, but will not be paid for their labor until April, when the Championship Season begins.[80] MiLB teams compete in games six days each week during the Championship Season.[81] It is reasonable to assume that MiLB players work around sixty hours per week between training, studying scouting reports, and competing.[82] At the High–A and Low–A levels, this means players would earn an hourly wage of $8.33 if their weekly wage is broken down by the hours of labor they perform.[83]

The current compensation of MiLB player, even at the Triple–A level, still does not compare to the compensation of players in the NBA and NHL development leagues.[84] At the Double–A level, players now earn $600 per week, this equals a $12,600 annual salary which is a seventy-one percent raise from 7,350.[85] At the Triple–A level, players now earn $700 per week, this equals a $14,700 annual salary which is a thirty-nine percent raise from $10,542.[86] The minimum salary in the G League, the NBA's development league, is $35,000.[87] The minimum salary in the NHL's development league, the American Hockey League (AHL), is $52,000.[88] In the G League and the AHL, players enjoy fifty dollars and eighty-one dollars per diem respectively when traveling for work.[89] MiLB players receive twenty-five dollars per diem.[90] G League and AHL players receive housing at their home city.[91] The MLB announced in October 2021 that starting in April 2022, "certain" MiLB players would be provided housing.[92] Despite the 2021 pay raises, the MLB consistently provides lesser compensation and benefits to its

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[79] *See id.*

[80] *See id.*

[81] *See id.*

[82] *See id.* (stating that MiLB players work sixty hours a week); Pannullo, *supra* note 7, at 456 (stating that MiLB players work sixty to seventy hours a week).

[83] *See* Fagan, *supra* note 6.

[84] *See id.* (comparing MiLB, NBA G League, and AHL compensation); Pannullo, *supra* note 7, at 465–66 (indicating that AHL players are paid significantly more than MiLB players).

[85] *See* Fagan, *supra* note 6 (detailing current Double–A level MiLB compensation).

[86] *See id.* (detailing current Triple–A level MiLB compensation).

[87] *See id.* (stating G League compensation levels and salary structure).

[88] *See id.* (stating AHL compensation).

[89] *See id.* (explaining AHL and G League travel per diem).

[90] *See id.* (stating that MiLB players are expected to survive off of twenty-five dollars when travelling for games).

[91] *See id.* (stating that NBA G League players and AHL players have received housing as part of their employment with the parent league for years).

[92] *See* Perry, *supra* note 47.

developing players compared to other American sports leagues that gross lower revenue.[93]

B. The Hardships of Minor League Players

Garrett Broshuis, the Missouri based attorney representing the MiLB players in the *Senne* class action lawsuit, played several years in the minor leagues before beginning law school.[94] Broshuis found an alternative career after his baseball career ended,[95] but many other minor league players do not have alternative career paths planned or available.[96] Many players from Latin America, specifically players from the Dominican Republic, abandon their studies before age sixteen in order to pursue careers in baseball.[97] These players do not have other career paths available to them.[98] They choose to pursue a profession for which they have a highly specialized and profitable skill set and sacrifice other career opportunities.[99] Thus, these players depend on their income from professional baseball, whether at the minor league level or the major league level.[100] Players from Latin America and the Caribbean comprise over forty percent of MiLB players.[101]

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[93] *See* Fagan, *supra* note 6.

[94] *See* John H. Tucker, *A Minor League Pitcher–Turned–St. Louis Attorney Prepares for the Trial of a Lifetime*, ST. LOUIS MAGAZINE (Sept. 8, 2021, 7:00 AM), https://www.stlmag.com/longform/a-minor-league-pitcher%E2%80%93turned%E2%80%93st-louis-attorney-prepares-for-the-trial-of-a-lifetime/ (discussing Broshuis and the *Senne* trial).

[95] *See* Tucker, *supra* note 94 (explaining that Broshuis had the plan of going to law school if his baseball career did not reach his expectations).

[96] Gene Frenette*, For Jumbo Shrimp Players and Other Minor Leaguers, Always Good to Have a Plan B*, FLA.-TIMES UNION (Aug. 21, 2017, 3:09 PM), https://www.jacksonville.com/story/sports/minors/jumbo-shrimp/2017/08/21/jumbo-shrimp-players-and-other-minor-leaguers-always/15374179007/.

[97] *See* Kalthoff, *supra* note 39, at 362–63 (explaining how MLB scouting in the Dominican Republic has caused young boys to drop out of school when the nation's education system is already strained); *see also MLB–Dominican Republic Educational Initiatives*, MAJOR LEAGUE BASEBALL, https://www.mlb.com/news/mlb-dominican-republic-educational-initiatives/c-31428246 (last visited Jan. 5, 2023) (discussing how MLB academies in the Dominican Republic lead to young men abandoning their studies to pursue baseball and MLB's efforts to counter act that effect).

[98] *See* Kalthoff, *supra* note 39, at 363 (stating that after failed MLB careers, Dominican players that had abandoned their studies for baseball do not have career opportunities).

[99] *See id.*

[100] *See id.*

[101] *See* Senne Consolidated Complaint, *supra* note 26, at 32 (asserting that over forty percent of MiLB signees are amateur players from Latin American and Caribbean).

Many of these very young players are coming from difficult socio–economic circumstances.[102]International amateur players from Venezuela, the Dominican Republic, Colombia, and Panama are recruited by MLB Clubs that watch them play in their home countries.[103] International free agents from Latin America and the Caribbean can sign a UPC as young as sixteen years old and are often recruited for years before they are signed.[104] The minor league salaries they initially receive leave them still struggling to pay for necessities.[105] Thus, for all MiLB players, their signing bonus is critical to make ends meet while they are playing and earning a minor league salary.[106] But players from Latin America are undervalued by Clubs that offer them signing bonuses, and this the result of the structure of the system of international amateur player acquisition.[107] Significantly less money is dedicated to the spending pool for international free agent signing bonuses compared to the spending pool for signing bonuses in the Rule Four draft which is the method of acquiring American and Canadian players.[108] In 2022, 616 players were selected in the Rule Four draft and most Clubs had spending pools between $15.1 million and $10 million; in the 2022 international signing period (which ended December 15, 2022), most Clubs had

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[102] *See* Kalthoff, *supra* note 39, at 357–60 (discussing how young Latin American and Caribbean players are scouted in their home countries and offered contracts that are lower than their market value because MLB Clubs know the players coming from poverty will likely accept any contract offered to them).

[103] *See Hispanic Heritage Month*, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, https://www.mlbplayers.com/hispanic-heritage-month-2020 (last visited Jan. 5, 2023) (detailing where Latino baseball players are recruited from); Kalthoff, *supra* note 39, at 357–58 (discussing how most international amateurs are from Venezuela, the Dominican Republic, Colombia and other Latin American nations, but not Mexico because Mexico has a professional league that works with the MLB).

[104] *See, e.g.*, Leonardo Ruiz et al., *Sueños de Béisbol: Hopes, Experiences, and Expectations of Professional Baseball Players in the Dominican Republic*, 14 J. CLINICAL SPORT PSYCH. 1, 2 (2020) (discussing how trainers help recruiters watch middle school aged players).

[105] *See* Senne Complaint, *supra* note 22, at 31–32 (explaining that international amateur players are a significant part of the minor leagues and are harmed by the MLB labor practices).

[106] *See* Broshuis, *supra* note 3, at 64, 83–84 (explaining that players rely on the signing bonus money while they are in the minor leagues).

[107] *See id.* at 83–84 (discussing how the structure of international signing bonus spending pools encourage lower bonus offers).

[108] *See* Jesse Sanchez, *Where Top Int'l Prospects Are Signing*, MLB (Jan. 27, 2022), https://www.mlb.com/news/mlb-international-prospects-signing-day-2021-22) (listing the international signing bonus pool amounts); Jim Callis, *Each Club's 2022 MLB Draft Bonus Pools and Pick Values*, MLB (July 20, 2022), https://www.mlb.com/news/mlb-draft-2022-bonus-pools-pick-values#:~:text=The%20pools%20for%20all%2030,was%20distributed%20across%20all%20picks (listing the signing bonus pool amounts for the Rule 4 Draft).

spending pools between $6.2 million and $4.6 million and there is no limit on the number of players that can be signed, so it is likely that well over 616 players shared these bonus pools.[109] Additionally, there is a hard cap on the international spending pools allotted to each Club, but signing bonuses under $10,000 do not count towards the cap.[110] This shows that the player development and acquisition system is organized to encourage Clubs to seek cheap labor in Latin America and the Caribbean.[111] The difficult circumstances all minor league players experience is exacerbated further for most players from Latin America because they enter the minor leagues with less signing bonus money to rely on.[112]

There are investment fund companies and agents that target young Latin American MiLB players in desperate economic circumstances for loan contracts in which they receive an immediate loan in exchange for a percentage of their first MLB contract if they ever reach it.[113] The terms of the loans are often legally questionable and the methods of procuring the contracts are often unethical.[114] Big League Advance Fund (BLA) is one example of this type of investment fund and it has worked with 344 professional baseball players.[115]

In 2018, Francisco Mejia, a current MLB player, brought suit for unconscionable negotiation practices and contract terms against BLA.[116]

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[109] *See* Callis*, supra* note 108; *see also* Edward Sutelan, *MLB Draft Picks 2022: Complete Results From Rounds 1-20 In Baseball Draft*, SPORTING NEWS (July 26, 2022), https://www.sportingnews.com/us/mlb/news/mlb-draft-tracker-2022-results-picks/nro2kwj63ymphkvl5vb3ffak (indicating that 616 players were selected in the 2022 Rule 4 Draft).

[110] Kalthoff, *supra* note 39, at 377 (explaining that MLB Clubs avoid penalties by signing international players for signing bonuses below $10,000 because it will not count towards the spending cap).

[111] *See id.*

[112] *See id.* at 379 (explaining how Latin American players receive lower signing bonuses than comparable American players).

[113] *See generally* Ronald Blum, *Moneyball: Tatis Took Cash as Prospect, Owes Part of Fortune*, AP NEWS (Feb. 23, 2021) (discussing how players from Latin America and the Caribbean are targeted by Big League Advance and sports attorneys advise their clients against engaging these deals).

[114] *See id.* (stating that players are signing with investment funds and giving away their future earnings).

[115] *See id.* (stating that BLA works with hundreds of professional baseball players offering them loans); *see generally Big League* ADVANTAGE, https://bigleagueadvantage.com/ (last visited Feb. 25, 2022) (explaining that its plan is to offer immediate loans to help MiLB players make ends meet until they reach the MLB).

[116] *See* Danny Wild, *Indians' Mejia Sues Over Financial Deal*, MINOR LEAGUE BASEBALL, (Apr. 26, 2018), https://www.milb.com/news/indians-prospect-francisco-mejia-sues-bla-over-disputed-deal-272068894 (discussing Mejia's lawsuit against BLA).

The complaint states that Mejia does not speak English, he left the Dominican Republic with the equivalent of a ninth grade education at twenty years old, and when approached by BLA, he was desperate to pay medical bills for family in the Dominican Republic.[117] In 2016, as a minor league player, Mejia signed three contracts with BLA without representation and without a translator.[118] Additionally, each time Mejia signed a contract with BLA, it was during the off–season when he was not receiving any payment.[119] The complaint alleges that in 2017, Mejia was called up to the Cleveland major league roster and BLA representatives came to Mejia's home in the Dominican Republic and demanded payment of $9,036 and asserted that Mejia owed BLA ten million dollars in total.[120] Mejia settled with BLA, but attorneys have stated that BLA's targeting of young international players is offensive and MLB's system has failed to protect MiLB players from Latin America.[121]

In addition to being targeted for arguably unconscionable loan agreements, international players are also vulnerable to be victim to invalid oral agreements with MLB Clubs.[122] MLB Clubs can offer an international amateur player a contract during the annual international signing period if that player is sixteen years old or will turn sixteen before the end of the signing period.[123] Anonymous testimony from players and trainers in Latin America indicate that MLB Clubs will routinely make oral agreements with players years before they turn sixteen to keep the player away from other Clubs.[124] The Clubs can decide to abandon these

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[117] Complaint at 2–3, Mejia v. Big League Advance Fund I, L.P., 1:18-CV-00296 (D. Del. filed Feb. 21, 2018) (asserting that Mejia was twenty years old when he was offered BLA loans).

[118] *Id.* at 3–4.

[119] *See id.* at 3–4 (indicating that Mejia signed three contracts between September and December of 2016).

[120] *See id.* at 2, 4–5.

[121] *See* Blum, *supra* note 113 (discussing how sports attorneys advise players against BLA loans, as well as how the operation is harmful to international players).

[122] *See* Maria Torres & Ken Rosenthal, *'A Failed System': A Corrupt Process Exploits Dominican Baseball Prospects. Is an International Draft Really the Answer?*, THE ATHLETIC (Jan. 20, 2022), https://theathletic.com/3080470/2022/01/20/a-failed-system-a-corrupt-process-exploits-dominican-baseball-prospects-is-an-international-draft-really-the-answer/ (explaining that players are approached by MLB scouts and offered illegal oral contracts that often fall out and leave the player with no real contract).

[123] *See International Amateur Free Agency & Bonus Pool Money*, MAJOR LEAGUE BASEBALL GLOSSARY, https://www.mlb.com/glossary/transactions/international-amateur-free-agency-bonus-pool-money (last visited June 26, 2023) (explaining the age limit).

[124] *See* Torres & Rosenthal, *supra* note 122 (discussing oral agreements with players as young as twelve years old).

invalid agreements before the player legally signs any agreement.[125] This leaves the player with no employment contract after he was isolated from other scouts because there was an understanding that he was already bound to an agreement.[126]

Another harmful effect of the race for MLB Clubs to sign international players as young as possible is the use of performance enhancing drugs.[127] Players in Latin America are competing for roster spots with players in the American Rule Four draft who are eighteen to twenty one years old.[128] Thus, as young as age eleven or twelve, MLB scouts are looking for international players that can perform physically like grown men that are in the Rule Four draft.[129] This leads international players and trainers to resort to steroid use to force the players to develop physically faster than is naturally possible.[130] Furthermore, there is a practice of international players' trainers taking large portions of players' signing bonuses, especially in the Dominican Republic.[131] Overall, under the existing MLB international player acquisition system, amateur players in Latin America are forced to rely on actors, MLB scouts and independent trainers, that routinely manipulate and exploit them while the entire process is not monitored.[132]

The current state of MiLB player compensation is harmful to players, especially international amateur players that come from vulnerable socio-economic situations.[133] If Low–A and High–A MiLB players' weekly salaries are broken down by the hours they work, the

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[125] *See id.* (discussing how clubs abandon players as they reach close to 16 years of age).

[126] *See id.* (discussing the unethical ways in which team personnel receive compensation from trainers).

[127] *See, e.g.*, Ruiz et al., *supra* note 104, at 2 (discussing the issue of steroid use among young players in the Dominican Republic).

[128] *See* Torres & Rosenthal, *supra* note 122 (discussing pressure on young teenage players in the Dominican Republic).

[129] *See id.* (discussing how players are watched and recruited before age sixteen).

[130] *See* Ruiz et al., *supra* note 104, at 2 (explaining that young players in the Dominican Republic are pressured to use steroids to compete and attempt to escape a life in poverty).

[131] *See id.* (stating that it is a regular practice for trainers to take up to 50% of a player's signing bonus).

[132] *See id.* (discussing how players are exploited and placed in dangerous situations due to pressure to use steroids); *see also* Torres & Rosenthal, *supra* note 122 (discussing how MLB scouts do not try to hide their misconduct because the process of international player acquisition is not monitored).

[133] *See, e.g.*, Closius & Stephan, *supra* note 35, at 95 (discussing how MiLB players struggle to pay for necessities and are deprived of rights that other American workers enjoy); Kalthoff, *supra* note 39, at 360–61 (discussing how amateur players in Latin America often come from lives in poverty).

hourly rate would fall below thirty state minimum wage laws.[134] Additionally, the total compensation that players receive over the year leaves all MiLB players below the poverty threshold for a two-person household—$17,420—and most players also fall below the threshold for a single-person household—$12,880.[135] The pay they receive does not reflect MLB revenue or the revenue of the MLB Clubs that pay MiLB players.[136] In contrast, AHL players earn significantly more than MiLB players despite playing fewer games and generating less revenue.[137]

II. "ABOVE THE LAW": SITUATING BASEBALL IN ANTITRUST AND LABOR LAW

Professional sports operate within and create conflicts between antitrust and labor law.[138] The sphere of labor law and matters resulting from collective bargaining are under the jurisdiction of the NLRB.[139] Antitrust matters are under federal jurisdiction and governed by the Sherman Act.[140] However, antitrust law must yield jurisdiction to the NLRB on matters of union formation and strikes according to the statutory labor exemption in the Norris LaGuardia Act and the Clayton Act.[141] This process is necessary for union formation because it would otherwise be a restraint of trade in violation of the Sherman Act.[142] Additionally, in 1965, the United States Supreme Court established a non-statutory labor exemption that protects collective bargaining

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[134] *See, e.g.*, Fagan, *supra* note 6 (indicating how MiLB salaries would equate to hourly wages and comparing them to state minimum wage law); Pannullo, *supra* note 7, at 456 (stating that MiLB players work sixty to seventy hours a week);

[135] *See, e.g.*, Fagan, *supra* note 6 (listing current MiLB salaries); *2021 U.S. Federal Poverty Guidelines*, *supra* note 6 (indicating poverty thresholds and guidelines in 2021).

[136] *See generally* Axelrod, *supra* note 1, at 506 (discussing MLB revenue).

[137] *See* Williams, *supra* note 12, at 535 (illustrating the differences between MLB and NHL salary and workload).

[138] *See* Brown v. Pro Football, Inc., 518 U.S. 231, 233 (1996) (stating that issue of professional football player compensation "arises at the intersection of the Nation's labor and antitrust laws"); *see generally* Gabe Feldman, *Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law*, *in* THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 209 (Michael A. McMann ed., 2017) (discussing sports law landscape).

[139] *See, e.g.*, Michael H. LeRoy, *Federal Jurisdiction in Sports Labor Disputes*, 2012 UTAH L. REV. 815, 815–16 (explaining how professional sports interact with labor law and antitrust law).

[140] *See* Sherman Antitrust Act, 15 U.S.C. §§ 1–7.

[141] *See* Norris LaGuardia Act, 29 U.S.C. § 101, 104; Clayton Act; 15 U.S.C. § 17 (requiring that antitrust scrutiny yield to allow collective bargaining to work).

[142] *See, e.g.*, Feldman *supra* note 138, at 216 (discussing the history of the statutory exemption).

actions.[143] In 1996, the Court stated that as a general rule, the non-statutory labor exemption applies to professional sports.[144] Thus, for all professional sports without antitrust exemptions, the non-statutory labor exemption protects matters of collective bargaining—including compensation and work conditions—from antitrust scrutiny.[145] This allows the professional sport leagues to operate efficiently because teams can agree on uniform work conditions and salary minimums and maximums without antitrust violations.[146]

Most professional athletes can move between the realms of antitrust and collective bargaining based on their claims, but MiLB players lack the power to make an antitrust law claim, even though they now have collective bargaining power.[147] Since the MLBPA was formed in 1966, collective bargaining has allowed MLB players to raise minimum salaries and achieve arbitration rights.[148] Collective bargaining is intended to allow fair, balanced compromise between employer and employee without outside interference.[149] For the most elite players this means they have to give up some rights; they could be subject to a salary cap limits on compensation and free agency rules that limit their mobility to different employers.[150] However, for players that lack individual bargaining power, union bargaining provides economic justice by negotiating higher compensation and uniform work conditions.[151] The formation of the Professional Hockey Players Association (PHPA) demonstrates how players with little leverage benefit from collective bargaining.[152] The PHPA represents players in the AHL, the NHL's equivalent of MiLB.[153] With collective bargaining, AHL players obtained

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[143] *See* Loc. Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 691 (1965) (stating that matters agreed to between the union and the employer in collective bargaining will not violate Sherman Act).

[144] *See* Brown v. Pro Football, Inc., 518 U.S. 231, 235–36 (1996) (articulating the general rule that the non-statutory labor exemption applies to the business of professional sports).

[145] *See, e.g.*, *id.* at 237.

[146] *See, e.g.*, *id.*

[147] *See, e.g.*, LeRoy, *supra* note 139, at 831–32 (explaining how MiLB players' situation is distinct from the rest of professional sports because of the antitrust law exemption and the failure to unionize).

[148] *See* Broshuis, *supra* note 3, at 53, 70, 72.

[149] *See* Feldman *supra* note 138, at 210.

[150] *See, e.g.*, *id.* at 212.

[151] *E.g.*, Pannullo, *supra* note 7, at 466–67 (discussing benefits of the PHPA for AHL players).

[152] *See* Fagan, *supra* note 6 (explaining how AHL salaries are negotiated by the PHPA and are higher than MiLB salaries).

[153] *See, e.g.*, Pannullo, *supra* note 7, at 465.

health insurance plans, pensions, salary negotiations, and improved work conditions.[154]

The MLBPA previously had no legal obligation to consider MiLB player interests, so in previous MLB agreements, the MLBPA agreed to certain terms to the detriment of MiLB players in order to achieve more for major league players.[155] For example, in the 2007 MLB CBA, the MLBPA negotiated terms that changed the eligibility requirements for a MiLB player to sign to a MLB team through the Rule 5 Draft.[156] In the Rule 5 Draft, MiLB players that are playing at an MLB caliber can be drafted by an MLB team.[157] After the 2007 CBA, player eligibility for the Rule 5 Draft was extended from three to four years of MiLB service.[158] This benefits the MLB Clubs because they can control which players advance to the MLB, but it harms players because it eliminates a potential year of MLB play which can be extremely valuable since careers are usually short.[159]

Additionally, in the 2016 CBA, the MLBPA negotiated terms that set a soft spending cap with penalties for international amateur signings.[160] Most amateur signings are from Latin America because players from Korea and Japan often come from the professional leagues of their respective countries, and MLB has special rules on how MLB Clubs can acquire Korean and Japanese professional players.[161] Latin American players do not come from professional leagues; rather, baseball systems in countries such as Venezuela, Colombia, the Dominican Republic, and Mexico are designed to prepare young players to go play in the United States.[162] Mexico does have a national professional baseball

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[154] *See id.* at 469 (detailing the benefits that have been achieved with collective bargaining).

[155] *See* Broshuis, *supra* note 3, at 84–85 (discussing how MiLB players are affected by MLB CBA negotiations).

[156] *See id.* at 84.

[157] *See id.* at 85.

[158] *See id.*

[159] *See id.* (discussing how the Rule 5 draft eligibility requirement limits player's control over career).

[160] *See id.* at 87–88 (discussing international amateur spending cap); Ronald Blum, *Hard Cap on International Baseball Agents Will Stem Flow into MLB*, THE STAR (June 19, 2017) (explaining that the system in the 2017 agreement means "less money will be chasing more players" on the international amateur player market).

[161] *See Korean Posting System*, MAJOR LEAGUE BASEBALL GLOSSARY, https://www.mlb.com/glossary/transactions/korean-posting-system (describing rules on how MLB Clubs can acquire Korean players with professional experience); Japanese Posting System, MAJOR LEAGUE BASEBALL GLOSSARY, https://www.mlb.com/glossary/transactions/japanese-posting-system (describing rules on acquiring Japanese players with professional experience).

[162] *See, e.g.*, William B. Gould, *Globalization in Collective Bargaining, Baseball, and Matsuaka: Labor and Antitrust Law on the Diamond*, 28 COMP. LAB. L. & POL'Y J.

league, but MLB Clubs prefers to sign amateur players from other Latin American countries because they can sign at a younger age and the Mexican League requires MLB to pay a premium for obtaining its professional players.[163] Amateur players from Latin America often do not receive fair signing bonuses for their talent; the amount is below their market value, and MLB has far less rules for how MLB can acquire and fairly compensate amateurs from Latin America compared to professional players from Asia.[164]

Before unionizing, MiLB players had little authority to combat salary suppression and MLB CBA terms that affect them.[165] In 2017, the Supreme Court denied certiorari and refused to address the baseball antitrust exemption in two cases that raised the issue: *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*[166]—which regarded selling tickets to view the Cubs game from a rooftop in Chicago[167]—and *Wycoff v. Office of Commissioner* of Baseball[168]—which regarded the payment of MLB Club talent scouts.[169] The dismissal of *Nostalgic Partners* in 2022 reinforced the validity of the antitrust exemption.[170] The Southern District of New York noted that the plaintiffs otherwise had standing for the antitrust claim and asserted a valid antitrust claim, but the exemption encompassed the claim.[171] However, the short slip opinion made a point to note that it is possible that the Supreme Court is prepared to eliminate what remains of the baseball antitrust exemption,[172] and the United States had filed a statement of interest urging the court to read the

283, 289–90 (explaining how recruitment in Venezuela and the Dominican Republic has increased and how those players do not have a professional league that works with MLB like Japan and Korea).

[163] *See, e.g.*, Kalthoff, *supra* note 39, at 357 (discussing the Mexican professional league and MLB's preference to sign international amateurs in Latin America and the Caribbean).

[164] *See* Christian Red & Teri Thompson, *In Latin America, Big League Clubs Are Exploiting Prospects As Young As 12, Whistleblower Told Feds*, USA TODAY SPORTS (June 16, 2020) (discussing how MLB signs players as young as possible and for the lowest signing bonus amount as possible).

[165] *See* Broshuis, s*upra* note 3, at 53–54 (discussing how MiLB players still are under the baseball antitrust exemption and do not have a union).

[166] 870 F.3d 682 (7th Cir. 2017).

[167] *See id.* at 684 (explaining claims made by plaintiffs).

[168] 705 F. App'x 26, 28 (2d Cir. 2017).

[169] *See id.* at 28 (explaining suit and maintaining baseball antitrust exemption).

[170] *See* Nostalgic Partners LLC v. Off. of the Comm'r of Baseball, No. 21-cv-10876, 2022 WL 14963876, at *1, *7 (S.D.N.Y. Oct. 26, 2022).

[171] *See id.* at *7.

[172] *See id.* at *1, *7.

exemption narrowly.[173] Despite these factors that indicate support to eliminate the antitrust exemption, the case was dismissed. [174]

In *Alston*, the Supreme Court refused to extend an antitrust law exemption to the NCAA the way that it did to MLB.[175] Justice Gorsuch's majority opinion recognized that the baseball antitrust exemption is an aberration.[176] This may mean the Court is encouraging Congress to repeal the baseball antitrust exemption and recognize the reality that professional baseball is certainly an interstate operation and falsely suppressing wages under market value violates the Sherman Act.[177] The *Alston* case and the future of compensating NCAA athletes highlights issues of economic justice for athletes that perform labor that generates billions in revenue for the employer. *Alston* focused on compensating athletes for use of their name, image, and likeness.[178] However, Justice Kavanaugh wrote a concurring opinion and further asserted that the NCAA should not be permitted to continue to not pay athletes their fair share of revenue on the argument that they are amateur athletes, not professionals.[179] Justice Kavanaugh argues that tradition of NCAA amateur competition does not justify its failure to fairly compensate athletes for labor and the NCAA should reform its compensation rules as it is "not above the law."[180]

The *Senne* class action settlement and the collective bargaining for minor leaguers will likely follow and take advantage of the Court's message in *Alston* that entities of organized sports should not be permitted to collude and operate above the law.[181] When professional athletes take action against their team employers, they either make claims in the realm of antitrust law or the realm of labor law under a collective bargaining agreement.[182] Antitrust law claims can help players control their mobility between employers and prevent collusion and false

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[173] Statement of Interest of the United States at 8–9, *Nostalgic Partners*, 2022 WL 14963876.

[174] *See Nostalgic Partners*, 2022 WL 14963876, at *7.

[175] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2159–60 (2021) (discussing the baseball antitrust exemption).

[176] *See id.* at 2159.

[177] *See id.* at 2160 (detailing criticism on baseball antitrust exemption).

[178] *Id.* at 2166.

[179] *Id.* at 2166–69 (J., Kavanaugh, concurring) (stating that NCAA ought to compensate athletes for labor).

[180] *Id.* at 2169.

[181] *See id.* at 2166 (concluding that the NCAA should not be granted an antitrust law exemption and the Court should be cautious to fairly evaluate antitrust remedies for NCAA operations).

[182] *See* Brown v. Pro Football, Inc., 518 U.S. 231, 233–34 (1996) (stating that the issue of professional football player compensation touches potential antitrust law violation claims or potential labor law claims).

suppression of salaries.[183] Collective bargaining has helped professional athletes outside of MiLB obtain fair salary structures and work conditions.[184] Collective bargaining will allow players to improve their pay and labor conditions despite the fact that MiLB players lack FLSA protections and the ability to make an antitrust law claim due to unique legal mechanisms created by the League.[185]

III. LEGAL FORCES THAT OPERATE TO ALLOW THE SUPPRESSION OF MILB COMPENSATION

Two legal mechanisms, antitrust law and the FLSA, ensure that American workers are paid a fair market value for their labor and that employers do not collude to falsely suppress wages or restrain trade.[186] The MLB has found methods to avoid both antitrust scrutiny and application of the FLSA to MiLB compensation.[187] Congress and the courts have both acted to "save" America's pastime to the detriment of the player employees.[188]

A. How MLB Escapes Antitrust Law Scrutiny of MiLB Operations

The Supreme Court created and enshrined the baseball antitrust exemption in three key cases: *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,[189] *Toolson v. New York Yankees, Inc.*,[190] and *Flood v. Kuhn*.[191] The 1922 Supreme Court

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[183] *E.g.*, Broshuis, *supra* note 3, at 90–91 (discussing how the baseball antitrust exemption give MLB power over MiLB employment terms and allows salary suppression).

[184] *See, e.g.*, Feldman, *supra* note 138, at 210, 214 (discussing how collective bargaining is useful to player employees in professional sports because it improves wages, hours, and conditions of employment).

[185] *See* Broshuis, *supra* note 3, at 68–69 (explaining that MiLB players lack power to make antitrust claim); Axelrod, *supra* note 1, at 512 (explaining formation of SAPA and how MiLB players are not entitled to the protections of the FLSA after SAPA passed).

[186] *See, e.g.*, Feldman, *supra* note 138, at 216 (explaining how antitrust law and labor law are intended to operate to protect employees); Fair Labor Standards Act of 1938, 29 U.S.C. § 201.

[187] *See, e.g.*, Pannullo, *supra* note 7, at 449 (explaining how antitrust law does not apply); Axelrod, *supra* note 1, at 509–12 (explaining strategies MLB has used to avoid the FLSA).

[188] *See* Closius & Stephan, *supra* note 35, at 95–98 (examining action by the courts and Congress that has harmed MiLB player employees).

[189] 259 U.S. 200 (1922).

[190] 346 U.S. 356 (1953).

[191] 407 U.S. 258 (1972).

case *Federal Baseball* established the antitrust exemption.[192] The Supreme Court held that the business of baseball is not subject to antitrust scrutiny because it is an intrastate activity and thus cannot restrain interstate trade which the Sherman Act seeks to protect.[193] No other professional sports have been granted this exemption from antitrust law.[194]

In 1953, despite the fact that the business of baseball was certainly an interstate operation, the antitrust exemption was maintained in *Toolson*.[195] The Supreme Court asserted that legislation would be the way to change stare decisis set in *Federal Baseball*.[196] In *Toolson*, the plaintiff was a MiLB player in the Yankee's club system who wanted to be traded to a different team employer to have a better opportunity of reaching the major leagues, since the Yankee's major league team was already full of talent.[197] Any American worker would likely have similar logic; his chance of upward mobility with his current employer seemed unlikely, so he wanted to shop his skills on the market to see if another employer would offer a better opportunity.[198] With the exemption granted *in Federal Baseball*, MLB employers could retain players forever using reserve clauses in player contracts.[199] Teams could reserve a player by continually renewing his contract and prevent him from seeking a contract with another team.[200] Toolson lost his case and never played in the major leagues.[201]

In *Flood*, the player lost again, but the case led to Congress passing the Curt Flood Act which ended the MLB reserve system that Toolson challenged.[202] Curt Flood's name is famous to the sports world

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[192] *Fed. Baseball*, 259 U.S. at 208–09 (holding that baseball is not subject to federal antitrust law because the games are "purely state affairs").

[193] *Id.* at 209.

[194] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2159 (2021) (stating that the Supreme Court has refused to grant other sports an exemption like the one granted to baseball in the *Federal Baseball* case).

[195] *See generally Toolson*, 346 U.S. 356.

[196] *See id.* at 357.

[197] *See* David P. Pepe, *The Catalyst for Change in Baseball Labor Agreements: A Legal Look at Curt Flood's Impact on Free Agency*, N.J. LAW., Feb. 2021, 60, 62 (explaining Toolson's story).

[198] *See id.*

[199] *See* Williams, *supra* note 12, at 525 (explaining development of reservation system and effect of player freedom in market).

[200] *See id.* (explaining how the reserve clause functioned to keep player employees from enjoying free market).

[201] *See* Pepe, *supra* note 197, at 64.

[202] *See id.* at 62–63 (discussing how Curt Flood's case fits into the history of the antitrust exemption); John T. Wolohan, *The Curt Flood Act of 1998 and Major League Baseball's Federal Antitrust Exemption*, 9 MARQ. SPORTS L.J. 347, 367 (1999).

because he is credited for creating free agency and allowing athletes to take their talents to the free market for the best offer.[203] Flood challenged the Cardinals' power to trade him to the Phillies without allowing him to insert his preferences for where he lives and works.[204] His case was based in principles of civil rights and the larger industrial labor movement.[205]

Flood argued that the lack of freedom he had as an employee to control his career treated him like a piece of property belonging to the baseball club.[206] Flood lost his case, but it led to the Curt Flood Act of 1998 which formally ended the reservation system in the MLB.[207] However, the reserve system still exists formally in the MiLB because the Curt Flood Act specifically applies to "professional Major League Baseball players."[208] The Curt Flood Act made MLB operations subject to antitrust scrutiny the same way that other professional sports always had been, limited by the usual labor exemptions.[209] MiLB operations still are not subject to antitrust law scrutiny.[210]

B. How MLB Escapes Application of the FLSA to MiLB Operations

Prior to the 2021 restructuring of MiLB and the raises given to players at each MiLB level, players earned wages below the federal minimum wage.[211] Despite salary raises, players still make less that the minimum wage in several states, notably Arizona where minimum wage is $13.85 and many MLB Clubs operate minor league training facilities.[212] Additionally, even after 2021 restructuring, players are not paid for overtime or mandatory training and conditioning before the

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[203] *See* Pepe, *supra* note 197, at 61 (describing how Flood is known for the origin of free agency in professional sports).

[204] *See id.* at 63.

[205] *See id.*

[206] *See id.* (discussing how Flood wrote a letter to the then MLB commissioner asserting that his basic rights as an American citizen were being violated).

[207] *See* 15 U.S.C. § 26b.

[208] *See id.* (stating that antitrust law applies to MLB players, so employers cannot collude to suppress salaries or use a reserve clause in contracts); *but see, e.g.*, Ryan Probasco, *Revisiting the Service Time Quandary: Does Service Time Manipulation of Minor League Baseball Players Violate MLB's Collective Bargaining Agreement?*, 15 DEPAUL J. SPORTS L. 1, 5 (discussing how MLB Clubs manipulate player service time and informally still operate a reserve system even at the MLB level by preventing players from becoming eligible to shop the free market).

[209] *See* 15 U.S.C. § 26b.

[210] *See, e.g.*, Closius & Stephan, *supra* note 35, at 95–96.

[211] *See* Fagan, *supra* note 6 (discussing compensation prior to 2021).

[212] *See id.* (stating that Low–A and High–A players earn $8.33 an hour); *see also Minimum Wage Information*, INDUSTRIAL COMMISSION OF ARIZONA, https://www.azica.gov/labor-minimum-wage-main-page (last visited Feb. 25, 2022) (stating that Arizona minimum wage is $13.85).

Championship Season.[213] This would violate the FLSA, but the MLB has been able to avoid application of the FLSA through multiple strategies.[214] Prior to 2018—when the SAPA was passed—MLB attempted to rely on the seasonal worker and the bona fide professional capacity exemptions to the FLSA.[215] Courts rejected the use of the seasonal worker exception because MiLB teams maintain year round business operations, even if the Championship Season is only five months.[216] The bona fide professional capacity fails to cover MiLB players because their labor is based on physical skill, which is outside the U.S. Department of Labor's definition of bona fide professional.[217] MLB still was set on a business model based on paying MiLB players as little as possible; thus, in 2014 the concept of SAPA originated at MLB meetings and was passed in 2018.[218]

SAPA is an exemption to the FLSA specifically for MiLB player employees.[219] SAPA allows MLB Club employers to avoid minimum wage law, overtime compensation, and compensation for training.[220] SAPA passed in an omnibus spending bill and many congressmen and congresswomen who voted on the bill were unaware that SAPA was part of the bill.[221] While MLB was planning on restructuring the minor leagues in order to provide raises to the players, MLB was also lobbying for state versions of SAPA in states with minimum wage laws and MiLB teams.[222] Arizona and Minnesota both rejected SAPA state legislation.[223]

Arizona's minimum wage is currently $13.85 and there are no exemptions that would prevent that law from applying to MiLB players

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[213] *See* Fagan, *supra* note 6 (detailing how MiLB players perform labor that is uncompensated).

[214] *See, e.g.*, Axelrod, *supra* note 1, at 509–11 (discussing how MLB has used the seasonal exemption, the bona fide professional exemption, and SAPA to avoid the FLSA).

[215] *See id.* at 509-10.

[216] *See id.*

[217] *See* 29 C.F.R § 541.3(a) (2022) (explaining that those who perform repetitious physical movements in their labor are not in the bona fide professional exemption).

[218] *See, e.g.*, Axelrod, *supra* note 1, at 512 (discussing history of formation of the 2018 SAPA).

[219] *Id.* at 501 (explaining how SAPA is an amendment to the FLSA for MiLB compensation).

[220] *See, e.g.*, Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., *Saving America's Pastime Means Not Paying Minor League Players*, JD SUPRA LEGAL NEWS (Jan. 25, 2019), https://www.jdsupra.com/legalnews/saving-america-s-pastime-means-not-45220/ (discussing effect of SAPA).

[221] *See, e.g.*, Nathaniel Grow, *The Save America's Pastime Act: Special-Interest Legislation Epitomized*, U. COLO. L. REV. 1013, 1013 (2019) (stating that SAPA was buried deeply within the 2,232 page federal spending bill).

[222] *See, e.g.*, *id.* at 1040 (discussing how MLB was spending money lobbying for SAPA before giving raises to MiLB players).

[223] *See* Axelrod, *supra* note 1, at 517–18.

performing labor in Arizona.[224] MLB wanted to create a SAPA exemption in Arizona's minimum wage law because fourteen of the thirty MLB Clubs have MiLB affiliates in Arizona.[225] Based on calculations that High–A and Low–A players work sixty hours a week, they earn $8.33 an hour after the 2021 restructuring.[226] This is above the federal minimum wage of $7.25, but it is below the Arizona minimum wage of $13.85, which players would be entitled to if SAPA is repealed.[227]

The antitrust law exemption allows MLB Clubs to collude and falsely suppress MiLB compensation and SAPA allows MLB Clubs to evade FLSA compensation and work condition requirements and standards.[228] These legal mechanisms maintain a business model based on paying MiLB players as little as possible.[229] The antitrust law exemption and SAPA shape the terms of the UPC that all MiLB players sign.[230] The antitrust law exemption allows all teams to set the same salaries for all players based on their level in the minor league system.[231] Players cannot entertain offers from other team employers unless they are released from their contract.[232] Additionally, the UPC has no provisions about the players' working conditions.[233] While MLB announced plans to provide housing to "certain" MiLB players, those plans have not been clarified, but it is likely that not all players will receive housing during their employment.[234] The combined operation of the baseball antitrust

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[224] *See* INDUSTRIAL COMMISSION OF ARIZONA, *supra* note 212.

[225] Axelrod, *supra* note 1, at 517.

[226] Fagan, *supra* note 6 (presenting hourly wage calculation based on sixty hour work week); Pannullo, *supra* note 7, at 456 (stating that MiLB players work sixty to seventy hours a week).

[227] INDUSTRIAL COMMISSION OF ARIZONA, *supra* note 212; *Minimum Wage*, U.S. DEPARTMENT OF LABOR, https://www.dol.gov/general/topic/wages/minimumwage (last visited Feb. 23, 2023).

[228] *See* Save America's Pastime Act, Pub. L. No. 115-141, § 201, 132 Stat. 1126, 1126–27 (2018) (creating exception to the FLSA for MiLB compensation); Broshuis, *supra* note 3, at 97.

[229] *See, e.g.*, Pannullo, *supra* note 7, at 443 (stating that MLB has failed its players with its business model).

[230] *See* Senne Consolidated Complaint, *supra* note 26, at 32–33 (stating that UPC forces players to stay with one MLB Club employer for seven years even though the employer can terminate the relationship at any time).

[231] *See* Broshuis, *supra* note 3, at 96 (discussing antitrust exemption and compensation).

[232] *See* Senne Consolidated Complaint, *supra* note 26, at 33 (stating that players cannot shop their talent on the market because the UPC ties them to one employer for seven years).

[233] *See, e.g.*, *id.* at 39–40 (discussing work conditions such as hours worked, training requirements, and travel demands that are not addressed by the UPC).

[234] *See* Perry, *supra* note 47 (stating that housing will begin in 2022 without more detail from MLB).

exemption and SAPA ultimately deprive MiLB players of fundamental rights to be compensated adequately for all their labor.[235] This is inconsistent with the rest of the professional sport landscape and American labor and employment law.[236]

IV. PROPOSED SOLUTION TO IMPROVE MILB CONDITIONS AND INTERNATIONAL AMATEUR PLAYER DEVELOPMENT AND ACQUISITION

To improve MiLB player compensation and work conditions, (1) Congress or alternatively the Supreme Court should eliminate the baseball antitrust exemption in order to stop false suppression of wages and reserve clauses in MiLB contacts; (2) Congress should repeal SAPA so that the FLSA applies to MiLB player compensation in order to force MLB Clubs to compensate employees for all their labor and overtime; and (3) MiLB player employees should engage in collective bargaining to improve the salary structure and reform the international amateur player acquisition system.[237] Since players that sign as international free agents enter the minor leagues with lower signing bonuses and less protection from actors with bad intentions, this greatly effects their condition while in the minor leagues; thus, a solution to address minor league issues should be compounded with a solution to international amateur player acquisition.[238]

A. Counterargument from MLB: Suppressing Compensation is Fundamental to the MiLB

Opposite of the players' side of the battle, the MLB Clubs will likely argue that the baseball antitrust exemption and the current weekly wage salary structure must be maintained in order to preserve the minor

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[235] *See* Broshuis, *supra* note 3, at 96 (identifying antitrust exemption and unfair labor practice as main issues for MiLB).

[236] *See* Brown v. Pro Football, Inc., 518 U.S. 231, 249 (1996) (stating that it "would be odd to fashion an antitrust exemption" for professional football); *see also* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S.Ct. 2141, 2159–60 (2021) (stating that the baseball antitrust exemption is inconsistent with American sports and antitrust law).

[237] *See* Closius & Stephan, *supra* note 35, at 105 (arguing that Congress should repeal the baseball antitrust exemption the way that it repealed it from the MLB in 1998); Axelrod, *supra* note 1, at 527–29 (asserting that MLB should not be permitted to evade FLSA and minimum wage); Pannullo, *supra* note 7, at 466–67 (asserting that MiLB players should organize).

[238] *See* Ruiz et al., *supra* note 104, at 1–2 (describing how players from Latin America enter their professional baseball careers with less signing bonus money compared to American players); *see also* Broshuis, *supra* note 3, at 83–84 (discussing how lower signing bonuses for players from Latin America affects their lives in the minor leagues).

league system.[239] MLB Clubs and owners may also argue that increasing MiLB salaries would require them to constrict the MiLB system again and cut teams, similar to 2021.[240] However, operations in other professional leagues undercut this argument; MLB's gross revenue is significantly more than that of the NHL and the NHL pays its minor league players a minimum salary of $52,000.[241]

Alternatively, MLB Clubs could argue that the antitrust law exemption is necessary to maintain the tradition of housing MiLB teams in smaller cities around the country, rather than in large markets.[242] The Clubs would argue that removing the antitrust exemption on the business of baseball would allow MiLB teams to move to larger markets which would harm small local economies.[243] MLB has shown that it is not willing to protect small city markets—when MLB restructured the MiLB in 2021, it cut forty MiLB teams from the MiLB system[244]—so if the antitrust exemption is repealed by Congress, MLB likely will not interfere to prevent MiLB teams from relocating.[245] Overall, legal action to deliver economic justice to MiLB player employees is justified because SAPA and the baseball antitrust exemption are both inconsistent with American labor law principles and the condition of minor league players is urgent.[246]

Finally, since players from Latin America enter the minor leagues as free agents and American (including Puerto Rico) and Canadian player are subject to the Rule Four draft, the MLB Clubs may argue that players from Latin America actually have the more favorable system, so it should

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[239] *See* Bradley V. Murphy, *Protecting America's Pastime: The Necessity of Major League Baseball's Antitrust Exemption for the Survival of Minor League Baseball*, 49 IND. L. REV. 793, 819 (2016) (stating that the antitrust law exemption is for consumer welfare and allows MiLB to exist).

[240] *See, e.g.*, Nostalgic Partners Complaint, *supra* note 22, at 2–3.

[241] *Compare* Jabari Young, *Major League Baseball Revenue for 2019 Season Hits a Record $10.7 billion*, CNBC (2019) (indicating MLB gross revenue in 2019), *with* Axelrod, *supra* note 1, at 506 (stating that the NHL 2018–2019 revenue was $5.09 billion, more than twice the revenue of the NHL); *see also* Fagan, *supra* note 6 (stating that AHL minimum salary is $52,000).

[242] *See, e.g*, Murphy, *supra* note 239, at 819.

[243] *See, e.g*, *id.*

[244] *See* Nostalgic Partners Complaint, *supra* note 22, at 9 (stating that forty MiLB teams were cut from the MLB).

[245] *See, e.g.*, *id.*22 at 7.

[246] *See e.g.*, Closius & Stephan, *supra* note 35, at 98–99 (discussing how the situation of MiLB players is distinct and inconsistent with other American workers because of the antitrust law exemption); Axelrod, *supra* note 1, at 501 (explaining how SAPA disadvantages MiLB player employees compared to other American workers).

not be reformed.[247] Free agency allows players to negotiate with several teams which gives much more power to the player.[248] However, this argument overlooks the fact that the actual system created by the League is structured to undervalue Latin players and the system is unmonitored which leads to oral agreements that bind players before they turn sixteen.[249] Thus, although international players can theoretically negotiate with several teams and use that as leverage, they suffer consistently lower signing bonuses compared to drafted players.[250] Finally, reforming the international amateur player system does not mean a draft should be imposed; the MiLB bargaining unit should avoid a draft system and reform the free agency system.[251]

B. Proposed Legal Solutions

The solution to MiLB compensation involves three legal reforms: (1) the baseball antitrust exemption must be eliminated through a Supreme Court ruling or legislation resembling the Curt Flood Act; (2) SAPA must be repealed in order to allow minor league baseball players to be paid fairly for all their labor including training; and (3) MiLB players should bargain to improve compensation, labor conditions, reform international player acquisition operations.[252] The result of these legal reforms would be a minor league system that fairly compensates players and affords them the same rights that other American workers enjoy. Although prior attempts to challenge the antitrust exemption were denied by the Supreme Court, the exemption could be at a tipping point

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[247] *See e.g.,* Daniel Hauptman, *The Need for a Worldwide Draft to Level the Playing Field and Strike Out The National Origin Discrimination in Major League Baseball*, 30 LOY. L.A. ENT. L. REV. 263, 264 (2009) (arguing that MLB unfairly discriminates against American and Canadian players because they are subject to the draft system).

[248] *See id.*

[249] *See* Torres & Rosenthal, *supra* note 122, (explaining that players are approached by MLB scouts and offered illegal oral contracts that often fall out and leave the player with no real contract).

[250] Broshuis, *supra* note 3, at 83–84 (discussing how players from Latin America are subject to a system that leaves them with lower signing bonuses).

[251] *See id.* (discussing the theoretical advantage of the free agent system for Latin American players).

[252] *See* Closius & Stephan, *supra* note 35, at 98–99 (discussing how Congress failed to protect MiLB players in the 1998 Curt Flood Act which gave subject MLB to antitrust law regarding MLB player employment); Axelrod, *supra* note 1, at 516 (asserting that MLB should not be permitted to avoid paying minimum wage to employees); Pannullo, *supra* note 7, at 466–67 (asserting that MiLB players should collectively bargain for compensation and work conditions based on the PHPA negotiated CBA for AHL players).

as it approaches its centennial.[253] The *Alston* decision clearly reframed what remains of the baseball antitrust exemption in a way that indicates the Supreme Court's willingness to eliminate it.[254] *Alston* also emphasized the civil rights issues of paying athletes fair portions of the revenue their labor produces which similarly strikes at the core of MiLB compensation.[255] The *Alston* decision, the *Senne* settlement and formation of the MiLB bargaining unit make this an opportune moment to properly address MiLB compensation and player work conditions.[256]

1. Ending the Antitrust Exemption

The relief of the Curt Flood Act of 1998 was too narrow to fully address the baseball antitrust exemption because the Act merely covers MLB players.[257] The Curt Flood Act formally ended the reserve clause in the MLB, but it does not cover MiLB players or other aspects of the business of baseball.[258] Thus, the baseball antitrust exemption remains intact and allows the MLB to unjustly suppress MiLB salaries, keep MiLB players under reserve clauses, and oust MiLB teams as MLB affiliates.[259] The remainder of the baseball antitrust exemption ought to be repealed by Congress through legislation resembling the Curt Flood Act or, alternatively, through the Supreme Court.[260] However, this time,

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[253] *See* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953) (maintaining antitrust exemption); Flood v. Kuhn, 407 U.S. 258 (1972) (maintaining antitrust exemption); Wyckoff v. Off. of the Comm'r of Baseball, 705 F. App'x. 26, 28 (2d Cir. 2017) (maintaining the antitrust exemption and disposing of antitrust law claims); Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC, 870 F.3d 682, 688 (7th Cir. 2017) (maintaining the baseball antitrust exemption and disposing of Plaintiff's antitrust law claims).

[254] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2159–60 (2021) (stating that the baseball antitrust exemption is an aberration in the law).

[255] *See id.*

[256] *See id.* at 2159–60 (indicating that the baseball antitrust exemption that harms MiLB player employees is inconsistent with American law); Pannullo, *supra* note 7, at 472–73 (discussing circumstances that would support a movement to organize MiLB player employees).

[257] *See* 15 U.S.C. § 26b (removing the antitrust exemption from MLB player contracts only).

[258] *See id.*

[259] *See* Broshuis, *supra* note 3, at 96 (discussing antitrust exemption and the effect on MiLB players); Nostalgic Partners Complaint, *supra* note 22, at 9 (arguing that MLB unlawfully ousted forty MiLB teams in a manner that would ordinarily violate antitrust law).

[260] *See* Closius & Stephan, *supra* note 35, at 105 (arguing that Congress should entirely eliminate the antitrust exemption).

the entire exemption ought to be disposed of to ensure that MLB is not above the law in any manner.[261]

The rhetoric of basic civil rights violations that Flood used to frame his 1969 case against the MLB and the reserve clause remain relevant to MiLB compensation and working conditions.[262] MiLB players are still subject to reserve clauses, a system which Flood equated to treating players as a piece of property.[263] MiLB players' rights are also violated by the fact that their labor performed in training before the season is uncompensated entirely, and their compensation is still below several state minimum wage levels.[264] Additionally, the racial inequality nuances of Flood's argument remain relevant due to the high percentage of international players in the MiLB.[265]

The most current data available indicates that over forty percent of MiLB players are international signings from Latin America and the Caribbean.[266] Approximately thirty percent of MLB players are Latino.[267] Despite player diversity, ninety-three percent of MLB management positions are filled by white men.[268] Additionally, MiLB players lack control over where they play and who they play for due to the reserve clause.[269]

Flood's argument for civil rights and racial justice remains urgent in baseball today, especially considering how MLB has shaped a system to sign teenagers in Latin America and the Caribbean as young as sixteen years old for the lowest contract price possible.[270] Their skill and labor is

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[261] *See* Broshuis, *supra* note 3, at 98 (discussing how Curt Flood Act does not cover MiLB)

[262] *See* Edmund P. Edmonds, *The Curt Flood Act of 1998: A Hollow Gesture After All These Years?*, 9 MARQ. SPORTS L.J. 315, 315–16 (1999) (discussing how Curt Flood framed his case against the MLB in civil rights).

[263] *See id.* ("'I do not feel I am a piece of property to be bought and sold.'").

[264] *See* Broshuis, *supra* note 3, at 63 (explaining that players are only paid during the regular season at a salary below federal poverty guidelines); *see also* Fagan, *supra* note 6 (noting that MiLB players are not paid for their labor during spring training).

[265] *See* Pepe, *supra* note 197, at 62 (discussing how racial nuances influenced Curt Flood); Senne Consolidated Complaint, *supra* note 26, at 32 (asserting that forty percent of MiLB players are Latino).

[266] *See* Senne Consolidated Complaint, *supra* note 26, at 32 (asserting that forty percent of MiLB players are Latino).

[267] *See* Zachary D. Rymer, *Does Baseball Have a Race Problem at Manager?*, BLEACHER REPORT (June 3, 2015), https://bleacherreport.com/articles/2483855-does-baseball-have-a-race-problem-at-manager.

[268] *See id.* (explaining that management positions in professional baseball is almost entirely held by white men although this does not reflect player demographics).

[269] *See, e.g.*, Williams, *supra* note 12, at 525 (explaining reserve system and effect of player freedom in market).

[270] *See* Kalthoff, *supra* note 39, at 357–58 (discussing how amateur international players are actively recruited and singed at young ages).

intentionally undervalued, and they enter the minor leagues and are released from the minor leagues with less than their American counterparts.[271] MLB's development system in Latin America and the Caribbean resembles a numbers game.[272] The system pulls players away from other career prospects before sixteen years of age and releases nearly all of them before they can earn a sustainable salary for themselves, let alone support their families in the future.[273]

The urgency of eliminating the baseball antitrust exemption is possibly reaching a tipping point that it never has before due to the *Alston* case and unionization of minor league players.[274] However, the Supreme Court has historically refused to hear cases on the antitrust exemption, so the elimination of the exemption through the courts is unlikely.[275] The Court refused to eliminate the antitrust exemption in 1953 in *Toolson* and in 1967 in *Flood*; both cases were brought by professional baseball players and pertained to the core of organized baseball business.[276] The Supreme Court refused to hear two cases on the antitrust exemption in 2018,[277] but these did not pertain to the core aspects of the business of baseball and did not illustrate how harmful the antitrust exemption is to player employees.[278] The *Rooftops* case was about whether a Chicago apartment building could be permitted to sell tickets to view the Cubs game from its rooftop.[279] *Wyckoff* raised the issue of compensation for professional baseball scouts that work for the MLB and must sign

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[271] *See* Ruiz et al., *supra* note 104, at 2 (discussing how Latin players enter and leave professional baseball with less than American players).

[272] *See id.* (asserting that 97% of players in Dominican Academies are released).

[273] *See id.*

[274] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S.Ct. 2141, 2159–60 (2021) (calling the baseball antitrust exception inconsistent); Matt Snyder, *Minor-League Baseball Players Unionize: Minor Leaguers Officially Join MLBPA After Authorization*, CBS SPORTS (Sep. 14, 2022, 5:35 PM), https://www.cbssports.com/mlb/news/minor-league-baseball-players-unionize-minor-leaguers-officially-join-mlbpa-after-authorization/.

[275] *See* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (maintaining antitrust exemption); Wyckoff v. Off. of Comm'r of Baseball, 705 F. App'x. 26, 28 (2d Cir. 2017) (disposing of antitrust law claims); Right Field Rooftops, L.L.C. v. Chi. Cubs Baseball Club, LLC, 870 F.3d 682, 688 (7th Cir. 2017) (disposing of antitrust law claims).

[276] *See generally Toolson*, 346 U.S. at 79 (maintaining antitrust exemption); Flood v. Kuhn, 407 U.S. 258 (1972).

[277] Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC, 138 S. Ct. 2621 (2018) (denying writ of certiorari); Wyckoff v. Off. of Comm'r of Baseball, 138 S. Ct. 2621 (2018) (denying writ of certiorari).

[278] *See Wyckoff*, 705 F. App'x at 28; *Right Field Rooftops*, 870 F.3d at 688.

[279] *See Right Field Rooftops*, 870 F.3d at 685–86 (explaining core issue of the lawsuit).

uniform contracts.[280] The Supreme Court denied certiorari in both cases,[281] but this is likely because the cases did not demonstrate sufficient urgency to eliminate the one-hundred- year-old exemption created in *Federal Baseball*.[282]

The *Alston* case demonstrates how the legal landscape of professional sports and the concept of economic justice for athletes have developed in recent years.[283] In *Alston*, the Supreme Court refused to extend an antitrust exemption to the NCAA for payment of NCAA athletes.[284] Justice Gorsuch's majority opinion also noted that the baseball antitrust exemption is inconsistent and highly criticized.[285] Justice Gorsuch's majority opinion and Justice Kavanaugh's concurring opinion are both grounded in the principle of providing fair and proportional compensation to athletes for their labor.[286] Yet while Justice Gorsuch's opinion limited its criticism to the academic-related benefits at issue in the case,[287] Justice Kavanaugh asserted that NCAA athletes should be paid for all their labor that produces revenue and would have addressed the NCAA's entire compensation structure.[288]

Despite the commentary in *Alston*, the claims in *Nostalgic Partners*— challenging the elimination of forty minor league team affiliates—were dismissed at the district court level based on the antitrust exemption.[289] Thus, the exemption should be eliminated by Congress with legislation resembling the Curt Flood Act.[290] If the exemption is eliminated, MLB could not falsely suppress MiLB player salaries.[291]

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[280] *See Wyckoff*, 705 F. App'x at 28 (explaining claims asserted by MLB scouts).

[281] *Right Field Rooftops*, 138 S. Ct. 2621 (denying writ of certiorari); *Wyckoff*, 138 S. Ct. 2621 (denying writ of certiorari).

[282] *See* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200, 208–09 (1922) (asserting that the business of baseball is an intrastate activity and cannot violate the Sherman Act).

[283] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring) (asserting that the NCAA is not above the law).

[284] *See id.* at 2159–60 (refusing NCAA request to grant an exemption to antitrust law).

[285] *See id.* at 2159.

[286] *See id.* at 2166 (Kavanaugh, J., concurring) (asserting that it is fair to pay NCAA athletes); *id.* at 2166.

[287] *Id.* at 2166.

[288] *See id.* at 2166–68 (Kavanaugh, J., concurring) (asserting that the NCAA should pay athletes because they are performing revenue producing labor).

[289] *See* Nostalgic Partners LLC v. Off. of the Comm'r of Baseball, No. 21-cv-10876, 2022 WL 14963876, *1 (S.D.N.Y. Oct. 26, 2022) (indicating that the antitrust exemption protected the league from the suit).

[290] *See* Closius & Stephan, *supra* note 35, at 105 (arguing that Congress should entirely eliminate the antitrust exemption).

[291] *See, e.g.*, Broshuis, *supra* note 3, at 96 (discussing how antitrust exemption effects MiLB salaries).

Further, another necessary part of the solution is to apply the FLSA and state wage and labor laws to MiLB compensation practices.[292]

2. Reforming the Salary Structure to Comply with the FLSA

SAPA allows the MLB to evade application of the FLSA to MiLB operations which allows the suppression of MiLB compensation below minimum wage standards and the federal poverty line.[293] In order to improve MiLB compensation, SAPA must be repealed and the FLSA must be applied.[294] State minimum wage laws is another necessary component to improve MiLB compensation.[295] It is evident that the MLB is concerned about state minimum wage law since it attempted to pass SAPA legislation in Arizona where most teams operate MiLB facilities.[296] SAPA is as inconsistent with American law as the baseball antitrust exemption and should be repealed to ensure that MiLB player employees enjoy the rights other American workers enjoy.[297] The FLSA is intended to protect the most vulnerable that lack bargaining power and will not complain of low wages or poor treatment due to fear of losing the little they do have.[298] Depriving teenage player employees of their FLSA rights and protection is alarming, especially because MLB Clubs recruit their youngest players from Latin America and the Caribbean, where they often come from financially vulnerable situations and quickly agree to any chance to work in the US.[299]

The *Senne* class action lawsuit calls to apply the FLSA and state minimum wage laws to past MiLB labor and to improve current MiLB compensation.[300] If SAPA is repealed, MiLB compensation would have

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[292] *See, e.g.*, Axelrod, *supra* note 1, at 501 (recognizing that SAPA prevents application of the FLSA).

[293] *See id.* at 516–18 (explaining how SAPA operates and how MiLB salaries are below Arizona and Minnesota minimum wage laws); *2021 U.S. Federal Poverty Guidelines*, *supra* note 6 (indicating poverty threshold levels in 2021).

[294] *See, e.g.*, Grow, *supra* note 221, at 1049 (indicating that the FLSA ought to apply to MiLB player employees and they should be protected).

[295] *See* Axelrod, *supra* note 1, at 518–20 (justifying how MiLB players should benefit from state minimum wage laws).

[296] *See id.* at 518 (stating that SAPA legislation was proposed and unsuccessful in Arizona and Minnesota).

[297] *See, e.g.*, Pannullo, *supra* note 7, at 456–57 (discussing importance of FLSA and harm of SAPA).

[298] 29 U.S.C. § 202 (stating the policy of the FLSA is to ensure a minimum standard of work conditions for the health and wellbeing of workers).

[299] *See* Closius & Stephan, *supra* note 35, at 99.

[300] *See* Senne Consolidated Complaint, *supra* note 26, at 83, 84 (asserting FLSA and state wage and labor law claims against the MLB and MLB Clubs).

to meet the FLSA.[301] MLB would be required to compensate MiLB players for mandatory spring training before the Championship Season and for overtime.[302] MLB attorneys asserted that players are not entitled to payment under FLSA or state minimum wage during spring training because they are not employees during that period.[303] They reason that the players benefit from training while MLB Clubs do not benefit and only incur costs to provide training.[304] The FLSA defines "employ" as to "suffer or permit to work."[305] The players of the *Senne* case argued that they are employees because the training, which can be over fifty hours a week, is mandatory.[306] Also, they are employed as "professional baseball players" in the UPC, and they train to earn a salary in their craft, not to gain nonmonetary benefits.[307] Yet, the MLB attorneys maintained that players are not employees because they develop life skills and amateur players would pay for the caliber of training MiLB players receive in spring training.[308] Based on the FLSA definition of employee and the UPC language of MiLB player employment terms, the players have the stronger argument to apply the FLSA.[309]

3. Collective Bargaining Goals in Conjunction with International Operations Reform

A complete solution to the issues minor league players face must address the international amateur player development and acquisition

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[301] Save America's Pastime Act, Pub. L. No. 115-141, § 201, 132 Stat. 1126, 1126–27 (2018) (preventing application of FLSA).

[302] *See* Pannullo, *supra* note 7, at 446–47 (discussing how FLSA would require payment for MiLB spring training and for overtime worked).

[303] *See, e.g.*, Evan Bleier, *MLB Wants to Treat Minor Leaguers Like Unpaid Interns During Spring Training*, INSIDE HOOK, (Feb, 17, 2022) (explaining how MLB counsel Elise Bloom says that players are not "employees" during training because the Clubs only incur costs for the players benefit).

[304] *See id.* (indicating that MLB counsel Elise Bloom argues that players benefit more from off season training).

[305] 29 U.S.C. § 203(g).

[306] *See* Senne Consolidated Complaint, *supra* note 26, at 2–3 (asserting that MLB Clubs require MiLB player employees to train over fifty hours a week during spring training and off season training).

[307] *See id.* at 173 (presenting MiLB UPC)

[308] *See* Bleier, *supra* note 303 (stating that spring training gives MiLB players the opportunity to "develop their language skills," which likely was a comment made by counsel Bloom regarding international MiLB players, and to develop other life skills that are beneficial to players, but not beneficial to the MLB).

[309] *See* Senne Consolidated Complaint, *supra* note 26, at 173 (indicating that in MiLB UPC, MiLB players are professional baseball players); *see* also 29 U.S.C. § 203(g) (defining "employ" as "to suffer or permit to work").

practices that effect the lives of at least 40% of minor league players.[310] In addition to reforming international operations, the main goals of the MiLB bargaining unit should be to achieve compensation reform and set minimum salary requirements.[311] Additional goals should be to improve labor conditions by assisting in providing all MiLB players housing, not just select players, by improving and lessening travel demands, and establishing a grievance procedure for players since they previously had no method to assert claims against the employer.[312]

The primary goal in bargaining for minor leaguers should be to achieve a compensation model that pays MiLB player employees a salary that reflects the portion of revenue that they produce, demonstrates investment in their development, and pays players all year.[313] The reformed compensation model should resemble the AHL of the NHL and the G League of the NBA where players earn an annual minimum salary reflective of the market value and with additional opportunities to add onto the minimum salary which demonstrates meaningful investment in the future of the sport.[314] An annual salary structure will be more appropriate for MiLB players' labor because they work year round, despite currently only receiving payment during the Championship season in the past.[315] The current MiLB compensation model was created without any input from MiLB players, so ideally, MiLB players can participate in bargaining to create a new model.[316]

Similarly, Major League Agreement terms affecting MiLB players such as the Rule 5 Draft eligibility requirement and the international amateur spending cap should be revisited with MiLB player interests considered.[317] The Rule 5 Draft eligibility requirements should be lessened to allow MiLB players to transfer into the MLB when they are playing at the proper caliber and when a MLB Club wants to sign

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[310] Senne Consolidated Complaint, *supra* note 26, at 32 (asserting that over forty percent of MiLB signees are amateur players from Latin American and Caribbean).

[311] *See, e.g.*, Pannullo, *supra* note 7, at 467 (discussing how MiLB could benefit from collective bargaining for compensation and work conditions like the PHPA).

[312] *See, e.g.*, Broshuis, *supra* note 3, at 63 n.81 (addressing how MiLB player usually travel to games by bus).

[313] *See* Axelrod, *supra* note 1, at 506 (explaining how MiLB compensation is disproportionate to MLB revenue).

[314] *See* Pannullo, *supra* note 7, at 465–67 (explaining how the AHL annual salary works and how it could be a useful model to the MiLB).

[315] *See* Broshuis, *supra* note 3, at 63 (explaining that MiLB players are paid only during the Championship Season).

[316] *Id.* at 84, 100 (stating that before the minor league players formed a bargaining unit, the MLB CBA terms affected them).

[317] *See, e.g.*, *id.* at 84–87 (discussing how CBA terms harm MiLB players and they were not represented).

them.[318] This will empower MiLB players to earn more money earlier in their careers, which will help players immensely, and help streamline professional baseball player development.[319]

Additionally, the structure of international amateur player acquisition would be of concern to the MiLB unit, rather than the MLB player bargaining unit, because it effects the earnings and conditions of MiLB players.[320] Essentially all amateur players signed from Latin America and the Caribbean begin their professional baseball career in the MiLB and few will ever play for an MLB team, so this is an issue the MiLB unit should address, not the MLB players' unit.[321] The MiLB unit should make it a goal to significantly raise or eliminate the spending cap on international amateur player signings.[322] The cap encourages MLB Clubs to sign players to contracts with signing bonuses as low as possible which leaves international players severely undervalued.[323] Teams are encouraged to offer players signing bonuses below $10,000 because it will not count toward the low spending cap.[324] The MiLB unit should bargain with MLB to create league rules to regulate the practices of recruiting and signing amateur players in Latin America.[325] The goal should be to encourage fair market signing bonus values for international amateur signees.[326] Given the compensation history of the MiLB, signing bonuses are critical to helping MiLB players survive.[327] Additionally, there should be better monitoring of agents, trainers, and Club scouts that

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[318] *See, e.g.*, *id.* at 77–78 (discussing Rule 5 draft terms).

[319] *See id.*

[320] *See id.* at 88–89 (discussing international player acquisition and how it is an issue that pertains to MiLB players and minor league baseball).

[321] *See id.* at 83–84 (stating that all amateur player signings from Latin America and the Caribbean sign to MiLB UPC contracts); Kalthoff, *supra* note 39, at 363 (estimating that less than one percent of international amateur signings play at the MLB level).

[322] *See, e.g.*, Broshuis, *supra* note 3, at 83–84 (explaining the effect of the cap on spending).

[323] *See id.*(discussing the effect of the spending cap and spending strategies); *see also*, Kalthoff, *supra* note 39, at 364–65 (discussing how players from Latin America receive signing bonuses below their market value).

[324] *International Amateur Free Agency & Bonus Pool Money*, MAJOR LEAGUE BASEBALL GLOSSARY, https://www.mlb.com/glossary/transactions/international-amateur-free-agency-bonus-pool-money (last visited July 1, 2023) (explaining that international amateur players can be recruited at age sixteen and any signing bonus over $10,000 will count towards the spending cap).

[325] *E.g.*, Kalthoff, *supra* note 39, at 358 (discussing how MLB tactics of recruiting and signing amateur players in Latin America and the Caribbean are often unfair, manipulative, and mostly unregulated).

[326] *See, e.g.*, *id.* (discussing how professional baseball has mentality to sign "Latin players on the cheap" and take advantage of young men in desperate circumstances).

[327] *See, e.g.*, Broshuis, *supra* note 3, at 89 (discussing signing bonuses for MiLB players).

interact with international prospects so that players are not victim to bonus skimming, usury loan agreements, or illegal oral contracts before they are eligible to sign.[328]

MiLB players and the MLBPA should also explore more fundamental changes to international operations in Latin America.[329] Raising the minimum signing age and investing in independent player training and independent leagues would allow players to develop more before beginning their professional career in the minor leagues.[330] Raising the minimum age could help lessen performance enhancing drug use among young players because there would be less pressure on them to compete with American players significantly older than them.[331] Additionally, players would have more time to show their value to Club scouts when they are more physically mature which would help players gain slightly more bargaining power.[332]

The history of MiLB–MLB relations has forever changed now that players are unionized and improving MiLB compensation seems more plausible now than ever before.[333] The *Alston* decision has invigorated a movement for economic justice for athlete's labor and highlighted the injustice of athletes not receiving compensation for the revenue producing labor that they perform.[334]

CONCLUSION

The struggle of trying to pay for housing and meals while playing in the minor leagues cannot be explained as rite of passage of chasing the dream to play in the majors.[335] To empower MiLB players, the baseball

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[328] *See* Ruiz et al., *supra* note 104104, at 2 (discussing the practice of trainers in the Dominican Republic taking portions of player signing bonuses).

[329] *See* Torres & Rosenthal, *supra* note 122 122(discussing how corrupt and unethical conduct is entrenched in recruiting practices in Latin America).

[330] *See id.* (indicating that some players and agents that advocate for international players think the signing age should be increased).

[331] *See id.* (explaining the different treatment of international and American players in the age requirement).

[332] *See id.*

[333] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S.Ct. 2141, 2159–60 (2021) (calling the baseball antitrust exemption an inconsistency); *see also* Williams, *supra* note 12, at 550 (asserting that "[t]he tide may be shifting toward lifting the [baseball] antitrust exemption that has long interfered with minor leaguers' ability to earn a livable wage . . . . ").

[334] *See Alston*, 141 S.Ct. at 2167–69 (J., Kavanaugh, concurring) (stating that NCAA ought to compensate athletes for labor).

[335] *See, e.g.*, Broshuis, *supra* note 3, at 52–53 (arguing that MiLB are not treated fairly as American workers mostly due to narrative that struggling to make ends meet while working the MiLB is part of what it takes to work in the MLB).

antitrust exemption should be eliminated, and Congress should repeal the SAPA.[336] MiLB players union should negotiate a new salary structure and set standards for fair labor practices. Additionally, the MiLB players union should seek to reform the international player acquisition system to protect international amateur free agents and their families that suffer from the player development structure created by the League.[337]

[336] *See id.* at 96 (discussing antitrust exemption and the detrimental effect on MiLB compensation); Closius & Stephan, *supra* note 35, at 105 (arguing that what remains of the baseball antitrust exemption should be repealed).

[337] *See* Closius & Stephan, *supra* note 35, at 105 (discussing benefits of forming a union); Kalthoff, *supra* note 39, at 353–55 (discussing how MLB practices are largely unregulated in Latin America and the Caribbean and players are treated unfairly by MLB personnel).

RAP AND RICO: EXAMINING WHEN CONSTITUTIONALLY PROTECTED RAP MUSIC IS CRIMINALIZED BY THE RACKETEERING INFLUENCES AND CORRUPT ORGANIZATIONS ACT

Will Duffield[*]

INTRODUCTION

This excerpt from a California District Attorney is from a prosecutor's handbook:

> Perhaps the most crucial element of a successful prosecution is introducing the jury to the real defendant. Invariably, by the time the jury sees the defendant at trial, his hair has grown out to a normal length, his clothes are nicely tailored, and he will have taken on the aura of an altar boy. But the real defendant is a criminal wearing a do-rag and throwing a gang sign. Gang evidence can take a prosecutor a long way toward introducing that jury to that person. Through photographs, letters, notes, and even music lyrics, prosecutors can invade and exploit the defendant's true personality. Gang investigators should focus on these items of evidence during search warrants and arrests.[1]

It reveals a shocking and racist insight into how prosecutors view rap lyrics as nothing more than inculpatory evidence ripe for exploitation. This premise is based upon the racial stereotype of young, Black men's style of dress, presentation, and musical interests. This is undoubtedly a component of the larger disparate impact Black communities face as a consequence of the failed War on Drugs and ever-expanding prison-industrial complex.[2] The use of artistic lyrics in criminal prosecutions

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[1] ALAN JACKSON, PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW, 15–16 (Am. Prosecutors Rsch. Inst. 2004) (emphasis omitted).

[2] *See* Donald F. Tibbs & Shelley Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, 52 WASH. U. J.L. & POL'Y 33, 35, 51 (2016). The number of people in

raises serious ethical and Constitutional concerns.[3] Rap music—a lyric-centric subgenre of hip hop—possesses important social and political significance, particularly to inner-city Black communities.[4] Rap lyrics are full of metaphor, countless linguistic techniques, hyperbole, socio-political commentary, and symbolism.[5] For the most part these lyrics are abstract, artistic, and narrative—the reality they portray cannot be relied upon to be forthright.[6]The First Amendment protects abstract speech, as well as other lyrical themes found in rap such as socio-political commentary and narrative fiction.[7] Thus, it should be unconstitutional to conjure criminal conduct or to claim that the lyrics themselves constitute criminal conduct from these lyrics. Unfortunately, courts have held otherwise.[8]

The federal Racketeering Influenced and Corrupt Organizations Act (hereinafter "RICO"), otherwise known as the crime of being a criminal,[9] essentially criminalizes the forming of an "enterprise" and being involved in federal or state crimes that affect interstate commerce and further the goals of the enterprise.[10] Put simply, RICO criminalizes group racketeering—an organized scheme to collect money by illegal means.[11] There are two types of enterprises targeted by the RICO statute: legal entities (such as businesses) and non-legal entities or groups associated-in-fact.[12] This essay will focus on the latter. Recent Supreme Court precedent, specifically *Boyle v. United States*, has lowered the burden of proof for prosecutors to prove the existence of an association-in-fact enterprise, which today consists of mostly low-level street criminals.[13] *Boyle* announced that prosecutors must prove "a purpose,

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federal prison has increased by more than 790% in the post-Civil Rights era. *See id.* at 35.

[3] *See* U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech.").

[4] *See generally* Akilah N. Folami, *From Habermas to "Get Rich or Die Tryin": Hip Hop, The Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & L. 235 (2007).

[5] *See* Andrea Dennis, *Poetic (In)Justice - Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 20–22 (2007).

[6] *See id.* at 22–23.

[7] *See* Dawson v. Delaware, 503 U.S. 159, 168 (1992); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

[8] *See ,e.g.,* United States. v. Graham, 293 F. Supp. 3d 732, 736, 740–41 (E.D. Mich. 2017).

[9] *See generally* Gerard E. Lynch, *RICO: The Crime of Being a Criminal Parts I and II*, 87 COLUM. L. REV. 661 (1987).

[10] *See id.* at 680–81.

[11] *See* 18 U.S.C. § 1961(1); *Racketeering*, MERRIAM-WEBSTER LEGAL, https://www.merriam-webster.com/legal/racketeering (last visited Apr. 27, 2023).

[12] 18 U.S.C. § 1961(4).

[13] 556 U.S. 938, 948 (2009).

relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[14] Most pertinent to this essay, however, is that *Boyle* allows juries to infer the existence of an association-in-fact enterprise from a pattern of racketeering activity, or in other words, a pattern of criminal activity that supposedly furthers the goals of the enterprise.[15] This essay critiques the use of rap lyrics and rap music videos to establish a pattern of racketeering activity, even though First Amendment protections exist that should protect rap music. Specifically, I argue that prosecutors and courts violate criminal defendants' constitutional rights by admitting abstract lyrics to establish the existence of criminal enterprises in RICO prosecutions.

Through an examination of the federal RICO prosecution of the Detroit-based Seven Mile Bloods ("SMB"),[16] I demonstrate how prosecutors use *Boyle*'s expanded definition of association-in-fact enterprise to admit abstract music lyrics against criminal defendants in RICO prosecutions for their truth through hearsay exemptions, and ask jurors to utilize the substance of the lyrics (which loosely reference what prosecutors refer to as racketeering predicate acts, such as murder and drug trafficking) to infer the existence of an association-in-fact criminal enterprise. The government also argues that the rap lyrics and videos serve the enterprise's purpose by arguing the videos are overt acts that cultivate a reputation of violence to intimidate rivals and witnesses.[17]

While this essay focuses exclusively on the SMB case in the Eastern District of Michigan, this occurrence is not unique to this prosecution. In fact, there are three other roughly concurrent RICO cases where defendants' lyrics were used for the same reasons in the exact same court.[18] I urge that such arguments contravene deeply embedded constitutional principles rooted in the First Amendment rights of freedom of speech and expression. In short, by using these lyrics and videos to establish an element of the RICO offense, prosecutors are criminalizing constitutionally protected speech in a way that creates a disparate impact

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[14] *Id.* at 946.

[15] *See id*.

[16] United States v. Arnold, No. 2:15-CR20652 (E.D. Mich. filed Sept. 26, 2015).

[17] Sixth Superseding Indictment at 10–11, 18–19, 21, *Arnold*, No. 2:15-CR-20652 (E.D. Mich. Jan. 3, 2018).

[18] These cases are the prosecutions of other Detroit groups known as Young N' Scandalous (YNS), 6 Mile Chedda Grove, and Smokecamp/Original Paid Bosses. United States v. Toney, No. 5:17-cr-20184 (E.D. Mich. May 10, 2017); United States v. Mills, No. 2:16-cr-20460 (E.D. Mich. filed Jun 22, 2016); United States v. Sanders, No. 2:17-cr-20740 (E.D. Mich. Nov. 1, 2017). These cases were originally part of this essay but were scrapped for redundancy. However, it is important to recognize that the SMB Case is not unique even among its own Federal District Court.

on Black communities in which rap music and lyrics are culturally significant forms of art and socio-political commentary.

In the SMB case, the prosecutors introduce the lyrics not with the purpose of proving what the lyrics declare, but rather for the purpose of establishing an independent pattern of criminal activity.[19] As such, the "pattern of criminal activity" the government evinces is nothing more than vague and generic references to drugs, violence, and criminal activity.[20] This pattern functions as potentially crucial evidence in proving the existence of a criminal enterprise under RICO.[21] As a result, lyrics that are constitutionally protected artistic expression, fictional narrative, or social or political commentary are directly used to establish criminal elements of RICO.[22] This essay does not argue that all lyrics should be protected. Prosecutors alleging that lyrics refer to facts, motive, or intent of a specific criminal act they believe the defendant committed is different from prosecutors alleging that generalized lyrics about guns, drugs, and murder are evidence of a pattern of *independent criminal activity* of the musicians who wrote or sung the songs.[23] It is unconstitutional to allege the rap lyrics are evidence of a pattern of racketeering without any significant factual nexus connecting the specific lyrics to the alleged specific criminal activity of the defendant.[24] A factual nexus connecting the lyrics to the criminal activity is necessary, otherwise the criminalization of the lyrics may result in a chilling effect on otherwise protected speech.[25]

This paper will proceed in four sections. In section one, I discuss the factual background of the SMB case. Here, I will describe the factual background of the case and the government's arguments to establish the problem of admitting rap lyrics as evidence in RICO cases. In section two, I explain RICO's origins and legislative history, the language of the statute, the elements of RICO, and most importantly its expansion through Supreme Court cases *United States v. Turkette* and *Boyle.* Further, I will discuss the overwhelming evidence that suggests RICO's scope has surpassed its original intent. In section three, I explain the protections afforded by the First Amendment and how rap music fits within the scope of these protections when no factual nexus can connect the lyrics to specific criminal activity. Finally, in section four I explain how the use of rap lyrics and rap videos in the SMB case to prove the

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[19] *See* discussion *infra* Part IV.
[20] *See* discussion *infra* Part IV.
[21] *See* discussion *infra* Part IV.
[22] *See* discussion *infra* Part IV.
[23] *See* discussion *infra* Part IV.
[24] *See* discussion *infra* Part IV.
[25] *See* discussion *infra* Part IV.

existence of an association-in-fact enterprise through a pattern of racketeering activity criminalizes First Amendment protected speech. The SMB case acts as a prime example in which I will closely examine the introduced lyrics and videos, the unconstitutional government arguments supporting their admittance into evidence, and court treatment of the lyrics. In this section I will also consider and address counter arguments to my thesis. This section also examines when lyrics and music videos could be constitutionally admissible in RICO prosecutions and when they should not be.

I. INTRODUCING THE PROBLEM: THE SEVEN MILE BLOODS CASE, FACTUAL BACKGROUND AND PROSECUTOR THEORIES

The SMB case *United States v. Arnold* exemplifies when the expanded scope of RICO crosses paths with rap lyrics and videos.[26] The expansion of RICO will be explained later. For now, it is important to focus on the lyrics and videos the government introduced and why the government introduced them. The case involves a group known as the Seven Mile Bloods.[27] The Seven Mile Bloods, or SMB, was a group that existed on Detroit's northeast neighborhood in the ZIP code 48205.[28] This area is also known as 4820-Die, or the Red Zone.[29] The federal government indicted twenty-one members of SMB and alleged a litany of violent and drug-related crimes, including RICO conspiracy, violence in aid of racketeering, and murder.[30] The federal government alleged that the group used drug houses and shared workers to sell cocaine, heroin, marijuana, codeine promethazine, and pills and also ran an extensive opiate pipeline from Detroit to West Virginia.[31] SMB is most notoriously known to have posted hitlists of rival gang members on Instagram during the violent Detroit summer of 2014.[32] The government alleged that the group consisted of an association-in-fact enterprise and that the purposes of SMB were to keep victims in fear, preserve power through

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[26] United States v. Arnold, No. 2:15-CR20652 (E.D. Mich. filed Sept. 26, 2015).

[27] Sixth Superseding Indictment, *supra* note 17 at 3.

[28] Robert Snell, *The Red Zone: Inside Detroit's Deadly Gang Wars,* DETROIT NEWS, https://www.detroitnews.com/story/story-series/death-by-instagram/2018/04/22/detroit-gang-war-red-zone/432776002/ (Apr. 23, 2018, 1:39 PM).

[29] *Id.*

[30] Fifth Superseding Indictment at 7–9, United States v. Arnold, No. 2:15-CR-20652 (E.D. Mich. Oct. 14, 2017).

[31] *Id.*at 5.

[32] *See* Robert Snell,*'Got 'Em',* DETROIT NEWS, (Apr. 24, 2018, 6:00 PM), https://www.detroitnews.com/story/story-series/death-by-instagram/2018/04/24/detroit-gang-wars-laughing-emojis-ar-15-search/439092002/.

intimidation, promote and enhance the enterprise and its members, and maximize profits through illegal activity.[33]

In the SMB case, the government used rap lyrics and videos as evidence to establish the existence of a criminal enterprise under the RICO statute (which will be explained later).[34] More pertinently, the government introduced the lyrics to establish evidence of a pattern of racketeering activity and included the publication of the rap songs as overt acts of racketeering (meaning the videos themselves were activities that furthered the purpose of the enterprise).[35] The government sought to introduce lyrics, as well as music videos they intended to play for a jury.[36] Most of the songs are from unobtrusive Detroit rappers Hardwork Jig, Cocaine Sonny (also known as Hardwork Sonny), and RO Da Great.[37]

The government argued that it was important to admit the songs and lyrics and gave two prominent reasons: the songs and videos make the existence of the SMB enterprise and the enterprise's racketeering activity more probable and the tracks explain the purpose and goals of the alleged SMB enterprise, which, according to the government was "to maximize profits through narcotics trafficking and violence, and the means the SMB enterprise uses to accomplish its goals, including violence and threat of violence against witnesses and rival gang members."[38] The government alleged that the rap lyrics and music videos were evidence of a pattern of racketeering activity, revealed the enterprise's purpose (such as selling drugs and committing violent crimes), and *actually functioned as a purpose of the enterprise itself* by intimidating potential witnesses and rival gang members.[39] For example, the government argued that the song "Murda" by Cocaine Sonny talks about the existence of the Seven Mile Blood, or 55, the Red Zone, and the gang's engagement in racketeering activity including murder, drug distribution, and witness intimidation.[40] The government contends the song is also a threat to rivals and snitches."[41] Some of the lyrics ascribed to are:

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[33] Fifth Superseding Indictment, *supra* note 30, at 7.

[34] Sixth Superseding Indictment, *supra* note 17, at 10, 17–19.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Government's Response to Motion to Preclude the Government's Use of Rap Lyrics and Rap Videos at Trial at 7–8, United States v. Graham, No. 2:15-CR-20652 (E.D. Mich. Aug. 15, 2017).

[39] Fifth Superseding Indictment, *supra* note 30, at 7, 11, 17–19.

[40] Government's Supplemental Briefing at 3, *Graham*, No. 2:15-CR-20652 (E.D. Mich. Feb. 10, 2018).

[41] Exhibit A to Government's Supplemental Briefing at 3, *Graham*, No. 2:15-CR-20652 (E.D. Mich. Feb. 10, 2018).

> In the hood where I'm from, little ******[42] they murder. . . . Every night and day, another ***** get murder[ed]. . . . Through the gun smoke, all you smell is murder. . . . . Red zone bitch with [UI][43] a place where you get your toe tag is random Heard this bitch I had to sample, ****** still mad from past example. . . . Still ride around with extended clips, don't squash shit we finish shit / My hood, my squad, I'm in this shit. . . . Disrespect and I'll murk ya / All you hearin is gunshots, all you smellin is gun smoke, / You ain't ready for gun war, what you carry a gun for? / We don't get down to snitching, don't need no murder witness / If a ***** start snitching, guaranteed he be missing . . . .[44]

Another song's lyrics:

> Where I'm from it's all bad, ****** getting killed, / It's getting hard to find dope, so ****** flipping pills, scripts. . . . I'm from the Red Zone ***** where we quick to shoot, pow/ it's all bad over here, we ain't got shit to lose. . . . Everybody in my neighborhood claiming red. . . . Bag life boy bitch yea ***** trappin, what up doe . . . .[45]

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[42] The lyrics in this song and several other songs quoted throughout this article contain frequent use of a racial epithet. The University of Denver Sports and Entertainment Law Journal does not publish epithets, even when quoted, unless their use is critical to the analysis in the article. As such, this term has been omitted and designated with asterisks in lyrics throughout this article.

[43] UI means unintelligible. The government was not able to understand the lyrics.

[44] Exhibit A to Government's Supplemental Briefing, *supra* note 41, at 1–3; SUPPARAY, *HARDWORK SONNY FT BERENZO & BLOCK-MURDER (Dir. by Supparay),* YOUTUBE (Feb. 20, 2014), https://www.youtube.com/watch?v=C1PXrUiId5c.

[45] *See* Exhibit B to Government's Supplemental Briefing at 1–2, *Graham*, No. 2:15-CR-20652 (E.D. Mich. Feb. 10, 2018); SUPPARAY, *HardWork Jig - Welcome to Hob City intro (Dir. by Supparay*), YOUTUBE (Mar. 8, 2013), https://www.youtube.com/watch?v=pQsWtn1DJHw&t=15s.

The lyrics are generic and vague in their reference to gun violence, murder, and drug distribution, but the government does not use the lyrics to prove the criminal activity of gun violence, murder, or drug distribution.[46] Instead, the government uses the lyrics as evidence of a generalized 'pattern of racketeering activity' that can be used as evidence for the existence of a criminal enterprise.[47]

Section four will illustrate that rap music, even violent 'gangsta rap' like this, should be protected by the First Amendment because the speech is an abstract, artistic expression of violent and impoverished inner-city life. In many cases, rap lyrics like those quoted above, are narrative fiction that directly portrays pertinent political and social commentary of the Black experience in inner-city 'hoods.'[48] Unless the government can prove otherwise by, for example, establishing a close nexus between events mentioned in the songs and real-world criminality, the introduction of criminal defendants' rap lyrics against them at trial tramples upon their freedom of expression and stifles the free speech rights of others who engage in similar forms of artistic reflection.[49] The government did not allege the lyrics from the song "Murda" should be used as evidence to convict the rapper-declarants of murder, but rather the government alleged the song is evidence of a pattern of violent crime, or a pattern of racketeering activity.[50] Furthermore, a component of this racketeering activity is the threatening speech the songs allege to purport toward rivals and potential witnesses, yet no defendant in the SMB case is charged with making terroristic threats.[51]

Since Federal Rules of Evidence allow the lyrics to be admitted,[52] juries can use the lyrics to find a pattern of racketeering activity and thus infer the requisite elements of RICO.[53] Additionally, the government can argue the violent nature of the lyrics is a function of the group (intimidating rivals and witnesses).[54] Thus, the arguably

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[46] *See* Government's Supplemental Briefing, *supra* note 40, at 2.

[47] *See* Government's Response to Motion to Preclude the Government's Use of Rap Lyrics and Rap Videos at Trial, *supra* note 38, at 9.

[48] *See* Dennis, *supra* note 5, at 13–14 (discussing the narrative properties of rap lyrics).

[49] *See id.* at 25–27 (discussing similar mediums of narrative fiction).

[50] Exhibit A to Government's Supplemental Briefing, *supra* note 41, at 3–4.

[51] Fifth Superseding Indictment, *supra* note 30, at 5–11 (bringing RICO claims against all defendants and asserting the rap videos are overt acts of the RICO conspiracy).

[52] Fed. R. Evid. 801.

[53] *See* 18 U.S.C. § 1962.

[54] *See* 18 U.S.C. § 1961 (outlining the definition of "enterprise" in RICO charge to include "any union or group" of individuals).

fictitious nature of the lyrics as well as the lyrics' violent characteristics were used by the government to establish key elements of RICO—a notion that violates key principles of First Amendment protection of social and political commentary, narrative fiction, and artistic expression as explained in section three. Section four will apply the First Amendment arguments to the SMB case and explain why the introduction of rap music in the case violated the defendant's First Amendment rights.

This case represents the problematic practice of using abstract rap lyrics to establish key criminal RICO elements.[55] But how did we get here? One must understand that for the most part rap lyrics are abstract and that the lyrics cannot be readily relied upon for veracity.[56] The abstract and narrative nature of the lyrics as well as the socio-political commentary of rap award the lyrics First Amendment protection when no factual nexus can connect specific lyrics to the alleged specific criminal acts.[57] But first, it's important to understand RICO, how it has undoubtedly been expanded beyond its original intent, and how this expansion has paved the way for prosecutors to establish association-in-fact enterprises in a manner that violates defendants' core constitutional rights.

II. RICO: THE CRIME OF BEING A CRIMINAL

A. The Act's History: From Antitrust to Anti-Crime

The Racketeer Influenced and Corrupt Organizations Act, or RICO Act, was enacted in 1970 as part of the Organized Crime Control Act.[58] Prior to its passage, Congress had taken notice of the criminal infiltration of legitimate businesses as early as the 1950s.[59] Typically, after a legitimate business had been infiltrated, illegal methods such as extortion or usury were employed to retain unfair advantages over legitimate businesses.[60] By the 1960s, the US government noticed

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[55] *See generally* Sixth Superseding Indictment, *supra* note 17, at 4–13.

[56] *See* Dennis, *supra* note 5, at 14–16 (discussing the trouble with presuming rap lyrics are true statements that can be used as evidence).

[57] *Id.* at 24–25 (discussing the expressive nature of rap lyrics alongside other works of narrative fiction); *see also* U.S. Const. amend. I.

[58] Toby D. Mann, *Legislative History of R.I.C.O.*, *in* 1 TECHS. IN THE INVESTIGATION & PROSECUTION OF ORGANIZED CRIME 58, 79 (G. Robert Blakey ed., 1980).

[59] *Id*. at 60.

[60] PRESIDENT'S COMM. ON L. ENF'T & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY, 190 (1967) ("The ordinary businessman is hard pressed to compete with a syndicate enterprise.").

criminal organizations had taken ahold of labor unions as well.[61] The federal government was becoming acutely aware of the massive and complex Italian-American crime family Cosa Nostra—an organization that was behind the infiltration of various legitimate businesses and labor unions.[62]

The United States government initially relied on antitrust laws to combat the increasingly powerful criminal organizations.[63] However, antitrust laws were designed to maintain competition, not battle the activities of violent criminal organizations.[64] In 1967, Senate bills 2048 and 2049 recommended additions to the Sherman Antitrust Act to combat the growing threat of organized criminal syndicates.[65] Neither of the bills were adopted but they played an important role in formulating what eventually became the RICO Act.[66] Congress believed a new independent criminal statute would allow a more flexible approach to attacking criminal syndicates than any antitrust statutes could offer.[67]

Senate Bill 30, which would eventually become the RICO Act, was crafted by the Senate in 1969 and approved almost unanimously.[68] Yet, during this process, the bill was no stranger to controversy.[69] The American Civil Liberties Union quickly took note of the bill's broad scope and lobbied complaints to the bill's Senate Subcommittee.[70] The

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[61] *Id.* ("Control of labor supply and infiltration of labor unions by organized crime prevent unionization of some industries, provide opportunities for stealing from union funds and extorting money by threats of possible labor strife, and provide funds for the enormous union pension and welfare systems for business ventures controlled by organized criminals.").

[62] *History of La Cosa Nostra*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/investigate/organized-crime/history-of-la-cosa-nostra (last visited Nov. 3, 2022).

[63] *See, e.g., L.A. Meat & Provision Drivers Union Local 626 v. United States*, 371 U.S. 94, 95–96 (1962); *see also United States v. Pa. Refuse Removal Ass'n*, 357 F.2d 806, 807 (3d Cir. 1966).

[64] *See Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 43 (1930) (citing *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 388 (1923)). The Sherman Act was designed to prevent the restraint of market competition in legitimate commerce. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Apr. 6, 2023).

[65] G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies,* 53 TEMP. L.Q. 1009, 1015–16 (1980).

[66] *Id.* at 1016–17.

[67] *Id.*

[68] *Id.* at 1019.

[69] *See id*. at 1020.

[70] *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Crim. L. & Procs. of the Comm. on the Judiciary*, 91st Cong. 475 (1969) (statement of Lawrence Speiser, Director, Wash. Office, Am. C.L. Union) ("First and foremost, we

Association of the Bar of the City of New York expressed concerns about the scope as well, claiming the "pattern of racketeering" element of the bill was too extensive and may harm innocent business owners.[71] However, the Senate declined to ask for a conference regarding the House's review of the Bill and rushed to pass the Organized Crime Control Act to battle the infiltration of business by organized criminal syndicates.[72] The legislative history reveals that some members of Congress were also fearful about RICO's expansiveness before its enactment.[73] The statute was clearly designed to protect legitimate businesses from mob interference, not throw low level street criminals in jail.[74]

B. The Statute

The RICO Act has both a private civil suit provision and the more commonly known criminal provision.[75] The sizable RICO statute essentially criminalizes illegal activity that aims to further the goals of an organization or enterprise.[76] The illegal activity targeted by the RICO statute is known as "racketeering."[77] Racketeering activity, also known as predicate acts, include a litany of acts that would be illegal if performed in isolation, but when they are performed to further an enterprise's purpose, they are characterized as predicate acts for the purpose of a RICO suit.[78] These acts include both state offenses and federal offenses.[79]

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are concerned by the enormous and virtually unlimited breadth of the criminal provisions of the proposed legislation.").

[71] *Organized Crime Control: Hearings Before Subcomm. No. 5 of the Comm. on the Judiciary,* 91st Cong. 370 (1970) (statement of Sheldon H. Elsen, Chairman, Comm. on Fed. Legis., Ass'n of the Bar of the City of N.Y.) ("[W]e have to take a look and see how broad this provision of 'pattern of racketeering activity' is. I think if you will look at the underlying crimes which are involved, it would seem to apply to a theft from an interstate shipment, regardless of the value of the property stolen, and unlawful use of a stolen telephone credit card - the "Mom and Pop" variety of illegal gambling business, the local numbers place, a securities fraud case, practically any State or Federal felony or misdemeanor involving drugs, including marihuana. We think that it is too broad, particularly when you consider you are dealing with a person's opportunity to engage in business as a result of having been involved in any of the acts which are defined as comprising part of 'a pattern of racketeering activity.'").

[72] *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901, 84 Stat. 941 (codified as 18 U.S.C. §§ 1961-1968).

[73] *See, e.g.,* Mann, *supra* note 58, at 90–91.

[74] *Id*. at 92.

[75] 18 U.S.C. §§ 1963–1964.

[76] *See* 18 U.S.C. §§ 1961–1968.

[77] *See* 18 U.S.C. § 1962.

[78] *See* 18 U.S.C. § 1961(1).

[79] *Id.*

The following are common racketeering predicate offenses: murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, dealing in a controlled substance, bribery, fraud, embezzlement, obstruction of justice, witness intimidation, forgery, human trafficking, extortion, illegal gambling, and more.[80] The Congressional Research Service provides a helpful summary of the statute:

> In simple terms, RICO condemns
> (1) any person
> (2) who
> (a) uses for or invests in, or
> (b) acquires or maintains an interest in, or
> (c) conducts or participates in the affairs of, or
> (d) conspires to invest in, acquire, or conduct the affairs of
> (3) an enterprise
> (4) which
> (a) engages in, or
> (b) whose activities affect, interstate or foreign commerce
> (5) through
> (a) the collection of an unlawful debt, or
> (b) the patterned commission of various state and federal crimes.[81]

In addition to proving the existence of an enterprise, the government must prove that an individual engaged in at least two predicate acts of racketeering.[82] The government must also prove that the enterprise affected interstate commerce.[83] Congress also instructed that RICO should be liberally construed to effectuate its remedial purposes.[84] However, the government's burden of establishing the existence of an

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[80] 18 U.S.C. §§ 1961–1962. While these offenses are illegal when committed in isolation, these acts become racketeering acts when committed to further the criminal conspiracy of an organization. *See id.*

[81] CHARLES DOYLE, CONG. RSCH. SERV., 96-950, RICO: A BRIEF SKETCH 1–2 (2021).

[82] 18 U.S.C. § 1961(5).

[83] 18 U.S.C. § 1962.

[84] Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947.

'enterprise' is the focal point of most criminal RICO cases and is the focal point of this essay, particularly a pattern of racketeering activity.[85]

C. What Is an Enterprise?

One critical element the government must prove is the existence of an "enterprise."[86] 18 U.S.C. § 1961(4) defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[87] There are two types of enterprises recognized both by statute and case law: enterprises that are legal entities and enterprises that are associations-in-fact.[88] Legal entity enterprises have historically consisted of businesses[89] and labor unions,[90] but have also included other business-like entities such as law enforcement agencies[91] and government organizations.[92] Plaintiffs in civil RICO cases do not have a difficult burden when proving the existence of an enterprise; the plaintiffs must merely show proof of the entity's legal existence.[93] However, an association-in-fact enterprise is one that is "associated in fact though not a legal entity."[94] But what does this mean exactly?

D. Association-in-Fact Enterprises Under Turkette *and Subsequent Expansion After* Boyle

While the RICO statute mentions RICO could apply to groups that were "associated in fact though not a legal entity,"[95] the majority of the law governing association-in-fact enterprises is case law.[96] *United States*

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[85] *See, e.g.*, H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 232–33 (1989).

[86] 18 U.S.C. § 1962(c).

[87] 18 U.S.C. § 1961(4).

[88] *See id.*

[89] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Pointe Physical Therapy, LLC, 107 F. Supp. 3d 772, 784 (6th Cir. 2015).

[90] United States v. Scotto, 641 F.2d 47, 52 (2d Cir. 1980) ("The term 'enterprise' includes 'any union.'"), *overruled on other grounds by* Napoli v. United States, 45 F.3d 680 (2d Cir. 1995).

[91] *See, e.g.*, United States v. Casamayor, 837 F.2d 1509, 1511 (11th Cir. 1988) (finding members of the Key West Police Department in Florida to be a criminal enterprise).

[92] *See, e.g.*, United States v. Frumento, 563 F.2d 1083, 1092 (3d Cir. 1977) (holding that the state Bureau of Cigarette and Beverage Taxes operated as a criminal enterprise within the meaning of §1961(4)).

[93] Webster v. Omnitrition Int'l, Inc., 79 F.3d 776, 786 (9th Cir. 1996).

[94] 18 U.S.C. §1961(4).

[95] *Id*.

[96] *See generally* United States v. Turkette, 452 U.S. 576 (1981).

v. Turkette set important precedent concerning what type of defendants RICO could target.[97] *Turkette* involved a group of individuals who were convicted by a jury of violating the RICO Act.[98] The government alleged the group committed multiple arsons, defrauded insurance companies, bribed or attempted to bribe police officers, and attempted to violate state law regarding court proceedings.[99] The First Circuit Court of Appeals reversed the jury conviction, stating that Congress did not intend RICO to categorize exclusively criminal groups as enterprises.[100] But the Supreme Court disagreed and reversed the appellate court's decision.[101] Justice Byron White, writing for the majority, explained that in criminal RICO cases the government only has to prove the defendants are "associated together for a common purpose engaging in a course of conduct."[102] *Turkette* also explained that these types of prosecutions require the government to establish that a criminal enterprise exists as a distinct element from the racketeering element.[103] The Court, however, stated that the enterprise element and racketeering activity element may "coalesce," and failed to specify just how much structure is necessary to establish an enterprise.[104] Because of this, circuit courts have differed "on the degree of proof necessary to establish the existence of an enterprise that is sufficiently distinct and separate from the underlying pattern of racketeering."[105] The Supreme Court addressed this confusion left in the wake of *Turkette* in 2009.[106]

Boyle v. United States involved a group of bank robbers who were convicted of violating RICO by a jury in the Second Circuit.[107] Boyle was an on and off member of the group and disputed whether the group could be considered an association-in-fact enterprise.[108] Boyle asked the judge to inform the jury they must find that the enterprise had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate

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[97] *Id.*

[98] *Id.* at 578–79.

[99] *Id*. at 579.

[100] *Id*. at 576.

[101] *Id*. at 577.

[102] *Id*. at 583.

[103] *Id*. ("The existence of an enterprise at all times remains a separate element [from the pattern of racketeering activity element] which must be proved by the Government.").

[104] *Id.*

[105] Sean M. Douglass & Tyler Layne, *Racketeer Influenced and Corrupt Organizations,* 48 AM. CRIM. L. REV. 1075, 1090 (2011).

[106] Boyle v. United States, 556 U.S. 938 (2009).

[107] *Id.* at 940.

[108] *Id*. at 941–42.

acts.[109] The district court refused to instruct the jury that they needed to find a hierarchal structure of the group, and the jury ultimately found Boyle violated RICO. [110] The U.S. Court of Appeals for the Second Circuit affirmed the conviction.[111]

The Supreme Court affirmed.[112] The Court held that an association-in-fact enterprise must have a structure, but the jury instructions do not need to include the term structure.[113] *Boyle* clarified to the circuits that the government need only prove three elements of an association-in-fact enterprise: a purpose, relationships among enterprise participants, and longevity to complete the enterprise's purpose.[114]

The *Boyle* Court reaffirmed that the existence of an enterprise is distinct from the pattern of racketeering, but evidence to prove either "may in particular cases coalesce."[115] *Boyle* effectively broadened the scope of association-in-fact enterprises.[116] Thus, *Boyle* affirmed that "proof of a pattern of racketeering activity may be sufficient in a particular case to permit a jury to infer the existence of an association-in-fact enterprise."[117]

Boyle is seen by many as an expansion of RICO beyond its intended purpose.[118] Perhaps the problematic effect of *Boyle* is best explained in its dissent written by Justice John Paul Stevens.[119] Justice Stevens explains that:

> The trial judge in this case committed two significant errors relating to the meaning of [the term "enterprise"]. First, he instructed the jury that "an association of individuals, without structural hierarchy, form[ed] solely for the purpose of carrying out a pattern of racketeering acts" can constitute an enterprise. And he allowed the jury to find that element satisfied by evidence showing a group of criminals with no existence beyond its intermittent commission of racketeering acts and related offenses.

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[109] Randy D. Gordon, *Clarity and Confusion: RICO's Recent Trips to the United States Supreme Court*, 85 TUL. L. REV. 677, 704 (2011) (quoting *Boyle*, 556 U.S. at 943).

[110] *Boyle,* 556 U.S. at 943.

[111] *Id*.

[112] *Id.* at 941.

[113] *Id*. at 946.

[114] *Id*. at 941.

[115] *Id*. at 947 (citing United States v. Turkette, 452 U.S. 576, 583 (1981)).

[116] *See id.* at 946–47.

[117] *Id*. at 951.

[118] *See id.* at 952 (Stevens, J., dissenting).

[119] *Id.*

> Because the Court's decision affirming petitioner's conviction is inconsistent with the statutory meaning of the term enterprise and serves to expand RICO liability far beyond the bounds Congress intended, I respectfully dissent.[120]

Stevens explains that 18 U.S.C. § 1961(4)—the RICO statutory text that criminalizes any "union or group of individuals associated in fact although not a legal entity"—requires a commonality to exist between legal entity enterprises and association-in-fact enterprises.[121] However, the only difference between the two is that an association-in-fact enterprise lacks any "legally defined structural forms such as a business corporation."[122] Essentially, Stevens argued that the majority eliminated the enterprise element from the RICO Act by allowing the existence of an enterprise to be *inferred* from a pattern of racketeering activity.[123] Stevens believed this was an impermissible expansion of the RICO Act[124] and, to quote an earlier Supreme Court RICO case, "appl[ied] RICO to new purposes that Congress never intended."[125] While Stevens may not have anticipated the expansion of RICO to result in an infringement of First Amendment rights, the introduction of rap lyrics to establish a pattern of racketeering activity exemplifies *Boyle's* dangerous expansion of RICO's association-in-fact component.

III. THE FIRST AMENDMENT AND RAP MUSIC

A. Rap Lyrics are a Form of Artistic Expression and Inferring Criminal Elements from Them Violates First Amendment Protections

The First Amendment of the United States Constitution protects a citizen's freedom of speech.[126] While the First Amendment does not provide all-encompassing protection, there are many important types of speech that are protected.[127] The First Amendment is designed to prevent

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[120] *Id*. (citations omitted).

[121] *Id.*

[122] *Id*. at 953 (quoting Limestone Dev. Corp. v. Village of Lemont*,* 520 F.3d 797, 804–05 (7th Cir. 2008).

[123] *Id.* at 957.

[124] *Id.* at 959.

[125] Reves v. Ernst & Young, 507 U.S. 170, 183 (1993).

[126] U.S. CONST. amend. I.

[127] *Why You Should Care About the First Amendment*, FREEDOM FORUM INST., https://www.freedomforum.org/the-first-amendment/why-you-should-care-about-the-first-amendment/#FA9 (last visited Nov. 19, 2022) (explaining that the First

government censorship of freedom of expression.[128] However, speech that threatens, incites violence, causes mass panic, intentionally deceives, or defames is not protected by the First Amendment.[129] For this essay, the relevant types of speech that are protected by the First Amendment are artistic expressions and public speech that relates to social, political, or community matters, as well as narrative fiction.[130]

The Supreme Court has ruled that the First Amendment extends to "artistic expression" such as literature, poetry, and music.[131] The First Amendment shields protected artistic expression from private litigation, statutory restrictions, and criminal penalties.[132] The New Jersey Supreme Court case *State v. Skinner* exemplifies a case where the defendant's rap lyrics were improperly admitted into evidence.[133] In *Skinner,* Vonte Skinner was arrested for attempted murder.[134] The prosecution entered into evidence several handwritten hardcore rap lyrics written by Skinner.[135] The state argued that the lyrics were not to prove that Skinner was a deplorable person, but rather the lyrics shed light on the "defendant's motive and willingness to resort to violence."[136] Yet, none of the lyrics made reference to the victim or any specific facts related to the event in question.[137] While the New Jersey Supreme Court vacated Skinner's conviction, the court did so under the theory that the introduced lyrics were more prejudicial than probative, and not because the "fictional form[] of inflammatory self-expression" should be protected under the First Amendment.[138] However, the court added that "writing rap lyrics—even disturbingly graphic lyrics, like defendant's—is not a crime."[139] Yet, there are sociological scholarly arguments that rap music should

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Amendment does not protect true threats, fighting words, intentionally false statements, and more).

[128] *See id.*

[129] *Which Types of Speech Are Not Protected by the First Amendment?*, FREEDOM FORUM INST., https://www.freedomforuminstitute.org/about/faq/which-types-of-speech-are-not-protected-by-the-first-amendment/ (last visited Mar. 12, 2022).

[130] *See, e.g.,* Elonis v. United States, 575 U.S. 723 (2015); Snyder v. Phelps, 562 U.S. 443 (2011); Am. Postal Workers Union v. United States Postal Serv., 830 F.2d 294 (D.C. Cir. 1987).

[131] *See* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989); *see also* Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Boston, 515 U.S. 557, 569 (1995).

[132] *See* N.Y. Times Co. v Sullivan, 376 U.S. 254, 277–78 (1964); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 n.51 (1982).

[133] State v. Skinner, 95 A.3d 236 (2014).

[134] *Id*. at 238.

[135] *Id.*

[136] *Id.* at 244.

[137] *See id.* at 241; *see also* Tibbs & Chauncey, *supra* note 2, at 55.

[138] *Skinner*, 95 A.3d at 238–39.

[139] *Id*. at 249.

generally be protected by the First Amendment, as will be examined below.[140]

The commercialization of the rap music industry, and the 'rapper' monolith created by this commercialization, necessitate First Amendment artistic expression protection of rap lyrics.[141] From N.W.A to Jay-Z, hip hop and rap have been in the mainstream limelight since the 1980s.[142] By 2017, rap eclipsed rock as the most popular genre of music.[143] To reach this level of success, however, record labels focused on creating imagery and lyrics that supported their own financial viability.[144] As Andrea Dennis explains, this commercialization forces rappers to favor monetary aims over truth and authenticity, which results in "a monolithic image of rappers as violent, drug-involved, misogynistic thugs and criminals . . . ."[145] Thus, amateur rappers respond to this 'monolith' and try to replicate it with hopes of obtaining fame and fortune.[146] In doing so, the imagery and narratives created by these rappers are not necessarily truthful.[147] The lyrics may be a fabricated product created to entertain the widest possible audience.[148] Furthermore, rap music's employment of poetic rap conventions such as metaphors, wordplay, collective knowledge, intentional mispronunciations, semantic inversion (reversion of a word's meaning), neologism (invention of new words), roleplay, and boasting bolster the argument that the rap lyrics are undoubtedly a form of artistic expression.[149] Thus, it is a violation of First Amendment protection of artistic speech to use the lyrics as evidence of general criminal activity, or more specifically, in this case, a pattern of racketeering activity without connecting the lyrics with a factual nexus to specific criminal activity.

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[140] *See, e.g.*, Erin Lutes et al., *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77, 83–84 (2019).

[141] Dennis, *supra* note 5, at 16–17, 40.

[142] *See* Lutes et al., *supra* note 140, at 77.

[143] *See id.*

[144] Dennis, *supra* note 5, at 16.

[145] *Id.* at 16–17.

[146] *Id*.

[147] *Id.* at 17.

[148] *Id.* at 19.

[149] Brief of the Marion B. Brechner First Amend. Project & Rap Music Scholars (Professors Erik Nielson and Charis E. Kubrin) as Amici Curiae Supporting Petitioner at 10–11, Elonis v. United States, 575 U.S. 723 (2015) (No. 13-983) [hereinafter Marion B. Brechner First Amend. Project & Rap Music Scholars Amicus Brief].

B. The Origins and Characteristics of Rap Music Reveal Important Artistic, Social and Cultural Significance for Black, Inner-city Communities, thus Requiring Protection under the First Amendment

Speech on matters of social, political, or public concern is at the heart of First Amendment protection.[150] In *Snyder v. Phelps,* a case involving the infamous Westboro Baptist Church protesting the funerals of a dead veteran with heinous messages about recently deceased United States servicemembers, the Supreme Court held that public speech that relates to social, political, or other community concerns is protected by the First Amendment.[151] Social and political commentary is among "the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[152] Speech deals with social, political, or other matters of public concern when it is subject to general interest of public value or concern.[153] Furthermore, this type of speech is still protected even when the speech is of an arguably inappropriate or controversial nature.[154] In *Snyder,* the Westboro Baptist Church displayed repugnant signs outside a fallen soldier's funeral service.[155] However, the Supreme Court held that "[w]hile these messages may fall short of refined social or political commentary, the issues they highlight. . . . are matters of public import."[156] Rap music should be afforded similar socio-political protection since rap music has deep roots in the notion of "the failure of White civil society to protect [Black Americans] from the historical, social, emotional, and legal violence of American day-to-day life."[157]

The socio-political importance of Rap music is made clear through an analysis of its history.[158] Rap music is a lyrical-centric subgenre of hip hop.[159] Hip hop was developed by inner city African Americans and Latinos and was a medium for political and social commentary based upon their daily lives, economic struggles, deterioration of inner cities, deindustrialization, and a rise in mass incarceration.[160] Both rap and hip hop developed as products of "the

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[150] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985).

[151] Snyder v. Phelps, 562 U.S. 443, 454 (2011).

[152] *Id*. at 452 (quoting Connick v. Meyers, 461 U.S. 138, 145 (1983)).

[153] *Id*. at 453.

[154] *Id*. (citing Rankin v. McPherson, 483 U.S. 378, 387 (1987)).

[155] *Id*. at 448.

[156] *Id.* at 454.

[157] Tibbs & Chauncey, *supra* note 2, at 58.

[158] *See* Marion B. Brechner First Amend. Project & Rap Music Scholars Amicus Brief, *supra* note 149, at 3.

[159] *See id.* at 6.

[160] *Id*.

combined effects of poverty, unemployment, and isolation from mainstream America," where "the physical landscape mirrored the hopelessness faced by its residents."[161] Rap developed as a verbal subcomponent of hip hop that focused on storytelling, exaggeration, wordplay, and metaphor.[162] Both hip hop and rap have "historically functioned as a musical form that, through invented stories and characters, draws attention to a variety of pressing social issues, particularly those facing disadvantaged urban communities."[163] An example of this from the SMB case is the songs "Mikey and Jonny Story, Pt. 1" and "Mikey and Jonny Story, Pt. 2" by Hardwork Sonny.[164] The songs are a fictional narrative that follow the story of two inner-city youths who grow up in troubled households that were negatively affected by drug addiction and incarceration.[165]

There is no question that rap has drawn criticism from mainstream Anglo-Saxon America—particularly subgenres of rap known as hardcore rap or "gangster/gangsta rap."[166] Hardcore rap, which is the primary subject of this essay, developed in the 1980s and expressed the deindustrialization of big cities and the effect of crack economies in these cities.[167] Gangsta rap draws on the African American storytelling tradition of the "bad man," a trope found in African American poetry since the 1800s.[168] Hardcore rap often contains explicit themes of "toxic masculinity, misogyny, homophobia, illicit substances, gang culture, violence, and other criminal activities."[169] However, the genre also offers themes of "respectful resistance, self-work, empowerment, and community in the face of racial injustice and socioeconomic struggles."[170] Gangsta rap "has allowed young men and women of color to create a poetic universe in which they are masters of their

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[161] *Id.*

[162] *Id.* at 3.

[163] *Id.* at 12.

[164] COCAINE SONNY, *Mikey & Jonny Story, Pt. 1*, *on* MONEY, DESIRE, REGRET (Hard Work Ent. 2014) (downloaded from iTunes); COCAINE SONNY, *Mikey & Jonny Story, Pt. 2*, *on* MONEY, DESIRE, REGRET (Hard Work Ent. 2014) (downloaded from iTunes).

[165] *Mikey and Jonny Story, Pt. l*, *supra* note 164; *Mikey and Jonny Story, Pt. 2*, *supra* note 164.

[166] Lutes et al., *supra* note 140, at 79.

[167] Leola Johnson, *Silencing Gangsta Rap: Class and Race Agendas in the Campaign Against Hardcore Rap Lyrics,* 3 TEMP. POL. & CIV. RTS. L. REV. 25, 25 (1993-1994).

[168] Marion B. Brechner First Amend. Project & Rap Music Scholars Amicus Brief, *supra* note 149, at 13.

[169] Lutes et al., *supra* note 140, at 79.

[170] *Id.*

environments."[171] The lyrics derive from the perspective of social outcasts—members of communities that have been targets of institutional, systemic racism.[172] Rappers highlight the conditions in Black, urban America that many are unwilling to confront—drug addiction, gun violence, and police brutality, to name a few—all while constructing themselves as figures of power and success despite perilous conditions. [173]

C. The Complex Linguistic Construction of Rap Lyrics Makes Substantive Accuracy of Rap Lyrics Nearly Impossible, thus Requiring First Amendment "Narrative Fiction" Protection

The First Amendment also provides protection to writers of narrative fiction.[174] The District of Columbia Circuit Court of Appeals in *American Postal Workers Union v. United States Postal Serv*, stated "[N]arrative fiction does not purport to describe events that have actually happened. Narrative fiction, unlike an intentionally false statement of facts, deserves considerable first amendment protection."[175] In the case, the DC Circuit Court affirmed a lower court ruling that the United States Postal Service violated a worker's First Amendment rights by firing him for a fictional editorial he wrote about the right to work.[176] The postal worker wrote about how he supposedly read a politician's accidentally-opened mail about restricting labor unions.[177] The defendant's editorial commented on the irony of working on mail that purported to undermine his own union efforts within the USPS.[178] The court noted that the right to work is an interest of public concern.[179] While *American Postal Workers Union* deals with unlawful termination rather than criminalizing narrative fiction, the case stands for the broad proposition that narrative fiction, especially in the context of public concern, deserves considerable First Amendment protection.[180]

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[171] Marion B. Brechner First Amend. Project & Rap Music Scholars Amicus Brief, *supra* note 149, at 13.

[172] *Id*.

[173] IMANI PERRY, PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP 107–10 (2004).

[174] *See* Am. Postal Workers Union v. United States Postal Serv., 830 F.2d 294, 306 (D.C. Cir. 1987).

[175] *Id.*

[176] *Id.* at 296–97.

[177] *Id.* at 297.

[178] *Id*.

[179] *Id.* at 301.

[180] *See id.* at 306.

Much of rap music generally contains elements of narrative fiction and should fall within the narrative fiction protection of the First Amendment.[181] Thus, just as a worker cannot be terminated for writing narrative fiction, neither can a musician be prosecuted based largely on the content of fictional rap lyrics.[182] More specifically, a factfinder should not be able to find a pattern of racketeering activity from rap lyrics such as "[w]e in this bitch wilding, killing ****** for fun, dog, leaving ****** stinkin'[sic], stretched out in the bando,"[183] and thus find the existence of a criminal enterprise from rap, because rap is generally narrative fiction. Even if some of the declarant's rap lyrics can be traced to real life facts about the declarant, rap music's employment of poetic rap conventions such as metaphors, wordplay, collective knowledge, intentional mispronunciations, semantic inversion (the reversion of a word's meaning), neologism (the invention of new words), roleplay and boasting complicate the distinction of what is fictional narrative and what is not.[184] These commonly used poetic rap conventions complicate the true meaning of rap lyrics for an objective factfinder.[185] For example, metaphors are commonly employed in rap and are used to express braggadocio or exaggerated narratives.[186] These narratives come "from the autobiographical nature of the music, and of African American folk literary culture, which entails the telling of one's story in epic or comic terms."[187] Courts ignore the fact that in rap, "ambiguity is prized, meaning is destabilized, and gaps between the literal and the figurative are intentionally exploited."[188] Additionally, a rapper may choose to include a word or phrase for the word's phonetic value or how the word fits into a rap's meter or rhyme scheme rather than because of what the word means or connotates.[189] The complex lyrical construction of rap adds an additional layer of convolution to words that may not be

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[181] Jason E. Powell, Note, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L.J. 479, 522–23 (2009).

[182] *See id.*; *Am. Postal Workers Union,* 830 F.2d at 313.

[183] Exhibit A to Government's Supplemental Briefing, *supra* note 41, at 1.

[184] Dennis, *supra* note 5, at 4; Marion B. Brechner First Amend. Project & Rap Music Scholars Amicus Brief, *supra* note 149, at 9–11.

[185] *See* Marion B. Brechner First Amend. Project & Rap Music Scholars Amicus Brief, *supra* note 149, at 13, 15.

[186] Dennis, *supra* note 5, at 25.

[187] *Id*. at 23.

[188] Marion B. Brechner First Amend. Project & Rap Music Scholars Amicus Brief, *supra* note 149, at 9.

[189] *Id*. at 10.

understood at a mainstream level.[190] The First Amendment protects narrative fiction.[191]

Additionally, the lyrical construction and the narrative tropes of rap music indicate that the veracity of the lyrics cannot be relied upon.[192] Thus, the narrative and fictitious nature of rap music should be protected under the First Amendment if no factual nexus can be drawn that connects specific lyrics to specific real life criminal activity.[193] Inferring a pattern of racketeering activity from rap lyrics violates this principal and could send a chilling effect to other artists who wish to express similar constitutionally protected speech.[194]

Finally, the 'keeping it real' tenet in rap further complicates the veracity of lyrics and narratives.[195] The tenet of "Keeping it Real" has no singular meaning and its origin is not clear.[196] It generally means rejecting the whitewashed notion of pleasing mainstream audiences and instead embracing the harsh reality of the violent and impoverished inner city.[197] In other words, this rap tenet states that lyrics or narratives that are authentic deserve credibility and praise.[198] As author Imani Perry explains, "'Keeping it real' encompasses more than knowing the seamier side of life in the ghetto firsthand . . . The rapper's aim is to convince an audience that his 'shit is real,' but this is a much more complex task than simply proving that the events he described actually happened to him."[199] Artists will often claim that their lyrics are real life experiences; this may be true, but it may also be true that the lyrics express a collective narrative, events that happened to someone else, or are in fact entirely fabricated.[200] The effort to portray authenticity, however, "does not disallow fiction, imaginative constructions, or hip hop's traditional

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[190] *See id*. at 10–11.

[191] *See* Am. Postal Workers Union v. United States Postal Serv., 830 F.2d 294, 306 (D.C. Cir. 1987).

[192] Dennis, *supra* note 5, at 4.

[193] *See id*. at 40; *see also* Marion B. Brechner First Amend. Project & Rap Music Scholars Amicus Brief, *supra* note 149, at 3–5.

[194] *See* Dennis, *supra* note 5, at 40; *see also* Marion B. Brechner First Amend. Project & Rap Music Scholars Amicus Brief, *supra* note 149, at 3–5*;* Sixth Superseding Indictment, *supra* note 17, at 4–5, 11.

[195] Dennis, *supra* note 5, at 19.

[196] *Id*.

[197] *Id*.

[198] *Id*.

[199] *Id*. (quoting PERRY, *supra* note 172, at 95).

[200] *Id*. A collective narrative is a common synthesis of experiences of a certain community—usually a community that has experienced trauma. For an in-depth discussion of this topic, *see* DAVID DENBOROUGH, COLLECTIVE NARRATIVE PRACTICE: RESPONDING TO INDIVIDUALS, GROUPS, AND COMMUNITIES WHO HAVE EXPERIENCED TRAUMA (2008).

journey into myth."[201] In fact, to bolster this 'authenticity,' many rappers create a character that embraces this commercial tenet of 'keeping it real.'[202] Often, these rappers stay in character long after they leave the stage—similar to professional WWE wrestlers.[203] For example, William Leonard Roberts II, better known by his stage name Rick Ross, has had a very successful career in the gangsta rap genre of music.[204] Rick Ross often raps about manufacturing and selling drugs,[205] however, Roberts is a college graduate and worked as a corrections officer before becoming a professional musician.[206] His success can be attributed to savvy marketing and being successful at 'keeping it real,' even though it is reasonable to question the lyrics Roberts espouses.[207]

It is clear the treatment of rap lyrics by courts is flawed and thus, puts lyricists at a disadvantage in a criminal prosecution—a disadvantage that adds to the racial obstacles an inner-city defendant already faces.[208] Thus, as explained above, the First Amendment protects artistic expression, matters of social, political, or public concern, and narrative fiction.[209] Using rap lyrics to establish a pattern of independent criminal activity violates these conventional First Amendment protections.

IV. WHEN RAP AND RICO COMBINE; THE SEVEN MILE BLOODS CASE CLOSELY EXAMINED

A. The Government Use of the SMB Lyrics to Establish an Independent Pattern of Racketeering Activity Violates First Amendment Protection of Abstract and Artistic Speech, Socio-Political Commentary, and Narrative Fiction

As stated previously, hardcore gangster rap often employs themes that are violent and inflammatory in nature. As stated *infra* section three, rap lyrics generally consist of violent abstract lyrics that provide socio-political commentary on impoverished inner-city Black

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[201] Dennis, *supra* note 142, at 19 (quoting PERRY, *supra* note 173, at 87).

[202] Marion B. Brechner First Amend. Project & Rap Music Scholars Amicus Brief, *supra* note 149, at 14.

[203] *Id*.

[204] *Id*. at 15.

[205] *See Rick Ross,* BIOGRAPHY, https://www.biography.com/musician/rick-ross (last updated Sept. 10, 2019).

[206] Marion B. Brechner First Amend. Project & Rap Music Scholars Amicus Brief, *supra* note 149, at 15.

[207] *See id*.

[208] *See* Dennis, *supra* note 5, at 28–30.

[209] *See* Snyder v. Phelps, 562 U.S. 443, 454 (2011); Am. Postal Workers Union v. United States Postal Serv., 830 F.2d 294, 306 (D.C. Cir. 1987).

communities. Added to these lyrics are lyrical and narrative rap tropes that complicate meaning and veracity, thus leading to an art form that exists as a narrative fiction.[210] All of these elements are protected by the First Amendment.[211] With this in mind, a thorough examination of the Seven Mile Bloods case reveals the unconstitutional use of rap lyrics to establish a pattern of racketeering activity.

Prosecutors use *Boyle*'s expanded definition of association-in-fact enterprise to introduce abstract music lyrics against criminal defendants in RICO prosecutions for their truth through hearsay exemptions, and ask jurors to utilize the substance of the lyrics to infer the existence of an association-in-fact enterprise.[212] Recall, additionally, that the government argues that the rap lyrics and videos *serve* the enterprise's purpose, by, for instance, "including violence and threats of violence against witnesses and rival gang members."[213] Both of these contentions violate the First Amendment protection of abstract artistic speech, fictional speech, or speech that deals with contemporary social or political discourse.[214] The SMB case exemplifies this problematic practice.

In the SMB case, the government provided a brief that discussed the purpose for which they intended to use the lyrics.[215] While *infra* section one revealed some of the lyrics that were introduced, this government brief reveals the lyrics *plus* what the government purports the lyrics to convey. Here are some of the songs and videos and the governments' arguments for their admissibility:

> Exhibit 87: "Murda" (rap video). . . .
>
> - Relevance: the video opens with McClure standing in front of a vacant house "tagged" with "Red Zone" graffiti; the entire song talks about the existence of the Seven Mile Bloods and the violent nature of that group; lyrics reference 55, Red Zone, and SMB's involvement in various racketeering activity including murder, drug distribution, and witness intimidation; and the

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[210] *See* Powell, *supra* note 181, at 522–23.

[211] *See Snyder*, 562 U.S. at 454; *Am. Postal Workers Union*, 830 F.2d at 306.

[212] *See, e.g.*, Government's Response to Motion to Preclude the Government's Use of Rap Lyrics and Rap Videos at Trial, *supra* note 38, at 14.

[213] *Id.* at 7–8.

[214] *See Snyder*, 562 U.S. at 454; *Am. Postal Workers Union*, 830 F.2d at 306.

[215] *See generally* Government's Supplemental Briefing, *supra* note 40.

> entire song is a threat to rival gangs and "snitches."[216]

Here is the relevant part of the transcript of the song "Murda" by Hardwork Jig (defendant Donell Hendrix), Berenzo (Billy Arnold), and Cocaine Sonny (Corey Bailey):

> Red zone bitch with [UI] a place where you get your toe tag is random
> Heard this bitch I had to sample,
> ****** still mad from past example
> Real ****** be so proud to murder, all a ***** smell is loud 'n murder
> Hash street beef to the wildest murder, killing ****** as kids calling childish murders
> Still ride around with extended clips, don't squash shit we finish shit
> My hood, my squad, I'm in this shit
> When I was locked grand yards, [UI] there were shooters over here, my rides completed
>
> Me and my ****** got a choppa piece and if you in the zone you bound to cross, you get your ass clapped like a round of applause,
> Fast life, different cases, blow all up on you ****** faces
> Strap life you ****** faking, I do this shit for my ****** ain't make it
> Berenzo bitch still murder ******, get a good fresh air murder *****
> Lotta these ****** I ain't heard of *****,
> Leave a shell in your back like a turtle *****[217]

The government alleged that the lyrics and videos showed a group of co-conspirators that were involved in a pattern of racketeering activity and the lyrics functioned as a threat to other gangs or potential witnesses.[218] However, no specific lyrics are tied to any actual specific crime. To explicate the government's argument: the lyrics such as

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[216] *Id.* at 3–4.

[217] Exhibit A to Government's Supplemental Briefing, *supra* note 41, at 2–3. UI refers to lyrics the government has deemed unintelligible—further bolstering their ineptitude at deciphering the meaning or syntax of the lyrics.

[218] *See* Government's Supplemental Briefing, *supra* note 40, at 7–8.

"flipping pills,"[219] "leave a shell in your back,"[220] and "got a choppa piece"[221] refer to selling drugs, murder, and possession of a firearm respectively.[222] The lyrics, however, are not actually tied to any specific instances of illegal drug transactions, murder, or gun possession, but rather are meant to prove "the existence of the SMB enterprise and the enterprise's racketeering activity."[223]

The government also prescribed meaning into lyrics that simply cannot be supported, such as the notion that "Murda" was a threat to rival gangs and potential witnesses[224] rather than a general description of violent crime in their Detroit neighborhood. A critical examination of the lyrics reveals they are typical vague lyrics are often found in hardcore rap.[225] Other than references to other co-defendants or references to geographic locations, the pattern of racketeering evinced by the government is overly general and criminalizes the violent nature of the lyrics rather than any specific criminal conduct. The lyrics of "Murda" paint a grim depiction of the Red Zone, where young Black men are sucked into the violence of the streets where murder is rampant.[226] The lyrics portray a depraved and hopeless environment.[227] In "Murda," the lyrics are extremely violent in nature but do not offer any insight into specific acts of violence or any particular murders.[228] If anything, the government's belief that the lyrics prove the existence of a criminal enterprise, or the existence of racketeering activity is nothing short of propensity evidence (or the notion that the violent nature of the lyrics evince an inclination to participate in violent behavior), a type of evidence that is not allowed under Federal Rule of Evidence 404.[229]

It is worth noting how much information is implied by the government; most of the information in the government's supplemental brief is not explicitly stated in the lyrics. For example, what are the threats

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[219] Exhibit B to Government's Supplemental Briefing, *supra* note 45, at 1.

[220] Exhibit A to Government's Supplemental Briefing, *supra* note 41, at 3.

[221] *Id.* at 2.

[222] *See* Government's Response to Motion to Preclude the Government's Use of Rap Lyrics and Rap Videos at Trial, *supra* note 38, at 10–12.

[223] *Id.* at 7.

[224] Government's Supplemental Briefing, *supra* note 40, at 3.

[225] *See* Exhibit B to Government's Supplemental Briefing, *supra* note 45, at 2–3 ("On stage off mollys yeah I do drugs, but if my P.O. asks ***** I don't do drugs. Bag life boy bitch yeah ***** trappin."). Lyrics from other rap songs refer to generic drug trafficking language such as "whip up..in the kitchen" and "trappin." *See, e.g.*, MIGOS, *Stir Fry*, *on* CULTURE II (Quality Control Music, Capitol Recs. & Motown Recs. 2018); DRAKE, FUTURE, *Jumpman*, *on* WHAT A TIME TO BE ALIVE (Cash Money Recs. 2015).

[226] *See generally* Exhibit A to Government's Supplemental Briefing, *supra* note 41.

[227] *Id.*

[228] *Id.*

[229] Fed. R. Evid. 404.

in "Murda," and who is the intended target of the threats?[230] What lyrics support evidence that the individuals were involved in the murders or drug transactions that are enumerated in the indictment? The rap lyrics introduced by the government do not contain any specific evidence for any specific crime.[231] Instead, the lyrics creatively relay violent inner-city street elements in a way that is hyperbolic and narrative and thus deserve First Amendment protection. However, protection was never granted. The United States District Court of the Eastern District ruled that the lyrics were admissible,[232] but the opinion could not be more unsound.

B. The Lyrics Are Deemed Admissible but for Misconceived Reasons

In December of 2017, the district judge ruled that the lyrics could be admitted at trial.[233] The opinion did entertain a First Amendment argument but focused primarily on whether the lyrics could be considered abstract.[234] The government argued that the lyrics are not precluded from use as evidence because the government is not using the lyrics to paint the defendants as "morally reprehensible."[235] The court agreed with the government's argument: "[h]ere, the government is not seeking to punish defendants because of the content of the speech; rather the speech is being introduced as evidence of independent criminal behavior."[236] But this is simply just not true. The defendants *are* being prosecuted for the content of their lyrics, especially when the lyrics can be used by a fact-finder to infer the existence of an association-in-fact enterprise from a pattern of

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[230] *See* Exhibit A to Government's Supplemental Briefing, *supra* note 41, at 2–3. A lyric in the song states "If a ***** start snitching, guaranteed he be missing." *Id.* However, the notion that snitches may face consequences on the street (also popularized by the saying "snitches get stitches") is nothing more than a reference to "a code of the streets" that functions as a substitute for the law in communities that distrust law enforcement structure. Richard Rosenfeld et al., *Snitching and the Code of the Street*, 43 BRITISH J. CRIMINOLOGY 291, 291 (2003).

[231] *See generally* Government's Supplemental Briefing, *supra* note 40. For example, the defense argued that famous rappers Kendrick Lamar and Vic Mensa have lyrics very similar to SMB's and that if one were to "[t]ake away the name of the rapper and insert the name of a Defendant . . . the Government would argue that the lyrics go to show 'the SMB enterprise's purpose and goals including trafficking narcotics and using violence and murder to intimidate witnesses and enemies.'" *See* Defendant Quincy Graham's Reply to the Government's Response to Motion to Preclude the Government's Use of Rap Lyrics and Rap Videos at Trial at 4–5, United States v. Graham, No. 2:15-CR-20652 (E.D. Mich. Aug. 28, 2017).

[232] United States v. Graham, 293 F. Supp. 3d 732, 738 (E.D. Mich. 2017).

[233] *Id.*

[234] *Id.* at 736.

[235] *See id*.

[236] *Id*. at 737.

racketeering activity and the lyrics are alleged to be in furtherance of the conspiracy. The District Court's opinion manifests the exact reason why the lyrics *should not* be used in a criminal RICO prosecution: the "independent criminal behavior"[237] divulged by the lyrics *is* the content that the government wished to introduce as criminal conduct. The independent criminal behavior is unsubstantiated, vague, and overwhelmingly representative of stereotypical hardcore gangster rap. Without demonstrating any particular criminal activity the lyrics refer to, the inclusion of the rap lyrics into the RICO prosecution represents a full embodiment of RICO being "the crime of being a criminal."[238]

The government and the District Court opinion supported the introduction of the lyrics by arguing that the lyrics could not be abstract because some of them have been linked to real life events.[239] In other words, the government argued that because *some* of the lyrics had been tied to real life events, then *all* of the lyrics could be relied upon to be true. However, the real-life events did not include a single enumerated crime that an SMB member was charged with.[240] The real-life events included: the geographic location of the gang, news coverage of alleged past gang activity, and mentions of time served by alleged members.[241] Other lyrics seem to be incidental to the SMB indictment such as lyrics about street locations, the "Red Zone,"[242] and lyrics that refer to an alleged SMB member's previous felony acquittal from 2009.[243] None of the lyrics the government tied to real life had to do with the specific alleged criminal activity that the SMB members currently faced.[244] Yet, every single lyric from every single SMB song was ruled to not be abstract because the government had tied *some* incidental lyrics to real-life events.[245] This logic does not seem to make sense and unfairly categorizes all of the lyrics as truthful, even when some of the lyrics are clearly symbolic and narrative fiction.

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[237] *Id*.

[238] *See* Lynch, *supra* note 9, at 662.

[239] *Graham*, 293 F. Supp. 3d at 736.

[240] *See id.* at 740.

[241] *Id*. at 736–37.

[242] Daniel Washington, *Dans La Zone Rouge: Into the Red Zone*, MICH. CHRON. (Aug. 27, 2015), https://michiganchronicle.com/2015/08/27/dans-la-zone-rouge-into-the-red-zone/ (explaining that the term "Red Zone" does not refer exclusively to Seven Mile Blood territory and that the term is "very well known" among Detroit natives).

[243] *Graham*, 293 F. Supp. 3d at 736 ("'[A]int nobody seen but they all heard it ... not guilty was the damn verdict.'").

[244] *See* Government's Response to Motion to Preclude the Government's Use of Rap Lyrics and Rap Videos at Trial, *supra* note 38, at 10.

[245] *Graham*, 293 F. Supp. 3d at 738.

C. Defining a Parameter between Constitutionally Protected Speech and Admissible Speech in RICO Prosecutions

It is essential to note that not *all* rap lyrics should be precluded from evidence in RICO prosecutions. Such an assertion would be unsubstantiated. Lyrics that are deemed to be truthful and contain a strong factual nexus to a specific crime should undoubtedly be admissible against the defendant. However, this is not what happened in the SMB case.[246] In the SMB case, the lyrics were not connected via a factual nexus to any particular crime or activity but instead were used *to establish* the existence of a pattern of activity from which the factfinder is asked to infer an association-in-fact enterprise.[247] This parameter is important to establish.

For example, *Boyle* mentioned that the prosecution must prove relations among those associated with the enterprise.[248] As such, the prosecutors in the SMB case argued the rap lyrics and videos should be admitted because the lyrics "demonstrate[d] the relationship between the Defendants . . . ."[249] Furthermore, the government argued that the lyrics should be admitted to "provide a visual representation of the indicia of the SMB Enterprise including clothing, symbols, tattoos, hand signals, and territory."[250] Both of these purposes are likely acceptable ways to use the rap lyrics and music videos as evidence.[251]

To help flesh out the distinction between the permissible and impermissible use of rap lyrics and music videos as evidence, it is important to examine *Wisconsin v. Mitchell*,[252] *United States v. Pierce*,[253] and New York Senate Bill S7527.[254] In *Mitchell*, the Supreme Court clarified that the First Amendment limits the government's ability to regulate speech, but it does not prohibit the speech from being used as evidence to establish the elements of a crime such as motive or intent.[255]

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[246] As discussed *infra* note 18, the SMB case is representative of a multitude of RICO prosecutions where lyrics were admitted in a similar manner—all in the same district court within two years.

[247] *See Graham*, 293 F. Supp. 3d at 738–39.

[248] Boyle v. United States, 556 U.S. 938, 946 (2009).

[249] Government's Response to Motion to Preclude the Government's Use of Rap Lyrics and Rap Videos at Trial, *supra* note 38, at 7.

[250] *Id*.

[251] *See* Justin Walters, *Flamed Up and Patted Down: Gang Insignia, Terry Stops, and Speech Integral to Criminal Conduct,* 82 MISS. L.J. 367, 369–70 (2013) (explaining the use of "gang indicia, such as the member's clothing or tattoos . . . does raise First Amendment concerns" but has been deemed admissible in gang prosecutions).

[252] 508 U.S. 476 (1993).

[253] 785 F.3d 832 (2d Cir. 2015).

[254] S.B. 2527, 244th Legis. Sess., Reg. Sess. (N.Y. 2021).

[255] *Mitchell,* 508 U.S. at 489.

In that case, the defendant made comments about his intention to assault white people before subsequently assaulting a white victim.[256] Wisconsin had a statute that increased the sentencing guidelines for racially motivated crimes.[257] The Supreme Court held that the statute was constitutional because any "chilling effect" on racially-motivated speech would be too attenuated and speculative.[258] As such, the court allowed the defendant's statement about his intention to harm white people to be admitted into evidence.[259]

In *Mitchell,* the speech had a strong factual nexus to the motive and intent of the underlying crime. *Mitchell* is distinguishable from the SMB case because the government in *Mitchell* sought to introduce speech made *prior* to the act that directly related to the motive or intent of the crime.[260] Mitchell voiced his intent to commit violence toward a class of individuals and then proceeded to do exactly that.[261] Unlike M*itchell,* in the SMB case, the government sought to introduce the speech as independent criminal behavior, or evidence of a pattern of racketeering which could then be deduced to find the existence of a criminal enterprise.[262] The SMB music was not used to prove motive or intent of any behavior but rather was used to establish the existence of the behavior itself.[263]

In *United States v. Pierce,* the defendant objected to the use of his rap lyrics and tattoos as evidence in a prosecution for murder, RICO conspiracy, and narcotics distribution.[264] Melvin Colon, the defendant in *Pierce*, was convicted on multiple counts including RICO conspiracy, murder in aid of racketeering, and conspiracy to distribute narcotics.[265] Colon appealed his conviction, specifically the government's use of his tattoos and a rap video he posted to Facebook.[266] The Second Circuit appellate opinion discusses:

> In the video, Colon is seen rapping: "YG to OG / Somebody make somebody nose bleed / I'm OG shoot the Ruger / I'm a shooter." At trial, [a government witness]

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[256] *Id*. at 480.
[257] *Id*. at 482.
[258] *Id*. at 488.
[259] *Id*. at 490.
[260] *Id.* at 488.
[261] *Id*. at 480.
[262] *See* Government's Response to Motion to Preclude the Government's Use of Rap Lyrics and Rap Videos at Trial, *supra* note 38, at 9.
[263] *See id.*
[264] 785 F.3d 832, 836 (2d Cir. 2015).
[265] *Id*. at 837.
[266] *Id*.

> served as a guide through the lyrics, testifying that the Young Gunnaz crew, or YG, was feuding with the OG . . . The video helped establish Colon's association with members of the enterprise and his motive to participate in the charged conduct against members of the Young Gunnaz.[267]

The introduced lyrics contain a strong factual nexus to the crimes Colon was charged with. The lyrics named a group whose members the defendant was accused of murdering. Furthermore, the lyrics are not used to establish a pattern of independent criminal activity, but rather they are used to establish an intent to commit specified criminal conduct aimed at a particularized group. Both *Mitchell* and *Pierce* include specific crimes that the government has directly tied to the lyrics. The lyrics were not used to *infer* any criminal elements. There is no question that specific lyrics that refer to specific crimes should be admitted into evidence. However, this is unquestionably different than the introduction of lyrics to establish a pattern of racketeering activity. First Amendment protection regarding artistic expression, socio-political commentary, and narrative fiction should all have applied to the Seven Mile Bloods' lyrics since the government did not meet the burden of connecting any specific lyrics to any specified real life criminal activity like the prosecutors did in *Mitchell* and *Pierce*.

The government could have used the SMB lyrics in a manner similar to the way the government in *Pierce* did but chose not to. In my analysis of the SMB case, I identified a song that explicitly mentions the name of a rival gang that SMB was known to have committed acts of violence against.[268] In the song "Camp 9" by SMB rappers Devon McClure, Jeffrey Adams, Arlandis Shy, and Diondre Fitzpatrick, the song states: "Got my ****** locked, yeah the Hustle Boys snitchin.'"[269] The Hustle Boys is a Detroit gang and longtime rival of SMB.[270] In the summer of 2014, two SMB members were alleged to have shot up a car full of Hustle Boys and killing one.[271] Thus, the government could have permissively used the lyrics of "Camp 9" to prove a motive or intent in

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[267] *Id*. at 840 (citations omitted).

[268] Exhibit F to Government's Supplemental Briefing at 4, *Graham*, No. 2:15-CR-20652 (E.D. Mich. Feb. 10, 2018).

[269] *Id.*

[270] Robert Snell, *A Deadly Rivalry*, DETROIT NEWS (May 1, 2018, 4:57 PM), https://www.detroitnews.com/story/story-series/death-by-instagram/2018/04/22/detroit-gang-wars-deadly-rivalry-seven-mile-bloods/433489002/.

[271] *Id.*; Sixth Superseding Indictment, *supra* note 17, at 18 (enumerating the shooting as overt acts 44 and 45).

the killing: SMB viewed the Hustle Boys as snitches, and this motivated them to commit acts of violence toward them. In this example, there exists a factual nexus between the murder and the lyrics. However, no such effort was made by the government. Perhaps this was a conscious decision made by the government so as not to create a precedent that would make the admissibility of lyrics in RICO prosecutions more difficult, or perhaps the government knew the court would allow its use of lyrics anyway.

Lastly, there is an important bill in New York that expounds on the parameters of admissibility and inadmissibility of rap lyrics in criminal prosecutions.[272] The New York bill would prohibit prosecutors from admitting rap lyrics into evidence unless there is "clear and convincing" evidence that the lyrics are literal, relevant to a disputed fact, and have a strong, factual nexus to a specific fact.[273] Prominent rappers Jay-Z and Meek Mill support the bill.[274] The proposed legislation aims to protect rappers' First Amendment rights to artistic expression and ensure "defendants are tried based upon evidence of criminal conduct, not the provocative nature of their artistic works and tastes."[275] This bill proposes a practical, albeit comprehensive, application of the case law and constitutional issues discussed in this essay. The existence of this bill solidifies a growing worry that Black, inner-city individuals are becoming victims to their own artistic expression, narrative speech and socio-political commentary.

CONCLUSION

There are generally many problems with the admissibility of rap lyrics. These problems include "how to properly interpret, understand, and give meaning to the lyrics and how to define permissible evidentiary purposes."[276] The evidentiary and constitutional problems of admitting rap lyrics into criminal evidence is further complicated by RICO. Originally designed to take down highly organized mob infiltration of businesses, RICO now primarily targets peripheral street gangs

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[272] S.B. 2527, 244th Legis. Sess., Reg. Sess. (N.Y. 2021).

[273] *Id.* § 2.

[274] Alex Gallagher, *Jay-Z, Meek Mill and More Push for Law That Would Stop New York Prosecutors Using Rap Lyrics as Evidence*, NME (Jan. 19, 2022), https://www.nme.com/news/music/jay-z-meek-mill-push-for-law-prosecutors-rap-lyrics-evidence-3141106.

[275] S.B. 2527, 244th Legis. Sess., Reg. Sess. (N.Y. 2021).

[276] Dennis, *supra* note 5, at 3.

comprised of mainly Black and Latino members.[277] Moreover, *Boyle v. United States*, which sanctioned the inference of an existence of a criminal enterprise from a pattern of racketeering activity, allows a devious loophole for prosecutors to take advantage of. The rap lyrics are used to find a pattern of criminal activity or racketeering that can then be used to establish the existence of a criminal enterprise under RICO. However, entrenched case law holds that artistic speech, speech that involves socio-political commentary, and narrative fiction—all of which apply to rap lyrics—are protected under the First Amendment.[278] When rap lyrics are used to *establish* criminal activity (as opposed to linking the lyrics to a specific crime, such as in *Pierce*), these First Amendment principles are violated. Although the rap lyrics are violent in nature and discuss criminal occurrences, the argument that the lyrics constitute a pattern of racketeering simply because they vaguely refer to criminal happenings presents significant First Amendment and racial discrimination issues. The SMB case represents an overlooked but growing problem for low-profile Black rappers. The New York State Bill S7527 is a step in the right direction when it comes to the treatment of rap lyrics and criminal evidence. It may seem futile to fight for stricter rap protocols in criminal RICO prosecutions, especially when defendants often face overwhelming odds and a litany of charges. Yet, the First Amendment right to free speech should be equally applied to everyone no matter the circumstances. If rap music is not rightfully protected in RICO prosecutions, like in the SMB case, then a chilling effect on the artistic, social, political, and narrative nature of rap may result.

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[277] *See RICO Act Being Used to Target Street Gangs,* TAMPA BAY TIMES (Nov. 5, 2007), *https://www.tampabay.com/archive/2007/11/05/rico-act-being-used-to-target-street-gangs/*.

[278] *See,.e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989); Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Boston, 515 U.S. 557 (1995); Elonis v. United States, 575 U.S. 723 (2015); Snyder v. Phelps, 562 U.S. 443 (2011); Am. Postal Workers Union v. United States Postal Serv., 830 F.2d 294 (D.C. Cir. 1987).

IT SHOULDN'T BE SEXY: EXPLORING THE INTERSECTION BETWEEN STAGED INTIMACY AND THE LAW

Spencer M. Darling[1]

ABSTRACT

If your job requires you to passionately embrace your coworker after surviving the seat-riveting climax action of the third act, does that complicate your workplace's sexual harassment prevention strategy? Most jobs do not require workers to make intentional intimate contact with their coworkers. Yet, in the entertainment industry, some jobs require not just intimate contact with coworkers but selling that contact as authentic. This staged intimacy, like staged violence, carries a risk that simulated conduct can result in real harm.

When produced without precaution, staged intimacy can create working conditions that constitute sexual harassment in violation of Title VII of the Civil Rights Act of 1964. This same law gives employers a preventive duty that requires them to take affirmative steps to eliminate sexual harassment in the workplace. Unfortunately, traditional preventive measures found in most workplaces are ill-equipped to prevent the kinds of harassment that can arise from staged intimacy. Recently, however, a new field of professionals composed of intimacy coordinators and intimacy directors have emerged with a stated goal of making staged intimacy safer and more comfortable for performers. Their methodology, abstracted to apply as a harassment prevention tool, may hold legal significance.

This article asks whether an employer's Title VII duty to prevent sexual harassment in the workplace can be interpreted to support employer adoption of new safeguards for the production of intimate scenes. Such an interpretation could be an important step in reforming the workplaces of an industry that has become synonymous with sexual abuse.

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[1] J.D., University of Michigan Law School. The views expressed in this article are the author's alone and are not necessarily representative of the views of any employer, institution, or persons affiliated with the author. Special thanks to Lauren, for inspiring this piece and for relentlessly supporting and encouraging me. Thanks to my friends and peers who provided feedback or a sounding board during the writing process. Finally, thanks to the editors at the *University of Denver Sports & Entertainment Law Journal* for their hard work, edits, and suggestions.

INTRODUCTION

> "Staging sex doesn't need to be sexy—it shouldn't be, any more than staging violence should be scary."[2]

The last 6 years have been punctuated by stories of sexual abuse in the entertainment industry.[3] These stories are not new; rather, the industry has a long history and culture of normalizing abuse.[4] The #MeToo movement elucidated this culture and created a broader awareness of the problems plaguing the industry through victims' stories.[5] The movement spurred industry introspection focusing particularly on the structural flaws that facilitate abuse.[6] One notable flaw up for discussion was the way the entertainment industry approaches staged intimacy.[7] Staged intimacy is a term that covers all the simulated intimate acts so essential to storytelling.[8] While staged intimacy encompasses so-called "sex scenes," the term also covers everything from the smallest embrace to the most protracted overly dramatic kiss in the rain.[9] It is also related to the type of scenes that are less comfortable to consume and yet equally important to some stories—scenes with

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[2] CHELSEA PACE WITH CONTRIBUTIONS FROM LAURA RIKARD, STAGING SEX 10 (2020).

[3] *See generally #MeToo: A Timeline of Events*, CHI. TRIB. (Feb. 4, 2021), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html [hereinafter *#MeToo Timeline*].

[4] *See History of Hollywood Sexual Abuse*, HELPING SURVIVORS OF SEXUAL ABUSE & ASSAULT, https://helpingsurvivors.org/history-of-hollywood-sexual-abuse/ (last visited Feb. 19, 2023).

[5] *See* Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements — And How They're Alike*, TIME, https://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/ (Mar. 22, 2018, 5:21 PM); *see also #MeToo Timeline*, *supra* note 3.

[6] *See, e.g.*, Jocelyn Gecker, *Soul-Searching in Opera World After Tumultuous #MeToo Year*, ASSOCIATED PRESS (Dec. 29, 2019), https://apnews.com/article/entertainment-europe-ap-top-news-us-news-music-ba051f1e1ebe96f403a806c8c8faf740.

[7] *Id.*

[8] *See* Dep't of Theatrical Arts for Stage & Screen, *Theatrical Intimacy Policy*, UTAH VALLEY UNIV., https://www.uvu.edu/theatre/students/intimacy-policy.html (last visited May 26, 2023) [hereinafter *UVU Theatrical Intimacy Policy*] .

[9] *See id.*; *see also* Tonia Sina Campanella, *Intimate Encounters: Staging Intimacy and Sensuality* (May 2006) (M.F.A. thesis, Virginia Commonwealth University) (available at https://scholarscompass.vcu.edu/cgi/viewcontent.cgi?article=2070&context=etd); UMBC Theatre Dep't, *Theatrical Intimacy and Instructional Touch Policy*, UNIV. OF MD., BALT. CNTY., https://theatre.umbc.edu/current-students/theatrical-intimacy-and-instructional-touch-policy/ (ratified Aug. 26, 2019) [hereinafter *UMBC Theatrical Intimacy Policy*].

theatrical sexual violence.[10] For those who followed #MeToo's stories and their fallout, it may not be a surprise that the way the entertainment industry has traditionally staged intimate scenes has paid little regard to performers' safety.[11] Stories of performers being mistreated, coerced, harassed, or even outright sexually abused during the production of intimate scenes exist as far back as Hollywood's Golden Age and as recently as the last decade.[12] The awareness that came from #MeToo allowed for frank discussions about the working conditions within the entertainment industry, especially concerning staged intimacy. This article explores one potential way to reform these working conditions by leveraging existing law.

Reforming private workplaces requires a relatively flexible legal framework that incentivizes private actors (i.e. employers) to implement forward-looking harm reduction measures. The workplace harassment law arising from Title VII's unlawful employment practices provides the relevant framework.[13] Evolving interpretations of Title VII have historically reformed US workplaces.[14] The foundation of sexual harassment law resulted from a concerted effort to convince courts that sexual harassment is prohibited under a proper understanding of Title VII.[15] Courts eventually agreed not just that sexual harassment is prohibited by Title VII,[16] but that employers had a duty to exercise *reasonable care* to prevent harassment.[17] Failure to uphold this preventive duty had consequences, namely, vicarious liability.[18] The resulting framework for sexual harassment law has two important characteristics that make Title VII the ideal vessel for the reform proposed here—vicarious liability and a reasonableness standard.[19] The mechanics of each of these characteristics is essential in understanding

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[10] *See* PACE, *supra* note 2, at 80 ("Theatrical sexual violence is the consensual staging of a nonconsensual story.").

[11] *See generally #MeToo Timeline*, *supra* note 3.

[12] *See* Myrna Oliver, *Hedy Lamarr; Screen Star Called Her Beauty a Curse*, L.A. TIMES (Jan. 20, 2000, 12:00 AM), https://www.latimes.com/archives/la-xpm-2000-jan-20-mn-55828-story.html#:~:text=Hedy%20Lamarr%2C%20the%20raven-haired,home%20in%20suburban%20Orlando%2C%20Fla.

[13] *See generally* 42 U.S.C. § 2000e.

[14] *See* Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1235 (1994).

[15] *See* Reva Siegel, *Introduction: A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 8–9 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

[16] *See* Bernstein, *supra* note 14, at 1235–36.

[17] *See* discussion *infra* Section II(a).

[18] *See generally* PRAC. L. LAB. & EMP., INDIVIDUAL SEXUAL HARASSMENT JURY AWARDS AND SETTLEMENTS CHART: OVERVIEW (2022), Westlaw.

[19] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998).

how this argument ultimately leads to reformed workplaces.

Vicarious liability provides a motivating force for employers to reform their workplaces by encouraging the adoption of forward-looking preventive strategies in hopes of avoiding liability.[20] This incentivization overcomes the "diffusion of responsibility" inherent in large organizations that "blunts the kind of moral control that might exist with respect to the decision-making of an autonomous individual."[21] In other words, it is hard to compel organizations to act from a sense of moral obligation, but vicarious liability provides them a financial reason to act. Because of this motivation, judicial opinions in sexual harassment cases shape workplaces.[22] As courts determine what constitutes reasonable care in preventing harassment, employers (or at least those employers wishing to avoid the cost of litigation and an unfavorable judgment) respond by implementing prevention strategies that conform to the contours of case law.[23] In general, these prevention strategies manifest as anti-harassment or so-called sexual harassment policies.[24] The effect of vicarious liability, at least to some extent, is that it facilitates a pipeline between court decisions and anti-harassment policies even if the result is a cynical "checking the box" approach.[25]

Reasonable care provides flexibility to the legal framework, allowing it to be applied to new or previously unforeseen scenarios. Employing a standard of reasonable care rather than a set of rigid prescriptions allows the law to be more malleable and require different levels of care where there are different kinds of risk.[26] The fact that

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[20] *Id.* at 764 ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation . . . ."); Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 77 (2002).

[21] Langevoort, *supra* note 19, at 77.

[22] *See* Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U. L. REV. 419, 454-56 (2020) (criticizing the drafting of organizational policies related to sexual harassment prevention as "checking the box" to ensure compliance with the law and making changes in the workplace only in response to changes in the law and recommending that employers draft policies to promote an organizational culture rather than simply comply with the law).

[23] *Id.*

[24] *See Burlington Indus.*, 524 U.S. at 764 ("Title VII is designed to encourage the creation of . . . effective grievance mechanisms.").

[25] Langevoort, *supra* note 21, at 77; Goldberg, *supra* note 22, at 454–56.

[26] *See* Baskerville v. Culligan Int'l Co., 50 F.3d 428, 432 (7th Cir. 1995) (Posner, J.) ("Just as in conventional tort law a potential injurer is required to *take more care* . . . to prevent catastrophic accidents than to prevent minor ones, so an employer is required to take more care . . . to protect [employees] from serious sexual harassment than to protect them from trivial harassment.") (emphasis added).

reasonable care can mean something different when dealing with different risks, or different facts of a workplace, means that employers may have to do something more or something less depending on the circumstances. [27] Thus, if staged intimacy creates a serious or unique risk of harassment, it may be that reasonable care in workplaces with staged intimacy requires employers do 'something more' to prevent harassment than an employer with a more traditional workplace.

Section I of this article illustrates that such a risk of serious harassment exists in workplaces with staged intimacy. This risk of serious harassment comes from what this discussion calls the boundary-determination problem. In a nutshell, the problem is this: how does one determine what conduct is appropriate and part of an intimate scene, and what conduct is inappropriate and crosses the line into sexual harassment? To illustrate the depth of this problem, Section I draws from real stories of staged intimacy that resulted either intentionally or unintentionally in sexual abuse. These stories show not only that real harm can come from improperly staged intimacy, but that the boundary-determination problem, when left unsolved, allows for conditions that constitute hostile work environment harassment and offers a shield to abusers who can justify sexual abuse as "part of the scene." The fact that the boundary-determination problem exists in workplaces with staged intimacy opens the door to argue that employers whose workplaces involve staged intimacy must do 'something more' to meet a standard of reasonable care. While it opens the door, it does not prove that employers must do 'something more.' Proving that requires an understanding of what the law requires of employers. Hence, Section I analyzes case law surrounding anti-harassment policies to find what standards the law has set for anti-harassment policies. This analysis concludes that a policy's suitability for the working environment and its effectiveness are essential to meeting a standard of reasonable care.

With an understanding of what standards must be met for an anti-harassment policy to meet a standard of reasonable care in mind, Section II attempts to apply that understanding in two ways. First, Section II applies the understanding of what it takes for an anti-harassment policy to meet a standard of reasonable care to prove conclusively that workplaces involving staged intimacy require employers to do 'something more.' By taking examples of traditional run-of-the-mill policies and applying them to workplaces with staged intimacy, it becomes apparent that traditional anti-harassment policies are neither drafted to account for the working environment nor are they effective.

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[27] Faragher v. City of Boca Raton, 524 U.S. 775, 808–09 (1998) (noting that reasonable care can differ based on the size of the workforce and concentration of employees).

Their unsuitability and lack of effectiveness is tied to their inability to solve the boundary-determination problem. Second, Section II applies this understanding to detail the minimum requirements for this 'something more' that employers must do. To do this, it borrows from intimacy directors and intimacy choreographers (intimacy professionals) to synthesize two policies that workplaces with staged intimacy should incorporate into their anti-harassment policies to meet a standard of reasonable care in preventing workplace harassment. Those two policies are: (1) boundary policies, which allow performers to set enforceable boundaries for intimate scenes; (2) choreography policies, which require choreographing and documenting the movements of intimate scenes according to performers' boundaries. Finally, Section II closes by illustrating the practicability of boundary and choreography policies by examining how they have been implemented by university theatre departments.

In sum, when taken together, Section I and II of this argument contend that boundary and choreography policies are the 'something more' courts should hold reasonable care requires in workplaces with staged intimacy. Interpreting the law in this way would reform the workplaces of the entertainment industry through the above-described mechanics of vicarious liability. The argument for this interpretation of the law requires proving two things. First, that traditional run-of-the-mill prevention strategies (i.e., traditional anti-harassment policies) do not rise to the level of reasonable care when it comes to preventing harassment in workplaces with staged intimacy. Second, that boundary and choreography policies can be the 'something more' that constitute reasonable care in workplaces involving staged intimacy.

After fully establishing all the components of this argument, Section III addresses whether the entertainment industry's reliance on classifying (or perhaps misclassifying) workers as independent contractors presents an obstacle to this argument. Independent contractors are ineligible for Title VII protection. Within the industry itself there is a persistent understanding that this means performers are not eligible for Title VII protection.[28] Section III introduces much needed nuance into this prevailing notion and illustrates how agency law doctrine favors finding that in many cases performers are employees. To add further support, Section III then explores case law surrounding adult

[28] Bryce Covert, *Actresses—and Millions of Other Workers—Have No Federal Sexual-Harassment Protections*, THE NATION (Oct. 19, 2017), https://www.thenation.com/article/archive/actresses-and-millions-of-other-workers-have-no-federal-sexual-harassment-protections/ (discussing various hurdles a performer faces in bringing a Title VII claim including industry power dynamics and employment law complications).

entertainment dancers who (as performing artists themselves) have successfully challenged independent contractor classifications under circumstances analogous to performers who work on stage or in film.

I. UNDERSTANDING HOSTILE WORKING ENVIRONMENTS, THEIR RELATIONSHIP WITH STAGED INTIMACY, AND WHAT THE LAW REQUIRES OF EMPLOYERS

A. Hostile Work Environment Sexual Harassment: An Overview

The focus of this discussion is ultimately on showing that Title VII's duty of reasonable care can be interpreted to support the adoption of boundary and choreography policies in workplaces with staged intimacy. However, before that can be discussed, there must be a preliminary understanding regarding the basics of sexual harassment, and specifically hostile work environment harassment. Hostile work environment harassment is the kind of harassment that is most likely to arise from staged intimacy simply because it is the form of harassment that accounts for the working environment generally.[29] A basic understanding requires an overview of three things. First, the different types of hostile work environment claims. Second, the conduct that qualifies as sexual harassment. And third, the relevant factors of a working environment that constitutes a hostile work environment.

There are three subcategories of hostile work environment claims,[30] but for this discussion, only two are relevant—coworker claims and supervisor harassment claims. As the names imply, which claim a plaintiff brings depends on whether the harasser is a supervisor or a coworker.[31] There are technical differences between these two kinds of claims. For example, one imposes vicarious liability and the other imposes direct liability.[32] Employers are vicariously liable for supervisor harassment based on an agency theory,[33] but employers are directly liable for coworker harassment because coworker harassment uses a negligence theory.[34] Also, because it employs a negligence theory, coworker harassment cares not only about whether an employer took reasonable care to prevent harassment but also whether they knew or should have

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[29] *See e.g.,* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

[30] 3 LEX K. LARSON & KIM H. HAGAN, LARSON ON EMPLOYMENT DISCRIMINATION § 46.07 (2d ed. 2021).

[31] *Id.*

[32] B. Glenn George, *If You're Not Part of the Solution, You're Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J.L. & FEMINISM 133, 148 (2001).

[33] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 802–03 (1998).

[34] *See* George, *supra* note 32, at 148.

known about the harassment.[35] That said, practically speaking, both claims employ a standard of reasonable care to evaluate whether an employer is liable. Consequently, the case law elaborating on an employer's duty of reasonable care is useful regardless of what kind of harassment the case dealt with.[36]

Since the focus of this discussion centers on intimate scenes where the harm originates from a co-performer (coworker), the legal framework to obtain redress would be a coworker harassment claim. The relevant test for whether an employer was negligent in preventing harassment consists of two inquiries: "first, into the employer's actual or constructive knowledge of harassment, and second, into the adequacy of the employer's remedial and *preventive responses* to any actually or constructively known harassment."[37] A duty of reasonable care applies to both prongs (i.e. it applies to the employer's detection and prevention efforts).[38]

Regardless of the type of claim brought, the relevant scope of conduct and the relevant factors for assessing the hostility of a workplace are the same.[39] A good example illustrating the scope of conduct that constitutes sexual harassment can be found in the Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex.[40] The Guidelines define the harassing conduct as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[41] These Guidelines "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[42] Courts have seized on the 'unwelcomeness' of the conduct as the "gravamen of any sexual harassment claim."[43] Thus, while the scope of conduct that can constitute sexual harassment may be as broad and nebulous as "other verbal or physical conduct of a sexual nature," if it is not unwelcome, it falls

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[35] Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 673 (10th Cir. 1998).

[36] *See* LARSON & HAGAN, *supra* note 30 ("Although many of the same facts relevant to the affirmative defense in a vicarious liability will also be relevant in the negligence claim, the burden of proving that the preventive and remedial measures were not adequate falls on the plaintiff."); *see also* George, *supra* note 32, at 148.

[37] *See Adler*, 144 F.3d at 673 (emphasis added).

[38] Williams v. Waste Mgmt. of Ill., Inc., 361 F.3d 1021, 1029 (7th Cir. 2004) ("[A plaintiff] must show that his employer has been negligent either in discovering or remedying the harassment.") (internal citations and quotations omitted).

[39] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 787–88 (1998).

[40] 29 C.F.R. § 1604.11 (2022).

[41] *Id.*

[42] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (internal citations omitted).

[43] *Id.* at 68; *see also* LARSON & HAGAN, *supra* note 30, § 46.03(b).

outside the scope of conduct.[44]

In determining whether conduct creates a hostile work environment, courts generally look at three factors: "(1) [w]as the conduct sufficiently severe or pervasive so as to alter the terms and conditions of employment? (2) Was the conduct offensive to the plaintiff? (3) Would the conduct have been offensive to the reasonable person or reasonable victim?"[45] The "or" in the first factor means showing severity or pervasiveness is enough to state a claim.[46] Whereas, the second factor (subjective offense) and the third factor (objective offense) are both required.[47]

Severity and pervasiveness are evaluated by looking at the "totality of circumstances."[48] While "no single factor is required," relevant factors may include "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[49] "Psychological harm," while not required, may be relevant.[50] By including "mere offensive utterances" in juxtaposition to humiliation and physical threats, the standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[51]

The law varies on what is required to show subjective offense.[52] For example, showing psychological harm will establish subjective offense.[53] While there is no definitive list of considerations, the crucial point is that the victim themself find the conduct offensive.[54] Evidence that plaintiff reported conduct can show subjective offense,[55] but evidence showing that plaintiff was dismissive of the conduct or that

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[44] *See* LARSON & HAGAN, *supra* note 30, § 46.03(b).

[45] *Id.* § 46.05; *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998).

[46] LARSON & HAGAN, *supra* note § 46.05 ("Abusive conduct that is either severe *or* pervasive is actionable; it does not have to be both.") (emphasis in original) (citing *Meritor Sav. Bank*, 477 U.S. at 60; Harris v. Forklift Sys., Inc., 510 U.S 17, 21 (1993)).

[47] *Harris*, 510 U.S at 21 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment . . . is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

[48] *Meritor Sav. Bank*, 477 U.S at 69.

[49] *Harris*, 510 U.S at 23; *Faragher*, 524 U.S. at 787–88.

[50] *Harris*, 510 U.S at 23.

[51] *Id.* at 21.

[52] *See* 3 LARSON & HAGAN, *supra* note 30, § 46.05.

[53] *See id.*

[54] *Id.* (analyzing circuit treatment of the subjective offense factor).

[55] Hall v. City of Chi., 713 F.3d 325, 332 (7th Cir. 2013).

plaintiff embraced the conduct can preclude a plaintiff from showing subjective offense.[56]

Finally, the objective factor employs a familiar reasonable person/victim test.[57] The law varies here too, depending on whether offensiveness is assessed according to a reasonable victim's perspective or a reasonable person's perspective.[58] For the purposes of this discussion, it is sufficient to rely on the following guidance from the Supreme Court: "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"[59]

To reemphasize, this is an overview of hostile work environment harassment. There is much discussion regarding each factor and interesting edge cases,[60] but full treatment of this complicated subject is not within the scope of this discussion. A preliminary understanding of these factors at least makes it possible to understand the kind of harassment that arises from intimate scenes.

B. How Staged Intimacy Creates Hostile Work Environments

The best way to illustrate how staged intimacy creates hostile work environments is by analogizing intimate scenes with another type of scene—fight scenes.[61] A workplace that involves staged sword fighting, for example, has a risk of producing certain harms inherent in sword fighting. Those potential harms obviously relate to physical injury. Similarly, a workplace that involves staged intimacy contains an inherent risk of producing harm that can come from intimate interactions. The risk of harm present in intimate scenes is more complicated than physical wounds. Intimate scenes "[leave] the door open to abuses of power" and, "[e]ven in the absence of abuse or wrongdoing," risks leaving performers

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[56] *See* Gibson v. Concrete Equip. Co., 960 F.3d 1057, 1064 (8th Cir. 2020).

[57] *See* LARSON & HAGAN, *supra* note 30, § 46.05.

[58] *See id.* (discussing reasonable person versus reasonable woman standards); *see also* Rabidue v. Osceola Refin. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting) ("In my view, the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men . . . . I would have courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant.").

[59] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (internal citation omitted).

[60] *See generally* LARSON & HAGAN, *supra* note 30, § 46.05.

[61] Similar analogistic thinking was used by an early pioneer of intimacy direction to illustrate the idea that there is a potential for harm in both violent and intimate scenes. Campanella, *supra* note 9, at 2.

"psychologically, physically, and emotionally vulnerable."[62] Hence, both types of scenes are simulated scenarios not intended to harm performers, but without proper precaution, harm is more likely.[63] For fight scenes, basic precautions are taken, such as choreographing fights to performer ability and providing general safety instruction.[64] The thought of taking similar precautions in intimate scenes is a relatively new idea.[65] By analyzing stories of intimate scenes produced without proper precaution, it becomes apparent that the consequences of not taking these precautions are working conditions that constitute a hostile work environment. Furthermore, it becomes apparent that the boundary-determination problem presents an obstacle to effective harassment prevention.

Consider, for example, Maria Schneider's story; while filming *Last Tango in Paris*, she was unaware that the production involved a now infamous rape scene with Marlon Brando as her co-performer.[66] She learned of the scene the day it was to be shot.[67] According to Schneider, who at the time was early in her career, she did not understand she could decline the last-minute addition of the scene.[68] Schneider said of the scene, "even though what Marlon was doing wasn't real, I was crying real tears . . . . I felt humiliated and, to be honest, I felt a little raped, both by Marlon and Bertoucci."[69] Bertoucci, the film's director, would later admit he planned the scene with Brando the morning before and justified withholding the plan from Schneider "because I wanted her reaction as a girl, not as an actress."[70] In 2007 Schneider said of the scene's fallout, "I felt very sad because I was treated like a sex symbol – I wanted to be recognised as an actress and the whole scandal and aftermath of the film

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[62] PACE, *supra* note 2, at 6.

[63] Pinckney v. Van Damme, 447 S.E.2d 825, 827 (N.C. Ct. App. 1994) (finding that throughout filming, action star Jean Claude Van Damme disregarded basic precautions recommended by the production's crew resulting in a performer's permanent vision loss).

[64] Leora Heilbronn, *Interview with Fight Choreographer Brynn Knickle*, BRIEF TAKE (Nov. 30, 2019), https://brieftake.com/interview-fight-choreographer-brynn-knickle/.

[65] *See* Breena Kerr, *How HBO Is Changing Sex Scenes Forever*, ROLLING STONE (Oct. 24, 2018), https://www.rollingstone.com/tv-movies/tv-movie-features/the-deuce-intimacy-coordinator-hbo-sex-scenes-739087/.

[66] *See* Lina Das, *I Felt Raped by Brando*, DAILY MAIL (Jul. 19, 2007, 10:45 PM), https://www.dailymail.co.uk/tvshowbiz/article-469646/I-felt-raped-Brando.html.

[67] *Id*.

[68] *Id.*

[69] *Id.*

[70] Hannah Summers, *Actors Voice Disgust Over Last Tango in Paris Rape Scene Confession*, THE GUARDIAN (Dec. 4, 2016, 12:38 PM), https://www.theguardian.com/film/2016/dec/04/actors-disgust-last-tango-paris-rape-scene-confession-bertolucci.

turned me a little crazy and I had a breakdown."[71]

Intimate scenes can also be a pretextual smoke screen for sexual assault.[72] Chloé Briot, a French opera singer, describes an incident of abuse during a performance of *L'inondation*.[73] "The assaults . . . happened *only* during the two sex scenes planned by the stage producers . . . in the middle of the performance, he fondled my right breast . . . in the second scene, he violently opened my legs and put his head on my genitalia."[74] Briot said of her experience, "Today, I am broken. I don't know how I will get back on the stage . . . and I feel vulnerable when I sing."[75]

While clearly these stories depict sexual abuse, the question remains whether these workplaces are hostile in the legal sense. A comparison of these experiences with the previous overview of hostile work environment harassment answers that question affirmatively. Granted, since many of the elements involve questions of fact, it's impossible to say for certain without a finder of fact. But overall, there are persuasive reasons to believe these stories meet the threshold of a hostile work environment.

First, there is the requisite conduct since both performances involved conduct that was sexual in nature. In addition, both performers explicitly stated they found the conduct unwelcome. Further, there are several aspects of Briot's and Schneider's stories that align with factors courts consider relevant in assessing the severity and pervasiveness of conduct. Schneider specifically described her experience as humiliating, stating she cried "real tears," and her mental health concerns following the scene certainly demonstrate the severity of the conduct.[76] In Briot's case, she claims her experience directly affected her ability to perform, implying an effect on the terms and conditions of her employment.[77] These same aspects of their experience allude to psychological harm, which could also show subjective offense.[78] Regarding the frequency and duration of the conduct, Briot alleges she suffered these assaults throughout the touring show's run.[79] In Schneider's case, the scene was

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[71] Das, *supra* note 66, at 4.

[72] Adam Sage, *French Opera Houses Sat by as I Was Groped on Stage, Soprano Chloé Briot Claims*, THE TIMES, (Aug. 27, 2020), https://www.thetimes.co.uk/article/french-opera-houses-sat-by-as-i-was-groped-on-stage-soprano-chloe-briot-claims-cxdpbsjzb.

[73] *Id.*

[74] *Id.* (emphasis added).

[75] *Id.*

[76] *See* Das, *supra* note 66.

[77] Sage, *supra* note 72.

[78] Harris v. Forklift Sys., 510 U.S. 17, 23 (1993).

[79] *Id.* at 19.

one take; however, it is worth noting that when conduct is severe enough frequency is less consequential.[80]

The objective and subjective factors, being especially reliant on a finder of fact, are harder to answer. What can be said is that when compared to other cases, these stories could plausibly persuade a finder of fact to see the working environment as both subjectively and objectively offensive. For example, "crotch-grabbing" and vulgar language was held to present a genuine issue of material fact regarding whether the conduct was offensive.[81] Further, repeated attempts to touch an employee's hands and hair, combined with attempts to look under the employee's clothing and "teasing comments" regarding the employee's sex life were behaviors severe enough to hold that a reasonable jury could find the conduct was objectively and subjectively offensive.[82] These fact patterns are comparable to the examples described above. Hence, Briot's and Schneider's stories could meet the subjective and objective factors.

From these stories it should be obvious that improperly staged intimacy can easily result in conduct that creates a hostile work environment. But there is a final interesting and important issue that Briot's story highlights. That issue is the boundary-determination problem. Consider that in Briot's example, there is a willingness to perform an intimate scene—she agreed to perform her role knowing it involved staged intimacy. Clearly, Briot is okay with some form of conduct that is sexual in nature but sees the conduct of her co-performer, Boris Grappe, as exceeding the appropriate bounds of the scene, making it unwelcome. Unless boundaries are defined, a harasser may well use the intimate nature of the scene as an excuse. This is the boundary-determination problem in action; it creates an obstacle to identifying the conduct that is required for a performer to fulfill their job duties and the conduct that crosses the line into the realm of harassment.

Taking advantage of the ambiguity inherent in this problem is exactly what Grappe appears to have done.[83] In an effort to undermine Briot's story, Grappe simply pointed to the fact that sexual contact was

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[80] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("[I]solated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (internal citations omitted).

[81] Markham v. White, 172 F.3d 486, 492 (7th Cir. 1999) (rejecting defendant's argument that crotch grabbing and vulgar language was so commonplace as to not be actionable).

[82] Holtz v. Rockefeller & Co., 258 F.3d 62, 75 (2d Cir. 2001).

[83] Sage, *supra* note 72 ("The opera . . . was rehearsed and performed in the presence of an artistic team, a technical team, colleague singers, an orchestra and . . . the public. It is in this context my colleague Chloé Briot claims to have been sexually assaulted on stage for weeks, even months, without any of the above mentioned people noticing.") (quoting Grappe).

part of the job description and that his behavior was observed without comment by staff and audience alike.[84] This response ignores whether it would have been possible for an observer to notice anything was amiss in the first place. Unless boundaries are defined it is difficult if not impossible for a co-performer, observers, or anyone else to notice any improper conduct.

As a final caveat, it must also be mentioned that there are good reasons that a performer in the entertainment industry might not want to speak up or draw attention to harassment during intimate scenes. Stories where intimate scenes serve as a pretext for sexual assault are, unfortunately, not novel within the industry.[85] Neither is a lack of action in response to said assaults.[86] There is a common sentiment that performers, underneath their convincing performance, feel humiliated, "gross,"[87] and generally uncomfortable.[88] Yet, at the same time performers are disincentivized from speaking out or taking legal action.[89] Of the examples presented here, only Briot has pursued any legal action.[90] The persistence of this conduct and the lack of legal action by performers is due in part to the power imbalance present in the industry and the zero-sum game performers play in order to get work.[91] Speaking out has consequences, and the industry keeps victims silent by controlling access to opportunities.[92] As one performer puts it, "[t]ypically if you complain, you don't get hired back."[93] The industry's ability to leverage entire careers in exchange for silence has given the industry little incentive to prevent abusive working conditions. The boundary-determination problem can be used to support this power imbalance. So long as it is difficult to differentiate between appropriate and inappropriate intimate conduct, abusers will always be able to undermine victims who make the difficult choice of speaking out.

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[84] *Id.*

[85] *See, e.g.*, Gecker, *supra* note 6 (detailing "unscripted sexual violence" during a performance of *MacBeth*).

[86] Covert, *supra* note 28 (discussing various hurdles a performer faces in bringing a Title VII claim including industry power dynamics and employment law complications); *but see infra* Part III for a discussion on overcoming these hurdles.

[87] Katie Strick, *Up Close - But Not Too Personal: The 'Intimacy Workshops' Giving Actors Guidelines for Sex Scenes*, LONDON EVENING STANDARD (May 2, 2018), https://www.standard.co.uk/culture/theatre/up-close-but-not-too-personal-the-intimacy-workshops-giving-actors-guidelines-for-sex-scenes-a3828901.html.

[88] Kerr, *supra* note 65.

[89] *See* Covert, *supra* note 28.

[90] Sage, *supra* note 72.

[91] *See* Gecker, *supra* note 6.

[92] *See id.* ("The climate has always been 'don't tell and suck it up and deal with it.'").

[93] *Id.*

Solving the boundary-determination problem does not remove all obstacles to speaking out and taking action, but it moves the needle in the right direction. Moreover, solving the problem is essential in preventing the kinds of harassment that arises from improperly staged intimacy. Ultimately, the fact that the combination of boundary and choreography policies manage to solve this problem while traditional approaches fail is why reasonable care in workplaces with staged intimacy requires adopting boundary and choreography policies. However, illustrating this point first requires a fuller understanding of an employer's duty to prevent harassment in the workplace.

C. What the Law Requires of Employers

It is worth reemphasizing the importance of an employer's preventive duty. Harm prevention, according to the Supreme Court, is Title VII's "primary objective."[94] Reasonable care is the standard under which employers' efforts towards fulfilling their preventive duty are assessed,[95] but a more specific understanding of what constitutes reasonable care is required to reach this arguments conclusion. Understanding exactly what constitutes reasonable care is important for two reasons. First, proving that reasonable care requires adopting boundary and choreography policies in workplaces with staged intimacy requires proving that traditional measures do not meet the standard of reasonable care. Illustrating failure requires knowing the threshold for success. Second, understanding the specifics of what constitutes reasonable care gives legal relevance to boundary and choreography policies.

There is no one approach for an employer to take to meet the standard of reasonable care, strictly speaking. Certain approaches, such as the implementation and enforcement of anti-harassment policies, have become standard even though they are not required.[96] Courts find anti-harassment policies to be very persuasive in determining whether an

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[94] Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

[95] *Id.* at 807.

[96] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) ("Title VII is designed to encourage the creation of . . . effective grievance mechanisms."); Brown v. Perry, 184 F.3d 388, 396 (4th Cir. 1999) ("[W]here . . . there is no evidence that an employer adopted or administered an anti-harassment policy in bad faith or that the policy was otherwise defective or dysfunctional, the existence of such a policy militates strongly in favor of a conclusion that the employer 'exercised reasonable care to prevent' and promptly correct sexual harassment."); Thornton v. Fed. Express Corp., 530 F.3d 451, 456 (6th Cir. 2008) ("Generally, an employer satisfies the first part of this two-part standard when it has promulgated and enforced a sexual harassment policy.").

employer exercised reasonable care to prevent harassment.[97] Focusing on what courts have to say about anti-harassment policies helps bring the nebulous concept of reasonable care back down to earth. Still, the fact that anti-harassment policies can be persuasive in determining whether an employer fulfilled their duty does not mean that any policy suffices. An employer cannot performatively maintain an anti-harassment policy and rely on its mere existence as a shield from liability.[98] There are certain standards a policy must meet. First, an anti-harassment policy must be "suitable to the employment circumstances."[99] Additionally, it must be "both reasonably designed and reasonably effectual."[100] There is no definitive rule that determines whether an anti-harassment policy is effective—only guidance from case law.[101] Effectiveness is an inquiry into whether there is some defect in the substance of the policy itself or its implementation.[102] In other words, the policy must be substantively and practically effective. This discussion primarily focuses on substantive effectiveness.

Courts have provided relatively specific rules on what the substance of an effective policy should contain.[103] Some of these rules are particularly important in giving boundary and choreography policies legal relevance, particularly rules concerning the scope of prohibited conduct. These rules ensure that an effective policy is broad enough to cover various forms of harassment, but does not merely make a generic statement that harassment is wrong.[104] They require that a policy draw the line between appropriate and inappropriate.[105] Thus, at the most fundamental level, a policy should define sexual harassment and address it specifically,[106] as well as explain the kind of conduct that is

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[97] *Thornton*, 530 F.3d at 456.

[98] *See Faragher*, 524 U.S. at 808–09.

[99] *Burlington Indus*., 524 U.S. at 765.

[100] *Brown*, 184 F.3d at 396 (citing *Faragher*, 524 U.S. at 807–09).

[101] *See* LARSON & HAGAN, *supra* note 30, § 46.07(5)(b)(i).

[102] Clark v. United Parcel Serv., Inc., 400 F.3d 341, 349–50 (6th Cir. 2005) (analyzing both the content of an anti-harassment policy and its implementation); Episcopo v. Gen. Motors Corp., 128 F. App'x 519, 523 (7th Cir. 2005).

[103] *See e.g.,* cases cited *supra* note 96.

[104] Smith v. First Union Nat'l Bank, 202 F.3d 234, 245 (4th Cir. 2000) (holding a definition of sexual harassment that only prohibits sexual advances or "sexually provocative misconduct" was not reasonably effective).

[105] *See id.*

[106] *Id.*; *see also* Equal Emp. Opportunity Comm'n v. Rotary Corp., 297 F. Supp. 2d 643, 664 (N.D.N.Y. 2003) (holding that a policy that did not specifically address sexual harassment cannot satisfy the first prong of the Faragher-Ellerth defense as a matter of law); Robles v. Cox & Co., 154 F. Supp. 2d 795, 804 (S.D.N.Y. 2001) ("A grievance policy which does not specifically address sexual harassment does not, on its own, provide sufficient evidence of reasonable care for a grant of summary judgment.")

prohibited.[107] Broad and generic nondiscrimination policies that make no specific mention of sexual harassment are not effective.[108] Rather, an effective policy offers "specific guidance regarding sexual harassment."[109] From a commonsense perspective, it is obvious why generic prohibitions on harassment or inadequate explanations of what can constitute harassment are ineffective—they do not provide enough direction. An employee should be able to read an anti-harassment policy and have a clear idea of what is expected of them.[110] An anti-harassment policy should endeavor to leave little to no room for assumptions. This is why anti-harassment policies generally cover various forms of harassment, even providing lists of conduct that is sexual in nature that could create a hostile work environment.[111]

The above rules are what will provide the legal relevance to boundary and choreography policies, but it is important to note there are other requirements that anti-harassment policies in workplaces (with or without staged intimacy) should meet to be effective and therefore meet the standard of reasonable care.[112] For example, to ensure an anti-harassment policy is effective it should be disseminated to employees, include an express anti-retaliation policy, offer a complaint procedure that allows for employees to bypass immediate supervisors, and mandate maintaining records of harassment complaints against supervisors.[113] Then, depending on jurisdiction and state law, training on the policy and the designation of supervisors as mandatory reporters may be required.[114] Furthermore, because the standard of reasonable care applies to the prevention and remediation of sexual harassment,[115] policies must be effective in their implementation (i.e., practically effective).[116] Whether a policy is practically effective "depends upon the effectiveness of those

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[107] Anderson v. Wintco, Inc., 314 F. App'x 135, 139 (10th Cir. 2009) (holding a policy was "facially effective" because it, inter alia, "provide[d] a clear explanation of prohibited conduct"); *see also* JOSEPH DOMENICK GUARINO, *ANTI-HARASSMENT POLICIES: KEY DRAFTING TIPS* (2023).

[108] Equal Emp. Opportunity Comm'n v. Boh Bros. Constr. Co., 731 F.3d 444, 463–64 (5th Cir. 2013).

[109] *Id.*

[110] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72–73 (1986) (noting that employees need to be on notice of an employer's interest in correcting sexual harassment).

[111] *See generally* GUARINO, *supra* note 107.

[112] *See* LARSON & HAGAN, *supra* note 30, § 46.07 (assembling precedent on effectiveness from circuit courts).

[113] *Id.*

[114] *Id.*

[115] Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 673 (10th Cir. 1998).

[116] *See* Clark v. United Parcel Serv., Inc., 400 F.3d 341, 349 (6th Cir. 2005)

who are designated to implement it."[117] For example, if a policy dictates how and to whom an employee should report harassment, but then that report is not acted on once received, there may be a failure of implementation.[118] It does not matter if that failure is because of managerial confusion[119] or a dereliction of duty by a supervisor.[120] What matters is that there was a failure to successfully execute the anti-harassment policy.[121]

These rules lay out important guidelines for an effective anti-harassment policy that should be reflected in any policy regardless of whether said policy must account for staged intimacy. The question moving forward is, can traditional run-of-the-mill anti-harassment policies be effective in workplaces with staged intimacy?

II. HOW TRADITIONAL ANTI-HARASSMENT POLICIES FAIL AND WHY BOUNDARY AND CHOREOGRAPHY POLICIES ARE ESSENTIAL TO EXERCISING REASONABLE CARE IN WORKPLACES WITH STAGED INTIMACY.

A. Exposing the Gaps: Traditional Preventive Measures' Shortcomings

The argument that reasonable care in workplaces with staged intimacy requires implementing boundary and choreography policies relies on showing that traditional preventive measures do not constitute reasonable care. Specifically, traditional workplace policies and procedures do not solve the boundary-determination problem. Because of this failure, they are not "suitable to the employment circumstances"[122] of the industry, nor are they "reasonably effectual."[123] If traditional policies cannot meet the standard of reasonable care, then employers must do 'something more' to meet that standard. Together boundary and choreography policies are that 'something more.' Before elaborating further on what these policies entail, the failure of traditional anti-harassment policies must be illustrated.

Model policies provide a suitable exemplar for a traditional run-of-the-mill anti-harassment policy. The state of New York publishes a model "Sexual Harassment Policy for All Employers" (the New York

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[117] *See id.* at 350.
[118] *See* Gentry v. Exp. Packaging Co., 238 F.3d 842, 847–850 (7th Cir. 2001).
[119] *Id.* at 848.
[120] *See Clark*, 400 F.3d at 350–51.
[121] *See id*. at 349–50.
[122] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 745 (1998).
[123] Smith v. First Union Nat'l Bank, 202 F.3d 234, 244 (4th Cir. 2000).

Policy) that defines sexual harassment similarly to the EEOC guidelines (conduct that is sexual in nature) and gives specific examples including a prohibition on "[t]ouching, pinching, patting, grabbing, brushing against another employee's body or poking another employees' body."[124] Similarly, Lexis' Practical Guidance (the "Lexis Policy") and Thomson Reuters' Practical Law (the "Reuters Policy") publish model policies.[125] The Lexis policy prohibits hostile work environments by name and gives a non-exhaustive list of behaviors that create such an environment including "any unwelcome touching . . . or other physical contact."[126] The Reuters Policy explicitly prohibits hostile work environments by name and gives a non-exhaustive list of prohibited conduct that contributes to a hostile working environment including conduct that is "[p]hysical (for example, assault or inappropriate physical contact)."[127] For the purposes of this discussion, these model policies will serve as an exemplar of traditional anti-harassment policies.

The proof of traditional policies' substantive failures is found in the gaps they leave in terms of employee guidance when applied to a workplace with staged intimacy. Specifically, the way traditional policies define sexual harassment and outline prohibited conduct (at least with respect to workplaces with staged intimacy) does not actually draw the line between appropriate and inappropriate conduct nor provide specific guidance.[128] Traditional policies leave room for employees to make assumptions about what is permissible.[129] In workplaces with staged intimacy, the employment circumstances require that effective guidance enables an employee to engage in conduct that is sexual in nature (as part of their job duties) without sexually harassing their co-performer. For a policy to be suitable to the employment circumstances and effective in preventing harassment in a workplace with staged intimacy, an employee must know what conduct is appropriate and part of the scene and what conduct is inappropriate and could constitute harassment. In other words, it must enable the employee to solve the boundary-determination problem. The only method for reliably sorting appropriate and inappropriate conduct where one must perform sexual behavior is to provide a means of determining whether said conduct is unwelcome. As

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[124] *Sexual Harassment Policy for All Employers in New York State*, NEW YORK STATE DEPARTMENT OF LABOR 2–3, https://www.ny.gov/sites/default/files/atoms/files/SexualHarassmentPreventionModelPolicy.pdf (last visited Feb. 8, 2023).

[125] *See* GUARINO, *supra* note 107; PRACTICAL LAW LABOR & EMPLOYMENT, ANTI-HARASSMENT POLICY (Thomas Reuters 2023) [hereinafter Reuters Policy].

[126] *See* GUARINO, *supra* note 107.

[127] Reuters Policy, *supra* note 125.

[128] *See* GUARINO, *supra* note 107; Reuters Policy, *supra* note 125.

[129] *See* GUARINO, *supra* note 107; Reuters Policy, *supra* note 125.

the next section makes clear, making that determination requires boundary and choreography policies. The following breakdown reveals exactly how this lack of specific guidance fails to prevent harassment.

Unwelcomeness is a key component in the legal definition for the scope of conduct that can constitute sexual harassment.[130] Unsurprisingly, all the above policies include some use of "unwelcome" in their definition of harassment.[131] But none of them provide a method of determining what is and is not unwelcome. Granted, while each of the above model policies notes that their lists of prohibited behaviors are non-exhaustive,[132] not even by way of inference could an employee manage to use said lists to draw the line between appropriate and inappropriate conduct in workplaces with staged intimacy. This is because these policies are not drafted with the employment circumstances of a workplace with staged intimacy in mind. It is fine to use a general list of prohibited conduct and to omit a process for determining whether conduct is unwelcome in an accounting firm where no one's job requires performing sexual conduct. In a workplace where job duties require performing conduct sexual in nature, that definition and list of prohibited conduct needs to be paired with boundary and choreography policies that ensure that conduct of a sexual nature is never unwelcome.

Consider the following inferences a performer could make when a policy does not define "unwelcome" and examples of prohibited behavior include the kinds of conduct they must perform as part of an intimate scene. A performer or director left to improvise a scene without any requirement to establish boundaries and script movements could easily improvise movements that are shocking, traumatic, and legally constitute a hostile working environment much like the stories detailed in Part I. These improvised and ultimately abusive movements could run the spectrum from being born of ill-intent or perhaps naïve assumptions.

On the naïve end of the spectrum, a well-meaning performer relying on the above policies could assume that because their co-performer, by virtue of agreeing to perform in a production with staged intimacy, has consented to any movements they improvise and therefore their conduct is not unwelcome. Alternatively, perhaps they simply believe anti-harassment policies do not apply to staged intimacy. After all, the policy directly prohibits conduct that is part of an intimate scene—that sounds like it prevents a performer from doing their job, how can that policy apply to staged intimacy? Or on a more basic level that anyone

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[130] Meritor Sav. Bank, FSB v. Vinson, 477 U.S 57, 68 (1986).

[131] *Sexual Harassment Policy for All Employers in New York State*, *supra* note 124; GUARINO, *supra* note 107; Reuters Policy, *supra* note 125.

[132] *Sexual Harassment Policy for All Employers in New York State*, *supra* note 124, at 3.

who has ever had coworkers likely relates to—perhaps, unless made explicitly part of the production process, it is extremely uncomfortable to ask coworkers for their personal boundaries regarding simulated sex acts. Thus, it might be more comfortable to believe conduct is welcome or that the production's anti-harassment policy does not apply. While these assumptions might raise moral concerns, it is understandable (given the general awkwardness of the subject matter) how a performer could rationalize their way to making these assumptions. The traditional anti-harassment policies outlined above provide no guidance that would allow for employees to avoid these assumptions. So long as these assumptions cannot be headed off, there is a real risk that performers will improvise movements that, under the right circumstances, could create a hostile working environment as previously illustrated.

On the more questionable end of the spectrum, somewhere beyond naïve but short of explicit ill-will, a performer could conclude that workplace policies are irrelevant if they conflict with artistic integrity. These thoughts of a hypothetical performer are not as far-fetched as they sound; the industry is populated with numerous performers who believe artistic integrity requires adopting and embodying the traits of their character even if that means abusing co-performers and crew members.[133] Notable performers have justified battery and degrading insults intended to evoke "real tears" as part of their method acting performance.[134] Let's also not forget that Maria Schneider's director justified withholding the traumatic rape scene from her to achieve a realistic reaction.[135] Neither determining the merit of these performer's techniques nor whether artistic purity is simply serving as a convenient pretext to abuse others is required to prove the point that there are performers who are willing to act in shocking ways on principles of artistic integrity. A traditional anti-harassment policy, because it does not require performers to first determine boundaries and document a scene's movements, leaves the door open for this kind of cruel improvisation.

The point is not that a traditional policy cannot guide some employees in workplaces with staged intimacy. It is perfectly possible that two performers could, of their own accord, discuss an intimate scene and perform it without ever feeling any conduct is unwelcome. The point is, even if it sounds like performers should be able to intuitively navigate the boundary-determination problem based on the vague guidance from

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[133] *See* Jordan Kisner, *The Madness of Method Acting*, THE ATLANTIC (Feb. 1, 2022) https://www.theatlantic.com/magazine/archive/2022/03/the-method-acting-isaac-butler-review/621310/.

[134] *Id.*

[135] Summers, *supra* note 70.

a traditional anti-harassment policy, there are variables and competing artistic interests that necessitate an anti-harassment policy that is specifically tailored to a workplace with staged intimacy. It is uncomfortable, but nonetheless true, that a performer could read and acknowledge a traditional anti-harassment policy and still improvise the kinds of traumatic scenes outlined in Part I without thinking said behavior crossed any line. There is not enough specific guidance and too much room for assumptions about appropriate behavior. As illustrated in the next section, the addition of boundary and choreography policies into any one of the model policies would minimize the room performers have to make these potentially harmful assumptions.

As a secondary point, there are real questions whether, without being able to differentiate between conduct that is part of an intimate scene and appropriate or inappropriate and harassing, traditional anti-harassment policies can be effectively implemented. Since failures of implementation are fact specific it is a harder point to prove. [136] However, given the above it should be obvious that if there is more room for employees to be confused concerning what conduct is and is not harassment, there is room for those enforcing the policy to make similar mistakes. This secondary point is not essential to this argument but is worth noting as it illustrates how important clear guidance is to the overall effectiveness of anti-harassment policies.

Developing these policies is the next step in this argument. From the above it is clear that traditional approaches fail due to their inability to enable a performer or person charged with implementing an anti-harassment policy to solve the boundary-determination problem. Solving the problem requires providing a method for determining what conduct is appropriate and part of a scene, and what conduct crosses the line into sexual harassment. Given that 'unwelcomeness' is the "gravamen of any sexual harassment claim,"[137] ensuring that conduct never strays into the realm of unwelcomeness is one way to solve the boundary-determination problem.

B. Closing the Gaps: Synthesizing Boundary and Choreography Policies

Having established what a standard of reasonable care requires and having illustrated the failures of traditional anti-harassment policies, this argument has shown that in workplaces with staged intimacy, employers must do 'something more' than merely implementing a run-

[136] Meritor Sav. Bank, FSB v. Vinson, 477 U.S 57, 77 (1986).
[137] *Id.* at 65.

of-the-mill anti-harassment policy. This article asserts the 'something more' to ensure an employer can meet the standard of reasonable care is boundary and choreography policies. This section defines boundary and choreography policies and illustrates their legal relevance. In brief, the way in which they work to prevent harassment and solve the boundary-determination problem means that these policies make workplace anti-harassment policies effective in workplaces with staged intimacy. Because boundary and choreography policies are essential to the effectiveness of a policy in workplaces with staged intimacy, they are legally relevant. In essence, they close the gaps a working environment with staged intimacy creates in traditional anti-harassment policies.

To design boundary and choreography policies, this discussion borrows from intimacy professionals both for the inspiration behind the policies themselves and to shape them. Because their methodology is built to account for the employment circumstances of the industry, relying on this expertise ensures that boundary and choreography policies are "suitable to the employment circumstances" of the industry.[138] It also ensures, more pragmatically, that these policies are not overly burdensome. This argument does not contend, however, that adopting intimacy professionals into every production is essential to meet the standard of reasonable care.[139] Nor is this a complete survey of all methodologies for staging intimate scenes. Rather, this is borrowing techniques from intimacy professionals and fitting them to the contours of the law.

The idea of boundary policies comes from the consent-centric framework of intimacy professionals.[140] Because of their focus on consent, intimacy professionals recommend conducting exercises that allow performers to communicate and learn each other's boundaries.[141] By analyzing these exercises, it becomes clear that the baseline of safely staging intimacy is to make sure all parties know what kinds of contact and what areas of contact each performer is comfortable with.[142] This is directly in line with this discussion's legal goal of providing a reliable method for ensuring that sexual conduct in staged intimacy is never

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[138] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 746 (1998).

[139] Courts take into account factors like the size and complexity of an employer when determining whether an employer exercised reasonable care. Faragher v. City of Boca Raton, 524 U.S. 775, 808–09 (1998). Hence, an argument that reasonable care requires on staff intimacy professionals has more weight regarding sophisticated operations but less weight regarding small time operations.

[140] *See* PACE, *supra* note 2, at 17.

[141] *Id.* ("The Boundary Practice is an exercise designed to address the complex problems of unclear expectations and general awkwardness around negotiating consensual touch.").

[142] *See id.*

unwelcome. Ensuring consent throughout the staging process requires that boundary policies contain, at minimum, two features. First, they should allow employees to set boundaries for physical touch that can be enforced by performers or relevant production members against other performers and directors.[143] Second, they should empower employees to stop or pause a scene if a performer becomes uncomfortable.[144] These two features give performers entitlements that may, at first, seem like they have the potential to be disruptive. Ideally, before performers are hired (i.e. during the audition process) there should be an effort to communicate the productions expectations regarding intimate scenes.[145] This way a production company knows, at minimum, that the performers they are bringing on are comfortable with staged intimacy and the level of nudity or touch involved.[146] Boundary setting would merely specify the specifics. For example, a performer might express (from the moment they audition) that they are comfortable performing an intimate scene nude, but when it comes time to specify their boundaries for the scene, they might express that they are personally uncomfortable being touched on the neck.

Choreography policies work in harmony with boundary policies to make sure that once all the movements are set according to a performer's boundaries, there is no deviation.[147] Choreography policies should mandate documentation of the movements and contact performers will make during a scene.[148] These policies should require that all movements or revisions to movements are in accord with performer boundaries.[149] Choreography policies should also require the distribution of the scripted movements to relevant personnel.[150] Finally, the

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[143] *See id.* at 6 (emphasizing that a newer safer approach to staging intimacy requires maintaining consent throughout the process and respecting everyone's boundaries); *UVU Theatrical Intimacy Policy*, *supra* note 8, at 35; *UMBC Theatrical Intimacy Policy*, *supra* note 8.

[144] *See* PACE, *supra* note 2, at 17–18 (advising that intimacy professionals use the "Button" tool that allows performers to use a neutral word like "button" to halt or pause a scene); *UVU Theatrical Intimacy Policy*, *supra* note 8; *UMBC Theatrical Intimacy Policy*, *supra*, note 8.

[145] PACE, *supra* note 2, at 102–04; *UVU Theatrical Intimacy Policy*, *supra* note 8; *UMBC Theatrical Intimacy Policy*, *supra* note 8.

[146] PACE, *supra* note 2, at 102–04; *UVU Theatrical Intimacy Policy*, *supra* note 8; *UMBC Theatrical Intimacy Policy*, *supra* note 8.

[147] *See* PACE, *supra* note 2, at 70.

[148] *See id.*; *UVU Theatrical Intimacy Policy*, *supra* note 8; *UMBC Theatrical Intimacy Policy*, *supra*, note 8.

[149] PACE, *supra* note 2, 10at 70; *UVU Theatrical Intimacy Policy*, *supra* note 8; *UMBC Theatrical Intimacy Policy*, *supra* note 8.

[150] PACE, *supra* note 2, 10at 70; *UVU Theatrical Intimacy Policy*, *supra* note 8; *UMBC Theatrical Intimacy Policy*, *supra* note 8.

documentation of choreographed movements should be in desexualized language.[151] Desexualized language includes a non-sexualized description of the level of touch and the specific area of the physical contact.[152] The aim of desexualization is, frankly, to make sure staged intimacy is work, and work isn't sexy.[153] For example, in practice, desexualization turns "grope [your] scene partner" into "find muscle- and bone-level contact" with a scene partner's backside.

The legal relevance of these policies comes from their ability to fill the gaps left by traditional policies. Take any one of the previously mentioned model anti-harassment policies, add boundary and choreography policies, and suddenly those model policies are no longer substantively ineffective. This is because boundary and choreography policies enable employees to solve the boundary-determination problem and always ensure that whatever sexual conduct they must perform as part of a scene is not unwelcome.

For example, the primary reason that traditional anti-harassment policies are ineffective in workplaces with staged intimacy is that they provide poor guidance on what sexual harassment is and what conduct constitutes sexual harassment.[154] As shown previously, there is a lot of room for a performer to make assumptions that their co-performer has automatically consented to whatever movements they might improvise during an intimate scene by virtue of having agreed to perform a show with staged intimacy. Further, there is room for a performer to simply compartmentalize their performance as not bound by an anti-harassment policy. An anti-harassment policy that requires performers to express their personal boundaries and reduce the movements into written choreography leaves no room for these assumptions. So long as no performer is being coerced or misled, the scripted movements should accord with their personal boundaries. Consequently, there will be no conduct in an intimate scene that either performer finds unwelcome. What conduct is appropriate and part of the scene and what conduct crosses the line? That's easy, look at the choreography.

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[151] PACE, *supra* note 2, 10at 70; *UVU Theatrical Intimacy Policy*, *supra* note 8; *UMBC Theatrical Intimacy Policy*, *supra* note 8.

[152] PACE, *supra* note 2, at 10.

[153] *Id.* ("Staging sex doesn't need to be sexy—it shouldn't be, any more than staging violence should be scary.").

[154] *See, e.g.*, Equal Emp. Opportunity Comm'n v. Rotary Corp., 297 F. Supp. 2d 643, 664 (N.D.N.Y. 2003); Robles v. Cox & Co., 154 F. Supp. 2d 795, 804 (S.D.NY. 2001).

C. A Survey of Enacted Boundary and Choreography Policies

Perhaps the solution to the ineffectiveness of traditional anti-harassment policies (adopting boundary and choreography policies) seems too simple or too abstract. However, these policies are not merely abstract principles—they have been put into practice. Some university theatre programs have incorporated the advice of intimacy professionals into Theatrical Intimacy Policies.[155] Notably, Title IX allows for a plaintiff to bring a hostile environment harassment claim analogous to Title VII claims.[156] While it is not explicitly stated, one can infer that the policies discussed below exist (at least in part) to prevent hostile environments in the Title IX context.

Currently enacted university Theatrical Intimacy Policies are substantively similar.[157] Thus, this discussion will focus on just one, the University of Maryland Baltimore County's Theatrical Intimacy Policy (the "UMBC Theatrical Intimacy Policy").[158] Sections of this policy contain the two minimum requirements of boundary policies.[159] For example, the policy states that "theatrical intimacy requires . . . [establishing] boundaries" and recommends using "the Button" which allows performers to use a neutral word like "Button" to stop a scene should they feel uncomfortable.[160] It also meets the criteria laid out above for choreography policies stating:

> All theatrical intimacy, regardless of how simple or straight-forward it might be, must be choreographed. Choreography must be notated by performers and stage management. Notation should be written, but can also be in the form of an audio recording. Performers must not deviate from choreography. If a performer's boundaries change [in a way] that alters the choreography, they should notify the instructor and/or choreographer as soon

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[155] *UVU Theatrical Intimacy Policy*, *supra* note 8; *UMBC Theatrical Intimacy Policy*, *supra* note 8.

[156] Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 534 (3d Cir. 2018) ("Title IX's 'hostile environment harassment' cause of action originated in a series of cases decided under Title VII of the Civil Rights Act . . . . The Supreme Court has 'extended an analogous cause of action to students under Title IX.' Title VII cases are therefore instructive.")

[157] *Compare UMBC Theatrical Intimacy Policy*, *supra* note 8, *with UVU Theatrical Intimacy Policy*, *supra* note 8.

[158] *UMBC Theatrical Intimacy Policy*, *supra* note 8.

[159] *Id.*

[160] *Id.*

> as possible so modifications can be made.[161]

It also specifies that desexualized language is to be used when discussing staged intimacy generally and prohibits directors from making unilateral changes to choreography.[162] Overall, this prototypical example of a Theatrical Intimacy Policy contains practical examples of the boundary and choreography policies that this discussion advocates for.

The requirements for boundary and choreography policies articulated in this argument are expressed in terms of minimal requirements. This is to honor the reality that the law only requires reasonable care.[163] If traditional policies fail to meet the standard of reasonable care because they do not provide performers guidance on how to determine appropriate and inappropriate conduct during staged intimacy, then meeting a standard of reasonable care only requires remedying the failure to provide adequate guidance. Still, out of caution or perhaps to promote a healthier organizational culture that works in synergy with anti-harassment policies to prevent harassment, an employer can go beyond these minimums.[164] For example, the UMBC Theatrical Intimacy Policy, in addition to boundary and choreography policies, incorporates an "Instructional Touch" policy that sets guidelines for instructional touching (e.g., adjusting a performer's positioning).[165] Moreover, it has a detailed policy for the kinds of potentially awkward physical contact involved in costume fitting.[166] Again, it is not contended that these additional policies are required, but they do help illustrate that productions can and currently are implementing not just versions of boundary and choreography policies, but additional policies that make the process of staging intimacy safer. This dissuades any arguments concerning the practicality of implementing boundary and choreography policies.

When it comes to workplaces involving staged intimacy, traditional anti-harassment policies have some alarming gaps. This should not be surprising. Until recently, there was not much zeal within the industry to take a deeper look in the mirror at problems with staging intimacy and sexual abuse.[167] Having protected itself through the power

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[161] *Id.*

[162] *Id.*

[163] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

[164] Goldberg, *supra* note 22, at 425, 478–79 (discussing the importance of workplace culture and its relationship with employers' legal compliance efforts).

[165] *UMBC Theatrical Intimacy Policy*, *supra* note 8.

[166] *Id.*

[167] *See, e.g.*, Susan Berridge & Tanya Horeck, *Sexual Misconduct in Film and TV: How Intimacy Coordination Can Help to Address the Historic Issue*, THE CONVERSATION (May 11, 2021, 4:45 AM) https://theconversation.com/sexual-

imbalances inherent in its structure,[168] the entertainment industry did not need to develop policies and practices for making staged intimacy safer. The above articulation of boundary and choreography policies is perhaps not the only formulation that would fill the gaps apparent in traditional anti-harassment policies. After all, the standard of reasonable care is relatively flexible.[169] What is clear is that no matter what combination of policies and procedures is used to make anti-harassment policies fit for workplaces with staged intimacy, they must address the boundary-determination problem. In other words, they must provide a reliable method for determining appropriate and inappropriate conduct thereby ensuring that the sexual conduct that is part of a production is never unwelcome to the relevant performers.

III. THE ENTERTAINMENT INDUSTRY'S RELIANCE ON INDEPENDENT CONTRACTORS AND THE POTENTIAL COMPLICATIONS IT CREATES

This discussion has so far shown that traditional anti-harassment policies cannot constitute reasonable care in workplaces with staged intimacy and that employers must do 'something more.' This argument has proffered boundary and choreography policies as that 'something more' and illustrated that their legal relevance lies in the way they ensure anti-harassment policies are effective and suitable to the employment circumstances of a workplace with staged intimacy. Still, anyone familiar with the entertainment industry is likely wondering whether the industry's reliance on classifying performers as independent contractors poses a threat to this argument's conclusion. Title VII only protects employees, and it has long been understood that independent contractors are outside the scope of its protection.[170] Despite the fact that independent contractor or employee classification is not determined by contract,[171] there is a prevailing notion that this use of independent contractors allows

misconduct-in-film-and-tv-how-intimacy-coordination-can-help-to-address-the-historic-issue-160489.

[168] *See supra* notes 91–93 and accompanying text.

[169] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 808–09 (1998) (noting that reasonable care can differ based on the size of the workforce and concentration of employees).

[170] 1 LEX K. LARSON & KIM H. HAGAN, LARSON ON EMPLOYMENT DISCRIMINATION § 3.02 (2d ed. 2021) ("[S]ome form of employment relation—past, present, or future—must be in the picture: if, for example, the disputed relationship is that of independent contractor, Title VII protections would not apply.").

[171] Howarth v. Rockingham Publ'g Co., 20 F. Supp. 2d 959, 964 (W.D. Va. 1998) ("Employers cannot simply designate persons as 'employees' or 'independent contractors;' the actual contract of employment determines whether the service is being performed by an employee or an independent contractor.")

for entertainment industry employers to skirt around the edges of Title VII.[172] This is what this discussion will call the independent contractor problem. The solution to this problem requires proving (usually as a preliminary matter) that one is misclassified as an independent contractor.[173] This section shows not only that it is doctrinally plausible that performers could win such a challenge but assembles a body of analogous case law where performers have done so successfully. At the close of this section, it should be obvious that, in general, the entertainment industry's reliance on classifying performers as independent contractors poses no obstacle for this argument.

But first, before digging into the law, the independent contractor problem must be qualified with respect to its actual impact on the argument herein. It must be emphasized that not every performer needs to be an employee for the argument here to work. It is only necessary that there is a non-trivial set of performers who are legally employees and could therefore successfully bring a claim and adopt some version of the argument outlined herein. Further, even if this discussion's proofs for why performers are employees is wholly rejected, the argument that reasonable care requires the adoption of boundary and choreography policies in productions with staged intimacy stands for two reasons. First, independent contractor classification of performers, while prevalent, is not universal.[174] Second, some states have sexual harassment laws with mechanics analogous to Title VII,[175] and in states like California and New York (states that are significant bases of operation for the entertainment industry) these laws explicitly cover independent contractors.[176] In those

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[172] *See* Covert, *supra* note 28.

[173] *See e.g.,* Long v. Diamond Dolls of Nev., No. 19-cv-00652, 2020 WL 6381673, at *9 (D. Nev. Oct. 29, 2020).

[174] For example, union performers are classified as employees. Edward Lee, *Can Copyright Law Protect People From Sexual Harassment?*, 69 EMORY L.J 607, 645 (2020); *see also* SAG-AFTRA, *California Member Advisory Regarding AB5* (Aug. 2, 2019), https://www.sagaftra.org/california-member-advisory-regarding-ab5 ("SAG-AFTRA members have always been employees of the producers and companies who are signatories to our collective bargaining agreements."). Though, this classification too could be challenged because, again, what classification the parties choose is not controlling. Howarth v. Rockingham Publ'g Co., 20 F. Supp. 2d 959, 964 (W.D. Va. 1998) ("Employers cannot simply designate persons as 'employees' or 'independent contractors;' the actual contract of employment determines whether the service is being performed by an employee or an independent contractor.")

[175] Fowler v. Scores Holding Co., 677 F. Supp. 2d 673, 681 (S.D.N.Y. 2009) ("New York courts require the same showing for claims brought under the NYSHRL as federal employment discrimination claims brought under Title VII . . . ."); Humenny v. Genex Corp., 390 F.3d 901, 906 (6th Cir. 2004) (noting that claims brought under Michigan's Elliott-Larsen Civil Rights Act "are analyzed under the same evidentiary framework used in Title VII cases."); CAL. GOV'T CODE § 12940 (2022).

[176] N.Y. EXEC. LAW § 296-d (McKinney 2022); CAL. GOV'T CODE § 12940(j)(1).

states, the mechanics of this argument could play out at a state level. Hence, the purpose of addressing the employee/independent contractor classification here is not that it poses a fatal threat if left unaddressed. Rather, the purpose is to challenge a prevailing misconception that is often asserted as a blanket reason for why Title VII cannot improve working conditions within the entertainment industry.[177] Such an assertion misses important nuance and fails to grapple with the fact that not only is worker classification a complicated issue in general, but that the specific issue of how to classify stage and screen performers has not been deeply explored by courts with respect to Title VII.[178]

A. Proving Misclassification: The Doctrinal Argument

While the practice of classifying performers as independent contractors is not fatal to this argument, it does necessitate illustrating that performers are, in most cases, misclassified as independent contractors.[179] In the context of Title VII, courts have used three tests to determine whether a worker is an employee or an independent contractor: the common law agency test, the economic realities test, and the hybrid test.[180] Each test has its own set of factors to consider.[181] At the same time, they do not have meaningful substantive differences.[182] Crucially, all of them are concerned with the level of control retained by the hiring party.[183] However, Supreme Court precedent favors using the common law test when the term employee is not defined or is defined in an

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[177] Covert, *supra* note 28.

[178] The author is aware of Alberty-Velez v. Corporación de Puerto Rico para la Difusión Pública, 361 F.3d 1, 7 (1st Cir. 2004). However, the facts of that case do not represent a typical performer-production relationship. Moreover, the plaintiff in *Alberty-Velez* was a television host and similar subsequent analysis applied to a radio show host was less conclusive regarding appropriate worker classification. Ocasio v. RAAD Broad. Corp., 954 F. Supp. 2d 67, 75 (D.P.R. 2013).

[179] This qualification is added only because there is conceivably a contractual relationship a performer could negotiate that would give them the required amount of control over a production to make them both a performer and legally an independent contractor.

[180] 1 LEX K. LARSON & KIM H. HAGAN, LARSON ON EMPLOYMENT DISCRIMINATION § 4.02(3) (2023).

[181] *Id.*

[182] Adcock v. Chrysler Corp., 166 F.3d 1290, 1292 n.3 (9th Cir. 1999) ("The common law agency approach is essentially indistinguishable from the approach previously used by this Circuit in analyzing 'employment relationship' for Title VII purposes."); *see also* LARSON & HAGAN, *supra* note 180 (compiling a list of courts who have found the differences in the three main tests for distinguishing between an employee and independent contractor to be minimal).

[183] Lilley v. BTM Corp., 958 F.2d 746, 750 (6th Cir. 1992) (applying the economic realities test and analyzing the level of control retained by the hiring party).

unhelpful or circular manner.[184] Title VII defines an employee in an unhelpful and circular manner,[185] therefore, this discussion will frame the issue under the common law test, but will also use analysis from cases applying other tests where said analysis concerns the control the hiring party retains since that factor is shared in common by all three tests.[186]

Under the common law agency test the employee/independent contractor distinction depends on "the hiring party's right to control the manner and means by which the product is accomplished."[187] The more control retained by the hiring party, the more likely it is that the worker is really an employee.[188] Courts look at the following twelve factors to evaluate the hiring party's control:

> [1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party's discretion over when and how long to work; [7] the method of payment; [8] the hired party's role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; [12] and the tax treatment of the hired party.[189]

No one factor is dispositive,[190] nor is every factor always relevant.[191] The factors are simply indicative of the amount of control the hiring party retains over "the manner and means by which the product is accomplished."[192] How much control the hiring party retains is what is dispositive,[193] so the obvious inquiry is into the day-to-day of a performer

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[184] *See* Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 445 (2003) ("[W]e explained that 'when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency.'" (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992)).

[185] LARSON & HAGAN, *supra* note 180.

[186] *See* LARSON & HAGAN, *supra* note 180.

[187] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

[188] *Id.* at 752 (finding that the amount of absolute freedom to decide when and how long to work favored against an employment relationship).

[189] *Id.* at 751–52.

[190] *Id.* at 752.

[191] *See* Aymes v. Bonelli, 980 F.2d 857, 861 (2d Cir. 1992) (narrowing *Reid*'s twelve factors to the five most relevant factors).

[192] *Reid*, 490 U.S. at 751.

[193] *Id.*

to analyze how much control they retain compared to their employer.

Christian Ketter, an attorney, legal scholar, and operatic tenor, uses his unique background to describe the day-to-day working experience of a performer and the level of control they exercise over a production's final product.[194] In doing so, Ketter concludes that performers in the entertainment industry lack control over the manner and means of a production.[195] The control over manner and means "is typically exerted via a rehearsal process dictating what the performance itself will be 'and how it will be done.'"[196] Performers attend several kinds of rehearsals.[197] For example, a stage performer might attend blocking, tech rehearsals, and dress rehearsals.[198] Blocking is the process of determining the path performers take onstage.[199] The director has final say over blocking.[200] Tech rehearsals integrate performers' performances, music (if any), and the technical aspects of the production.[201] Each of these rehearsals are essential in achieving the final 'product.'[202] Most importantly, performers do not control these rehearsals, nor do they control the final product.[203] Instead, directors provide performers with feedback on how to adjust their work to meet the needs of the final product.[204] Each of these facts supports the notion that performers themselves lack control over the manner and means of the final product.

While Ketter did not explicitly apply the twelve factors above, applying them to the working experience of a performer also favors a conclusion that performers lack control over the manner and means. For example, it is "part of the regular business" of a production to put on shows or create some other form of media.[205] Performers are hired to

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[194] Christian Ketter, *A Curtain-Call for Performing Arts Industry Clauses: Why Nonunionized Stage-Performers Are "Employees" Not "Independent Contractors,"* 9 ARIZ. ST. SPORTS & ENT. L.J. 1, 1, 21–23 (2020).

[195] *Id.* at 18.

[196] *Id.* (citing *Independent Contractor Defined*, IRS (Jan. 23, 2020), https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined).

[197] Ketter, *supra* note 194, at 21–25.

[198] *Id.*

[199] JV Mercanti, *60+ Theatre Terms and Definitions Every Actor Should Know*, BACKSTAGE, https://www.backstage.com/magazine/article/theater-terms-every-actor-know-4975/ (Feb. 15, 2022).

[200] *Id.*

[201] *See* Ketter, *supra* note 194, at 22.

[202] *See id.* at 22–23.

[203] *Id.* at 21, 23.

[204] *Id.* at 23

[205] *Id.* at 49.

facilitate this regular business.[206] Further, professional performers are generally not responsible for supplying a stage, lighting, or costumes.[207] Hence, the production supplies the "instrumentalities and tools."[208] There are more nuanced considerations as well. Consider that the production's producers control the scheduling of all the aforementioned rehearsals, and they make said schedules "independently of an individual performer's schedule."[209] This indicates the hiring party—and not the performers—has the "discretion over when and how long to work."[210] Certainly, the skill of a performer is important to the final product, and that may indeed favor finding performers have control over the manner and means of the final product. However, it is worth reemphasizing that not all factors must favor employee classification.

It is worth noting that in some instances courts have held freelance orchestra musicians to be independent contractors while rejecting arguments that conductors exercise enough control over the manner and means for musicians to be employees of an orchestra.[211] However, the reasoning in those cases is distinguishable and not analogous to performers of stage and screen. First, the director-performer relationship is different from the conductor-musician relationship. Directors generally exercise more control, they are the "captain" and control "all creative decisions" whereas a conductor or music director leads the orchestra and may set tempo or the phrasing of the music.[212] Additionally, orchestra musicians, being musicians, are more likely to provide their own instruments which courts have found relevant in classifying them as independent contractors.[213]

All in all, it is important to keep in mind that in any determination of worker classification there is "no bright line but a spectrum, and that courts must struggle with matters of degree rather than issue categorical pronouncements."[214] The above analysis illustrates that performers lack

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[206] *Id.* at 25.

[207] *Id.* at 33.

[208] Courts have acknowledged the significance of providing a stage and equipment in cases analyzing whether dancers at adult entertainment venues are independent contractors. *See, e.g.*, Harrell v. Diamond A Ent., Inc., 992 F. Supp. 1343, 1350 (M.D. Fla. 1997); *but see* Alberty-Velez v. Corporación de P.R. para la Difusión Pública, 361 F.3d 1, 8 (1st Cir. 2004) (diminishing the significance of employer provided filming equipment).

[209] Ketter, *supra* note 194, at 21.

[210] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

[211] Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 490 (8th Cir. 2003) (admitting that the question of whether musicians are independent contractors is "thorny").

[212] *See* Mercanti, *supra* note 199.

[213] *Lerohl*, 322 F.3d at 491.

[214] McFeeley v. Jackson St. Ent., LLC, 825 F.3d 235, 241 (4th Cir. 2016).

control over the manner and means of the production, but that same analysis can come out different if there are specific facts and unique arrangements giving performers more control.[215] Still, the basic tenants of agency law doctrine move the needle in favor of employee status and there is further support to be found by studying case law with analogous fact patterns concerning dancers, primarily dancers at adult entertainment venues.

B. Proving Misclassification: Dancers as a Case Study

Cases involving dancers classified as independent contractors often involve a primary claim where a dancer's classification as an independent contractor must be challenged as a preliminary hurdle to bringing the primary claim.[216] This is analogous to various other types of performers who could challenge their independent contractor status to bring a Title VII claim. Examining courts' reasoning regarding the control exercised by clubs employing dancers further supports the conclusion that performers are generally not independent contractors.

Courts often emphasize the lack of control dancers have over their schedules (i.e. when and how long to work) when holding that they are employees rather than independent contractors.[217] Allowing dancers to choose what days to work but requiring they work a minimum of three days a week (including at least one weekend day or a Monday) while adhering to a shift framework was—when considered alongside other aspects of the employer's control—enough to hold that the club possessed the requisite level of control over dancers.[218] Conversely, arrangements where dancers can leave whenever they want favor classifying dancers as independent contractors.[219] By comparison, the above arrangements are less demanding than a rehearsal schedule for a stage production or a shooting schedule for a film would be.[220]

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[215] For example, a performer (a television show host) may be an independent contractor where their contract gave them control over the sponsors who would provide costumes, jewelry, and other image-related supplies and services necessary for her appearance. Alberty-Velez v. Corporación de P.R. para la Difusión Pública, 361 F.3d 1, 7 (1st Cir. 2004).

[216] *See, e.g.*, Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901, 911 (S.D.N.Y. 2013).

[217] *See id.* at 913, 916; *McFeeley*, 825 F.3d at 242; Harrell v. Diamond A Ent., Inc., 992 F. Supp. 1343, 1350 (M.D. Fla. 1997) (noting defendant club had a policy that penalized tardiness).

[218] *See Hart*, 967 F. Supp. 2d at 913–19.

[219] *See* Barber v. D. 2801 Westwood, No. A-14-709238-C, 2017 WL 4330426, *5 (Dist. Ct. Nev. Aug. 8, 2017).

[220] *Compare* the scheduling rules outlined in *Hart*, 967 F. Supp. 2d at 913, 916, *with* the scheduling demands of a performer described in Ketter, *supra* note 194, at 22–23.

It is also part of the regular business of an adult entertainment club to have dancers performing.[221] As one court put it, "without the dancers, the business would likely cease to exist or be more akin to a sports bar or nightclub."[222] Media productions similarly rely on performers as part of their regular business. Without performers whatever media is being produced cannot materialize (whether it be for the stage or for film) and one is left with the image of a solemn director with no one to heed their instructions.

Case law analyzing the employment classification of dancers has also considered the more direct inquiry of who is in control over the manner and means of achieving the final product.[223] Club control over appearance and conduct (including dancers' routine) have been relevant considerations in evaluating whether dancer or club holds control.[224] Clubs that implemented strict rules of conduct are found to exercise more control over the manner and means.[225] Conversely, clubs with limited rules are likely to lack the requisite level of control.[226] Similar facts are found in film and stage productions. It is often essential to the creative vision of the work being produced that a production control a performers' conduct and appearance. Putting aside the obvious fact of costuming, directors exercise complete control over how performers conduct themselves during a performance ensuring that performers appropriately portray their roles.

The conclusion of this case study does not result in a clear line of where performers are and are not independent contractors. Remember, this analysis works in matters of degree rather than categorical pronouncements.[227] The above doctrinal analysis coupled with a case study of adult entertainment dancers tilts the balance towards finding that many performers are in fact employees. Admittedly, a more administrable test for determining independent contractor status would be desirable not just in the context of performers, but in the context of

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[221] *See Barber*, 2017 WL 4330426, at *6; Long v. Diamond Dolls of Nev., No. 19-cv-00652, 2020 WL 6381673, *9 (D. Nev. Oct. 29, 2020); *McFeeley*, 825 F.3d at 244.

[222] *Long*, 2020 WL 6381673, at *9.

[223] *See Barber*, 2017 WL 4330426, at *5.

[224] *See id.* (finding it significant that defendant club did not tell dancers how to dance or how many dances to perform); Fowler v. Scores Holding Co., 677 F. Supp. 2d 673, 680 (S.D.N.Y. 2009) (finding control over appearance and conduct was one factor that lead the court to hold plaintiff stated a plausible claim that she was an employee); Harrell v. Diamond A Ent., 992 F. Supp. 1343, 1350 (M.D. Fla. 1997) (pointing to defendant clubs internal rules and regulations which included fines for noncompliance as indicative of control).

[225] *See, e.g., McFeeley*, 825 F.3d at 242.

[226] *See Barber*, 2017 WL 4330426, at *5.

[227] *See McFeeley*, 825 F.3d at 241.

Title VII more broadly. Still, at the very least it has been established that a performer misclassified as an independent contractor is not precluded from bringing a claim arguing that reasonable care in workplaces with staged intimacy require boundary and choreography policies.

CONCLUSION

The unique risk that staged intimacy poses regarding sexual harassment in the workplace warrants unique preventative measures. By demonstrating that traditional approaches to preventing harassment fail to prevent harassment in workplaces with staged intimacy, this argument has proven, at minimum, that employers whose workplaces involve staged intimacy must do 'something more.' As asserted here, that 'something more' should be the adoption of boundary and choreography policies. It may be the case that there are other configurations of this 'something more,' but at minimum they must be able to grapple with the boundary-determination problem, otherwise they risk being as ineffective as traditional approaches.

Title VII may not provide the best or most convenient way of reforming workplaces,[228] but without new legislation it is the framework one is left to work with. Further, it has retained enough flexibility to allow for arguments that push courts to consider its protections in new contexts. Moreover, the vicarious liability framework provides a useful way to regulate the private sphere without direct legislation. If the cultural momentum continues to support victims, it becomes more likely that performers who experience the kind of harassment detailed herein take action. Furthermore, as productions continue adopting intimacy professionals and performers begin to expect safer working conditions,[229] it becomes more likely that a case will arise that asks directly: What does it mean to take reasonable care to prevent harassment in a production involving staged intimacy? This argument has provided sufficient reasoning to conclude it requires the adoption of boundary and choreography policies.

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[228] *See* Goldberg, *supra* note 22, at 483.

[229] SAG-AFTRA, STANDARDS AND PROTOCOLS FOR THE USE OF INTIMACY COORDINATORS (2021), https://www.sagaftra.org/files/sa_documents/SA_IntimacyCoord.pdf.

THE PLAYBOOK: A GUIDE TO COLLEGE ATHLETE UNIONIZATION IN THE WAKE OF *ALSTON*

Ashlyn Hare*

ABSTRACT

Since the Supreme Court's decision in National Collegiate Athletic Association v. Alston, the movement for college athlete unionization has drastically expanded. As college sports—and their profitability—continue to grow, problems such as the exploitation of athletes of color, gender inequity, and abuse and mistreatment of athletes have signaled the need for restoring decision-making power to the athletes. This can be achieved through collective bargaining, but the complexity of college sports and its many stakeholders makes the route to a college athletes players association far from clear. This article analyzes the legal pitfalls in previous unionization efforts, and provides solutions to the most complex legal issues facing a college athlete unionization effort.

I. INTRODUCTION

In July of 2021, the United States Supreme Court released its first landmark decision on college sports since 1983. In *National Collegiate Athletic Ass'n v. Alston*, the Supreme Court officially upheld the Ninth Circuit's determination that NCAA rules restricting education-related benefits for college athletes violate antitrust laws.[1] However, it was the provocative remarks in Justice Kavanaugh's concurrence in the decision

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[1] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2166 (2021), *aff'g In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239 (9th Cir. 2020).

that made headlines.[2] Justice Kavanaugh lambasted the NCAA, calling its arguments "circular and unpersuasive."[3] Notably, Justice Kavanaugh provided the NCAA with their ticket out of endless antitrust litigation: collective bargaining.[4]

Indeed, the year following *Alston* has created a tipping point. The courts and the National Labor Relations Board have given their strong opinions in favor of player employee status.[5] As a result, players across sports are organizing in a concerted way,[6] and it seems it is only a matter of time before some form of college athlete players' association emerges. But what happens when the players do act? What would a college athlete union look like? What will be its impact?

This paper seeks to provide a roadmap for college athlete unionization. Part II briefly explains how to form a union under the National Labor Relations Act. Part III outlines three main legal challenges to college athlete unionization—employee status, the joint employer doctrine, and the public school issue—and provides routes to overcome them. Finally, Part IV discusses collective bargaining, including how a college athlete union might be structured, appropriate bargaining units, functional barriers to organization, and subjects of bargaining that college athletes will want to address in a collective bargaining agreement.

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[2] *Id.* at 2166–69 (Kavanaugh, J., concurring); *see also, e.g.,* Paul Myerberg, *Supreme Court Justice Brett Kavanaugh Rips NCAA in Antitrust Ruling, Says It 'Is Not Above the Law'*, USA TODAY (June 21, 2021), https://www.usatoday.com/story/sports/college/2021/06/21/justice-brett-kavanaugh-rips-ncaa-in-shawne-alston-opinion/7771281002/.

[3] *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring).

[4] *Id.* at 2168 (Kavanaugh, J., concurring) ("[C]olleges and student athletes could potentially engage in collective bargaining . . . to provide student athletes a fairer share of the revenues that they generate for their colleges.").

[5] Johnson v. Nat'l Collegiate Athletic Ass'n, 556 F. Supp. 3d 491, 501 (E.D. Pa. 2021); OFF. OF THE GEN. COUNS., MEMORANDUM GC 21-08, STATUTORY RIGHTS OF PLAYERS AT ACADEMIC INSTITUTIONS (STUDENT-ATHLETES) UNDER THE NATIONAL LABOR RELATIONS ACT (2021) [hereinafter NLRB Memo].

[6] *See* Robin Lundberg, *College Football Players Demand Seat at the Table: Unchecked*, SPORTS ILLUSTRATED (Aug. 10, 2020), https://www.si.com/college/2020/08/10/college-football-players-demand-seat-at-table-with-we-want-to-play-movement; *see also #WeAreUnited*, PLAYERS' TRIB. (Aug. 2, 2020), https://www.theplayerstribune.com/articles/pac-12-players-covid-19-statement-football-season; Jacob Cohen, *Success of College Athlete Unity Illuminates the Power of Student Athletes*, MICH. DAILY (Sept. 16, 2020), https://www.michigandaily.com/sports-society/success-college-athlete-unity-illuminates-power-student-athletes/.

II. BACKGROUND: UNIONIZATION UNDER THE NATIONAL LABOR RELATIONS ACT

The vast majority of labor unions in the United States are formed under the National Labor Relations Act (NLRA), a federal law that governs labor rights in private-sector workplaces.[7] To form a union under the NLRA, workers must be statutory employees within the meaning of the NLRA,[8] and they must work for an employer within the jurisdiction of the NLRA.[9] This means the employer must be in the private sector. A union can first approach the employer showing majority support and request recognition.[10] If the employer declines to recognize the union, it must file a representation petition[11] with the National Labor Relations Board (NLRB) that shows it has obtained support from at least 30% of workers within the bargaining unit.[12] After the petition is filed, the NLRB Regional Director will determine its viability and, if the petition is proper, the Regional Director will conduct a secret ballot election.[13] If a majority of employees within the bargaining unit vote in favor of the union, the Regional Director certifies the union.[14] All statutory employees have some protection under the NLRA, but unionization affords labor organizations additional rights, including the right to collectively bargain with the employer over wages, hours, and other terms and conditions of employment.[15]

III. LEGAL BARRIERS TO UNIONIZATION

Critics often cite three major reasons why college athletes cannot unionize under the NLRA. The first is that college athletes are not

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[7] 29 U.S.C. §§ 151–169.

[8] *Id.* § 152(3).

[9] *Id.* § 152(2).

[10] NLRB, *Your Right to Form a Union*, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/your-right-to-form-a-union (last visited Mar. 15, 2023).

[11] NLRB, *RC Petition*, available at, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3040/Form%20NLRB-502%20(RC)%20-%20RC%20Petition.pdf.

[12] NLRB, *The NLRB Process*, https://www.nlrb.gov/resources/nlrb-process (last visited Dec. 14, 2021). A "bargaining unit" is a group of employees authorized to engage in collective bargaining on behalf of all the employees in a company. *See Bargaining Unit*, MERRIAM-WEBSTER LEGAL, https://www.merriam-webster.com/legal/bargaining%20unit (last visited Mar. 24, 2023). Bargaining units are discussed in more detail *infra* Part IV.A.

[13] *The NLRB Process*, *supra* note 12.

[14] *Id.*

[15] 29 U.S.C. § 158(c).

employees within the meaning of the Act.[16] The second is that colleges and universities are not employers under the Act since rules for athletes and enforcement of those rules are promulgated and exercised by three different entities: colleges, conferences, and the NCAA. The third is that the NLRA only applies to private schools, and thus college athletes at public schools are subject instead to state laws, and not within the scope of NLRB regulation.[17] This part of the article addresses all three critiques and provides avenues for college athletes, regardless of whether they are at a public or private school, to establish themselves as employees of their conferences and the NCAA, both of which are private organizations subject to the NLRA.

A. Employee Status

1. The History of College Athlete Employee Status

The battle for employee status has been ongoing for over half a century. The first landmark decision on college athlete employee status was *University of Denver v. Nemeth* in 1953.[18] In *Nemeth*, a football player brought a worker's compensation claim for an injury he sustained during football practice.[19] At the time, Nemeth was employed by the University to conduct certain work on the tennis courts on campus.[20] He was paid $50 a month from the University, $10 of which was deducted from his pay and put towards his meals at the student cafeteria.[21] The court determined that Nemeth's student job was contingent upon his performance on the football team, finding it was "the settled practice of the University to insist that those who held the jobs and received the free meals, engage in football games under penalty of losing the job and meals."[22] Consequently, the court determined that Nemeth was: 1) an employee; and 2) injured in the course of his employment, thus entitling him to worker's compensation.[23]

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[16] *See, e.g.*, Michael McCann, *Breaking Down Implications of NLRB Ruling On Northwestern Players Union*, SPORTS ILLUSTRATED (Aug. 17, 2015), https://www.si.com/college/2015/08/17/northwestern-football-players-union-nlrb-ruling-analysis (concluding that the NLRB's decision to decline jurisdiction over the Northwestern football team indicates they are not employees under federal labor law).

[17] *See* Nw. Univ. & Coll. Athlete Players Ass'n (CAPA), Petitioner, 362 N.L.R.B. 1350, 1354 (2015).

[18] 257 P.2d 423 (Colo. 1953).

[19] *Id.* at 424.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 428.

[23] *Id.* at 427, 430.

In direct response to the *Nemeth* decision, the NCAA developed the term "student-athlete" in an effort to evade employee status of college athletes.[24] Soon thereafter, the term was mandated.[25] Former NCAA Executive Director Walter Byers explained, "[w]e crafted the term student-athlete, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes."[26] Suddenly, courts started diverging from the major ruling in *Nemeth*. In 1957, just four years later, the Colorado Supreme Court found that Ray Herbert Dennison, a football player at Fort Lewis A&M College who tragically died during a game, was not an employee of the school.[27] The court distinguished *Nemeth*, reasoning that Nemeth's employment as a tennis court maintenance worker depended on his participation on the football team, whereas Dennison was under no contractual obligation to play football.[28]

College athlete employee status was not significantly challenged again until 2014, when the Northwestern University football team attempted to unionize.[29] After gaining support from 30% of its members, the Northwestern football team petitioned the Regional Director for a representation election.[30] The Regional Director ultimately directed the athletes to conduct an election, determining through an extensive analysis that the athletes were employees under Section 2(3) of the National Labor Relations Act.[31]

Section 2(3) of the National Labor Relations Act provides that "the term 'employee' shall include any employee" except agricultural laborers, independent contractors, supervisors, or individuals that are subject to the Railway Labor Act.[32] To determine whether an individual is considered an employee under the Act, the National Labor Relations

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[24] Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 84 (2006).

[25] *Id.* (citing WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995)).

[26] *Id.* (quoting BYERS, *supra* note 25). Because the term "student-athlete" has historically been used to deprive college athletes of economic rights, this paper instead uses the terms "college athlete" or "player."

[27] State Comp. Ins. Fund v. Indus. Comm'n, 314 P.2d 288, 289–90 (Colo. 1957).

[28] *Id.* at 290.

[29] Tom Farrey, *Kain Colter Starts Union Movement*, ESPN (Jan. 28, 2014), https://www.espn.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union.

[30] *Id.*

[31] Nw. Univ. & Coll. Athletes Players Ass'n (CAPA), Petitioner, Case 13-RC-121359, 2014 WL 1246914, at *1 (N.L.R.B. Mar. 17, 2014).

[32] 29 U.S.C. § 152(3).

Board employs a common law test.[33] Under that test, an employee is one who performs services for another under a contract of hire, subject to the other's control or right of control, in return for compensation.[34] The Regional Director determined that grant-in-aid Northwestern football players, but not walk-ons, satisfied the common law test.[35]

The Regional Director's decision relied on two main reasons. First, scholarship football players perform a service for the benefit of the employer for which they receive compensation in the form of a grant-in-aid scholarship.[36] On this point, the Regional Director noted that players are recruited and granted scholarships based on their athletic prowess.[37] Additionally, players sign a contract that sets forth the terms of their scholarship.[38] Second, scholarship football players are subject to the employer's control in the performance of their duties as football players.[39] Here, the Regional Director emphasized that the football coaches have substantial control over the athletes' schedules, including practice times, locations, and travel itineraries.[40] Moreover, the employer maintains control by monitoring athletes' adherence to team and NCAA rules and disciplining them for violations.[41] Team rules are extensive, and provide the employer control over significant portions of the players' personal lives, including what vehicles they drive, whether or not they can leave campus, and what they can post on social media.[42] Upon determining the Northwestern players were employees, the Regional Director ordered an immediate election to take place.[43]

The Northwestern football team's unionization effort came to a halt after the NLRB declined to exercise jurisdiction over the case.[44] Consequently, the election ballots remained sealed,[45] and a college

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[33] NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 93–94 (1995) (explaining that courts should interpret the term "employee" using the common law agency doctrine unless Congress dictates otherwise).

[34] *Nw. Univ.*, 2014 WL 1246914, at *12. It is also worth noting that some versions of the common law test do not necessarily require compensation, although payment is "strongly indicative of employee status." Boston Medical Center Corp., 330 N.L.R.B. 152, 160 (1999).

[35] *Nw. Univ.*, 2014 WL 1246914, at *15.

[36] *Id.* at *12.

[37] *Id.*

[38] *Id.* at *13.

[39] *Id.*

[40] *Id.* at *13–14.

[41] *Id.* at *14.

[42] *Id.*

[43] *Id.* at *21.

[44] *Nw. Univ.*, 362 N.L.R.B. at 1350.

[45] *Id.* at 1350 n.1 (acknowledging that an election was held pursuant to the Regional Director's order and the ballots were impounded while the case was on appeal).

athlete union never came to fruition. Contrary to what many labor commentators have opined,[46] the *Northwestern* NLRB decision does not overrule the Regional Director's determination of college athlete employee status, nor does it even consider it.[47] The sole reason the Board declined the case was because exercising jurisdiction "would not promote stability in labor relations."[48] In fact, the Board implicitly invites a new bargaining unit to bring the question.[49]

While the Board provides no direct avenue to unionization of college athletes, its reasoning strongly implies the sort of bargaining unit needed for the Board to exercise jurisdiction. First, the Board determined that the proposed bargaining unit was distinguished from professional players associations because it was comprised of only a single team.[50] Then, the Board turned to the problem that would prevent it from exercising jurisdiction over a larger bargaining unit: the vast majority of Football Bowl Subdivision (FBS) institutions are public schools, explicitly exempt from the NLRA's jurisdiction.[51] On this point, the Board also noted that Northwestern University is the only private school in its conference.[52] From this, the Board has implied that it would exercise jurisdiction over a multi-team bargaining unit in a conference with numerous private schools.[53]

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[46] *See, e.g.*, Zev J. Eigen, *Should College Athletes Be Allowed to Unionize? No: College Athletes Work Hard, But They Are Not Employees*, WALL ST. J. (Sept. 15, 2015, 10:01 PM), https://www.wsj.com/articles/should-college-athletes-be-allowed-to-unionize-1442368889.

[47] *Nw. Univ.*, 362 N.L.R.B. at 1355 ("[W]e conclude, without deciding whether the scholarship players are employees under Section 2(3), that it would not effectuate the policies of the Act to assert jurisdiction in this case.").

[48] *Id.* at 1352.

[49] *Id.* at 1354 n.16 ("We do not reach whether and do not decide that team-by-team organizing and bargaining is foreclosed or that we would never assert jurisdiction over an individual team.").

[50] *Id.* at 1353–54.

[51] *Id.* at 1354.

[52] *Id.*

[53] It is worth acknowledging that the Board's reasoning in declining jurisdiction has been heavily criticized. *See generally* Roberto L. Corrada, *The Northwestern University Football Case: A Dissent*, 11 HARV. J. OF SPORTS & ENT. L. 15 (2019). For example, despite the Board's emphasis that a single-team unit is unprecedented, dicta in Board opinions from professional sports cases suggests that a single-team unit can perhaps be *more* appropriate. *Id.* at 33 (citing *N. Am. Soccer League*, 236 N.L.R.B. 1317, 1320 (1978)). Consequently, though one can infer what might be an "appropriate" bargaining unit, the Board has demonstrated that it may choose to arbitrarily decline jurisdiction in cases involving college sports.

2. Recent Developments in the Fight For College Athlete Employee Status

The college sports landscape has changed dramatically in the nine years since Northwestern football players attempted to unionize. On June 30, 2021, the NCAA officially voted to allow college athletes to profit off their name, image, and likeness.[54] Additionally, the COVID-19 pandemic triggered a wave of college athlete concerted action, with numerous players' movements forming to demand stronger player safety protocols.[55] Despite the drastic changes across the landscape of college sports in the past decade, none has been more destabilizing than the Supreme Court's 2021 decision in *NCAA v. Alston*.

The central issue in *Alston* was whether NCAA rules restricting education-related benefits such as scholarships for graduate school, payment for academic tutoring, or paid post-eligibility internships violated antitrust laws.[56] On its face, the decision may appear relatively insignificant. At the lower level, the athletes challenged all NCAA amateurism bylaws that prohibited athletes from being compensated for their athletic labor ("pay-for-play").[57] On that issue, the district court found that the restrictions were reasonable because they distinguish college sports from professional leagues.[58] The Ninth Circuit affirmed,[59] and the athletes did not appeal to the Supreme Court.[60] A finding to the contrary would have shattered college sports. If a court were to find that NCAA amateurism rules violate antitrust laws, college athletes would almost immediately become employees separate and distinct from their endeavors as students. The price of college athlete labor, particularly in revenue sports like football and basketball, would likely skyrocket. So when comparing the prospect of pay-for-play against the meager education-related benefits the court did award, the decision seems inconsequential.

Nonetheless, the Supreme Court's decision was a substantial blow to amateurism. For the better part of the last decade, the NCAA has been making the legal argument that amateurism affords it protection against

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[54] Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy.

[55] *See, e.g.*, Lundberg, *supra* note 6.

[56] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2147 (2021).

[57] *Id.* at 2151.

[58] *Id.* at 2153.

[59] *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d at 1244, *aff'd sub nom.* Alston, 141 S. Ct. at 2147.

[60] *Alston*, 141 S. Ct. at 2147.

antitrust scrutiny.[61] In *Alston*, the Court stripped the NCAA of its last remaining antitrust defenses. The Supreme Court confirmed that the NCAA is indeed a profit-making enterprise and its regulations are properly subject to a rule of reason antitrust analysis, as opposed to a more abbreviated review.[62] Moreover, it squashed the NCAA's theory that it can avoid antitrust scrutiny by "relabel[ing] a restraint as a product feature."[63] In other words, the NCAA cannot price-fix the value of labor—otherwise known as a labor monopsony[64]— but then escape antitrust liability by incorporating price-fixing into the definition of college sports, as the NCAA has done with amateurism.[65] Thus, while the Supreme Court decision was not as groundbreaking as it could have been had pay-for-play been on the table for review, it was still a significant win that reinvigorated the college athlete unionization movement. Indeed, courts and the NLRB alike have signaled that they are ready to define college athletes as employees, both citing *Alston*.[66]

In August of 2021, the United States District Court for the Eastern District of Pennsylvania ruled on a motion to dismiss in *Johnson v. National Collegiate Athletic Ass'n*.[67] The named plaintiffs comprise college athletes, male and female, across a variety of NCAA sports.[68] They assert that the NCAA and its member universities violated the Fair Labor Standards Act (FLSA) and various state minimum wage laws by

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[61] *See, e.g.*, Brief for Petitioner at 21–23, *Alston*, 141 S. Ct. 2141 (2021) (No. 20-512).

[62] *Alston*, 141 S. Ct. at 2159.

[63] *Id.* at 2163.

[64] A monopsony is a market situation in which one buyer controls the market. *Monopsony*, BLACK'S LAW DICTIONARY (11th ed. 2019). In the context of college sports, this means the NCAA is the only "buyer" of college athlete labor, specifically in Division I basketball and FBS football, because there are no "viable substitutes" to elite college football and basketball. *Alston*, 141 S. Ct. at 2152 (quoting *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019)).

[65] *Alston*, 141 S. Ct. at 2163; *see also Alston*, 141 S. Ct. at 2167–68 (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.") (citations omitted).

[66] Johnson v. Nat'l Collegiate Athletic Ass'n, F. Supp. 3d 491, 501 (E.D. Pa. 2021); Michael McMann, *NCAA Amateurism Roasted by 'Hot Bench' in Federal Appeals Hearing*, SPORTICO (Feb. 15, 2023, 5:45 PM), https://www.sportico.com/law/analysis/2023/federal-appeals-court-rebukes-ncaa-1234710033/; NLRB Memo at 5-6.

[67] *Johnson*, 556 F. Supp. 3d at 491.

[68] *Id.*

failing to pay college athletes for their labor.[69] The FLSA requires plaintiffs to be employees and, like the NLRA, engages in a common law analysis to determine whether individuals are considered statutory employees.[70] The court concluded that the athletes plausibly alleged they are employees under the FLSA,[71] rejecting precedential case law to the contrary.[72] Although a finding of FLSA employee status has no bearing on NLRA employee status,[73] it is significant that a federal court shifted from previous opinions in college athlete FLSA cases. In doing so, the court relied heavily on the majority opinion in *Alston* as well as Justice Kavanaugh's concurrence, noting the illogical "circular reasoning" that universities "should not be required to pay Plaintiffs a minimum wage under the FLSA because Plaintiffs are amateurs, and that Plaintiffs are amateurs because the [universities] have a long history of not paying student athletes like Plaintiffs."[74]

The federal courts are not alone in their reading of *Alston*. On September 29, 2021, Jennifer Abruzzo, General Counsel of the NLRB, released a memo definitively stating that college athletes are employees under Section 2(3) of the NLRA.[75] The memo makes three major points. First, it emphasizes that, although the NLRB declined jurisdiction in *Northwestern*, they did not reverse or even decide on the Regional Director's finding that the Northwestern football players are employees.[76]

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[69] *Id.*

[70] *Id.* at 500 (discussing the numerous common law tests employed under the FLSA to determine employee status). Although the FLSA and NLRA both employ common law tests to determine employee status, a determination of employee status under one statute does not necessitate a finding of employee status under the other. *See* Gabe Feldman, *Episode 20: College Athletes as Employees? Jennifer Abruzzo, General Counsel of the NLRB, Explains*, BETWEEN THE LINES: A PODCAST ABOUT SPORTS AND THE LAW, at 27:57 (Oct. 10, 2021), https://podcasts.apple.com/us/podcast/episode-20-college-athletes-as-employees-jennifer-abruzzo/id1525109223?i=1000538167783 (explaining how the FLSA and NLRA employee definitions differ).

[71] *Id.* at 512.

[72] The *Johnson* court discusses only one of these cases, *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285 (7th Cir. 2016), in depth; however, other courts have rejected FLSA lawsuits brought by athletes on the grounds that college athletes are not employees, *e.g.*, *Dawson v. Nat'l Collegiate Athletic Ass'n*, 250 F. Supp. 3d 401, 408 (N.D. Cal. 2017), including the U.S. District Court for the Eastern District of Pennsylvania itself. *Livers v. Nat'l Collegiate Athletic Ass'n*, No. 17-4271, 2018 WL 2291027, at *12 (E.D. Pa. May 17, 2018). The fact that the court chose to ignore its own precedent lends further to the argument that the Supreme Court's ruling in *Alston* has changed the game for college athletes.

[73] *See* Feldman, *supra* note 70 (explaining how the FLSA and NLRA employee definitions differ).

[74] *Johnson*, 556 F. Supp. 3d at 501.

[75] NLRB Memo at 1.

[76] *Id.* at 2.

Accordingly, it maintains that FBS football players, and potentially many other college athletes, clearly satisfy the broad definition of "employee" under Section 2(3) of the Act.[77] Second, the memo acknowledges that the NLRB has the ability to pursue misclassification violations against the NCAA and its member schools.[78] A misclassification violation applies when an employer, by word or by deed, intentionally misclassifies an employee—in this case as a "student-athlete"—leading that employee to believe they are not protected by the NLRA.[79] Finally, the memo notes that the NLRB may pursue certain unfair labor practice claims against schools, conferences, and the NCAA together under a joint employer theory of liability.[80]

Abruzzo's memo, though groundbreaking, does not mean that college athlete employee status is guaranteed. Abruzzo is the General Counsel, and therefore only has power to bring unfair labor practice charges against employers.[81] The NLRB is not bound by her memo in any way. Still, Abruzzo's memo is yet another signal from the government that college athletics is in dire need of reform.[82] And while it answers the biggest question the Board has so far had to grapple with, it still leaves many unanswered.

Perhaps the most glaring question the memo prompts is precisely which "Players at Academic Institutions" qualify for employee status. The memo claims that Division I FBS football players, like those at Northwestern, unequivocally satisfy the employee definition.[83] It also notes that similarly situated college athletes should also satisfy the definition.[84] What constitutes a "similarly situated" player is a key issue. Most college athletes, aside from walk-on, non-scholarship athletes, satisfy the common law test at face value. All scholarship athletes receive monetary compensation for performance under a contract of hire and all college athletes in NCAA-recognized sports are subject to NCAA

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[77] *Id.* at 3.

[78] *Id.* at 4.

[79] *See id.*; *see also* Feldman, *supra* note 70, at 17:38 (explaining that a misclassification violation would not apply to anyone who innocently uses the term "student-athlete").

[80] NLRB Memo at 9.

[81] NLRB, *General Counsel*, https://www.nlrb.gov/bio/general-counsel (last visited Oct. 14, 2021) ("The General Counsel . . . is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases.").

[82] *See, e.g.*, Sydney Umeri, *How Each NIL Bill in Congress Will Affect Student-Athletes*, SB NATION (June 23, 2021, 6:09 PM), https://www.sbnation.com/college-basketball/2021/6/23/22545287/college-athletes-name-image-likeness-bills-ncaa (compiling proposed bills in Congress regarding college sports reform).

[83] NLRB Memo at 3.

[84] *Id.*

bylaws. Moreover, most, if not all, universities and individual teams implement policies that the athletes must adhere to.

However, both the *Northwestern* Regional Director's decision and the NLRB memo place particular emphasis on revenue-generating athletes.[85] In *Northwestern*, the Regional Director notes that football players perform services "for the benefit" of the employer.[86] This takes the form of millions of dollars in revenue each year, generated through ticket sales, television contracts, merchandise sales, and licensing agreements.[87] *Northwestern* also acknowledges that a successful football team has additional intangible benefits, such as increased alumni donations and applicants for enrollment.[88] The NLRB memo likewise acknowledges the benefits the employer receives in the form of revenue and university reputation.[89] Additionally, the *Northwestern* Regional Director's decision and the NLRB memo both make reference to the amount of compensation football players receive.[90] *Northwestern* distinguishes that although college athletes do not receive a traditional paycheck, they nonetheless receive a "substantial economic benefit," sometimes totaling in excess of a quarter of a million dollars over the course of a player's undergraduate career.[91] Likewise, the NLRB memo acknowledges that football players receive "significant compensation, including up to $76,000 per year."[92]

Despite the Regional Director's emphasis on the significant amount of compensation FBS football players receive, no case law supports the proposition that compensation must be "substantial" to qualify as an employee.[93] On the contrary, the NLRB has held that

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[85] Nw. Univ. & Coll. Athletes Players Ass'n (CAPA), Petitioner, Case 13-RC-121359, 2014 WL 1246914, at *12 (N.L.R.B. Mar. 17, 2014); NLRB Memo at 3.

[86] 2014 WL 1246914 at *12.

[87] *Id.*

[88] *Id.*

[89] NLRB Memo at 3.

[90] *Nw. Univ.*, 2014 WL 1246914 at *12; NLRB Memo at 3.

[91] 2014 WL 1246914 at *12.

[92] NLRB Memo at 3.

[93] This is noteworthy because in Division I, NCAA sports are divided into "headcount" and "equivalency" sports. Headcount sports only offer full-ride scholarships, but teams are restricted to how many they can give. The headcount sports in Division I are football, men's and women's basketball, women's volleyball, women's tennis, and women's gymnastics. Equivalency sports, on the other hand, have a set number of scholarships that coaches can divide among the team as they see fit. In an equivalency sport, scholarship athletes can receive any amount of money, from $1,000, for example, to a full scholarship. Some schools might even give athletes a book scholarship, meaning the school will pay for the athletes books but will not pay for tuition. *See* Keirsten Sires, *What's the Difference: Headcount and Equivalency Scholarship*, 2ADAYS, https://www.2adays.com/blog/scholarships-equivalency-sports-

employee status requires only "presence of some form of economic relationship between the employer and the individual."[94] Indeed, this lenient proposition has been applied liberally. In *Seattle Opera v. NLRB*, the D.C. Court of Appeals affirmed a Board ruling that auxiliary choristers receiving a flat sum of merely $214 were employees.[95] In fact, the court expressly noted that under the National Labor Relations Act, "the amount (as opposed to the mere fact of) compensation is irrelevant."[96] Similarly, on a podcast explaining her memo, Abruzzo dismissed concerns that revenue generation is an essential component of employee status.[97] She also notes that employee status could apply to all college athletes who receive some form of compensation,[98] and compensation may not necessarily be in the form of a scholarship.[99] Athletes could prove compensation through other tangible benefits like athletic apparel or athletic meal services.[100] The distinction, like in *Northwestern*, would likely be between scholarship athletes and walk-on athletes.[101] However, without a dispositive Board finding on the issue, it

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headcount-sports/ (June 22, 2023). Consequently, although many college athletes are on *some* form of scholarship, the amount of that compensation varies drastically.

[94] WBAI Pacifica Foundation & United Electrical, Radio & Machine Workers of America, 328 N.L.R.B. 1273, 1274 (1999).

[95] 292 F.3d 757, 762-64 (D.D.C. 2002).

[96] *Id.* at 762–63 n. 4.

[97] Feldman, *supra* note 73, at 15:14.

[98] *Id.*

[99] Derek Silva & Johanna Mellis & Nathan Kalman-Lamb, *Episode 89: The NLRB Memo with Jennifer Abruzzo*, END OF SPORT PODCAST, at 30:29 (Nov. 10, 2021), https://podcasts.apple.com/ca/podcast/episode-89-the-nlrb-memo-with-jennifer-abruzzo/id1507693741?i=1000541348539 ("Just because you're not compensated, or just because you are in a particular sport that isn't an extensive profit-making machine, does not mean that you are not a statutory employee.").

[100] *See id.*

[101] Some scholars have argued it is revenue generation that incentivizes universities to treat certain athletes like employees, and no such incentive exists for athletes in other sports. Roberto L. Corrada, *College Athletes in Revenue-Generating Sports As Employees: A Look Into The Alt-Labor Future*, 95 CHI.-KENT L. REV. 187, 216 (2020). While it is certainly true that revenue-generating athletes may be subjected to increased time demands because of the value they bring to the university, incentives do exist to maximize performance in other sports. For example, other sports have seen steadily increasing coaching salaries that, albeit minimal compared to football coaching salaries, are still significantly higher than the average salary in more traditional jobs. Coaches, who have the most direct control over athletes, are incentivized to win more games to maximize their own salaries. That pressure on coaches trickles down to the athletes. Steve Berkowitz et al., *NCAA's Power 5 Schools See Steep Raise in Pay for Non-Revenue Coaches*, USA TODAY, https://www.usatoday.com/story/sports/2019/08/12/ncaa-power-5-schools-steeply-raising-pay-non-revenue-sport-coaches/1946843001/ (Aug. 13, 2019). Moreover, the basic structure of competitive sports incentivizes success; so long as universities are

is uncertain precisely which "Players at Academic Institutions" would qualify as employees.

B. The Joint Employer Doctrine

The second significant hurdle to college athlete unionization is the overwhelming presence of the NCAA. While one route to unionization would be to recognize individual units at each university, bargaining in any context would be severely restricted without the NCAA as a party because the NCAA sets the bounds within which its member schools are permitted to act. Moreover, inclusion of the NCAA and its conferences as employers is essential to bring a large-scale college athlete union into the NLRB's jurisdiction over the private sector.

To illustrate the NCAA's power, consider how the union representing the Northwestern football players would have bargained with its employer, Northwestern University, had the College Athletes Players Association gained exclusive bargaining rights. Say, for example, members of the Northwestern football team determined that they, as employees, were entitled to their share of the football team's ticket sales. In any ordinary employer-employee relationship, they would negotiate a fair percentage of the university's revenue from home football games, that negotiation would be memorialized in a collective bargaining agreement, and that would be the end of the dispute. But if Northwestern were to attempt such a negotiation, the football players, as well as the University, would squarely violate NCAA bylaws that prohibit payment for participation in athletic competition. Accordingly, all members of the football team would be rendered ineligible, and the University itself would risk enormous sanctions. While the NCAA has never done so, misconduct as flagrant as athletic department endorsement of revenue-sharing is so unprecedented that it might even be sufficient to warrant banning Northwestern University from the NCAA altogether.

If the football players decided to push even further, they could request a share of revenue from the university's television contracts. However, NCAA football television contracts are negotiated at the conference level.[102] Thus, for Northwestern football players to receive their equitable share of the television revenue they generate, the Big Ten

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investing money into athletic programs, coaching salaries, and athletic scholarship, there will always be pressure on the athletes from their coaches and athletic department administrators to win.

[102] See Michael Smith & John Ourand, *College Realignment, Round 2?*, SPORTS BUS. J. (Dec. 3, 2018), https://www.sportsbusinessjournal.com/Journal/Issues/2018/12/03/In-Depth/College-sports.aspx.

Conference would have to be a party. This dilemma underscores precisely the problem the NLRB noted in its decision when it declined to exercise jurisdiction: "There is thus a symbiotic relationship among the various teams, the conferences, and the NCAA. As a result, labor issues directly involving only an individual team and its players would also affect the NCAA, the Big Ten, and the other member institutions."[103] For college athletes to engage in any meaningful bargaining regarding wages, hours, and other terms and conditions of employment—as required by the Act—the university, conference, and NCAA all must be parties to the agreement. To incorporate the NCAA or the conferences as parties, they would have to be recognized as joint employers with the universities.

Joint employers are defined as two or more employers, within the meaning of common law, that "share or co-determine those matters governing essential terms and conditions of employment."[104] If two entities are recognized as joint employers, both have an obligation to bargain with the union.[105] In 2015, the Board reconsidered its approach to the joint employer doctrine and held that, in determining whether employers share and co-determine matters of employment, courts should evaluate both the terms and conditions of employment that an employer has a right to control, as well as the matters the employer actually exercises control over, whether direct or indirect.[106] The United States Court of Appeals for the District of Columbia Circuit affirmed the Board's rule, concluding that the joint employer test should consider "both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment."[107]

In 2020, however, the Trump NLRB issued a much narrower Final Rule on the joint employer doctrine.[108] Under that Final Rule, an employer must possess and exercise substantial direct and immediate control over one or more essential terms of employment.[109] The essential terms and conditions of employment are explicitly defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.[110] While the Trump Board acknowledged that indirect and reserved right to control has some determinative value, it can only be used

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[103] Nw. Univ. & Coll. Athlete Players Ass'n (CAPA), Petitioner, 362 N.L.R.B. 1350, 1353–54 (2015).

[104] Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 1599, 1622 (2015), *aff'd in part and rev'd in part*, 911 F.3d 1195 (D.C.C. 2018).

[105] NLRB, *NLRB Issues Joint-Employer Final Rule* (Feb. 25, 2020), https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-joint-employer-final-rule.

[106] *Id*.

[107] *Browning-Ferris*, 911 F.3d at 1200.

[108] Joint Employers, 29 C.F.R. § 103.40 (2020).

[109] *Id.*

[110] *Id.*

to supplement evidence of direct and immediate control; a finding of joint employer status cannot be based solely on indirect influence or a reserved right of control that is not exercised.[111]

1. The NCAA As a Joint Employer

Under either standard, the NCAA can qualify as a joint employer.[112] Athletes are employees of the NCAA under the common law test because they compete in NCAA-sanctioned events, which the NCAA profits from, in exchange for a scholarship.[113] Furthermore, the NCAA exercises direct and immediate control over numerous essential terms and conditions of employment through its bylaws, including educational requirements such as full-time enrollment and good academic standing to maintain eligibility,[114] limits on compensation,[115] regulation of athletic hours,[116] and complete control over all NCAA championship events.[117] To illustrate one, the NCAA exercises direct and

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[111] *Id.*

[112] Some scholars have argued that the Board's final rule will not withstand scrutiny if challenged again in the courts, because the joint-employer doctrine is founded on common law principles. *See* Corrada, *supra* note 101, at 210 ("The decision places in question Trump Board efforts to again narrow the joint employer rule since the Court refused to defer to the NLRB on the question of the joint employer test, claiming that the test requires an analysis of the common law of agency, a determination squarely to be made by courts. The Court then found the Board's new 2015 standard to be consistent with *common law* principles. This means that the new expanded joint employer test is likely to withstand change efforts by conservative administrations."). This argument is supported by the D.C. Circuit's reasoning in *Browning-Ferris*, 911 F.3d at 1207 (explaining that the Board is tasked with "mak[ing] tough calls on matters concerning labor relations," not "recast[ing]" traditional common law principles of employment law). Even so, I am choosing to analyze the NCAA under the Final Rule's definition of a joint employer because an employer that can meet the stricter standard will also meet the more lenient *Browning-Ferris* standard.

[113] *See* Andrew McInnis, *Play Under Review: How the NLRB Failed to Protect Some of the Most Vulnerable Employees—College Athletes*, 2018 MICH. ST. L. REV. 189, 241–43 (2018) (explaining how the NCAA does not need to *directly* pay athletes to meet the common law employer test because such a requirement would render the joint employer doctrine obsolete).

[114] NCAA, 2021-22 NCAA DIVISION I MANUAL § 14.01.2 (2021), available at https://web3.ncaa.org/lsdbi/reports/getReport/90008.

[115] *See generally id.* §§ 12, 16.

[116] *Id.* § 17.1.7.

[117] *Id.* § 31.1.1; *see also* Jay D. Lonick, *Bargaining With the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 164 (2015) ("The detail of the NCAA bylaws is astounding, there are rules governing eligibility for participation in a variety of NCAA events, awards and benefits for enrolled student-athletes, scheduling of athletic events, and enforcement principles which include both individual student-athlete and university

immediate control over discharge and discipline. As demonstrated in the example above, should a player violate NCAA bylaws, the NCAA has control to sanction both the athlete and the university.[118] This authority is not scarcely exercised either—athletes and programs are regularly punished by the NCAA for even minor, self-reported violations of NCAA compensation rules.[119] The NCAA's direct and actual control over determining player eligibility and ineligibility is sufficient alone to meet the standards of the Final Rule. And should control over discipline and discharge not be an adequate finding for the Board, the NCAA also exercises substantial control over wages, hours, and hiring of athletes, albeit in a less direct way. Taking wages as an example, NCAA bylaws permit schools to award an athlete only a grant-in-aid up to the full cost of attendance at the university; however, beyond a scholarship, athletes must be "amateurs" to retain eligibility, which means they cannot receive pay for participation in their sport.[120] Furthermore, the NCAA also mandates full scholarships in headcount sports, which removes decision-making power from the universities' regarding how much scholarship money to award an athlete.[121] In many ways, the NCAA, like other sports leagues, maintains even more power over the athletes than the individual schools themselves.

2. The Conferences as Joint Employers

Compared to the universities and the NCAA, the conferences have relatively limited direct control over the terms and conditions of employment. However, certain conferences still may qualify as joint

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punishments. Behind each rule is the idea that student-athletes must not receive compensation, a paternalistic way to keep money in the universities and the NCAA.") (footnotes omitted).

[118] *See generally* 2021-22 NCAA DIVISION I MANUAL § 19.

[119] *See*, Derek Saul, *NCAA Suspends Top Star Kofi Cockburn For Now-Legal Infraction*, FORBES, https://www.forbes.com/sites/dereksaul/2021/11/01/ncaa-suspends-top-star-kofi-cockburn-for-now-legal-infraction/?sh=a78ccc338eee (Apr. 21, 2022) (basketball player suspended for three games for selling signed apparel one month before NIL went into effect); *see also* Brittany Collens, *The NCAA Erased My Career*, PLAYERS' TRIB. (Apr. 21, 2021), https://www.theplayerstribune.com/posts/brittany-collens-tennis-ncaa-university-of-massachusetts (tennis program fined and stripped of conference title for accidentally reimbursing athlete an additional $252); Pat Forde, *James Wiseman Will Have to Sit Out 11 More Games, But Memphis's Fight With the NCAA Isn't Over*, SPORTS ILLUSTRATED (Nov. 20, 2019), https://www.si.com/college/2019/11/20/james-wiseman-ineligible-ruling-ncaa-memphis-penny-hardaway (basketball player suspended for twelve games for accepting money from head coach to relocate to Memphis while in high school).

[120] *See generally* 2021-22 NCAA DIVISION I MANUAL § 12.

[121] *Id.* §§ 15.5.2–15.5.3; *see also* Sires, *supra* note 93.

employers. Similar to the NCAA, athletes also compete in conference events and championships, which the conferences profit from, in exchange for a scholarship.[122] This, in itself, is not a sufficient finding for joint employer status for all conferences. But the Power Five Conferences[123] are granted additional autonomy by the NCAA over athletics personnel; insurance and career transition; promotional activities; recruiting restrictions; pre-enrollment expenses and support; financial aid; awards, benefits, and expenses; academic support; health and wellness; meals and nutrition; and time demands.[124] This additional autonomy is enough for the Power Five Conferences to qualify as joint employers under the substantial direct and immediate control standard. Most prominently, these conferences have significant control over employee benefits, including how much money each school must spend on athlete training tables and other meal services or the extent of post-graduation medical coverage for athletic-related injuries.[125] The Power Five Conferences also have a fair amount of control over employee wages, including determining the limits of financial aid and whether to provide cost of attendance stipends.[126] Accordingly, the Power Five Conferences could also be considered joint employers of their respective athletes.

C. The Public School Issue

As numerous labor experts have recognized, the NCAA and its conferences clearly satisfy the test for joint employers even under the stricter "substantial direct and immediate control" standard.[127] Even so, whether the NLRB can exercise jurisdiction over the NCAA due to the overwhelming presence of public schools in college sports is

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[122] *See* McInnis, *supra* note 113 (clarifying that athletes do not need to be paid directly by both joint employers for the joint employer to satisfy the common law test).

[123] The Power Five Conferences include the Atlantic Coast Conference, the Big Ten Conference, the Big 12 Conference, the Pac-12 Conference, and the Southeastern Conference. *See, e.g.*, 2021-22 NCAA DIVISION I MANUAL § 5.02.1.1.

[124] *Id.* § 5.3.2.1.2.

[125] *See id.*

[126] *See* John Wolohan, *What Does Autonomy for the "Power 5" Mean for the NCAA?*, LAWINSPORT (Feb. 11, 2015), https://www.lawinsport.com/topics/item/what-does-autonomy-for-the-power-5-mean-for-the-ncaa.

[127] *See* Lonick, *supra* note 117, at 165–66; *see also* Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from* Northwestern University *and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1650–51 (2017); Corrada, *supra* note 101, at 210 ("There is very little doubt that the NCAA is a joint employer under the new standard if athletes are 'employees' and colleges and universities are 'employers.' However, the NCAA is likely a joint employer under the narrower 'strict control' test as well.") (footnotes omitted).

questionable. The NCAA will have multiple grounds to assert it should not be considered an employer under the Act, including its substantial connection with the public schools by virtue of their joint employer status and their involvement in the NCAA's governance. Moreover, should the Board exercise jurisdiction over the NCAA as a private employer, the public schools may argue that they should be excluded from the bargaining unit. Each of these arguments is discussed in turn below.

1. Public Schools as Joint Employers

Some have criticized whether the NLRB can exercise jurisdiction over the NCAA as a joint employer alongside public entities that are explicitly exempt from the NLRA.[128] Some scholars have offered routes around this roadblock.[129]

In his article, *Bargaining with the Real Boss*, Jay D. Lonick observed that the NLRB had previously permitted a similar situation in *Res-Care*.[130] In that case, the Board exempted a private employer from collective bargaining because the employer was under such pervasive control from the Department of Labor that no meaningful bargaining could take place.[131] Lonick argues the Board could provide a similar solution to the inverse situation here: the NCAA, a private employer, exercises such great control over public universities and their operations

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[128] Lonick, *supra* note 117, at 165.

[129] *Id.* at 165–66 ("[E]ven without the new standard, the NCAA exercises the 'strict control' at Tier-A to be a joint employer of student-athletes. The NCAA controls the entry to the workforce—via the Student-Athlete Agreement—and the terms of ongoing employment through its rules regarding eligibility. Behind its bylaws is a clear threat of action, which shows not only a 'right' to control, but the NCAA exercising that right, as seen in countless cases against even the highest- profile athletes in college sports. Underlying these procedures is the economy of college sports, which depends on student-athletes agreeing to abide by NCAA rules and forces athletes to sacrifice the value of their skills on the open market for years. In the aggregate, these circumstances show the NCAA controls the field that student-athletes work in, and the purpose of the NLRA is served by finding they are 'employees' to the private 'employer,' the NCAA.") (footnotes omitted); Edelman, *supra* note 127 ("Yet, even though arguing that the NCAA is a joint employer of college athletes represents a novel argument, there are myriad factors that point in favor of finding the NCAA to serve as a joint employer. For example, the NCAA bylaws require all FBS football and Division I men's basketball players to sign an identical letter of tender, which includes their 'terms of employment.' In addition, the NCAA bylaws set forth uniform rules for financially compensating college athletes. Finally, the NCAA even has enforced nationwide rules pertaining to academic eligibility and drug testing—evidence of the NCAA's actual control over college athlete conduct at both private and public colleges.") (footnotes omitted).

[130] Lonick, *supra* note 117, at 165.

[131] Res-Care, Inc., 280 N.L.R.B. 670, 670 (1986), *overruled by* Mgmt. Training Corp., 317 N.L.R.B. 1355, 1355 (1995).

in college sports that it should still be recognized as a joint employer, despite the public school exemption.[132] Although *Res-Care* was later overruled because the test was considered "unworkable,"[133] Lonick suggests that college sports may be a more appropriate industry for an equivalently novel exercise of jurisdiction.[134]

Indeed, college sports are a unique branch of the joint-employer doctrine; in nearly all other industries, aside from government contracts with private corporations like the one at issue in *Res-Care*, it is virtually inconceivable to have both a private employer and public employer that exercise substantial direct and immediate control over employees. In fact, in *Management Training*, which overruled *Res-Care*, the Board compiles numerous cases in which it ultimately did exercise jurisdiction over a private employer, despite the private employer being engaged in a government contract that significantly controls mandatory subjects of bargaining such as employee wages.[135] In those cases, it would appear that the government employer would meet the Final Rule definition of a joint employer because it exercises substantial direct and immediate control over wages, an essential term or conditioning of bargaining. Yet, the mere presence of that government employer was not enough for the Board to decline jurisdiction over the private employer.[136]

From this logic, *Management Training* supports the theory that the NCAA should be considered an employer despite the universities' exemption from the Act. Indeed, *Management Training* specifically notes that jurisdiction should not be "determined on the basis of whether the employer or the Government controls most of the employee's terms and conditions of employment . . . . the Board will only consider whether the employer meets the definition of 'employer' under Section 2(2) of the

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[132] Lonick, *supra* note 117, at 165.

[133] *Mgmt. Training*, 317 N.L.R.B. at 1355.

[134] *See* Lonick, *supra* note 117, at 165 ("Thus, there is a way to address the interplay between the public and private sectors, as long as the Board identifies a clearer rule, *or* limits its findings to college sports.").

[135] *Mgmt. Training*, 317 N.L.R.B. at 1356–57; *see also* Airway Cleaners, L.L.C., 363 N.L.R.B. No. 166 (Apr. 18, 2016) (exercising jurisdiction over a private employer, even though it was a joint employer alongside an exempt entity under the NLRA).

[136] *Mgmt. Training*, 317 N.L.R.B. at 1358 n.16 ("The fact that we have no jurisdiction over governmental entities and thus cannot compel them to sit at the bargaining table does not destroy the ability of private employers to engage in effective bargaining over terms and conditions of employment within their control. The holding in Ohio Inns, Inc. that it would not effectuate the policies of the Act to assert jurisdiction over a private employer because the state is a joint employer is hereby overruled.") (citations omitted).

Act."[137] Thus, the Board would have jurisdiction over the NCAA, even if it might not have jurisdiction over the public school joint employers.[138]

2. Public Schools as NCAA Members

The NCAA is also likely to argue that it is inappropriate for the Board to exercise jurisdiction over it because it is comprised of predominantly public member schools. While it is possible the Board could decline jurisdiction over the NCAA for this reason, it is unlikely to because the NCAA has been recognized as an independent private entity. To begin with, in *National Collegiate Athletic Ass'n v. Tarkanian*, the Supreme Court recognized that the NCAA is an independent private actor and its member schools' enforcement of its policies does not transform the NCAA into a state actor.[139] Although the question in *Tarkanian* involved a constitutional challenge rather than an NLRA inquiry, the decision supports a finding that the NCAA is likewise a private employer for purposes of the NLRA.

The Board has also previously recognized the Big East Conference, an athletic conference that includes public school members, as a private employer within its jurisdiction.[140] In *Big East Conference*, the Board did note that the conference included only two public member schools and thus the public schools could not control the conference's decisions.[141] This inquiry seems to allude to the NLRA's exemption of political subdivisions.[142] In similar situations involving independent non-profit associations, the NLRB has considered whether public members constitute a majority of the association's Board of Directors.[143] While the

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[137] *Id.* at 1357–59.

[138] In this situation, the joint employer doctrine allows the Board to exercise jurisdiction over only the NCAA as an employer, and thus athletes would only be able to seek a league-wide (or conference-wide) bargaining unit. Public university athletes would not be able to collectively bargain with both the NCAA and their university, as is typical in ordinary uses of the joint employer doctrine. It is unlikely that the Board could extend its jurisdiction so far as to require a public entity to bargain. A bargaining unit has discretion to request bargaining with only one employer; in *North American Soccer League*, the players sought only a league-wide bargaining unit despite a finding that the league and its member clubs were joint employers. 236 N.L.R.B. 1317, 1321 (1978), *aff'd*, 613 F.2d 1379 (5th Cir. 1980).

[139] 488 U.S. 179 (1988).

[140] Big East Conference, 282 N.L.R.B. 335, 341 (1986).

[141] *Id.*

[142] *See* 29 U.S.C. § 152(2).

[143] *See* Truman Med. Ctr., 239 N.L.R.B. 1067, 1068 (1978) (noting that representation accorded to state entities was "less than the majority required for effective action"); *see also* Sw. Tex. Pub. Broad. Council, 227 N.L.R.B. 1560, 1562 (1977) (acknowledging that private citizens made up the majority of the Board of Directors).

NCAA does not mandate a particular composition of public and private school representatives on its Board of Governors,[144] the current voting members of the Board include ten private school members and ten public school members.[145] If a tie occurs, the NCAA president, an NCAA employee and thus private member, breaks the tie.[146] Accordingly, private members currently can control the Board of Governors. Moreover, members of the Board of Governors are charged with acting on behalf of the NCAA, rather than representatives of their institutions.[147] Thus, the current Board composition and its purpose support asserting jurisdiction over the NCAA.[148]

3. Exclusion of Public School Athletes from the Bargaining Unit

Similarly, the Board may have concerns about exercising jurisdiction over public school athletes, even if they are recognized as employees of the NCAA or their conferences. In *North American Soccer League*, the Board recognized a league-wide bargaining under a joint employer theory, finding that the players were employees of both the league and the individual clubs.[149] However, the Board excluded two of the clubs located in Canada, and thereby excluded the Canadian teams' players from the league-wide bargaining unit, due to the fact that the Board does not have jurisdiction over foreign enterprises.[150] While the

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[144] *See* 2021-22 NCAA DIVISION I MANUAL § 4.1.1.

[145] *See* NCAA, *Board of Governors Roster*, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=EXEC (last visited Dec. 11, 2021).

[146] 2021-22 NCAA DIVISION I MANUAL § 4.1.1.

[147] *See id.* § 4.1.1; *see also* NCAA, *What is the NCAA Board of Governors?*, https://ncaaorg.s3.amazonaws.com/governance/ncaa/legislation/2018-19NCAAGov_OverviewWhatIsBOG.pdf (last visited Dec. 12, 2021) ("Members have a fiduciary responsibility to act in the best interest of the overall Association, rather than the interest of any particular division or school.").

[148] Whether public schools can control the NCAA's decisions is, admittedly, a more complicated inquiry because there are multiple levels of governance. The NCAA Division I Board of Directors, which is the overall governing body for Division I, contains only seven private school members out of twenty-four overall. NCAA, *Division I Board of Directors Roster*, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=BOARD (last visited Dec. 11, 2021). But the Division I Council, which is the Division's primary legislative body, is equally split between private school members and public school members. NCAA, *Division I Council Roster*, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1COUNCIL (last visited Dec. 11, 2021).

[149] *See* N. Am. Soccer League, 236 N.L.R.B. 1317, 1321 (1978), *aff'd*, 613 F.2d 1379 (5th Cir. 1980).

[150] *Id.*

Board has discretion to decline jurisdiction over certain entities, as it did in *North American Soccer League*, the presence of public joint employers does not compel it to do so, as explained above. Nor does it require the Board to exclude athletes that are jointly employed by both a private entity and a public entity. Indeed, in the examples described in *Management Training*, which involved only two employers—as opposed to hundreds of employers in the NCAA—if the Board were to exclude all employees that were jointly employed by a public entity, it would effectively exclude all the employees. Thus, exclusion of athletes at public schools would be inconsistent with previous applications of the joint employer doctrine in the presence of a public employer.

The dissent in *North American Soccer League* also noted that the Board was not obligated to exclude the Canadian teams' players from the bargaining unit, emphasizing that the Canadian teams engaged substantially in interstate commerce in the United States.[151] Moreover, the dissent highlighted that separating the bargaining units would result in two collective bargaining agreements despite the fact that the players share similar interests, and such a separation could lead to instability in labor relations should those collective bargaining agreements differ in any respect.[152] Likewise, in college sports, whether an athlete attends a private school or public school does not significantly impact their athletic experience.[153] Public schools and private schools differ mostly in their funding and academic scholarships,[154] but this is immaterial to the terms and conditions of athletic employment. Additionally, universities are so substantially bound by the rules and regulations of their conference and the NCAA that all schools, regardless of public or private designation, adhere to essentially the same structures and operations.

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[151] *Id.* at 1323 (Murphy, dissenting).

[152] *Id.* at 1324 ("Disparity between the negotiated benefits presents the further possibility of players on United States or Canadian clubs capitalizing on the peculiarities of the others' collective-bargaining agreement by employing economic weapons to force the Employer to grant them equivalent or improved benefits. Representation of both groups by a single bargaining representative would further promote greater equity in the bargaining relationship, thereby fostering a healthier relationship. Segmentation of this unit as the majority has done will tend to undercut the ability of the players on the Canadian clubs to bargain effectively.").

[153] The author of this article competed in Division I Track and Field at both Vanderbilt University, a private school, and the University of Oregon, a public school, and found the experiences at both to be substantially comparable.

[154] *See, e.g.*, Tyler Epps, *Private vs. Public Colleges: What's the Difference?*, BEST COLLS., https://www.bestcolleges.com/blog/private-vs-public-colleges/ (Sept. 26, 2022).

4. Exercising Jurisdiction Would Effectuate the Purposes of the Act

Perhaps the most compelling argument is that exercising jurisdiction would effectuate the purposes of the Act. As *Browning-Ferris* correctly recognizes, Congress enacted the NLRA to "protect the rights of workers to act together to better their working conditions," as well as to promote stable labor relations.[155] Implicit in that purpose is that workers are inherently vulnerable and require collective action to secure their protections.[156] Currently, college athletes are among the most vulnerable workers in America.[157] Revenue-generating employees are trapped in an exploitative system where the NCAA and its universities reap billions of dollars in profits from a predominately Black workforce that never sees a share of the money,[158] and women's and Olympic sport athletes have likewise seen their fair share of inequities, neglect, and abuse.[159] Moreover, labor relations in college sports are currently far from stable. Athletes have turned to the press,[160] the courts,[161] and collective action[162] to remedy inequities, because the NCAA and its universities have shown they are unwilling to intervene to protect athletes. The Supreme Court has recognized that collective bargaining would provide the NCAA solace from repeated antitrust litigation,[163] and the NLRB's General Counsel has likewise acknowledged that college sports are ready

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[155] Browning-Ferris Indus. of Cal., Inc., 911 F.3d 1195, 1200 (D.C.C. 2018).

[156] *See* McInnis, *supra* note 113, at 248.

[157] *Id.* at 249–50.

[158] *See, e.g.*, Victoria L. Jackson, *A Jim Crow Divide in College Sports*, CHI. TRIB. (Jan. 16, 2018, 3:05 PM), https://www.chicagotribune.com/opinion/commentary/ct-perspec-college-sports-ncaa-black-athletes-exploited-0117-20180116-story.html.

[159] *See, e.g.*, Associated Press, *Michigan State Blasted in Federal Report for Failure to Stop Larry Nassar*, NBC NEWS (Jan. 31, 2019, 5:15 AM), https://www.nbcnews.com/news/us-news/michigan-state-blasted-federal-report-failure-stop-larry-nassar-n965216.

[160] *See* Gillian R. Brassil, *Sedona Prince Has a Message For You*, N.Y. TIMES, https://www.nytimes.com/2021/05/29/sports/ncaabasketball/sedona-prince-ncaa-basketball-video.html (Aug. 7, 2021) (explaining how women's basketball players exposed inequalities between the men's and women's NCAA basketball tournaments on TikTok); *see also* Caitlin Schmidt, *Eight Former UA Athletes Detail 'Rotten Culture' in Track and Field Program*, ARIZ. DAILY STAR, https://tucson.com/sports/arizonawildcats/eight-former-ua-athletes-detail-rotten-culture-in-track-and-field-program/article_26ead223-11c5-5fc1-8c17-73ef134ed973.html (June 27, 2022) (athletes turned to press after multiple reports of misconduct by the coaching staff were ignored by athletic department administration).

[161] *See generally* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021); *see also* O'Bannon v. NCAA, 802 F.3d 1049, 1075–76 (9th Cir. 2015).

[162] *See, e.g.*, Lundberg, *supra* note 6.

[163] *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

for unionization.[164] It's evident that the industry of college sports has been steadily disrupted since the Board declined to exercise jurisdiction in *Northwestern*. Today, another college athlete unionization attempt, particularly one comprised of a more appealing bargaining unit that proceeds under a joint employer theory, should instead be welcomed by the Board as a long-awaited victory for American labor relations.

IV. COLLECTIVE BARGAINING

Even if a college athlete unionization effort is successful in securing employee status and recognizing the NCAA and its conferences as joint employers, such a large union will inevitably face significant hurdles in organization. This next section analyzes possible bargaining units and the advantages and disadvantages of each from both a functional and legal perspective. Additionally, this section will consider subjects of bargaining that will likely arise when a college athlete union is recognized.

A. Bargaining Units

One of the most significant challenges for a college athlete union will be determining how to organize thousands of athletes across the country competing in different sports. Because the NCAA is composed of a wide variety of universities and programs, a college athlete union cannot simply mirror the organization of professional sports. And because college sports are such a unique industry, balancing private and public employers and multiple tiers of governance, other large-scale labor unions provide little guidance. This section begins by explaining the need for collective bargaining in all sports and then offers possible constructions of bargaining units consistent with the NLRB's "community of interest" test.[165]

1. The Need for Collective Bargaining in All College Sports

Previous proposals for college athlete unionization have focused on the need for collective bargaining in the largest revenue-generating sports: football and men's basketball.[166] While the athletes in these sports are certainly the most exploited and have the most to gain from collective

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[164] *See generally* NLRB Memo.

[165] Boeing Co., 368 N.L.R.B. No. 67, at *1 (2019).

[166] *See* Corrada, *supra* note 101, at 189–90 n.7; *see also* Edelman, *supra* note 127, at 1643–51 (focusing discussion on Division I men's basketball and FBS football); *see generally* McInnis, *supra* note 113 (arguing for a college football players union).

bargaining financially, this article focuses on the need for collective bargaining across all college sports. One reason for this is because the NLRA requires collective bargaining "with respect to wages, hours, and other terms and conditions of employment."[167] Though wages are certainly a key component of bargaining, bargaining over hours and other terms and conditions of employment has the potential to make an enormous impact in women's sports and Olympic sports,[168] particularly in regards to health and safety conditions.

The other reason this article focuses on collective bargaining for all athletes is because women's sports have been systematically disadvantaged by university athletic departments and the NCAA.[169] Many have recognized that women's college sports are far more popular and profitable than the NCAA makes them out to be, despite their designation as "non-revenue."[170] In fact, an independent review of gender inequity in the NCAA by the law firm Kaplan Hecker & Fink revealed that the NCAA's structure, which is built on maximizing revenue to disperse funding to member schools, has led it to repeatedly invest in sports that are already profitable and cut costs in other championships, further widening existing gender disparities.[171] Additionally, players' unions in women's professional sports have demonstrated how collective bargaining is mutually beneficial for players and leagues.[172] Accordingly, collective bargaining is a critical first step in rectifying gender inequity in college sports as well as promoting the development of Olympic sports and women's sports.

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[167] 29 U.S.C. § 158(d).

[168] Most people refer to college sports that are not football or basketball as "non-revenue sports." This term is misleading, however, because the vast majority of sports do in fact bring in revenue, even if they are not net profitable. For example, the University of Southern California reported that women's sports brought in $18.6 million in revenue in 2018-19. *See* Amanda Christovich, *Newsletter,* FRONT OFF. SPORTS COLL. (May 19, 2021), https://frontofficesports.com/newsletter/fos-college-pac-12-blindspot/. Accordingly, this paper will instead refer to "non-revenue" sports by what they actually are, women's sports and Olympic sports.

[169] Victoria Jackon, Opinion, *NCAA Gender Inequity Is a Feature, Not a Bug*, GLOB. SPORTS MATTERS (Nov. 9, 2021), https://globalsportmatters.com/opinion/2021/11/09/ncaa-gender-inequity-feature-not-bug-title-ix/.

[170] *See, e.g.*, *id.*

[171] Kaplan Hecker & Fink LLP, *NCAA External Gender Equity Review: Phase II*, at 6 (Oct. 25, 2021), https://kaplanhecker.app.box.com/s/y17pvxpap8lotzqajjan9vyye6zx8tmz.

[172] Michael McCann, *Analyzing the WNBA's New CBA Deal and What It Means for the Future of the League*, SPORTS ILLUSTRATED (Jan. 14, 2020), https://www.si.com/wnba/2020/01/14/wnba-cba-labor-salary-raise-players-association/.

2. The Case for Sport-wide Collective Bargaining in College Athletics

Any route to unionization for college athletes will be fraught with extraordinary challenges due to the vast number of college athletes, the entanglement of public and private entities, and the national structure of the NCAA. The most effective structure of a college athlete union is likely NCAA-wide or conference-wide bargaining units organized by sport.

As a preliminary matter, individual university bargaining units would create a legal nightmare. As evidenced by *Northwestern*, the NLRB is not inclined to exercise jurisdiction over a single-team or single-university bargaining unit.[173] Single-team units are also unconventional in sports;[174] all of the major professional leagues currently engage in league-wide bargaining.[175] Additionally, while private school athletes would be governed by the NLRA, public school athletes would be subject to their respective state law. Further complicating matters, each state has different laws governing unionization, and some states prohibit public sector employees from unionizing altogether.[176] As a practical matter, individual bargaining units are also unlikely to effectuate large-scale change. While athletes may be able to negotiate some benefits within the constraints of NCAA rules, such as reduced practice hours or more comprehensive medical coverage, most NCAA rules operate as strict prohibitions. Thus, university bargaining units would be fairly restricted in terms of subjects of bargaining. However, starting at the university level would afford players more time to organize larger units across their conference or the NCAA. And, if players were to seek a larger bargaining unit later, the experience and benefits gained by bargaining at the university level may increase union support.

In contrast, aside from a NCAA-wide bargaining unit or potentially a conference-wide bargaining unit, there is virtually no conceivable union structure that would fall within the exclusive jurisdiction of the NLRB. Yet while a bargaining unit composed of all

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[173] *Nw. Univ.*, 362 N.L.R.B. at 1354.

[174] *Id.* at 1354 n. 16 ("The Board has never addressed the appropriateness of single-team bargaining units within a professional league.").

[175] The Women's National Basketball Association, the National Women's Soccer League, the National Basketball Association, the National Football League, Major League Baseball, and the National Hockey League all have league-wide players associations. *See Labor Organizations in the Sports Industry*, RUTGERS UNIV. LIBRS. (Oct. 18, 2022, 10:45PM), https://libguides.rutgers.edu/c.php?g=336678&p=2267003.

[176] *See* MILLA SANES & JOHN SCHMITT, REGULATIONS OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES, CTR. FOR ECON. & POL'Y RSCH., Mar. 2014, at 5.

athletes across all NCAA sports might be the most effective legal technique, and would give athletes the most bargaining power, such a structure could present fatal difficulties for union organization. Generally, employees favor smaller bargaining units because it is faster to organize and easier to win with a smaller unit.[177] Thus, a Division I bargaining unit would logistically be very difficult to organize, particularly with the constant turnover of graduating athletes. Moreover, such a large bargaining unit would almost certainly fail the NLRB's "community of interest" test, which analyzes the composition of a bargaining unit to ensure its members have sufficiently similar interests.[178]

Athletes could also opt to organize within a single sport across Division I. This method would maintain bargaining power while also distinguishing between the interests of football and basketball players and the remainder of the sports that have fewer financial concerns. Additionally, athletes would have a better chance at organizing because of inter-sport connections. Some athletes may have been high school teammates, and others still may have connections across schools due to conference competition.

The biggest challenge to NCAA-wide units based on sport is whether the bargaining units would share a sufficient community of interest. In order to be considered "appropriate," a college athlete bargaining unit must share an internal community of interest, and any excluded athletes must have "meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members."[179] The Board will also consider guidelines that the Board has established in particular industries.[180] When determining whether a petitioned-for unit shares a community of interest, the Board will consider factors such as:

> "[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the

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[177] *See generally* Robert Combs, *ANALYSIS: Even After 'Micro Unit' Ruling, Unions Still Aim Small*, BLOOMBERG L. (Aug. 17, 2021, 3:01 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-even-after-micro-unit-ruling-unions-still-aim-small.

[178] Boeing Co., 368 N.L.R.B. No. 67, at *1 (2019).

[179] *Boeing Co.*, 368 N.L.R.B. at *3 (quoting Constellation Brands, U.S. Operations, Inc. v. NLRB, 842 F.3d 784, 794 (2d Cir. 2016)) (emphasis added).

[180] *Id.* at *4.

> Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised."[181]

Sport-wide units would generally align with these factors. At individual universities, teams obviously practice separately, and each sport requires its own specialization of skills. Sports also occur in different seasons, with different season lengths, practice times, and championship structures. Indeed, the NCAA Division I Manual contains almost one hundred pages dedicated entirely to sport-specific rules and regulations.[182] While athletes across sports may interact with each other in educational settings or in shared facilities, these interactions occur outside of regular "work" hours.

The more difficult analysis is whether sport-wide units share an internal community of interest across multiple schools and conferences. In a sport like football, such a bargaining unit would likely need to be bifurcated between Football Bowl Subdivision (FBS) universities and Football Championship Subdivision (FCS) universities because they compete in separate championships.[183] However, NCAA-wide bargaining units in other sports will have to deal with the increasing divide between the Power Five Conferences and the mid-major Division I schools. Most significantly, Power Five schools bring in significantly more revenue and are more equipped to pay direct salaries and distribute revenue to players. Players could opt to organize sport-wide across the Power Five Conferences, but a more manageable organizing effort would consist of sport-wide bargaining units in each Power Five conference and separate sport-wide bargaining units for the remaining Division I schools. This proposal most effectively balances the legal and functional barriers of unionizing. Sport-wide bargaining units across a single conference will be the most manageable to organize and they are more likely to share a community of interest because the schools play each other every season and are subject to the same conference rules. Additionally, Power Five conference bargaining units will ensure all joint employers—the universities, the conference, and the NCAA—are parties to negotiations.

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[181] *Id.* at *2 (quoting United Operations, Inc., 338 N.L.R.B. 123, 123 (2002)).

[182] *See generally* 2021-22 NCAA DIVISION I MANUAL § 17.

[183] FBS teams compete in the College Football Playoff, which is not administered through the NCAA, whereas FCS teams compete in a regular NCAA Division I National Championship. *See* Patrick Pinack, *College Football Trivia: What Does 'FBS' and 'FCS' Actually Mean?*, FAN BUZZ (Dec. 7, 2021, 1:27 PM), https://fanbuzz.com/college-football/what-does-fbs-stand-for/.

B. Subjects of Bargaining

Once a union has been recognized, the employer is obligated to bargain with the union's representatives in good faith "with respect to wages, hours, and other terms and conditions of employment."[184] A college athlete players association can look to professional leagues as a model.[185] In professional sports, players associations bargain over a vast array of terms and conditions, including minimum and maximum salaries, revenue sharing, season lengths, safety protocols, health benefits, player drafts, and free agency.[186]

College athletes are already extremely vocal about some changes they would seek through collective bargaining. For example, the Pac-12 football players' We Are United movement demanded COVID-19 health and safety protections, preservation of sports programs, additional economic support for minority players, increased post-graduate medical coverage, and economic rights such as including name, image and likeness reform and revenue distribution.[187] Certainly, the largest subject of bargaining for sports like football and basketball will be player compensation and revenue-sharing of ticket sales and broadcast revenue.[188] In addition to increased economic rights, players might pursue limitations on time spent in practice and other sport-related activities like team meetings and press conferences, as well as increased health and safety protections like a reduction in full-contact practices.[189]

Female athletes are also likely to seek additional gender equity protections. This year, after a video by University of Oregon basketball player Sedona Prince went viral on TikTok for revealing the inadequate facilities for women's players at the NCAA Tournament, many athletes were shocked to learn that the NCAA is not subject to Title IX.[190] The situation prompted demands that NCAA championships adhere to equal standards, particularly in sports like basketball that both men and women

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[184] 29 U.S.C. § 158(d).

[185] *See* Corrada, *supra* note 101, at 214.

[186] Gabe Feldman, *Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law*, OXFORD HANDBOOK OF AM. SPORTS L. 209, 212 (Sep. 2017), https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190465957.001.0001/oxfordhb-9780190465957-e-10; *see also* Corrada, *supra* note 101, at 214–15.

[187] *#WeAreUnited*, *supra* note 6.

[188] Corrada, *supra* note 101, at 214.

[189] *See id.* at 214–15.

[190] Cecelia Townes, *Where Is Title IX in the NCAA Weight Rooms?*, FORBES (Mar. 19, 2021, 10:46 AM), https://www.forbes.com/sites/ceceliatownes/2021/03/19/where-is-title-ix-in-the-ncaa-weight-rooms/?sh=82173c7007a0/; *see also* Brassil, *supra* note 160.

play.[191] Specifically, female athletes would likely seek increased promotional funding for women's sports.[192] Additionally, advocates of Title IX frequently emphasize that although the vast majority of universities are not Title IX compliant, no university has ever lost federal funding.[193] Accordingly, female athletes may seek enhanced NCAA enforcement of Title IX, such as requiring schools to be Title IX compliant to compete in or host NCAA championships.

Female athletes may also have more specific concerns regarding health and safety. For example, female athletes are at increased risk for developing eating disorders, particularly in endurance sports like track and field,[194] and several recent stories have prompted criticism of coaches' involvement in athletes' nutritional plans.[195] Athletes could seek increased medical coverage to include eating disorder treatment, as well as additional safeguards to prevent eating disorders from developing, like a prohibition of public weigh-ins. Female athletes may also pursue an NCAA rule change that would sanction member schools for covering up sexual assaults. This year, an NCAA panel decided not to sanction Baylor University after the university severely mishandled sexual assaults committed by its football players, prompting even NCAA President Mark Emmert to call for "transformational change."[196] Finally, female athletes

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[191] Cecelia Townes, *Where Is Title IX in the NCAA Weight Rooms?*, FORBES (Mar. 19, 2021, 10:46 AM), https://www.forbes.com/sites/ceceliatownes/2021/03/19/where-is-title-ix-in-the-ncaa-weight-rooms/?sh=82173c7007a0/.

[192] *Id.*

[193] *Title IX*, WOMEN'S SPORTS FOUND., https://www.womenssportsfoundation.org/advocacy_category/title-ix/#:~:text=Title%20IX%20does%20not%20require%20equal%20expenditure%20of%20funds%20on,dollars%20proportional%20to%20participation%20rates (last visited Dec. 12, 2021).

[194] Ron Thompson, *Mind, Body and Sport: Eating Disorders*, NCAA, https://www.ncaa.org/sport-science-institute/mind-body-and-sport-eating-disorders (last visited Dec. 12, 2021).

[195] Mary Cain, *I Was the Fastest Girl in America, Until I Joined Nike*, N.Y. TIMES (Nov. 7, 2019), https://www.nytimes.com/2019/11/07/opinion/nike-running-mary-cain.html; Ken Goe, *Women Athletes Allege Body Shaming Within Oregon Ducks Track and Field Program*, OREGONIAN, https://www.oregonlive.com/trackandfield/2021/10/women-athletes-allege-body-shaming-within-oregon-ducks-track-and-field-program.html (Oct. 25, 2021, 3:06 PM); Ashlyn Hare, *What We Can Learn from the Harmful Body-Shaming Culture Around the University of Oregon Track Program*, GLOBAL SPORT MATTERS (Feb. 9, 2022), https://globalsportmatters.com/culture/2022/02/09/what-we-can-learn-harmful-body-shaming-culture-university-oregon-track-program/; Schmidt, *supra* note 160.

[196] Joe Hernandez, *NCAA Won't Punish Baylor For Failing To Report Sexual Assault Claims Against Players*, NPR (Aug. 12, 2021, 12:42 PM), https://www.npr.org/2021/08/12/1027070133/ncaa-baylor-sexual-assault-claims-failure-to-report#:~:text=Music%20Of%202021-

could push for maternity benefits that would protect salaries and eligibility.[197]

V. CONCLUSION

College sports are at a tipping point. The NCAA and its member schools are facing intense scrutiny from the federal courts, government regulators, and the court of public opinion. Unionization and collective bargaining can offer both athletes and the NCAA a solution. Yet, no matter how necessary a college athlete union may be, there are still significant legal obstacles that stand in the way. Unlike professional sports, college sports involve a complex web of conflicting interests at numerous levels, and trying to use traditional labor law to address those issues is challenging and imperfect.

However, recent developments in college sports have offered a path to unionization. *Alston* and the NLRB General Counsel's memo indicate that the NLRB may be willing to recognize a reinvigorated college athlete union under a joint employer theory. And, such a union need not be limited to athletes in revenue-generating college sports. All athletes in Division I sports stand to benefit significantly from collective bargaining. Indeed, systematically disadvantaged athletes, such as athletes of color and female athletes, stand to benefit the most. As the NCAA continues to evolve in the wake of groundbreaking legal developments, it should do so by putting power back into the hands of those most important to its mission—the athletes.

,NCAA%20Won't%20Punish%20Baylor%20For%20Failing%20To%20Report%20Sexual,Waco%2C%20Texas%2C%20in%202016.

[197] *See* Meredith Cash, *The WNBA Has a New CBA That Increases Player Salaries, Ensures Maternity Leave, and Improves Marketing and Travel for the League*, BUS. INSIDER (Jan. 14, 2020, 4:18 PM), https://www.businessinsider.com/new-wnba-cba-improves-salaries-maternity-leave-marketing-travel-2020-1 (discussing the new WNBA collective bargaining agreement that grants players paid maternity leave, a childcare stipend and housing assistance, accommodations for nursing mothers, and family-planning reimbursements for adoption, fertility treatment, and egg freezing).