

# DEFLATING AMATEURISM: HOW COLLEGE BASKETBALL'S BUBBLE CONSIDERATION UNDERMINES THE NCAA'S PRINCIPLE OF AMATEURISM

*Taylor A. Story*<sup>1</sup>

To improve is to change; to be perfect is to change often.

*-Sir Winston Churchill*

## INTRODUCTION

Imagine the confusion of a full-time Amazon employee, often required to work overtime, if they received compensation limited to the cost of their food, transportation, and living arrangements instead of a normal paycheck. The reason provided is that they are employed to attain training in the necessary job skills. To many this would appear unfair, maybe illegal, and it would certainly draw national media attention and swift condemnation from many public figures.

Instead of occurring at a fictional Amazon factory, such situations of inequity and payment occur daily in intercollegiate athletics. Conversely, only a momentary collective outrage is expressed by the national media and public figures, before turning back to other matters. Meanwhile, the National Collegiate Athletic Association (“NCAA”) — intercollegiate athletics governing body —

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<sup>1</sup> Editor-in-Chief, *Mississippi Sports Law Review* (Vol. 10); J.D. Candidate 2021, The University of Mississippi School of Law. The author wishes to thank Professor William W. Berry III for his assistance, feedback, and guidance in the development of this comment. The author also wishes to thank Mackinlee Rogers for her time, helpful commentary and suggestions throughout the writing process, as well as Sachi Denham, Rachel Henderson, and the entire staff of the *Mississippi Sports Law Review*.

and its member institutions (i.e., colleges and universities) continue to generate millions of dollars off of their “student-athletes” labor without ensuring they receive the meaningful education that was promised.<sup>2</sup>

The NCAA exists to protect the integrity of intercollegiate athletics by upholding the principle of amateurism.<sup>3</sup> The NCAA defines an amateur as a student-athlete whose participation in intercollegiate athletics is primarily motivated by education and who the NCAA protects from exploitation by commercial interests.<sup>4</sup> Historically, an amateur participated in athletics only for the love of the sport and received no compensation.<sup>5</sup> Conversely, the NCAA allows compensation in the form of scholarships limited to tuition and room and board, in addition to the allowed cost of attendance.<sup>6</sup>

Commercialization has transformed intercollegiate athletics from competition between student-athletes who participated in athletics while attaining an education, to a competition between “employee-athletes” whose participation generates vast wealth for other stakeholders while denigrating the athlete’s ability to attain a meaningful education.

The latest example of this reality is the NCAA’s response to the outbreak of the coronavirus (“COVID-19”) pandemic. Instead of focusing on ensuring student-athletes receive a meaningful education — the NCAA’s purported primary motivation for an athlete’s athletic participation — during trying times, the NCAA fo-

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<sup>2</sup> See What is the NCAA? NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Dec. 2, 2020).

<sup>3</sup> See *id.*

<sup>4</sup> Nat’l Collegiate Athletic Ass’n, 2020-21 NCAA Division I Manual (Aug. 2020), available at <https://web3.ncaa.org/lstdbi/reports/getReport/90008>, (hereinafter NCAA Division I Manual).

<sup>5</sup> The International Olympic Committee and the Modern Olympic Games (1950), [https://stillmed.olympic.org/Documents/Olympic%20Charter/Olympic\\_Charter\\_through\\_time/1950-Olympic\\_Charter.pdf](https://stillmed.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/1950-Olympic_Charter.pdf) (“You will be a true sportsman[, a]s an athlete . . . [i]f you take part in sport for the love of it . . .”) (emphasis omitted) (Hereinafter IOC Manual).

<sup>6</sup> See generally *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955 (N.D. Cal. 2015), *aff’d in part, vacated in part*, 802 F.3d 1039 (9th Cir. 2015); *In re: National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation*, 375 F.Supp. 3d 1058 (Cal N.D. 2019), *aff’d*, 958 F.3d 1239 (9th Cir. 2020), cert. granted sub nom. *NCAA v. Alston*, 2020 WL 7366281 (Mem).

cused its attention on ensuring its largest revenue generator March Madness can occur.<sup>7</sup> Additionally, the NCAA has sought to take advantage of COVID-19 by filing trademarks for multiple phrases related to conducting college basketball during such times.<sup>8</sup>

The commercialization of intercollegiate athletics and simultaneous neglect of the NCAA's principle of amateurism's purported educational aim reveal the stark reality that money drives intercollegiate athletics and not amateurism values. This then undermines the NCAA's defense of its principle of amateurism and the rules promulgated to uphold it. The NCAA amateurism model and their control of intercollegiate athletics now faces two imminent threats: the outbreak of COVID-19 and subsequent opportunity it provides for the Power Five Conferences — ACC, Big Ten, Big 12, Pac-12 and SEC — to seize further control by breaking away from the NCAA in basketball and potentially other sports, as well as the imminent review of the NCAA's amateurism rules viability under antitrust law by the Supreme Court.

Part I of this note briefly describes the history of the NCAA and the competing narratives of intercollegiate athletics. Part II describes the National Basketball Association's implementation of a Bubble to complete their 2020 season and the proposed use of a Bubble or controlled environment during the upcoming college basketball season. Part III analyzes the conflict between the commercial interests of modern intercollegiate athletics and the NCAA's principle of amateurism. Part IV argues that the consideration of implementing a Bubble for the upcoming college basketball season undermines the NCAA's principle of amateurism. Part V concludes this note by laying out the two major imminent threats to the NCAA's amateurism model and their continued

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<sup>7</sup> See Joseph Choi, NCAA in talks to host all of March Madness in Indianapolis, *The Hill* (Nov 16, 2020), <https://thehill.com/blogs/in-the-know/in-the-know/526173-ncaa-in-talks-to-host-all-of-march-madness-in-indianapolis>.

<sup>8</sup> See Dylan Wallace, NCAA Files Trademark for "Battle in the Bubble," *FanNation* (Aug. 31, 2020), <https://www.si.com/college/indiana/basketball/ncaa-filed-trademark-for-battle-in-the-bubble>; Joe Kinsey, NCAA Files Trademark For 'Mask Madness' to go with 'Battle in the Bubble,' *Outkick* (Dec. 28, 2020), <https://www.outkick.com/ncaa-files-trademark-for-mask-madness-to-go-with-battle-in-the-bubble/> (reporting that ESPN commentator Jay Bilas jokingly wondered if the NCAA would try to trademark the phrase "Mask Madness" following their filing of a trademark for the phrase "Battle in the Bubble" months earlier).

control of intercollegiate athletics: the outbreak of COVID-19 and the opportunity it presents the Power Five Conferences to further breakaway from the NCAA and the impending review of the viability of the NCAA's amateurism rules under antitrust law by the Supreme Court

## I. THE COMPETING NARRATIVES OF INTERCOLLEGIATE ATHLETICS

The NCAA serves as the governing body of intercollegiate athletics.<sup>9</sup> Its primary responsibilities include enforcing the rules established by its member institutions and conducting annual championships.<sup>10</sup> The modern NCAA, though, reflects little of its humble origins. As the industry of intercollegiate athletics has expanded and its popularity grown, so too has the NCAA's role.

The NCAA's expanded role has landed it at the center of public debate surrounding the future of intercollegiate athletics and the NCAA's role in them. This debate has resulted in two competing narratives. The NCAA narrative centers on the concept of the "student-athlete" in an environment where athletic participation is primarily motivated by education.<sup>11</sup> On the other hand, the alternative narrative centers on the concept of the "employee-athlete" whose primary motivation for attending an academic institution is athletic participation.<sup>12</sup>

These two narratives come into conflict when comparing the educational interests asserted by the NCAA and the economic realities that the commercialization of intercollegiate athletics have resulted. This debate plays out not only among common fans but in front of agencies such as the National Labor Relations Board and courts as high as the Supreme Court.

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<sup>9</sup> See What is the NCAA, *supra* note 2.

<sup>10</sup> See *id.*

<sup>11</sup> See NCAA Division I Manual, *supra* note 4.

<sup>12</sup> See William W. Berry III, *Employee-Athletes, Antitrust, and The Future of College Sports*, 28 *Stan. L. & Pol'y Rev.* 245, 262 (2017).

*A. History of the NCAA and the “Student-Athlete” Narrative*

## 1. History of the NCAA

Much like the NCAA, modern college football resembles little of its humble beginnings. Multi-million-dollar coaching contracts, hundred-million-dollar stadiums, and technology providing fans unlimited access to their favorite teams did not exist. What existed then, and does today, is the opportunity for institutions to generate inordinate revenue from athletics and infatuated fans expecting instant victory and sustained success.<sup>13</sup>

Such opportunity and excitement offered fertile ground for unethical and potentially downright dangerous behavior.<sup>14</sup> In pursuit of success, institutions admitted otherwise academically ineligible players, created classes just for athletes, and had professors hand out undeserved grades.<sup>15</sup> All of these actions were taken in the pursuit of athletic success.<sup>16</sup> Likewise, wealthy alumni offered money to come play or to continue playing at their institution.<sup>17</sup>

While the willingness to engage in unethical behaviors was worrisome, it paled in comparison to the intentionally dangerous actions teams took on the field. Players deliberately targeted other teams’ top players with the hopes of causing serious injury or ending their season altogether.<sup>18</sup> The apex arrived during the 1905 season, which resulted in more than eighteen players killed and

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<sup>13</sup> See Jim Weathersby, *Teddy Roosevelt’s Role in the Creation of the NCAA*, *The Sports Historian* (July 6, 2016), <https://www.thesportshistorian.com/teddy-roosevelts-role-in-the-creation-of-the-ncaa/#>.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* (“For example, in a game between Princeton and Dartmouth, Princeton’s players intentionally broke the collarbone of Dartmouth’s best player early in the game. Other premeditated acts such as breaking an opponent’s nose were commonplace. In some cases, players died from overly aggressive play. A Union College player died after a play during a game with New York University.”).

over 100 serious injuries.<sup>19</sup> Finding this environment untenable, many institutions considered discontinuing their programs.<sup>20</sup>

National attention arrived on the issue when President Theodore Roosevelt, an Ivy League graduate and avid football fan, intervened.<sup>21</sup> President Roosevelt called a conference with athletic directors from three top institutions to discuss college football's reformation.<sup>22</sup> Continued problems led the Chancellor of New York University ("NYU") to invite leaders from some of the country's top programs to determine the future of college football.<sup>23</sup> While President Roosevelt's conference resulted in little concrete action, the NYU meeting resulted in the formation of a rules committee.<sup>24</sup>

President Roosevelt requested that the participants of his White House conference and the NYU Chancellors conference meet and continue their progress towards meaningful reform.<sup>25</sup> By year's end, this work resulted in the establishment of the Intercollegiate Athletic Association ("IAA"), composed of 60 member institutions.<sup>26</sup> Five years later, the IAA changed its name to the NCAA.<sup>27</sup>

Despite massive economic and technological expansion and numerous changes to the competition structure and rules, the NCAA remains intercollegiate athletics' sole governing body. Today the NCAA is comprised of 1,098 member institutions (i.e., colleges and universities), competing in three different divisions and spread out over 102 athletic conferences.<sup>28</sup> The NCAA website states that each year "[n]early half a million college athletes make

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<sup>19</sup> See Rodney K. Smith, A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics, 11 Marq. Sports L. Rev. 9, 12 (2000).

<sup>20</sup> See Weathersby, *supra* note 13 (Responding to the egregious level of danger "Columbia and Union abolished football and more schools threatened to do the same. Harvard's president also called for the abolition of the sport").

<sup>21</sup> See *id.*

<sup>22</sup> See *id.* (Explaining the high-powered schools consisted of mostly Ivy Leagues, such as Harvard, Pennsylvania, Princeton, and Yale, along with schools such as Union and Swarthmore).

<sup>23</sup> See Smith, *supra* note 19, 12.

<sup>24</sup> See e.g., *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See e.g., *id.*

<sup>28</sup> See What is the NCAA, *supra* note 2.

up the 19,886 teams that send more than 57,661 participants to compete each year in the NCAA's 90 championships in 24 sports across 3 divisions."<sup>29</sup>

NCAA member institutions promulgate the rules of intercollegiate athletics.<sup>30</sup> Presidents from various institutions serve on committees that "ultimately decide which rules to adopt—everything from recruiting and compliance to academics and championships—and implement them on campus."<sup>31</sup> Institutions agree to abide by and uphold these rules and ensure compliance by their athletes.<sup>32</sup> Under the leadership of President Mark Emmert,<sup>33</sup> the NCAA and its 500 employees, enforce and uphold these rules and conduct all annual championships, except the College Football Playoffs."<sup>34</sup>

In recent years, the emergence of a heated debate over the NCAA's amateurism rules has resulted in two competing narratives: the NCAA's "student-athlete" narrative<sup>35</sup> and the alternative "employee-athlete" narrative.<sup>36</sup> This note will consider both narratives and the supporting and opposing arguments.

## 2. The NCAA's "Student-Athlete" Narrative

The NCAA narrative centers on the idea of the "student-athlete."<sup>37</sup> Essentially, a student-athlete is an amateur who plays the sport simply "for the love of the game."<sup>38</sup> Therefore, the student-athlete's primary purpose for attending an institution and participating in athletics is attaining an education.<sup>39</sup>

To better understand the principle of amateurism and how it has changed throughout the years, many scholars have analyzed the shift in amateurism from its pure beginnings to its complex

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<sup>29</sup> *Id.*

<sup>30</sup> *See id.*

<sup>31</sup> *Id.*

<sup>32</sup> *See* Compliance, NCAA, <http://www.ncaa.org/compliance> (last visited Dec. 2, 2020) (hereinafter *Compliance*).

<sup>33</sup> *See* About Us, Office of the President, NCAA, <http://www.ncaa.org/about/who-we-are/office-president> (last visited Dec. 2, 2020).

<sup>34</sup> *See* What is the NCAA, *supra* note 2.

<sup>35</sup> *See* NCAA Division I Manual, *supra* note 4.

<sup>36</sup> *See* Berry, *Employee-Athletes*, *supra* note 12.

<sup>37</sup> *See* NCAA Division I Manual, *supra* note 4.

<sup>38</sup> *See* IOC Manual, *supra* note 5.

<sup>39</sup> *See* NCAA Division I Manual, *supra* note 4.

modern form.<sup>40</sup> While amateurism may trace its roots as far back as ancient Greece, analysis of the current form necessitates looking only as far back as Victorian England.<sup>41</sup> British elites employed the term to separate themselves from working-class people in the sport of rowing.<sup>42</sup>

In its original form, “amateur” was used to define one who only competed in sport as a hobby.<sup>43</sup> A professional, on the other hand, competed out of a need or want for money.<sup>44</sup> In this reality, money played second fiddle to the desire to maintain separate social distinctions.<sup>45</sup>

The rules created by the 1950 International Olympic Committee (“IOC”) reinforced the original definition:

An amateur is one who participates and always has participated in sport solely for pleasure and for the physical, mental or social benefits he derives therefrom, and to whom participation in sport is nothing more than recreation without material gain of any kind, direct or indirect and in accordance with the rules of the International Federation concerned.<sup>46</sup>

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<sup>40</sup> See William W. Berry III, *Amending Amateurism: Saving Intercollegiate*

*Athletics Through Conference Athlete Revenue-Sharing*, 68 *Ala. L. Rev.* 551, 557-60 (2016) (Discussing the evolution of the definition of amateurism from its founding to the modern era) (hereinafter *Amending Amateurism*); see also Kristen R. Muenzen, *Weakening Its Own Defense? The NCAA’s Version of Amateurism*, 13 *Marq. Sports L. Rev.* 257, 259-63 (2003) (Discussing the evolution of the NCAA’s definition of amateurism and how the dictionary definition and NCAA definition stand at odds).

<sup>41</sup> See Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, *The Atlantic* (Jul. 25, 2012), <http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/> (Stating “In reality, amateurism in both the Olympics and college sports comes from the same place: Victorian England.”).

<sup>42</sup> See *id.*; see also e.g., Berry, *Amending Amateurism*, *supra* note 40; Anna McCullough & Aswin Tony Subketaew, *Ancient Greek “Amateurism,” the NCAA and the Courts*, 31 *Int’l J. Hist. Sport* 1033 (2014).

<sup>43</sup> See Hruby, *supra* note 41 (Explaining that to differentiate themselves from the working class, British elites coined the “concept of amateurism...extending it more...[to] someone who...only did sport as a hobby.”); See also IOC Manual, *supra* note 24 (“An amateur is one...to whom participation in sport is nothing more than recreation”).

<sup>44</sup> See Berry, *Amending Amateurism*, *supra* note 40, at 557-58.

<sup>45</sup> See Hruby, *supra* note 41.

<sup>46</sup> See IOC Manual, *supra* note 5.

In the IOC's view, an amateur athlete only "[took] part in sport for the love of it."<sup>47</sup> In practice, while Olympic Athletes did not receive direct compensation for their participation, their celebrity status and success resulted in significant financial gain.<sup>48</sup>

The NCAA's modern definition adds one major caveat — education is the primary motivation for participation in athletics and sports are simply an avocation.<sup>49</sup> The NCAA manual states:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be *motivated primarily by education* and by the physical, mental and social benefits to be derived. *Student participation in intercollegiate athletics is an avocation*, and student-athletes should be protected from exploitation by professional and commercial enterprises.<sup>50</sup>

Under the NCAA's view, participation in athletics is merely an avocation — a hobby or minor occupation — secondary to the primary reason for participation: attaining a meaningful education.<sup>51</sup>

To further this educational aim, the NCAA has established mandatory eligibility rules.<sup>52</sup> These rules have undergone numerous changes over the years. The current rules require incoming athletes to complete sixteen core classes identified by the NCAA and attain the required minimum grade point average ("GPA") and Scholastic Aptitude Test ("SAT") or American College Test ("ACT") score on the NCAA's sliding scale eligibility model.<sup>53</sup>

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<sup>47</sup> Id.

<sup>48</sup> See Hruby, *supra* note 41 (Citing Neil Faulkner, Olympic Myth #1, Yale University Press: YaleBooks (April 23, 2012), <https://yalebooksblog.co.uk/2012/04/23/olympic-myth-1-the-amateur-ideal-author-article-by-neil-faulkner/> ("[Ancient Olympic] champions invariably became very rich men. They may have left Olympia with only an olive crown, but they could expect ample reward for their efforts at home, and they could earn generous prizes thereafter by appearing at any of some hundreds of local sports festivals.")).

<sup>49</sup> See NCAA Division I Manual, *supra* note 4, §2.9.

<sup>50</sup> Id. (emphasis added).

<sup>51</sup> Id.

<sup>52</sup> See generally NCAA Division I Manual, *supra* note 4.

<sup>53</sup> Paul C. Weiler et al., *Sports and the Law: Text, Cases and Problems* 803-04 (6th ed. 2008) (The 16 core courses are composed of 4 years of English, 3 years of Math, 2 years of Science, 1 additional course in either English, Math, or Science, 2 years of social science, and four years of "additional academic course work." Students must secure a minimum 2.00 GPA in these core courses). See also William W. Berry III, Ed-

The most significant change came with the NCAA's introduction of the Academic Progress Rate ("APR") system.<sup>54</sup> The APR employs a series of complex calculations, requiring assigned points to be added up and divided by a team's possible points, and then multiplied to determine an average for the team.<sup>55</sup> A team's failure to meet the required average can result in various penalties including scholarship deductions.<sup>56</sup> If the failure continues further penalties can include a loss of practice time, a reduction in the number of permitted competitions, and more serious penalties such as suspensions for coaches and limitations on membership privileges.<sup>57</sup> Beginning in the 2008-09 season, the NCAA added an eligibility requirement that teams competing in the postseason must achieve either a 900 APR four-year average or a 930 APR two-year average.<sup>58</sup>

These requirements caused institutions to make significant investments in resources aimed at ensuring eligibility. Athletes now have access to academic success centers staffed with tutors covering almost every subject.<sup>59</sup> Some institutions hire students or volunteers to walk to various classes and ensure athletes' attendance,<sup>60</sup> while other institutions utilize smartphone applications to do so.<sup>61</sup> Other investments include access to academic advisors and counselors, academic tracking programs, and even required study hall hours.<sup>62</sup>

To protect the NCAA's principle of amateurism, the rule book provides an extensive list of conduct examples that could jeopardize one's amateur status.<sup>63</sup> Conduct generally prohibited includes: receiving payment for participation in sports; accepting a promise

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educating Athletes Re-Envisioning the Student Athlete Model, 81 *Tenn. L. Rev.* 795, 813 (2014).

<sup>54</sup> See *supra* note 53, Weiler at 803-04; Berry, *Educating Athletes* at 813-14.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See Student Athlete Academic Support, Vanderbilt University, <https://www.vanderbilt.edu/studentathletes/services/> (last visited Dec. 2, 2020).

<sup>60</sup> See *id.*; Jake New, *Class Checkers*, *Inside Higher Ed* (Jun. 24, 2015), <https://www.insidehighered.com/news/2015/06/24/attendance-monitoring-programs-common-college-athletics>.

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> See NCAA Division I Manual, *supra* note 4, § 12.1.

of future payment; signing a contract to play for a professional team; receiving a salary or other form of assistance from a professional team; competing on a professional team even without pay;<sup>64</sup> taking a break before college while continuing to play the sport; receiving prize money from any competition above the allowable amount; and being represented by or taking benefits from an agent or endorsing a commercial product.<sup>65</sup> With that being said, actions not explicitly listed in the rule book can still yet lead to a violation if the NCAA deems it a threat to amateurism.<sup>66</sup>

Despite shifting positions, the NCAA emphatically insists its existence remains necessary to protect intercollegiate athletics' integrity by upholding the principle of amateurism and protecting student-athletes from "professional and commercial exploitation."<sup>67</sup> The NCAA takes this role very seriously, pursuing even those most minor violations and handing out stiff penalties to those who dare break the rules.<sup>68</sup>

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<sup>64</sup> See *id.*

<sup>65</sup> See Amateurism, NCAA, <http://www.ncaa.org/student-athletes/future/amateurism> (last visited Dec. 2, 2020).

<sup>66</sup> See Jeff Borzello, Penny Hardaway, James Wiseman and the Memphis Tigers: A Timeline, ESPN (Dec. 19, 2019), [https://www.espn.com/mens-college-basketball/story/\\_/id/28059747/penny-hardaway-james-wiseman-memphis-tigers-line](https://www.espn.com/mens-college-basketball/story/_/id/28059747/penny-hardaway-james-wiseman-memphis-tigers-line) (During the 2019-2020 season, Memphis Tigers freshmen James Wiseman, the number one ranked recruit, was ruled ineligible, after previously being ruled eligible, because the NCAA declared head coach Penny Hardaway a booster for donating to help the university build its hall of fame ten years prior. The problem being Hardaway had paid to help Wiseman's family move to Memphis to play for his high school team, and a year later Hardaway was hired as the head coach. The NCAA argued Hardaway as a booster had provided impermissible benefits to Wiseman's family to get them to move to Memphis).

<sup>67</sup> See *Nat'l Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1058-59 (9th Cir. 2015); See also NCAA Division I Manual *supra* note 4, §2.9.

<sup>68</sup> Gabrielle Hays, UT reports minor NCAA violations for 2018, 10 News (Aug. 15, 2018), <https://www.wbir.com/article/sports/college/vols/ut-reports-minor-ncaa-violations-for-2018/51-584350470> (Reporting that in 2018, the University of Tennessee reported six-level III violation's, including one for a recruit receiving popcorn and water) ("According to [the] NCAA, 95 percent of all Level III incidents result in penalties."); See also NCAA, New Violation Structure Introduced, (Aug. 1, 2013), <http://www.ncaa.org/about/resources/media-center/news/new-violation-structure-introduced> (Level IV and III constitute the lowest level of violations. Level IV violations are "Incidental infractions that are inadvertent and isolated, technical in nature and result in a negligible, if any, competitive advantage." While Level II violations "are isolated or limited in nature; provide no more than a minimal recruiting, competitive or other advantage; and do not include more than a minimal impermissible benefit.").

The NCAA Committee on Infractions investigates and adjudicates alleged rule violations, determines penalties, and hears appeals.<sup>69</sup> Member institutions are required to self-police their employees and athletes and report violations to the NCAA.<sup>70</sup> Failure to do so can result in even harsher penalties.<sup>71</sup>

In fairness, the NCAA's amateurism rules do not claim to follow the original pure form, which allowed no compensation of any kind. Conversely, the current rules allow limited compensation tied to education.<sup>72</sup> Such compensation includes a scholarship that covers tuition and room and board, in addition to the cost of attendance.<sup>73</sup>

### *B. The Alternative "Employee-Athlete" Narrative*

The alternative narrative rests on the notion of the "employee-athlete," in which athlete's primary motivation to attend an institution is athletic participation.<sup>74</sup> The NCAA and its member institutions exploit these athletes' free labor to generate financial benefits for themselves and other stakeholders.<sup>75</sup> Supporters of this position advocate for a pay-to-play approach in which athletes can receive compensation for the revenue their athletic abilities

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<sup>69</sup> See Division I Committee on Infractions, NCAA, <http://www.ncaa.org/governance/governance/committees/division-i-committee-infractions> (last visited Dec. 2, 2020).

<sup>70</sup> See Compliance, *supra* note 32; NCAA Division I Manual, *supra* note 4, § 1.3.2.

<sup>71</sup> See *supra* note 70.

<sup>72</sup> See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2015), *aff'd in part, vacated in part*, 802 F.3d 1039 (9th Cir. 2015); See also NCAA Division I Manual, *supra* note 4.

<sup>73</sup> See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2015), *aff'd in part, vacated in part*, 802 F.3d 1039 (9th Cir. 2015); In re: National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 375 F.Supp.3d 1058 (Cal N.D. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), cert. granted sub nom. *NCAA v. Alston*, 2020 WL 7366281 (Mem).

<sup>74</sup> See Berry, *Employee-Athletes*, *supra* note 12.

<sup>75</sup> See Weiler, *supra* note 53, 721. See generally Joe Nocera & Ben Strauss, *Indentured: The Inside Story of the Rebellion Against the NCAA* (2016); All Things Considered: "Indentured" Explores Efforts to Fight Mistreatment of College Athletes, NPR (Feb 15, 2016), <https://www.npr.org/2016/02/15/466848768/indentured-explores-efforts-to-fight-mistreatment-of-college-athletes>; Taylor Branch, *The Shame of College Sports*, *The Atlantic* (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

generate.<sup>76</sup> Under this view, the athlete is not a “student-athlete” but rather an “employee-athlete” of their institution<sup>77</sup>

This narrative is premised upon two general assumptions: (1) at present, the commercialization of intercollegiate athletics has already taken place— especially in the revenue sports of basketball and football; and (2) commercialization has created obstacles to athletes’ ability to obtain a meaningful education and thus undermines the NCAA’s position.<sup>78</sup>

The first assumption premising this narrative is that the commercialization of intercollegiate athletics has already taken place and will continue to expand. Supporters of the employee-athlete narrative point to the explosion of revenues generated from advertising, tickets, and television to exemplify the existing and continued commercialization.<sup>79</sup> Although the athletes are prohibited from receiving any remuneration from the revenues they generate, the NCAA, conferences,<sup>80</sup> conference commissioners,<sup>81</sup> institutions, coaches, sponsors, and networks are not.

Commercialization has significantly expanded institutions’ revenue streams, which in turn are utilized to advance their athletic department. The sale of broadcasting rights provides institutions with significant financial windfalls.<sup>82</sup> Additionally, conferences and institutions have launched their own television net-

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<sup>76</sup> See Berry, *Amending Amateurism*, supra note 40, 553. See Editorial, *Pay to Play (and Study) in College Sports*, *Chicago Tribune* (Feb. 2, 2015), <http://www.chicagotribune.com/news/opinion/editorials/ct-ncaa-football-pay-edit-0202-20150130-story.html>.

<sup>77</sup> See Berry, *Employee-Athletes*, supra note 12, 262-63. See also *Decision and Direction of Election, Nw. Univ. Emp’r & Coll. Athletes Players Ass’n (CAPA)*, No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014), <http://apps.nlr.gov/link/document.aspx/09031d4581667b6f>, dismissed on other grounds, 362 N.L.R.B. 167 (2015).

<sup>78</sup> See Berry, *Amending Amateurism*, supra note 40, 560-65.

<sup>79</sup> See *id.*

<sup>80</sup> See Steve Berkowitz, *Power Five Conferences had over \$2.9 billion in revenue in fiscal 2019, new tax records show*, *Statesman* (Jul. 12, 2020), <http://www.statesman.com/sports/20200712/power-five-conferences-had-over-29-billion-in-revenue-in-fiscal-2019-new-tax-records-show> (Showing in 2019, the Power Five conferences combined for \$2.9 billion in revenue. ACC \$455.4 million, Big ten \$780 million, Big 12 \$439 million, Pac-12 \$530.4 million, SEC \$720.6 million).

<sup>81</sup> See *id.* (Showing in 2019, Big Ten Commissioner Jim Delaney made \$10.3 million, Pac-12 Commissioner Larry Scott \$5.4 million, Big 12 Commissioner Bob Bowlsby \$4.0 million, ACC Commissioner John Swofford \$3.8 million, and SEC commissioner \$2.6 million).

<sup>82</sup> See *infra* note 191.

works.<sup>83</sup> The increased cashflow opportunity has allowed coaching salaries across the board to increase.<sup>84</sup> Likewise, institutions invest inordinate financial capital in upgrading existing facilities or even building new ones.<sup>85</sup>

The resultant benefits are not exclusive to the institutions: as commercialization has also enriched the fan experience. Fans now have nearly limitless access and opportunity to purchase merchandise related to their favorite team.<sup>86</sup> Additionally, fans can purchase subscriptions to websites and message boards, which grants access to exclusive information and provides a forum to discuss the team.<sup>87</sup>

The second assumption is that commercialization has created obstacles to an athlete's ability to attain a meaningful education. Despite NCAA time restrictions,<sup>88</sup> athletes typically dedicate forty

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<sup>83</sup> See The Big Ten Conference Announces Media Agreements Increasing National Coverage of Big Ten Sports, Big Ten (Jun. 21, 2006), [https://bigten.org/new/2006/6/21/The\\_Big\\_Ten\\_Conference\\_Announces\\_Media\\_Agreements\\_Increasing\\_National\\_Coverage\\_of\\_Big\\_Ten\\_Sports.aspx](https://bigten.org/new/2006/6/21/The_Big_Ten_Conference_Announces_Media_Agreements_Increasing_National_Coverage_of_Big_Ten_Sports.aspx); SEC Network to broadcast 24/7, ESPN (May 2, 2013), [https://www.espn.com/espn/story/\\_/id/9235260/sec-espn-announce-sec-network-2014](https://www.espn.com/espn/story/_/id/9235260/sec-espn-announce-sec-network-2014); Paul Steinbach, ESPN, University of Texas to Launch Longhorn Network, Athletic Business (Jan. 2011), <https://www.athleticbusiness.com/espn-university-of-texas-to-launch-longhorn-network.html>.

<sup>84</sup> Ben Bolch et al, Expensive instructors: The salaries of every Power Five college football coach, Los Angeles Times (Sept. 17, 2020), <https://www.latimes.com/sports/story/2020-09-17/ncaa-college-football-coaches-salaries-athletic-department-revenues>.

<sup>85</sup> See John Duffley, Kyle Field's \$450 Million Upgrade in Mesmerizing 1-Minute Video, FanBuzz (Sept. 2, 2020), <https://fanbuzz.com/college-football/sec/enjoy-this-time-lapse-of-the-entire-kyle-field-reconstruction-project-for-tbt/> (Explaining in 2013, Texas A&M approved a \$485 million plan to increase the capacity of its stadium from 82,589 to 102,500.); Austin Miller, Ole Miss Releases First Phase of Renovation, Expansion Plans for Vaught-Hemingway, Ole Miss (Aug. 7, 2014), [https://olemisssports.com/news/2014/8/7/Ole\\_Miss\\_Releases\\_First\\_Phase\\_of\\_Renovation\\_Expansion\\_Plans\\_for\\_Vaught\\_Hemingway](https://olemisssports.com/news/2014/8/7/Ole_Miss_Releases_First_Phase_of_Renovation_Expansion_Plans_for_Vaught_Hemingway); Thom Patterson, America's incredibly expensive college football stadiums, CNN (Sept. 28, 2018), <https://www.cnn.com/2018/09/28/us/expensive-college-football-stadiums/index.html> (Showing Notre Dame spent \$400 to update its stadium adding new seating, a large video board, as well as improvements to the Wi-Fi, lighting, and press box. The University of Tennessee projected a cost of \$340 million for renovations to their entry gates and towers, as well as an expansion to the south concourse.).

<sup>86</sup> See Darren Rovell, Colleges alter jersey sales policy, ABC News (Jun. 5, 2014), <https://abcnews.go.com/Sports/colleges-alter-jersey-sales-policy/story?id=24011703>.

<sup>87</sup> See generally 247sports.com (Dedicated to tracking the top recruits in both college basketball and football); Rebel Grove on Rivals.com (Discussion board dedicated to all thing related to the University of Mississippi athletics); elevenwarriors.com (Discussion forum for Ohio State fans).

<sup>88</sup> See NCAA Division I Manual, *supra* note 4, §17.1.7.1.

or more hours a week to athletics.<sup>89</sup> This all-consuming nature limits athletes' abilities to choose certain majors, or at the very least causes them to shy away from more difficult ones, and can limit the classes they enroll in.<sup>90</sup>

Obstacles may also arise when institutions cut academic corners to meet the demands stemming from commercialization. Tactics most often employed include placing athletes into easier classes, or with "athlete-friendly" faculty,<sup>91</sup> and employing qualified tutors that ultimately completed athlete's classwork instead of assisting them in learning the material.<sup>92</sup>

At the extreme end of the corner-cutting spectrum sit institutions that commit outright academic fraud.<sup>93</sup> For example, the University of North Carolina placed athletes in fraudulent classes for over two decades.<sup>94</sup> These classes often did not meet and, in some cases, did not have an assigned professor.<sup>95</sup> The classes' only requirement often consisted of a short paper due at the end of the semester.<sup>96</sup> Athletes often received significant assistance from a tutor in writing the paper. Moreover, the paper was then graded by a secretary who typically did not read it in its entirety.<sup>97</sup>

The facts underlying the employee-athlete's two foundational assumptions lead to the rejection of the NCAA's proffered "stu-

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<sup>89</sup> See Peter Jacobs, *Here's the Insane Amount of Time Student-Athletes Spend on Practice*, *Business Insider* (Jan. 27, 2015), <https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1> (Citing a 2011 NCAA survey in which "[m]any student-athletes, however, reported that they practice at least 30 hours a week on average, with some sports reporting weekly practice commitments of more than 40 hours).

<sup>90</sup> See Weiler, *supra* note 53, 721; See also William W. Berry III, *Educating Athletes Re-Envisioning the Student Athlete Model*, 81 *Tenn. L. Rev.* 795, 813 (2014) (hereinafter *Educating Athletes*).

<sup>91</sup> See Berry, *Amending Amateurism*, *supra* note 40, 564; Berry, *Educating Athletes*, *supra* note 90, 815-16.

<sup>92</sup> See *supra* note 91.

<sup>93</sup> See *supra* note 91.

<sup>94</sup> See, Sean Gregory, *North Carolina Academic Fraud Decision Exposes College Sports Hypocrisy*, *TIME* (Oct. 13, 2017), <https://time.com/4981782/north-carolina-academic-fraud-decision-exposes-college-sports-hypocrisy/>; Jeremy Bauer-Wolf, *NCAA: No Academic Violations at UNC*, *Inside Higher Ed* (Oct. 16, 2017), <https://www.insidehighered.com/news/2017/10/16/breaking-ncaa-finds-no-academic-fraud-unc>.

<sup>95</sup> See *supra* note 94.

<sup>96</sup> See *supra* note 94.

<sup>97</sup> See *supra* note 94.

dent-athlete” model.<sup>98</sup> In sum, athletic participation primarily motivates an athlete’s attendance at an institution rather than education.<sup>99</sup>

Foundational to the employee-athlete model’s workability is the existence of an employer-employee relationship between the “employee” athlete and the “employer” institution. Recently, agencies<sup>100</sup> and courts have increasingly lent credence to this concept.<sup>101</sup> Peter Ohr, the National Labor Relations Board (“NLRB”) Regional Director, outlined such a relationship and found scholarship members of the Northwestern football team were university employees.<sup>102</sup> Likewise, in Judge Hamilton’s concurring opinion in the Seventh Circuit case, *Berger v. NCAA*, he reasoned that the economic reality for revenue sports and scholarship athletes might not comport with the principle of amateurism or a finding that they are not employees.<sup>103</sup>

Expounding on these opinions, Professor William W. Berry III, illustrated the relationship between the “employee” athlete and the “employer” institution.<sup>104</sup> Institutions hire athletes under a term contract that lasts up to four years.<sup>105</sup> Consideration consists of the athletes’ training and participation on the institutions’ behalf in athletic competitions.<sup>106</sup> In exchange, institutions agree to compensate the athlete in the form of a scholarship.<sup>107</sup> Such

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<sup>98</sup> See, Berry, *Employee Athletes*, supra note 12, 262-63.

<sup>99</sup> See supra note 98.

<sup>100</sup> See Decision and Direction of Election, *Nw. Univ. Emp’r & Coll. Athletes Players Ass’n (CAPA)*, No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014), <http://apps.nlr.gov/link/document.aspx/09031d4581667b6f>, dismissed on other grounds, 362 N.L.R.B. 167 (2015) (Hereinafter NLRB).

<sup>101</sup> See generally *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955 (N.D. Cal. 2015), aff’d in part, vacated in part, 802 F.3d 1039 (9th Cir. 2015); In re: National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation, 375 F.Supp.3d 1058 (Cal N.D. 2019), aff’d, 958 F.3d 1239 (9th Cir. 2020), cert. granted sub nom. *NCAA v. Alston*, 2020 WL 7366281 (Mem); *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring).

<sup>102</sup> See NLRB, supra note 101; See also Berry, *Employee Athletes* supra note 12, 262-63 (Analyzing the employee-athlete, by explaining the employee-employer relationship foundation used in the NLRB regional directors’ decision); Weiler, supra note 53, 880-81.

<sup>103</sup> See *Berger*, 843 F.3d 285, 294 (Hamilton, J., concurring).

<sup>104</sup> See Berry, *Employee Athletes*, supra note 12, 262-63.

<sup>105</sup> See id.

<sup>106</sup> See id.

<sup>107</sup> See id.

scholarships cover room and board, tuition, and the allowable cost of attendance.<sup>108</sup> Additional consideration can come in the form of academic support staff and facilities.<sup>109</sup> Although the agreement requires the athlete's attend class and progress towards a degree, classroom attendance and educational advancement play second fiddle to their primary "work" as an athlete.<sup>110</sup> These facts lead to the conclusion that athletes chose institutions for their athletic value rather than academic value.<sup>111</sup>

The employee-athlete narrative rejects the NCAA's position that these are student-athletes motivated to compete primarily by education. Instead, it asserts that athletes are "employees", and their member institutions are their "employers," and thus the two are engaged in an employer-employee relationship. Courts and Agencies have begun to lend more credence to this idea.

### *C. The Agency and Judicial Response*

The history and tradition of amateurism, as well as the NCAA's guardian roll, runs deep in intercollegiate athletics. The Supreme Court recognizes "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports... [and] the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics."<sup>112</sup>

Nevertheless, the modern definition of amateurism resembles little of its pure beginnings.<sup>113</sup> The days of an amateur being the casual rower in the English River<sup>114</sup> have yielded to the "amateur" devoting over forty hours a week playing for highly paid coaches in massive stadiums on prime-time television.<sup>115</sup> This modern form of amateurism resembles little of its historical form.

As "amateurism" expanded, the NCAA's stranglehold over intercollegiate athletics lessened due to growing challenges to its

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<sup>108</sup> See *id.*

<sup>109</sup> See *id.*

<sup>110</sup> See *id.*

<sup>111</sup> See *id.*

<sup>112</sup> *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984).

<sup>113</sup> See *supra* note 40.

<sup>114</sup> See *supra* notes 41, 42.

<sup>115</sup> See generally *supra* notes 23, 85, 90; *infra* note 188.

rules. Increasingly, this modern form appears to reflect more of an “employee-athlete” relationship than a “student-athlete” one.<sup>116</sup> Agencies and courts have taken notice of such and progressively now progressively offer less deference to the NCAA as more challenges are brought against its amateurism model.<sup>117</sup>

In 2014, football players at Northwestern University filed a case with the National Labor Relations Board (“NLRB”), arguing they were University employees.<sup>118</sup> Although the NLRB’s ruling in favor of the players was overturned on jurisdictional grounds, its underlying reasoning offers a roadmap for the future.<sup>119</sup>

NLRB Regional Director, Peter Ohr, concluded under these circumstances that the athletes “met the criteria for being classified as employees.”<sup>120</sup> Director Ohr reasoned the athletes were employees because (1) they provide a valuable service to the university — as demonstrated by the substantial revenue and public relations benefits the university receives; (2) they are compensated — with scholarships that include tuition, fees, books, room, and board; (3) they are required to perform services for the university as a condition of receiving that compensation; and (4) their “work” is controlled by supervisors, employees by the university (their coaches).<sup>121</sup>

Director Ohr provided additional reasoning for his decision, which appears to support the argument that education is not the primary focus. His reasons included: (a) players spent significantly more time on athletics than education; (b) the players “work,” playing football — for which they received no academic credit — had no relationship to their education; (c) the university employees who supervise the players are coaches not academic faculty;

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<sup>116</sup> See NLRB, *supra* note 101; Berger, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring).

<sup>117</sup> See NLRB, *supra* note 101; O’Bannon v. Nat’l Collegiate Athletic Ass’n, 7 F. Supp. 3d 955 (N.D. Cal. 2015), *aff’d* in part, *vacated* in part, 802 F.3d 1039 (9th Cir. 2015); *In re: National Collegiate Athletic Association Athletic Grant-in-aid Cap Anti-trust Litigation*, 375 F.Supp. 3d 1058 (Cal N.D. 2019), *aff’d*, 958 F.3d 1239 (9th Cir. 2020), cert. granted sub nom. NCAA v. Alston, 2020 WL 7366281 (Mem); Berger v. Nat’l Collegiate Athletic Ass’n, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring).

<sup>118</sup> See NLRB, *supra* note 101; Weiler, *supra* note 53, 880-81.

<sup>119</sup> See NLRB, *supra* note 101, dismissed on other grounds, 362 NLRB 167 (2015)

<sup>120</sup> *Id.* See also Weiler, *supra* note 53, 880-81.

<sup>121</sup> See NLRB, *supra* note 101.

and (d) the financial aid players receive was aimed at ensuring athletic participation not academic completion.<sup>122</sup>

Ultimately, the full NLRB vacated the decision of Director Ohr on jurisdictional grounds.<sup>123</sup> The Board declined to opine on the ultimate question of whether the athletes were employees.<sup>124</sup>

However, the NLRB's general counsel, Robert Griffin, did weigh in on the question. Griffin sent a memo to the regional directors and stated, "it is clear . . . that scholarship football players at Northwestern and other Division I FBS private colleges and universities are employees under the NLRA because they perform services for their colleges and the NCAA, subject to their control and in return for compensation."<sup>125</sup>

Federal courts have also weighed into the "employee-athlete" dispute. In *Berger v. NCAA*, former members of the University of Pennsylvania women's track and field team sued the University on the claim they were employees under the Fair Labor Standards Act ("FLSA") and entitled to minimum wage.<sup>126</sup> The Seventh Circuit rejected their claim and held that their status as student-athletes did not qualify them as employees.<sup>127</sup> In his concurring opinion, Judge Hamilton questioned whether traditional amateurism can coexist with the modern economic reality of commercialized intercollegiate athletics.<sup>128</sup>

The NCAA's amateurism model has also faced antitrust law challenges. In *O'Bannon v. NCAA*, Ed O'Bannon, a former member of the University of California Los Angeles ("UCLA") Bruins basketball team sued Electronic Arts Sports ("EA Sports") over the use of his name, image, and likeness ("NIL") in their college bas-

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<sup>122</sup> *Id.*

<sup>123</sup> *Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA)*, 362 NLRB 1350 (2015) (Held creating a bargaining unit in this situation, where other Big Ten institutions were not subject to the NLRB's jurisdiction as public universities, was not appropriate).

<sup>124</sup> *See id.*

<sup>125</sup> See Memorandum GC 17-01 from Richard Griffin, Jr., Gen. Counsel, NLRB, on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context to All Reg'l Dirs., Officers-in-Charge, and Resident Officers (Jan. 31, 2017), <https://www.insidehighered.com/news/2017/02/02/nlr-general-counsel-says-private-college-football-players-are-employees>.

<sup>126</sup> *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 287 (7th Cir. 2016).

<sup>127</sup> *Id.* at 287.

<sup>128</sup> *Id.* at 294. (Hamilton, J., concurring).

ketball video game.<sup>129</sup> The initial suit for misapplication evolved into a class-action lawsuit against the NCAA.<sup>130</sup> The class of current and former players argued that the NCAA's amateurism rules, preventing their ability to receive compensation for the use of their NIL, violated the Sherman Act.<sup>131</sup>

The district court held that the NCAA's amateurism rules prohibiting athletes' receipt of compensation for their NIL constituted an antitrust violation under the Sherman Act.<sup>132</sup> Judge Claudia Wilken ruled that the NCAA must pay the athletes \$5,000 per year, to be held in a trust until they complete their education.<sup>133</sup> On appeal, although the Ninth Circuit upheld the decision, it determined that the cost of attendance was a sufficient remedy.<sup>134</sup>

In the class-action suit, *in re: National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation*, current and former athletes took their challenges to the NCAA's amateurism model a step further and questioned the legality of the NCAA's model.<sup>135</sup> They argued the NCAA's compensation constituted a violation of antitrust law as an unlawful restraint on commerce.<sup>136</sup> Although Judge Wilken did not strike down the entire system, she did hold that the NCAA cannot place limits on "benefits related to education."<sup>137</sup> Her ruling further expanded the cost of attendance category. On appeal, the Ninth Circuit affirmed.<sup>138</sup>

These cases resulted in a perplexing dilemma for agencies and courts. While they have repeatedly held the NCAA's amateurism rules in violation of antitrust laws, they have been unwilling

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<sup>129</sup> O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1055 (9th Cir. 2015)

<sup>130</sup> Id. at 1055-56.

<sup>131</sup> Id.

<sup>132</sup> Id.

<sup>133</sup> Id. at 1008-09.

<sup>134</sup> Id. at 1079.

<sup>135</sup> *In re: National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation*, 375 F.Supp. 3d 1058 (Cal N.D. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom. NCAA v. Alston*, 2020 WL 7366281 (Mem).

<sup>136</sup> Id.

<sup>137</sup> Id. at 1102.

<sup>138</sup> *In re: National Collegiate Athletic Association Athletic Grant-in-aid Cap Antitrust Litigation*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom. NCAA v. Alston*, 2020 WL 7366281 (Mem).

to throw them out wholesale. Instead, courts have opted for incremental change. One point is clearly discernible, though, where the NCAA no longer enjoys the presumption that its amateurism rules are valid.

## II. THE BUBBLE ENVIRONMENT

Following the March 2020 outbreak of COVID-19 in the United States, much of everyday life was thrown into chaos. Government's closures of businesses and schools sent millions to unemployment lines and left children stuck at home. The pandemonium put society at a standstill, and professional and intercollegiate sports were not immune from this phenomenon. On March 11, 2020, the National Basketball Association ("NBA") suspended its season "until further notice" after a Utah Jazz player tested positive for COVID-19.<sup>139</sup> The next day, the NCAA cancelled March Madness, all other winter sports, as well as its planned spring championships.<sup>140</sup>

For many Americans, sports were far from the top of their priority list; however, for organizations and individuals whose financial viability depends upon them, sports were front and center. These organizations and individuals were given the difficult task of finding a way to permit sports to resume while also ensuring safety. The result of their efforts? A "Bubble." The theory behind the "Bubble" was quite simple: The best chance of a return to sports was the creation of an environment where everyone's movements could be controlled and thus maximizing the ability to prevent the contraction or spreading of the virus.

Major sports leagues — including the NBA, WNBA, MLS, and NHL — all adopted a Bubble or, at the very least, a more flexible version of a controlled environment.<sup>141</sup> Their efforts ended in

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<sup>139</sup> See NBA suspends season until further notice after player tests positive for the coronavirus, ESPN (Mar. 11, 2020), [https://www.espn.com/nba/story/\\_/id/28887560/nba-suspends-season-further-notice-player-tests-positive-coronavirus](https://www.espn.com/nba/story/_/id/28887560/nba-suspends-season-further-notice-player-tests-positive-coronavirus).

<sup>140</sup> See Ahiza Garcia-Hodges, NCAA cancels March Madness tournaments, all other winter and spring championships, NBC News (Mar. 12, 2020), <https://www.nbcnews.com/news/us-news/ncaa-cancels-march-madness-tournaments-n1157261>.

<sup>141</sup> See Adam Lashinsky and Brian O'Keefe, How the NBA kept the bubble from bursting, Fortune (Oct. 15, 2020), <https://fortune.com/longform/nba-bubble-2020-orlando-florida-disney-covid-19-coronavirus-pandemic-los-angeles-lakers-lebron-james-basketball/>.

a resounding success. The success in professional leagues led to the inevitable question of whether it could be translated into an amateur environment.<sup>142</sup> This possible scenario raised numerous concerns relating not only to cost and feasibility, but also compliance with the virtues of amateurism.<sup>143</sup>

### A. *The NBA Bubble*

Similar to nearly every other organization around the globe, the NBA did not escape the virus' halt on society. Early in the pandemic a player tested positive for the virus, and as a result the NBA suspended its 2020 season. After months of deliberations, the NBA decided to restart its season on July 13th in the "NBA Bubble" ("Bubble").<sup>144</sup> The players who decided to participate were required to report to the Bubble on July 7th which allowed a sufficient amount of time to quarantine before starting play.<sup>145</sup>

The Bubble, slightly reminiscent of an Olympic Village,<sup>146</sup> was the result of collaboration between the NBA, ESPN, Walt Disney World, and public health officials.<sup>147</sup> ESPN's Wide World of Sports Complex, located within the Walt Disney World Resort in Orlando, Florida, provided the necessary facilities to safely re-

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<sup>142</sup> See College basketball bubble? NCAA considers adopting NBA's approach for '20-21 season, FOX Sports (Sep. 7, 2020), <https://www.foxsports.com/midwest/story/college-basketball-bubble-ncaa-considers-adopting-nbas-approach-for-20-21-season-090720>.

<sup>143</sup> *Id.*

<sup>144</sup> See Everything you need to know about the 2019-20 NBA season restart, NBA (Jul. 22, 2020), <https://www.nba.com/nba-returns-2020-faq> (hereinafter NBA Return).

<sup>145</sup> See Tadd Haislop, NBA bubble, explained: A complete guide to the rules, teams, schedule & more for Orlando games, SportingNews (Aug. 26, 2020), <https://www.sportingnews.com/us/nba/news/nba-bubble-rules-teams-schedule-orlando/zhap66a9hcwq1kmcex3ggabo#:~:text=Upon%20arrival%20at%20the%20NBA,how%20often%20players%20are%20tested>.

<sup>146</sup> Generally, the Olympic Village, is where Olympic Athletes live during the Olympic Games. The Village has dormitories, places to congregate, as well as places to eat. See Adam Carlson, Past Gold Medalists Dish on What It's Really Like Inside the Olympic Village, People (Feb. 17, 2018), <https://people.com/sports/life-inside-olympic-village/>.

<sup>147</sup> See Ramona Shelburne, How Adam Silver, the NBA's stars and owners negotiated these playoffs, ESPN (Jun. 4, 2020), [https://www.espn.com/nba/story/\\_/id/29267245/how-adam-silver-nba-stars-owners-negotiated-playoffs](https://www.espn.com/nba/story/_/id/29267245/how-adam-silver-nba-stars-owners-negotiated-playoffs).

sume the season and mitigate the spread of COVID-19 infections.<sup>148</sup>

To achieve this goal, the NBA limited the number of allowed team personnel, prohibited guests, required those arriving to quarantine in their hotel rooms for a specified period, and mandated two negative tests.<sup>149</sup> Additionally, the NBA instituted detailed protocols for those who received a positive test.<sup>150</sup>

Those who left the Bubble's confines were subject to specified quarantine and testing protocols.<sup>151</sup> If one left without an appropriate excuse, they were subjected to pay reductions.<sup>152</sup> To ensure safety and reduce the potential spread of the virus, players had food provided to their rooms during the initial quarantine period, and then had designated rooms to get food thereafter.<sup>153</sup> The NBA strictly enforced these rules and went as far as setting up a hotline for individuals to call and report violations to ensure compliance.<sup>154</sup>

The sixteen teams previously qualified based on the standings at the suspension of play were invited to play in the Bubble, as well as teams within six games of the lowest-seeded team in each conference.<sup>155</sup> The twenty-two teams invited each played eight "seeding games," from their remaining regular-season schedule, to determine which teams would make the playoffs.<sup>156</sup>

One notable caveat was the addition of a possible play-in tournament between the eighth and ninth seeds if the latter was

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<sup>148</sup> See Haislop, *supra* note 146 (Noting that ESPN and the NBA have a strong connection to each other, but that it made the most logistical sense given the fact Disney World, has three different courts that could be used, as well as multiple hotels, and the ability to isolate that area of the campus to keep others out).

<sup>149</sup> See *id.*; See also NBA Return, *supra* note 145.

<sup>150</sup> See Haislop, *supra* note 146 (Explaining the process, a person in the Bubble would undergo following a positive test).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> See NBA Return, *supra* note 145. See also Kurt Helin, Are plans for a play-in tournament just to get Zion Williamson in the bubble? NBA Sports (May 28, 2020), <https://nba.nbcsports.com/2020/05/28/are-plans-for-a-play-in-tournament-just-to-get-zion-williamson-in-the-bubble/> (Noting ESPN.com writer Brian Windhorst opined that certain teams in the league felt this was a ploy by the NBA to allow rookie Superstar Zion Williamson to play games in the Bubble).

<sup>156</sup> *Id.*

within four games of the former.<sup>157</sup> If needed, the play-in tournament would consist of a best of two series, where the lower seed would have to win both games to advance to the playoffs.<sup>158</sup> Other than this one caveat, the playoffs were conducted in the traditional manner culminating with the NBA Finals beginning on September 30, 2020.<sup>159</sup>

Ultimately, the NBA Bubble succeeded in keeping players and staff safe and allowed the NBA to crown a 2020 champion.<sup>160</sup> All in all an impressive feat considering the league commissioner did not originally believe the idea “sounded[ed] logistically realistic.”<sup>161</sup> The total cost of pulling off such an achievement was reported to be around \$180 million with the NBA expecting to fall short of its revenue goal by around \$1.5 billion.<sup>162</sup>

### *B. The Proposed College Basketball Bubble(s)*

In September 2020, the NCAA announced the college basketball season would move its start date back to November 25<sup>th</sup>.<sup>163</sup> It, however, offered no clarity about how that season would be conducted.<sup>164</sup> Not only were teams left scrambling to piece together schedules for the season, but they also had to figure out where and how to play them. The confusion led to the inevitable question: could college basketball successfully imitate an NBA-style Bubble, or would the associated costs, including testing and travel, be too exorbitant?

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See Lashinsky, *supra* note 142 (Noting the Los Angeles Lakers prevailed in six games over the Miami heat to claim the team’s seventeenth championship).

<sup>161</sup> See Jeff Zillgitt, Meet the eight key figures who helped make the NBA bubble a success, USA TODAY (Oct. 13, 2020), <https://www.usatoday.com/story/sports/nba/2020/10/13/nba-bubble-succeeded-because-eight-key-figures-adam-silver/3640236001/>.

<sup>162</sup> See Lashinsky, *supra* note 142.

<sup>163</sup> See Greg Johnson, DI Council approves Nov. 25 start date for men’s and women’s basketball, NCAA (Sept. 16, 2020), <http://www.ncaa.org/about/resources/media-center/news/di-council-approves-nov-25-start-date-men-s-and-women-s-basketball>.

<sup>164</sup> See Myron Medcalf and Jeff Borzello, What Wednesday’s NCAA ruling will mean for the 2020-21 college basketball season, ESPN (Sept. 15, 2020), [https://www.espn.com/mens-college-basketball/story/\\_/id/29884573/what-wednesday-ncaa-ruling-mean-2020-21-college-basketball-season](https://www.espn.com/mens-college-basketball/story/_/id/29884573/what-wednesday-ncaa-ruling-mean-2020-21-college-basketball-season).

The concept of a college basketball Bubble picked up steam after reports broke that the NCAA filed a trademark for the phrase “Battle in the Bubble.”<sup>165</sup> This idea received mixed responses within the college basketball community— supporters argued the Bubble could be a viable option<sup>166</sup> while opponents argued either it would be unworkable for college basketball<sup>167</sup> or the costs associated make it unrealistic.<sup>168</sup>

The more realistic option appears to be a quasi-Bubble or “controlled environments.”<sup>169</sup> These modified versions of the NBA Bubble that would operate in different places at different times. Many cities and venues have already begun planning to host such events: for example, the Mohegan Sun Casino in Connecticut,<sup>170</sup> ESPN’s Wide World of Sports Complex,<sup>171</sup> the MGM Grand and Mandalay Bay in Las Vegas, and Indianapolis’s convention center are the sites of planned large bubble events.<sup>172</sup> Additionally, traditional holiday tournaments are considering controlled environments as well as many individual universities.<sup>173</sup>

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<sup>165</sup> See Wallace, *supra* note 8.

<sup>166</sup> See College basketball bubble? NCAA considers adopting NBA’s approach for ‘20-21 season, FOX SPORTS (Sept. 7, 2020), <https://www.foxsports.com/midwest/story/college-basketball-bubble-ncaa-considers-adopting-nbas-approach-for-20-21-season-090720> (Quoting Mark Starsiak, vice president of sports at Intersport “[i]t’s certainly viable... [f]rom a basketball standpoint, I think we can follow those models.”).

<sup>167</sup> See Jeff Borzello, Bubbles, buy games and bid worries: Inside the frenzy to save college basketball’s nonconference season, ESPN (Sep. 22, 2020), [https://www.espn.com/mens-college-basketball/story/\\_/id/29937616/bubbles-buy-games-bid-worries-frenzy-save-college-basketball-nonconference-season](https://www.espn.com/mens-college-basketball/story/_/id/29937616/bubbles-buy-games-bid-worries-frenzy-save-college-basketball-nonconference-season) (“[w]hile bubbles have been highly effective from the NBA and NHL... we won’t see them in college basketball.”).

<sup>168</sup> *Id.* (Reporting statements made by Mercer Coach Greg Gary, “[w]e don’t have the money to do what the NBA does,” and Director of tournaments for Basketball Travelers, “[w]e can’t create what the NBA has done... [i]t’s just not conceivable, cost-wise.”).

<sup>169</sup> *Id.* (Crediting NCAA senior vice president of basketball Dan Gavitt with coining the term “controlled environment.”)

<sup>170</sup> See Matt Norlander, College basketball’s season could be saved in part by plans for bubbles in big cities, CBS SPORTS (Sep. 21, 2020), <https://www.cbssports.com/college-basketball/news/college-basketballs-season-could-be-saved-in-part-by-plans-for-bubbles-in-big-cities/>.

<sup>171</sup> *Id.* (Reporting ESPN would move its events, The Champions Classic, Charleston Classic, Myrtle Beach Invitational, NIT Season Tip-Off, Wooden Legacy, Orlando Invitational, Jimmy V Classic, and the Diamond Head Classic to Orlando).

<sup>172</sup> *Id.*

<sup>173</sup> See Borzello, *supra* note 168.

These controlled environments could provide a solution for potential scheduling, safety, and testing issues. The potential benefits are apparent; however, the cost may not make it a realistic option. Some reports have indicated that entry fees could exceed \$90,000.<sup>174</sup> Such a steep fee could prove difficult for institutions and athletic departments experiencing sharp declines in revenue and staff layoffs as a result of COVID-19.<sup>175</sup>

For those who could afford to participate, venues have produced extensive plans to implement the proper safety procedures to provide testing, lodging, food, officials, and almost any other need. At the Mohegan Sun, officials have already implemented safety measures, which they claim exceed any potential NCAA guidelines.<sup>176</sup> They currently require masks constantly and have temperature scanners in place at entrances.<sup>177</sup> Additional measures planned for these events include placing teams on separate hotel floors, providing access to routes around the property that avoid the general public, and supplying separate spaces for team meetings and meals.<sup>178</sup> Similarly, sites in Las Vegas and Indianapolis have proposed comparable plans.<sup>179</sup>

The concept of a Bubble and a controlled environment have already proven successful in various professional leagues including the NBA, WNBA, and NHL. As the college basketball season quickly approaches, those in power must decide if such an option would best serve their interests. This question is a complicated one due to logistics and public health concerns already complicated from a logistical and public health perspective. Intercollegiate

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<sup>174</sup> *Id.* (“The all-inclusive price starts at \$90,000 per team and would cover 20 hotel rooms per traveling party, testing, daily food vouchers ranging from \$30-\$50 and the cost of game officials.”).

<sup>175</sup> See Andy Uhler, College athletics departments cut pay, staff and teams because of COVID, Market Place (Oct. 19, 2020), <https://www.marketplace.org/2020/10/19/college-athletics-departments-cut-pay-staff-and-teams-because-of-covid/>.

<sup>176</sup> See Borzell, *supra* note 168.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See Norlander, *supra* note 171. (Reporting in Las Vegas, organizers have said their presentation states they will manage almost every aspect of the event from lodging, and transpiration, to securing and constructing the playing venues and securing officials. They have also provided detailed safety protocol plans which include temperature checks, initial testing upon arrival, and at least every other day, and proper management and sanitization of all transportation, and facilities).

athletics adds another layer to the effect that such an environment would have on the principle of amateurism.

### III. THE CONFLICT BETWEEN COMMERCIAL INTERESTS AND AMATEURISM

The conflicts between the commercial interest of modern intercollegiate athletics and the NCAA's principle of amateurism call into question whether the primary motivation for participation is monetary or educational. Commercialization has transformed intercollegiate athletics and consequently diminished the importance of the athlete's education.

At the offset, it is important to note the distinction between Ivy League athletes, non-revenue sport athletes, and revenue sport athletes.<sup>180</sup> Ivy League athletes do not receive athletic scholarships, nor do non-revenue athletes maintain the demanding schedule of their revenue sport counterparts.<sup>181</sup> In these situations, the idea of amateurism — playing for the love of the game — appears plausible.<sup>182</sup> Therefore, the conflict between commercial interest and education does not exist, or is at least less relevant. However, in the world of revenue sports, the billion-dollar economic landscape does not offer such hope.

#### *A. Commercialization has transformed intercollegiate athletics*

By any objective measure, intercollegiate athletics—especially in the revenue-generating sports of basketball and football—constitutes a big-money business.<sup>183</sup> The question is what caused the transformation of intercollegiate athletics into something that looks much more like professional athletics than amateur athletics? In short, commercialization.

Gone are the days of checking the local paper for the previous night's scores and being limited to watching the team whose

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<sup>180</sup> See Berger, 843 F.3d at 294 (Hamilton, J., concurring).

<sup>181</sup> Id.

<sup>182</sup> Id. (“With economic reality as our guide, as I believe it should be, there may be room for further debate, perhaps with a developed factual record rather than bare pleadings, for cases addressing employment status for a variety of purposes.”).

<sup>183</sup> See NCAA Finances, USA Today, <https://sports.usatoday.com/ncaa/finances/> (last visited Dec 2, 2020); Where Does the Money Go? NCAA, <http://www.ncaa.org/about/resources/finances> (last visited Dec 2, 2020).

games were broadcasted in one's region. Today, technology dominates. The rise of social media and streaming services now provides fans with access to every angle of intercollegiate athletics. Sports reporters and beat writers now tweet out up to the minute updates.<sup>184</sup> Fans pay for access to websites dedicated to tracking the nation's top recruits, offering insider updates and providing a forum to discuss the latest news on their favorite team.<sup>185</sup>

In recent years, commercialization has led the economic industry of intercollegiate athletics to flourish.<sup>186</sup> For example, lucrative television contracts fetch million-dollar price tags.<sup>187</sup> Additionally, commercialization has transformed the fan experience.

In college basketball, the annual postseason tournament, March Madness, continues to be the NCAA's largest revenue source.<sup>188</sup> In 2010, the NCAA reached a fourteen-year broadcasting agreement with CBS Sports and Turner Broadcasting valued at \$10.8 billion.<sup>189</sup> In 2016, the groups agreed to an eight-year extension valued at \$8.8 billion.<sup>190</sup> The original agreement provides an annual payout of \$771 million, but the extended term will pay out \$1.1 billion.<sup>191</sup> During the 2018-2019 season, March Madness generated around \$868 million in revenue from television and marketing rights, in addition to \$178 million in ticket sales.<sup>192</sup> Advertisers — aware of March Madness's' widespread popularity

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<sup>184</sup> See generally Darren Rovell (@darrenrovell), <https://twitter.com/darrenrovell> (last visited Dec. 2, 2020); Dan Wolken (@DanWolken), <https://twitter.com/danwolken> (last visited Dec. 2, 2020).

<sup>185</sup> See supra note 88.

<sup>186</sup> See Will Hobson and Steven Rich, Playing in The Red: Big-time College athletic departments are taking in more money than ever — and spending it just as fast. These 28 schools operated at a loss in 2014, *Washington Post* (Nov. 23, 2015), <https://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/>.

<sup>187</sup> See Ramogi Huma and Ellen J. Staurowsky, TV Money Windfall in Big Time College Sports \$784 Million Reasons for Reform, NCPA, <https://www.ncpanow.org/research/body/TV-Money-Windfall-in-Big-Time-College-Sports.pdf> (last visited Dec. 2, 2020).

<sup>188</sup> See Tim Parker, How Much Does the NCAA Make off March Madness? Investopedia (Oct. 31, 2019), <https://www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp>.

<sup>189</sup> See Noah McGee, How Much money does the NCAA make from March Madness? MSN (Feb. 6, 2020), <https://www.msn.com/en-us/money/markets/how-much-money-does-the-ncaa-make-from-march-madness/ar-BBZIYDV>.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

— were willing to spend around \$1.6 million for a thirty-second commercial during the championship game.<sup>193</sup>

Likewise, conferences and institutions have taken advantage of the favorable media markets to launch exclusive television networks.<sup>194</sup> In 2007, the Big Ten Conference and Fox Networks launched the Big Ten Network (also known as the “B1G Network”).<sup>195</sup> In 2011, the University of Texas launched the Longhorn Network, which provides hours of coverage of its varsity teams.<sup>196</sup> Additionally, in 2014, the Southeastern Conference (“SEC”) and Entertainment and Sports Programming Network (“ESPN”) teamed up to launch the ultra-successful SEC Network.<sup>197</sup>

In 2017, the NCAA surpassed the billion-dollar mark for the first time.<sup>198</sup> During fiscal year 2018-19, three institutions generated more than \$200 million in revenue, and forty institutions generated more than \$100 million.<sup>199</sup> Notwithstanding increased revenues, only twenty-five athletic departments were profitable in 2019.<sup>200</sup> All were members of a Power Five conference.<sup>201</sup> These revenue shortfalls were not covered by donors or rainy-day funds but rather by student fees.<sup>202</sup>

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<sup>193</sup> See Wayne Friedman, March Madness Grows 5% in National TV Ad Dollars, Ratings Down, *MediaPost* (April 3, 2018), <https://www.mediapost.com/publications/article/317061/march-madness-grows-5-in-national-tv-ad-dollars.html#:~:text=SQAD%2C%20the%20media%20cost%20and,ranged%20between%20%241%2C387%2C933%20and%20%241%2C660%2C956>.

<sup>194</sup> See *supra* note 84.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* See also Gracie Blackburn-Evans, Five things to know about Longhorn Network on its fifth anniversary, *ESPN Front Row* (Aug. 26, 2016), <https://www.espnfrontrow.com/2016/08/five-things-to-know-about-longhorn-network-on-its-fifth-anniversary/>.

<sup>197</sup> See Jason Morton, Five years on, student-athletes made SEC Network a success, *Tuscaloosa News* (Aug. 18, 2019), <https://www.tuscaloosaneews.com/news/20190818/five-years-on-student-athletes-made-sec-network-successgoo>.

<sup>198</sup> See Steve Berkowitz, NCAA reports revenues of more than \$1 billion in 2017, *USA TODAY* (Mar. 7, 2018) <https://www.usatoday.com/story/college/2018/03/07/ncaa-reports-revenues-more-than-1-billion-2017/402486002/> (Reporting the NCAA 2017 revenue as \$1.06 billion).

<sup>199</sup> See *supra* note 184.

<sup>200</sup> See *Finances of Intercollegiate Athletics, NCAA*, <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics> (Last visited Nov. 17, 2020).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

Commercialization has resulted in a proverbial arms race as institutions strive to maintain the highest level of competition and success.<sup>203</sup> Coaching salaries continue to soar as basketball and football head coaches command multi-million-dollar salaries,<sup>204</sup> and even some top tier assistant coaches drawing more than one million dollars.<sup>205</sup> Institutions pour hundreds of millions into their facilities,<sup>206</sup> including adding high dollar luxury club areas for donors.<sup>207</sup> Massive recruiting budgets and the use of private jets and

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<sup>203</sup> See Jake New, *Banking on the Big Five, Inside Higher Ed* (Aug. 15, 2016), [https://www.insidehighered.com/news/2016/08/15/colleges-increase-athletic-spending-hopes-joining-power-five?utm\\_source=inside+higher+ed&utm\\_campaign=89092157d1-dnu201608015&utm\\_medium=email&utm\\_term=0\\_1fbc04421-89092157d1-197414985&mc\\_cid=89092157d1&mc\\_eid=1ab0ee503b](https://www.insidehighered.com/news/2016/08/15/colleges-increase-athletic-spending-hopes-joining-power-five?utm_source=inside+higher+ed&utm_campaign=89092157d1-dnu201608015&utm_medium=email&utm_term=0_1fbc04421-89092157d1-197414985&mc_cid=89092157d1&mc_eid=1ab0ee503b).

<sup>204</sup> See Erik Brady et al, *College football coaches continue to See salary explosion, USA Today* (Nov 20, 2012), <https://www.usatoday.com/story/sports/ncaaf/2012/11/19/college-football-coaches-contracts-analysis-pay-increase/1715435/>; Steve Berkowitz and Tom Schad, *5 surprising findings from college football coaches salaries report, USA Today* (Oct. 15, 2020), <https://www.usatoday.com/story/sports/ncaaf/2020/10/14/college-football-coaches-salaries-five-surprising-findings-data/5900066002/> (Showing in 2006, head coaches at 42 major programs made at least \$1 million. In 2012, at least 42 coaches made at least \$2 million. For the 2020-21 season, the average pay for all FBS coaches was \$2.7 million. Alabama head coach Nick Saban will make \$9.3 mill for the season, while Clemson head coach Dabo Swinney will make \$8.3 million.); Laura McKenna, *The Madness of College Basketball Coaches' Salaries, The Atlantic* (Mar. 24, 2016), <https://www.theatlantic.com/education/archive/2016/03/the-madness-of-college-basketball-coaches-salaries/475146/>.

<sup>205</sup> See NCAA Salaries, *USA Today*, <https://sports.usatoday.com/ncaa/salaries/football/assistant>. (Last visited Nov. 17, 2020) (Showing in 2019, the two highest paid assistant coaches were Louisiana State University's Dave Aranda, who made \$2.5 million, and Clemson's Brent Venables who made \$2.2 million. While the top 24 coaches all took home at least \$1.0 million.).

<sup>206</sup> See John Duffley, *Kyle Field's \$450 Million Upgrade in Mesmerizing 1-Minute Video, FanBuzz* (Sept. 2, 2020), <https://fanbuzz.com/college-football/sec/enjoy-this-time-lapse-of-the-entire-kyle-field-reconstruction-project-for-tbt/> (Explaining in 2013, Texas A&M approved a \$485 million plan to increase the capacity of its stadium from 82,589 to 102,500.); Austin Miller, *Ole Miss Releases First Phase of Renovation, Expansion Plans for Vaught-Hemingway, Ole Miss* (Aug. 7, 2014), [https://olemisssports.com/news/2014/8/7/Ole\\_Miss\\_Releases\\_First\\_Phase\\_of\\_Renovation\\_Expansion\\_Plans\\_for\\_Vaught\\_Hemingway](https://olemisssports.com/news/2014/8/7/Ole_Miss_Releases_First_Phase_of_Renovation_Expansion_Plans_for_Vaught_Hemingway); Thom Patterson, *America's incredibly expensive college football stadiums, CNN* (Sept. 28, 2018), <https://www.cnn.com/2018/09/28/us/expensive-college-football-stadiums/index.html> (Showing Notre Dame spent \$400 million to update its stadium adding new seating, a large video board, as well as improvements to the Wi-Fi, lighting, and press box. The University of Tennessee projected a cost of \$340 million for renovations to their entry gates and towers, as well as an expansion to the south concourse.).

<sup>207</sup> See *supra* note 207.

helicopters allow coaches to crisscross the country courting top recruits.<sup>208</sup>

More recently the effects of commercialization have opened up the possibility of athletes being able to profit off of intercollegiate athletics as well. In 2020, the NCAA Board of Governors offered its support for a proposed rule change allowing athletes to receive financial benefits from the use of their name, image, and likeness (“NIL”).<sup>209</sup> Although the proposal still awaits final approval from each of the three NCAA divisions, it moves the NCAA one step closer to granting the very relief Edward O’Bannon sought in federal court six years prior.

The new rules, if passed, generally allow athletes to receive compensation from the use of their NIL.<sup>210</sup> Permissible compensation can include endorsing third-party products, engaging in social media influencing, as well as autographs signing events among others.<sup>211</sup> However, these rules do provide limits on earnings.<sup>212</sup> Furthermore, the rules do prohibit the use of conference and institutional logos in such activities.<sup>213</sup> They also prohibit institutional involvement in facilitating or making such payments or using the process to hide payments for participation.<sup>214</sup>

The sudden shift in favor of athletes being compensated for their NIL was not the result of any goodwill. Rather, the NCAA found itself squarely in the crosshairs of state legislatures — namely California, Colorado, Florida and Nebraska — that have

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<sup>208</sup> See David Ching, For Colleges, Spending Big On Recruiting Does Not Necessarily Translate To All-Sports Success, *Forbes* (Jun. 5, 2018), <https://www.forbes.com/sites/davidching/2018/06/05/spending-big-on-recruiting-does-not-necessarily-translate-to-all-sports-success/?sh=6861724b7044>; Tom Schad, As salaries soar, so do more college football coaches with personal access to private planes, *USA Today* (Oct. 24, 2019), <https://www.usatoday.com/story/sports/ncaaf/2019/10/23/college-football-more-coaches-being-given-access-private-planes/3984675002/>.

<sup>209</sup> See Barrett Sallee and Adam Silverstein, NCAA takes big step toward allowing name, image and likeness compensation for athletes, *CBS Sports* (Apr. 29, 2020), <https://www.cbssports.com/college-football/news/ncaa-takes-big-step-toward-allowing-name-image-and-likeness-compensation-for-athletes/>.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

enacted laws allowing such compensation.<sup>215</sup> Even Congress has entered the debate with NIL being filed in the recent session.<sup>216</sup>

In an effort to receive favorable outcomes, the NCAA and Power Five conference have expended hundreds of thousands of dollars to curtail the legislation. Reporting indicates that in 2019 lobbying expenses by the NCAA and some Power Fives Conference totaled \$750,000.<sup>217</sup> In 2020, with a global pandemic raging, the Power Five had already made \$350,000 in lobbying expenditures.<sup>218</sup> Such behavior is difficult to comprehend since the NCAA and its member institutions assert that education is the primary focus.

Increased commercialization has transformed intercollegiate athletics. The word “amateur” no longer invokes images of Francis Ouimet striding down the fairways at The Country Club with his ten-year-old caddie in tow. Instead, thoughts turn to crisp fall evenings in Vaught-Hemingway<sup>219</sup>, Jordan-Hare<sup>220</sup>, or The Big House<sup>221</sup> with each stadium filled with fifty thousand plus fans playing live on national television. But these grand stages for athletics did not pay for themselves, instead money generated by intercollegiate athletics — which one might think would go towards the primary goal of education — in addition to some hefty loans, paid for these magnificent stadiums. Commercialization has also created the opportunity for athletes to potentially profit from their athletic participation — a direct violation of the term “amateur” — further diminishing the importance of education.

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<sup>215</sup> See Kristi Dosh, NAIA Becomes First in College Sports to Pass Name, Image and Likeness Legislation, *Forbes* (Oct. 7, 2020), <https://www.forbes.com/sites/kristidosh/2020/10/07/naia-becomes-first-in-college-sports-to-pass-name-image-and-likeness-legislation/?sh=219679b411aa>.

<sup>216</sup> See Sam Cooper, Power Five conferences spending big money behind the scenes to lobby Congress on NIL legislation, *Yahoo Sports* (May 19, 2020), <https://sports.yahoo.com/power-five-conferences-spending-big-money-to-lobby-congress-on-nil-legislation-195843763.html>.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Vaught-Hemingway Stadium, located in Oxford, Mississippi, is the home of the University of Mississippi football team.

<sup>220</sup> Jordan-Hare Stadium, located in Auburn, Alabama, is the home of the University of Auburn football team.

<sup>221</sup> The Big House, formerly known as Michigan Stadium, located in Ann Arbor, Michigan, is the home of the University of Michigan football team.

*B. Increased commercialization diminishes the importance of education*

Increased commercialization has relegated education — the supposed primary motivation underpinning the NCAA’s principle of amateurism — to a secondary concern. The majority of athlete’s time is now dedicated to athletics, institutions cut academic corners and overlook illegal behavior in favor of athletic benefits.

The NCAA rules limit participation in athletic activities to no more than four hours a day and twenty hours a week.<sup>222</sup> Nevertheless, studies suggest many revenue sports athletes often spend forty hours or more per week on athletics.<sup>223</sup> NCAA limitations fail to account for time spent outside of formal activities to watch film; to work out; to travel to and from athletic events and to participate in competitions.<sup>224</sup> As a result, the modern athletic structure leaves minimal time for academics.

Such time constraints impair an athlete’s ability to maintain an educational focus. For example, time limits restrict athletes’ choices of majors and classes.<sup>225</sup> These demands lead athletes to “cluster” into specific majors and courses taught by athlete “friendly” professors.<sup>226</sup>

Furthermore, such demanding schedules lead athletes to lean on academic support staff and tutors to complete classes.<sup>227</sup> Instead of academic tutors assisting athletes in learning the course

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<sup>222</sup> See NCAA Division I Manual, *supra* note 4, §17.1.7.1.

<sup>223</sup> See *supra* note 90.

<sup>224</sup> See NCAA Division I Manual, *supra* note 4, §17.1.7.1 (Explaining limitations of four hours a day and twenty a week apply only to “countable activities,” which under §17.02.1 is defined as “...any required activity with an athletics purpose involving student-athletes and at the direction of, or supervised by, one or more of an institution’s coaching staff...”).

<sup>225</sup> See Berry, *Educating Athletes*, *supra* note 91, 814-17.

<sup>226</sup> See *id.*

<sup>227</sup> See Doug Lederman, *Concerns about Clustering*, *Inside Higher Ed* (Nov. 20, 2008), <http://www.insidehighered.com/news/2008/11/20/cluster>; Mark Dent, Michael Sanserino & Sam Werner, *Do Colleges Drop the Ball with Student-Athletes?* *Pittsburgh Post-Gazette* (May 31, 2014), <http://www.post-gazette.com/sports/college/2014/06/01/Do-colleges-drop-the-ball-with-student-athletes/stories/201406010120>; Joy Gaston Gayles & Shouping Hu, *The Influence of Student Engagement and Sport Participation on College Outcomes Among Division I Student Athletes*, 80 *J. Higher Educ.* 315 (2009); Joshua Castle, Robin Ammon & Les Myers, *The 9 Credit Rule: A Look at Its Impact on Academic Advising for Intercollegiate Football Athletes*, 5 *J. Physical Educ. Sports Mgmt.* 59 (2014).

material, they often just completed the work for them. The resulting reality is that while an athlete may ultimately receive a diploma, they may have not received an education<sup>228</sup> If necessary, some institutions are willing to take additional shortcuts.

These are not merely the abstract effects of increased commercialization, but the real-life consequences felt by athletes. For example, in a 2015 lawsuit stemming from the fraudulent classes offered by the University of North Carolina the athletes argued they were deprived of a meaningful education.<sup>229</sup>

Obstacles to attaining a meaningful education are exacerbated when institutions willingly commit academic fraud. The University of North Carolina provides the most egregious example.<sup>230</sup> An investigation found they offered sham classes for almost two decades.<sup>231</sup> These classes often never met in person and required only the submission of one short paper.<sup>232</sup> Moreover, some classes had no assigned professor, and the department secretary graded the papers.<sup>233</sup>

The University of North Carolina is not the lone culprit. The final exam for a class taught by a University of Georgia assistant basketball coach included questions such as “[h]ow many points is a 3-pointer worth?”<sup>234</sup> Likewise, Syracuse University academic assistance staff used athletes’ personal login information to submit their assignments for them.<sup>235</sup> Similarly, academic tutors at

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<sup>228</sup> *Id.* (Analyzing problems that compromise academic education: clustering of majors, pressures of eligibility requirements, athletic participation as a full-time occupation, and the reality that just because an athlete receives a diploma does not mean they received an education.).

<sup>229</sup> See Peter Jacobs, Former UNC Student-Athletes Detail Fake “Paper Classes” In New Lawsuit Against School And NCAA, *Business Insider* (Jan 23, 2015), <https://www.businessinsider.com/lawsuit-against-unc-over-paper-classes-2015-1> (The athletes sued on the grounds they had been deprived of a “meaningful education.”); Lynn O’Shaughnessy, Do College Athletes Have Time to be Students? *CBS News* (Feb. 18, 2011), <http://www.cbsnews.com/news/do-college-athletes-have-time-to-be-students/>; David Moltz, How Athletes Spend Their Time, *Inside Higher Ed* (Feb. 14, 2011), <https://www.insidehighered.com/news/2011/02/14/how-athletes-spend-their-time>.

<sup>230</sup> See Gregory, *supra* note 94.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> See Coach Gave Every Student an A, *ESPN* (Mar. 4, 2004), <http://espn.go.com/ncb/news/story?id=1750279>.

<sup>235</sup> See Jon Solomon, What Syracuse’s NCAA Case Revealed About Academic Fraud, *CBS Sports* (Mar. 7, 2015), <http://www.cbssports.com/collegefootball/writer/>

the University of Minnesota completed an estimated 400 assignments for athletes over a four-year period.<sup>236</sup> More recently, an investigation found that University of Missouri athletic tutors completed class work for twelve athletes, including completing all of a class for one athlete and the vast majority for numerous others.<sup>237</sup>

Increased commercialization further diminishes the importance of education when it leads institutions to engage in or cover up illegal behavior. In 2011, abuse allegations against former Pennsylvania State University football defensive coordinator Jerry Sandusky rocked the sporting world.<sup>238</sup> Prosecutors alleged Sandusky abused numerous young boys from 1994 to 2009, with the abuse occasionally occurring at the University's own athletic facilities.<sup>239</sup> The allegations resulted in the ouster of Legendary Coach Joe Paterno and University President Graham Spanier.<sup>240</sup> Sandusky was ultimately convicted and further sentenced to thirty to sixty years in prison.<sup>241</sup>

The University hired former FBI Director Louis Freeh to conduct an independent investigation into the University's handling of the matter.<sup>242</sup> His report found that University leaders showed "total and consistent disregard for the child victims while covering up the attacks of a longtime sexual predator."<sup>243</sup> Additionally, the NCAA handed down stiff penalties to the University, including a \$60 million fine, a four-year postseason ban, the removal of twenty scholarships, and the annulment of all wins for the 1998 through 2011 seasons.<sup>244</sup> However, two years later, the NCAA removed the postseason ban and scholarship limitations.<sup>245</sup>

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jonsolomon/25096871/what-syracuses-ncaa-case-revealed-about-academic-fraud.

<sup>236</sup> See Minnesota Put on 4-Year Probation, CBS News (Oct. 24, 2000), <https://www.cbsnews.com/news/minnesota-put-on-4-year-probation/>.

<sup>237</sup> See Cameron Teague-Robinson, NCAA penalizes MU athletics for academic fraud, Columbia Daily Tribune (Jan. 31, 2019), <https://www.columbiatribune.com/sports/20190131/ncaa-penalizes-mu-athletics-for-academic-fraud>.

<sup>238</sup> See Penn State Scandal Fast Facts, CNN (Jul. 1, 2020), <https://www.cnn.com/2013/10/28/us/penn-state-scandal-fast-facts/index.html>.

<sup>239</sup> Id.

<sup>240</sup> Id.

<sup>241</sup> Id.

<sup>242</sup> Id.

<sup>243</sup> Id.

<sup>244</sup> Id.

<sup>245</sup> Id.

In 2018, following an investigation, the NCAA stripped the University of Louisville Men's basketball program of its 2013 national championship.<sup>246</sup> The investigation found that the team's staff had arranged hotel rooms for players and recruits to meet with prostitutes.<sup>247</sup>

More recently, the Department of Justice ("DOJ") announced that a two-year investigation by the Federal Bureau of Investigation ("FBI") uncovered pay-for-play schemes involving coaches, corporate executives, and sports agents.<sup>248</sup> As a result, numerous Division I men's basketball programs, including traditional blue-blood powerhouses, face potential penalties for violations of NCAA rules.<sup>249</sup>

In response to the DOJ's announcement, NCAA President Mark Emmert said, "[t]hese allegations, if true, point to systematic failures that must be fixed and fixed now if we want college sports in America."<sup>250</sup> Further, Emmert announced the formation of the Independent Commission on College Basketball, chaired by former United States Secretary of State Condoleezza Rice.<sup>251</sup> The commission was tasked with proposing solutions to clean up the sport.<sup>252</sup>

While well-intentioned, Emmert's response failed to address the overarching problems. The NCAA continues to argue, as it long has, that its existence is necessary to protect the integrity of intercollegiate athletics. Yet, the record reflects a glaring inability to effectively police member institutions and a failure to uphold its own principle of amateurism.

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<sup>246</sup> See Marc Tracy, *Louisville Must Forfeit Basketball Championship Over Sex Scandal*, THE NEW YORK TIMES (Feb. 20, 2018), <https://www.nytimes.com/2018/02/20/sports/ncaabasketball/louisville-ncaa-title.html>.

<sup>247</sup> *Id.*

<sup>248</sup> See Aaron Moody, *Here's a master guide to the college basketball corruption scandal and FBI investigation*, The News&Observer (Oct 26, 2018), <https://www.newsobserver.com/sports/article208880939.html>.

<sup>249</sup> See *id.*; See also Report: FBI probe into NCAA corruption identifies possible violations by basketball powers, ESPN (Feb. 23, 2018), [https://www.espn.com/mens-college-basketball/story/\\_/id/22553502/fbi-probe-corruption-reveals-basketball-powers-broken-ncaa-rules](https://www.espn.com/mens-college-basketball/story/_/id/22553502/fbi-probe-corruption-reveals-basketball-powers-broken-ncaa-rules) (Naming Duke, North Carolina, Kentucky, Michigan State, and Kansas as involved universities).

<sup>250</sup> See NCAA statement on Yahoo! Sports story, NCAA (Feb. 23, 2018), <https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-yahoo-sports-story>.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

The effects of increased commercialization evidence the diminished importance of the athlete's education. Athletic demands can limit the major they pursue or classes they take. Additionally, athletes spend significantly more time devoted to athletics than academics. Which causes the time they do actually spend on academics to be used for just keeping up instead of learning. Furthermore, increased commercialization has led institutions to cut academic corners, further diminishing the importance of education, as well as to engage in illegal behavior or the covering up of such.

This conflict between commercial interests and education casts doubts upon the viability of the NCAA's principle of amateurism and necessary existence to protect it. One foundational element to the NCAA's principle is the need to protect athletes from exploitation by commercial interest. The reality though is the NCAA may be aiding in doing just that. The billion-dollar industry brought about by commercialization damages the claim that no economic market exists in intercollegiate athletics and the amateurism underpinnings of intercollegiate athletics.<sup>253</sup> The NCAA's defense of its principle of amateurism grows more tenuous with each additional failure.

#### IV. COLLEGE BASKETBALL'S BUBBLE CONSIDERATION UNDERMINES THE NCAA'S PRINCIPLE OF AMATEURISM

The NCAA's principle of amateurism is founded on the idea that college athletes' motivations for participating in intercollegiate athletics are education and the moral benefits that can be derived. Further, the NCAA claims it exists to protect this principal by preventing the professional or commercial exploitation of college athletes. Yet the NCAA's reaction to the COVID-19 outbreak including developing a "Bubble" or controlled environment and trademarking phrases related to COVID-19 undermines their own principle of amateurism.

In reality, the NCAA does more to undermine its principle of amateurism than it does to protect it. As the previous section illustrated commercialization has eroded the educational aim of in-

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<sup>253</sup> Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109 (1984).

tercollegiate athletics. The truth of the matter is amateurism values do not drive intercollegiate athletics, money does.

If any doubt remains, current events render it moot. In the midst of COVID-19, the NCAA's focus is not on assisting athletes through this trying time or ensuring they continue to receive a meaningful education. Instead, the NCAA is focused on protecting its bottom line and maintaining its control over intercollegiate athletics. Such actions directly undermine the NCAA's principle of amateurism.

For example, when COVID-19 forced the NCAA to cancel the 2020 edition of March Madness they began planning to ensure the 2021 edition could occur and they began exploring avenues to capitalize financially off the outbreak. The NCAA, its member institutions and stakeholder began discussing the option of implementing the Bubble used by the NBA or a similar controlled environment.

Consideration of an NBA style Bubble or similar controlled environment shows the mockery the NCAA's principle of amateurism has become. Either option would take players out of the classroom and away from their institution's campus. Furthermore, it exacerbates the already widening divide in the attention paid to athletics over education. In turn further attenuating the link between athletics and amateurism and strengthening the proverbial link between athletics and money.

Additional evidence undermining the NCAA's principle of amateurism surfaces in their response to being forced to cancel March Madness in 2020. As ESPN reported "the NCAA is dead set on hosting a tournament [in 2021] as it lost \$375 million due to last year's tournament cancellation."<sup>254</sup> To ensure this occurred the NCAA announced the upcoming March Madness tournament will be conducted in one location as opposed to the traditional format of using numerous locations.<sup>255</sup> Which the NCAA argued is necessary because of logistical and health concerns related to COVID-19.<sup>256</sup> While these are legitimate concerns, they are not

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<sup>254</sup> See Joseph Choi, NCAA in talks to host all of March Madness in Indianapolis, *The Hill* (Nov 16, 2020), <https://thehill.com/blogs/in-the-know/in-the-know/526173-ncaa-in-talks-to-host-all-of-march-madness-in-indianapolis>.

<sup>255</sup> See *id.*

<sup>256</sup> See *id.*

the NCAA's only concerns. Instead, the NCAA is concerned with the annual \$771 million payout they receive per their broadcasting agreement, and the estimated \$1.6 million they can collect per 30 second commercial during the championship game.<sup>257</sup>

Furthermore, the NCAA undermines its principle of amateurism not only by responding to the COVID-19 outbreak by looking into implementing an NBA style Bubble, but also by filing trademarks to make money off of phrases tying COVID-19 and intercollegiate athletics together. In August 2019, the NCAA filed a trademark for the phrase "Battle of the Bubble" sparking public debate over the use of a Bubble for college basketball.<sup>258</sup> Additionally, in December 2019 the NCAA — apparently picking up on the suggestion of ESPN commentator Jay Bilas — filed a trademark for the phrase "Mask Madness."<sup>259</sup>

The NCAA's principle of amateurism anticipates "amateurs" who attend institutions primarily to attain an education — competing in intercollegiate athletics for the love of the game and its moral benefits. The consideration of the NBA style Bubble, plan to conduct March Madness in a controlled environment, and attempt to profit off of the COVID-19 outbreaking by trademarking phrases tying it to the athletic are the antithesis of the amateurism model. On the contrary, these actions give intercollegiate athletics the appearance of professional athletics instead of amateur athletics.

## V. FUTURE IMPLICATIONS — THE POWER FIVE BREAKAWAY AND THE SUPREME COURT

There are two immediate threats to the NCAA's control of intercollegiate athletics: COVID-19 and the opportunity it provides to the Power Five conferences to repeat history and breakaway

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<sup>257</sup> See *supra* note 192.

<sup>258</sup> See Dylan Wallace, NCAA Files Trademark for "Battle in the Bubble, FanNation (Aug. 31, 2020), <https://www.si.com/college/indiana/basketball/ncaa-filed-trademark-for-battle-in-the-bubble>.

<sup>259</sup> See Joe Kinsey, NCAA Files Trademark For 'Mask Madness' to go with 'Battle in the Bubble,' Outkick (Dec. 28, 2020), <https://www.outkick.com/ncaa-files-trademark-for-mask-madness-to-go-with-battle-in-the-bubble/> (reporting that ESPN commentator Jay Bilas jokingly wondered if the NCAA would try to trademark the phrase "Mask Madness" following their filing of a trademark for the phrase "Battle in the Bubble" months earlier).

from the NCAA in basketball and the Supreme Court's impending review of the NCAA's amateurism rules.

The threat COVID-19 poses to the NCAA model leaves the noteworthy question of what the future might look like for intercollegiate athletics. To what extent will the Power Five conferences be open to the NCAA model going forward or any proposed changes? On the other hand, does the ever-loosening grip of the NCAA's power, combined with the threat of COVID-19, present the opportunity for the Power Five conferences to seize control?

Prior to the outbreak, the NCAA's role in intercollegiate athletics already appeared to be on borrowed time. That is, their necessity had long ago been called into question, public perception continued to trend downward. Because of the COVID-19 outbreak the NCAA was forced to cancel March Madness leaving them without their largest revenue generator. The already tenuous nature of their existence and subsequent crumbling financial position has left them somewhat defenseless to the Power Five's disregard for their authority.

In reality COVID-19 presents the perfect opportunity for the Power Five conferences to break away from the NCAA as they did in football in 2014. If there is a way to take for themselves the vast financial fortunes of March Madness, without the NCAA or non-power five institutions' involvement, history may very well repeat itself in an environment driven by money.

For decades, the NCAA controlled college football similarly to how it currently controls college basketball. This control came undone when the Supreme Court struck down the NCAA's ability to determine which teams played on television each year or to penalize teams who attempted to enter into their own outside broadcasting deals with networks.<sup>260</sup> As a result, conferences and teams were set free to make their own agreements and sell broadcasting rights to the highest bidders. Conferences and institutions quickly seized the opportunity. The decision also rendered the NCAA essentially unable to impose its own form of post-season championship system in the sport.

Over the years, various formats have attempted to fill the void of a post-season championship system. However, in 2014 the

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<sup>260</sup> Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

Bowl Championship Series (“BCS”) gave way to the College Football Playoff (“CFP”).<sup>261</sup> That same year, the largest five conferences — ACC, Big Ten, Big 12, Pac-12 and SEC — broke away, thereby forming the Power Five.<sup>262</sup>

The Power Five were granted “autonomy” from the NCAA, which allowed the Power Five to set up their own rules.<sup>263</sup> These new rules increased the cost of attendance allowance, provided stipends to athletes who participated in summer athletic activities, allocated additional funding for mental health resources, and set rules to give athletes more free time away from mandatory sports requirements.<sup>264</sup>

The enormous power wielded by the Power Five conferences is reflected in their payout from the CFP.<sup>265</sup> While the other leagues’ split \$75 million in the first year of the event, each Power Five conference took home \$50 million each. This is for good reason though, considering that they have essentially taken a monopolistic position in the CFP. To date, no team outside of the Power Five has been selected to participate — not even an undefeated one.<sup>266</sup>

The CFP remains wildly popular among fans and continues to generate millions in revenue, especially for the Power Five conference. This phenomenon has taken place without the involvement of, or necessity to split revenue with, the NCAA.

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<sup>261</sup> See Brett McMurphy, Arlington to host title game, ESPN (Apr. 23, 2018), [https://www.espn.com/college-football/story/\\_id/9204021/arlington-texas-host-first-college-football-playoff-championship](https://www.espn.com/college-football/story/_id/9204021/arlington-texas-host-first-college-football-playoff-championship).

<sup>262</sup> See Brian Bennett, NCAA board votes to allow autonomy, ESPN (Aug. 7, 2014), [https://www.espn.com/college-sports/story/\\_id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences](https://www.espn.com/college-sports/story/_id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* See also Will Vandervort, Power 5 Conferences approve new rules that will affect student athletes, *The Clemson Insider* (Jan. 24, 2019), <https://www.theclemsoninsider.com/2019/01/24/power-5-conferences-approve-new-rules-that-will-affect-student-athletes/>.

<sup>265</sup> See George Schroeder, Power Five’s College Football Playoff revenues will double what BCS paid, *USA Today* (Jul. 16, 2014), <https://www.usatoday.com/story/sports/ncaaf/2014/07/16/college-football-playoff-financial-revenues-money-distribution-bill-hancock/12734897/>.

<sup>266</sup> See Joel Reuter, Making a Playoff Case for Every Non-Power 5 Team in the Top 25, *Bleacher Report* (Nov. 24, 2020), <https://bleacherreport.com/articles/2919440-making-a-playoff-case-for-every-non-power-5-team-in-the-top-25>.

The Power Five Conferences wasted no time flexing their muscle by warning the NCAA that should fall sports or championships be cancelled, they will host them.<sup>267</sup> Such an antagonistic position offers a clear indication of the rapidly waning patience the Power Five have for the NCAA or its rules.

If the Power Five successfully broke away from the NCAA, and thus non-power five institutions took home more money in the process, why should they not do it in basketball? The NCAA finds itself in a compromising situation. As the NCAA's principle of amateurism continues to deteriorate grip on intercollegiate athletics continues to slip. The NCAA should see the writing on the wall: it must tread carefully, especially in dealing with the Power Five.

Current circumstances have presented the Power Five conferences to seize complete control of their athletics, and it appears the Power Five conferences are ready to pounce. If there is a way to take for themselves the vast financial fortunes of March Madness, without the NCAA or non-power five institutions' involvement, history may very well repeat itself in an environment driven by money.

The second imminent threat to the NCAA model arose on December 16, 2020 when the Supreme Court granted petitions for writs of certiorari in two cases *NCAA v. Alston* and *American Athletic Conference v. Alston*. The cases were consolidated under *NCAA v. Alston*.<sup>268</sup> The general question being presented to the Court is whether the NCAA's amateurism rules violate antitrust law.

The question presented in the first case is “[w]hether the Ninth Circuit erroneously held, in conflict with decisions of other circuits and general antitrust principles, that the National Collegiate Athletic Association eligibility rules regarding compensation of student-athletes violate federal antitrust law.”<sup>269</sup> The question presented in the second case is “[w]hether the Sherman Act authorizes a court to subject the product-defining rules of a joint

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<sup>267</sup> See Dennis Dodd, Power Five, NCAA are now officially adversaries, and a breakaway may only be a matter of time, CBS Sports (Aug. 3, 2020), <https://www.cbssports.com/college-football/news/power-five-ncaa-are-now-officially-adversaries-and-a-breakaway-may-only-be-a-matter-of-time/>.

<sup>268</sup> *Id.*

<sup>269</sup> *In re National Collegiate Athletic Association*, 958 F.3d 1239 (9th Cir. 2020), cert granted, 2020 WL 7366281

venture to full Rule of Reason review, and to hold those rules unlawful if, in the court's view, they are not the least restrictive means that could have been used to accomplish their procompetitive goal."<sup>270</sup>

The Supreme Court's ruling could determine the NCAA's future role in intercollegiate athletics.

### CONCLUSION

Over the past decade, the role of the NCAA and the principle of amateurism has found itself in the center of the public debate over the appropriate compensation for college athletes. At the heart of this question is the debate over whether intercollegiate athletics is driven by amateurism values or by money.

This note has explored the question at the heart of this debate: whether intercollegiate athletics is driven by amateurism values or by money. Specifically, this note has analyzed the evolving definition of amateurism, the commercialization of intercollegiate athletics, and the use of a Bubble to ensure that March Madness can occur. Finally, this note has argued that the answer to this central question is that money drives intercollegiate athletics and not amateurism values. This note concludes by considering the two immediate threats to the NCAA's control of intercollegiate athletics: COVID-19 and the opportunity it provides to the Power Five conferences to repeat history and breakaway, as well as the Supreme Court's imminent review of the NCAA's amateurism rules viability under antitrust law.

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<sup>270</sup> In re National Collegiate Athletic Association, 958 F.3d 1239 (9th Cir. 2020), cert granted, 2020 WL 7366279

