

RECENT CASES

TITLE IX — STUDENT ATHLETES — SECOND CIRCUIT EXPANDS TITLE IX DISPARATE TREATMENT ANALYSIS. — *Radwan v. Manuel*, 55 F.4th 101 (2d Cir. 2022).

Questions regarding worker protections for collegiate athletes have been simmering for decades: Are collegiate athletes employees of their universities or merely students?¹ Should they receive workers' compensation for injuries?² Can they unionize?³ But these questions have taken on renewed life in a world where student athletes generate billions of dollars for universities and private companies.⁴ Now, courts and Congress scrutinize intercollegiate athletics,⁵ and recently, student athletes have won a series of legal and policy victories.⁶ It is in this context that *Radwan v. Manuel*⁷ can be seen as a potential legal toehold for advocates seeking employee classification for student athletes. On its face, the decision in *Radwan* is a significant victory for gender equality, expansively interpreting disparate treatment doctrine in the context of Title IX of the Education Amendments Act of 1972.⁸ However, less discussed is the court's dicta analyzing the First and Fourteenth

¹ See Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, at 80, 88.

² See Jason Gurdus, Note, *Protection off of the Playing Field: Student Athletes Should Be Considered University Employees for Purposes of Workers' Compensation*, 29 HOFSTRA L. REV. 907, 908 (2001).

³ See *Nw. Univ.*, 362 N.L.R.B. 1350, 1352–55 (2015); Benjamin Sachs, *NLRB General Counsel on Players at Academic Institutions*, ONLABOR (Sept. 29, 2021), <https://onlabor.org/nlr-general-counsel-on-players-at-academic-institutions> [<https://perma.cc/PV4M-PTHS>].

⁴ See *NCAA Earns \$1.15B in 2021 as Revenue Returns to Normal*, AP NEWS (Feb. 2, 2022), <https://apnews.com/article/coronavirus-pandemic-sports-business-health-indiana-cof4a0a468c22ae071ad84562b03c827> [<https://perma.cc/K2XS-475T>].

⁵ See, e.g., Maryclaire Dale, *NCAA Asks US Appeals Court to Block Pay for Student-Athletes*, AP NEWS (Feb. 15, 2023), <https://apnews.com/article/sports-compensation-in-education-college-6f6feb3a3973dee785ad2b778a490e0e> [<https://perma.cc/9D3K-RNT4>]. See generally *Compensating College Athletes: Examining the Potential Impact on Athletes and Institutions: Hearing of the S. Comm. on Health, Educ., Lab. & Pensions*, 116th Cong. 2 (2020).

⁶ See *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2154, 2162 (2021) (holding that the National Collegiate Athletic Association's (NCAA) rules against providing education-related benefits for student athletes violate antitrust law and finding that the NCAA is capable of depressing wages); Alan Blinder, *College Athletes May Earn Money from Their Fame, N.C.A.A. Rules*, N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html> [<https://perma.cc/4JK8-6MHX>] (describing the NCAA's decision to permit students to begin profiting from image and likeness endorsement deals as “one of the most significant changes in the association's 115-year history”); Memorandum GC 21-08 from Jennifer A. Abruzzo, Gen. Couns., NLRB, to All Reg'l Dirs., Officers-in-Charge, and Resident Officers, NLRB 4 (Sept. 29, 2021), <https://apps.nlr.gov/link/document.aspx/09031d458356ec26> [<https://perma.cc/3HHV-XH7H>] (declaring the protections of the National Labor Relations Act cover certain collegiate athletes).

⁷ 55 F.4th 101 (2d Cir. 2022).

⁸ Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified in scattered sections of 20, 29, and 42 U.S.C.); see *Ensuring Title IX Protections* — *Radwan v. University of Connecticut Board of Trustees*, NAT'L WOMEN'S L. CTR. (Nov. 30, 2022), <https://nwlc.org/resource/ensuring-title-ix-protections-radwan-v-university-of-connecticut-board-of-trustees> [<https://perma.cc/2TYE-R4BA>].

Amendment claims that may imply that employment law has particular relevance to the relationship between a student athlete and their college.

On November 9, 2014, the University of Connecticut (UConn) women's soccer team won its first-ever conference championship.⁹ At the referee's whistle, the players rushed the field — screaming, embracing, and celebrating the penalty-kick victory.¹⁰ In the heat of the moment, UConn freshman and one-year athletic scholarship recipient¹¹ Noriana Radwan raised a joyful middle finger to a TV camera.¹² ESPN televised the bird, and a yearslong legal battle took flight.¹³

Radwan was subsequently suspended from all team activities.¹⁴ And, in December — weeks after Radwan's coach asked that she improve her fitness and grades for the upcoming spring season¹⁵ — the remainder of Radwan's full scholarship was canceled because her gesture was “an embarrassment” to UConn.¹⁶ Radwan's scholarship “covered the cost of tuition, fees, room, board, and course-related books,” had a set term of one year, and could be “immediately reduced or canceled during the term of [the] award if” Radwan “engage[d] in *serious misconduct* that [brought] substantial disciplinary penalty.”¹⁷ The letter revoking her scholarship thus indicated the reason was for “serious misconduct.”¹⁸

Radwan sued UConn (through its Board of Trustees) and university officials, alleging that UConn had violated Title IX by terminating her scholarship on the basis of sex.¹⁹ She also alleged violations of her free speech, equal protection, and procedural due process rights under 42 U.S.C. § 1983.²⁰ The district court granted summary judgment to UConn and its officials on Radwan's First and Fourteenth Amendment

⁹ *UConn Wins 2014 American Athletic Conference Championship*, U. CONN. ATHLETICS (Nov. 9, 2014, 12:00 AM), https://uconnhuskies.com/news/2014/11/9/UConn_Wins_2014_American_Athletic_Conference_Championship.aspx [<https://perma.cc/TR23-5V6V>].

¹⁰ See Noriana Radwan, *A Middle Finger Cost Me My Livelihood as a Woman Athlete*, ACLU CONN. (Dec. 14, 2020, 12:00 PM), <https://www.acluct.org/en/news/middle-finger-cost-me-my-livelihood-woman-athlete> [<https://perma.cc/YZR9-REAC>].

¹¹ *Radwan*, 55 F.4th at 106.

¹² See *Radwan v. Univ. of Conn. Bd. of Trs.*, 465 F. Supp. 3d 75, 84–85 (D. Conn. 2020) (The camera operator “could not say that the gesture was directed at the opposing team.” *Id.* at 85.).

¹³ See *id.* at 82.

¹⁴ *Id.* at 85.

¹⁵ *Id.* at 88.

¹⁶ *Id.* at 89 (quoting Defendants' Exhibit 31, at 106, *Radwan*, 465 F. Supp. 3d 75 (No. 16-cv-2091), ECF No. 91-2).

¹⁷ *Radwan*, 55 F.4th at 106 (alteration in original) (quoting Joint Appendix at 59, *Radwan*, 55 F.4th 101 (No. 20-2194)).

¹⁸ *Radwan*, 465 F. Supp. 3d at 90 (quoting Defendants' Motion for Summary Judgment Exhibit at 76, *Radwan*, 465 F. Supp. 3d 75 (No. 16-cv-2091)). The UConn Student-Athlete Handbook prohibited behavior including “[u]sing obscene or inappropriate language or gestures to officials, opponents, team members or spectators.” *Radwan*, 55 F.4th at 106 (quoting Joint Appendix, *supra* note 17, at 79 (alteration in original)).

¹⁹ *Radwan*, 465 F. Supp. 3d at 82, 94.

²⁰ *Id.* at 94, 105.

claims.²¹ Meanwhile, the district court held there was no genuine issue of material fact about whether UConn's treatment of female athletes constituted sex discrimination under Title IX.²² Radwan appealed.²³

The Second Circuit affirmed in part and reversed in part.²⁴ Writing for the panel, Judge Bianco²⁵ found a triable issue of fact as to whether Radwan's scholarship was illegally terminated because of her sex.²⁶ Specifically, Radwan had sufficiently detailed the ways in which misconduct by male athletes at UConn was not punished to the same degree.²⁷ Whereas the district court found that Radwan was not "similarly situated" to male athletes because she was not disciplined by the "same decisionmaker,"²⁸ the Second Circuit rejected this interpretation. It recognized the structure of sex-segregated athletic teams where male and female athletes often have different coaches and discipliners, and thus could hardly ever be "similarly situated" under a "same decisionmaker" test.²⁹ The court vacated the Title IX judgment and remanded.³⁰

Judge Bianco invoked qualified immunity and upheld the lower court's grant of summary judgment to defendants as to the due process claim.³¹ But, notably, he held that a one-year athletic scholarship constituted a constitutionally protected property interest for two reasons³²: First, the scholarship "was for a set term of one year, terminable only for cause."³³ Thus, the scholarship was analogous to contracts in the "employment context," which may constitute protected property interests where an employee has for-cause employment protection or otherwise expects their employment relationship to continue for a set period.³⁴ Second, Radwan's reliance on the scholarship was significant: it was "her exclusive source of funding for housing, college tuition, and books."³⁵ What's more, "an athletic scholarship is the result of years of

²¹ See *id.* at 103–05, 107, 113–14 (granting summary judgment on a variety of grounds, including insufficient evidence, failure to appeal, and qualified immunity).

²² See *id.* at 100.

²³ *Radwan*, 55 F.4th at 113.

²⁴ *Id.* at 105.

²⁵ Judge Bianco was joined by Judge Carney and by Judge Komitee of the United States District Court for the Eastern District of New York, sitting by designation.

²⁶ *Radwan*, 55 F.4th at 139, 141.

²⁷ *Id.* at 133–35 (citing examples). Radwan also cited UConn's inconsistent explanations for her punishment and its nonadherence to internal disciplinary procedures. *Id.* at 133. Indeed, under the athletic director's tenure, "no male student-athlete was ever permanently removed from his team, or had his scholarship terminated, for a first instance of unsportsmanlike conduct." *Id.* at 135.

²⁸ See *Radwan v. Univ. of Conn. Bd. of Trs.*, 465 F. Supp. 3d 75, 98–100 (D. Conn. 2020) (quoting *Russell v. N.Y. Univ.*, No. 15-cv-2185, 2017 WL 3049534, at *32 (S.D.N.Y. July 17, 2017)).

²⁹ *Radwan*, 55 F.4th at 136; see also *id.* at 136–37.

³⁰ *Id.* at 141.

³¹ *Id.* at 129.

³² *Id.* at 125.

³³ *Id.*

³⁴ *Id.* (citing *Perry v. Sindermann*, 408 U.S. 593, 602 (1972); *O'Connor v. Pierson*, 426 F.3d 187, 196 (2d Cir. 2005)).

³⁵ *Id.* at 126.

practice and dedication,”³⁶ constituting the “dependence” and “permanence” needed to create a constitutionally protected property interest.³⁷ Nonetheless, the court granted qualified immunity because the constitutional holding was not clearly established at the time Radwan’s scholarship was terminated.³⁸ Thus, the court did not decide whether the process afforded to Radwan was sufficient.³⁹

The court also upheld on qualified immunity grounds the district court’s summary judgment findings on the First Amendment claim.⁴⁰ Though the Second Circuit summarized “some basic tenets of First Amendment law”⁴¹ and their application in the university setting specifically, the court did not reach any constitutional holdings.⁴² Instead, the Second Circuit concluded that students’ free speech rights in the collegiate setting were not clearly established in this context.⁴³

Although *Radwan*’s immediate significance lies in its expansion of Title IX protections for student athletes, the case’s dicta are also important for the groundwork they lay in explicating the potential employment relationship between athletes and their universities. Even though the circuit court denied Radwan’s First and Fourteenth Amendment claims, the court’s opinion may help bolster arguments for student athletes who seek employment protections, such as minimum wage and overtime pay, under the Fair Labor Standards Act of 1938⁴⁴ (FLSA).

The debate over whether student athletes qualify as “employees” under the FLSA is ongoing. Prior to the Supreme Court’s 2021 watershed antitrust decision in *National Collegiate Athletic Ass’n v. Alston*,⁴⁵ two federal appellate courts had decided that student athletes were not “employees” under the FLSA.⁴⁶ But, in *Alston*, the Supreme Court eliminated as an illegal restraint of trade the restriction of the National

³⁶ *Id.* (citing *Ezekwo v. N.Y.C. Health & Hosps. Corp.*, 940 F.2d 775, 783 (2d Cir. 1991); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

³⁷ *Id.* at 126–27 (citing *S & D Maint. Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988)).

³⁸ *Id.* at 129.

³⁹ *Id.* at 128.

⁴⁰ *Id.* at 113.

⁴¹ *Id.* at 114.

⁴² *Id.* at 115–18; *see also id.* at 122–23.

⁴³ *Id.* at 122 (“The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” (alteration omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))). The court acknowledged that the First Amendment generally “include[s] gestures and other expressive conduct.” *Id.* at 115. It also acknowledged that K–12 schools “can regulate the content of student speech . . . that would otherwise be protected if uttered or displayed by a member of the general public,” *id.* (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)), but the Supreme Court has suggested that free speech holdings in the K–12 context “may not apply with equal force in college and university settings,” *id.* at 117 (citing *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring in the judgment)).

⁴⁴ 29 U.S.C. §§ 201–219.

⁴⁵ 141 S. Ct. 2141 (2021).

⁴⁶ *Dawson v. Nat’l Collegiate Athletic Ass’n*, 932 F.3d 905, 908 (9th Cir. 2019); *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 288 (7th Cir. 2016).

Collegiate Athletic Association (NCAA) on student athletes receiving education-related benefits.⁴⁷ While the ruling's immediate impact was "rather modest,"⁴⁸ the decision "la[id] the groundwork for a successful future challenge to the NCAA's restrictions on compensation unrelated to education."⁴⁹ Indeed, Justice Kavanaugh noted that the reasons for not paying student athletes are "circular and unpersuasive."⁵⁰ With this decision, student athletes became newly empowered to seek compensation and other piecemeal work benefits afforded through antitrust, employment, and labor laws.⁵¹ Now, the Third Circuit is considering their FLSA status.⁵² A favorable decision in the Second Circuit could force or further a circuit split.

Under the FLSA, an "employee" is "any individual employed by an employer,"⁵³ where an "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency,"⁵⁴ and "employ" means to "suffer or permit to work."⁵⁵ To determine whether an individual is an "employee," the Second Circuit applies an economic reality test where "the overarching concern is whether the alleged employer possessed the power to control the workers in question."⁵⁶ Four factors are considered but neither exclusive nor dispositive⁵⁷: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."⁵⁸ Moreover, a court should assess a potential employer-employee relationship based on "'economic reality' rather than 'technical concepts.'"⁵⁹

The Second Circuit's Fourteenth Amendment analysis in *Radwan* recognized key economic realities of college athletics. First, the due process analysis supported the argument that athletic-scholarship recipients

⁴⁷ 141 S. Ct. at 2151–53, 2166.

⁴⁸ Nathaniel Grow, *The Future of College Sports After Alston: Reforming the NCAA via Conditional Antitrust Immunity*, 64 WM. & MARY L. REV. 385, 407 (2022); see also *id.* at 389–90, 407 n.100 (noting that the student athletes did not challenge the NCAA's full compensation restrictions but instead only challenged the NCAA's restriction on the offering of education-related benefits to student athletes such as laptops, study-abroad trips, and stipends for graduate school).

⁴⁹ *The Supreme Court, 2020 Term — Leading Cases*, 135 HARV. L. REV. 323, 471 (2021).

⁵⁰ *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring).

⁵¹ See, e.g., Tyler J. Murry, Note, *The Path to Employee Status for College Athletes Post-Alston*, 24 VAND. J. ENT. & TECH. L. 787, 794–95 (2022).

⁵² See *Johnson v. Nat'l Collegiate Athletic Ass'n*, No. 22-1223 (3d Cir. argued Feb. 15, 2023).

⁵³ 29 U.S.C. § 203(e)(1).

⁵⁴ *Id.* § 203(d).

⁵⁵ *Id.* § 203(g).

⁵⁶ *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999).

⁵⁷ *Id.* (citing *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988)); see also *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 142 (2d Cir. 2008).

⁵⁸ *Id.* (quoting *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984)).

⁵⁹ *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33 (1961) (quoting *United States v. Silk*, 331 U.S. 704, 713 (1947)).

qualify for recognition under an economic reality test in general.⁶⁰ Whereas most other courts have not readily found general property interests in the student-athlete context,⁶¹ the Second Circuit declared a constitutional property interest in fixed-period scholarships terminable for cause.⁶² As detailed above, the Second Circuit emphasized Radwan's "level of dependence" on and "the unique nature of" her athletic scholarship.⁶³ It recognized her scholarship as something more than just a source of educational funding but rather something that was both "of significant value to her future education and professional opportunities"⁶⁴ and earned after "years of practice and dedication."⁶⁵ Thus, in *Radwan*, the court recognized the extent to which student athletes sacrifice to reach and play at the collegiate level. And, in so doing, student athletes' academic "livelihood" becomes dependent on the ability of their athletic scholarships to finance it. Indeed, this reliance on an athletic scholarship, the court noted, may "even . . . go further than [the reliance accompanying] an average employment contract."⁶⁶

Evidence beyond Radwan's case bolsters the court's conclusion. In 2016, the NCAA surveyed Division I student athletes and found that one-third "reported having concerns about how their finances would impact their ability to complete their degree,"⁶⁷ with an even greater percentage of respondents saying that "quitting their sport would make staying at their current college a problem financially."⁶⁸ Meanwhile, the labor expended and services provided by college athletes generate billions of dollars. In 2021, the NCAA earned \$1.15 billion in revenue, which was largely distributed back to its member schools.⁶⁹ The economic dependence between student athletes and their schools is mutual.

⁶⁰ See Geoffrey J. Rosenthal, Practitioner's Note, *College Play and the FLSA: Why Student-Athletes Should Be Classified as "Employees" Under the Fair Labor Standards Act*, 35 HOFSTRA LAB. & EMP. L.J. 133, 141 (2017) (explaining employees satisfy the test if they are "economically dependent on the business to which [they] render[] service" (quoting Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 90 (2013))); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 97 (2006).

⁶¹ See Amanda Siegrist et al., *Interscholastic Athletics and Due Process Protection: Student-Athletes Continue to Knock on the Door of Due Process*, 6 MISS. SPORTS L. REV. 1, 18 (2016). See generally Ray Yasser & Matthew Block, *Upon Further Review: Recognizing Procedural Due Process Rights for Suspended High School Athletes*, ENT. & SPORTS L., Fall 2008, at 1, 22–23 (discussing the due process analysis in the context of high school athletics).

⁶² *Radwan*, 55 F.4th at 125.

⁶³ *Id.* at 127.

⁶⁴ *Id.*

⁶⁵ *Id.* at 126.

⁶⁶ *Id.* at 125.

⁶⁷ Rosenthal, *supra* note 61, at 150 (citing NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA GOALS STUDY OF THE STUDENT-ATHLETE EXPERIENCE: INITIAL SUMMARY OF FINDINGS: JANUARY 2016 (2016)).

⁶⁸ *Id.* at 150–51 (quoting NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 67, at 3).

⁶⁹ *NCAA Earns \$1.15B in 2021 as Revenue Returns to Normal*, *supra* note 4.

Second, the due process analysis illustrated the nature and degree of “employer” control over student athletes.⁷⁰ The court’s discussion of Radwan’s scholarship relied heavily on analysis in “the employment context,”⁷¹ drawing parallels between a scholarship and an employment contract. This analysis implicitly recognized a coach’s ability to effectively hire and fire an athlete and determine the rate and method of payment in a decision regarding whether or not to renew a scholarship.⁷²

Meanwhile, the court’s First Amendment analysis might speak to the second prong of the economic reality test.⁷³ The court distinguished *Radwan* from other First Amendment precedent on the basis of Radwan’s role as a student athlete and university representative: “Here, there is no indication that [UConn] would have taken any disciplinary action . . . had [Radwan] displayed the middle finger in some other university setting”⁷⁴ Instead, UConn exercised its control of Radwan’s expressive conduct “as an athlete on the university’s sports team, wearing the university’s jersey, during a university sports event.”⁷⁵

The court’s analysis implicitly distinguished the role of an athlete and a student. In elevating and describing responsibilities of a student athlete, the Second Circuit’s reasoning suggested — but did not explicitly invoke — the Supreme Court’s *Connick-Pickering*⁷⁶ free speech balancing test, which recognized that a public employee’s speech rights must be balanced with the interests of the state as an employer.⁷⁷ As to employer interests, the Court has underscored that “the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.”⁷⁸ In this manner, the Second Circuit’s First Amendment analysis in *Radwan* suggested that, just like a public employer’s control over an employee, a public university may well be able to control a student athlete’s speech.

The court did draw distinctions between athletes and employees in its Title IX analysis.⁷⁹ Thus, one might argue that the court’s Title IX

⁷⁰ Specifically, the first and third prongs of the four-part economic reality test.

⁷¹ *Radwan*, 55 F.4th at 125.

⁷² *See id.* at 125, 126 n.15.

⁷³ *See* Rosenthal, *supra* note 61, at 141 (describing the second prong as “the employer’s ability to control the terms and conditions of employment”).

⁷⁴ *Radwan*, 55 F.4th at 119.

⁷⁵ *Id.*

⁷⁶ *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

⁷⁷ *See generally* Andrew C. Alter, Note, *Public Employees’ Free Speech Rights: Connick v. Myers Upsets the Delicate Pickering Balance*, 13 N.Y.U. REV. L. & SOC. CHANGE 173 (1984–85) (describing the effect of the *Connick* decision on the balancing test established in *Pickering*).

⁷⁸ *Connick*, 461 U.S. at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part and concurring in the result in part)).

⁷⁹ Even though the “same decisionmaker” factor may often be an important one” in both a Title IX and a Title VII employment discrimination analysis, “its importance can vary.” *Radwan*, 55 F.4th at 137. In the athletic context, the court emphasized, “a shared decisionmaker may be a less

analysis undercuts its other employment analogies, and *Radwan* does not signal any interest in finding that athletes should be afforded employment protections. But the court distinguished the athletic context from the employment context for the purpose of applying a judicial test. Nothing in the court's disparate treatment analysis under Title IX spoke to the economic reality test and the nature of the "employer-employee" relationship between college athletes and their universities, and so it does not foreclose an argument under the FLSA.

Even if the reasoning in *Radwan* helped establish the building blocks toward satisfying the FLSA's definition of "employee," there is a risk that student athletes will be analogized to certain nonprotected classifications.⁸⁰ For example, in *Johnson v. National Collegiate Athletic Ass'n*,⁸¹ the Eastern District of Pennsylvania considered the student-athlete-classification question by analyzing the Second Circuit's test for interns⁸² under *Glatt v. Fox Searchlight Pictures, Inc.*⁸³ The *Glatt* court considered whether an intern or an employer is the "primary beneficiary" of the relationship by looking at a nonexhaustive set of factors.⁸⁴ But student athletes may have greater ease in demonstrating they are not interns, particularly once *Radwan* is invoked to help overcome the traditional understandings of college athletics and uncompensated labor. The Eastern District of Pennsylvania, for example, found in favor of student athletes even after applying *Glatt*.⁸⁵

Regardless of whether the Second Circuit intended to indicate its predilections in the debate, advocates of student-athlete compensation would be remiss to ignore *Radwan* and the potential toehold the court provided in the debate moving forward. As courts continue to draw doctrinal analogies to employment law in areas of law such as the First Amendment and due process, the theoretical and doctrinal distinctions between student athletes and employees may soon become untenable — causing ripple effects, not just for FLSA benefits but also for other employment law protections as well.⁸⁶

relevant factor" because collegiate athletics is "dominated by single-sex teams with similar performance metrics and that are bound by the same standards of conduct." *Id.* In the employment context, "individuals frequently have varied job responsibilities and standards of performance." *Id.*

⁸⁰ See, e.g., *Brown v. N.Y.C. Dep't of Educ.*, 755 F.3d 154, 167–68 (2d Cir. 2014) (recognizing the application of "several variations of economic reality tests as best suited to particular situations," *id.* at 167, such as in cases determining employer status and distinguishing employees from independent contractors, domestic service workers, and interns).

⁸¹ 556 F. Supp. 3d 491 (E.D. Pa. 2021), *argued*, No. 20-1223 (3d Cir. Feb. 15, 2023).

⁸² *Id.* at 508–12.

⁸³ 811 F.3d 528 (2d Cir. 2016).

⁸⁴ *Id.* at 536. These factors include the extent to which the intern experience is similar to that of an educational environment, interns expect compensation, interns receive academic credit, and the intern work complements but does not displace paid employee work. See *id.* at 536–37.

⁸⁵ *Johnson*, 556 F. Supp. 3d at 512.

⁸⁶ See generally Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIA. L. REV. 65 (2014).