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ISSUE I

CARRON JOAN MITCHELL, ESQ.
ANGELA MONTAG JONES, ESQ.
JOE A. CURTIS, ESQ.
PROFESSOR STACEY STEINBERG, ESQ.
SIMON PULMAN, ESQ.
NATANEL WAINER, ESQ.
NATHANIEL OTTO
RACHEL COERS

FLORIDA ENTERTAINMENT AND SPORTS LAW REVIEW

VOLUME III, ISSUE I **2023–2024**

LETTER FROM THE EDITOR

The Florida Entertainment and Sports Law Review is proud to present the first issue of its third volume.

The theme of this Fall 2023 publication is "The Conflict of Rights in Content Creation." There is true power in ownership over something built by one's hard work and creativity. But nothing is created in a vacuum—and the sports and entertainment industries rely on profiting off the work of others. However, recent developments have created unique issues that interfere with this delicate ecosystem. This publication explores the implications of these developments and how the power dynamics have evolved.

First, we present three Career Spotlights from some of the most influential names in sports and entertainment law. Angela Jones, Business & Legal Affairs Senior Director at Netflix, Joe Curtis, EVP & Chief Legal Officer at LAA Sports and Entertainment, and Carron Mitchell, Entertainment & Music Law Partner at Nixon Peabody, LLP, provide a look into how they entered the sports and entertainment law industries, what their average day looks like, and give advice to law students and lawyers on how to join the industries.

Next, we feature two Commentary Interviews. In *The Art of Sharing: Children's Rights in the Influencer Era*, Stacey Steinberg examines the delicate balance between the rights of children, parents, the state, and social media platforms in the worlds of "sharenting" and child influencing.

In *Three Strikes & the Tale of Who's Out in Hollywood*, Simon Pulman provides an analysis of the recent entertainment guild strikes and explains the effects Artificial Intelligence has on the livelihoods of those who work in the entertainment industry.

We next feature three Articles. In *A Call of Duty for the Legalization and Regulation of Esports Betting*, Natanel Wainer discusses how individuals are attempting to capitalize on the growth in esports following recent federal sports betting legislation. He analyzes the impact of current federal and state-level legislation on the issue and explains the consequences of an unregulated esports industry.

In *The End of an Error: No More Misclassifying University Employees as Mere Student-Athletes*, Nathaniel Otto highlights the discrepancies in how collegiate student-athletes are treated in relation to the NCAA and its member universities. He discusses the outsized benefits these institutions receive from the on-field product of athletes and how those same athletes can recapture their fair compensation.

Finally, in *"Reed"-ing the Green: How Patrick Reed's Defamation Lawsuits Point to the Contours and Rifts in Professional Golf*, Rachel Coers highlights the conflicts between the PGA and professional golfers following the rise of LIV Golf. She then analyzes whether Patrick Reed's subsequent legal actions were merely a "creative pleading strategy" or a "weaponization" of defamation law.

We would like to thank all of our incredible authors for their valuable contributions to this publication. We would also like to thank our Faculty Advisor, Professor Rachel Arnow-Richman, and our Publication Manager, Lisa Caldwell, for their constant support and guidance.

I would personally like to thank all of our staff and senior editors and directors for their dedication and hard work on this publication. Finally, I want to extend a special thank you to the executive board for their support in both the editorial process and as friends. This publication would not have been possible without them.

CATHERINE W. GRIMLEY
EDITOR-IN-CHIEF

FLORIDA ENTERTAINMENTAND SPORTS LAW REVIEW

VOLUME III **December 2023** **ISSUE I**

CAREER SPOTLIGHTS

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CAREER SPOTLIGHT: CARRON MITCHELL

Carron Joan Mitchell is a partner in Nixon Peabody LLP's Entertainment practice group, based in the firm's Los Angeles office. Carron has extensive experience representing clients in the entertainment and sports industries, including recording artists, music producers, songwriters, actors, content creators, professional athletes, entrepreneurs, startups, established companies, and other entertainment industry professionals. Carron represents clients in a variety of transactional deals, including, but not limited to, the negotiation of agreements for music recording and distribution, publishing, touring, merchandising, sponsorship and endorsement, NIL, talent and production, television, talent representation, licensing, content creation, and content monetization. She is also a Certified Contract Advisor with the National Basketball Player Association (NBPA) and National Football League Players Association (NFLPA), serving as an agent to professional athletes.

QUESTIONS & ANSWERS

1. Please briefly explain your career path and what led you to your current position.

I honestly never grew up thinking I would be be an attorney, or even work in the sports and entertainment industry. However, I always had a passion for being creative; I made music, wrote songs and poetry, painted, and did photography. I was athletic, loved sports and fitness, and ran Division 1 track & field at the University of Pittsburgh. I was on a pre-med track in undergrad before I accepted the fact that I did not actually want to be a doctor. I can thank my Student Athlete Advisor for the countless conversations he had with me, where I tried to discover what it was that I actually wanted to do. I switched my major to English Writing with a Journalism track and Communications. I then did an internship with a local radio station that led me to meeting a music industry executive and obtaining a summer internship at Sony Music in New York City. From there, I met an Artist and Repitoir (A&R) executive who would let me sit in on meetings and listen in on phone calls of him trying to sign talent. When I asked him, "If you could do it all over, what career would you choose?" he replied, "I'd probably be a lawyer; they run the industry." That is what sparked my interest in the legal and business side of the entertainment and sports industries. I took the LSAT and applied to law school with the full intention of either being a sports and entertainment attorney, sports agent, or just working in either field in a business capacity. I knew there was no other industry I would be interested in working in. I attended law school with this laser focus, ensuring that every internship helped fuel my passions for music, sports,

and entertainment. My first job out of law school was at a boutique entertainment firm in NYC. After that, I moved to Los Angeles, where I started my own practice and built a book of business. Then, Julian Petty, a mentor of mine and a Partner at Nixon Peabody, LLP who lead their entertainment group, reached out and asked if I had an interest in joining their practice. I could add a lot more color to the story, but it would be the length of a book, so the rest is history.

2. What is one of the biggest misconceptions in your industry?

The biggest misconception is probably that working in the entertainment and sports industry is all fun and games. Don't get me wrong, it absolutely is fun, but that comes from working in an area where you have a genuine interest. If you are genuinely passionate about the issues that you work on, then any area of the law can be fun and exciting to wake up and work in every day. However, I think people seek the glitz and the glam, the shows and the games, but don't realize that a lot of the events people in my industry attend are for work purposes. I might be at a concert, but I am there to have facetime with clients, executives, managers, and agents. Sometimes meeting a client at a studio, after a game or concert, is the only time you will be able to meet with them in person, due to their demanding travel schedules. Most of the conversations that take place at these events are business forward; they just happen to be taking place in a fun location.

You are not only dealing with complex legal issues that are constantly developing with new technology, but when you mix that with strong personalities and a very fast-paced, cut-throat environment, you will realize how multi-faceted of a professional you need to be in order to thrive in the sports and entertainment industry. There is a very high volume of workflow, especially in your early years. There is an insane number of contracts you will read and review on a daily basis. Combine all of this with non-stop emails and phone calls—you really have to be a high functioning individual, who is able to juggle multiple tasks all of which require a high level of thinking.

Keeping yourself abreast of the developing legal issues, the ability to produce high quality work product, strategically thinking for the advantage of your client, and maintaining a strong social network of relationships allows you to connect not only with talent but with business professionals—these are all key characteristics to thrive in this area of the law.

3. What was the first professional "win" that made you confident that you belonged in your specific role or the entertainment industry overall?

My first major "win" was representing a friend from college, who is a music producer, in the negotiation of their worldwide music publishing and administration deal with Sony Music Publishing.

This friend was a person I had collaborated with in my earlier days as a songwriter. We used to make beats and record songs together on Garage Band in their dorm room. What made it even more amazing, was that the A&R executive who was signing them was the same executive I had interned for years prior, and the one that inspired me to go to law school and become an attorney. This deal was a full-circle moment, and it solidified that I was exactly where I needed to be and doing what I was intended to do.

4. How is the music industry responding to recent technological trends and innovations, such as the use of Artificial Intelligence (AI) to produce music that mimics a particular artist's voice and/or style?

There have been very different responses to these new AI innovations. In some areas of the music industry, AI is revolutionizing workflow productivity and is welcomed with open arms. In other areas, people are seeing it as a direct insult to creativity and a threat to authenticity. I recently had a client use an AI tool to strip a vocal performance from a demo of a song in a YouTube video. They then separated it out from the production and music and into a single vocal stem file, and used that as a sample in a new song. From a creative standpoint, this idea is incredible! From a legal standpoint, AI opens up questions of copyright law and what is and is not protectable if an AI tool creates the product. Provided we set boundaries that do not impede someone's rights to control their creative art and vocal identity, I think if and when it is used properly, AI will positively impact the music industry. It is going to be very interesting to see where things go.

5. How do you stay up to date with the ever-evolving entertainment law landscape?

I try keep up to date with all the trends and developments in the entertainment industry. Every morning, before checking my email, I review the industry trade sites. I might even check the music industry blogs, with almost the same frequency that I check my Instagram or TikTok account. I also use social media as a tool for discovery on new

music, technologies, and trends. You would be amazed at how much information you can learn, or at least be introduced to, whether or not it is accurate. What you find on social media can be a great starting place to continue further research.

6. What are the most common legal challenges or issues that businesses and individuals in the entertainment space encounter, and how do you help clients address them?

I think one of the greatest challenges in the business is pushing the envelope on deal structures and the way creatives do business. Parties often get stuck in their ways and fall into what everyone perceives as "common practice" or "industry standard." I like to disrupt this way of thinking. We cannot just disrupt the industry with new technologies. We also have to be innovative on the business side and disrupt how we structure deals. Things are certainly tipping in the favor of creatives, as they have greater access to the tools needed to build their own careers. I find that creators gaining more access to these types of tools have forced companies to be more receptive to the disruption of deal practices.

One of the most common legal challenges we still encounter is ownership over the intellectual property. From there, the next issue is the grant of rights to exploit that property and the limitation of rights restricting certain levels of exploitation. These issues all stem back to disruption of what was once an "industry standard" deal. Intellectual property rights are still one of the most foundational issues that I deal with on a day-to-day basis, no matter what kind of deal it is and who the talent is.

When it comes to general business issues and challenges, there is a lot of managing expectations in my industry. You never want any client to feel as though their art is less valuable or important than the next person's art and talent, and most peope do not want to hear that anyway. The unfortunate reality is that many companies push this feeling onto the talent by virtue of the financial-focused aspects of the business. Fighting for the talent's art and simultaneously explaining that they are in the music business is a challenge. Afterall, the purpose of "business" is to make a profit.

7. What is the relationship like between artists and digital distribution or streaming platforms, such as Netflix, Hulu, Apple Music, and Spotify, and what do you hope that relationship will look like in five to ten years?

An artist's success starts with discovery. People need to actually hear the music or see the talent in order for a career to be built. Streaming platforms are critical to this success for an artist. I read a statistic that said there are 100,000 songs uploaded to digital service providers every single day! As an artist, imagine having to cut through the noise so that your song is the song that people choose to listen to that day. Imagine the business team that needs to put that artist in a strategically marketable position, so that a fan decides to click on their client's song. You can be the most talented person in the world, but if no one hears your music, how will you ever earn that title?

The digital service providers (DSPs) are oftentimes the gatekeepers to discovery. The relationship between the artist and the DSPs is so important from a supportive standpoint because that relationship allows for your artist to get placed on the top of a new music playlist or get featured on a billboard in Times Square or other major markets.

Social platforms like TikTok and Instagram also serve as huge discovery tools for new music. For example, TikTok realized the importance of its ability to market new music when it launched SoundOn, a new platform on TikTok for music creators to distribute music.

Even across the video-on-demand streaming platforms like Netflix, Hulu, and Amazon, you will see music and media intertwining in both the scripted and unscripted content spaces. In the next five to ten years, I imagine many of these companies will develop a direct distribution channel, where artists no longer need to go through a third-party to distribute content and music on their platforms.

8. What is some advice you would give to law students interested in working in your field and what are some action items they can execute now to stand out?

Take advantage of being a student and the opportunity it gives you to learn from professionals. You are given a lot more grace as a student, because once you enter the professional world, you are expected to know your stuff. That is not to say that you won't still have mentors that teach you along the way, but I found that as a student, I was able to gain advice from professionals at higher levels more than when I was in my first few years of practice.

In order to stand out, you want to add value to those interactions that you do have. Whether that is through amazing work product as an intern

or summer associate, or through an introduction to someone that an executive is trying to get in touch with, when the relationship feels like a two-way street, you are more likely to stand out and leave a lasting impression following a simple informational phone call.

Finally, you need to have a genuine passion for the industry. Again, it is not the easiest business to work in. If you want to practice in the music, entertainment, and sports industries, you have to love the industry first and immerse yourself in the business. Otherwise, it will be a challenge to stay committed during the times that are not so glamourous.

CAREER SPOTLIGHT: ANGELA JONES

Angela Montag Jones is Senior Director, Business & Legal Affairs (Original Series) at Netflix, based in Los Angeles, California. She joined Netflix in early 2013 and currently leads a team of business and legal affairs executives that make up Netflix's U.S. Studio Partnerships team. Prior to joining Netflix, Angela started her legal career as an associate in the Business & Finance group at Morgan, Lewis & Bockius, LLP, where she counseled clients on mergers and acquisitions, public and private company finance and securities law, and later as a Senior Counsel at Comcast, where she handled a range of content acquisition deals for Comcast's Cable division. Angela graduated from Juniata College in 2001 with a B.A. in Politics (Political Philosophy), and received her J.D. from The College of William & Mary, Marshall-Wythe School of Law in 2004. She currently lives in Manhattan Beach, California with her husband, their three children, and two dogs. She is also active with Soroptimist International of Manhattan Beach (she has served as President, Treasurer, and is a member of the board of directors), which is a service organization focused on empowering women and girls, both locally and internationally.

QUESTIONS & ANSWERS

1. Please briefly explain your career path and what led you to your current position.

My choice to attend law school, following my undergraduate studies, was motivated not by any specific vision of what type of law I wanted to practice (I had no idea) or by any specific career path that I wanted to end up on—it was driven by the fact that I was still very much unsure as to what type of career I ultimately wanted to pursue. I also knew that getting a law degree would be a helpful and versatile tool on my way to figuring all of this out. I attended law school at the College of William & Mary, Marshall Wythe School of Law, and while I was there, I worked as a graduate research fellow for one of the bankruptcy professors. I quickly realized that as far as transactional vs. litigation goes, I was much more interested in pursuing a transactional path. So, I decided to spend my 2L summer at Morgan Lewis in Philadelphia as a summer associate in their Business & Finance practice group. I joined the firm after graduation and spent just under six years as an associate, where my early practice focused on public and private company M&A, debt and equity financing, securities work, and general corporate governance. I ultimately knew that becoming a partner was not what I wanted to do, so I was open to considering in-house options. A friend-of-a-friend let me know that Comcast (which was right across the street from Morgan Lewis) was

looking for an attorney to join their interactive media group, Comcast Interactive Media (CIM). CIM was structured as a start-up within Comcast to work on all things related to their website and apps—including their upcoming "TV Everywhere" initiative, where the cable companies were starting to make full episodes of television shows available online. Since this was late 2009 through early 2010, online streaming was still a fairly novel concept, and there really were not many lawyers who had experience in this area. So, fortunately for me, they were just looking for someone with good negotiation and drafting skills who could help them figure out how to structure and draft these deals. I spent the next three years at Comcast working with some incredibly smart people who were effectively crafting what the initial streaming landscape looked like in the legacy cable television world. This initiative evolved very quickly in my time at Comcast. These internet streaming discussions eventually became an integral part of Comcast's multi-billion dollar affiliate deal negotiations; so by the end of my tenure there, I had been in the room negotiating with top executives from Disney, Fox, CBS, and other prominent entertainment networks. A recruiter from Netflix reached out to me in mid-2012. At that point, Netflix did not yet have a global footprint, as they had had only launched their streaming service in a handful of countries beyond the U.S. and Canada, and had not yet made the leap into commissioning original content. They were looking for an attorney to work on licensing TV and movies for its service in the U.S. and Canada, and, just based on the luck of good timing, I was one of only a handful of non-Netflix attorneys that had direct experience working in the still fairly nascent streaming world on the platform side (licensing in for a distributor). I eventually decided to take a leap of faith on the role, moved my entire family to Los Angeles in April of 2013, and have been at Netflix ever since.

My role at Netflix has evolved over the years from legal support for licensed content in the U.S. and Canada, to helping launch our service in Australia and New Zealand and attaining a combined business and legal role focused on original series. But it has always maintained a throughline of managing external studio and producer relationships, which is what I really love doing. Currently, I manage the U.S. Studio Partnerships business affairs team for series, which is responsible for negotiating deals for all original series commissioned by Netflix that are produced by another studio, as well as managing the ongoing relationships with these studio partners.

2. What are the most common legal challenges or issues that you encounter at Netflix, and how do you address them?

One of the most common issues we encounter involve the underlying rights to the series that we are commissioning. In some cases, a series that we want to make is based on a book, graphic novel, or article, while in other cases, it is simply based on an original script written by an individual. In all cases, verifying that the rights granted to the studio or producer who we are relying on to produce the series for us is the single most important step to ensuring that we are (1) able to exhibit the series in the manner that we need to (e.g., globally, in all languages); (2) appropriately protected from a business and investment perspective (e.g., the rightsholder may not permit someone else to develop a competing project at the same time); and (3) at a basic level, getting the rights needed to actually make the project we want to make. We typically ask our producing partners to deliver us a "chain-of-title" for the project, which is a series of documents that effectively demonstrates the rights' ownership lifecycle of the project. We typically review these documents to make sure there are no big red flags. If there are pieces of the rights that need to be cleaned up, we may reopen some of the rights deals to try and negotiate for the necessary terms.

3. What was the first professional "win" that made you confident that you belonged in your role or the industry overall?

When I first came to Netflix, it was a big shift for me as far as company size, hierarchy, and process. At that point in time, Netflix was still a relatively small company. I had just come from the largest cable company in the U.S., and before that I had been at a very large law firm. I distinctly remember my first deal at Netflix (the license of an independent film to put on service) where we had negotiated through all but one last issue. I had a creative solution to offer up to try and finalize the deal. When I ran it by my then-manager and asked him who needed to sign off, he told me that there was no one else to run it by—it was completely up to me. So I offered it up, and we closed the deal. This closing was such a powerful moment for me as an executive. The ability to take complete ownership (both good and bad) of a decision was such a shift for me from my prior roles, and it was one of the defining moments in my career that gave me a huge sense of confidence in what I was doing. If the company would trust me enough to empower me to make these types of decisions, then I should trust myself in the same way.

4. What sorts of crossovers do you see between popular streaming platforms and the sports industry working primarily with Netflix Original Series, and what do you hope that relationship will look like in five to ten years?

From my own personal experience as a more casual sports fan, I can see the value in some of the leagues, teams/organizations, and even individual players leveraging streaming platforms to build awareness, interest, and fandom through really entertaining storytelling—especially when well-done stories get served up to a subscriber who may not be a current fan. I never thought I would ever care about Formula 1 racing (F1), but I can't get enough of *Drive to Survive* and all of the compelling backstories and drama with the racing teams. Plus, it also got me interested in watching actual F1 races because I now feel a connection to the personalities and the stories behind the racing. My hope is that these high quality, entertaining, sports-adjacent programs continue to grow over the next five to ten years.

5. How do you stay up to date with the ever-evolving landscape of entertainment and media law surrounding streaming services, and how do unexpected disruptions, such as the ongoing SAG-AFTRA strike, affect your ability to accurately forecast in the space?

There are a couple of really great entertainment law symposiums in Los Angeles every year, so I make it a point to attend all of those events. Streaming has been a big focus of those events over the past five years, so it is a particularly relevant forum to listen, learn, and stay current. Additionally, our business is built on relationships and networking, so I make it a priority to make regular lunches, dinners, and other meetings with my counterparts at each of the other studios—we learn a lot from each other through these relationships. As far as unexpected disruptions, the biggest effect they have is that they really force us (particularly business and legal affairs executives) to continue to be nimble and react quickly. We learned a lot from the widespread halt in production during the COVID-19 pandemic (as far as the logistics of shutting down production and then eventually having to ramp back up), although one hopes that such disruptions will not be a regular occurrence.

6. What is one of the biggest misconceptions in your industry?

That working as an entertainment lawyer in Hollywood is super glamorous! I am sad to report that most of the time there is nothing fancy about deal negotiations.

7. What is something that has changed since you began working in streaming technology, and how has that change impacted your current job in the industry?

The biggest change that I have felt in the industry over the past fourteen years or so (as far as impact on my role) is the proliferation of players in the streaming business—both in terms of platforms and producers. Netflix was one of the few subscription streamers in the game for a long time, and we had crafted our initial deal structures and terms in a particular way that made sense for our then-nascent original series business. As we have increased the number of shows on our slate over the years, more companies have created their own streaming platforms, and more producers are prepared to produce series for streaming services as well. As a result, projects have become increasingly competitive, and we are now consistently reevaluating our typical deal structures by looking at creative ways to evolve with the industry and stay competitive with the other platforms. In the end, this competition has made my job much more interesting and rewarding because creative problem solving is a great exercise to go through.

8. What is some advice you would give to law students interested in working in your field, and what are some action items they can execute now to stand out?

First and foremost, network and make connections. Start by reaching out to alumni from your undergrad or law school who are in the entertainment industry and just ask for a quick call to pick their brains and ask questions about how they got where they are. I have met with a number of students from my alma mater over the years in this exact way, and I promise that ninety-nine percent of people you reach out to will be happy to get on the phone for a quick chat. Second, do not discount the path of starting out in a more general transactional or litigation field in order to get some solid legal training. A lot of the really talented folks I work with did not go directly into entertainment—they took some time to get some great basic drafting, negotiation, and/or litigation training at a firm before they made the leap to going in-house. And finally, be open to opportunities as they become available. Streaming television was not even a thing that existed when I was in law school, so I could not have possibly conceived that this is what I would have been doing! There will be more groundbreaking technology and business models on the horizon, so you just need to prepare yourself to have a good foundation of legal and business skills and be open to unexpected things that arise.

CAREER SPOTLIGHT: JOE CURTIS

Joe A. Curtis is the Executive Vice President & Chief Legal Officer of LAA Sports & Entertainment and Managing Attorney of Jocur Legal. Joe's practice focuses primarily in corporate & business law, sports & entertainment law, and intellectual property. Additionally, he has represented a broad array of clients in state and federal criminal defense, landlord/tenant, corporate formation, and venture capital. Joe received his J.D. from the University of Miami School of Law, and B.A. in Political Science from the University of Miami.

QUESTIONS & ANSWERS

1. Please briefly explain your career path and what led you to your current position.

I began practicing law in 2017, first working at a firm doing business/specialized visas, and then joining another firm in 2018 where I practiced criminal defense and general civil litigation. My perspective on the legal field was, and still is, that a lawyer's job is to tell a compelling story. Great stories can change minds, and the art of telling great stories effectively is what separates lawyering from other professions.

With this perspective, I pitched the idea of opening up a Sports & Entertainment division at Seltzer Mayberg, my law firm at the time. My goal in doing this was to connect with clients on a deeper level than just the typical transactional lawyer-client relationship. Sports & Entertainment law is different than "regular" law practice, not because of the substance of the work, but because the clients live in a context that is not experienced by the average person. Clients in sports and entertainment live with expectations and pressures that expand past the case at hand, and these influences that they encompass can impact their professional careers. This context is important because holding space for that type of client and being understanding and aware of the various dynamics at play will make you stand out.

A year into the Sports & Entertainment division, I was introduced to Zac Hiller, and we built a relationship largely due to my ability to "get it" when it came to various pressures and circumstances that came with professional athletes and entertainers. I consider myself an artist at heart, and I can understand and connect with clients from that point of view. Over time, I found myself wanting to be more involved in the representation and management of athletes and entertainers in order to empower them to reach their full potential.

I joined LAA Sports & Entertainment in September of 2021 as Chief Operating Officer and General Counsel and became VP and Chief Legal Officer in 2023.

2. What are the most common legal challenges or issues that you encounter in the athlete and talent representation business, and how do you address them?

The most common "challenge," I believe, is the reality that people generally feel that the world is more complicated than it actually is. When it comes to any actual or perceived challenge, the first step is to analyze and approach the challenge from a human standpoint; what is the other side's leverage in a negotiation or disagreement, and what is the best way to reach a genuinely fair resolution? Most of the time in the sports and entertainment industry, people lead with ego and not reason. Being able to keep this in mind allows myself and my clients to respond to any situation from a levelheaded and contextual point of view, instead of emotion.

3. What was the first professional "win" that made you confident that you belonged in your role or the industry overall?

I think a culmination of "wins" is what built up my confidence, and each win played a different part in helping me realize that I belonged. After I completed a few speaking engagements and "sat at the table" is really when I was able to actually take a look at how others in the industry think and express themselves, and that is when I felt that I definitely belonged.

4. What is one of the biggest misconceptions in your industry?

The biggest misconception is that those in power hold absolute power. The only time you really don't have the power within yourself to accomplish something is when you convince yourself that the moment is too big for you. I have a saying that I repeat to myself and those around me, "Closed Mouths Don't Get Fed." If something is bothering you or making you feel wronged, speak up. More often than not, when you speak up you learn one of two things: how to solve a problem or what the actual problem is.

5. How do you stay up to date with the ever-evolving legal landscape of entertainment and sports law surrounding individual representation services, and how do changes, such as state and local NIL legislation, affect your ability to accurately forecast in the industry?

I feel like I am supposed to say CLEs, but in reality, I stay up to date with social media. I make sure I follow any account that could give me

information and sometimes set up push notifications, so I don't miss an update.

6. What was your experience like building out a sports practice from scratch at your previous law firm and how does that builders mindset translate to your current role working with individual athlete representation?

My experience building out the sports practice helped me realize what I am capable of in terms of marketing and business acumen. Each person is his or her own business, and with the ever-expanding world of self-expression and personal likeness, it is important that your decision takes into consideration any possible short-term and/or long-term impacts on your brand.

7. What is some advice you would give to law students interested in working in your field and what are some action items they can execute now to stand out?

My advice is to go out and do it. Many people spend time trying to figure out how to get in the door instead of walking up to the door and knocking. You would be surprised what can happen and how quickly your life can change just by having someone simply answer the door. It is important to show people, who will eventually become your peers, that you are not afraid to put yourself out there and make things happen. It sounds cheesy, but it is really that simple.

THE ART OF SHARING: CHILDREN'S RIGHTS IN THE INFLUENCER ERA

Stacey Steinberg[*]

Catherine Grimley: It seems that a main focus of your scholarship has been sharenting. In fact, you have published an article on the topic, *Sharenting: Children's Privacy in the Age of Social Media*.[1] Can you define sharenting and further explain some of its legal implications?

Stacey Steinberg:

When I think about sharenting, I think of the intersection of a parents right to share on social media, or really to share about their child anywhere, and a child's interest in maintaining control of their digital footprint and the child's interest in privacy. The first time I saw the word "sharenting" used was in the Wall Street Journal around 2012,[2] and in 2015, I started to really think about sharenting and how it was impacting my life, as a parent and as a photographer. I set out to try and understand it better from a legal perspective.

One of the legal implications of sharenting is the impact that it has on kids, and it starts with the fundamental right that parents have to raise their children as they see fit.[3] That fundamental right is defined by a number of United States Supreme Court cases that spoke on this issue,[4] which try to balance the parents' interest with the States' *parens patriae* interest.[5] However, from the child's perspective, the child might have an

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* Stacey Steinberg is a Master Legal Skills Professor at the University of Florida Levin College of Law where she also serves as the Director of the Center on Children and Families and the Supervising Attorney of the Gator TeamChild Juvenile Law Clinic. Professor Steinberg thanks Catherine Grimley, Garrett Lee, Colton Teal and Nathaniel Otto for their assistance with this interview.

1. Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L. REV. 839 (2017).

2. Steven Leckart, *The Facbook-Free Baby*, WALL ST. J., https://www.wsj.com/articles/SB10001424052702304451104577392041180138910 [https://perma.cc/JH5W-KLNJ] (May 12, 2012).

3. *See* Meyer v. Nebraska, 43 S. Ct. 625, 626 (1923) (recognizing that the parental right to raise one's children is a fundamental right within the Fourteenth Amendment that cannot be infringed upon by the government without the due process of law).

4. *See* Meyer, 43 S. Ct. at 626; Pierce v. Soc'y of Sisters, 269 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 165–66 (1944).

5. *See* Steinberg, *supra* note 1, at 871 (explaining that under parens patriae, a state may bring a civil action on behalf of the residents of the state to enjoin a practice, enforce compliance, obtain damages, or obtain other relief as appropriate in order to protect persons legally incapable of caring for themselves); Meyer, 43 S. Ct. at 626 (recognizing the parents' fundamental right to raise their children); Pierce, 269 U.S. at 534–35 (explaining that the Fourteenth Amendment protects the liberty interests of parents and guardians to direct their children's education, and this

interest in privacy and might have an interest in getting to adulthood with the ability to define themselves on their own terms online. Sharenting, if done inappropriately, can lead to identity theft, stolen photos, and/or a myriad of other consequences. While I set out to explore sharenting from a legal perspective, I really found that a public health model of child protection might be the best way to protect kids because I think most parents do want to do what is best for their kids.[6] Oftentimes, they just need more information to make those decisions.

Catherine Grimley: In your sharenting article, you mention the *Sidis* case, where the court deemed a former child prodigy a public figure even though Sidis had left the public eye in his adulthood. Thus, the court denied Sidis the privacy rights available to private individuals. Since this time, courts have considered child entertainers public figures. Should this same reasoning apply to children who gain attention from adults sharing content of them on the adult's social media?

Stacey Steinberg

When that case was decided, it was a time long before social media. It was a time before information traveled at the speed of light that it does now. In *Sidis*, the child's parents had chosen to highlight the fact that he was a child prodigy.[7] He was featured at different events, and newspapers would follow him and run stories about how brilliant he was.[8] All sorts of things that most parents, and kids, would be very proud. However, as he became an adult, Sidis wanted to live a life that was more private, and the New Yorker magazine acted like paparazzi and stalked him down. They captured photos, gathered information, and ran a story about where this child prodigy was today, now that he was an adult.[9] Sidis sued, arguing that he had a right to privacy, and the court basically said, once you are a public figure, you are always a public figure.[10] And so, your

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right cannot be curtailed unless a state can show a reasonable relation to a purpose within the competency of the state); Prince, 321 U.S. at 165–66 (explaining that although the Court acknowledges that decisions made within the private realm of family life cannot be regulated by the state, the family itself is not beyond regulation in the public interest).

6. *See* Steinberg, *supra* note 1, at 866 (explaining that "[t]he public health model attempts to effectuate change by educating professionals, the public, and parents about potential dangers facing children").

7. Sidis v. F-R Pub. Corp., 113 F.2d 806, 807 (2d Cir. 1940).

8. *Id.*

9. *Id.*

10. *See id.* at 809 (arguing that at some point, the public's interest in obtaining information becomes dominant over the individual's desire for privacy especially when for those who chose to place themselves in the public eye, and even though Sidis has cloaked himself in obscurity since his child prodigy days, details of his life today are still a matter of public concern).

question really focuses on what parents share about their kids on social media, and whether the children would be public figures. And I believe that that is a great question. Generally speaking, parents are not turning their kids into internet celebrities. For kids whose parents share about them to friends and family, probably not. But for the parents who do try to make their kids celebrities online, I think they are going to run into an interesting issue as the court tries to navigate how to apply the reasoning in Sidis to the reality of social media and internet fame that so many young people experience.

Catherine Grimley: Some current legislation regarding sharenting focuses on ensuring that the child is compensated if their likeness produces a profit.[11] Do you think future legislation should also focus on requiring a parent to receive their child's consent before using their likeness?

Stacey Steinberg:

I think that it would be wise for future legislation to do that when parents share about older kids. The ramifications of using a child's picture or using a child's information in a public setting can impact the child long past childhood. I have also been concerned about in the debate over sharenting is that it does put a lot of obligation on parents who might not be in the best position to understand all the risks and take on all the financial costs that are involved. Perhaps we could shift some of the obligation onto the business sector.

Catherine Grimley: Now, more than ever, social media influencers are rising in popularity. Thus, an increasing number of minors are choosing to place themselves in the public eye as influencers. Tell us about this new trend of child influencers, and what potential legal implications it raises.

Stacey Steinberg:

When I started my research on children's privacy, the child influencer spot was really a tiny piece of the work that I was doing. It was something that I was able to politely ignore. I did not want to go into this area, and it was not a big enough piece of the sharenting equation that I felt like I had to. That is not true anymore. That was not even true in 2020 when my book came out.[12] But right now, when we talk about children's online

11. *See* CAL. FAM. CODE § 6750 (West 2023).
12. STACEY STEINBERG, GROWING UP SHARED (2020).

privacy and how it intersects with parent's rights, the focus is on child influencers and the roles that kids play in their parent's social media when parents are profiting.

There are laws that exist to protect children who are actors. These laws, like California's Coogan's Law, protect the monies they are allowed to receive and put limits on the number of hours and under what conditions the children are able to work.[13] Those laws don't generally apply to children who work for their parents doing similar types of performance art. That is probably because, years ago, when these laws were created, this sort of situation did not exist, even offline. This may also be because, in the United States, we give such strong deference to parental autonomy.[14] For example, when we think about a child who is working on a parent's farm, they are able to do things that are much more dangerous than if they were working on a neighbor's farm. That is because the parents have the right to employ their child or to have their child work in more dangerous conditions under their constitutional right to family autonomy and to control how their child is raised.[15] When we talk about child influencers, we have this unique situation where the parent is both the employer of the child and the protector of the child. And so, states are looking to find ways to ensure that children are protected when parents serve as the gatekeepers and the gate-openers. The laws that shield the income of child actors away from parents[16] are laws that give us some precedent for the idea that children do have a right to some of the earnings. It will be interesting to see how courts parse through these laws to determine where the parents' right to control their child ends and the states' *parens patriae* right to protect the child begins.

13. *See* CAL. LAB. CODE § 1308.7 (West 2023); CAL. FAM. CODE § 6752 (West 2023).

14. *See* Meyer v. Nebraska, 43 S. Ct. 625, 626 (1923) (acknowledging that the Fourteenth Amendment protects the parental right to raise one's children, free from government intervention without the due process of law); Troxel v. Granville, 120 S. Ct. 2054, 2063–64 (2000) (explaining that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made"); Wisconsin v. Yoder, 92 S. Ct. 1526, 1541–42 (1972) (explaining that parental autonomy, which has long been a pillar of Western history and culture, "is now established beyond debate as an enduring American tradition" via the Due Process Clause of the Fourteenth Amendment).

15. *See* 29 U.S.C. § 213(c) (2023); *see also supra* note 13.

16. *See* CAL. FAM. CODE § 6752(b)(1)-(2) (West 2023).

Catherine Grimley: What kinds of implications can the rise of child influencing have on family dynamics, and how do these changing dynamics impact the interests of the child, the parents, and the state?

Stacey Steinberg:

One of the things that I think about when I talk about sharenting generally, and one of the reasons why it flies under the radar so much, is that children might not feel comfortable objecting to their parent's actions online. But more than just feeling uncomfortable about it, they might not understand that they have interests that conflict with their parents. And when you don't know that you have an interest, it is difficult to exercise any sort of right to protect that interest.

When parents use their children as part of their social media profit scheme, or when parent's get so much of their identity from their children's performances, it absolutely impacts family dynamics and the way that a family interacts. This impact is not only online but is also offline, which is perhaps more important for the child's development because most of their time, presumably, is taking place offline. This dynamic can impact how the child sees themselves as an individual, and it can change how the child sees themselves as a part of a larger group. The blame is often placed on the parents, but perhaps it is part of a more significant societal shift where private family matters—or things that would be interesting only to family and close friends—are no longer private.

Catherine Grimley: Are there any benefits of creating laws that specifically protect child influencers on the internet instead of fitting child influencers under existing legislation that protects child performers? If so, what are they?

Stacey Steinberg:

I think that we will need to create new laws because kids are doing things as child influencers that were never contemplated when the existing laws were enacted. So, the current laws will have to be amended or new laws will have to be created to protect this population. As far as, "what are they?" I think Washington state has new legislation regarding children who appear on their parents' commercial social media sites that could be a good model for other states to follow.[17]

17. *See* WASH. REV. COODE. § 49.12.124 (2023).

Catherine Grimley: Some of your forthcoming research focuses on parental control of children's access to and use of social media pages. Can you tell us about the proposed laws related to this topic and highlight their legal implications?

Stacey Steinberg:

Some states are in the process of drafting and passing laws that would require parental consent before kids are allowed to use social media platforms and that parental consent requirement would extend all the way up until the age of eighteen.[18] So, even seventeen-year-olds would not be able to access sites like Instagram or TikTok without a parent's express permission. These laws aim to make children safer, but by doing so, they often curtail a child's privacy rights. It is interesting to look at these laws through the lens of the international community, and how they view child privacy because the United Nations Convention on the Rights of the Child (UNCRC) focuses on children's rights in a digital world. Included in those rights are the rights to access of information.[19] The United States has signed the UNCRC, but we are the only UN member country that has not ratified the document.[20] And so, laws like the Utah Law seem to stand in stark contrast to both the UNCRC's comment 25[21] on children's rights in the digital world and the international consensus on the autonomy of children as they come of age.

As a parent, I absolutely understand the desire to keep kids off of TikTok and Instagram. My interest as a parent is to shelter my child from as many dangerous things as I possibly can. But I think that as laws are created, the job of these laws is not to just protect my interests as a parent, but to balance those interests with those of young people. This balancing will involve weighing the risks relative to the benefits of these laws.

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18. *See Holding Social Media Accountable*, UTAH.GOV, https://socialmedia.utah.gov/#:~:text=Starting%20on%20March%201%2C%202024,access%20to%20their%20child's%20account [https://perma.cc/R87U-9ZFV].

19. *See* Convention on the Rights of the Child, art. 17, Nov. 20, 1989, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child#:~:text=States%20Parties%20recognize%20the%20important,being%20and%20physical%20and%20mental [https://perma.cc/DD53-AQLU].

20. *See* Convention on the Rights of the Child, Nov. 20, 1989, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4 [https://perma.cc/6GYW-8P8J].

21. General Comment No. 25 (2021) on Children's Rights in Relation to the Digital Environment, UNITED NATIONS (Mar. 2, 2021), https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-25-2021-childrens-rights-relation [https://perma.cc/V8XF-V2YE].

Catherine Grimley: The Electronic Frontier Foundation has critiqued proposed federal legislation, the Protecting Kids on Social Media Act, by stating it requires privacy-invasive verification procedures and creates a second-class online experience for social media users.[22] When developing regulations, how can legislators best balance the minors' interests in freely accessing media against the potentially harmful effects of social media use, such as privacy concerns? Likewise, do you think legislators are in the best position to address these concerns, or should parents be responsible for their child's access to and actions on social media?

Stacey Steinberg:

To the first piece, legislators can better balance these interests by considering the role of the companies and digital platforms to create platforms that aim to be safe by design. The age-appropriate design code used in Europe is one example.[23] If the onus and burden could shift to the internet companies to make websites that are generally more appropriate for all of us, that could go a long way. To that end, legislatures are in a good position to parse out and identify the concerns. I hesitate to say that parents should be responsible for their child's access to and actions on social media because I think parents are all in vastly different positions to take on that responsibility. Additionally, the knowledge and experience necessary to keep kids safe online is out of reach for so many, including myself; I have spent many years trying to understand this area and still do not have all the answers.

Catherine Grimley: There has been some debate regarding social media platforms' rights to provide a satisfactory experience for users versus parents' rights to raise their children and protect them from the potential dangers of the internet. Do parents' rights fully represent children's interests, or are there additional considerations that should be contemplated?

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22. Jason Kelley & Sophia Cope, *The Protecting Kids on Social Media Act is a Terrible Alternative to KOSA*, EFF (Aug. 28, 2023), https://www.eff.org/deeplinks/2023/08/protecting-kids-social-media-act-terrible-alternative-kosa [https://perma.cc/CH8S-UA44].

23. *Special Group on the EU Code of Conduct on Age-Appropriate Design*, EUR. COMM'N, https://digital-strategy.ec.europa.eu/en/policies/group-age-appropriate-design#:~:text=The%20Code%20aims%20to%20reinforce,an%20ad%20hoc%20special%20group [https://perma.cc/UQE6-RQM8].

Stacey Steinberg

I think that, as a society, we believe parents' and children's rights are almost always aligned, but in reality, the two diverge more often than we see at first glance. And so, parents' rights can never fully represent children's interests because children have interests that are separate and apart from those of their parents and *those* interests need to be contemplated.[24] When I say that they need to be contemplated, I am not necessarily saying that the laws need to be framed to fully protect what children want. In my world of child welfare, we call that a child's stated interest as opposed to a child's best interest. But to pass smart legislation, we need to consider both the child's best interest and the child's stated interest.[25] Finally, we need to listen to the child to really be able to understand what those stated interests are.

Catherine Grimley: One more question for you. You are a professor at UF Law, so you spend a lot of time around law school students. If there was one piece of advice that you could give to law school students, what would it be?

Stacey Steinberg:

My one piece of advice is to be true to who you are now and who you were before law school and to not be afraid to let that part of you—that unique special part of you that makes you different from your classmates—shine. I always knew I wanted to work with kids, but I did not know what that would look like. In law school, I became a guardian ad litem volunteer, which led me to my work as a special victims unit prosecutor and then an attorney for child welfare services. But when I came to the law school, I really, in some ways, thought I had professionally left that love of working with kids behind. I was hired here as a legal writing professor. At the same time, I started taking a lot more pictures, and I had a photography business that was getting off the ground. At the time, I felt those two pieces of myself did not align. They did not intersect. Honestly, sometimes I was embarrassed to be a law professor with a photography business on the side. But honestly, it was that photography business that really led me to ask the difficult questions when I studied sharenting, and it was that passion for children's rights that allowed me to look at it through a legal lens. I feel really fortunate that at the time, Dean Laura Rosenbury and Professor Lyrissa Lidsky,

24. *See generally* Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759 (2011).

25. Determining the Best Interests of the Child, CHILDREN'S BUREAU 2–4 (2020), https://www.childwelfare.gov/pubpdfs/best_interest.pdf [https://perma.cc/8APG-45SF].

two of my friends and mentors at UF Law, really encouraged me to not be constrained by the legal analyses that existed in the past but to view it through a new lens and to bring with that new lens my own experiences as a parent and as a photographer.

So, the one piece of advice that I would give law students is to not try to follow in someone else's path. Create your own path. Learn from the people around you, have confidence in yourself, and know that the things that you enjoy and are good at, while not having anything to do with the law, can still be a part of what makes you a successful attorney.

THREE STRIKES & THE TALE OF WHO'S OUT IN HOLLYWOOD

Simon Pulman[*]

Catherine Grimley: Can you provide some background on the respective SAG-AFTRA and the writers' strike? Please explain what the strikes are, and the parties involved.

Simon Pulman:

Certainly. Every three years the Alliance of Motion Picture and Television Producers (AMPTP), which is an industry body that represents the largest movie studios and now also the largest streamers, negotiates new collective bargaining contracts with the major entertainment guilds. The guilds primarily involved are the Directors Guild of America (DGA), the Screen Actors Guild—American Federation of Television and Radio Artists (SAG-AFTRA), which represents the actors, and the WGA, which is the Writers Guild of America. It is important to note that these guilds represent the majority of working directors, actors, and writers in scripted film and television. With respect to SAG-AFTRA, for example, most of the prominent and recognizable actors in the United States are in SAG-AFTRA. Likewise, a huge proportion of professional screenwriters are in the WGA—so those entities very much represent the interests of those entertainment professionals.

Now, the last negotiations took place in 2020 while the world was primarily preoccupied with the COVID-19 pandemic. The priority of the companies and guilds at that time was making it through the pandemic safely (by, for example, implementing COVID protocols on set). Therefore, there were a lot of unaddressed issues that arose out of the changing entertainment landscape that had to be addressed this time. And so, effectively, what happened this year resembles a bit of a perfect storm. The DGA was able to make a deal, and it took around six months of the WGA being on strike before they were able to reach a resolution. And as of today, October 31, 2023, SAG-AFTRA has not yet made a deal and remains on strike.

* Partner and co-chair of Pryor Cashman's Media + Entertainment and Film, TV + Podcast Groups; he is also co-chair of the M+E Transactions and Financing Practice.

Catherine Grimley: What are some of the underlying motivations of each party that caused this strike for the SAG-AFTRA? What were some of the motivations of the Writers' Guild?

Simon Pulman:

The major entertainment guilds are concerned about two or three things. One of the primary concerns stems from the changing nature of the entertainment business, particularly the emergence of streaming services. Essentially, the guilds feel that talent and creative contributors do not participate in the same way in the success of a service on platforms such as Apple, Amazon, or Netflix in the same way they would for, for example, in a sitcom that plays in syndication for a long period of time. A lot of the negotiations has implicated the concept of a "streaming bonus" for successful shows and movies on subscription services. The other big sort of existential piece, which is implicated in different ways with the WGA and SAG-AFTRA, is artificial intelligence (AI). AI is something that was a fairly secondary issue even twelve or eighteen months ago. Over the last year, it has caused a lot of concern about what the possible implications could be for contracting parties.

So, if we zoom in and we get a little bit more granular, the WGA was concerned about a few things. The first piece in the negotiation cycle is a negotiation for what we call the minimums, which is the minimum amount that a writer gets for writing a script or being in a writer's room.[1] The second piece is in part because of streaming and short orders; there has been this phenomenon that has arisen over the past five or six years, which we call "mini rooms" or "pre green light rooms." And this is the notion that instead of continuously writing a show and being on set and writing as you produce like was done in the days of 22–34 episode procedural shows like "Law and Order," or sitcoms like "Friends," writers would basically be put into a short room and asked to write an entire season of television upfront and then not necessarily be engaged for additional services thereafter. What these short rooms created were situations where writers felt that the studios were not committing to them on these shows in the way that perhaps they had previously.

Then, as far as AI goes for the writers, it is largely about credit. What a layperson may not understand is that when you look at the credits on a motion picture, particularly television series, and you see "story by," "teleplay by," or "written by," that is not just about vanity and having

1. *See Memorandum of Agreement for the 2023 WGA Theatrical and Television Basic Agreement*, WRITER'S GUILD OF AM. 4–9 (Sept. 25, 2023), https://www.wga.org/uploadedfiles/contracts/2023_mba_moa.pdf [https://perma.cc/9JAD-RNGE]; *see generally Schedule of Minimums*, WRITER'S GUILD OF AM. (Nov. 2021), https://www.wga.org/uploadedFiles/contracts/min20.pdf [https://perma.cc/B3BJ-UNVX].

your name included just so that your friends and family can see it. There are actually real financial implications that stem from that credit, especially with pilot episodes, but also for residuals on other episodes as well. Essentially, the concern is that upon WGA Credit Determination, which occurs on every WGA show or movie, writers might be divested of full writing credit for their work—and the entitlements that come with that—with AI coming into the picture. The WGA's concern was that that studio executives could either have AI rewrite work by a human writer or use AI to generate an underlying scenario and then require a writer to write a script based on that. Either path could lead to a situation where it would be impossible for writers to receive full writing credit (and therefore full payment) for their work. Because, for example, a writer cannot qualify for created by in television, typically, if the writer is adapting a book because there is underlying material. So, the nightmare scenario would be that something is spat out by AI, is handed to the writer, who is then asked to turn it into a screenplay, and then the writer does that work but would not be able to get all of the entitlements that comes with full writing credit. This was a big issue that was ultimately resolved.

However, one significant piece regarding AI that was not expressly resolved was related to training. This is the notion of feeding copyrighted material into some kind of AI model. For example, if you put all the action movies from the last thirty years into an AI model, you could then ask a large language model like ChatGPT or whatever to spit out an action script. Effectively, they punted on the issue, and the writers sort of reserved their legal rights.

As far as SAG-AFTRA goes, there are very similar types of issues around the implications of streaming, residuals, and actors not being able to get those repeat payments for an exhibition. This was due, in part, to the fact that on streaming, it is very difficult to ascertain what an exhibition is. It is not like Seinfeld being broadcast at 6:00 p.m. and 6:30 p.m. in most major markets all around the country, with Nielsen ratings to support the viewership for those broadcasts. On streaming platforms, there is little data transparency around the number of people viewing a particular series, and therefore it is hard to calculate residuals that should be paid. As far as AI goes with the actors—and I believe this still remains open—there are fascinating issues around the scanning of actors' digital likenesses—this is what SAG-AFTRA is calling synthesized performance or use of a "digital replica." The guild is concerned by the notion that by inputting a lot of performances of a particular actor into an AI model, you could then use the model to generate a new performance by that actor. For example, you can ask the model to create a new Brad Pitt movie or, perhaps more germane in the short term, create a crowd

scene so you do not need extras. That was a big, big concern that is still being addressed.

One of the bigger issues was around the timing of consent, and the devil is in the details. The AMPTP, as I understand it, agreed that they would need consent to use this kind of technology, but the question remained with the timing. The AMPTP was proposing that they could get the consent upfront, presumably as part of the initial contract, whereas the SAG-AFTRA was saying no, you have to go back on a case-by-case basis and get informed consent based on the specifics of the desired use.

Catherine Grimley: What are the statuses of the two strikes?

Simon Pulman:

Thankfully, the WGA strike was resolved, and it was ratified on October 9, 2023, although the writers actually went back to work a couple of weeks earlier.[2]

As of today, October 31, 2023, we do not yet have a SAG-AFTRA deal. What that means is that unless a production signs something called an interim agreement, the actors cannot appear on set, cannot act, and cannot promote any movies. Yesterday, I saw that the new Hunger Games prequel, *The Ballad of Songbirds and Snakes*, signed up for a SAG-AFTRA interim agreement. That movie is complete, so the controversy was not about shooting, it was about allowing those actors to appear on talk shows or to appear at premiers and to support the promotion of the movie.

Catherine Grimley: Some argue that streaming platforms have been largely insulated from the strikes' impacts. Why are these platforms benefitting from the prolonged delay of traditional network's content, and what does this mean for the overall effect of the strikes?

Simon Pulman:

I don't know that I 100% agree with this. It is true, and the theory here would be that there are at least a couple types of content that are not subject to SAG-AFTRA. One, obviously, is anything that is produced abroad. And it has been well publicized that the streaming platforms have done a great job importing content from Spanish-speaking territories, South Korea, Japan, other locales, and, therefore, can feed those from the

2. Peter White & Dominic Patten, *It's Official: WGA Members Overwhelmingly Ratify New Three-Year Deal with Studios*, DEADLINE (Oct. 9, 2023, 1:59 PM), https://deadline.com/2023/10/writers-strike-deal-approved-ratification-vote-1235567930/ [https://perma.cc/K3EE-4B8S].

United Kingdom (UK) to their audiences. The second piece is that many unscripted productions are also not subject to SAG-AFTA, including documentaries.[3] Finally, they have a pipeline of content that was pre-produced over the last six months.

I believe that most lay people—most members of the public—would not really have noticed a lot of the effects of the strikes. Clearly, there have been things like Dune, for example, being pushed into next year rather than a theatrical release. However, the streaming platforms have been affected, much like everybody else, because we have to look forward into 2024. Right now, there are a lot of movies that have not been able to be completed because post and dubbing has not been completed during the strikes and, moreover, there has been no actual production. So, I think they are potentially going to have the same crunch as everybody else come 2024.

There is another piece to this, which is kind of interesting. Arguably, the streamers are less reliant on promotion from actors to publicize their pieces. This is primarily because these platforms do not have to recruit people via talk shows and premieres and magazine articles to go out to the theater and watch a movie. In theory, the movie is pushed to you via the algorithm. You watch a particular movie, and you are recommended more content that you may like. Moreover, I think now on Netflix a lot of people select programming based on what is on the "Top 10" list on a Friday night. So, while everybody has been affected by the inability to recruit actors to promote content, it may be to varying degrees.

Catherine Grimley: Before the negotiations ceased earlier this month, SAG-AFTRA was proposing to place a per subscriber tax on the AMPTP streaming services. This seems to be where negotiations reached an impasse. What was SAG-AFTRA hoping to achieve with this tax? Was this a realistic and feasible request from SAG-AFTRA?

Simon Pulman:

The first thing to note here is that at no point in time did SAG-AFTRA characterize this as a tax or a levy. That was something that I think came from certain elements of the press and commentators—possibly from the AMPTP. It was noted that effectively and reportedly, SAG-AFTRA was looking for a percentage of the revenues of the streaming platforms. The reason they were doing that, I think, was that they essentially said, "you are huge corporations, you have a lot of cash, you have huge penetration, and you are effectively building your ecosystems based on the content

3. *Solidarity with WGA*, SAG-AFTRA, https://www.sagaftra.org/get-involved/solidarity-wga#wgafaqs [https://perma.cc/9TZN-LGSD].

that we creatives produce, our names and likenesses, and our performances." The notion was that SAG-AFTRA believed that a lot of value derived from the actors' performances and creative productions, and that the members were not sharing proportionately in that value.

Now, a direct participation in the revenues of these companies would not be realistic or feasible as characterized for a few reasons. First, if it was accurate that they were looking for a percentage of revenues of, let's say, Apple; clearly you cannot have a percentage of the revenues of Apple because Apple makes money selling iPhones and tablets and not from selling subscriptions to its TV service, which I am sure is a rounding error in the overall economics of the company. Second, many of these services are not profitable at this stage, so it really would not make sense. Third, this proposal is for a flat percentage. It would not key payment to the actual proportional success of the service or the actual shows in movies and that has always been the key, even with residuals. The shows that have paid out residuals over time were those that were repeated over and over again because they were successful. Conversely, a show that was canceled halfway through season one, and never aired again, did not generate a lot of residuals. And this goes to an accompanying point which is this: a lot of streaming services have actually pulled down original content over the last twelve months. This move is speculated to be partly about tax write-offs, but partly because the residuals formula, as it presently stands, does not distinguish between a successful show and any other show. It is actually based on how long the show has been on the service[4] and, so, we have sort of lost that proportionality on both ends in terms of participation in real success.

Catherine Grimley: Prior to the subscriber tax proposal, the AMPTP was offering SAG-AFTRA the same success-based residual that they gave to the WGA. This would have potentially allowed a performance

4. *Why Do TV Shows and Movies Leave Netflix*?, NETFLIX, https://help.netflix.com/en/node/60541#:~:text=Though%20we%20strive%20to%20keep,much%20it%20costs%20to%20license [https://perma.cc/C46U-HQ8A] (explaining that TV shows and movies leave Netflix at the conclusion of the licensing agreement between the title and Netflix, though Netflix can renew the licensing agreement if the rights to the title are still available); Henry T. Casey, *Disney Plus and Hulu to Lose Content – What's Going On?*, YAHOO FIN. (May 11, 2023), https://finance.yahoo.com/news/disney-plus-hulu-lose-content-142906029.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAADHHdgo4UAjEOOunkIche5MotS5Tjnv8pIg2mhzN-o1LRH1VSbQRRRFnrleqK6b4SXLvgBXZQ4EFwqx6g0KiqdMuj_vloGPek989IBDmdArxXNDBMuzmbYUirkfE5Xhk6WQT1_bjrEQ2KVJNK3RMbVd0f9oF22bIE7BG6gHTjsuE#:~:text=In%20a%20move%20that%20might,along%20with%20varying%20other%20costs [https://perma.cc/7RBW-ZFQK] (explaining that Disney and Hulu routinely choose to remove titles that do not get enough attention from their service in order to save costs on the residuals, royalties, and licensing agreement payments owed for those titles).

bonus based on domestic subscribers watching the program during the first 90 days of release. Why was this term not accepted by SAG-AFTRA? Was it unreasonable for SAG-AFTRA to rebut with the per subscriber tax?

Simon Pulman:

It is important to note that as we talk today, we do not know where SAG-AFTRA will end up on this issue. By the time this Commentary is published, we may very well have those details, and perhaps this will have been resolved.

The performance bonus, as structured for the WGA, was definitely a big win for them. But, as I understand it, it would have applied to a relatively small proportion of shows. The other thing that is interesting about it, which I think is probably a smart thing, is that it tiers success to the actual platform. A show has to be watched a lot more on Netflix to be deemed a success proportionate to its subscription base versus Peacock, for example, which has fewer subscribers. The theory would be, well, yes, that show was watched by fewer people in the aggregate on Peacock, but proportionally, it was a benefit, it drove subscriptions, and it drove value to that platform. I have to imagine that to the extent it has not been accepted; it would be because they did not feel like it was going to benefit members sufficiently. However, in my mind, the WGA proposal would and should have been a signpost for at least some kind of resolution for SAG-AFTRA. So, the fact that it has not been accepted yet is interesting to me.

Catherine Grimley: Was there a clear winner of the WGA strike and subsequent agreement? If so, which party won and why?

Simon Pulman:

The WGA agreement went much further than I expected in terms of things like minimum staffing in writers' rooms and the success-based residual, which I never thought would be agreed to in any form. The winner there is the WGA. With that being said, however, they did not get the full data transparency that they were looking for. If you look at the provisions, there are very specific parameters around what kind of data can be shared and with whom within the WGA,[5] but it is certainly a better foothold than they would have gotten. My overall concern with these strikes, when you look five, ten, fifteen years into the future, is that there will be no winners. By effectively crippling the industry for six, seven,

5. *Memorandum of Agreement*, *supra* note 1, at 60–61.

eight months, or more, it has just caused further harm to a business that frankly is already challenged by other forms of entertainment.

I really hope that going into 2024, there is a renaissance in creative filmmaking, risk taking, exciting new productions, exciting new franchises, new writers, and new voices given opportunity. I think that these strikes came at a time when peak TV was already over, already starting to decline, and I think the strikes accelerated that. Now, we are presently in a time of real uncertainty, even when the SAG-AFTRA strike lifts.

Catherine Grimley: In the future, do you expect ongoing debates between the writers and studios on the use of AI-generated content? Will filmmakers and screenwriters be able to secure creative and intellectual property rights in their work?

Simon Pulman:

AI is undoubtedly going to be an evolving issue. Part of the reason why I think it has been challenging to reach resolution around AI is that neither side wanted to rule out its use entirely because everybody recognizes that there are applications of these tools that can be helpful. We are seeing some of these applications in subtitling and dubbing. I know it is being used in animation, previsualization, and post-production. There are ways that AI can be used as a tool for creatives while not necessarily cannibalizing their product. At the same time, as you have seen over the last twelve months, I would imagine when you look at the submissions to journals like yours, just two years ago there were relatively few AI submissions people wanted to write journal articles and now, I have to imagine, there is a surplus. This technology is moving so quickly. It is evolving so quickly. There are practical implications. There are going to be contractual issues around how we address these pieces. Additionally, you have the bigger picture issue around copyright law.

There are at least three fairly major cases that are presently examining the copyright implications of things like training, many of them coming out of the literature in the publishing world.[6] More broadly, you have things like name and likeness usage and how it interacts with the right of publicity laws, which, generally speaking, has been state governed up to

6. Compl., Tremblay v. OpenAI Inc., No. 3:23-cv-03223 (N.D. Cal. 2023), https://llmlitigation.com/pdf/03223/tremblay-openai-complaint.pdf [https://perma.cc/C486-ZQ6N]; Compl., Anderson v. Stability AI Ltd., No. 3:23-cv-00201 (N.D. Cal. 2023), https://ipwatchdog.com/wp-content/uploads/2023/02/Andersen_et_al_v._Stability_AI.pdf [https://perma.cc/NY4F-PPSX]; Compl., Authors Guild v. OpenAI Inc., No. 1:23-cv-08292 (S.D. N.Y. 2023), https://authorsguild.org/app/uploads/2023/09/Authors-Guild-OpenAI-Class-Action-Complaint-Sep-2023.pdf [https://perma.cc/XD9E-8DV7].

now. Will we see some federal name and likeness or right of publicity type laws? Possibly. I think that this would have to be sort of enmeshed in that, and it is going to be interesting. Will they be able to secure creative and intellectual property rights in their work? Look, I think you would have to counsel anybody presently to be cautious around the use of AI because you do not want to defeat your ability to protect your work, and you do not want to inadvertently infringe on third party work either.

I do think that there is a really interesting application of AI for actors in terms of not only a performance of the modification, but this notion of using AI to posthumously bring people back, you know, back and to act in films. Tom Hanks has spoken about this. We have the notion of James Earl Jones licensing his voice to be used for Darth Vader even after he has retired.[7] That has some interesting implications relating to timing of consent, post-mortem rights of publicity, and trust in the state law that I think is another really interesting piece. We have even seen de-aging, most recently in the last Indiana Jones movie, but we are coming fairly close to a time where it might be possible to have the likes of James Dean or Marilyn Monroe star in a new movie type of concept. That has a lot of implications for working actors, the estates of actors, movie companies, and for everybody else.

I can imagine a world where, outside of entertainment, an advertising agency or a marketing agency would submit some concept designs, and they end up getting used. Then, it comes out in the wash that they have been generated using some ChatGPT prompt, and it was relating to some IP. It is going to get very, very complex. You just have to urge caution around all this stuff because it is so legally unsettled at the moment.

Catherine Grimley: Studios have recently suggested that they will start canceling TV show series if the strike continues. Do you think this is merely a scare tactic or something that the studios are legitimately considering?

Simon Pulman:

It has already happened. There have been a number of shows that have been cancelled, that were ordered and renewed and then cancelled, or, even in some instances, were produced and then pulled off.[8] What is

7. Emma Roth, *James Earl Jones Lets AI Take Over the Voice of Darth Vader*, THE VERGE (Sept. 24, 2022, 5:37 PM), https://www.theverge.com/2022/9/24/23370097/darth-vader-james-earl-jones-obi-wan-kenobi-star-wars-ai-disney-lucasfilm [https://perma.cc/YY8C-C8WZ].

8. Alan Sepinwall, *20 TV Shows Canceled During the Hollywood Strikes*, ROLLING STONE (Oct. 11, 2023), https://www.rollingstone.com/tv-movies/tv-movie-lists/20-tv-shows-canceled-hollywood-strikes-the-idol-the-great-streaming-1234851019/a-black-lady-sketch-show-hbo-1234851033/ [https://perma.cc/65TK-YJGX].

impossible to say is how much of that is directly related to the strikes, and how much of it is a broader industry phenomenon. We have lived through a period of time, because there has been so much competition at the platform level, where there has been almost unfettered hunger to fund and produce content to try to recruit subscribers. For better or worse, we have seen a broader range of television than ever before and probably less scrutiny, in certain respects, at the creative level. I think what we are seeing now is a rollback on spending in general. Some of that will likely be strike related because a lot of these entities do not have the same income, they may be a little fearful, but I think it is more symptomatic of a bigger industry re-examination of economics, streaming, and Wall Street's desire for profitability rather than sort of a tech-focused notion of investing in potential future profitability via growth.

Catherine Grimley: What are some of the conditions and consequences that arise from SAG-AFTRA and similar strikes that may occur in the future?

Simon Pulman:

These kinds of high-pressure negotiations are always complex and multifaceted. Time is always a factor in a negotiation, and as the duration of a strike extends, the positions and leverage of the respective parties may shift. I think that on the studio side of things, we are at the point where they need to make a deal. They need their actors to come out and promote their big upcoming holiday movies, and if production doesn't resume soon the 2024 and 2025 slates will be jeopardized. At the same time, you can see the bigger name actors are also eager to make a deal and get back to work. The challenge with the actors is that something like 86% of SAG-AFTRA members make less than $26,500 a year from acting.[9] So, the majority of SAG-AFTRA members are not working steadily as actors, and it is not their sole source of income. Arguably, that means that they do not have the same urgency to push for a resolution.

However, what is crystal clear is that the industry at large needs a deal, and that it's not just about the studios and the actors, but also all the other people in the industry who are affected. Millions are without work because of the strikes. They include vendors, below the line crew, and visual effects providers who rely on production, as well as restaurants and other local establishments in Los Angeles and elsewhere. It's also all of

9. CNN, *SAG-AFTRA President Shares What 86% of Actors on Strike are Really Paid in a Year*, 2:50–3:05 YOUTUBE (Aug. 7, 2023), https://www.youtube.com/watch?v=A_OEgpFnpA8 [https://perma.cc/639X-R2YZ].

the assistants and junior executives who have been laid off right at the start of their careers as cost-cutting measures. Hopefully we will see a resolution soon, and I also hope that this is the last "double strike" that we see in our lifetimes.

A CALL OF DUTY FOR THE LEGALIZATION AND REGULATION OF ESPORTS BETTING

Natanel Wainer[*]

Abstract

It is undeniable that the world of esports is quickly becoming a mainstream form of entertainment and competition. With changes to federal law allowing states to legalize sports gambling, individuals are attempting to capitalize on the burgeoning growth of esports. While there is no shortage of discussion on traditional sports betting, esports betting has yet to fully be explored. Esports is arguably a subset of the sports industry and with the United States currently going through a transitional period regarding the way it treats sports gambling, now is the perfect time to begin regulating esports betting. Because many states have recently begun passing esports-specific betting legislation, this Article discusses the challenges in regulating esports betting, before identifying and advocating for ideal regulatory solutions to assist in minimizing the major risks associated with esports betting.

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* Natanel "Natu" Wainer is a proud University of Florida Levin College of Law graduate, having received his J.D. in 2021. Prior to law school, Natu traveled throughout the United States competing in Call of Duty esports tournaments. Natu would like to thank everyone on the Florida Entertainment & Sports Law Review for their help in editing this Article. Natu would also like to give a special thanks to his wife, Esther, and his son, Michael, for all their continued love and support.

INTRODUCTION

Electronic sports (esports)[1] is a rapidly growing industry in which players compete against other players in organized competitive video game matches and tournaments. The term "esports" comprises a group of different competitive video games and gaming competitions, much like the Olympics, which is comprised of various different sports. Among the most popular esports titles are League of Legends,[2] Call of Duty,[3] and Counter-Strike: Global Offensive (CS:GO).[4] Similar to traditional sports, fans across the globe attend tournaments in stadiums or tune in online to watch live broadcasts of the events. Over the past few years, esports has emerged as a top spectator sport, especially among younger viewers.[5] In fact, in 2021, the League of Legends World Championship finals drew in approximately 73.8 million viewers.[6] By comparison, the final game in the 2021 NBA Finals only drew in 12.52 million viewers.[7]

With continuing growth in the popularity of esports and its exposure to the mainstream, esports has also given rise to a lucrative gambling market.[8] By 2027, the global esports betting market size is projected to

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1. *See* Kieran Darcy, *Why the Associated Press Stylebook Went with esports, Not eSports*, ESPN (July 6, 2017, 10:57 AM), https://www.espn.com/esports/story/_/id/19860473/why-associated-press-stylebook-went-esports-not-esports [https://perma.cc/Q6Z9-AATV] (noting that although there have been multiple different spellings of "esports," the Associated Press determined that this would be the correct spelling).

2. *See* Agilio Macabasco, *Absolute Beginner's Guide to League of Legends*, MOBALYTICS (July 5, 2019), https://mobalytics.gg/blog/absolute-beginners-guide-to-league-of-legends/ [https://perma.cc/B4H9-2TTK] (explaining that League of Legends is a team-based strategy game where opposing teams face off to destroy the other's base).

3. *See Call of Duty (series)*, CALL OF DUTY WIKI, https://callofduty.fandom.com/wiki/Call_of_Duty [https://perma.cc/8RKQ-EDT9] (explaining that Call of Duty is a first-person shooter game).

4. *See* Steven Rondina, *What is CS:GO?*, HOTSPAWN (Jan. 6, 2021, 7:30 PM), https://www.hotspawn.com/counter-strike/guides/what-is-csgo [https://perma.cc/8UNC-XE2M] (explaining that Call of Duty is a first-person shooter game).

5. *See* Christopher Ingraham, *The Massive Popularity of Esports, in Charts*, WASH. POST (Aug. 27, 2018, 2:59 PM), https://www.washingtonpost.com/business/2018/08/27/massive-popularity-esports-charts/ [https://perma.cc/E6P6-NSVN].

6. Declan McLaughlin, *Worlds 2021 Final Draws 73.8 Million Peak Concurrent Viewers, Riot Reports*, UPCOMER (Nov. 21, 2021), https://upcomer.com/worlds-2021-final-draws-73-8-million-peak-concurrent-viewers-riot-reports [https://perma.cc/3BW8-7QVC].

7. *2021 NBA Finals Finishes Up 32 Percent in Viewership vs. 2020 NBA Finals*, NBA (July 21, 2021, 9:05 PM), https://www.nba.com/news/2021-nba-finals-finishes-up-32-percent-in-viewer ship [https://perma.cc/U9UF-TBYS].

8. *See* Andrew Meola, *How eSports Has Given Rise to Competitive Gaming Betting and Gambling — with Skins and Real Money*, BUS. INSIDER (Jan. 9, 2018, 10:52 AM), https://www.businessinsider.com/the-rise-of-esports-betting-and-gambling-2018-1 [https://perma.cc/488L-3QXP].

increase by $3.52 billion.[9] Given the rise of esports, it is no surprise that esports is one of the fastest-growing sports markets in regards to betting volume.[10]

Esports betting largely falls into two specific categories: cash betting and skin betting.[11] Skin betting is the practice of wagering in-game virtual cosmetic items on the outcome of professional matches or other casino style games of chance.[12] These skins are then able to be sold online for real-world currency.[13] Although skin betting has received a majority of the public's attention, this Article will focus mainly on cash betting.[14] Cash betting works similar to its traditional sports counterparts. Companies calculate the odds on who will win a specific match or tournament and use those odds to determine how much money will be paid out to the winning bettors.[15] Because the United States is currently going through a substantial transition period regarding the way it generally treats sports gambling,[16] it is crucial to determine whether and where esports betting falls within the sports gambling spectrum.

This Article presents one of the first examinations of strictly esports cash betting and its position within the current gambling framework in America. It analyzes the current changes in federal law governing sports gambling and examines how some states have responded to these

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9. *See Esports Market Size to Grow by USD 3.52 Billion from 2022 to 2027, Presence of Companies like Activision Blizzard Inc., Amazon.com Inc. and Beyond the Summit and More Makes the Market Fragmented – Technavio*, MARKETWATCH (Oct. 2, 2023, 2:30 PM), https://www.marketwatch.com/press-release/esports-market-size-to-grow-by-usd-3-52-billion-from-2022-to-2027-presence-of-companies-like-activision-blizzard-inc-amazon-com-inc-and-beyond-the-summit-and-more-makes-the-market-fragmented-technavio-1415d49c [https://perma.cc/F4TK-PZED].

10. Cort Smith, *Esports Betting Market Set to Explode to a Total Value of $12.9B by 2020*, CASINO.ORG (Jan. 20, 2019, 2:00 AM), https://www.casino.org/news/esports-betting-market-set-to-explode-to-a-total-value-of-12-9b-by-2020 [https://perma.cc/JJ6Q-MRW4].

11. *See* Myers, *infra* note 15; Meola, *supra* note 8; *Cf.* Kevin Liu, *A Global Analysis into Loot Boxes: Is It "Virtually" Gambling?*, 28 WASH. INT'L L. J. 763, 764 (2019) (examining how loot boxes are likely gambling).

12. *See* Taylor Stanton Hardenstein, *"Skins" In The Game: Counter-Strike, Esports, and The Shady World of Online Gambling*, 7 U. NEV. L.V. GAMING L.J. 117, 121–22 (2017); Evan Lahti, *CS:GO's Controversial Skin Gambling, Explained*, PC GAMER (July 06, 2016), https://www.pcgamer.com/csgo-skin-gambling/ [https://perma.cc/WH77-V7X9] (listing roulette, rock-paper-scissors, poker, and dice as some of the casino style games used to bet skins).

13. Hardenstein, *supra* note 12.

14. *See generally Valve's Counter-Strike Illegal Gambling Controversy Continues*, POLYGON (July 23, 2016, 7:52 PM), https://www.polygon.com/2016/7/7/12122834/valve-counter-strike-csgo-lawsuit-il legal-gambling [https://perma.cc/P4RW-BTSJ].

15. *See* Maddy Myers, *How Esports Gambling Works*, KOTAKU (Mar. 21, 2018), https://compete.kotaku.com/how-esports-gambling-works-1823959797 [https://perma.cc/K3L2-6UUV].

16. *See generally* Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313 (2019); *infra* Part II.A.

changes. Ultimately, this Article argues that not only is esports betting consistent with the current changes in federal gambling law, but that regulating, rather than ignoring the issue, is the next logical step. Part I provides a brief overview on the history of esports. Next, Part II gives an overview of esports betting in general and prior scandals that have occurred. Then, Part III examines the current state of federal gambling laws and shows how esports fits within the current mold. Thereafter, Part IV analyzes how some states have addressed esports betting. Finally, Part V identifies and reconciles the problems with esports betting and the law by proposing potential regulations. Ultimately, this Article concludes that states are not only ready, but are also in the prime position to begin regulating esports betting.

I. THE HISTORY OF ESPORTS BETTING

As previously mentioned, esports has given rise to a new market of sports gambling. Although esports is a relatively new phenomenon, betting on sports has been around for centuries.[17] Consequently, esports betting, and specifically cash betting, has followed the path of traditional sports by using data to determine betting lines for the outcome of matches.[18] Some companies have also begun providing fantasy esports competitions.[19] Fantasy esports, just like traditional fantasy sports, can be defined as "a wide range of contests in which participants construct virtual teams to compete against other participants' teams, using statistics generated by real-life athletes in individual and team-based sporting events."[20]

A. *Betting Scandals*

The number of past scandals the esports scene has experienced reveals the dire need for gambling regulations. Arguably, the biggest esports scandal occurred in 2015 when South Korean authorities arrested twelve people regarding five fixed StarCraft 2 matches.[21] By throwing the

17. *See* Chil Woo, Note, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 572–73 (2013) (noting that sports betting was extremely popular during the 1800s, in conjunction with the rise of professional baseball).

18. Myers, *supra* note 15.

19. S*ee, e.g.*, *Fantasy Esports*, DRAFTKINGS, https://www.draftkings.com/fantasy-call-of-duty [https://perma.cc/W4LL-3UDE].

20. *See* Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 93 IND. L.J. 653, 656 (2017).

21. John T. Holden et al., *Esports Corruption: Gambling, Doping, and Global Governance*, 32 MARYLAND J. INT'L L. 236, 267 (2017); *see* Brendan Sinclair, *12 Arrested in Esports Match Fixing Scandal – Report*, GAMESINDUSTRY (Oct. 19, 2015), https://www.gamesindustry.biz/articles/2015-10-19-12-arrested-in-esports-match-fixing-scandal-report [https://perma.cc/D7AT-ZVWA].

matches, two players were able to win $37,000 collectively through illegal betting websites.[22] Unfortunately, esports match-fixing scandals continue to occur. The same year as the StarCraft 2 scandal, twenty-one CS:GO players were accused of match-fixing.[23] More recently, match-fixing scandals have also occurred in arguably the biggest esport, League of Legends.[24] Similarly, in 2021, Valve permanently banned an entire Dota 2 team from competing in all official Valve events due to the team's match-fixing.[25] While the industry has made efforts to combat match-fixing, it is clear that there is still work to be done.

B. *Esports Betting in America*

Estimated to be at least a $1 billion industry, "[t]he US is one of the world's largest esports betting black markets."[26] This is primed to change with the shifts in federal gambling laws. These shifts in law and attitude have opened the door for legal esports betting to surge. In 2018, the United States Supreme Court issued its decision in *Murphy v. National Collegiate Athletic Association*[27] eliminating a federal ban prohibiting states from authorizing sports gambling.[28] Prior to *Murphy*, Nevada was the only state permitted under federal law to offer fully regulated sports betting in casinos.[29] Major Las Vegas casinos, such as the Downtown Grand and the MGM Grand, embraced esports by offering esports betting and esports competitions.[30] However, because paid fantasy sports fell into

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22. Sinclair, *supra* note 21.

23. *See* Aurangzeb Durrani, *Match-Fixing Comes to the World of E-Sports*, TECHCRUNCH (Apr. 23, 2016, 10:30 AM), https://techcrunch.com/2016/04/23/match-fixing-comes-to-the-world-of-e-sports/ [https://perma.cc/MUU2-YZHF].

24. *See* Alex Leckie-Zaharic, *Condi Suspended for 18 Months as Major LPL Match-Fixing Scandal Exposed*, DOT ESPORTS (June 18, 2019, 8:51 AM), https://dotesports.com/league-of-legends/news/condi-suspended-for-18-months-as-major-lpl-match-fixing-scandal-exposed [https://perma.cc/5DWZ-9EFE] (noting *League of Legends* player "Condi" violated match-fixing and betting rules during the 2019 season).

25. Danelie Purdue, *We Have 99 Problems and Match-Fixing is One of Them*, ONE ESPORTS (Apr. 7, 2023, 4:00 AM), https://www.oneesports.gg/gaming/match-fixing-esports-problem/. [https://perma.cc/C5BB-UQTC]

26. Press Release, Esports Integrity Coalition, ESIC Comment on Legalized Sports Betting in the USA (May 15, 2018), https://www.lawinsport.com/topics/item/esic-comment-on-legalized-sports-betting-in-the-usa [https://perma.cc/VHD8-FA4T]; *see* Jake Seiner, *Esports Integrity Chief Concerned About Fortnite Gambling*, ASSOCIATED PRESS (Nov. 21, 2018), https://www.apnews.com/dc3ee6764e5142619a38d85bc8e46293 [https://perma.cc/M5AY-EJQ7].

27. 138 S. Ct. 1461 (2018).

28. *Id.* at 1484–85.

29. *Id.* at 1471 ("At the time of PASPA's adoption, a few jurisdictions allowed some form of sports gambling. In Nevada, sports gambling was legal in casinos, and three States hosted sports lotteries or allowed sports pools.").

30. *See* Ian Lecklitner, *Global Esports Gambling is Worth Nearly $13 Billion – and it's Only Getting Bigger*, MEL MAGAZINE, https://melmagazine.com/en-us/story/global-esports-gambling-is-worth-nearly-13-billion-and-its-only-getting-bigger [https://perma.cc/7CFE-25VQ].

a grey area within America's gambling legislation, entrepreneurs began developing platforms for esports-dedicated fantasy leagues.[31]

Similar to paid fantasy leagues, betting on the outcome of "one-on-one" competitive video game matches fell outside the scope of federal gambling laws.[32] Essentially, websites were created that allowed individuals to find competitors online and bet money on the outcome of their matches.[33] Thus, because players were betting on their own "skill" rather than on "chance," these wager matches were not prohibited by the federal gambling laws.[34] However, as the esports betting market continued to grow, it was only a matter of time until individuals began exploring the idea of betting on professional esports matches.

II. FEDERAL GAMBLING LAWS

It is important to analyze the current federal laws governing online gambling and sports betting to better understand how esports betting fits within the current mold. Regarding gambling legislation, no federal or state court has defined esports or ruled on whether esports should be considered a sport.[35] This initial question is important because depending on the answer, certain laws would or would not apply to esports betting. Observing the ways other areas of the law treat esports can help shed light on this crucial question.

Although U.S. immigration law can be very complex and unpredictable, many esports players have been granted P-1A visas.[36] The P-1A visa applies to individuals who enter the United States to perform as an athlete, individually or as a team, at an internationally recognized level of play.[37] While obtaining a P-1A visa as an esport player has been inconsistent, by at least granting some esports players the P-1A visa, the United States has essentially consented that some esports players are

31. *See* Eugene Kim, *Billion-Dollar Sports-Gambling Startups Draft Kings and FanDuel are Legal Because a Loophole in the Law*, BUS. INSIDER (Sept. 11, 2015, 8:50 AM), https://www.businessinsider.com/why-draft-kings-and-fanduel-are-legal-2015-4 [https://perma.cc/7BP6-VY98] (noting that fantasy sports are legal under the Unlawful Internet Gambling Enforcement Act because they are considered a "game of skill" and not a "game of chance").

32. *See* Matthew Dobill, *Leveling (up) the Playing Field: A Policy-Based Case for Legalizing and Regulating Esports Gambling*, 37 LOY. L.A. ENT. L. REV. 139, 157–58 (2017).

33. *See id.* at 157; *see, e.g.*, *Checkmate Gaming*, CMG, https://www.checkmategaming.com/ [https://perma.cc/YK3J-A4PE].

34. *See* Dobill, *supra* note 32, at 158.

35. *Cf.* N.J. STAT. ANN. § 5:12A-10 (West 2021) (defining sports events as excluding certain "electronic sports" and "competitive video games"); Navarro v. FIT, No. 6:22-CV-1950-CEM-EJK, 2023 WL 2078264 (M.D. Fla. 2023) (holding that esports is not a sport within the purview of Title XI).

36. *See* Bridget A.J. Whan Tong, *A New Player Has Entered the Game: Immigration Reform for Esports Players*, 24 JEFFERY S. MOORAD SPORTS L.J. 351, 352 (2017).

37. Immigration and Nationality Act, 8 U.S.C. § 1184(c)(4)(A)(i)(I) (2023) (describing requirements to obtain a P-1A visa).

athletes.[38] Arguably, this means that some esports competitions must be sporting events. Accordingly, this Article takes the position that esports should be classified as sports.

This section will analyze three major federal gambling laws that play a role in determining how esports betting can and should be regulated. These laws are the Professional and Amateur Sports Protection Act (PASPA),[39] the Wire Act,[40] and the Unlawful Internet Gambling Enforcement Act (UIGEA).[41]

A. *The Professional and Amateur Sports Protection Act*

In 1992, to stop the spread of state-sponsored sports wagering, PASPA became law.[42] Under PASPA, states could not "sponsor, operate, advertise, promote, license, or authorize by law or compact" any betting or wagering scheme based on the outcome of professional or amateur sports matches.[43] However, PASPA contained three grandfather clauses exempting states from this broad prohibition. The first exemption related to states that already had a wagering scheme in operation prior to the enactment of PASPA.[44] The second exemption related to states that already had statutes authorizing sports wagering, as long as the sports wagering was actually conducted in that state.[45] The third exemption related to any state that had an authorized and licensed gambling casino in a municipality throughout a specific ten-year period, to the extent that the state authorized legal sports betting at that casino within one year of the enactment of PASPA.[46] Effectively, these exemptions were only applicable to Nevada, Delaware, Oregon, and Montana.[47]

On May 14, 2018, the Supreme Court issued the *Murphy* decision.[48] The Court held that PASPA's provision prohibiting states from authorizing sports gambling was an unconstitutional violation of the

38. *See* Courtney New, *Immigration in Esports: Do Gamers Count as Athletes?*, FORBES (May 18, 2017, 3:49 PM), https://www.forbes.com/sites/allabouttherupees/2017/05/18/immigration-in-esports-do-gamers-count-as-athletes/#70a3cdba468e [https://perma.cc/2Z7A-Y62Y].

39. Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified as amended at 28 U.S.C. §§ 3701–04).

40. Federal Wire Act, Pub. L. No. 87-216, 75 Stat. 491 (1961) (codified as amended at 18 U.S.C. § 1084).

41. Unlawful Internet Gambling Enforcement Act, Pub. L. No. 109-347, 120 Stat. 1952 (2006) (codified as amended at 31 U.S.C. §§ 5361–67).

42. *See* Jennifer Roberts & Greg Gemignani, *Who Wore It Better? Federal v. State Government Regulation of Sports Betting*, 9 U. NEV. L.V. GAMING L.J. 77, 82 (2019).

43. 28 U.S.C. § 3702 (2023).

44. 28 U.S.C. § 3704(a)(1) (2023).

45. 28 U.S.C. § 3704(a)(2) (2023).

46. 28 U.S.C. § 3704(a)(3) (2023).

47. *See* Roberts & Gemignani, *supra* note 42, at 83 (noting that the first exemption applied only to Delaware and Oregon, while the second exemption applied only to Nevada and Montana).

48. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1461 (2018).

anticommandeering rule.[49] In invalidating the entirety of PASPA, the Court noted that Congress may still regulate sports gambling if they so choose.[50] However, the federal prohibition against states authorizing sports wagering schemes was lifted, giving each state the right to freely regulate sports betting.[51]

Taking the position that esports falls under the category of sports, the overturning of PASPA plays a major role in the future of esports betting. However, even if esports is considered to be a sport, state legislation might still require esports-specific verbiage.[52] In other words, individuals who oppose including esports in the definition of sports for betting purposes may argue that esports was not envisioned by the legislators when that specific state's sports betting laws were written. Accordingly, including esports-specific verbiage would be ideal. Whether esports betting ends up falling into the same category as traditional sports betting may very well end up depending on how broadly each state's sports betting laws are interpreted. All that seems clear is that after *Murphy*, esports betting in the United States is primed to explode.

B. *The Wire Act*

Enacted in 1961, the original purpose of the Wire Act was to suppress organized gambling crime by prohibiting the use of wire communications to make bets or wagers.[53] While the Wire Act appears to relate to a broad range of gambling activities, the statute has been held to apply only to sporting events or contests.[54] In 2011, the Justice Department's Office of Legal Counsel (OLC) issued an opinion stating that the Wire Act is limited to governing activities associated with sports gambling.[55] Be that

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49. *Id.* at 1478.

50. *Id.* at 1484–85.

51. *Id.*

52. *See* Noah Smith, *Esports Bookmaking? Globally, it's Already a Billion–Dollar Gambling Industry*, WASH. POST (Apr. 6, 2018, 1:13 PM), https://www.washingtonpost.com/sports/esports-bookmaking-globally-its-already-a-billion-dollar-gambling-industry/2018/04/06/be89c282-2b99-11e8-8688-e053ba58f1e4_story.html?noredirect=on [https://perma.cc/A4PG-VNEU] ("There has to be clarity [regarding esports being classified as a sport for betting purposes by regulators], and right now there are more questions than there are answers.").

53. H.R. REP. NO. 87-967, at 2631 (1961) ("The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.").

54. *See In re* MasterCard Int'l Inc., 313 F.3d 257, 262–63 (2002) (noting that the Wire Act relates to gambling on sporting events or contests).

55. U.S. Dept. of Just., Off. of Leg. Couns., Opinion Letter on Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act (Sept. 20, 2011).

as it may, in 2018, the OLC reversed the 2011 opinion, noting that the Wire Act also covers other forms of gambling that do not involve sports.[56]

Following the 2018 OLC opinion, Judge Paul Barbadoro issued a decision in *New Hampshire Lottery Commission v. Barr*,[57] setting aside the 2018 OLC opinion and holding that the Wire Act "applies only to transmissions related to bets or wagers on a sporting event or contest."[58] By merely setting aside, rather than providing a nationwide injunction of the 2018 OLC opinion, the door has been left open for arguing that Judge Barbadoro's holding only extends to the New Hampshire Lottery Commission.[59] Nonetheless, if esports is deemed to fall under the category of being a sport, gambling site operators may be liable under the Wire Act.

C. *The Unlawful Internet Gambling Enforcement Act*

The remaining federal statute relevant to esports gambling is the UIGEA. The UIGEA prohibits any "person engaged in the business of betting or wagering" from knowingly accepting any financial transaction, "in connection with . . . unlawful Internet gambling."[60] It is important to note that the UGIEA does not expressly ban individuals from gambling on the internet.[61] Rather, it forbids institutions engaged in the gambling business from knowingly accepting electronic funds to be used in connection with an illegal internet bet or wager.[62]

In essence, the UIGEA can be broken down into five elements: (1) the placing of a bet or wager; (2) on the internet; (3) knowingly accepted; (4) in a jurisdiction where external laws (state or federal) make such a bet illegal; and (5) exemptions for certain intrastate and intratribal gambling

56. U.S. Dept. of Just., Off. of Leg. Couns., Opinion Letter on Reconsidering Whether the Wire Act Applies to Non-Sports Gambling (Nov. 2, 2018) ("Only the second prohibition of the first clause of section 1084(a), which criminalizes transmitting 'information assisting in the placing of bets or wagers on any sporting event or contest,' is so limited.").

57. 386 F. Supp. 3d 132, 160 (2019).

58. *Id.* at 160.

59. *See* Michael Casey, *Judge: Federal Wagering Law Only Applies to Sports Gambling*, ASSOCIATED PRESS (June 3, 2019, 10:46 AM), https://www.apnews.com/20c298bea5c34a15a108dd2e348b4497 [https://perma.cc/UC6U-8SK5].

60. 31 U.S.C. § 5363 (2006).

61. Andrew M. Nevill, *Folded Industry? Black Friday's Effect on the Future of Online Poker in the United States*, 2013 U. ILL. J.L. TECH. & POL'Y 203, 210 (2013).

62. *Id.*

operations are not met.[63] Thus, in order for the UIGEA to apply, there must have been a predicate law (state or federal) that was broken.[64]

Continuing with the assumption that esports are considered to be sports, it appears clear that the UIGEA would extend to betting on the outcome of esports matches.[65] However, even if esports are not considered to qualify as sporting events under the UIGEA, esports betting would likely still be governed by the UIGEA simply because an esports match would fall under "a contest of others."[66]

III. STATE GAMBLING LAWS

After PASPA was overturned, states gained the ability to create legislation enabling esports betting.[67] Analyzing how certain states have incorporated esports betting into their sports betting legislation can help paint a clearer picture of how esports betting should be regulated. It is also worth noting that since PASPA has been overturned, some states have enacted legislation permitting sports betting while specifically excluding any esports-specific verbiage.[68] Because the law tends to be slow in catching up with the changes in time and technology, including esports-specific verbiage within betting legislation is preferred. Even though the law in other regards has inferred that esports would classify as a sport,[69] until a court affirmatively finds that esports are sports, the definition of a sporting event in gambling legislation should include specific mention of esports. Due to this preference, this Section will mainly analyze the two most popular laws regarding esports betting, while still shedding light on the more recent legislation.

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63. Thomas A. Flynn, Note, *The Ace in the Hole: Why the Unlawful Internet Gambling Enforcement Act Did Not Categorically Ban Online Poker in the United States*, 5 GEO. MASON J. INT'L COM. L. 75, 84 (2013).

64. Erik Gerstner, Note, *Losing the Digital Shirt off Your Back: Applying the Unlawful Internet Gambling Enforcement Act to Virtual Property Betting*, 9 WM. & MARY BUS. L. REV. 321, 330 (2017).

65. *See* 31 U.S.C. § 5362(1)(A) ("The term 'bet or wager' . . . means the staking or risking by any person of something of value upon the outcome of . . . a sporting event . . . ."); *see also* United States v. Lyons, 740 F.3d 702, 729 (1st Cir. 2014) (holding that taking bets on sporting events via the internet qualified as "unlawful gambling" under the UIGEA).

66. *See* 31 U.S.C. § 5362(1)(A).

67. *See supra* Part II.A.

68. *See* discussion *supra* pp. 8–10.

69. *See supra* Part II.

A. *New Jersey*

Shortly after the decision in *Murphy*, New Jersey legislators rushed to update the state's 2014 betting law.[70] Over the course of compiling an updated sports betting bill, the state legislators included a ban on esports betting.[71] The bill stated that "[a] prohibited sports event includes all high school sports events, electronic sports, and competitive video games."[72] However, merely three days after the legislation was passed, New Jersey's Division of Gaming Enforcement (NJDGE) issued emergency regulations to further explain the state's position on esports betting.[73] The emergency regulations explicitly included within the definition of "[s]ports event," "all professional electronic sports and competitive video game events that are not sponsored by high schools, do not include high school teams, and do not include any participant under the age of 18 years."[74] Over a year after the passing of the bill, in November of 2019, the NJDGE allowed sportsbooks to take wagers on an esports competition for the first time.[75]

Allowing esports betting so long as every participant is at least eighteen years old is a step in the right direction.[76] Esports are unlike traditional sports in that many players are able to compete at the highest level at ages well below eighteen. Because players can compete at such young ages, some established esports leagues and events lower the required age threshold below eighteen.[77] Nevertheless, some leagues in America satisfy the age requirement.[78] Those leagues are highly regulated and have become the next step in converting esports into a more traditional sports model. Therefore, by limiting esports betting the way

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70. Maddy Myers, *New Jersey Added a Last-Minute Esports Betting Ban and No One Knows Why*, KOTAKU (June 8, 2018), https://compete.kotaku.com/new-jersey-added-a-last-minute-esports-betting-ban-and-1826678155 [https://perma.cc/36AF-Y6J8].

71. *See id.*; S. 2602, 218th Leg. (N.J. 2018).

72. N.J. STAT. ANN. § 5:12A-10 (West 2018).

73. *See* 50 N.J. Reg. 1652(a) (June 13, 2018); *Sports Wagering Emergency Regulations*, DIVISION OF GAMING ENFORCEMENT, https://www.nj.gov/oag/ge/docs/SportsBetting/SportsWageringEmergencyRegulations.pdf [https://perma.cc/CQ88-KYAN].

74. N.J. ADMIN. CODE § 13:69N-1.1 (2018).

75. Marco Cerino, *Esports Betting Approved in NJ in Time for League of Legends World Championship*, THE LINES (Nov. 9, 2019), https://www.thelines.com/esports-betting-nj-league-of-legends-championship/ [https://perma.cc/U3LQ-42D2].

76. *See infra* Part V.

77. *See* Mitch Reames, *New Jersey Allows Esports Betting with Massive Restriction*, NAT'L FOOTBALL POST (June 17, 2018), https://nationalfootballpost.com/betting-esports/ [https://perma.cc/RET9-BTJS] (noting that the age threshold for *League of Legends* and *Rocket League* is 17 years old and 15 years old, respectfully).

78. *See id.* (noting that the *Overwatch* League, *Call of Duty* League, and *NBA 2K* League all require a minimum age of 18 to compete).

New Jersey's law does, the law essentially places esports on the same platform as traditional sports.[79]

B. *Nevada*

Considering that Las Vegas has been the main hub for gambling in America, it comes as no surprise that esports betting is allowed in Nevada. Prior to the passing of any esports-specific legislation, the Nevada Gaming Control Board (NGCB) gave permission for sportsbooks to accept wagers on esports.[80] Shortly thereafter, Governor Brian Sandoval signed Senate Bill 240,[81] which solidified the legality of esports betting in Nevada.[82] The bill amended Nevada's statutes regarding pari-mutuel betting systems to include esports.[83] Ironically, while the bill has been dubbed "the esports betting bill," it actually failed to include the word "esports" in its language.[84] Instead, the phrase "other events" was added to the prior list of pari-mutuel betting activities.[85]

Unlike the New Jersey law, Nevada failed to include any esports-specific verbiage in its legislation. However, it is clear that esports betting was a central point intended to be included under the law. For starters, during the Nevada Senate hearings discussing the law, former esports competitor Jonathan "Fatal1ty" Wendel spoke about his training regimen, arguing that esports competitions should be considered alongside traditional sporting events.[86] Furthermore, A.G. Burnett, chairman of the NGCB, expressed a desire to see esports events held at the T-Mobile

79. *See* Rick Maese, *NBA Commissioner Adam Silver Says Days of One-and-Done Players Will Soon Be Over*, WASH. POST (May 9, 2019, 4:40 PM), https://www.washingtonpost.com/sports/2019/05/09/nba-commissioner-adam-silver-days-one-and-done-players-will-be-over-soon/ [https://perma.cc/6X8A-RKPA] (stating that the one-and-done rule of the NBA is likely to soon change to once again allow 18-year-olds to enter the NBA without going to college).

80. *See* David Sheldon, *ESports Betting Now Fully Recognized Under Nevada Law, Gov. Sandoval Signs Parimutuel Bill*, CASINO.ORG (May 30, 2017, 9:34 PM), https://www.casino.org/news/esports-betting-now-fully-recognized-under-nevada-law-gov-sandoval-signs-parimutuel-bill/ [https://perma.cc/EN3J-T8GP].

81. S.B. 240, 2017 Leg., 79th Sess. (Nev. 2017).

82. *See id.*

83. *See id.*

84. *See* Jacob Wolf, *Nevada Governor Approves Esports Betting Bill*, ESPN (June 3, 2017, 12:08 AM), https://www.espn.com/sports-betting/story/_/id/19512317/chalk-nevada-governor-approves-esports-betting-bill [https://perma.cc/63NM-63Z6]; *see also Nevada Governor Passes "Esports Betting Bill"*, MCV (May 30, 2017), https://mcvuk.com/business-news/Nevada-governer-passes-esports-betting-bill/ [https://perma.cc/HBA6-MFCH].

85. *Id.*

86. *See* Minutes of the Meeting of the Assembly Committee on Judiciary, 81st Sess. (May 25, 2021), leg.state.nv.us/Session/81st2021/Minutes/Assembly/JUD/Final/1286.pdf [https://perma.cc/AEE6-US32].

Arena.[87] The combination of these factors, together with the prior green light given for sportsbooks to accept esports bets, demonstrated why the public was so quick to call this "the esports betting bill."[88] Nonetheless, in the last three years, various states have followed New Jersey's example and enacted legislation containing esports-specific verbiage allowing betting on esport competitions.[89]

IV. THE CALL OF DUTY: CONSIDERATIONS AND PROPOSALS

In light of the current trends of esports betting in the United States, it is important for states to find an effective way to regulate the market. Currently, thirty-six states have regulated full-scale sports betting.[90] While some of these states expressly prohibit esports betting,[91] many of them lack clarity as to whether esports betting is permitted.[92]

87. Dejan Zalik, *Nevada Governor Signs Bill Legalizing Pari-Mutuel Wagering on Esports Events*, THE LINES, https://www.thelines.com/nevada-esports-betting-law/ [https://perma.cc/MLE2-TALP] (Jan. 22, 2018) ("Ideally, you would have people coming from all over the globe to compete, with people paying to come in and bet on that event like you would a sportsbook.").

88. *See supra* note 84.

89. *See* S.B. 1797, 55th Leg., 1st Sess. (Ariz. 2021) (defining "sports event" as "a professional sport or athletic event, a collegiate sport or athletic event, a motor race event, an e-sport event or an Olympic event"); H.B. 19-1327, 2019 Sess. (Colo. 2019) (defining a "prohibited sports event," in part as, "a video game that is not sanctioned by a sports governing body as an electronic competition"); H.B. 6451 (Conn. 2021) (defining "sporting event" as including an "e-sports event, except for those in which one of the participants is a Connecticut intercollegiate team and the event is not in connection with a permitted intercollegiate tournament"); S.B. 247, 2021 Reg. Sess. (La. 2021) (defining "sporting event" as "any competitive video game or other electronic sports event"); H.B. 940 (Md. 2021) (defining "sporting event" as "an electronic sports or video game competition in which each participant is at least 18 years old"); L.B. 561 (Neb. 2021) (stating that an authorized sporting event includes "an electronic sport, or a simulated game); H.B. 1 (Tenn. 2020) (defining "sporting event" as "any professional sporting or athletic event, including motorsports and e-sports"); S.B. 384 (Va. 2020) (defining "sports event" as including "electronic sports event, or competitive video game event"); H.B. 2638, 66th Leg., Reg. Sess. (Wash. 2020) (defining "sports wagering" as the business of accepting wagers on " an electronic sports or esports competition or event"); H.B. 0133, 66th Leg. General Sess. (Wyo. 2021) (defining "sporting event" as including "electronic sports").

90. *See* Will Yakowicz, *Where is Sports Betting Legal? A Guide to All 50 States*, FORBES (Jan. 9, 2023, 9:56 AM), https://www.forbes.com/sites/willyakowicz/2023/01/09/where-is-sports-betting-legal-america-2022/?sh=2d9011cc386b [https://perma.cc/ZY46-5G9K].

91. IND. CODE § 4-31-2-20.9 (2019) ("Sports wagering . . . does not include . . . wagering on e-sports.").

92. *See* MISS. CODE ANN. § 75-76-5 (2019); *see also* 2021 Gaming Compact Between the Seminole Tribe of Florida and the State of Florida, FLA. GOV'T, 14 ¶ CC (Apr. 23, 2021), https://www.flgov.com/wp-content/uploads/pdfs/2021%20Gaming%20Compact.pdf [https://perma.cc/345C-7ZVE].

A. *Regulatory Risks*

Increased esports betting comes with major implications. Before discussing some of the significant regulatory risks, it is important to understand some the basic difficulties with legalizing and regulating esports betting. For starters, esports is a relatively new phenomenon, and, therefore, many sportsbooks lack sufficient data on the performance of esports teams and players that would be used to establish the odds for bets. Another difficulty is that, unlike traditional sports, esports has no governing body to uphold the integrity of the game. Furthermore, when analyzing the few regulated sportsbooks in the United States that have taken bets on esports, we have seen that the cost-benefit of accepting esports bets is not great due to the lack of volume of bets placed. Essentially, because the average bet on esports is proportionately low compared to traditional sports, there is not much room for profit.

Regarding regulatory risks, arguably the most talked about concern is the involvement of minors in underage esports betting.[93] In 2016, it was reported that approximately 80% of global esports enthusiasts were anywhere between ten through thirty-five years old, with about 27% being between the ages of ten years old through twenty years old.[94] However, while most people associate esports with younger audiences, the median age of American esports viewers is twenty-eight years old.[95] Nonetheless, because of the reputation that video games have, protecting minors will always be of great importance. Additionally, addiction to gambling is another considerable risk that comes with legalizing esports betting. The issue is exacerbated because many people no longer believe gambling is morally wrong.[96] As Rodger Svendsen, former director of the Minnesota Compulsive Gambling Hotline stated, "[w]e're working with the first generation that has been raised when gambling has been seen as a positive thing."[97] One need only explore the controversy surrounding

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93. *See* Aaron Swerdlow & Uriah Tagle, *Legalized Gambling Could Have Major Implications for Esports*, VENTUREBEAT (Sept. 2, 2018, 7:15 AM), https://venturebeat.com/2018/09/02/legalized-gambling-could-have-major-implications-for-esports/ [https://perma.cc/S56P-A5GH].

94. *Id.*

95. *See* Eoin "SilentEcho" Bathurst, *The Average Age of Esports Viewers is Higher than You May Think, Says GameScape from Interpret, LLC*, THE ESPORTS OBSERVER (Feb. 24, 2017), https://esportsobserver.com/average-age-esports-viewers-gamescape/ [https://perma.cc/UNL5-STQV].

96. Stephen F. Ross et al., *Reform of Sports Gambling in the United States: Lessons from Down Under*, 5 ARIZ. ST. SPORTS & ENT. L.J. 6, 12 (2015).

97. Tim Layden, *Bettor Education Gambling is the Dirty Little Secret on College Campuses, Where it's Rampant and Prospering*, SPORTS ILLUSTRATED (Apr. 3, 1995), https://www.si.com/vault/1995/04/03/8093095/bettor-education-gambling-is-the-dirty-little-secret-on-college-campuses-where-its-rampant-and-prospering-this-si-special-report-reveals-

loot boxes and skin betting to get a better idea of the dangers of stigmatizing gambling for minors.[98] For example, a thirteen-year-old boy was sent to rehab after using his grandparents' credit card without their permission or knowledge to wager on skins, and the boy eventually lost thousands of dollars.[99] Finally, the last major fear that legislators have regarding esports betting is match-fixing in professional competitions.[100] In spite of all the challenges concerning regulating esports betting, it is clear that none of these challenges are entirely new.

B. *Crossover with Traditional Sports*

Just like esports, traditional sports share many of the same risks and obstacles regarding betting. Many of the same individuals watching esports are likely to be avid sports fans as well.[101] In fact, a 2016 report showed that "NBA fans are 114% more likely than the general population to be esports fans."[102] Furthermore, experts in gambling addiction have warned about a predicted rise in gambling addiction due to the decision in *Murphy*.[103] In other words, the fear of gambling addiction is evident regardless of whether it involves solely traditional sports or esports. Lastly, there is no shortage of match-fixing scandals or integrity concerns in the history of sports. One of the biggest scandals occurred not long ago when NBA referee Tim Donaghy was arrested for betting on his own

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how-easy-it-is-for-students-to-bet-with-a-bookie-become-consumed-with-wagering-and-get-ove [https://perma.cc/U5F9-MCYF].

98. *See* Shaun Assael, *Skin in the Game*, ESPN (Jan. 20, 2017, 3:00 AM), http://www.espn.com/espn/feature/story/_/id/18510975/how-counter-strike-turned-teenager- [https://perma.cc/8JCD-GKRM] ("No extensive research has been done into skins gambling, much less how many of those who are hooked on it are minors. But Counter-Strike's popularity with kids undoubtedly puts many of them at risk.").

99. *See* Caroline McLeod, *More Than Skin Deep: Why It's Time to Go 'All-In' on Skin Gambling Regulation*, SSRN (Dec. 6, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3159661 [https://perma.cc/VTE3-9UAB].

100. *See supra* Part I.A.

101. *See Why Sports & Brands Want to be in Esports*, NEWZOO (Oct. 2016), http://resources.newzoo.com/hubfs/Reports/NEWZOO_Why_Sports_and_Brands_Want_to_Be_in_Esports.1.0.pdf?hsCtaTracking=b3a0262d-a819-40f3-a376-bfa571921bae%7Ca1594602-aff9-42bd-a6c5-118769c08d2a [https://perma.cc/G4MW-N85M].

102. Stephen Masters, *Year in Sports Media Report*, NIELSEN (2016), https://www.nielsen.com/wp-content/uploads/sites/2/2019/04/nielsen-year-in-sports-media-2016.pdf [https://perma.cc/VGP3-9KFB].

103. Josh Peter, *Sports Betting Ruling Will Lead to Costly Rise in Gambling Addiction, Experts Warn*, USA TODAY (May 14, 2018, 3:57 PM), https://www.usatoday.com/story/sports/2018/05/14/sports-betting-rise-gambling-addiction/608989002/ [https://perma.cc/TJ5E-HALE] ("You've got people today that would never, ever gamble with a bookmaker and never do anything illegal, and now you're making it legal . . . . They're going to be all over this sports betting thing.").

matches.[104] Even more recently, the Houston Astros illegally used a camera system to steal signs from opposing teams throughout their 2017 championship season.[105] In sum, the fears encompassing traditional sports betting are very similar to those encompassing esports betting.

C. *The Solution*

While no perfect solution exists, many practices may be helpful. One of the preliminary concerns that must be addressed is whether esports falls under the definition of "sports gambling." It is important to note that while states can outright ban esports betting, it would be a better practice to instead find ways to properly regulate it. Esports betting is already happening on the black market, and there are no signs of it stopping.[106] By taking the time to regulate and monitor esports betting, states can ensure a safer betting environment and possibly profit from increased tax revenue.

Esports betting uses the exact same type of odds and bets as traditional sports betting. While creating strict betting lines is no easy task and requires a significant amount of data, many sportsbooks keep a lookout on other sportsbooks to get an idea of where to draw the lines.[107] Considering that there are already many sportsbooks offering bets on esports, it appears that the data needed to establish accurate betting lines is not as scant as many believe it to be.

Regarding the fact that esports has no governing body, a possible solution would be to limit esports betting to specific leagues and tournaments. For example, the Call of Duty League and the Overwatch League are both regulated by Activision Blizzard and have become the

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104. *See* Scott Eden, *How Former Ref Tim Donaghy Conspired to Fix NBA Games*, ESPN (Feb. 19, 2019, 7:00 AM), https://www.espn.com/nba/story/_/id/25980368/how-former-ref-tim-donaghy-conspired-fix-nba-games [https://perma.cc/4TDS-SD92]; *Untold: Operation Flagrant Foul*, NETFLIX (2022) (documenting the 2007 gambling scandal where Tim Donaghy would place bets on the games he would officiate).

105. *See* Robert D. Manfred, Jr., *Statement of the Commissioner*, MLB (Jan. 13, 2020), https://img.mlbstatic.com/mlb-images/image/upload/mlb/cglrhmlrwwbkacty27l7.pdf [https://perma.cc/NR3X-2ZXU]; *see also* Darren Rovell, *Daily Fantasy Player Files Lawsuit Against MLB Over Astros Scandal*, ACTION NETWORK (Jan. 24, 2020, 11:51 AM), https://www.actionnetwork.com/mlb/mlb-lawsuit-astros-red-sox-scandal-daily-fantasy-draftkings?utm_source=twitter&utm_medium=social&utm_campaign=darrenrovell [https://perma.cc/3CMX-HMWY] (reporting that a daily fantasy player has filed a class action lawsuit alleging that the MLB should be held responsible for the cheating scandal because it compromised the statistics which determined whether fans won or lost money on their bets).

106. *See* Conditt, *supra* note 26 ("The US is one of the world's largest esports black markets.").

107. *See* Chris Yuscavage, *Everything You Need to Know About How Betting Lines Work*, COMPLEX (Jan. 30, 2015), https://www.complex.com/sports/2015/01/how-betting-lines-work/ [https://perma.cc/29T4-C5MQ].

next step in converting esports into the traditional sports model.[108] While having the game publisher regulate its own league brings on additional antitrust issues,[109] these leagues are still arguably the most primed for esports betting. Once more governance is in place, sportsbooks may then expand their coverage without much fear. This, in turn, would open the door for more people to bet on the esports they enjoy and, therefore, likely increase the volume of esports bets.

Nonetheless, in order to properly combat against the regulatory risks, lawmakers should also look to other industries for guidance. Minimum-age verification measures have frequently been used as a way to protect minors from accessing adult content.[110] However, this measure alone would likely not be sufficient to deter minors from betting on esports. Along with minimum-age verifications, states should set the minimum age to engage in esports betting at twenty-one.[111] Doing so would not only reduce the risk of underage betting, but would also reduce the risk of compulsive betting.[112] This age restriction recognizes that "college-aged males are the demographic group most likely to suffer from pathological gambling behaviors."[113] Another possible solution would be to cap the amount of money that any gambling operator may collect from any individual over a monthly period.[114] Integrating such a cap on an individual's monthly betting limit would functionally assist in mitigating the dangers of compulsive betting. By incorporating these safeguards, states can get one step closer to effectively regulating esports betting.

In addition, states should direct betting operators to provide warnings for esports bettors detailing the risks associated with the practice. Moreover, the esports industry should also look into regulating itself. For example, the Call of Duty League has rules set in place prohibiting participants from gambling on the outcome of any match, whether the

108. *See* Olivia Richman, *Activision Blizzard Earnings Call Spells Trouble for OWL, CDL*, ESPORTS ILLUSTRATED (May 6, 2023, 3:11 PM), https://esi.si.com/call-of-duty/activision-blizzard-earnings-call-spells-trouble-for-owl-cdl [https://perma.cc/YYC3-5RYX].

109. *See generally* Michael Arin, Note, *Competing Competitions: Anticompetitive Conduct by Publisher-Controlled Esports Leagues*, 104 MINN. L. REV. 1585 (2020) (discussing that publisher-controller esports leagues can manipulate their control over video game copyright protections and engage in anticompetitive practices).

110. *See* Matthew R. Yost, *Video Game Gambling: Too Big a Bet for New Jersey*, 70 RUTGERS U. L. REV. 335, 362 (2017) (stating that many pornographic websites use age verification measures prior to allowing access to their main page).

111. *See* W. VA. CODE § 29-22D-15(a) (2018) (providing an example of a state's sports wagering statute setting the minimum age to bet at twenty-one).

112. *See* Edelman, *supra* note 16, at 338.

113. *Id.*

114. Edelman, *supra* note 16, at 337.

individual is playing in that match or not.[115] But because some gamers may not be discouraged by mere rules, esports leagues should also implement anti-fraud and collusion detection systems.[116] "The ease with which esports leagues can adopt new gambling policies and anti-fraud policies combats the policy motivation behind regulating gambling."[117] Furthermore, these leagues should follow in the path of traditional sports and attempt to work with lawmakers in order for the leagues to have a right to restrict certain bets that they deem to be more susceptible to manipulation.[118] For instance, leagues may choose to allow betting on the outcome of a match or tournament but restrict bets on which player will get the first kill. Notably, if lawmakers decide to work with esports leagues, it is crucial that they do not specifically delegate any regulatory power to these leagues but should rather mandate league cooperation. Ultimately, following all of these practices is essential in providing a comprehensive and regulated betting space, ensuring that the least amount of harm occurs.

CONCLUSION

The United States Supreme Court's decision in *Murphy* changed the way America views sports gambling. Nonetheless, the Court's decision in *Murphy* did not simply legalize sports betting.[119] Rather, it granted states the ability to enact their own sports betting legislation.[120] This decision caused a ripple effect that has recently begun to reach the world of esports. As esports continues to grow in popularity and exposure, it has become increasingly evident that esports presents a lucrative monetization opportunity for the gambling industry. While wagering on esports is an exciting new market, work must be done in order to effectively regulate it. Because esports is relatively in its infancy compared to traditional sports, there are major concerns regarding corruption and controversy. However, many of these concerns overlap with the concerns surrounding traditional sports betting. Therefore, to

115. *See Tournament Rules*, CALL OF DUTY CHALLENGERS (May 5, 2023), https://www.callofduty.com/content/dam/atvi/callofduty/esports-new/2023-cdl-programs/challengers_2023_season_tournament_rules_v1-1.pdf [https://perma.cc/89KB-NUW6].

116. *See* Dobill, *supra* note 32, at 167.

117. *Id.*

118. *See* Ryan M. Rodenberg, *Due Process, Private Nondelegation Doctrine, and the Regulation of Sports Betting*, 9 U. NEV. L.V. GAMING L.J. 99, 112–15 (2019) (explaining that the NFL, NBA, and MLB all submitted statements proposing that they be able to restrict wagering on their own events).

119. Murphy, 138 S. Ct. at 1484 ("The legalization of sports gambling requires an important policy choice, but the choice is not ours to make.").

120. *Id.* at 1484–85 ("The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.").

capitalize on the burgeoning growth of esports, both the states and the esports industry should work together to successfully regulate esports betting.

Because esports should fall under the category of sports, states must begin by including esports-specific verbiage in their legislation. Regarding the actual regulation of esports betting, states should set the minimum age of betting on esports at twenty-one. Additionally, standard regulatory betting protocols that are already in place should be followed. This includes using minimum-age verification measures and geo-blocking technology to make sure betting is available only where it is legal. As for self-regulation, the esports industry should increase its monitoring of players and team affiliates to make sure no corruption occurs.

If esports betting continues to be ignored in this new transitional gambling reality we live in, society will continue to see a rise in the dangers associated with unregulated esports betting. Individuals will continue to bet money through illegal black markets leaving them vulnerable to unsecure funds, digital security, and a lack of legal protections.[121] States will continue to see a rise in gambling addictions, especially among young adults. Minors will continue to lack the safety measures that so desperately are needed. And esports will continue to see cases of corruption and match-fixing thus leading to esports being considered a more suspect domain. Ultimately, for esports betting to function effectively, the risks and obstacles outline in this Article must be tackled head on. In a world where the law is consistently slow to keep up with technology, the time is now to step up and regulate esports betting.

121. *See Illegal Sports Betting*, AMERICAN GAMING ASS'N (May 31, 2022), https://www.americangaming.org/illegal-sports-betting/ [https://perma.cc/8Q36-ZKA4] ("While legal, regulated sportsbooks uphold key principles of responsible gaming, protection of consumer funds, data privacy, and more, offshore books do nothing to protect their patrons.").

THE END OF AN ERROR: NO MORE MISCLASSIFYING UNIVERSITY EMPLOYEES AS MERE STUDENT-ATHLETES

Nathaniel E. Otto[*]

Abstract

Intercollegiate athletics is big business. The National Collegiate Athletic Association (NCAA), its member universities, and athletic administrators are well compensated for their efforts in making sure that the business runs smoothly. Historically, the athletes on the field, pitch, diamond, or hardwood have been left out of the discussion regarding how to divvy up the eleven-figure fruits of their labor. However, as college student-athletes being dubbed employees appears to be imminent, so too is their opportunity to finally be paid their fair share.

This Note analyzes the ramifications of college athletes achieving employee status. It discusses federal labor law and how it would likely govern the future relationship between athletes and their respective schools. Finally, this Note weighs the positive and negative aspects of college athletes being employees under the law and, ultimately, finds the NCAA's amateurism model in its death throes of relevancy.

* 2024 J.D. Candidate at the University of Florida Levin College of Law, n.otto@ufl.edu. I want to thank the entire Florida Entertainment & Sports Law Review (FESLR) team for their helpful comments and suggestions throughout the publication process, and the University of Florida Levin College of Law for providing FESLR a platform. I also want to thank Professor Paige Snelgro, whose guidance made this Note possible. Finally, I want to thank my beautiful wife, Dr. Alexandra Otto, for her tremendous support throughout my law school career and beyond.

INTRODUCTION

On September 29, 2021, the National Labor Relations Board's (NLRB or the Board) General Counsel, Jennifer Abruzzo, issued a memorandum (the Memo) that served as both an invitation and a warning.[1] Abruzzo opened by denouncing the term "student-athlete" and, instead, she declared that classifying these "Players at Academic Institutions" (Players) as "employees" is not only more accurate, but legally correct.[2] The Memo reads as an invitation to current and future Players—and plaintiff's attorneys—to challenge the denial of workplace protections by universities and the National Collegiate Athletic Association (NCAA) going forward. Additionally, Abruzzo provided a thinly veiled warning to the NCAA and its member schools that the Players' "employee" classification is supported by the statutory language of the National Labor Relations Act (NLRA or the Act).[3]

The Board's legal position concerning Players as employees is rooted in the definition of "employee" that the Supreme Court of the United States (Supreme Court) has interpreted as following the common law rule of agency.[4] Under the common law, an employee is "one who performs services for another, under the other's control or right of control, and does so in return for payment."[5] The Board's attribution of this foundational definition to Players has been bolstered by recent victories at the Supreme Court, a growing distrust in the ideal of amateurism in college sports, and the NCAA's hands-off approach to Name, Image, and Likeness (NIL) guideline enforcement.[6] As of December 2022, the NLRB's Los Angeles Region had plans to pursue "unfair labor practice charges against [the University of Southern California], the [Pacific-12 Conference] and the NCAA as single and joint employers of [NCAA Division I Football Bowl

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1. *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, NAT'L LAB. RELS. BD. (Sept. 29, 2021), https://www.nlrb.gov/ news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of [https://perma.cc/DCA7-T94A].

2. Memorandum from Jennifer A. Abruzzo, Gen. Couns., Nat'l Lab. Rel, Bd. To All Regional Directors, Officers-in-Charge, and Resident Officers (Sept. 20, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of [https://perma.cc/DCA7-T94A].

3. *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, *supra* note 1.

4. NLRB v. Town & Country Elec., 516 U.S. 85, 94 (1995).

5. Joseph Peluso, Note, *Caught in the Wave of Change: Why Scholarship Student-Athletes Should Be Allowed to Unionize*, 17 DUQ. BUS. L.J. 259, 262 (2015).

6. *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 580 U.S. 815, 815 (2016); NCAA v. Alston, 141 S. Ct. 2141, 2141–69 (2021); Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NAT'L COLLEGIATE ATHLETIC ASS'N (Oct. 26, 2022, 1:21 PM), https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx [https://perma.cc/X7T6-KMUP].

Subdivision] players and Division I men's and women's basketball players."[7] These past triumphs and upstarted court battles are compounded by the seemingly endless cession of control by the NCAA to Power Five conferences as their autonomy increases with the ballooning values of media rights deals.[8]

In *NCAA v. Alston*—which dealt with the NCAA limiting education-related benefits for student-athletes—Justice Kavanaugh, in his concurrence, admonished the NCAA for acting outside the bounds of antitrust law when he concluded that, "[t]he NCAA is not above the law."[9] By all accounts, the NLRB, the Supreme Court, and Players across the country appear to be in favor of college athletes being dubbed "employees." As this pay-for-play model of college athletics comes to fruition, there must be some discussion on what the legal ramifications are for the Players, the NCAA, and the partner universities, including: (1) Players' ability to collectively bargain or unionize under Sections 7 and 8 of the NLRA;[10] (2) compliance with equality requirements under Title IX of the Education Amendments of 1972 (Title IX);[11] and (3) the continued existence or future need for amateurism and the NCAA.[12]

I. THE HISTORICAL BACKGROUND OF UNIONIZATION ATTEMPTS IN COLLEGE ATHLETICS

Critics of the NCAA claim that it created the term "student-athlete" in the 1950s with the primary purposed of depriving Players of workplace protections.[13] To this day, the NCAA maintains that the participation of Players in collegiate athletics is all a part of the overall educational experience of attending college and should not be treated as the driving

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7. Ross Dellenger, *Significant NLRB Move Will Aid Pursuit of College Athletes Becoming Employees*, SPORTS ILLUSTRATED (Dec. 15, 2022), https://www.si.com/college/2022/12/15/nlrb-college-athletes-employees-pursuit [https://perma.cc/C73N-9RTJ].

8. *Here's a Look at All the Current Conference TV Deals*, ON3 (Aug. 2, 2021), https://www.on3.com/news/conference-tv-deals-current-status-college-football/ [https://perma.cc/7UBY-8NRF].

9. NCAA v. Alston, 141 S. Ct. 2141, 2167–69 (2021) (Kavanaugh, J., concurring).

10. *Requirements Under Title IX of the Education Amendments of 1972*, U.S. DEP'T OF EDUC. OFF. FOR CIVIL RTS. (Jan. 10, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/interath.html#:~:text=Title%20IX%20of%20the%20Education%20Amendments%20of%201972%20(20%20U.S.C.,therefore%20covered%20by%20this%20law [https://perma.cc/7VGB-Q5XC].

11. *Interfering with Employee Rights (Section 7 & 8(a)(1))*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1 [https://perma.cc/KLT4-9WPZ].

12. *Payment From Sports Team*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://fs.ncaa.org/Docs/eligibility_center/ECMIP/Amateurism_Certification/Payment_from_team.pdf [https://perma.cc/N4GY-X3FG] (Apr. 2019).

13. *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, *supra* note 1.

force for doing so.[14] Counterintuitively, the NCAA allows for high school athletes to be compensated by club or travel teams before their matriculation to the college ranks, but forbids these athletes from gaining any monetary benefit from their participation on athletic teams at the college level.[15] Admittedly, the NCAA is not in an enviable position. The NCAA is charged with the creation, promulgation, oversight, and enforcement of rules governing over 1,000 member universities and nearly half a million Players across Division I, II, and III athletics—a tall task for which they are handsomely rewarded.[16] The President of the NCAA, Mark Emmert, was reportedly paid a total of $2.99 million in 2020, while the organization simultaneously burned over $52 million in legal fees defending, and losing, the aforementioned *Alston* case at the Supreme Court.[17] The good news for the NCAA is that, as a 501(c)(3) "charitable organization," it is provided tax exempt status, meaning it does not have to share any of its total reported $1.1 billion revenue with Players or the federal government.[18]

In early 2014—nearly eight years before Abruzzo published the Memo denouncing the term "student-athlete" and calling for a proper classification of collegiate athletes as employees—the Northwestern University (Northwestern) football team made a valiant, albeit failed, attempt at unionization.[19] The players rallied around the team's then starting quarterback and team captain, Kain Colter, whose primary objective for achieving unionization was to provide access to long-term healthcare for college athletes.[20] Northwestern, as a private university, fell under the legal framework of the NLRB as opposed to state law

14. Anthony W. Miller, *NCAA Division I Athletics: Amateurism and Exploitation*, THE SPORT J. (Jan. 3, 2012), https://thesportjournal.org/article/ncaa-division-i-athletics-amateurism-and-exploitation/ [https://perma.cc/M5FC-QVH4].

15. *Payment From Sports Team*, *supra* note 12.

16. *The Differences Between NCAA Divisions*, NCSA COLL. RECRUITING, https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions [https://perma.cc/CB2A-VGP7].

17. Amanda Christovitch, *Tax Returns Reveal Mark Emmert, Coach K Paydays and NCAA Legal Fees*, FRONT OFFICE SPORTS (May 17, 2022, 4:33 PM), https://frontofficesports.com/tax-returns-reveal-mark-emmert-coach-k-paydays-and-ncaa-legal-fees/#:~:text=The%20NCAA%20reported%20%242.99%20million,%2452%20million%20in%20legal%20fees [https://perma.cc/7794-VELN].

18. *Id.*; John D. Colombo, *The NCAA, Tax Exemption and College Athletics*, 210 U. ILL. L. REV. 109, 112 (2010).

19. Joe Nocera and Ben Strauss, *Fate of the Union: How Northwestern Football Union Nearly Came to Be*, SPORTS ILLUSTRATED (Feb. 24, 2016), https://www.si.com/college/2016/02/24/northwestern-union-case-book-indentured [https://perma.cc/9A7X-HU5A].

20. *Id.*

concerning labor disputes.[21] Following the establishment of a partnership with the United Steelworkers Political Action Committee, which agreed to handle all legal disputes on behalf of the Players, Colter obtained signed union cards from thirty percent of the team.[22] Then, Colter made his case to the NLRB regional office in Chicago.[23] This NLRB office ultimately found for the players after considering the total number of hours players spent on football-related activities, which far exceeded any academic studies.[24] Northwestern would go on to appeal the decision of the regional board to the full NLRB in Washington D.C. In August 2015, the five-member board unanimously decided not to exercise jurisdiction over the issue of Players as employees. Thus, "[t]he status quo reigned,"[25] ending the first significant attempt by Players to form a union within the confines of the NCAA and college athletics.

In July 2022, another Big Ten Conference (Big Ten) football program looked to continue the work that Northwestern had started years before. Bolstered by the new college athletics landscape that allowed Players to financially benefit from the monetization of their individual NIL, the Pennsylvania State University (Penn State) football team held a secret meeting.[26] The meeting was called by then starting quarterback Sean Clifford, during which, he planned to introduce Jason Stahl, the man behind the newly formed pro-player group called the College Football Player Association.[27] Clifford "smuggled" Stahl into the team facility to speak with players about the benefits of forcing Big Ten leadership to discuss collectively bargained rights and benefits that Stahl felt players should be afforded.[28] Unfortunately, an assistant strength and conditioning coach of the Nittany Lions stumbled upon the meeting in its waning minutes and shared what he saw with the athletic department's top brass, which created some backlash for Clifford.[29] Despite the legal foundation that the players stood upon, they quickly distanced themselves from any mention of unionization or collective bargaining, likely in an

21. *Id.* (Below we discuss the difficulty of unionizing across the NCAA member schools, some of which are public universities and others that are private, and how this legal landscape differs based on which law governs).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Dennis Dodd, *College Football Players Group Presentation at Penn State Included Unionization Adoption, Document Shows*, CBS SPORTS (July 25, 2022, 3:57 PM), https://www.cbssports.com/college-football/news/college-football-players-group-presentation-at-penn-state-included-unionization-option-document-shows/ [https://perma.cc/2LSU-L3T4].

27. *Id.*

28. *Id.*

29. *Id.*

attempt to save their collegiate playing careers.[30] While the Penn State football team's attempt at self-organization was short-lived—having failed to reach near the level of national significance that Northwestern's had in 2014—the possibility of Players receiving some form of compensation beyond scholarship funding felt closer to a reality.

Should the successful establishment of a collegiate players association with bargaining powers come to pass, the dollars paid out through broadcasting and media rights agreements would comprise the largest pile of money to be divvied up as part of this additional compensation. In August 2022, the Big Ten announced its newest broadcasting and media rights deal, cementing it as the highest-earning sports conference across college athletics.[31] The landmark agreement married the Big Ten to Fox/FS1, CBS, NBC, and The Big Ten Network through the 2029–30 academic year.[32] The seven-year contract term is reportedly worth more than $8 billion to the Big Ten and its fourteen member schools.[33] This total will be divided amongst sixteen schools once the University of Southern California (USC) and University of California, Los Angeles join the Big Ten ranks in 2024.[34] Each of the other Power Five athletic conferences are similarly situated. The Southeastern Conference (SEC) recently signed a 10-year $3 billion exclusive broadcasting deal with Disney and the Entertainment and Sports Programming Network (ESPN).[35] The Big 12 Conference's (Big 12) media rights are worth $2.28 billion across a six-year agreement with ESPN and Fox Sports.[36] The Pacific-12 Conference (Pac-12) is nearing the end of a 12-year deal with Fox and ESPN that has earned the conference about $21 million annually.[37] Finally, the Atlantic Coast Conference (ACC) currently holds a 20-year deal with ESPN that earns each of its fourteen member schools $17 million annually.[38] Clearly, college athletics is big business. Unfortunately, the athletes on the field, hardwood, or pitch—the driving forces behind the value of these media rights deals that make them so

30. *Id.*

31. Nicole Auerbach, *Big Ten Announces TV Rights Deals Totaling Over $8 Billion with Fox, CBS, and NBC*, THE ATHLETIC (Aug. 18, 2022), https://theathletic.com/3518414/2022/08/18/big-ten-tv-deal-details-rights/ [https://perma.cc/SMT7-M8WR].

32. *Id.*

33. *Id.*

34. *Id.*

35. *SEC Reaches $3 Billion Deal with Disney, Drawing CBS Ties Towards an End*, N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/12/10/sports/ncaafootball/sec-disney-deal.html [https://perma.cc/AMW8-N8BA].

36. Michael Smith and John Ourand, *Big 12 Scores Big Win by Renewing Media Rights Deal with ESPN, Fox*, SPORTS BUS. J. (Oct. 30, 2022), https://www.sportsbusinessjournal.com/SB-Blogs/Breaking-News/2022/10/Big-12-renews-media-deal-ESPN-Fox.aspx [https://perma.cc/RP9M-SREN].

37. *Here's a Look at All the Current Conference TV Deals*, *supra* note 8.

38. *Id.*

lucrative to universities and sought after by broadcasters—receive none of it. But is dubbing Players "employees" the right answer, or do the negative results outweigh the benefits?

II. "EMPLOYEE" STATUS IMPLEMENTATION AND ITS RAMIFICATIONS

A. *Unionization and Collective Bargaining*

The NCAA was deliberate and calculated when they introduced the idea and legal framework of the "student-athlete."[39] Their goal was avoidance—the avoidance of workplace protections allowed under the NLRA.[40] Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[41] Section 8(a)(1) of the Act reinforces these rights by prohibiting an employer from "interfere[ing] with, restrain[ing], or coerce[ing] employees in the exercise of the rights guaranteed in Section 7."[42] Additionally, students and interns have historically been excluded from coverage under the Fair Labor and Standards Act (FLSA), but following their classification as employees of the university, Players would be afforded the right to bargain for FLSA benefits as well.[43] This coverage, combined with the Players' rights under the NLRA, would allow them to collectively bargain for overtime premiums, wage and hour limitations, and off-the-clock work payment.[44]

While the unionization effort of Players is now imminently possible, a major hurdle arises concerning the practicality of such a decision. As mentioned above, in the case of Northwestern, the fact that some colleges and universities are private entities while others exist as public state institutions poses a difficulty in maintaining uniformity in rulings.[45] In order to circumvent this apparent blockade on the potential protections provided by the NLRA to all Players, the Memo contains an important message in its final footnote.[46] In Footnote 34, Abruzzo wrote, "[b]ecause [Players] perform services for, and subject to the control of the NCAA

39. *See NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, *supra* note 1.

40. *Id.*

41. National Labor Relations Act § 7, 29 U.S.C. § 157.

42. National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1).

43. Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1141–42 (9th Cir. 2017).

44. *Id.*

45. Nocera and Strauss, *supra* note 19 (describing how a university's private or public designation dictates the body of law that the university operates under, with private universities operating under the National Labor Relations Board and public universities operating under the applicable state law).

46. Memorandum from Jennifer A. Abruzzo, *supra* note 2.

and their athletic conference, in addition to their college or university, in appropriate circumstances I will consider pursuing a joint employer theory of liability."[47] The idea and application of joint employer coverage in professional sports is not new, as it is recognized across professional American sports leagues including the National Football League (NFL), the National Basketball Association (NBA), Major League Baseball (MLB), and the National Hockey League (NHL).[48] Courts have developed a number of tests that aid in determining the presence of a joint employer relationship that often rely heavily on the element of control.[49] The federal law that outlines a joint employment relationship, 29 CFR § 825.106(a), reads as follows:

> Where the employee performs work which simultaneously benefits two or more employers . . . a joint employment relationship generally will be considered to exist in situations such as: . . . (3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.[50]

With this framework in mind, it is not farfetched to imagine a court or a regional office of the NLRB finding that a college athlete provides simultaneous benefit to the NCAA, the member university to which he/she attends, and the athletic conference to which that university belongs.

The joint employer theory was given new life in December 2022, when the NLRB's Los Angeles Region agreed that a suit brought by the National College Players Association (NCPA) and its Executive Director, Ramogi Huma, on behalf of football and basketball athletes at USC, had merit.[51] The NCPA filed suit against USC, the Pac-12, and the NCAA, claiming unfair labor practices arguing that Players are employees of not only USC, but also that the Pac-12 and the NCAA should also be

47. *Id.*

48. Marc Edelman, *The Future of College Athlete Player Unions Lies in an NLRB Memo Footnote*, FORBES (Oct. 4, 2021, 9:00 AM), https://www.forbes.com/sites/marcedelman/2021/10/04/the-future-of-college-athlete-players-unions-lies-in-an-nlrb-memo-footnote/?sh=445cc4b818ce [https://perma.cc/542V-NSCX].

49. MARION G. CARIN ET AL., WORK LAW: CASES AND MATERIALS 712 (4th ed. 2020).

50. 29 CFR § 825.106(a)(3).

51. Tom Schad, *Are College Athletes Employees? Case Against USC, Pac-12 and NCAA to Move Forward at NLRB*, USA TODAY (Dec. 15, 2022, 7:09 PM), https://www.usatoday.com/story/sports/college/2022/12/15/national-labor-relations-board-ncaa-pac-12-usc-athletes/10905458002/ [https://perma.cc/ X3ZK-974B].

considered "joint employers."[52] The importance of such a consideration, as briefly mentioned above, allows for athletes attending public colleges or universities to be covered by the NLRA and the NLRA's employee protections by way of the affiliated conference.[53] On May 18, 2023, the NLRB issued an official complaint against USC, the Pac-12, and the NCAA, alleging unfair labor practices under a joint employer theory.[54] This specific complaint applies only to football and basketball players and, if successful, could find these athletes to be designated employees under the NLRA.[55] Hearings regarding pretrial motions and subpoena issues took place on November 7–9, 2023, with testimony to be heard December 18–20, 2023, when college athletes can possibly clear their final hurdle towards employee status en route to unionization.[56]

The recently successful unionization efforts of MLB's minor league players provide a quality blueprint for college athletes.[57] The second-class treatment of minor league baseball players has long been an issue for player advocates. For example, the 2022 Minor League Housing Policy addressed seemingly basic living conditions for these professional athletes. The Policy mandated the provision of housing options "located at a reasonable, commutable distance from the ballpark," and that bedrooms now "must contain a single bed per player" with "no more than two players per bedroom."[58] Up until September 2022, minor league baseball players were essentially barred from collectively bargaining on their own behalf while minor league hockey, basketball, and soccer players each had union representation, thus giving them a seat at the table amongst their top-tier professional counterparts.[59] The decision by MLB

52. *College Athletes Closer to Being 'Joint Employees': NLRB Moves Case Against USC, Pac-12, and NCAA* (Dec. 20, 2022), https://www.natlawreview.com/article/college-athletes-closer-to-being-joint-employees-nlrb-moves-case-against-usc-pac-12 [https://perma.cc/79UD-FDVW].

53. *Id.*

54. Dan Murphy, *National Labor Relations Board Files Complaint for Unfair Labor Practices vs. NCAA, Pac-12, USC*, ESPN (May 18, 2023, 8:46 PM), https://www.espn.com/college-sports/story/_/id/37680838/national-labor-relations-complaint-ncaa-pac-12-usc-unfair-labor-practices [https://perma.cc/994S-YD57].

55. *Id.*

56. *Id.*

57. *Minor Leaguers are Joining the MLBPA: Here's What the Unionization Means*, ESPN (Sept. 14, 2022, 5:20 PM), https://www.espn.com/mlb/story/_/id/34586802/minor-leaguers-joining-mlbpa-here-unionization-means [https://perma.cc/3HLF-2Z4V].

58. Major League Baseball, *MLB to Provide Minor League Player Housing* (Nov. 18, 2021), https://www.milb.com/news/mlb-owners-to-provide-housing-to-minor-league-players-beginning-in-2022 [https://perma.cc/HCY4-DWJ4].

59. *See* Advocates for Minor Leaguers, *So What's the Problem?*, ADVOCATES FOR MINOR LEAGUERS, https://www.advocatesforminorleaguers.com/theproblem [https://perma.cc/N6S5-LY4V].

owners to finally relent regarding unionization of their minor league affiliates follows a significant win by minor leaguers in *Senne v. MLB*.[60]

In *Senne*, a California federal court approved a $185 million settlement for former Miami Marlins player Aaron Senne and fellow retired minor leaguers.[61] The settlement followed an eight-year battle between the opposing sides in a suit that alleged MLB teams violated federal and state minimum-wage and overtime laws in the operations of their minor league affiliates.[62] Prior to this major win for minor leagues, MLB argued that minor league players were seasonal employees which would exempt them from coverage under the FLSA.[63] This outcome provides college athletes with precedent to protect them against similar arguments made by the NCAA or their respective universities. Despite college athletes' newfound ability to unionize, these athletes should consider the tradeoffs associated with entering into a collectively bargained agreement with the NCAA and their universities.

Following their recent victory in *Alston v. NCAA*, Players may not wish to unionize, as it would force them to surrender antitrust rights based on the non-statutory labor exemption under antitrust law.[64] The non-statutory exemption in antitrust law exempts "agreements between and among employers and unions from antitrust liability."[65] Naturally, Player representatives would advocate for a carve out of this exemption regarding agreements made between parties during collective bargaining periods. Should the exemption remain in place, the artificial dampening or capping of compensation and benefits would ultimately fall outside of antitrust law jurisdiction and would diminish the efforts of collective

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60. Jeff Passan, *MLB to Pay $185 Million in Settlement with Minor League Players Over Minimum-Wage and Overtime Allegations*, ESPN (July 15, 2022, 7:02 PM), https://www.espn.com/mlb/story/_/id/34249632/mlb-pay-185-million-settlement-minor-league-players-minimum-wage-allegations [https://perma.cc/YT95-LRSW]. *See generally* Joint Stipulation of Class Settlement and Release, Senne v. Off. of the Comm'r of Baseball (N.D. Cal. 2022), https://www.baseballplayerwagecase.com/admin/api/connectedapps.cms.extensions/asset?id=59c90752-f520-43f6-9c68-4d534b79f151&languageId=1033&inline=true [https://per ma.cc/J62V-K5UC].

61. *Id.*

62. *Id.*

63. *Id.*; *see also* Fair Labor Standards Act § 13(a)(3), 29 C.F.R. 553.32(e) (providing FLSA exemption "for any employee employed by an amusement or recreational establishment if (1) it does not operate for more than 7 months in any calendar year or (2) during the preceding calendar year, its average receipts for any 6 months of such year were not more than 33 1/3 percent of its average receipts for the other 6 months of such year").

64. Edelman, *supra* note 48.

65. *What are the Statutory and Non-Statutory Labor Exemptions to Antitrust Liability?*, BONA LAW (Mar. 10, 2020), https://www.bonalaw.com/insights/legal-resources/what-are-the-statutory-and-non-statutory-labor-exemptions-to-antitrust-liability#:~:text=The%20Non%2DStatutory%20Labor%20Exemption&text=This%20exemption%20flows%20naturally%20from,and%20unions%20from%20antitrust%20liability [https://perma.cc/C72F-BYE4].

bargaining. However, the Sherman Act, which prohibits "every contract, combination, or conspiracy in restraint of trade," is not uniformly applied to every restraint on trade—only those restraints deemed unreasonable.[66] The Supreme Court carves out reasonableness in restraint of trade, which supports the efforts of the collective bargaining process and provides freedom for parties to contract.[67]

In *Brown v. Pro Football*, the Supreme Court discussed the issue of whether, following an impasse in collective bargaining between the NFL, its professional clubs, and the NFL Players Association, the NFL and its team owners were exempt from antitrust liability because they negotiated in good faith.[68] During negotiations, following the expiration of the League's collective-bargaining agreement in 1987, both parties agreed that each club was permitted to establish a "developmental squad."[69] The squad was made up of first-year players who failed to secure a regular season roster spot but would practice with the team and substitute injured players throughout the year.[70] The team owners agreed to pay these developmental squad players $1,000 per week—an offer that was unacceptable to the NFL Players Association.[71] Ultimately, after failing to come to an agreed amount, the owners unilaterally set the salary for developmental players at $1,000, and the Players Association filed this suit claiming that the cap was a violation of the Sherman Act and was an unreasonable restraint on trade.[72] The Court disagreed.[73] They considered the fact that the conduct occurred "during and immediately after" the negotiations and that the decision "grew out of, and was directly related to, the lawful operation of the bargaining process."[74] Additionally, the amount at issue concerned only the parties to the collective-bargaining relationship and "involved a matter that the parties were required to negotiate collectively."[75] The Court held that the non-statutory antitrust exemption applied to the NFL and the team owners as joint employers in this case.[76]

In *NCAA v. Alston*, a similar antitrust suit was leveled against the NCAA and certain member institutions for capping Players' athletic

66. *The Antitrust Laws: Guide to Antitrust*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/X3BX-NH39].

67. *Id.*

68. Brown v. Pro Football, 518 U.S. 231, 233–34 (1996).

69. *Id.* at 234.

70. *Id.*

71. *Id.*

72. *Id.* at 235.

73. *Id*.

74. *Id.* at 250.

75. *Id.*

76. *Id.*

scholarship amounts and placing limitations on "education-related benefits" for "student-athletes."[77] Without touching the issue of compensation Players are afforded through athletic scholarships, the Court struck down limitations on "education-related benefits" that could be provided by schools.[78] Importantly, the NCAA argued that due to the "special characteristics of [its] particular industry," it was properly entitled to a similar antitrust exemption as afforded to MLB and the NFL regarding collective bargaining.[79] The Court disagreed.[80] While it provided the opportunity for Congress to make such a concession for the NCAA in the future, the Court held that, as it currently stood, the only law it had been asked to enforce was the Sherman Act.[81]

Brown and *Alston* provide an important framework for current Players. These cases highlight how important a decision to unionize would be amongst college athletes. Armed with their victory in *Alston*—despite the Court not going as far as classifying Players as employees—and the Memo published by the NLRB, Players are in a much better position to allow the free market to determine their earning potential. Should the Players unionize, the Court would likely treat the NCAA and its member institutions as joint employers of the Players and provide them with protections against Sherman antitrust liability under the non-statutory antitrust exemption used in *Brown*.

B. *Title IX Equity and Future University Financing*

1. Title IX Concerns and Likely Outcomes

A free market system for the compensation of Players as employees of the NCAA and its member institutions—historically known as a pay-for-play model—would pose a host of additional challenges. Chief among them is Title IX.[82] Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance."[83] Collegiate athletic opportunities are an "integral part" of a college or

77. NCAA v. Alston, 141 S. Ct. 2141, 2147 (2021).

78. *Id.*

79. *Id.* at 2160; *see generally* Flood v. Kuhn, 407 U.S. 258 (1972) (explaining the special economic characteristics of the NCAA as a nonprofit organization in relation to the Court previously characterizing the MLB as not engaging in commonly accepted trade or commerce since its business is to provide baseball games for the public).

80. Alston, 141 S. Ct. at 2160; *see generally* Flood v. Kuhn, 407 U.S. 258 (1972).

81. Alston, at 2160; *see generally* Flood, 407 U.S. at 258.

82. *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 10.

83. 20 U.S.C. § 1681(a).

university's educational program and, therefore, are covered by Title IX provisions.[84]

To meet the requirements outlined in the law, scholastic institutions are required to conduct an analysis across three major areas: (1) student interests and abilities; (2) athletic benefits and opportunities; and (3) financial assistance.[85] The implementation of a pay scale for college athletes will affect and disturb each of the three factors the NCAA and its member institutions are required to weigh in creating athletic opportunities on their respective campuses. Immediately, issues arise in compliance and enforcement of such strict federal guidelines when the schools are forced to create equal opportunities for paid employees across sports, which, in most situations, are financial losers for universities.[86] As they now operate, collegiate athletic departments across the country are losing millions of dollars each year—and this is before having to sign paychecks to their incoming recruits and current stars.[87]

The first victim is Title IX's student interests and abilities prong, which mandates that institutions must ensure that both male and female students' interests and abilities be "equally and effectively accommodated."[88] To ensure compliance with this first prong, a governing body must assess a school based on (1) a determination of the athletic interests and abilities of its students; (2) the selection of the sports that are offered; and (3) the levels of competition, including opportunity for team competition.[89] Here, factors to consider are the performance records of both male and female teams, a substantial proportionality of athletic participants per number of males and females enrolled, and a particularity of sport offerings across the sexes.[90] Because Title IX is a federal law that public colleges and universities must abide by, the likely outcome is a major decrease in opportunities for athletic participation. Despite federal funding being poured into NCAA member institution athletic programs, several departments continue to lose money.[91] Likely, the inevitable results of abiding by both Title IX equality requirements and a free market pay-for-play model are continued losses and mass "layoffs."

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84. *Requirements Under Title IX of the Education Amendments 3 of 1972*, *supra* note 10.

85. *Id.*

86. Mike Herndon, *NCAA Study Finds All But 20 FBS Schools Lose Money on Athletics*, AL.COM (Aug. 20, 2014, 9:29 PM), https://www.al.com/sports/2014/08/ncaa_study_finds_all_but_20_fb.html [https://perma.cc/W8YS-GZQZ].

87. *Id.*

88. *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 10.

89. *Id.*

90. *Id.*

91. *See NCAA Finances: Revenue and Expenses by School*, USA TODAY (June 13, 2023, 8:51 PM), https://sports.usatoday.com/ncaa/finances [https://perma.cc/X6UP-M6T5].

This inevitable downsizing would negatively influence findings regarding the second prong of a Title IX analysis by diminishing the schools' ability to offer robust athletic benefits and opportunities to athletes. Additionally, the reduction in total offerings would put member universities in violation of the NCAA Division I 14-sport minimum rule. Under this rule, Football Championship Subdivision (FCS) and "nonfootball" schools must sponsor a minimum of 14 sports—a number that is increased to 16 for FBS schools—to be a member of the Division I rank and maintain eligibility for postseason events.[92] Several NCAA administrators are already citing this rule that requires mandatory adherence to this seemingly arbitrary minimum as an argument for their case against sharing revenue with current college athletes.[93] It would follow that something closer to a free market system in paying college athletes would require that the NCAA loosen the reins and drop the floor on this sport minimum, or do away with the rule all together. Some argue that the rule violates antitrust laws by barring university presidents and administrators from making decisions about athletic offerings in the best interest of their respective schools.[94] Regardless, a pay-for-play model affecting the 14-sport minimum rule would absolutely disturb the equality in "opportunity for team competition" under a Title IX analysis.

The third major area analyzed for Title IX considerations is the equality in financial assistance provided by an NCAA member university receiving any sort of government funding.[95] To satisfy this final prong of the Title IX analysis, universities are not required to show that the number of athletic scholarships offered or the value of those individual scholarships remain equal across sexes.[96] However, the statute does require that "the total amount of assistance awarded to men and women must be substantially proportionate to their participation rates in athletic programs."[97] This factor of Title IX adherence would likely survive a pay-for-play and college-athletes-as-employees system due to the enforcement of two other federal laws; Title VII and the Equal Pay Act

92. *Our Division I Members*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx [https://perma.cc/ZTU2-G5E5].

93. Marc Edelman, *NCAA Division I's 14-Sport Minimum Rule is Ripe for Antitrust Challenge*, FORBES (Dec. 12, 2022, 11:07 AM), https://www.forbes.com/sites/marcedelman/2022/12/12/ncaa-division-is-14-sport-minimum-rule-is-ripe-for-antitrust-challenge/?sh=4938443028eb [https://perma.cc/WP5J-2JTT].

94. *Id.*

95. *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 10.

96. *Id.*

97. *Id.*

(EPA), which both contemplate the wage gap and pay discrimination on the basis of sex.[98]

Under the EPA, in a case brought by an employee against an employer, the plaintiff is required to show that: (1) he/she was doing "substantially equal" work on the job, the performance of which required "substantially equal" skill, effort, and responsibility as the jobs held by the members of the opposite sex; (2) the job was performed under similar working conditions; and (3) he/she was paid at a lower wage then members of the opposite sex.[99] Once the plaintiff is able to establish these three factors, the burden is shifted to the employer, who is afforded four affirmative defenses: (1) a bona fide seniority system; (2) a merit system; (3) a system which measures earnings quantity or quality of production; and (4) a differential based on any factor other than sex.[100] Title VII captures a wider variety of employment discrimination claims when compared to violations under the EPA, and, therefore, a plaintiff succeeding in an EPA lawsuit could also have a valid claim under Title VII.[101] There are some procedural differences in the filings of either claim, which are discussed in the case below.

In *Wiler v. Kent State University*, Coach Kathleen Wiler sued her former employer, Kent State University, alleging pay discrimination on the basis of sex under both the EPA and Title VII.[102] The court compared the base pay of Wiler against that of Kent State's wrestling team coach, Andrassy, minus any incentive bonuses paid or additional compensation gained through the hosting of sports camps on campus.[103] Wiler sued for post resignation back pay and front pay for alleged misconduct, and also claimed that she was constructively discharged.[104] The timing of the filing of the suit was a point of contention concerning the allowance of back pay start dates. Because the EPA does not require a claimant to bring a claim to the Equal Employment Opportunity Commission before bringing the same claim in federal court, the court decided that a calculation of potential damages only extended back as far as the filing of the claim in federal court.[105] Alternatively, Title VII claims that allege the same or similar discriminatory practices on the basis of sex are

98. *The Interplay Between Title VII and the Equal Pay Act and Why it Matters in Your Pay Discrimination Claim*, THE NAT'L L. REV. (Nov. 13, 2017), https://www.natlawreview.com/article/interplay-between-title-vii-and-equal-pay-act-and-why-it-matters-your-pay [https://perma.cc/ZF74-559U].

99. *Id.*

100. 29 U.S.C. § 206(d)(1).

101. *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 10.

102. Wiler v. Kent State University, 2022 U.S. Dist. LEXIS 197045* (2022).

103. *Id.* at *25.

104. *Id.* at *10.

105. *Id.* at *14.

allowed back pay dating two years before the timely filing of a claim.[106] The court ultimately denied the defendant's motion for summary judgment, in part due to the substantial similarities between the work done by the coaches and the parity in pay.[107] The court came to this conclusion despite the defendant's arguments that it used a bona fide seniority system and that the differential was based on factors other than sex.[108]

The difference in base pay between the coaches analyzed in *Wiler* was only a few thousand dollars, yet the court in that case allowed for the case to proceed and decided that fact finding was in order. How difficult would it be to have a similar fact-finding analysis that pitted college athletes of opposite sexes, and who played vastly different sports, against one another? Is the work of the starting quarterback of a Power Five conference school the same or similar to that of the libero on the women's volleyball team? Does the top female golfer at an Ivy league university have a "substantially equal" skillset or effort level as that required by a member of the wrestling team? Are high-tech or novelty locker room décor captured under the "working conditions" of a college athlete? Under the current Title IX enforcement model, some of these questions are easily answered as violations due to lack of opportunity or financial assistance. But should the college athletics model be governed by EPA and Title VII employment laws? The line of equality between male and female athletes is harder to define. Alternatively, this shift could provide the NCAA with a new guiding light in its role as a governing body for college athletics. With a mind towards the future, the NCAA could focus less on policy enforcement and more on employment equality for athletes or even serve as a de facto Player Association. This sort of pivot could be the best-case scenario for the NCAA, as it moves closer to irrelevance and being treated as a mere event management group.

2. Future University Financing for College Athletics

In an on-campus struggle to decide which sports would remain following the shift to an athletes-as-employees model in college athletics, the bargaining power would be monopolized by a select few priority sports. In the above example, discussing the NCPA and its efforts to empower college athletes in collective bargaining, the groups admitted goal was to affirm employee status for only Division I men and women basketball players and Football Bowl Subdivision (FBS) football

106. *Id.* at *34.
107. *Id.* at *41.
108. *Id.* at *28–33.

players.[109] Should universities opt to maintain a number of traditionally non-priority or non-revenue generating sports—sometimes referred to as Olympic sports—there may exist a situation where the high tides of collectively-bargained-for salaries of some athletes lifts the boats of those with less power. The non-unionized and non-priority sports teams may receive some of the tangential benefits of comparison in pay across gender gaps that are collectively bargained for by the more powerful programs. Additionally, if Title IX goes by the wayside, would traditional federal funding associated with the law cease to flow into universities calling on major leagues to then subsidize their previously free developmental and farm leagues?

It is unlikely that the federal government would cease to provide funding to public universities following the fall of Title IX in relation to athletic equality. However, less of that funding may be allotted to athletic departments who are now cash-strapped and legally obligated to pay their newly dubbed employees. In 2020, the 160 minor league baseball teams then in business lost approximately $800 million, averaging nearly a $5 million loss per team.[110] Following such an abysmal year for both professional and semi-professional sports—especially with the impacts of COVID-19—40 of those minor league baseball teams went permanently out of business.[111] While college sports fans are often more engaged and invested in the college product than they are in traditional minor league clubs, the fact that most college sports teams are financial losers does not bode well if federal subsidies slow or stop completely.

C. *The End of Amateurism and the NCAA*

This Note is not a discussion on the current NIL landscape in college athletics. However, the NCAA's botched handling of NIL guideline implementation and enforcement is a telling sign of what can be expected from the member-led organization in the future, should it have one. Though NIL benefits and opportunities were not the focus of *Alston*, many NCAA member-schools—and the states in which they preside—took the scathing concurrence authored by Justice Kavanaugh to be a sign of the changing of the times regarding the almighty power of the

109. Dellenger, *supra* note 7; Alicia de Artola, *What Does FBS Stand for in College Football?*, FANSIDED (Oct. 16, 2021), https://fansided.com/2021/10/16/fbs-college-football-meaning-explained/ [https://perma.cc/9QDT-BERS] (explaining that FBS refers to the top half teams of Division I college football who are eligible to play in the postseason bowl games).

110. Barry M. Bloom, *Minor Leagues Seek Distressed Oaktree Loans to Meet New MLB Terms*, SPORTICO: THE BUS. J. (Mar. 17, 2021, 5:55 AM), https://www.sportico.com/leagues/baseball/2021/minor-league-baseball-lost-800-million-last-season-cant-stop-those-losses-1234624968/ [https://perma.cc/3YG2-9AE8].

111. *Id.*

NCAA.[112] The NCAA had a golden opportunity in 2019 when California became the first state to enact an NIL law, titled the "Fair Pay for Play Act." The California Act was not set to go into effect until January 1, 2023, which provided the NCAA plenty of lead time to make a pivot or, at least, prepare for this new reality.[113] The NCAA is routinely, and appropriately, treated as the whipping boy for its own follies, and the mishandling of the coming NIL era was another prime example of why. Considering its phobia of sharing revenue with, or outright paying athletes, the NCAA was perfectly positioned to give the imminent NIL legislation the thumbs up, and not only provide approval, but support.

The then-proposed NIL framework created a system in which the NCAA and its member schools were out zero dollars. Instead, players would be paid by third party businesses or collectives during participation in college athletics. There is an understandable argument for why the NCAA wanted to stay as far away from any sort of additional compensation for athletes; specifically, to avoid obvious comparisons to an employment relationship. But the NCAA could have championed the NIL cause and created sound and enforceable rules before any state laws went into effect. Instead, they punted. Then they waited and watched, likely hoping that college athletics would implode now that a handful of players were making substantial money, and the NCAA could say, "I told you so." The downfall of college athletics never came to pass, and now, current and former college athletes—armed with lawyers—are raging even harder against the NCAA machine that had an opportunity to be an ally to these athletes, but the NCAA fumbled.[114]

Maintaining and regulating amateurism has become the primary purpose of the NCAA. Understanding the NCAA's definition of amateurism requires a lesson in circular reasoning. The NCAA defines amateurism as a prohibition on the receipt of any payment or compensation for one's participation in athletics (i.e., not professional), and to participate in college athletics one must be an amateur.[115] Therefore, to participate in college athletics, an athlete must not receive or accept any form of payment or compensation. Staunch advocates of amateurism—who are often critics of new NIL legislation and any consideration that college athletes may be employees—use words like "purity" to describe their ideal and draconian model of a collegiate

112. *See* NCAA v. Alston, 141 S. Ct. 2141, 2166–69 (2021) (Kavanaugh, J., concurring).

113. Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12 [https://perma.cc/4DD6-6EDH].

114. *See generally* Johnson v. NCAA 2021 U.S. Dist. LEXIS 246324* (E.D. Pa. 2021) (oral arguments held Feb. 16, 2023); Dawson v. NCAA, 32 F.3d 905 (9th Cir. 2019); Berger v. NCAA, 843 F.3d 285, 288 (7th Cir. 2016).

115. *Amatuerism*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/sports/2014/10/6/amateurism.aspx [https://perma.cc/4EL8-HQNK].

sport.[116] This notion feels disingenuous because while the NCAA is requiring that athletes abstain from taking payments, the governing body's Eligibility Center is charging prospective college athletes a $70 registration fee to open an "Amateurism-Only account."[117] To be sure, the NCAA has historically made significant contributions to the marketing and growth of college athletics, but just last year, the organization was positioned to receive $870 million during its three week basketball tournament called March Madness.[118] Estimations that take into account the escalating values of TV broadcasting rights put the number over the $1 billion mark within the next five years.[119] Many athlete advocates believe amateurism is a façade, conjured up and maintained by the NCAA and its member institutions, to avoid sharing revenue with Players. The following cases highlight the past seven years of relevant legal challenges to the NCAA's outdated and allegedly illegal amateur structure.

In *Berger v. NCAA*, former athletes of the University of Pennsylvania (Penn) sued Penn, the NCAA, and over 120 other Division I colleges and universities, alleging that the institutions violated FLSA concerning a failure to pay the athletes minimum wage.[120] The district court granted the defendant colleges and universities' motion to dismiss on two grounds and held that Berger (1) lacked standing to sue any parties other than Penn and (2) failed to state a claim against Penn because "student athletes are not employees under FLSA."[121] On appeal, the 7th Circuit declined to use the multifactor *Glatt* test[122] to analyze the economic realities of the situation regarding the "work" relationship between Berger and Penn, claiming that the test failed to take into account the "tradition of

116. Mechelle Voepel, *College Athletes are Already Getting Paid*, ESPN (July 18, 2011, 3:00 AM), https://www.espn.com/college-sports/columns/story?columnist=voepel_mechelle&id=6739971 [https://perma.cc/C6WH-D7VN].

117. *Payment From Sports Team*, *supra* note 12.

118. Eben Novy-Williams, *March Madness Daily: The NCAA's Billion-Dollar Cash Cow*, SPORTICO: THE BUS. OF SPORTS (Mar. 26, 2022, 9:00 AM), https://www.sportico.com/leagues/college-sports/2022/march-madness-daily-the-ncaas-billion-dollar-cash-cow-1234668823/ [https://perma.cc/ALM3-4WYY].

119. *Id.*

120. Berger v. NCAA, 843 F.3d 285, 288 (7th Cir. 2016).

121. *Id.* at 289.

122. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534 (2d Cir. 2016). The factors are the extent to which the internship (1) includes an understanding there will be no compensation; (2) "provides training that would be similar to that which would be given in an educational environment"; (3) "is tied to the intern's formal education"; (4) "accommodates the intern's academic commitments by corresponding to the academic calendar"; (5) has a duration "limited to the period in which the internship provides the intern with beneficial learning"; (6) is composed of work that "complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern"; and (7) includes an understanding that the intern is not entitled "to a paid job at the conclusion of the internship."

amateurism" in college athletics.[123] The court's decision to give such deference to "tradition" in a collegiate landscape that, by 2016, was already receiving hundreds of millions of dollars from the efforts of athletes, seemed taboo. Ultimately, the court held that "student-athletic 'play' is not 'work'" and that, "*as a matter of law*, student athletes are not employees and are not entitled to minimum wage under the FLSA."[124] The court decided that the analysis was not so fact intensive that it should defeat the motion to dismiss. But, in a concurrence, one judge commented on the economic realities of non-revenue generating sports—for example, women's track and field—and that despite the "sometimes frayed tradition of amateurism" a finding of dismissal should stand.[125]

In 2018, a similar suit was brought by a former Villanova University football player against his alma mater and the NCAA, alleging minimum wage provision violations under the FLSA.[126] However, the court in *Livers v. NCAA* denied the defendant's motion to dismiss, finding that the "plaintiff [had] alleged sufficient facts to plausibly state his entitlement to relief under the FLSA."[127] In a different approach to that of the plaintiffs in *Berger*, the plaintiff in *Livers* alleged, and attempted to prove, a willful violation by the university and the NCAA.[128] The court also held that upon defeating the motion to dismiss and conditioned on a clearer establishment of the willfulness of the violation, the claim would remain viable, and "subject to fact discovery."[129] It is important to remember that while football is generally considered a revenue-generating sport, Villanova competes in the Division I FCS, placing it outside of the most competitive and lucrative tier of college athletics.

In 2019, the 9th Circuit decided *Dawson v. NCAA* along the same analytical lines as the 7th Circuit employed in *Berger*.[130] In *Dawson*, a former Division I FBS football player at USC sued the NCAA and the PAC-12 Conference as joint employers in violation of the FLSA concerning minimum wage and overtime pay.[131] The court in *Dawson* used the economic realities test to assess the employee and employer relationship, namely, three relevant circumstances: (1) the expectation of compensation; (2) the power to hire and fire; and (3) evidence that an arrangement was "conceived or carried out" to evade the law.[132] The court refused to address the merits under the first prong of the test—

123. *Berger*, at 290–91.
124. *Id.* at 293 (emphasis added).
125. *Id.* at 294.
126. Livers v. NCAA, 2018 U.S. Dist. LEXIS 124780, *1.
127. *Id.* at *17.
128. *Id.*
129. *Id.*
130. Dawson v. NCAA/PAC-12 Conf., 932 F.3d 905, 907 (9th Cir. 2019).
131. *Id.* at 907–08.
132. *Id.* at 909.

asking whether or not Dawson's scholarship engendered an expectation of compensation—because Dawson had not received an athletic scholarship to play at USC.[133] Additionally, without the PAC-12 or the NCAA having any control over which players were selected for a given university roster, the control that the individual university program had over the players was not attributable to the defendants, and, therefore, the plaintiff was unable to show the power of either defendant to hire or fire him.[134] Finally, the court found that there was no scheme or arrangement being carried out to evade the law, despite the greatly altered economic reality of college athletics, decades after the test was first implemented.[135] In what seemed like a step backward for athlete advocates, the court affirmed the district court's decision to dismiss the case for failure to state a claim against the NCAA and PAC-12.[136] Importantly, the court made sure to mention that the holding was restricted to the issue of joint employment and chose not to express an opinion regarding athlete's "employment status" in any context.[137]

On February 15, 2023, during oral arguments of *Johnson v. NCAA*, the 3rd Circuit judges admonished the finding in *Berger* by asking if the rationale behind it was simply, "[s]o they're amateurs because we call them amateurs?"[138] This summation made it appear as though the 3rd Circuit saw the *Berger* holding as a classic case of a parent telling his or her child, "because I said so." The 3rd Circuit has yet to author an opinion in *Johnson*, though the oral arguments seemed relatively one sided and not in favor of the NCAA. On what appears to be the verge of a circuit split, *Johnson* considers whether college athletes can be categorized as employees of their respective universities, for purposes of the FLSA, based solely on participation in college athletics.[139] The plaintiffs argue that, just like other university students engaged in work study programs, athletes should be paid for the time they spend in NCAA Division I interscholastic athletics.[140] The defendants filed a motion to dismiss claiming student-athletes were not employees for three primary reasons: (1) student athletes are amateurs; (2) the Department of Labor has determined that student athletes are not employees for purposes of the FLSA; and (3) the plaintiffs failed to satisfy the economic realities test to determine their status as employees.[141] The motion was originally denied,

133. *Id.*
134. *Id.* at 910.
135. *Id.*
136. *Id.* at 913.
137. *Id.* at 913–14.
138. Johnson v. NCAA, 2021 U.S. Dist. LEXIS 246324* (oral arguments held Feb. 16, 2023).
139. *Id.* at *2–3.
140. *Id.* at *3.
141. *Id.* at *4.

but the defendants are now asking the appellate court to certify the dismissal on interlocutory appeal. Should the athletes prevail in *Johnson*, a finding of employee status could completely defeat the core principle and purpose for the NCAA's existence as the governing body in gatekeeping the name of amateurism.

CONCLUSION

In March 2023, the NCAA appointed former Harvard college athlete and Governor of the Commonwealth of Massachusetts, Charlie Baker, as its new president.[142] Around this same time, the University of Miami women's basketball program was sanctioned for having "facilitated impermissible contact between two prospects and a booster."[143] Despite the appearance of a run-of-the-mill recruiting violation, headlines latched onto the NCAA's dubbing this conduct as "NIL-adjacent."[144] The timing does not appear to be coincidental. Some speculate that the hiring of a prominent politician to the role is a nod to the NCAA's goal of pushing national NIL legislation that will help the organization maintain control in its fight for relevance. Additionally, the simultaneous enforcement action taken against the University of Miami was a message to member institutions and their booster collectives about the future intentions of the new regime.

The NCAA made a grave error. The organization has been beating back a myriad of unionization attempts, efforts to achieve employee status, and pay-for-play legislation for decades, but punted its opportunity to change course in support of college athletes. The NCAA should have thrown its whole support and the resources of its offices behind imminent NIL laws that provided the NCAA with plenty of lead time for planning, but instead, it watched and waited. Ultimately, the onslaught of litigation continued, universities adapted, and athletic programs bolstered their front offices to account for this new era of college athletics. Today's college athletes can earn compensation for their participation using the long overdue legal rights to their own name, image, and likeness. The universities are benefiting from increased booster spending through collectives. The NCAA inches closer to obsolescence as Players charge towards employee status that would provide them with protections under Title VII, the EPA, the FLSA, and the NLRA. Under the economic

142. *NCAA Announces Governor Charlie Baker to be Next President*, NAT'L COLLEGIATE ATHLETIC ASS'N (Dec. 15, 2022), https://www.ncaa.com/news/ncaa/article/2022-12-15/ncaa-announces-governor-charlie-baker-be-next-president [https://perma.cc/7VX7-BTKG].

143. Meghan Durham, *Recruiting Violations Occurred in Miami (Florida) Women's Basketball Program*, NAT'L COLLEGIATE ATHLETIC ASS'N (Feb. 24, 2023, 12:00 PM), https://www.ncaa.org/news/2023/2/24/media-center-recruiting-violations-occurred-in-miami-florida-womens-basketball-program.aspx [https://perma.cc/C578-ZZL4].

144. *Id.*

realities test that considers the control that universities have over the lives and schedules of college athletes, achieving employee status seems forthcoming. After assigning member universities and conferences the title of joint employers, the path to unionization is also cleared for college athletes at both private and public institutions. Should these predictions come to pass, conferences' power and influence will increase, the universities will adapt to the changing landscape, and the juggernaut that is college athletics will carry on, leaving amateurism and the NCAA behind.

"REED"-ING THE GREEN: HOW PATRICK REED'S DEFAMATION LAWSUITS POINT TO THE CONTOURS AND RIFTS IN PROFESSIONAL GOLF

Rachel Coers[*]

Abstract

The birth of LIV Golf, coupled with its tentative merger with the PGA Tour, has set the stage for much conversation regarding professional golf, competition, and the ethics of funding sporting events. Patrick Reed, a professional golfer who began his career on the PGA Tour before joining LIV Golf, has initiated multiple lawsuits against various news stations and broadcasters alleging that they have defamed his reputation in their reporting of the events surrounding LIV Golf. This Note argues that Reed's various lawsuits are unpersuasive and constitute a "weaponization" of defamation law. However, this approach may be a creative strategy to keep Reed in the news, even if he has been deemed a "villain" in the golf world.

* 2024 J.D. Candidate at the University of Florida Levin College of Law, rcoers@ufl.edu. I would like to thank each of the Florida Entertainment & Sports Law Review (FESLR) members for their insight and dedication to improving this Note. Additionally, I extend my gratitude to Professor Lyrissa Lidsky for her suggestions and guidance throughout the writing process. Finally, I would like to thank my family for their unwavering support in each of my academic and personal endeavors.

INTRODUCTION

> The yearning to play a better game of golf is a national mania in America. No man who golf[s] is so stubborn, so conceited, so arrogant or so accomplished that he is not constantly striving to improve his score. He may not admit this to others. He may pretend that mediocrity is enough for him ("I shoot in the 90s and I have a lot of fun. That's good enough for me."). This man is telling a white lie and he knows it. He wants desperately to break 90 and when he does, he will want just to just as desperately to break 80. Let him shoot in the high 70s and he will have but one dream: par or better.[1]

The game of golf has intrigued, enchanted, and enraged amateur and professional players for centuries. Founding Father Benjamin Rush, a Declaration of Independence signatory and prominent physician, once pointed out that, "[g]olf is an exercise which is much used by a gentleman in Scotland . . . . A man would live 10 years longer for using this exercise once or twice a week."[2] For those bewitched by the sometimes infuriating game, Dr. Rush's plan of care is an attractive one. To get in a round once or twice a week could mean rising before dawn to take the earliest tee time, being paired with a stranger who happens to be quite the "chatterbox," or foregoing dinner to chase a twilight round—but for the golfer, these are all minor sacrifices. And for those professional golfers on the Professional Golfers Association Tour (PGA, PGA Tour, or the Tour), the attraction is even more compelling than for the casual player. For example, in the 2021–2022 season, the Tour paid out over $421 million in total prize money.[3]

Golf is constantly in flux. Evolutions in professional players' salaries, celebrity status, equipment technology, course management and design, grassroots promotion of the game, and media rights represent but a fraction of the changes the golf world has experienced. However, no recent development has changed the landscape of professional golf like the emergence of the LIV Golf League (LIV or LIV Golf). In the summer of 2022, LIV Golf emerged as a major competitor to the PGA Tour, the premier league for professional golfers.[4] LIV Golf, which is funded by

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1. Sidney L. James, *foreword to* BEN HOGAN, BEN HOGAN'S FIVE LESSONS, 5 (First Fireside ed. 1985).

2. Ben Johnson, *The History of Golf*, HISTORIC UK, https://www.historic-uk.com/HistoryUK/HistoryofScotland/The-History-of-Golf/ [https://perma.cc/2H9M-4ERP].

3. *The Increases in Professional Golf's Prize Money and Purses are Staggering*, GOLFDIGEST (Feb. 28, 2023), https://www.golfdigest.com/story/prize-money-jump-golf-2023 [https://perma.cc/5G6G-7V42].

4. Eric Mullin, *What is the LIV Golf Series? A Deep Dive into the PGA's Rival Tour*, GOLF.COM (June 8, 2022, 6:23 PM), https://www.nbcsports.com/chicago/what-liv-golf-series-deep-dive-pgas-rival-tour [https://perma.cc/U846-WWV3].

Saudi Arabia's Public Investment Fund, offers players major contracts and huge monetary payouts.[5] In the aftermath of this new league's inception, and its attempt to take on the PGA Tour as professional golf's most prominent stage, professional players, commentators, and fans alike have debated ethics, monopolization of the game, and player worth. Golfer Patrick Reed is a major player in these debates.

Reed, who defected from the Tour to LIV Golf soon after its inception, has filed multiple lawsuits alleging that his presence in the controversy subjected him to a campaign of character assassination. Reed has sued golf news outlets and broadcasters for claims such as defamation, seeking hundreds of millions of dollars in damages. The web of lawsuits, some of which have been dismissed by federal judges, displays Reed's willingness to take his troubles to court. At surface level, Reed may simply be attempting to resurrect his character in the golfing world and to seek reimbursement for the alleged harm he suffered. But these suits must also be viewed in the context of the broader climate of professional golf: Reed versus the Media cannot be viewed without also considering the PGA Tour versus LIV Golf.

I. BACKGROUND

A. *History of the PGA Tour*

The PGA Tour was created in 1968 by a group of players who split from the PGA of America, which had been formed in 1916.[6] As interest in the game grew in the United States during the early part of the 20th century, structure became necessary in organizing tournaments for players.[7] Importantly, when Deane Berman began his tenure as the second commissioner of the PGA Tour, the Tour's assets grew from $730,000 in 1974 to over $200 million by 1994.[8] In 2017, current PGA Tour commissioner Jay Monahan took office,[9] with the PGA's assets reaching over $346 million.[10]

Much like the National Basketball Association (NBA), the National Football League (NFL), or the Major League Baseball (MLB) are for their respective sports, the PGA Tour is the highest level of professional golf in the United States (and internationally).[11] The PGA Tour operates

5. *Id.*

6. *PGA Tour History*, PGA Tour, https://www.pgatourmediaguide.com/intro/tour-history-chronology [https://perma.cc/5E5N-R3S7].

7. *Id.*

8. *Id.*

9. *Id.*

10. *Combined Financial Statements June 30, 2017 and 2016*, THE PRO. GOLFERS' ASS'N OF AM., at 4, https://resources.pga.org/Document-Library/2017-pga-financials_0.pdf [https://perma.cc/2SM7-P5NS].

11. *PGA Tour History*, *supra* note 6.

tournaments across the globe, and players compete for a season-long FedExCup based on points earned at each tournament that year.[12] For collegiate golfers or players working their way up the ranks of the lower-level circuits that operate as a pipeline to the PGA Tour, there is no greater goal than making it on the Tour and competing against its golfers.

B. *Reed's Original Complaint*

In a complaint filed in August of 2022, on the heels of a contentious summer in the golf world, Patrick Reed initiated a civil suit against Brandel Chamblee and Golf Channel for $750 million in damages.[13] Reed alleged defamation as a result of the connected actions of Chamblee and Golf Channel that harmed Reed's reputation and livelihood.[14] After being "constructively terminated" from the PGA Tour, Reed alleged that Chamblee and Golf Channel, together with the PGA Tour and Commissioner Jay Monahan, defamed him for over a decade.[15] He claimed that the defendants maliciously misrepresented information which included the following:

> actively targeting Mr. Reed since he was 23 years old, to destroy his reputation, create hate, and a hostile work environment for him, and with the intention to discredit his name and accomplishments as a young, elite, world-class golfer, and the good and caring person, husband and father of two children, he is.[16]

In his original lawsuit, Reed claimed not only to have lost "multiple multi-million dollar sponsorship deals" thanks to Chamblee and Golf Channel, but that they, along with the PGA Tour, "continue to use the same and or similar tactics to defame other LIV players, and LIV, with the intention to destroy them and their families professionally and personally, and thus eliminate them as competitors to the PGA Tour and the DP World Tour."[17]

Reed's allegations of defamatory remarks against him regarding his transition to LIV Golf must be viewed in the broader context of past incidents involving Reed during his time on the PGA Tour. Reed is admittedly one of the best golfers in the world. He claimed back-to-back NCAA Championships, won nine PGA Tour Tournaments, and became

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12. *About Us*, PGA TOUR, https://www.pgatour.com/company/about [https://perma.cc/45V8-G6B2].

13. Compl., ¶ (a), Reed v. Chamblee, No. 4:22CV02778 (S.D. Tex. 2022), https://www.documentcloud.org/documents/22138086-patrick-reed-lawsuit-v-the-golf-channel-and-brandel-chamblee [https://perma.cc/ZJC3-XMG3].

14. *See generally id.* ¶¶ 29–57.

15. *Id.* ¶ 11.

16. *Id.*

17. *Id.* ¶ 12.

the youngest World Golf Champion, edging out Tiger Woods by twenty-six days.[18] However, he has also been at the center of a number of controversies.[19] Prior to winning two NCAA titles for Augusta State in 2010 and 2011, Reed spent a year on the University of Georgia's golf team before being dismissed.[20] According to Reed, his dismissal was a result of alcohol violations.[21] However, in Shane Ryan's book, *Slaying the Tiger: A Year Inside the Ropes on the New PGA Tour*, Ryan revealed that Reed allegedly cheated and stole from his teammates.[22] Later, Reed was caught on camera making a homophobic slur.[23] He also once commented that Jordan Spieth would have gotten a more favorable ruling than he received at a tournament.[24] Then, in 2018, Reed complained about the location of his free, PGA Tour-provided seats at a Red Sox game.[25] However, Reed's most controversial action was likely his rules violation during the Hero World Challenge, which led to a CBS Sports reporter claiming that he had witnessed Reed improving lies "up close" in the past.[26]

Reed's past accomplishments and public struggles provide an important backdrop for his defamation suit against Chamblee and Golf Channel—one that expounds upon the ongoing LIV Golf versus PGA Tour controversy that began in the summer of 2022. According to Reed's complaint, since his entrance into professional golf, "Mr. Reed has been abused and endured more than any other golfer from fans or spectators who have been allowed to scream obscenities only to be glorified by NBC's Golf Channel for doing so, because it gets Defendants Chamblee and Golf Channel 'clicks,' viewership, ratings and increased revenue."[27] He claimed that chants from fans including "[e]veryone hates you, cheater!" and "[w]hy don't you dig a grave and bury yourself in it!" have been maliciously and intentionally caused with actual malice by

18. *Id.* ¶ 7.

19. Josh Berhow, *A Brief History of Patrick Reed's Highs and Controversial Lows*, GOLF.COM (Apr. 8, 2018), https://golf.com/news/Tournaments/a-brief-history-of-patrick-reeds-highs-and-controversial-lows/ [https://perma.cc/5HDV-CFMW].

20. *Id.*

21. *Id.*

22. SHANE RYAN, SLAYING THE TIGER: A YEAR INSIDE THE ROPES OF THE NEW PGA TOUR 83 (2016).

23. Berhow, *supra* note 19.

24. *Id.*

25. *Id.*

26. Joel Beall, *A Year After Controversial Drop Patrick Reed Continues to be a Prisoner of His Past*, GOLF DIGEST (Jan. 26, 2022), https://www.golfdigest.com/story/patrick-reed-farmers-2022 [https://perma.cc/6T4W-3L6E].

27. Compl., ¶ 11, *supra* note 13.

Chamblee and Golf Channel.[28] And this defamatory conduct, he alleged, continued from Reed's past controversies into his transfer to LIV Golf.[29]

According to the complaint, Chamblee, "at the direction of and as an agent of Golf Channel and PGA Tour and DP World Tour," appeared on Travis Fulton's podcast "where he published the following numerous malicious and defamatory statements of and concerning Mr. Reed."[30] Speaking of the Saudi Crown Prince and his connection with LIV Golf, Chamblee commented that the players of LIV were "aligning themselves with a tyrannical, murderous leader . . . [and a] centralizing power, [that is] committing all these atrocities . . . I mean[,] would you have played for Stalin . . . [or] for Hitler[?]"[31] Reed contended that this false statement would be like claiming that LeBron James aligned himself with a "tyrannical, murderous leader" because he plays for the NBA, which is connected with the Chinese government and its suppression of the Uyghur people.[32] The complaint pointed to a number of other comments made by Chamblee, some questioning the morals of all players who moved to LIV Golf, and some pointing specifically to Reed and his past controversies.[33]

In late September 2022, Reed withdrew his original complaint from a federal court in Texas,[34] only to refile the suit in the Middle District of Florida and add defendants Shane Bacon, Damon Hack, and Eamon Lynch—all of whom are Golf Channel commentators.[35] The amended complaint requests the same $750 million in damages,[36] and it is unclear why Reed's attorney chose to move the case from Texas to Florida.[37] However, some have speculated that the move may have been due to forum shopping (Reed's case was originally assigned to Texas judge Alfred H. Bennett, who is reportedly an avid golfer and rules stickler) or

28. *Id.* ¶ 18.

29. *Id.* ¶ 29 ("In retaliation for Mr. Reed's decision to sign with LIV, Defendants Chamblee and Golf Channel, conspiring and acting in concert with the PGA Tour, DP World Tour, and OWGR, have engaged in a pattern and practice of maliciously defaming Mr. Reed, as well as LIV and other golfers signed with LIV.").

30. *Id.* ¶ 31.

31. *Id.*; Brandel Chamblee, Thoughts on the LIV Golf Tour, YOUTUBE, June 14, 2022, https://www.youtube.com/watch?v=xXxnqWJdWhI&t=339s [https://perma.cc/FJ9J-SNHW].

32. Compl., ¶ 34, *supra* note 13.

33. *See generally id.* ¶¶ 29–72.

34. Josh Sens, *Why Did Patrick Reed Withdraw and Refile His Defamation Suit? Here's One Possible Reason*, GOLF.COM (Oct. 13, 2022), https://golf.com/news/patrick-reed-refile-defamation-suit-reason/ [https://perma.cc/AQ9B-6JLU].

35. Compl., ¶¶ 4–8, Reed v. Chamblee, No. 3:22-cv-1059-PDB (M.D. Fla. (2022), https://golf.com/wp-content/uploads/2022/09/show_multidocs.pdf [https://perma.cc/3KSS-PXLB].

36. *Id.* ¶ (a).

37. Sens, *supra* note 34.

an issue with his attorney's ability to represent Reed (Larry Klayman,[38] Reed's lawyer, has been suspended from practicing in Washington, D.C., and a local court rule may have prohibited him from representing Reed in Texas).[39] Regardless of the reason, Reed's suit will now be tried in Ponte Vedra, Florida, a suburb of Jacksonville, Florida, which happens to house the PGA Tour headquarters.[40]

C. *The Birth of LIV Golf*

Reed's original complaint, filed just over two months following LIV Golf's inception, pointed to a larger adversarial event in the golf world. In June 2022, Saudi-backed LIV Golf entered the professional golf scene and instantly divided the golf community.[41] LIV Golf, on a mission to "reinvigorate golf," sought to situate itself as a direct competitor to the PGA Tour.[42] LIV adopted structural features to distinguish itself from the PGA Tour, including having fewer players per tournament, having no player cuts, and, most notably, offering staggering payouts to top players.[43] These paychecks sparked much of the initial intrigue surrounding LIV Golf, with Phil Mickelson topping the chart, receiving a contract for $200 million, after switching allegiances from the PGA

38. Larry Klayman has been entrenched in Washington politics for decades. Klayman, a conservative attorney, founded Judicial Watch and is known for filing multiple lawsuits against the Clinton Administration during the 1990s. He also vocalized concerns that Barack Obama was not born in the United States and more recently challenged the National Security Agency's (NSA) storage of American citizens' data. Klayman also found himself parodied on the hit show The West Wing. *See* ABC News, *Meet Larry Klayman: Man Behind the NSA Lawsuit*, ABC NEWS (Dec. 19, 2013, 1:58 PM), https://abcnews.go.com/Politics/meet-larry-klayman-man-nsa-lawsuit/story?id=21278998 [https://perma.cc/7U3Y-PYPN]. In 2022, the District of Columbia Court of Appeals found that Klayman violated the Rules of Professional Conduct after he began expressing his romantic feelings for a client and continuing to act on her behalf after she asked him to drop the suit and discontinue representation. Ultimately, Klayman's eighteen-month suspension requires a showing of fitness before he can practice in the District of Columbia. *See also* In re Larry E. Klayman, No. 20-BG-583 (D.C. Cir. 2022), https://fingfx.thomsonreuters.com/gfx/legaldocs/dwpkrxyoavm/In%20re%20Klayman%2020-BG-583.pdf [https://perma.cc/4KYZ-JYNV].

39. Sens, *supra* note 34.

40. *PGA Tour History*, *supra* note 6.

41. *See generally id.*

42. Tariq Panja & Andrew Das, *What is LIV Golf? It Depends Whom You Ask*, N.Y. TIMES (Feb. 21, 2023), https://www.nytimes.com/article/liv-golf-saudi-arabia-pga.html [https://perma.cc/86LN-PCYF].

43. *See The LIV Golf Format*, LIV GOLF, https://www.livgolf.com/liv-format [https://perma.cc/4PMG-WBMN]; *see also* Charles Laberge, *Here's the Prize Money Payout for Each Team at the 2022 LIV Golf Team Championshp – Miami*, GOLF DIGEST (Oct. 27, 2022), https://www.golfdigest.com/story/here-is-the-prize-money-payout-for-each-team-at-the-2022-liv-golf-team-championship-miami [https://perma.cc/J3VQ-UPMN].

Tour to LIV.[44] Mickelson's shift came after a *Golf Digest* interview in which he blamed the PGA Tour's "obnoxious greed" for causing him to seek other golfing opportunities.[45] On June 9, 2022, Mickelson and Dustin Johnson, then the number thirteen golfer in the world, headlined the field for the opening LIV Golf tournament.[46] The purse for the inaugural London Tournament was $25 million.[47]

Another notable name in golf, Greg Norman, was tapped as LIV's CEO.[48] In September 2022, Norman travelled to Washington to promote LIV's mission and to quell concerns about the Saudi-backed organization.[49] This meeting stirred its own controversy; Tennessee Congressman Tim Burchett "express[ed] dismay that members of Congress were discussing a golf league backed by Saudi funds[,]" adding that Norman's lobbying for LIV was nothing short of "propaganda."[50] But Republican members of Congress were not the only ones deriding LIV Golf. Democratic Senator Dick Durbin Tweeted in September 2022, "[t]his weekend, a golf glove will try and cover a blood-stained hand as the LIV golf Tournament comes to Chicago in the Saudi government's continued, desperate attempt to up its image."[51] Durbin later commented, "[m]oney shouldn't be allowed to cover up the murder and dismemberment of a journalist or the imprisonment and harassment of activists like Raif Badawi, Waleed Abu Ak-Khaair, and Salma al-

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44. Justin Birnbaum, *The World's Highest-Paid Golfers 2022: LIV Golf Reshuffles Top Earners and Sends Pay Soaring*, FORBES (July 29, 2022, 6:30 AM), https://www.forbes.com/sites/justinbirnbaum/2022/07/28/the-worlds-highest-paid-golfers-2022-liv-golf-reshuffles-top-earners-and-sends-pay-soaring/?sh=3fdb1e69724a [https://perma.cc/E32C-WG9L].

45. Kyle Porter, *Phil Mickelson Sounds Off on 'Obnoxious Greed' of PGA Tour as Rival Leagues Dig In*, CBS SPORTS (Feb. 3, 2022, 7:01 PM), https://www.cbssports.com/golf/news/phil-mickelson-sounds-off-on-obnoxious-greed-of-pga-Tour-as-rival-leagues-dig-in/#:~:text=All%20that%20would%20do%20is,the%20door%20for%20opportunities%20elsewhere.%22 [https://perma.cc/RZ9Z-HW9T].

46. *Mickelson Meltdown and a 7-Shot Win for Cam Smith in LIV Golf*, AP NEWS, https://apnews.com/article/cam-smith-mickelson-liv-trump-national-b2274185c1321b2c1e10afc7796fa20c [https://perma.cc/H3CB-PD5M] (Aug. 13, 2023, 6:52 PM).

47. *Id.*

48. *Greg Norman Named CEO of LIV Golf Investments*, PR NEWSWIRE (Oct. 29, 2021, 12:10 PM), https://www.prnewswire.com/news-releases/greg-norman-named-ceo-of-liv-golf-investments-301412066.html [https://perma.cc/HQ57-KWBT].

49. Jack Stebbins, *LIV Golf CEO Greg Norman Visits Capitol Hill as the Saudi-Backed League Battles the PGA Tour*, CNBC (Sept. 19, 2022, 5:03 PM), https://www.cnbc.com/2022/09/19/liv-golf-ceo-greg-norman-visits-capitol-hill-as-saudi-backed-league-battles-pga-tour.html [https://perma.cc/JV4P-RWUG].

50. Stephanie Kirchgaessner, *US Congressman Accuses LIV CEO Greg Norman of Pushing Saudi 'Propaganda'*, THE GUARDIAN (Sept. 22, 2022, 8:42 AM), https://www.theguardian.com/sport/2022/sep/22/greg-norman-liv-golf-series-saudi-arabia-us-congress-visit [https://perma.cc/5NYK-JGBJ].

51. Dick Durbin (@SenatorDurbin), TWITTER (Sept. 15, 2022, 12:21 PM), https://twitter.com/SenatorDurbin/status/1570447798847549441 [https://perma.cc/3ME8-R99X].

Shehab."[52] The controversy that surrounded LIV Golf has not, to say the least, been immune from the American political sphere.

The money LIV Golf promised the world's top talent caused a significant rift in the golf community. The Saudi Arabian sovereign wealth fund promised to siphon "an estimated $2.4 billion into LIV over the next couple of seasons to get the league off the ground."[53] The source of the funding sparked fierce debate due to the Saudi Crown Prince's role in the murder of U.S. journalist Jamal Khashoggi, alleged involvement with the 9/11 terrorist attacks, and other purported human rights violations.[54] In response, the PGA Tour shelled out $360,000 to DLA Piper, one of the largest law firms in the world, to lobby Washington legislators against Saudi-backed golf.[55] To complicate this matter even further, former President Donald Trump—unquestionably one of the most controversial politicians of the last decade—is a supporter of LIV Golf, while the ongoing debate over fair pay for athletes and ethics surrounding Saudi funding continues.[56]

One prominent name in golf remained absent from involvement with LIV Golf. A favorite among golf fans around the world, Tiger Woods, remained steadfast in his refusal to join the new entrant into the golfing world.[57] According to *Golf Digest*, the former best golfer in the world and winner of eighty-one PGA Tour events had a "mission, as a self-appointed shadow commissioner," to "reshape the PGA Tour in a way that enough new money will flow to ensure top players will want to stay, while giving himself a slice of the pie and more of a say in how the Tour operates."[58] Woods allegedly met with fifteen players to discuss a LIV-

52. Dick Durbin (@SenatorDurbin), TWITTER (Sept. 15, 2022, 12:21 PM), https://x.com/SenatorDurbin/status/1570447800218914819?s=20 [https://perma.cc/LZ4X-8R7F].

53. Birnbaum, *supra* note 44.

54. *See* Brian Schwartz, *Inside the PGA Tour's Washington Lobbying Effort Against the Saudi-funded LIV Golf League*, CNBC (July 29, 2022, 6:30 AM), https://www.cnbc.com/2022/07/21/inside-the-pga-tours-lobbying-effort-against-saudi-funded-liv-golf.html [https://perma.cc/GFP7-7NLJ].

55. *See id.*

56. Hailey Fuchs, *Like Everything Trump Touches, LIV Golf Has Become About Him*, POLITICO (Oct. 31, 2022, 4:30 AM), https://www.politico.com/news/2022/10/31/donald-trump-liv-golf-00064170 [https://perma.cc/5DQW-93YH].

57. Jay Busbee, *Tiger Woods, Rory McIlory Chart Golf's New Path Forward*, YAHOO SPORTS (Aug. 22, 2022), https://sports.yahoo.com/tiger-woods-rory-mc-ilroy-chart-golfs-new-path-forward-145534352.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAC5BQi-upVWDOPHQPA-scSs6pI0LD9ogpphEkVXxMensmC1UnZolFALiohAMl-wIheEOs5EHEvThVRhdYCvVF7oWS-iBmPWy1SCWi3T8mVSmrRWDspfJbK4w6G2MnGuO9DJNBLu6raDyHcqqu_3Z6oyu6UQ6JuV0ln3y9o77gP82 [https://perma.cc/6XY6-ZNT7].

58. *Id.*

like format (a "tour-within-the-tour") that would include no cuts, smaller fields, and huge payouts.[59]

D. *PGA Tour Antitrust Suit*

In August 2022, eleven players, including Phil Mickelson and Bryson DeChambeau, filed suit against the PGA Tour.[60] At the center of this lawsuit was the players' contention that "the Tour has evolved into an entrenched monopolist with a vice-grip on professional golf."[61] Further, the players alleged that the Tour's bans against anyone willing to defect to LIV served to "threaten irreparable harm to the players and their ability to pursue their profession."[62] This "unlawful strategy," according to the players, was implemented to deter the competition that emerged from LIV Golf because "the Tour explained to the players that it was [employing this unlawful strategy] precisely because LIV Golf is attempting to compete with the Tour."[63] Specifically, they claimed that the Tour's Conflicting Events Regulation (prohibiting players from participating in a non-PGA Tour events in North America in the same week in which a Tour-sanctioned event takes place) and the Media Rights Regulation (prohibiting players from playing in "any golf contest, exhibition or play" that appears on any media at any time, regardless of geographic location) effectively foreclosed the players, who are independent contractors, from participating in events that compete with the PGA Tour.[64]

The players pointed to "six practices, each of which is patently exclusionary, anticompetitive and unlawful under the Sherman Act."[65] These practices include: (1) threatening lifetime bans for joining LIV Golf; (2) expanding the Conflicting Events and Media Rights regulations; (3) "orchestrat[ing] a group boycott with the European Tour to ensure that" anyone considering joining LIV, including the plaintiffs, "cannot pursue his career and livelihood anywhere in the global golf 'ecosystem[;]'" (4) the encouragement of PGA of America to ban LIV players from participating in the PGA Championship and the Ryder Cup; (5) the threatening of agents and business partners of the players involved with LIV; and (6) the threatening of sponsors and instruction to sever

59. *Id.*

60. Compl., ¶¶ 16–27, Mickelson v. PGA Tour, Inc., No. 3:22-cv-04486 (N.D. Cal. 2022), https://cand.uscourts.gov/wp-content/uploads/2022/08/PGA-complaint.pdf [https://perma.cc/44BP-PPKT].

61. *Id.* ¶ 1.

62. *Id.* ¶ 3.

63. *Id.* ¶ 5.

64. *Id.* ¶ 8.

65. *Id.* ¶ 11.

relationships with LIV players.[66] Ultimately, the players posited that injunctive relief was necessary to combat the Tour's anticompetitive behavior, and without such relief, they would be "irreparably harmed" through the denial of financial and competitive opportunities.[67] To support this assertion, the complaint provided information on each of the eleven players, including tournament titles and professional accomplishments, personal accolades, and, at the end of each section, a note that the player "desires to continue to be a member of the Tour and to play in events on the Tour."[68]

The players contended that until LIV Golf entered the golf sphere, "no other Tour came close to the PGA Tour in terms of money, exposure, quality of on-course competition for players, fan interest, advertising or sponsorship opportunities[,]" and specified the ways in which the Tour operated in a harmful and anticompetitive way.[69] Ultimately, the Tour countered that, through the players' suit, "LIV asks the Court to invalidate these wholly legitimate provisions [of the Tour's Regulations] with the stroke of a pen *after* inducing the remaining Player Plaintiffs to violate those same regulations with hundreds of millions of dollars in Saudi money."[70]

E. *The Merger*

On June 6, 2023, the PGA Tour and LIV announced that they would be joining forces in a surprising merger.[71] The two entities plan to come together in a for-profit entity currently named "NewCo."[72] This move, though far from finalized, includes "a pledge to dismiss acrimonious litigation."[73] Still unknown is the distribution of wealth each entity will contribute to the partnership.[74] When this news broke, many PGA Tour players expressed their disappointment in the proposed merger: "[t]hey were blindsided by the news, learning of the agreement when the public did, and they did not seem to understand why the Tour waged a legal war against LIV and a war of morality against Saudi money, only to invite the wolf into the henhouse."[75] Those who had left the Tour for LIV had a

66. *Id.* ¶ 11.
67. *Id.* ¶ 15.
68. *Id.* ¶ 16.
69. *Id.* ¶ 42.
70. Answer to Am. Compl. at 1:21, Jones v. PGA Tour, Inc., No. 5:22-cv-04486-BLF (N.D. Cal. 2022).
71. Kevin Draper, *The Alliance of LIV Golf and the PGA Tour: Here's What to Know*, N.Y. TIMES (July 17, 2023), https://www.nytimes.com/2023/06/07/sports/golf/pga-liv-golf-merger.html [https://perma.cc/3GTX-FMTL].
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

decidedly different reaction—after raking in the cash, they now have the chance to return to the biggest stage in professional golf, an option made more enticing by LIV's declining viewership.[76]

Ultimately, professional golf is a business. The Tour likely would have been unable to operate if the Saudi Private Investment Fund gave its full backing to LIV over the next five to ten years.[77] By joining forces, the Tour has a chance to revive the game and remove some of the longstanding and outdated ideas of what golf should be. The two entities, all but enemies just months ago, have the opportunity to set aside their differences and forge a new path in professional golf. But a few colossal obstacles—namely the Department of Justice and the Federal Trade Commission—stand in their way.[78]

F. *The Continuing Saga of Patrick Reed's Litigation*

This Note focuses specifically on Patrick Reed's defamation suit against Brandel Chamblee, Golf Channel, and a number of others. But litigation does not occur in a vacuum—like many other cases, whether high-profile or not, Reed's suit has evolved, and the timeline has become more complex. The view that Reed's pleading strategy is not creative, but rather suggests a disrespect for the legal system and game of golf writ large, may be a dramatic take on what is unfolding. But considering his pleading strategy, which has been dubbed a shotgun pleading by the United States District judge deciding the case, it appears that Reed is unafraid to make a bold statement to the golf world regardless of the repercussions it may have on his career and reputation. Importantly, the new agreement by the Tour and LIV to drop all litigation does not prohibit Reed from pursuing his private lawsuits.[79]

On November 1, 2022, Reed's attorney filed a new complaint in the Middle District of Florida alleging that more members of the sports media

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76. James Colgan, *After Viewership Dip, LIV Golf Has Quietly Stopped Reporting TV Ratings*, GOLF.COM (May 17, 2023), https://golf.com/news/liv-golf-quietly-stopped-reporting-tv-ratings/#:~:text=In%20LIV's%20most%20recent%20ratings,second%20event%20in%20Tucson%2C%20Ariz [https://perma.cc/4Q7H-QVRB].

77. *See* Draper, *supra* note 71.

78. *See* Draper, *supra* note 71 (explaining that the Department of Justice and the Federal Trade Commission review mergers between companies the size of the PGA Tour and LIV Golf to ensure that the merger does not violate U.S. anti-trust laws).

79. A.J. Perez, *Patrick Reed's Legal Fight Continues Amid Pro Golf Peace*, FRONT OFF. SPORTS (June 29, 2023, 8:52 AM), https://frontofficesports.com/patrick-reeds-legal-fight-continues-amid-pro-golf-peace/ [https://perma.cc/X482-TP7Y] (explaining that the nature of Reed's lawsuits as being separate from the litigation between LIV Golf and the PGA Tour that was ongoing before the merger allows him to continue pursuing his claims).

world defamed him.[80] This suit, seeking $250 million in damages, "charges that the defendants knowingly reported false information about Reed in an effort to undermine the LIV Tour, which cost Reed lucrative sponsorships and other business deals."[81] These new defendants include Shane Ryan (who has recently written books about LIV Golf), the Associated Press, Fox Sports, the New York Post, and others.[82] This suit mirrors Reed's earlier complaint filed against Chamblee and Golf Channel, opining that Reed has been defamed based on a number of statements made regarding his new role as a member of the LIV Tour.[83]

The new complaint states that "[t]he Defendants in the *Chamblee Case*–much like the Defendants here–are all widely known mouthpieces for The Golf Channel, which again, is an admitted partner of the PGA Tour, so they are more than willing to spread false, malicious, and defamatory statements and commit other illegal acts of and concerning Mr. Reed and other LIV golfers because it serves their own interest to ensure that PGA Tour remains by far number one."[84] In the midst of the contentious climate between the PGA Tour and LIV, Reed's attorney took advantage of the sentiment that the Tour was attempting to monopolize professional golf. Indeed, Klayman did not hold back when it came to pointing his finger toward the PGA Tour as the ultimate enemy against his client Patrick Reed.

In a move that could be added under the headline, "but wait, there's more," Reed's attorney authored a letter, sent to CNN, providing a new twist to the "Patrick Reed versus the (golf) world" saga. Klayman noted in his letter that he and Reed have taken offense to CNN reporters Jake Tapper and Bob Costas, who "aired a highly defamatory piece titled, 'The Court Fight Between PGA Tour and LIV Golf Escalates as the Saudi-backed LIV Tries to Avoid Handing Over Information.'"[85] Further, Klayman argued the following:

> [t]his widely viewed broadcast in Florida, the nation and internationally, was not only defamatory but also designed to incite ridicule, hatred and violence against LIV Golf players, such as my client Patrick Reed, a world champion professional golfer, by publishing that he takes 'blood

80. Compl., ¶¶ 7–14, Reed v. Ryan, No. 3:22-cv-01181-BJD-PD (M.D. Fla. 2022), https://www.insurancejournal.com/app/uploads/2022/11/Patrick-Reed-complaint.pdf [https://perma.cc/53DJ-GM7D].

81. *Id.* ¶ (a).

82. *Id.* ¶¶ 7–14.

83. *See generally id.*

84. *Id.* ¶ 32.

85. Evan Bleier, *LIV Golfer Patrick Reed Threatens CNN and Bob Costas with $450M Lawsuit*, INSIDE HOOK (Jan. 19, 2023, 1:42 PM), https://www.insidehook.com/daily_brief/sports/liv-golfer-patrick-reed-cnn-costas-lawsuit [https://perma.cc/W6CV-SBSC].

> money' from the Saudi Public Investment Fund, in the wake of the 9/11 tragedy twenty-two (22) years ago.[86]

The letter included the threat of a $450 million suit against CNN if "an on-air public apology is not immediately made to Mr. Reed" and the network fails to discipline Tapper and Costas.[87]

In yet another letter, this time sent to Bloomberg and its CEO, Klayman asked for a similar story, authored by reporter Erik Larson, connecting LIV Golf with the 9/11 terrorist attacks to be removed from the site.[88] Importantly, "[n]either the CNN segment nor the *Bloomberg* story referenced Reed, a nine-time PGA Tour winner and the 2018 Masters champion, or mentioned him by name. Nonetheless, Klayman gave both Bloomberg and CNN five days to comply with the guidelines set out in the letter or risk the consequences."[89] These threats, on top of the hundreds of millions of dollars of damages requested in Reed's defamation suit against defendants, who may not have been properly identified,[90] suggests that Klayman will go to seemingly any length to silence those critical of Reed, or those critical of LIV Golf in general.

II. LEGAL ANALYSIS

A. *A Brief Overview of Defamation Law*

As the Restatement (Second) of Torts explains, "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[91] Defamation law encompasses the state torts of written defamation (libel) and spoken defamation (slander).[92] In these cases, the constitutional rights of free speech and press of the defendant accused of defaming the plaintiff must be considered. But there are limits to these constitutional rights, and courts must conduct a balancing act in each defamation case. As the Court in *Time, Inc. v. Hill* pointed out, courts should consider "the factors which arise in the particular context."[93] On one hand, defamation law seeks to protect individuals from words that could cause serious reputational harm. On

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *See* Order at 3, Reed v. Chamblee, No. 3:22-cv-1059-TJC-PBD (N.D. Fla. 2022), https://s3.documentcloud.org/documents/23314083/judge-order-dismiss-patrick-reed-lawsuit.pdf [https://perma.cc/6ECK-QBFY].
91. RESTATEMENT (SECOND) OF TORTS § 559 (1977).
92. *See* RESTATEMENT (FIRST) OF TORTS § 568 (1938).
93. 385 U.S. 374, 390 (1967).

the other hand, the First Amendment is a bedrock principle protected by courts to give individuals freedom to speak their minds.

As the Court determined in *New York Times v. Sullivan*, "[t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[94] In *Curtis Pub. Co. v. Butts*,[95] the Court extended the rule of *New York Times* to cases where the plaintiff in a defamation suit is a "public figure" rather than a public official.[96] The Court in *Butts* recognized that "dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure.'"[97]

Public figures are those individuals who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[98] Those individuals, who we might today label influencers, play such an important role in shaping society that the press and public need ample room to criticize them. Unlike a private individual (who need only prove negligence in a defamatory falsehood, rather than actual malice), "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."[99] The Court in *Butts*, in its consideration of a public figure's defamation suit, instructs a focus on conduct, not just the truth or falsity of a statement, to guide these legal analyses.[100]

Ultimately, a public figure "may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and

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94. 376 U.S. 254, 279–80 (1964). This Note will focus primarily on the reckless disregard prong of actual malice.

95. 388 U.S. 130, 155 (1967).

96. *Id.*

97. *Id.* at 149.

98. Gertz v. Robert Welch, Inc., 418 U.S. 323, 336–37 (1974) (Warren, C.J., concurring) (quoting Butts, 388 U.S. at 164).

99. *Id.* at 344–45; *see also* Eugene Volokh, *Dean Lyrissa Lidsky on the Nicholas Sandmann Litigation*, THE VOLOKH CONSPIRACY (Aug. 25, 2020, 1:55 PM), https://reason.com/volokh/2020/08/25/dean-lyrissa-lidsky-on-the-nicholas-sandmann-litigation/ [https://perma.cc/R99A-22RV] ("The distinction between public figures and private figures is crucial in defamation law, because private figures can recover for defamation by proving the defendant published a defamatory falsehood about them negligently, but public figures must prove actual malice, that is, that the defendant published the defamatory falsehood knowing or with reckless disregard of the truth.").

100. *See* 388 U.S. at 152–53.

reporting ordinarily adhered to by responsible publishers."[101] The test for determining liability for defamatory statements against public figures is a showing of actual malice, which is "subject to a clear and convincing standard."[102] Public-figure plaintiffs must also prove the falsity of the defamatory statement.[103]

In addition to considering whether a plaintiff is a public figure, the Court in *Gertz*[104] split public figures into two possible categories:[105] general public figures and limited purpose public figures.[106] General public figures "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."[107] A limited purpose public figure, rather than having broad fame based on their position or occupation, becomes known because of a particular dispute or issue. As the Court in *Gertz* notes, a limited purpose public figure is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."[108]

Foretich, which states the following, provides a helpful five-factor test to determine whether a plaintiff is a limited purpose public figure:

> (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation.[109]

If a plaintiff meets either the general purpose public figure or limited purpose public figure threshold, he or she will need to prove actual malice—that is, knowledge of the falsity of the statement or reckless disregard for its falsity.[110]

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101. *Id.* at 155.

102. Milkovich v. Lorain J. Co., 497 U.S. 1, 15 (1990) (citing *Gertz*, 418 U.S. at 342).

103. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (discussing the "self-censorship" that would occur if a defense of truth was implemented in defamation law and stating that, in such a cases "with the burden of proving [truth] on the defendant… [not] only false speech will be deterred").

104. 418 U.S. 323 (1974).

105. The Court also considered a third category of public figure, one who becomes a public figure through no purposeful action of his own, but the Court indicates that this category is exceedingly rare. *Id.* at 345.

106. *Id.* 351.

107. *Id.*

108. *Id.*

109. Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994).

110. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

To establish actual malice, a plaintiff must provide "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[111] For example, if a story "is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call," the plaintiff would likely prevail in establishing actual malice.[112] Additionally, if a statement is "so inherently improbable that only a reckless man would have put them in circulation," or if there are "obvious reasons to doubt the veracity of the informant or the accuracy of his reports," actual malice will likely be established.[113] But "[f]ailure to investigate does not in itself establish bad faith."[114]

Courts must also consider the distinction between statements of opinion and statements of fact. As the Court in *Gertz* noted, "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[115] The court in *Milkovich* explained that this passage in *Gertz* does not allow for a wholesale protection of defamatory statements disguised as opinions; some opinions imply that the speaker is resting his or her ideas on objective facts. The Court provides a helpful illustration:

> [i]f a speaker says, "[i]n my opinion Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth.[116] Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.[117] Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "[i]n my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."[118]

After examining the line of cases balancing factual statements and public debate, the *Milkovich* Court explained that "where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false

111. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
112. *Id.* at 732.
113. *Id.*
114. *Id.* at 733 (citing N.Y. Times Co., 376 U.S. at 287).
115. 418 U.S. 323, 339–40 (1974).
116. Milkovich v. Lorain J. Co., 497 U.S. 1, 18–19 (1990).
117. *Id.*
118. *Id.* at 18–19.

implications or with reckless disregard of their truth."[119] Actual malice is the critical piece in this defamation puzzle, and Reed will need to show, by clear and convincing evidence, that the defendants published these statements despite knowing they were false, or with a reckless disregard for their truth or falsity.

B. *Applying Defamation Law to Reed's Lawsuits*

Under *Milkovich*, a professional golfer with Reed's resume and accolades should be considered a public figure for purposes of defamation law.[120] Reed's status as a professional golfer may place him in the general purpose public figure category, given his pervasive fame and notoriety. At a minimum, he is a limited purpose public figure with respect to the LIV Golf controversy. Applying the five factors from *Foretich*, each requirement appears to be satisfied.[121] Reed's status as a professional golfer affords him access to the media that is not enjoyed by non-public figures; additionally, his pursuit of numerous lawsuits against those who attempt to speak against him and LIV Golf points to Reed assuming his role in the controversy, as well as an attempt to resolve the controversy (at least by striving to gain public support for LIV Golf). Finally, the LIV versus PGA Tour controversy existed before Chamblee or anyone else made their statements regarding Reed, and since these statements, Reed has retained his status as a public figure.

The proposition in *Gertz* that "those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" seems particularly important in Reed's case.[122] The history of Reed's run-ins with ruling officials, fans, and ultimately golf media must be considered because it is clear that Reed has "invite[d] attention and comment" regarding each of the instances when his character has been called into question by the press and public generally.[123]

The actual malice requirement from *New York Times* "requires that plaintiff impute to defendant a 'doubting state of mind' . . . or that

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119. *Id.* at 20.

120. *See* David A. Anderson, *Is Libel Law Worth Reforming*, U. PA. L. REV. 448, 500 (1991) ("The Court [in *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)] extended the requirements of *New York Times v. Sullivan* . . . to plaintiffs who hold no official position, but 'are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.' The lower courts have tended to view both the public official and public figure categories expansively. . . . The public figure category includes not only those who seek to influence public affairs, but also those who attract media attention by success in their careers or avocations or by their relationships with celebrities.").

121. Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994).

122. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

123. *Id.*

defendant 'knew or had reason to suspect' falsity."[124] Failing to conduct research about a subject or individual is not enough to meet this standard, but instead, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."[125] The absence of any suggestion in Reed's complaint that Chamblee or Golf Channel entertained any doubts concerning their statements, and a lack of proving knowledge, falsity, or reckless disregard for the falsity of their statements, suggests that Reed will be unable to overcome the actual malice requirement from *New York Times*.

Reed also has not shown that the statements against him were false. Chamblee and Golf Channel, as part of the American fabric of sports broadcasting, do not have unlimited freedom to proclaim false factual statements. But many of the statements at issue in this case are opinions protected by the First Amendment.[126] Although Reed's Complaint is rife with accusations of the defendants, this "shotgun pleading[,]" as Judge Corrigan would say, fails to allege anything beyond legal conclusions.[127] Chamblee's comments relating to the public controversy surrounding LIV Golf and Patrick Reed should not be chilled, and public debate regarding these issues should remain "uninhibited, robust, and wide-open."[128] Reed has failed to allege knowledge of falsity or reckless disregard of the truth by the defendants, making his lawsuits frivolous.

C. *The Creative (But Weaponizing) Strategy of Reed's Pleading*

This Note argues that Reed's defamation suit, though potentially a creative pleading strategy, is unpersuasive and a means of exploiting the law for his own gain.

Ultimately, Reed's suit does not show that the allegedly defamatory statements were made with actual malice. In their article analyzing the attempts of powerful individuals to "weaponize the law," Schafer and Kossef point out that, "[t]oday, the wealthy, famous, and otherwise powerful regularly resort to libel threats and libel lawsuits not to redress a cognizable injury to their reputation but instead to silence and punish

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124. THOMAS REUTER, DEFAMATION: A LAWYER'S GUIDE § 7.2 A SUBJECTIVE STANDARD 1 (2023).

125. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

126. *See* Milkovich v. Lorain J. Co., 497 U.S. 1, 20 (1990) ("*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.").

127. *See* Order at 1–2, *supra* note 90.

128. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

their critics and make to-be critics think twice before speaking."[129] This "weaponization" of defamation law is exactly what Reed and his attorney are attempting to achieve through Reed's various lawsuits and threatening letters.

This suit speaks to the broader issue surrounding the LIV Golf versus PGA Tour saga that unfolded before golf fans across the globe over the past year. Reed's attempt to throw his own suit into the ring during the height of litigation between LIV and the Tour points to, some may say, a creative pleading strategy–by timing his suit alongside all that the Tour was facing in the media and the courtroom, Reed and his litigation-happy attorney may have hoped for a settlement. Even if they received a fraction of their $750 million in claimed damages, Reed could see settlement as a win against his foes at Golf Channel and the Tour.

But Reed's strategy has already been exposed as a poor one. Judge Timothy Corrigan of the United States District Court for the Middle District of Florida dismissed Reed's original complaint, finding that it failed "to give Defendants adequate notice of the claims against them and the grounds upon which each claim rests . . . because Reed alleges 120 factual allegations, then proceeds to incorporate all 120 allegations into each and every count."[130] Reed has been given a chance to amend his complaint to comply with the judge's orders.

Whether Reed's original complaint against Chamblee is properly amended and whether litigation continues, one thing is clear: Reed's attorney will continue searching for ways to denounce and silence Reed's critics. The new litigation against Shane Ryan, the Associated Press, Fox Sports, and others, along with the letters threatening suit against CNN and Bloomberg, signal to anyone watching this saga unfold that Reed and his attorney do not plan on allowing LIV detractors to speak without a fight. With the uncertainty surrounding the merger, a disruption in professional golf over the next few years is inevitable. Whether or not that disruption includes the chilling of speech against other LIV detractors, thanks to a ruling in favor of Reed, remains to be seen.

D. *Embracing the "Villain" Character*

Ultimately, Reed's numerous suits point to an interesting, albeit potentially career-damaging, strategy. Reed and his litigious attorney chose to embrace a character that would be less than appealing to most

129. Matthew L. Schafer & Jeff Kosseff, *Protecting Free Speech in a Post-Sullivan World*, 75 FED. COMM. L.J. 1, 2 (2022).

130. Order at 1–2, *supra* note 90 (where Judge Corrigan, in the first page of the order, candidly points out that Reed's complaint "is a shotgun pleading," noting the issues surrounding notice and pointing out failure to comply with Federal Rule of Civil Procedure 8(a) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief") and a possible failure to identify the correct defendants).

professional athletes. Prior to the LIV Golf controversy and following a questionable drop at the 2021 Farmers Insurance Open, Sports Illustrated published an article titled "Patrick Reed, golf's No. 1 villain, strikes again on PGA Tour."[131] Its sub-title and opening lines are indicative of the general consensus regarding Reed: "Reed runs away with 5-stroke victory at Torrey Pines but proves to be game's biggest loser in more meaningful category: Integrity . . . . It's official. Patrick Reed is the most hated man in golf."[132] This article is nothing short of scathing in its overview regarding Reed's character and his perception, especially among the golf community. But for all Reed's shortcomings, has he truly earned such a severe title as "the most hated man in golf?"

As noted above, Reed has run into more than a few issues during his career on (and off) the Tour. Most of the reputational harms Reed has suffered have been arguably self-induced.

> There's a difference between being a self-centered jerk and a cheater. Reed is creating the appearance that he's both. There is plenty of evidence of the former and so much circumstantial evidence of the latter that it's difficult to disbelieve. In the court of public opinion, Reed has already lost.[133]

In a sport where integrity is king (an opinion some may say is no longer correct), Reed may have been destined to lose from the beginning. After the scandalous departure from his first university, numerous rulings issues, and now several lawsuits, it is easy to see why Reed has been crowned golf's number one villain. And, maybe, that is to his credit.

Certain professional athletes have long endured being placed into the category in which Reed now finds himself. NBC Sports' list of "The biggest villains in recent sports history" includes Tom Brady[134] and should include "basically anyone who has played basketball for Duke." Reed won't find himself on this list, but in an article titled "Introducing The Professional Golfer Villain Rankings[,]" Reed comes in third behind Bubba Watson and Bryson DeChambeau, two other players golf fans love to hate (and who left the Tour for LIV Golf).[135] And, as the "No. 1

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131. Gary van Sickle, *Patrick Reed, Golf's No. 1 Villain, Strikes Again on PGA Tour*, SPORTS ILLUSTRATED (Jan. 31, 2021, 9:01 PM), https://www.si.com/golf/news/feature-2021-01-31-patrick-reed-golfs-no-1-villain-strikes-again-on-pga-tour [https://perma.cc/237T-DC4C].

132. *Id.*

133. *Id.*

134. Laura Depta, *Biggest Villains in Sports Today*, BLEACHER REP. (June 12, 2015), https://bleacherreport.com/articles/2494262-biggest-villains-in-sports-today [https://perma.cc/A54K-H9QJ].

135. *Introducing: The Professional Golfer Villain Rankings*, 17,000 CREDITS (June 11, 2018), https://www.17000credits.com/blog/introducing-the-professional-golfer-villain-rankings [https://perma.cc/8KXH-PW4R].

Villain" article from Sports Illustrated notes, "[w]inning makes up for character flaws in sports . . . . Reed's mantra is that he's not here to be liked; he's here to win championships. So far, he's succeeding on both fronts."[136] Whether or not Reed planned on becoming one of professional golf's most infamous villains, the role is his.

So, is Reed's embracing the character of a sports villain actually a great move for his career? The answer is no. Not only should he lose his defamation case against Chamblee and the Tour, but Reed's current status as golf's antihero is doing more harm to his career than good. Although some may think that all press is good press, it certainly is not good press to be known as one of golf's most notorious rule violators, and adding on a number of high-profile, high-dollar lawsuits only serves to make matters worse for Reed. As Gary van Sickle aptly points out, "Reed has set himself up as an international rules-fudger. He has no one else to blame. Once you get that tag, you can never lose it. Worse, a charge like that can taint a player's legitimate successes."[137]

Golf's history as a game of integrity, honor, and virtue does not play in Reed's favor. For instance, the "Standards of Player Conduct" in the governing rules of golf state that "[a]ll players are expected to play in the spirit of the game by: [a]cting with integrity . . . [and] [s]howing consideration to others."[138] The First Tee, which operates to provide children with opportunities to play golf and learn about the game, says it best: "[g]olf is a game of etiquette and composure. Players are responsible for their actions and personal conduct on the golf course even at times when others may not be looking."[139] But should a player like Reed (or other well-known "villains" like Bryson DeChambeau or Bubba Watson) be asked to put winning in the backseat in order to put integrity and ethics in the driver's seat? In other words, should the "hotheads" of golf really be villainized for wanting to be the best in the world?

The recent history of golf counsels us on these issues. Tiger Woods has not been asked to give up his place as the best player in the world so that he can appear more honorable to fans. Tiger is an emotional player—just watch his final putt at the 2019 Masters.[140] But nobody has asked Tiger to give up his status as one of the greatest golfers in history, and he has held this title even through a slew of public controversies which put

136. Gary van Sickle, *supra* note 131.

137. *Id.*

138. *Rules of Golf – Rule 1*, U.S. GOLF ASS'N (2019), https://www.usga.org/content/usga/home-page/rules/rules-2019/players-edition/rule-1.html [https://perma.cc/7HEW-34EE].

139. *Living with Integrity*, FIRST TEE, https://firsttee.org/impact/nine-core-values/living-with-integrity/ [https://perma.cc/LWX4-UDY7].

140. *See* Luke Kerr-Dineen, *Emotional Tiger Woods Fights Back Tears as He Talks About His Iconic Masters Win*, GOLF.COM (Nov. 10, 2020), https://golf.com/news/tiger-woods-emotional-masters-win-2020/ [https://perma.cc/4S4U-4P2Q].

him in a very unfavorable light.[141] Tiger's continued top-tier performance has been much different than the approach taken by Reed.[142]

And ultimately, the LIV Golf versus PGA Tour controversy is an interesting mirror to a Reed-Woods comparison. It speaks to the overarching conflict that has been felt by golfers and fans alike, beginning with the initial rift in professional golf when LIV entered the scene. At surface level, Tiger stayed loyal to the Tour despite a massive offer from LIV to jump ship (in fact, Greg Norman first reported that Woods' offer was between $700 million and $800 million, although he later clarified that "the offer was a summation of potential value based on part ownership of a LIV franchisee").[143] Regardless, the offer was likely astronomical. And now, Tiger is joining the Tour's board of directors to quell player concerns about their representation during the merger.[144]

The ethical and moral implications of the pending merger reach far beyond the scope of this Note. However, it is important to consider the interests directing actors such as Reed in the midst of this controversy. Perhaps Reed sees this split in the golf world as an opportunity to boost his fame or status, and he could be embracing the role of a sports villain in an effort to increase his notoriety with the media. But, ultimately, athletes are driven by wins and losses. No professional golfer could survive the ultra-competitive nature of the game by wanting to be famous based on clout or media coverage alone; those are secondary to performance, and becoming a well-known player comes with competing at the highest level. Ultimately, the numerous lawsuits amounting to a "weaponization" of defamation law illustrate Reed's determination that a rift in the golf world may be his ticket to more fame, power, money, and likely much less popularity.

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141. *See* Brett Cyrgalis, *Tiger Woods' Five Years of Scandal and Misery Since That Infamous Crash*, FOX SPORTS (Mar. 1, 2023, 7:14 AM), https://www.foxsports.com.au/golf/tiger-woods-five-years-of-scandal-and-misery-since-that-infamous-crash/news-story/71bcc6ef46eae06d1d1c671728252c16 [https://perma.cc/94XF-JNBU].

142. *See* Doug Ferguson, *Tiger's Year: 5 Wins, 0 Majors, 3 Rules Violations*, USA TODAY (Sept. 17, 2023), https://www.usatoday.com/story/sports/golf/2013/09/17/tiger-woods-rules-violations/2828615/ [https://perma.cc/N3YM-PPJ5].

143. Jack Hirsh, *'Not Even Close to That:' Tiger Woods' Lucrative LIV Offer Clarified in Report*, GOLF.COM (Oct. 18, 2022), https://golf.com/news/tiger-woods-liv-offer-clarified/#:~:text='Not%20even%20close%20to%20that%3A'%20Tiger%20Woods'%20lucrative,LIV%20offer%20clarified%20in%20report&text=First%2C%20Greg%20Norman%20said%20Tiger,ownership%20of%20a%20LIV%20franchise [https://perma.cc/SLB8-79DX].

144. Louise Radnofsky & Andrew Beaton, *Tiger Woods Joins PGA Tour Board Amid Player Unrest Over Saudi Deal: The Tour is Ceding More Power to Golfers as it Seeks to Quell Dissent Over its Pact with LIV Golf's Backers*, WALL ST. J. (Aug. 1, 2023, 10:55 AM), https://www.wsj.com/sports/golf/tiger-woods-pga-tour-liv-golf-saudi-arabia-deal-d72d315d?mod=sports_minor_pos1 [https://perma.cc/EYW8-E9MH].

CONCLUSION

Patrick Reed is undeniably one of the best golfers in the world regardless of whether his recent and past conduct is advisable. His world ranking at 68 overall is no small feat, and he should not be labeled as only a power-hungry, overly-litigious individual.[145] At the same time, though, golf's integrity is at stake. Members of the media, like Brandel Chamblee, should not be silenced in their criticisms of professional athletes who have chosen to enter the arena of the public eye. Every American citizen has the freedom to form an opinion and express that opinion through the freedoms of speech and press. Recognizing the importance of balancing this freedom—especially in the midst of "cancel culture"—and the protections individuals have from being defamed is an incredibly fine line to walk. However, it must be done.

In this case specifically, Patrick Reed's defamation suits should fail. But we, as fans, must individually determine whether we think his conduct is suitable for the world of professional golf. Acknowledging that Patrick Reed may deserve the freedom to act in a way we may otherwise think is inappropriate for a professional athlete can be a hard pill to swallow; but, the American public is not responsible for contributing rules, determinations, or handing down decisions in defamation lawsuits. We, as golf fans, are responsible for shaping a fan-base that is respectful of the game's integrity while also recognizing the ongoing shortcomings in our game, both on and off the course.

145. *See Week 45 – 12th November 2023 World Ranking*, OFF. WORLD GOLF RANKING, https://www.owgr.com/current-world-ranking [https://perma.cc/J6EQ-GEHN] (last visited Nov. 14, 2023).

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