

# STUDENTS, ATHLETES, AND EMPLOYEES: An Evolving Distinction

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## ABSTRACT

*As the emergence of Name, Image, and Likeness (NIL) rights continues to redefine the legal environment of college athletics, many experts and commentators have turned their attention to student-athlete unionization, arguing both for or against classifying student-athletes as employees under the National Labor Relations Act of 1935. However, few commentators have addressed a critical observation that this Article finds indispensable to a well-functioning narrative among students, student-athletes, and employees: not all athletic programs are the same. In fact, many of these programs are so different from one another that focusing on the “forest” of unionization might gravely ignore the “trees” that characterize these complex groups of institutions.*

*In response, this Article aims to facilitate a more complete discussion between students, student-athletes, and employees by highlighting one group of institutions whose barrier to student-athlete unionization is very different from those of other institutions: the Ivy League. As this Article attempts to demonstrate, Ivy League athletic programs are institutionally unique in ways that mitigate the National Labor Relations Board (NLRB)’s concerns to grant “employee” status in other cases—namely that doing so will disrupt the balance of labor relations or financially imperil the affected universities. On these observations, this Article posits that notwithstanding the arguably questionable merits of student-athlete unionization, the Ivy League offers a uniquely promising “test site” in which to probe the practical consequences of classifying student-athletes as employees and derive valuable insights that could inform similar proposals at other institutions.*

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## INTRODUCTION

In May 1935, Congress passed the National Labor Relations Act (NLRA), which granted private employees a federal right to “engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>1</sup> Aimed at remediating “[t]he inequality of bargaining power between employees . . . and employers,” the Act protects most private sector employees from employer retaliation in response to forming or joining a labor union. The Act also authorizes unions to collectively bargain with an employer over employee wages, hours, and other working conditions.<sup>2</sup>

Despite its vague treatment in the Act, the “employee” classification is arguably the most critical determination of a worker’s rights under federal labor and employment law.<sup>3</sup> Indeed, the now-ubiquitous moniker of “student-athlete” was first coined by the National Collegiate Athletic Association (NCAA) to deliberately avoid classifying student-athletes as employees under federal law.<sup>4</sup> However, the legal standard for determining “employee” status, particularly with respect to student-athletes, remains a murky one; various formulations of the test have emerged over time in a longstanding effort to determine whether particular groups of alleged “employees” hold a protected right to unionize under the NLRA.

As developments in Name, Image, and Likeness (NIL) rights continue to redefine the legal environment of college athletics, many experts and commentators have turned their attention to student-athlete unionization, coming forward with countless pages of scholarship arguing for or against classifying student-athletes as employees under the NLRA. Yet few, if any, have addressed a critical observation that this Article finds indispensable to a well-functioning narrative of students, student-athletes, and employees: not all athletic programs are the same. On the contrary, many of these programs are so different from one another that focusing on the “forest” of unionization might gravely ignore the “trees” that characterize these complex groups of institutions.

In response, this Article aims to facilitate a more complete narrative of students, student-athletes, and employees by highlighting one group of institutions whose barriers to student-athlete unionization are very different from those of other institutions: the Ivy League. As this Article attempts to demonstrate, Ivy League athletic programs are institutionally unique in ways that mitigate the National Labor Relations Board (NLRB)’s concerns to grant “employee” status in other cases—namely that doing so will disrupt

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1. 29 U.S.C. § 157.

2. 29 U.S.C. § 151; JON SHIMABUKURO, CONG. RSCH. SERV., RL32930, *THE NATIONAL LABOR RELATIONS ACT (NLRA): UNION REPRESENTATION PROCEDURES AND DISPUTE RESOLUTION*1 (2013).

3. CONG. RSCH. SERV., RL32930, at 1.

4. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 83–84 (2006).

the balance of labor relations or financially imperil the affected universities. On these observations, this Article posits that notwithstanding the arguably questionable merits of student-athlete unionization, the Ivy League offers a uniquely promising “test site” in which to probe the practical consequences of classifying student-athletes as employees and derive valuable insights that could inform similar proposals at other institutions.

## I. BACKGROUND

### A. *Key Institutional Players: The NCAA and the NLRB*

Within the landscape of college athletics, two governing institutions exert powerful and wide-reaching influence over the treatment of student-athletes under the NLRA: the National Labor Relations Board (NLRB) and the National Collegiate Athletic Association (NCAA). As part of the NLRA, Congress created the NLRB to administer the Act and charged it with, among other responsibilities, remedying unlawful practices under the Act.<sup>5</sup> Importantly, a prerequisite to this protection is that the workers who wish to unionize must be “employees.”<sup>6</sup> The Act itself, however, is vague as to what constitutes an employee, clarifying only that the term “employee” shall include “any employee” so long as they are not part of a handful of specifically exempt groups, such as public sector employees, agricultural workers, railway workers, and family members of the employer.<sup>7</sup> The NLRA’s ambiguous language and circular definition of a critical term has left the NLRB and the judiciary to interpret the language of the statute and develop common law principles to differentiate protected “employees” from non-employees.<sup>8</sup> Indeed, “[w]ith little guidance from the ambiguous statute as to what groups constitute statutory employees, the Board, as the delegated expert agency, has been instrumental in forming the governing law.”<sup>9</sup>

The second important player is the NCAA, a non-profit organization that regulates the athletic programs of most colleges and universities.<sup>10</sup> The NCAA has long held (and vigorously maintained) a position that student-athletes are not employees under the NLRA and should not be permitted to unionize.

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5. Benjamin Feiner, *Setting the Edge: How the NCAA Can Defend Amateurism by Allowing Third-Party Compensation*, 44 COLUM. J.L. & ARTS 93, 104 (2020) (citing FREDERICK T. GOLDER & DAVID R. GOLDER, *LABOR & EMPLOYMENT LAW: COMPLIANCE & LITIGATION* § 2.1 (3d. ed. 2019)).
  6. Michael P. Cianfichi, *Varsity Blues: Student Athlete Unionization Is the Wrong Way Forward to Reform Collegiate Athletics*, 74 MD. L. REV. 583, 585 (2015).
  7. 29 U.S.C. § 152(3); *id.*
  8. Joshua Hernandez, *The Largest Wave in the NCAA’s Ocean of Change: The “College Athletes are Employees” Issue Reevaluated*, 33 MARQ. SPORTS L. REV. 781, 784 (2023).
  9. Cianfichi, *supra* note 6, at 585–86.
  10. *Can College Athletes Unionize?*, FINDLAW (Oct. 10, 2023), <https://www.findlaw.com/education/higher-education/can-college-athletes-unionize.html> [<https://perma.cc/W9T8-A6EN>].

However, that position is at a critical juncture following the U.S. Supreme Court's decision in *NCAA v. Alston*, which held that the NCAA could not limit certain benefits for employees but did not address whether the students in the case were employees and left open the possibility of extending federal rights under the NLRA to student-athletes.<sup>11</sup>

B. *Students as Employees: Interpreting and Applying the NLRA*

Historically, the NLRB examined the “economic realities” of the employee-employer relationship to determine whether workers could be categorized as protected employees. However, the NLRB now generally applies a right-of-control test, under which a person is classified as an employee if they are “subject to the other’s control or right of control” as to the purpose and execution of her work.<sup>12</sup> However, while the right-of-control test “remains the primary standard for differentiating employees from non-employees,” the NLRB’s jurisprudence has changed several times with respect to students who perform work for their universities, with some formulations imposing additional (and controversial) considerations that the student must satisfy before she is entitled to protection under the NLRA.<sup>13</sup>

The first significant evolution in the NLRB’s student-employee jurisprudence came in 2000, when the Board’s decision in *New York University* “revers[ed] twenty-five years of NLRB precedent” by classifying New York University’s graduate assistants as employees under the NLRA.<sup>14</sup> However, the NLRB overturned its *New York University* decision four years later in *Brown University and International Union, Automobile, Aerospace and Agriculture Implement Workers of America (Brown)*, where it found that student-assistants—for example, teaching assistants, research assistants, and examination proctors—were not employees because they were “primarily students” and had a “primarily educational, not economic, relationship with their university.”<sup>15</sup> In its decision, the NLRB considered four factors in determining that the graduate assistants were not employees: (1) the graduate assistants’ status as students, (2) the role of their graduate assistant duties in graduate education, (3) the graduate assistants’ relationship with the faculty, and (4) the financial aid the graduate assistant received to attend Brown University.<sup>16</sup>

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11. *Id.*; Nat’l Collegiate Athletics Ass’n v. Alston, 141 S. Ct. 2141 (2021).

12. Cianfichi, *supra* note 6, at 589.

13. *Id.* at 585–86.

14. N.Y. Univ., 332 N.L.R.B. 1205 (2000); Hernandez, *supra* note 8, at 786.

15. Brown Univ., 342 N.L.R.B. 483 (2004); Hernandez, *supra* note 8, at 786.

16. Cianfichi, *supra* note 6, at 591.

C. *Student-Athletes as Employees: From Brown to Northwestern and Beyond*

Although *Brown* predictably made it more difficult for student-*assistants* to obtain employee status, it was initially unclear whether the ruling would have the same consequence for student-*athletes*, whose relationship with the university is typically far more economic in nature.<sup>17</sup> The NLRB's first ruling as to whether student-athletes should be classified as employees came in *Northwestern University and College Athletes Players Association (Northwestern)*, a 2014 case in which the College Athletes Players Association filed a petition with the NLRB asserting that Northwestern University's football players were employees under Section 2(3) of the NLRA.<sup>18</sup> The NLRB initially found the "primarily students" standard articulated in *Brown* to be "inapplicable . . . because the players' football-related duties are unrelated to their academic studies."<sup>19</sup> However, on appeal, the NLRB declined to assert jurisdiction over the matter on grounds that doing so "would not promote stability in labor relations."<sup>20</sup>

Importantly, although the petitioner ultimately did not prevail in *Northwestern*, the decision did not foreclose the possibility that the student-athletes in question would have been deemed employees if the NLRB had chosen to exercise jurisdiction. Indeed, just two years later, the NLRB overturned *Brown* altogether, finding in *Columbia University in the City of New York and Graduate Workers of Columbia (Columbia)* that student-assistants were employees because the text of the NLRA "supports the conclusion that student-assistants . . . are common-law employees are covered by the Act."<sup>21</sup> In doing so, the NLRB "essentially unified the common law test and statutory standard definitions of an employee" by articulating that students who have an employment relationship with their university under the common law test are employees under Section 2(3) of the NLRA.<sup>22</sup> Later, in 2017, the NLRB issued a non-binding report clarifying how the Board would apply *Northwestern* in light of its subsequent decision in *Columbia*.<sup>23</sup> In the report, the NLRB concluded that scholarship football players in Division I Football Bowl Subdivision

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17. See Hernandez, *supra* note 8, at 795–96 ("When it comes to Brown University, scholars had theorized well before the Northwestern University decision that college athletes would meet the NLRB's university student statutory standard from Brown University. The basis of this argument is that '[t]he relationship between employee-athletes and their universities . . . is nearly exclusively economic, or commercial' which makes these individuals 'employees' under the NLRA.").
  18. Nw. Univ. Emp. & Coll. Athletes Players Ass'n, 198 L.R.R.M. (BNA) 1837, 2014 WL 1246914, at \*1 (2014); see Hernandez, *supra* note 8, at 787–88.
  19. Nw. Univ. Emp., 198 L.R.R.M. (BNA) 1837 at \*18; see Hernandez, *supra* note 8, at 787.
  20. Nw. Univ., 362 N.L.R.B. 1350, 1352 (2015); see Hernandez, *supra* note 8, at 788.
  21. Trs. of Colum. Univ., 364 N.L.R.B. 1080, 1085 (2016).
  22. See Hernandez, *supra* note 8, at 790.
  23. See *id.*

(FBS) private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act.<sup>24</sup>

D. *The Unique History of Ivy League Athletics*

The Ivy League itself has had a steadfast history against awarding athletic scholarships. Prior to the formation of the Ivy League, the presidents of all eight Ivy institutions agreed against offering athletic scholarships as part of the Ivy Group Agreement in 1945.<sup>25</sup> That agreement, however, only applied to football.<sup>26</sup> Once the Ivy League officially formed in 1954, all eight governing boards agreed to uphold the ban on athletic scholarships to avoid commercialization.<sup>27</sup> The primary objective of the Ivy Group Agreement was to preserve amateurism in college sports, driven by the idea that coaches and players should not behave as “professional performers in public spectacles,” but as members of recreational competition.<sup>28</sup> The agreement held that “athletes shall be admitted as students and awarded financial aid only on the basis of the same academic standards and economic need as are applied to all other students.”<sup>29</sup> The agreement also maintained a strong desire that all recruited athletes would be accurate representatives of each school’s study body.<sup>30</sup> Since then, the agreement has evolved in other respects, but the basic idea stands that athletes are students first and are evaluated for financial aid awards on the same basis as all other students.<sup>31</sup>

In general, antitrust law prohibits collaboration amongst entities for price-setting, as it stifles competition.<sup>32</sup> In 1992, Congress passed a temporary exemption to this general principle, which allowed universities to agree upon financial aid policies so long as all students were admitted per a “need-blind” standard, under which institutions do not take a student’s financial need into account during the admissions process.<sup>33</sup> Once the Improving America’s Schools Act of 1994 was passed, that exemption was broadened and extended

24. *Id.*

25. Anika Arora Seth, *Lawsuit Challenges Ivy Refusal to Offer Athletic Scholarships*, YALE DAILY NEWS, (Mar. 8, 2023, 12:32 AM), <https://yaledailynews.com/blog/2023/03/08/lawsuit-challenges-ivy-refusal-to-offer-athletic-scholarships> [https://perma.cc/T6TC-F6Q4].

26. *A History of Tradition*, THE IVY LEAGUE, <https://ivyleague.com/sports/2017/7/28/history-timeline-index.aspx> [https://perma.cc/R23Y-XRLQ].

27. Steven C. Swett, *Presidents Formally Accept New ‘Ivy Group’ Agreement*, HARVARD CRIMSON (Feb. 11, 1954), <https://www.thecrimson.com/article/1954/2/11/presidents-formally-accept-new-ivy-group> [https://perma.cc/SFR2-TESM].

28. *Id.*

29. Luke Pichini, *The Evolution of Ivy League Football*, CORNELL DAILY SUN (Oct. 7, 2020), <https://cornellsun.com/2020/10/07/the-evolution-of-ivy-league-football> [https://perma.cc/M7AV-6AW3].

30. *A History of Tradition*, *supra* note 26.

31. *See* Seth, *supra* note 25.

32. *Id.*

33. *Higher Education Amendments of 1992*, § 1544, PUB. L. NO. 102–325 (1992).

for additional years by Section 568.<sup>34</sup> Although Congress subsequently renewed the Act for the next twenty-eight years, Congress allowed it to expire on September 30<sup>th</sup>, 2022.<sup>35</sup>

The Ivy League President's Group uses a common methodology among its members to determine need-based financial aid awards; however, this practice can become anticompetitive as they collaborate with one another without the protection of the provisions in Section 568.<sup>36</sup> As a result, Ivy League schools are now prohibited from coordinating how much financial aid they will offer.<sup>37</sup>

Before Ivy League football became a part of the Football Championship Subdivision (FCS), as opposed to the more prominent FBS, the Ivy programs were considered some of the best in the country.<sup>38</sup> For instance, Yale and Princeton football were the premier team until 1939, achieving fifty-five national championships combined.<sup>39</sup> Since then, however, the Ivy League has struggled to compete with other prominent conference programs that have given their athletes scholarships and sent more of their players to the National Football League.<sup>40</sup>

Today, the Ivy League remains steadfast in its decision to not offer athletic scholarships, citing the belief that admission should be based on academic performance, not athletic skills.<sup>41</sup> One of the Ivy League's core beliefs is that student-athletes should choose to play at their schools for the "love of the game" and to grow as a person from being a part of a sports team; emphasizing focus on athletics as a means for students to develop their character, foster teamwork, and learn key leadership skills.<sup>42</sup> The Ivy League believes that offering athletic scholarships would, on the other hand, create an environment in which student-athletes focus more on their sport instead of on academics, and therefore fail to take full advantage of their schools' educational opportunities.<sup>43</sup>

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34. *Improving America's Schools Act of 1994*, § 568, PUB. L. No. 103-382 (1994).

35. See Seth, *supra* note 25.

36. *Id.*

37. *Id.*

38. See Pichini, *supra* note 29.

39. *Id.*

40. *Id.*

41. Aron Solomon, *Ivy League Schools Are Not Above Compensating Their Student-Athletes Fairly*, FORTUNE (Apr. 14, 2023, 11:15 AM), <https://fortune.com/2023/04/14/ivy-league-schools-compensating-student-athletes-fairly-new-lawsuit-end-special-status-sports-law-aron-solomon> [<https://perma.cc/4PXA-LACK>].

42. *Id.*

43. *Id.*

## II. LESSONS FROM PETITIONS BY GRADUATE ASSISTANTS AND MEDICAL RESIDENTS

### A. *The Importance of Comparisons to Other Groups of Workers*

Any decision by the NLRB allowing student-athletes at a university to unionize first depends on a determination by the NLRB that student-athletes constitute employees under the Act.<sup>44</sup> Besides the NLRB's opinion in *Northwestern*, NLRB precedents that considered the possibility of an employee-employer relationship between student-athletes and their universities are rare. Therefore, because of the relative depth of decisions contemplating graduate assistants as employees and because of the similarities in context between student-athletes and graduate students, the NLRB precedents dealing with graduate assistants are one of the best additional indicators of how the NLRB will rule when they considered the merits of deeming future groups of student-athletes as employees.

The NLRB first recognized that private nonprofit universities constituted employers in 1970.<sup>45</sup> The NLRB initially stood firm in their opinion throughout the 1970s and 1980s that graduate assistants were "primarily students" and, therefore, not employees.<sup>46</sup> However, recent cases such as *Columbia* have demonstrated that this opinion is flexible.<sup>47</sup> The NLRB first granted a petition to allow medical residents to unionize in 1999 after utilizing the common law control test before extending the scope of this decision to graduate assistants in 2004, legally classifying both groups as employees.<sup>5</sup> While the NLRB's finding in *Brown* pushed back progress for groups of students hoping to unionize, the NLRB's return to the control test in *Columbia* once again allowed them to recognize some circumstances in which students constitute employees under the Act, opening up the possibility for other categories of students to unionize.<sup>48</sup>

Accordingly, this Article identifies four key analogies from graduate assistant and medical resident cases that future groups of petitioning students, including student-athletes, should consider when crafting their legal arguments. First, the control test favors groups of students wanting to unionize. Second, the NLRB goes back and forth on its opinions regarding when students constitute employees. Third, precedents such as *Brown*, where the NLRB did not recognize the graduate assistants as employees, will not prevent student-athletes from unionizing. Fourth, future student-athlete cases are distinguishable from *Brown*. This Article also notes that if Ivy League student-athletes petitioned the NLRB to unionize, the negative precedent in

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44. 29 U.S.C. § 157.

45. Cianfichi, *supra* note 6, at 586.

46. See *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976); *Leland Stan. Junior Univ.*, 214 N.L.R.B. 621, 623 (1974); *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972).

47. *Trs. of Colum. Univ.*, 364 N.L.R.B. 1080 (2016).

48. *Id.* at 1083; see also *Brown Univ.*, 342 N.L.R.B. 483 (2004).

*Brown* would not block their efforts. However, their success would depend on the NLRB utilizing the common law control test.

B. *Evolution of the NLRB's Students-as-Employees Jurisprudence*

Initially, in the 1970s, the NLRB drew a firm line between employees who had the right to unionize and graduate assistants, whom they considered students.<sup>49</sup> Starting with *Adelphi University and Adelphi University Chapter, American Association of University Professors (Adelphi)* in 1972, the NLRB decided not to assert jurisdiction over a group of petitioning graduate assistants because the Board determined that graduate assistants were not employees under the Act because they were “primarily students.”<sup>50</sup> The Board based this decision on the nature of the work that the graduate assistants completed.<sup>51</sup> Additionally, while the Board contemplated that the graduate assistants performed some faculty duties, it reasoned that because the graduate assistants did not share the same or sufficiently similar interests to the regular faculty, the Act did not afford them collective bargaining capabilities.<sup>52</sup>

Again, a couple of years later, in *Leland Stanford Junior University and The Stanford Union of Research Physicists (Stanford)*, the NLRB maintained that graduate assistants were not employees.<sup>53</sup> First, its opinion emphasized that the graduate assistants’ research and teaching duties aimed to enrich their academic experience.<sup>54</sup> Second, the graduate assistants’ argument that their financial aid constituted compensation did not persuade the Board because the graduate assistants all received the same amount in financial aid despite any deviation in the quality of work, number of hours worked, or specific tasks.<sup>55</sup> Third, the Board examined whether the university controlled either graduate assistants’ tasks or the duration of their performance.<sup>56</sup> In doing so, the court focused on the fact that unlike the full-time Ph.D. holding research associates whose objective at the university was to “advance a project undertaken and on behalf of Stanford as directed by someone else,” the graduate assistants’ objective was that “of students within certain academic guidelines having chosen particular projects on which to spend the time necessary, as determined by the project’s needs.”<sup>57</sup> Together, these reasons resulted in the NLRB’s decision that the graduate assistants at Stanford were not employees under the Act.<sup>58</sup>

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49. See *Cedars-Sinai*, 223 N.L.R.B. at 253; *Stanford*, 214 N.L.R.B. at 623 (1974); *Adelphi*, 195 N.L.R.B. at 640.

50. *Cianfichi*, *supra* note 6, at 587; see also *Adelphi*, 195 N.L.R.B. at 640.

51. *Adelphi*, 195 N.L.R.B. at 640.

52. *Id.*

53. *Stanford*, 214 N.L.R.B. at 623.

54. See *Cianfichi*, *supra* note 6, at 587.

55. See *Stanford*, 214 N.L.R.B. at 622.

56. See *id.* at 623.

57. *Id.*

58. *Id.* at 623; see also *Cianfichi*, *supra* note 6, at 587.

The NLRB also concluded that medical residents did not constitute employees under the Act during this time.<sup>59</sup> In *Cedars-Sinai Medical Center and Cedars-Sinai House Staff Association (Cedars-Sinai)*, the NLRB determined that the medical interns, residents, and fellows primarily engaged in their respective activities for educational rather than financial purposes, and therefore were students and not employees.<sup>60</sup> As the NLRB summarized,

[Residents] participate in these programs not for the purpose of earning a living; instead they are there to pursue the graduate medical education that is a requirement for the practice of medicine. An internship is a requirement for the examination for licensing. And residency and fellowship programs are necessary to qualify for certification in specialties and sub-specialties.<sup>61</sup>

Like the graduate assistant cases, a significant factor in the NLRB's finding of a lack of an employment relationship in *Cedars-Sinai* was that the amount of time, quality, and nature of the medical interns and residents' work did not correlate to their financial aid packages.<sup>62</sup> However, in *Cedars-Sinai*, the NLRB expanded the list of considerations for when students can unionize by pointing out that the medical interns and residents' decision to apply for the program focused on the quality of education and opportunities for training instead of the size of the stipend associated with the program.<sup>63</sup> The NLRB's refusal to consider graduate assistants and medical residents as employees under the Act persisted until the turn of the century.<sup>64</sup>

The NLRB first determined that medical residents constituted employees under the Act in *Boston Medical Center Corporation and the House Officers' Association/Committee of Interns and Residents (Boston Medical)* before extending that opinion to graduate assistants in *New York University and International Union, United Automobile, and Aerospace and Agricultural Implement Workers of America (NYU)* a few years later.<sup>65</sup> In *Boston Medical*, the NLRB held that the medical interns, residents, and fellows employed by the hospital did constitute employees; so the Act entitled those hospital employees to collective bargaining power, which departed from the precedent in *Cedars-Sinai*.<sup>66</sup> Utilizing the standard law control test enabled the NLRB to find that the medical residents were employees even though their work directly related

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59. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976).

60. *Id.*

61. *Id.*

62. See Cianfichi, *supra* note 6, at 587–88.

63. See *Cedars-Sinai*, 223 N.L.R.B. at 257.

64. See *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152,168 (1999); see also *N.Y. Univ.*, 332 N.L.R.B. 1205 (2000).

65. See *Bos. Med.*, 330 N.L.R.B. at 168; see also Cianfichi, *supra* note 6, at 589.

66. See Cesar F. Rosado Marzan & Alex Tillett-Saks, *Work, Study, Organize!: Why the Northwestern University Football Players Are Employees under the National Labor Relations Act*, 32 HOFSTRA LAB. & EMP. L.J. 301, 318 (2015).

to their education and formal training. The control test used in *Boston Medical* accounted for a significant part of its outcome and signaled the beginning of precedent supporting the concept that student-athletes fit under the Act's protection as employees.<sup>67</sup>

Like in *Boston Medical*, the NLRB utilized the control test in *NYU* to find that the students were employees.<sup>68</sup> Further, in *NYU*, the NLRB specifically rejected the idea that graduate assistants were not employees because they were 'predominantly students.'<sup>69</sup> Significantly, New York University adamantly argued that giving collective bargaining rights to students, such as the graduate assistants in *NYU*, could negatively impact the university by infringing on its academic freedom.<sup>70</sup> However, the NLRB rejected the university's argument by drawing parallels to its prior decision that allowed university faculty to bargain collectively.<sup>71</sup> The NLRB reasoned that even thirty years after giving faculty collective bargaining power, unionizing had not adversely impacted academic freedom.<sup>72</sup> Therefore, giving collective bargaining power to the students would allow them to negotiate without affecting the university's bargaining power.<sup>73</sup> The NLRB's decision to use the control test allowed it to conclude that both the medical residents in *Boston Medical* and graduate assistants in *NYU* constitute employees under the Act.

Nevertheless, the NLRB's current stance that students can constitute employees did not follow from *NYU* without a notable setback. In *Brown*, decided in 2004, the NLRB reverted to its earlier position that graduate assistants are not employees under the Act because they are primarily students.<sup>74</sup> Despite earlier successes by *Boston Medical* and *NYU* students, the NLRB reached this decision because it declined to use the control test.<sup>75</sup> Instead, the Board focused on the idea that the relationship between the graduate assistants and Brown University was primarily educational, not economical.<sup>76</sup> One of the factors the Board relied on to come to its decision was the educational capacity in which the faculty in *Brown* supervised the graduate students during their research and teaching duties.<sup>77</sup> The NLRB also evaluated the stipend that the research assistants received and found that the stipend's goal was financial assistance and not compensation because "the amount was not dependent on

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67. *Bos. Med.*, 330 N.L.R.B. at 159.

68. *Id.* at 159; *N.Y. Univ.*, 332 N.L.R.B. at 1206.

69. Hernandez, *supra* note 8, at 786.

70. Cianfichi, *supra* note 6, at 588; *N.Y. Univ.*, 332 N.L.R.B. at 1208.

71. See Cianfichi, *supra* note 6, at 591; *N.Y. Univ.*, 332 N.L.R.B. at 1208.

72. Cianfichi, *supra* note 6, at 591.

73. *Id.*

74. *Brown Univ.*, 342 N.L.R.B. 483 (2004).

75. Hernandez, *supra* note 8, at 787.

76. *Brown Univ.*, 342 N.L.R.B. at 488-99.

77. Hernandez, *supra* note 8, at 786-87.

the nature or intrinsic value of the services performed or the skill or function of the recipient.”<sup>78</sup>

Despite this disappointing result in *Brown*, several years later, in 2016, the NLRB flipped-flopped back to finding that student-assistants are employees in *Columbia*.<sup>79</sup> Here, the NLRB reached this decision after leaning into the Act’s purpose and resurrecting the control test.<sup>80</sup> This decision recognized that graduate students are employees under Section 2(3) for all statutory purposes and that private universities have a federal right to unionize.<sup>81</sup>

While this shift back to the control test and statutory protections for graduate assistants are encouraging for the possibility of student-athletes unionizing, this case is not a slam dunk.<sup>82</sup> First, because *Columbia* applied specifically to graduate students, and second, because the NLRB emphasized that its decision that the graduate students in *Columbia* were employees under the Act does not guarantee that it will always exercise its jurisdiction in these cases.<sup>83</sup> This is consistent with the result in *Northwestern*, where the NLRB left the possibility of employee status open but refused to assert its jurisdiction over the Northwestern football players.<sup>84</sup> Nevertheless, the NLRB’s stance in *Columbia* puts the ball in the court of the student-athletes wanting to unionize to formulate arguments that build on these past precedents.

### C. *Lessons From the Graduate Assistant and Medical Resident Cases*

#### 1. The Control Test Favors Unionization for Student Groups

Groups of students wanting to unionize should insist that the NLRB use the control test when petitioning it to assert its jurisdiction. The control test favors students, especially student-athletes whose coaches exert substantial levels of direction in their daily and academic lives, as the level of influence and limitations the university asserts on the group of students determines the nature of the relationship.<sup>85</sup> For example, in *NYU*, the NLRB recognized graduate assistants as employees for the first time after utilizing the control test in their review, and in *Columbia*, the NLRB returned to their opinion that graduate assistants constitute employees under the Act after using the control test.<sup>86</sup> Additionally, one could argue that the NLRB’s primary reason for finding that the graduate assistants in *Brown* were not employees under the Act was because it did not use the control test and instead focused on the grad-

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78. *Id*; see also Cianfichi, *supra* note 6, at 591.

79. *Trs. of Colum. Univ.*, 364 N.L.R.B. 1080, 1083 (2016).

80. Hernandez, *supra* note 8, at 790.

81. *Colum. Univ.*, 364 N.L.R.B. at 1080; see Hernandez, *supra* note 8, at 790.

82. *Colum. Univ.*, 364 N.L.R.B. at 1083.

83. Hernandez, *supra* note 8, at 790.

84. *Nw. Univ.*, 362 N.L.R.B. 1350, 1365 (2015).

85. Cianfichi, *supra* note 6, at 589.

86. *Colum. Univ.*, 364 N.L.R.B. at 1083; *N.Y. Univ.*, 332 N.L.R.B. 1205, 1206 (2000).

uate assistants' academic relationship with the university and the nature of their stipends.<sup>87</sup>

Students-athletes, especially those at Ivy League universities, would be best-served by tailoring their arguments around the control test because attempting to fit an argument into a framework that does not utilize that test, similar to what happened in *Brown*, would present difficulties as Ivy League student-athletes do not receive athletic scholarships. Therefore, student-athletes seeking to unionize have the best chance of success if the NLRB continues its trend in *Columbia* of utilizing the control test to determine whether students constitute employees under the Act.

## 2. The NLRB's Students-as-Employees Jurisprudence is Inconsistent

The NLRB has changed its mind several times on whether graduate assistants and students in similar positions should be employees under Section 2(3).<sup>88</sup> For example, although the NLRB maintained that graduate students and medical residents lacked employee status under the Act for nearly twenty years, the Board changed its position after applying a different test in *Boston Medical* and *NYU*.<sup>89</sup> The Board also flip-flopped on the issue and what test to use within a timespan of just a few years.<sup>90</sup> Given the volatility of these decisions, groups of students petitioning the NLRB should prepare thorough arguments that address both good and bad precedents. Additionally, student-athletes set on unionizing should remember that previous victories and losses for other groups of students under the NLRB's review do not necessarily precipitate their own.

## 3. Existing Precedent Does Not Strictly Preclude Unionization

Though precedents such as *Brown*'s make it clear that the NLRB will not always allow students to unionize, *Brown* alone will not prevent the NLRB from recognizing that students, including student-athletes, can constitute employees under the Act. At the same time, those who are against student-athletes unionizing, such as the NCAA, would point to *Brown* and insist that students are not employees. In the most recent major case on this issue, *Columbia*, the NLRB extended jurisdiction and determined that the graduate students petitioning in that case constituted employees under the Act.<sup>91</sup> While technically, the NLRB has refused to assert jurisdiction over students in the majority of the relevant cases, the board's decision in *Northwestern* showed that the

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87. *Brown Univ.*, 342 N.L.R.B. 483, 495–96 (2004).

88. Cianfichi, *supra* note 6, at 584.

89. *See, e.g.*, *Leland Stan. Junior Univ.*, 214 N.L.R.B. 621, 623 (1974); *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972); *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152 at 168 (1999); *Cedars-Sinai Med. Ctr.*, 233 N.L.R.B. 251, 253 (1976); *N.Y. Univ.*, 332 N.L.R.B. at 1206 (2000).

90. *See, e.g.*, *Brown Univ.*, 342 N.L.R.B. at 483; *Colum. Univ.*, 364 N.L.R.B. . at 1080; *N.Y. Univ.*, 332 N.L.R.B. . at 1206.

91. *Colum. Univ.*, 364 N.L.R.B. at 1080.

NLRB will not mindlessly overlook their decision in *Colombia* that students constitute employees, and revert to their opinion in *Brown* when it comes to student athletes.<sup>92</sup> Further, when deciding *Northwestern*, the NLRB dismissed the university's argument that the precedent in *Brown* compelled the NLRB to side with the university.<sup>93</sup> Instead, the NLRB distinguished the cases on two grounds: that the student-athletes in *Northwestern* were undergraduate students instead of graduate students and that, unlike research, football does not relate to students' academics.<sup>94</sup> This is because, as the next Subpart will explain, student-athletes circumstances, such as those in *Northwestern*, are easy to distinguish from those of the graduate assistants in *Brown*.

#### 4. Many Student-Athlete Groups are Factually Distinguishable from the Graduate Assistants in *Brown*

Future groups of student-athletes seeking to unionize are distinguishable from the graduate assistants in *Brown* because student-athletes lack the critical link between their work activities and academics. Unlike the graduate assistants in *Brown*, the activities student-athletes are involved in do not directly relate to their studies.<sup>95</sup> In *Brown*, the NLRB refused to assert jurisdiction because they characterized the graduate students as "primarily students," given the vital link between their research, teaching duties, and academic programs.<sup>96</sup> While student-athletes, like graduate assistants, are degree-seeking students enrolled at their university, the undeniable link between graduate students' work and degrees does not exist for student-athletes.<sup>97</sup>

Future cases involving student-athletes will lack this connection, thereby distinguishing the relationship between student-athletes and their universities from graduate assistants and their universities in two aspects. First, student-athletes and their coaches have a materially different relationship than *Brown's* graduate assistants and their professors. It is true that both the faculty in *Brown* and the coaching staff in *Northwestern* served in positions of seniority over the graduate students and student-athletes. Additionally, that the faculty and coaching staff played a role in determining whether the students would have their scholarships renewed.<sup>98</sup> However, in *Brown*, the faculty directly engaged with the graduate assistants in their field of study, whereas the coaching staff's role in a student-athlete situation is far from academic.<sup>99</sup> Moreover, while the NLRB characterized the relationship between faculty

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92. *Id.*; see George Bivens, *NCAA Student Athlete Unionization: NLRB Punts on Northwestern University Football Team*, 121 *DICK. L. REV.* 949, 968 (2017).

93. *Nw. Univ.*, 362 *N.L.R.B.* 1350, 1365 (2015).

94. Bivens, *supra* note 114, at 968.

95. Cianfichi, *supra* note 6, at 595.

96. *Brown Univ.*, 342 *N.L.R.B.* 483, 488–99.

97. Cianfichi, *supra* note 6, at 595.

98. McCormick & McCormick, *supra* note 4, at 125–26.

99. *Id.*

and graduate students in *Brown* as supervisory, the relationship between student-athletes and coaches goes beyond mere supervision as the coaches assert much more control over their athletes' daily lives than professors do over their graduate students.<sup>100</sup> Furthermore, the faculty in *Brown* had the capability to determine whether graduate assistants would have their scholarships renewed. This fundamentally differs from the decisions coaches make regarding student-athletes' athletic scholarships as only faculty base their decisions primarily on academics.<sup>101</sup>

Second, the athletic scholarships that student-athletes receive differ materially from the financial aid received by the graduate assistants in *Brown*. While the graduate assistants in *Brown* received their stipend amount regardless of whether their degrees require teaching or research work, universities do not hand out athletic scholarships to students who are not student-athletes.<sup>102</sup> Universities award athletic scholarships under the condition that the student renders their athletic services to their respective team. Additionally, each graduate student in *Brown* received the same amount regardless of the value of their services, whereas athletics scholarships are highly variable within any given university team.<sup>103</sup> Therefore, because of the lack of the critical link between their work activities and academics that existed in *Brown*, as well as the significant differences regarding their supervision and compensation, future petitions by student-athletes are distinguishable from *Brown*.

While not an identical match, the NLRB's past cases regarding graduate assistants and medical residents are essential for future groups of students, such as student-athletes. Additionally, the NLRB should decline to use its decision in *Brown* to blockade petitions from student-athletes. The Board should instead utilize the control test as it did in *Columbia* because while both situations involve students and their universities, *Brown* and future cases involving student-athletes are distinguishable. Finally, if Ivy League student-athletes petitioned the NLRB to unionize, *Brown* should not impede their success for the above reasons, and their success should otherwise only depend on the NLRB opting to use the control test.

### III. DISTINGUISHING THE IVY LEAGUE FROM THE BIG TEN

#### A. *The NLRB's Reluctance to Certify Big Ten Athletes in Northwestern*

If the NLRB had made a final ruling in the *Northwestern* case that the student-athletes were employees eligible for benefits and a salary, then recruiting at Northwestern and other private institutions would have been significantly

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100. *Id.*

101. *Id.*

102. Hernandez, *supra* note 8, at 787.

103. McCormick & McCormick, *supra* note 4, at 125–26.

altered.<sup>104</sup> However, the NLRB desired to avoid a “patchwork” issue between private and public schools where only some college football players could become employees.<sup>105</sup> Additionally, since the NCAA had recently decided to allow the granting of guaranteed four-year scholarships at FBS schools, the NLRB reasoned that because the relationships between institutions and their respective athletes were actively changing, they should not interfere at that time.<sup>106</sup> Still, the issue remains open for future NLRB review, particularly if circumstances change such that they have clearer jurisdiction over any new policy.<sup>107</sup>

At the time of the decision, the Board only retained jurisdiction over the seventeen private universities in the 125 Division I FBS universities. Thus the Board reasoned that it would not make sense to bestow collective bargaining rights to only twenty-four percent of teams.<sup>108</sup> The NLRB’s hesitance to rule on that issue is understandable, as Northwestern is the only private university in the Big Ten Conference and therefore may have gained an unfair recruiting advantage over its public counterparts.<sup>109</sup> Moreover, doing so may have disrupted the “symbiotic relationship” that the NLRB felt college sports required and would have failed to “promote stability in labor relations” among Division I collegiate teams.<sup>110</sup> Because the NLRB has chosen not to determine whether state-level public employees can unionize, those works fall under state labor laws, which are not always modeled after the NLRA and are far more diverse.<sup>111</sup> Therefore, according to the NLRB, a few states could cause chaos by altering their respective labor laws to grant collective bargaining rights to student-athletes at public institutions not governed by the NLRB.

#### B. *Distinguishable Features of Ivy League Athletic Programs*

The NLRB has not always shied away from difficult decisions. The Board has previously set forth rules concerning both graduate and teaching assistants, which pose the same risk of instability among public and private universities that the NLRB cited as a major reason to decline jurisdiction in

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104. Michael McCann, *Breaking Down Implications of NLRB Ruling on Northwestern Players Union*, SPORTS ILL. (Aug. 17, 2015), <https://www.si.com/college/2015/08/17/northwestern-football-players-union-nlr-b-ruling-analysis> [https://perma.cc/XWS8-KX9N].

105. *Id.*

106. *Id.*

107. *Id.*

108. Cianfichi, *supra* note 6, at 607.

109. Zach Skillings, *What You Need to Know About the Big 10 Schools*, SCHOLARSHIPS 360 (Jan. 26, 2024), <https://scholarships360.org/college-admissions/what-you-need-to-know-about-the-big-10-schools/> [https://perma.cc/4UEP-JQUS].

110. Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athlete’s Rights Movement*, 38 CARDOZO L. REV. 1627, 1640 (2017).

111. *Id.* at 1646.

*Northwestern*.<sup>112</sup> The Ivy League, however, comprises of eight private, Division I programs in the FCS.<sup>113</sup> Many sports fans and writers concurred with the NLRB's ruling in *Northwestern* because once athletes from private universities were allowed to collectively bargain, they may use those rights to change prior NCAA policies, which would bestow a competitive advantage on private schools over their public competitors.<sup>114</sup> Since the NLRB lacks jurisdiction over public institutions, another major issue was that two states in the Big Ten had already enacted statutes preventing athletes on state-school scholarships from being classified as employees.<sup>115</sup> Although the NCAA itself combines public and private institutions, all Ivy League FCS programs are private.<sup>116</sup>

If union organizers within the Ivy League worked to create a bargaining unit within that one athletic conference, then the NLRB's concerns about disrupting "stability in labor relations" would likely be alleviated.<sup>117</sup> Columbia University has now practically unified the statutory standard and the common law test for determining whether a student can be classified as an employee, permitting other Ivy League universities to follow suit.<sup>118</sup> The result would be much less concern surrounding a possible bargaining unit with divergent member-interests.<sup>119</sup> The possibility of enacting the "non-statutory labor exemption" defense to potential antitrust claims would also likely be reduced, for the bargaining unit here would only consist of private college athletes.<sup>120</sup>

Another potential issue with respect to unionization is the threatened strain on financial resources. Schools that depend on revenues from their football and basketball programs may be forced to cut other sports teams due to lack of funding if they were required to pay student-athletes.<sup>121</sup> For instance, the University of California-Berkeley, an FBS institution, already has struggled to properly fund its other sport teams because the profits from their football and basketball programs are insufficient.<sup>122</sup> The majority of member schools in the NCAA depend on redistributed NCAA revenue, which grants about \$2.7 billion in athletic scholarships. In 2014, only twenty-three out of 1,100 such schools produced more funds than they put toward athletics.<sup>123</sup> The Ivy

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112. McCann, *supra* note 104.

113. *Football, THE IVY LEAGUE* (2023), <https://ivyleague.com/sports/football> [<https://perma.cc/N6TS-GBG7>].

114. Bivens, *supra* note 92, at 970.

115. McCann, *supra* note 104.

116. Hernandez, *supra* note 8, at 799.

117. Edelman, *supra* note 110, at 1648.

118. Hernandez, *supra* note 8, at 798.

119. Edelman, *supra* note 110, at 1649.

120. *Id.* at 1651.

121. Bivens, *supra* note 92, at 977.

122. *Id.*

123. Louanna Simon & Nathan Hatch, *Why Unionizing College Sports is a Bad Call*, WALL ST. J. (Apr. 7, 2014, 7:07 PM), <http://www.wsj.com/articles/SB10001424052702304441304>

League, however, likely would not have such an issue initially with funding. In 2021, their collective endowment totaled about \$192.6 billion, an increase from \$144 billion in 2020.<sup>124</sup> Currently, the Ivy League's total endowment is forecasted to reach \$1 trillion by 2048, setting them apart from other public, and even other private, institutions on the revenue front.<sup>125</sup>

After the *Northwestern* decision, the General Counsel to the NLRB, Richard F. Griffin Jr., composed a memorandum outlining the statutory rights of college students concerning unfair labor practices.<sup>126</sup> The memorandum declared that not only Northwestern University “grant-in-aid football players,” but also all scholarship football players in private Division I FBS institutions, should be recognized as employees under the NLRA.<sup>127</sup> Although nonbinding, the memorandum represents a new shift in attitudes in favor of allowing collegiate athletes to unionize, opening the door for Ivy League teams to do so as well.

Recently, the men's basketball team at Dartmouth College filed a petition to unionize.<sup>128</sup> The Service Employees International Union filed the petition to the NLRB, which all fifteen players on the team signed.<sup>129</sup> Michael LeRoy, sports labor expert and professor at the University of Illinois Urbana-Champaign, believes that the Dartmouth athletes have structural advantages that the Northwestern athletes lacked.<sup>130</sup> Namely, all of the Ivy League institutions are private, and the NLRB's prior key reasons for declining to rule on the Northwestern union would no longer apply as there are no public schools in Dartmouth's conference.<sup>131</sup>

Of course, the Dartmouth players will still need to show that they are employees. Additionally, other Ivy League basketball teams that choose not to unionize would not have the collective bargaining imposed upon them.<sup>132</sup> Still, basketball teams could be an advantageous means of kickstarting the unionization effort, for they traditionally have far smaller rosters than football programs and by allowing those players to collectively bargain first, the

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579480013097853156 [https://perma.cc/V5WW-J9EH].

124. Adam Andrzejewski, *Ballooning Ivy League Endowment Forecasted to Top \$1 Trillion By 2048*, FORBES (Oct. 31, 2021), <https://www.forbes.com/sites/adamandrzejewski/2021/10/31/ballooning-ivy-league-endowment-forecasted-to-top-1-trillion-by-2048> [https://perma.cc/9R7K-K6PH].

125. *Id.*

126. Edelman, *supra* note 110, at 1642.

127. *Id.*

128. Santul Nerkar, *Union Push by Dartmouth Athletes Is Distinct from Previous Failed Efforts*, N.Y. TIMES (Sep. 15, 2023) <https://www.nytimes.com/2023/09/15/sports/ncaabasketball/union-dartmouth-basketball.html> [https://perma.cc/BG8P-LR3F].

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

financial burden on their institution would be reduced.<sup>133</sup> Doing so would set a powerful precedent in favor of allowing student-athletes from other sports to unionize.

### C. *Concerns for Ivy League Unionization Efforts*

Despite the Ivy League's endowments and status as an entirely private conference, it may still encounter numerous issues with respect to unionization efforts. For instance, legislative decisions would still affect Ivy League programs attempting to unionize. One such major statute is Title IX, which requires educational institutions that receive federal aid to treat female and male students equally, including athletes.<sup>134</sup> Legal scholars debate over whether student-athletes classified as employees would be subject to Title IX. Although their "employment" would be based on sports-related activities, their eligibility for employment would rely on them also being an enrolled student in good academic standing at their university.<sup>135</sup> Therefore, classifying student-athletes on a men's team, such as the Dartmouth basketball team, as employees and not doing the same for a women's team may result in Title IX violations.<sup>136</sup>

Title VII is another statute that may impact the unionization of student-athletes at any school. Title VII prohibits discrimination on the basis of sex in the workplace.<sup>137</sup> Title VII additionally bans employers from paying women and men dissimilar wages to perform the same work.<sup>138</sup> Accordingly, the United States federal courts and Equal Employment Opportunity Commission would be required to review a situation in which only male student-athletes were able to unionize and received wages as a result, without their female counterparts receive any such compensation.<sup>139</sup>

Foreign student-athletes eligible via their F-1 student visas may also raise legal issues due to the twenty hour per week cap on permitted employment hours to retain their visas.<sup>140</sup> Despite the argument that student-athletes should receive employee status to be properly compensated for spending over twenty hours each week in relation to their sport, an official certification of employee status could actually cause foreign student-athletes to "violate" the terms of their visas and face ineligibility to play their sport, detention, or even deportation.<sup>141</sup>

Another common argument against unionization that could hold true for Ivy League universities is the resulting financial burden that unionization

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133. *Id.*

134. McCann, *supra* note 104.

135. *Id.*

136. Cianfichi, *supra* note 6, at 606.

137. McCann, *supra* note 104.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

would have on these institution's ability to continue supporting non-revenue generating sports—commonly any sport other than football or basketball.<sup>142</sup> In fact, former Princeton University president William Bowen has suggested that if college athletes were allowed to unionize, a “bifurcation” of colleges could occur, whereby some institutions could afford to pay their student-athletes a minimum wage while the majority of others would need to completely abandon their collegiate sports teams.<sup>143</sup>

The Ivy League does have its massive total endowment and a ten-year contract with ESPN to broadcast their sporting events over multiple ESPN platforms until 2028.<sup>144</sup> The ESPN contract, however, dictates that any revenue derived from that arrangement will not be disbursed to the Ivy League universities or their respective athletic departments, but will only be utilized to fund the Ivy League Network.<sup>145</sup> Therefore, since Ivy League student-athletes are already not receiving any aid from that deal, or from their schools' endowments, the additional strain on school revenues resulting from unionization efforts could indeed lead to the demise of less-profitable sports.

Another issue with the prospect of a bargaining unit comprised entirely of Ivy League universities is that it could fail to meet the requirement that such a unit display “community of interest.”<sup>146</sup> Factors that courts consider to determine if this requirement has been met include: (1) if the employees fall into a single department, (2) if the employees have distinct training and skills, (3) if strong overlap exists between classifications and job type, and (4) if the employees regularly contact each other.<sup>147</sup> Student-athletes at Ivy League institutions would likely fail the first and fourth requirements. Concerning the first requirement, every sports program already constitutes its own “department,” for they have independent schedules, coaches, and travel times.<sup>148</sup> As for contact, student-athletes on different teams may be friends outside of their respective sports, but the teams themselves rarely engage in work-related interactions with each other, and they do not necessarily work together to achieve one goal.<sup>149</sup> Therefore, if Ivy League athletes were to fail these two requirements, the NLRB would not recognize the student-athletes as employees under a singular bargaining unit.

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142. Hernandez, *supra* note 8, at 801.

143. Edelman, *supra* note 110, at 1634.

144. Andrew Sullivan, *Ivy League Signs Long-Term Deal with ESPN*, MEDIUM (Apr. 14, 2018), <https://medium.com/andrewcsullivan/ivy-league-signs-long-term-deal-with-espn-89dbc1c18d52> [<https://perma.cc/8G5C-DK8H>].

145. *Id.*

146. Edelman, *supra* note 110, at 1652; *see also* Specialty Healthcare, 357 N.L.R.B. 934, 939 (2011).

147. Edelman, *supra* note 110, at 1652.

148. *Id.*

149. *Id.* at 1653.

One major difference between Ivy League universities and Northwestern University is how the schools compensate their student-athletes. Region 13 originally ruled that the Northwestern football players were employees under the NLRA's section 2(3) because they defined an "employee" as any individual who completes services for another person under a contract to hire, subject to the employer's control, in exchange for payment.<sup>150</sup> There, the Northwestern football players' "tender" was their athletic scholarship contract, which guaranteed the players compensation by way of a paid education and living stipends.<sup>151</sup> However, because the Ivy League refuses to offer grant-in-aid scholarships, it may be extremely difficult for those student-athletes to be deemed employees under federal labor law.<sup>152</sup>

#### D. *Ivy League Students-Athletes as Employees*

Certain tests can be applied in order to determine whether the Dartmouth basketball players or any other student-athlete at an Ivy League university may be classified as an employee, such as the economic reality test from the Fair Labor Standards Act (FLSA) and the common law agency test under the NLRA, which both focus on the overlapping element of control.<sup>153</sup> Both tests also require an investigation into what benefits the potential employee creates for their employer as well as the amount of compensation the possible employee gains in exchange for their services. Generally, revenue-generating athletes have a better chance of certification than their poorer counterparts.<sup>154</sup>

When considering the level of control an alleged employer holds over their alleged employee, the Region 13 office of the NLRB in Chicago's decision found that the football players in *Northwestern* met their burden of proof to show any employee-employer relationship.<sup>155</sup> The decision cited the fact that Northwestern football coaches provided their players with an hourly itinerary of their daily activities throughout their six-week training camp prior to the academic year's beginning, which could last starting from 5:45 a.m. to 10:30 p.m.—indicating employment due to the high level of control the coaches held over their player's daily lives.<sup>156</sup> The football coaches at Northwestern also decided what their players would wear during the season when going to away games and the cars that players were allowed to drive on campus.<sup>157</sup> Ivy league football programs, such as the Columbia Lions, also participate in training camp prior to their first game of the season, but their regimen is slightly less

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150. *Id.* at 1637–38.

151. *Id.* at 1638.

152. *Id.* at 1644.

153. Jennifer A. Shults, *If at First You Don't Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for "Employee" Status*, 56 COLUM. L. REV. 451, 488 (2022).

154. *Id.*

155. Edelman, *supra* note 110, at 1638.

156. *Id.*

157. *Id.*

lengthy and strict, at twenty-four sessions total.<sup>158</sup> Ivy League student-athletes do, however, practice almost all year long, and develop their endurance and strength outside of their respective seasons.<sup>159</sup> Therefore, although their standard for coaches' "control" may not be as rigorous as Big Ten programs, Ivy League athletes would likely satisfy this prong of the two tests.

As for compensation, Ivy League athletes do not receive athletic scholarships. Of course, some Ivy League student-athletes may still receive scholarships, but only based on financial need or academic merit.<sup>160</sup> This fact may cut against Ivy League athletes looking to satisfy the compensation test. There is an argument that achieving an Ivy League degree itself could be considered generous compensation for playing a sport, as those schools are consistently held in high academic and professional regard. However, a recent study conducted by Brown and Harvard-based economists ultimately determined that having had attended an Ivy League university did not have a statistically significant impact on future earnings.<sup>161</sup> Thus, Ivy League athletes would likely fail the compensation test because they neither receive scholarships nor could argue that their degree itself indicates a greater likelihood of higher future earnings.

A new lawsuit against the NCAA, however, could help Ivy League student-athletes win the battle to unionize. In *Johnson v. NCAA*, players from a wide variety of sports argued that they deserve to be compensated with a fair, minimum wage for their activities.<sup>162</sup> If this were the case, both revenue-generating and non-revenue generating Division I athletes may be recognized as employees if the Third Circuit determines that those student-athletes could be considered employees "solely by virtue of their participation" in their schools' Division I programs.<sup>163</sup> Such a ruling would result in a circuit split between the Seventh, Ninth, and Third Circuit, ultimately having to be resolved in front of the Supreme Court. If the players were to win at trial and on presumably appeal, then all Division I athletes would be classified as employees

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158. *Columbia Football Opens Training Camp*, COLUM. LIONS (Aug. 20, 2022, 7:19 PM), <https://gocolumbialions.com/news/2022/8/20/columbia-football-opens-fall-camp.aspx> [<https://perma.cc/H5JU-PLP8>].

159. Craig Lambert, *From the Archives: The Professionalization of Ivy League Sports*, HARV. MAG. (June 28, 2019), <https://www.harvardmagazine.com/2019/06/professionalism-ivy-league-sports> [<https://perma.cc/RDZ8-FYXN>].

160. Solomon, *supra* note 41.

161. Jessica Dickler, *Is an Ivy League Degree Worth It? Report Finds Advantages Beyond Future Earnings*, CNBC (Aug. 2, 2023, 1:34 PM), <https://www.cnbc.com/2023/08/02/is-an-ivy-league-degree-worth-it-report-finds-advantages-beyond-pay.html> [<https://perma.cc/4PXA-LACK>].

162. See Shults, *supra* note 153, at 489.

163. *Id.*

under the FLSA—a potentially devastating outcome for the NCAA and its longstanding battle to cement the amateur status of student-athletes.<sup>164</sup>

One issue with *Johnson* that particularly rings true for Ivy League athletes, is the NCAA’s argument that a major factor of the economic reality test is whether the potential employees have already bargained for compensation.<sup>165</sup> Since the majority of Division I athletes, and all Ivy League athletes in particular, do not receive an athletic scholarship, opponents to unionization could point to how these student-athletes did not gain bargained-for compensation.<sup>166</sup> Therefore, perhaps the first necessary step for Ivy League athletes on the path to unionization would be obtaining athletic scholarships.

#### IV. THE (POTENTIAL) PROBLEM OF GRANT-IN SCHOLARSHIPS

##### A. *Why Having Athletic Scholarships May Be All-Important*

For Ivy League student-athletes aspiring to unionize, their automatic lack of an athletic scholarship may seriously detriment their case. Some of the only successes for student-athletes in the employment context have occurred when a court seriously considered the athletic scholarships in play. For instance, in 1963, the California Court of Appeals in *Van Horn v. Industrial Accident Commission*, determined a former student-athlete’s wife’s eligibility for worker’s compensation death benefits based on how California State Polytechnic College had “paid” him.<sup>167</sup> The decedent was paid \$150 a year for an “athletic scholarship,” which was raised by the Mustang Booster Club.<sup>168</sup> The booster club’s contributions were given to qualifying students, who had to uphold a 2.2 grade-point-average, take 12 credits of academic courses, be an athlete, and have the coach’s recommendation—in this instance, the coach only recommended members of his football team.<sup>169</sup> Here, the petitioner argued that the decedent had an employment contract with the college to participate in its college football program, but the Industrial Accident Commission and California Polytechnic College countered that he had voluntarily participated in the football team and that the scholarship was only a gift, and not payment.<sup>170</sup>

The court in *Van Horn* explicitly dismissed the argument that any student who is awarded an athletic scholarship and plays on their respective team is automatically the school’s employee.<sup>171</sup> Instead, the *Van Horn* court distin-

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164. *Id.*

165. *Id.* at 490.

166. *Id.*

167. See *Van Horn v. Indus. Accident Comm’n*, 219 Cal. App. 2d 457, 466 (1963), *superseded by statute*, CAL. LAB. CODE § 3352 (2018).

168. *Id.* at 462.

169. *Id.*

170. *Id.* at 463.

171. *Id.* at 467.

guished that evidence was needed to establish a contract of employment in order to infer reasonably that a student-athlete can be classified as an employee.<sup>172</sup> Then, by looking at the record, the court determined that the evidence presented qualified as the purported contract of employment, and found for the decedent's widow and dependents.<sup>173</sup> While this decision might not necessarily harm Ivy League student-athletes seeking to be recognized as employees, it does point to the harsh reality of their impending fight: in the majority of the few cases where student-athletes were able to prevail against their "employers," there was some sort of athletic scholarship in play that pointed to the student-athletes actually being employees.

In 1983's *Coleman v. Western Michigan University*, a Michigan Court of Appeals re-affirmed a decision that denied a former scholarship football player worker's compensation for an injury from football practice by distinguishing the facts at hand from *Van Horn*.<sup>174</sup> There, the court found that the Workers Compensation Appeals Board properly used evidence from the record that Western Michigan University could not revoke the plaintiff's annual scholarship, even though the university had expelled the plaintiff from the football team that year. The court thus concluded that the defendant had a limited right to the plaintiff under the economic reality test.<sup>175</sup> The court also found that the university's right to control the plaintiff only applied to football activity alone, whether the athlete had a scholarship or not. Thus, the university's rights under the economic reality test's first and second factors of control and discipline were quite limited, and although the third factor of the "payment of wages" aided the student-athlete because of his scholarship, the fourth factor, whether the employee's job was essential to the employer's business, weighed too heavily against finding an employment relationship for the plaintiff.<sup>176</sup>

The court in *Coleman* first distinguished the matter at hand from *Van Horn* based on the differences between the states' respective statutes.<sup>177</sup> The California statute in *Van Horn* imposed the burden of proof upon the alleged employer to prove that an employer-employee relationship does not exist, but the Michigan statute in *Coleman* did not similarly presume employment.<sup>178</sup> Then, by comparing the facts of the cases, the *Coleman* court recounted how the plaintiff in *Van Horn* was given a job at his college's athletic department where he was paid an hourly wage, and he was paid a fixed fee by the month for his scholarship.<sup>179</sup> However, in *Coleman*, the plaintiff was only awarded

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172. *Id.*

173. *Id.* at 464.

174. *Coleman v. Western Mich. Univ.*, 125 Mich. App. 35 (1983).

175. *Id.* at 38–39.

176. *Id.* at 41.

177. *Id.* at 42–43.

178. *Id.* at 43.

179. *Id.*

a scholarship for the entire academic year. Therefore, the court in *Coleman* determined that the plaintiff was not the defendant's employee.<sup>180</sup>

In 2015, a bill was introduced in the Connecticut General Assembly, that, if enacted into law, would allow student-athletes to unionize in their state.<sup>181</sup> The bill, however, would only grant employee status to student-athletes who receive scholarships that cover at least 90 percent of their tuition cost.<sup>182</sup> Therefore, Ivy League student-athletes automatically fail the first of three requirements to have this bill apply to them. Thus, in order to chart a path toward unionization, student-athletes at Ivy League institutions may need to focus their efforts on receiving athletic scholarships.

### B. *Controversy and Criticism*

On January 9th, 2022, five Yale alumni, along with other similarly situated former student of elite institutions, filed a class action suit against all seventeen private universities in the 568 Presidents Group for violating Section 568 of the Improving America's Schools Act.<sup>183</sup> Prior to this suit, an earlier complaint alleged that only nine universities had looked at student need during their admissions process in violation of the Act, however, the impending expiration of Section 568 likely prompted this new, enhanced suit.<sup>184</sup> This revised complaint claims that every school in the Group considered family finances during admissions decisions by factoring in the possibility of donor gifts and determining if the applicant would be able to pay while on the waitlist and if they were to be admitted as a transfer.<sup>185</sup> Additionally, the complaint suggests that the universities in the Group are able to give more extensive financial aid grants due to their massive endowment growth, and cites Yale's massive jump between 1994 and 2021 to a \$42.3 endowment, over a one thousand percent increase.<sup>186</sup> According to a news release from the plaintiffs' lawyers, the defendants could have awarded low- and middle-income families with increased financial aid had they not been colluding.<sup>187</sup>

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180. *Id.* at 44.

181. H.B. 5485, Gen. Assemb., Jan. Sess. (Conn. 2015); Gregg E. Clifton, *Proposed Connecticut Law Would Empower Certain Student-Athletes to Unionize*, CASETEXT (Feb. 11, 2015), <https://casetext.com/analysis/proposed-connecticut-law-would-empower-certain-student-athletes-to-unionize-1> [<https://perma.cc/4KYT-2SMK>].

182. Clifton, *supra* note 181.

183. Second Amended and Supplemental Class Action Complaint, *Carbone v. Brown Univ.*, 621 F. Supp. 3d 878 (N.D. Ill. 2022) (No. 1:22-cv-00125), ECF 106.

184. Jordan Fitzgerald, *Yale Sued for Violating Antitrust Law by Considering Financial Need in Admissions*, YALE DAILY NEWS (Feb. 16, 2022, 12:09 AM), <https://yaledailynews.com/blog/2022/02/16/yale-sued-for-violating-antitrust-law-by-considering-financial-need-in-admissions> [<https://perma.cc/3TAG-AEZ4>].

185. *See* Second Amended and Supplemental Class Action Complaint at 4, *Carbone*, 621 F. Supp. 3d 885.

186. *Id.* at 20.

187. Fitzgerald, *supra* note 184.

The Ivy League's prohibition on athletic scholarships in particular has recently drawn even further negative legal attention. In March 2023, past and present basketball players at Brown University, representing all Ivy League athletes, filed a class-action lawsuit against every single Ivy League institution due to their refusal to award athletic scholarships.<sup>188</sup> The class itself, however, would only encompass such athletes that had played since 2019.<sup>189</sup> The plaintiffs alleged that the Ivy League Agreement violates the Sherman Act due to both the lack of athletic scholarships and the institutions' failure compensate or reimburse athletes for any education-related expenses based on the services that the athletes provide for the schools.<sup>190</sup>

In fact, the need-based financial aid that Brown awarded the two basketball players, Tamenang Choh and Grace Kirk, failed to cover either athlete's full cost of attendance, including incidental expenses and room and board.<sup>191</sup> The current practice, the athletes argue, raises the price of education for Ivy League athletes and squashes their chances at being compensated for their athletic services, which the University defendants benefit from.<sup>192</sup> Additionally, the plaintiffs argue that antitrust laws govern the Ivy League Agreement because the defendants are commercial enterprises with numerous employees in their athletic departments.<sup>193</sup> Finally, the plaintiffs believe that the defendants cannot pretend that their actions are purely altruistic, but instead seek to maximize prestige and revenue by monetizing the athletes' services.<sup>194</sup> According to the plaintiffs, they do so by negotiating broadcast rights for the highest revenue possible for the Ivy League teams' competitions, selling tickets and merchandise, and obtaining large alumni donations.<sup>195</sup>

### C. *Analogizing Graduate Assistants to Ivy League Student-Athletes*

Applying the takeaways from the graduate assistant cases to the situation of Ivy League student-athletes looking to unionize is encouraging. This application reveals that as in the case of *Northwestern*, *Brown* is unlikely to be an issue and that the control test could yield a positive result for student-athletes at Ivy League universities as it has for graduate assistants. As explained in Part III, the control test is most favorable to students wanting the NLRB to consider them employees of their university under the Act and student-athletes at Ivy League universities are no exception.<sup>196</sup> The control test favors

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188. Complaint, *Choh v. Brown Univ.*, No. 3:23-cv-00305-AWT (D. Conn. Mar. 7, 2023), ECF No. 1.

189. *Id.* at 1–2.

190. *Id.* at 1.

191. *Id.* at 2.

192. *See id.*

193. *Id.*

194. *Id.* at 3.

195. *See id.*

196. *See, e.g., Cianfichi, supra* note 6, at 589.

student-athletes specifically because their coaches exert strong levels of discretion in their daily lives and academic activities.<sup>197</sup> Additionally, arguments that student-athletes at Ivy League universities are employees of their universities under the control test would help those students avoid the analysis in *Brown* which focused on the financial aid the graduate assistants received<sup>198</sup>—an analysis that would not be beneficial for Ivy League student-athletes as they do not receive athletic scholarships.

As is the case of other student-athletes hoping to unionize, negative precedent such as *Brown* will likely not prevent their efforts. This is because, as demonstrated by *Northwestern*, the NLRB has determined that *Brown* is not applicable to the cases of student-athletes and additionally the analysis in *Brown* revolved around not using the control test, something the NLRB reverted back to in *Columbia*.<sup>199</sup> Additionally, even if the NLRB changes its mind and defers to *Brown*, the cases of student-athletes, including those at Ivy League universities, are clearly distinguishable. Like with other student-athletes, the link between the graduate assistants' work for their universities and their academic programs does not exist in the same capacity for student-athletes in Ivy League universities.<sup>200</sup> While it is true that these student-athletes complete a degree while playing for their schools, their athletic pursuits do not fulfill an academic role in the same way that the research or teaching duties did for the graduate assistants in *Brown*.<sup>201</sup> Additionally, the relationship between the coaching staff and student-athletes at Ivy League universities, like other universities with athletic programs, is fundamentally different than that between graduate assistants and their universities.<sup>202</sup> The relationship between student-athletes and their coaches is more than just supervisory because of the level of control that coaches assert over their athletes' daily lives.<sup>203</sup>

Though undeniably frustrating in some contexts, here the takeaway that the NLRB has a tendency to change its mind regarding when students can and cannot be considered employees is also encouraging. While it is disappointing that the NLRB did not decide to assert its jurisdiction in *Northwestern*, the past cases from the NLRB involving graduate assistants indicate that this decision is not unshakable.<sup>204</sup> As we have previously seen with the graduate assistant cases, even when the NLRB seems unequivocally convinced of its position that students are not employees within a certain context, time and time again they have

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197. *See id.*

198. *Id.* at 591–92.

199. *See* Nw. Univ., 362 N.L.R.B. 1350, 1365 (2015); *see also* Trs. of Colum. Univ. 364 N.L.R.B., 1080 (2016).

200. McCormick & McCormick, *supra* note 4, at 125–26.

201. *Id.*

202. *Id.*

203. *Id.*

204. Cianfichi, *supra* note 6, at 584.

reconsidered and shifted their position to one that is more favorable for students hoping to unionize.<sup>205</sup> Such was the case after *Adelphi*, *Stanford*, and *Cedars-Sinai* in the 1970s as well as after *Brown* recently.<sup>206</sup> In a case such as the one here, where the NLRB has already expressed stated that they are unwilling to close the door on the possibility of student-athletes unionizing entirely, proponents of Ivy League student-athletes unionizing should be encouraged to keep trying, especially considering the number of points that were an issue in *Northwestern* that are already address for them because of their athletic conference.

#### D. *Could Ivy-League Students Presently Prevail?*

In recent years, the Ivy League universities have rolled out extensive financial aid reform to aid all students who would not previously have had the means to attend.<sup>207</sup> Now, the size of grants has almost doubled since the reform's implementation, and there is far less need for middle-income families supporting Ivy League student-athletes to take out student loans.<sup>208</sup> According to Steve Bilsky, The University of Pennsylvania's Athletic Director, a major reason for this change has been to compete with other Division I schools for top athletic talent.<sup>209</sup> Additionally, if a student-athlete's parents have an annual income of less than \$65,000, then they may be eligible to receive financial aid in full for their Ivy League education.<sup>210</sup> If a student-athlete's family makes \$65,000 to \$180,000 a year, they are not expected to pay over eighteen percent of their annual income, so both lower- and middle-class families have been aided by this reform.<sup>211</sup> These reforms have shown that Ivy League athletic programs have recognized that without offering some form of financial assistance, other schools will have a better chance at acquiring top talent.

Meanwhile, an athletic scholarship may still be necessary for Ivy League athletes to be officially recognized as employees. After all, an athletic scholarship would directly relate to the student-athletes' work as a member of an Ivy League sports team, as opposed to general financial aid that all other students have a chance to obtain without "paying" their institution back in potential ticket or television revenues. Therefore, the least contentious path forward for Ivy League student-athletes would be to first attempt to secure athletic

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205. See, e.g., *Leland Stan. Junior Univ.*, 214 N.L.R.B. 621, 623 (1974); *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972); *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976); *N.Y. Univ.*, 332 N.L.R.B. 1205, 1206.

206. See, e.g., *Stanford*, 214 N.L.R.B. at 623; *Adelphi*, 195 N.L.R.B. at 640; *Cedars-Sinai*, 223 N.L.R.B. at 253; *Colum. Univ.*, 364 N.L.R.B. at 1080.

207. *How the Ivy League Recruits Top Athletes Without Offering Athletic Scholarships*, COLLEGE SPORTS SCHOLARSHIPS, <https://www.collegesportsscholarships.com/ivy-league-athletic-scholarships> [<https://perma.cc/R94T-279P>].

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

scholarships, an issue that may be decided relatively soon if the Connecticut District Court rules in favor of the Ivy League student class in their pending suit. Next, the question of whether the student-athletes are truly “compensated” by their “employer” coaches and institutions would be answered in the student-athletes’ favor concerning where their “employee” status currently stands. Ivy League student-athletes would therefore no longer face the barrier of passing the economic reality and common-law agency tests to unionize.

E. *Proposing a Novel Argument that Does Not Rely on Compensation*

Student-athletes at Ivy League universities might not receive athletic scholarships, but many do receive financial aid. In fact, each of the Ivy League institutions are dedicated to affording prospective undergraduates admitted into their university a financial aid package that totals up to one hundred percent of their demonstrated financial need.<sup>212</sup> An argument that this form of financial aid constitutes compensation for the purposes of Ivy League student-athletes could help create the necessary circumstances for the Ivy League to serve as a “test site” for student-athletes unions.

Critics of student-athletes unionizing would argue that this argument neglects to account for the fact that (1) the amount of financial aid Ivy League student-athletes receive is not tied to their athletic pursuits and (2) that other students at these schools that are not athletes also receive this form of aid.<sup>213</sup> Though these aspects further delineate the paths of student-athletes at Ivy League universities that want to unionize from their peers at other institutions who do receive athletic scholarships, these points actually further align their circumstances with the graduate assistants the NLRB determined were employees of their universities in *NYU* and *Columbia*.

First, like the graduate assistants from prior NLRB petitions, Ivy League student-athletes receive financial aid from their universities. Though this aid is not directly linked to their roles as student-athletes this was also the case for the graduate assistants in *Columbia*, *Brown*, and *NYU*.<sup>214</sup> For example, in *Brown*

212. *E.g.*, *Types of Aid*, CORNELL FINANCIAL AID, <https://finaid.cornell.edu/types-aid> [<https://perma.cc/CK2F-84CQ>]; *Undergraduate Financial Aid*, BROWN FINANCIAL AID, <https://finaid.brown.edu> [<https://perma.cc/W9MT-NLEG>]; *Financial Aid*, GRIFFIN FINANCIAL AID OFFICE, <https://college.harvard.edu/financial-aid> [<https://perma.cc/4DGK-6BNX>]; *Financial Aid*, YALE FINANCIAL AID, <https://finaid.yale.edu> [<https://perma.cc/P4EW-5D9U>]; *How Aid Works*, COLUMBIA FINANCIAL AID AND EDUCATIONAL FINANCING, <https://cc-seas.financialaid.columbia.edu/how/aid/works> [<https://perma.cc/T3MQ-TLH7>]; *How Aid Works*, UNDERGRADUATE FINANCIAL AID, <https://finaid.princeton.edu/how-aid-works> [<https://perma.cc/9SD6-XJFG>]; *Introduction to Financial Aid*, FINANCIAL AID, <https://financialaid.dartmouth.edu> [<https://perma.cc/A2FA-54CT>]; *Financial Aid*, STUDENT REGISTRATION & FINANCIAL SERVICES, <https://srfs.upenn.edu/financial-aid> [<https://perma.cc/E664-BFYG>].

213. See Hernandez, *supra* note 8, at 278; McCormick & McCormick, *supra* note 4, at 125–26.

214. Colum. Univ., 364 N.L.R.B. 1080, 1096–97; N.Y. Univ., 332 N.L.R.B. 1205, 1206–07; Brown Univ., 342 N.L.R.B. 483, 496–97.

the graduate assistants received the same amount in financial aid for being in the same academic program regardless of the amount or quality of their work.<sup>215</sup> This is similar to the case of student-athletes at Ivy League universities that receive one hundred percent of demonstrated need in financial aid regardless of which sport they play or their amount of playing time.<sup>216</sup> It is true that the NLRB chose not exert its jurisdiction in *Brown*, however, these comparisons are still worth making because the result in *Brown* likely would have been different if the NLRB had utilized the control test, as they did in *Columbia* and *NYU*.

Second, like the graduate assistants from prior petitions who received financial aid for their programs regardless of their work duties, other undergraduate students at Ivy League universities receive one hundred percent of demonstrated need despite not being in the group that is looking to unionize.<sup>217</sup> This supports an argument built on similarities between Ivy League student-athletes and the graduate assistants in *Columbia* and *NYU*. In those cases, the NLRB still found that the graduate assistants were employees of the university even though other graduate students received the same form of aid despite not performing research or teaching duties for their university.<sup>218</sup>

Moreover, the argument that this money was supposed to support the students in their academic pursuits and while they attended the institution could be made in both of these situations, yet in both *Columbia* and *NYU* this did not prevent the NLRB from asserting its jurisdiction.<sup>219</sup> Therefore, the fact that other students receive this specific form of financial aid instead of athletic scholarships should not prevent the NLRB from considering this specific form financial aid as compensation in the case of Ivy League student-athletes for the purpose of assessing whether they are employees. Additionally, student-athletes at Ivy League universities wanting to unionize could benefit from emphasizing the ways in which they are similar to the graduate assistants in *NYU* and *Columbia*, instead of worrying about how they are different from the football players in *Northwestern*.

Another avenue that Ivy League student-athletes might aim to pursue would be to lobby their schools to adopt collectives: a formation of boosters who help to recruit and maintain student-athletes through financial compensation and additional benefits. If Ivy League institutions allowed this to occur, the collectives could not only promote their sports programs, but also move the needle toward recognizing student-athletes as employees.<sup>220</sup> Other Division I schools offer powerful collectives that bolster their athletic rosters by

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215. Hernandez, *supra* note 8, at 787; see also Cianfichi, *supra* note 6, at 591.

216. McCormick & McCormick, *supra* note 4, at 125–26.

217. Colum. Univ., 364 N.L.R.B. at 1096–97; N.Y. Univ., 332 N.L.R.B. at 1206–07; Brown, 342 N.L.R.B. at 496–97.

218. *Id.*

219. Colum. Univ., 364 N.L.R.B. at 1096–97; N.Y. Univ., 332 N.L.R.B. at 1206–07.

220. See Solomon, *supra* note 41.

helping student-athletes benefit from their NIL, such as Clemson University's TigerImpact, or Texas Christian University's Think NIL.<sup>221</sup> Thus, the athletic scholarship issue would become irrelevant since Ivy League collectives would further grow financial aid packages and allow Ivy League student-athletes to participate in free-market compensation.<sup>222</sup>

Finally, the NCAA itself may make drastic changes that could impact Ivy League student-athletes. The current NCAA President, Charlie Baker, proposed rule changes that could lead to two novel options for NCAA schools to compensate their athletes.<sup>223</sup> First, every Division I school would be able to sign NIL deals with their student-athletes. Alternatively, Baker proposed installing an unprecedented subdivision for institutions willing to provide a minimum of \$30,000 annually to at least half of their scholarship athletes, which has the capability to supply a minimum wage for certain athletes.<sup>224</sup> Doing so would constitute an investment of about \$7 to \$10 million by an average power conference athletic department annually, or about under ten percent of their yearly budget.<sup>225</sup> If Baker's proposed system were to be implemented, Ivy League athletes could essentially be paid as employees by their universities. However, the possibility that the Ivy League would adopt either of these options is uncertain.

## CONCLUSION

As this Article has attempted to show, many collegiate athletic programs are so different from one another that focusing on the "forest" of unionization risks gravely ignoring the "trees" that might enhance or undermine the value of extending unionization rights to student-athletes. Accordingly, because its athletic programs are different in ways that mitigate the NLRB's longstanding concerns about recognizing student-athletes as employees, the Ivy League universities offer a uniquely promising "test site" in which to probe the practical consequences classifying student-athletes as employees and derive valuable insights that could inform similar proposals at other institutions. Despite longstanding resistance from the NCAA and the NLRB, as calls for student-athlete unionization continue to gain traction, probing the benefits and consequences within a relatively low-risk environment may be a prudent answer to the possibility of a Supreme Court determination that student-athletes are, in fact, employees.

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221. *Tracker: University-Specific NIL Collectives*, BUS. OF COLLEGE SPORTS (Oct. 4, 2023), <https://businessofcollegesports.com/tracker-university-specific-nil-collectives> [https://perma.cc/4C77-5CX2].

222. See Solomon, *supra* note 41.

223. Dan Murphy, *What to Expect for NIL, Title IX with Proposed NCAA Rule Changes*, ESPN (Dec. 6, 2023, 3:30 PM), [https://www.espn.com/college-sports/story/\\_/id/39056505/ncaa-rule-changes-nil-paying-athletes-title-ix-charlie-baker-faq](https://www.espn.com/college-sports/story/_/id/39056505/ncaa-rule-changes-nil-paying-athletes-title-ix-charlie-baker-faq) [https://perma.cc/MQP5-HEVL].

224. *Id.*

225. *Id.*