RECENT CASES

EMPLOYMENT LAW — TITLE IX — THIRD CIRCUIT CREATES TEST TO ASSESS COLLEGE ATHLETE EMPLOYMENT STATUS UNDER THE FAIR LABOR STANDARDS ACT. — *Johnson v. National Collegiate Athletic Ass'n*, 108 F.4th 163 (3d Cir. 2024).

The debate concerning the fair compensation of National Collegiate Athletic Association (NCAA) athletes is not a new one.[1] Since Justice Kavanaugh's concurrence in *NCAA v. Alston*,[2] much of the discourse has shifted to how, not when, college athletes should be compensated.[3] In recent years, NCAA sports have also experienced the surge of Name, Image, and Likeness (NIL) payments to players.[4] Additionally, advocacy for direct pay-to-play compensation has arisen.[5] Recently, in *Johnson v. NCAA*,[6] the Third Circuit held that some college athletes may be employees of their universities for purposes of the Fair Labor Standards Act[7] (FLSA) and devised a test to determine which college athletes would qualify.[8] This test conflicts with Title IX's[9] equity regulations and principles, evincing the necessity for intervention by Congress or the NCAA itself to avoid the destruction of the college athletics model.[10]

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[1] *See, e.g.*, Michael Rosenberg, *Change Is Long Overdue: College Football Players Should Be Paid*, SPORTS ILLUSTRATED (Aug. 26, 2010), https://www.si.com/more-sports/2010/08/26/pay-college [https://perma.cc/X2TF-P4M2].

[2] 141 S. Ct. 2141 (2021). A unanimous Court in *Alston* held that the NCAA and its member schools violated federal antitrust law by agreeing to limit academic-related compensation. *See id.* at 2159, 2162, 2164. The case has been described as "one of the most significant sports law decisions in U.S. history" and weakened the NCAA's reliance on amateurism to justify not paying college athletes. Michael McCann, *Supreme Court Rules Unanimously Against NCAA in* Alston *Case*, SPORTICO (June 21, 2021, 10:29 AM), https://www.sportico.com/law/analysis/2021/supreme-court-rules-unanimously-against-ncaa-in-alston-case-1234632182 [https://perma.cc/SG8A-ARTD].

[3] *See, e.g.*, Michael McCann et al., *Name, Image and Likeness: A Guide to College Athlete NIL Deals, Compensation*, SPORTICO (Mar. 7, 2023, 12:00 PM), https://www.sportico.com/feature/college-athletes-paid-name-image-likeness-deals-nils-1234616329 [https://perma.cc/4CKK-YHUR].

[4] *See* Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/3DR7-KKVC]. With NIL, college athletes can profit off of their publicity but are still barred from receiving payments for their on-field performance, also known as "pay-for-play" payments. *See* McCann et al., *supra* note 3.

[5] *See, e.g.*, Daniel Libit & Lev Akabas, *67% of Americans Favor Paying College Athletes: Sportico/Harris Poll*, SPORTICO (Aug. 17, 2023, 12:01 AM), https://www.sportico.com/leagues/college-sports/2023/americans-favor-college-athletes-pay-harris-poll-1234734402 [https://perma.cc/3L76-VT8K].

[6] 108 F.4th 163 (3d Cir. 2024).

[7] 29 U.S.C. §§ 201–219.

[8] *See Johnson*, 108 F.4th at 180.

[9] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688.

[10] NCAA President Charlie Baker recently explained that ninety-five percent of NCAA student athletes could be unable to play their sports at the collegiate level if they are considered employees. Ben Nuckols & Associated Press, *NCAA Head Warns that 95% of Student Athletes Face Extinction if Colleges Actually Have to Pay Them as Employees*, FORTUNE (Feb. 24, 2024, 10:50 AM),

In 2019, six former college athletes brought several claims in the United States District Court for the Eastern District of Pennsylvania against the NCAA, the colleges and universities that the athletes attended, and over 100 other colleges and universities that are members of NCAA Division I.[11] The plaintiffs alleged violations of the FLSA and state employment laws.[12] Specifically, the plaintiffs argued that they were employees of the NCAA and of their schools and "[sought] payment of wages for the time [they] spent engaged in activities connected to NCAA sports."[13] The defendants moved to dismiss the complaint because "it [did] not plausibly allege that [p]laintiffs [were] their employees."[14]

Judge Padova denied the defendants' motion.[15] He rejected the "circular" reasoning that "amateur" status precluded college athletes from being employees, emphasizing Justice Kavanaugh's concurrence in *Alston*.[16] He also rebuked the defendants' argument that the Department of Labor Wage and Hour Division's *Field Operations Handbook* foreclosed an employee-employer relationship between college athletes and their universities as a matter of law.[17] Judge Padova lastly applied a multifactor economic-realities test from *Glatt v. Fox Searchlight Pictures, Inc.*[18] and held that the analysis of the *Glatt* factors[19] weighed in favor of the conclusion that the complaint "plausibly allege[d] that [p]laintiffs [were] employees" of the schools they attended.[20]

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https://fortune.com/2024/02/24/ncaa-college-sports-employees-student-athletes-charlie-baker-interview [https://perma.cc/94SB-S2MU]; *see also* Erin E. Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of* Northwestern *and* O'Bannon, 41 J. COLL. & U.L. 297, 334–35, 341 (2015) (discussing the argument that compliance costs might make it "too costly for college athletic departments to operate as they presently do," *id.* at 334–35); Sam C. Ehrlich, *The Inherent Bad Faith of the NCAA's Use of Title IX to Shield Its Illegal Business Practices*, 25 GEO. J. GENDER & L. 39, 78 & nn.234–36 (2023) ("Many athletic departments may legitimately struggle to balance expenses with the added costs that come with employment status." *Id.* at 78.); *cf.* Craig Garthwaite et al., *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 5, 35–36 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27734, 2020) (discussing how proposed rent-sharing models conflict with Title IX's principles).

11 Complaint — Class and Collective Action ¶¶ 9–21, Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2021) (No. 19-5230), 2019 WL 5847321. The reference to intercollegiate athletes throughout this comment as "college athletes" mirrors the Third Circuit's usage of the term. *See generally Johnson*, 108 F.4th 163. The original *Johnson* plaintiffs competed in collegiate football, swimming/diving, baseball, tennis, and soccer. *Johnson*, 556 F. Supp. 3d at 495–96.

12 *Johnson*, 556 F. Supp. 3d at 495.

13 *Id.* at 498.

14 *Id.* at 499.

15 *Id.* at 495, 512.

16 *Id.* at 501 (quoting NCAA v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring)).

17 *Id.* at 506.

18 811 F.3d 528 (2d Cir. 2016). In *Glatt*, the Second Circuit analyzed whether unpaid interns are considered "employees" under the FLSA. *Id.* at 533. The *Glatt* court assessed whether the employer was the "primary beneficiary of the relationship." *Id.* at 536.

19 *Id.* at 536–37.

20 *Johnson*, 556 F. Supp. 3d at 512.

The Third Circuit vacated and remanded.[21] Writing for the panel, Judge Restrepo[22] began by surveying the history of intercollegiate athletics, from its naissance at an 1852 boat race between Harvard and Yale University to its growth into the billion-dollar behemoth that NCAA Division I sports are today.[23] He also recounted the genesis of the NCAA's "student-athlete" moniker.[24]

Next, Judge Restrepo recited the FLSA's definition of employee — "any individual employed by an employer"[25] — which "has been described as 'the broadest [definition] that has ever been included in any one act.'"[26] He then highlighted two other integral definitions: *Employer* includes "any person acting directly or indirectly in the interest of an employer in relation to an employee"[27] and to *employ* is "to suffer or permit to work."[28] He explained that to determine FLSA employment, courts must "look to the economic realities of the relationship,"[29] which depend on the totality of the circumstances.[30]

Drawing on the preceding definitions and precedent from both the FLSA line of cases as well as common law NLRB cases, Judge Restrepo constructed a balancing test that suited the "sui generis"[31] situation of college athletes.[32] He held: "[C]ollege athletes may be employees under the FLSA when they (a) perform services for another party, (b) 'necessarily and primarily for the [other party's] benefit,' (c) under that party's control or right of control, and (d) in return for 'express' or 'implied' compensation or 'in-kind benefits.'"[33] In announcing the new test, he explained that *Glatt* was "not sufficiently analogous to the case at bar."[34]

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[21] *Johnson*, 108 F.4th at 182.

[22] Judge McKee joined the majority opinion. *See id.* at 167, 183.

[23] *Id.* at 167–71.

[24] *Id.* at 171–73. The NCAA's successful reliance on amateurism and the term "student-athlete" stemmed in part from Justice Stevens's dicta in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 120 (1984).

[25] 29 U.S.C. § 203(e)(1).

[26] *Johnson*, 108 F.4th at 176 (quoting United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945)).

[27] *Id.* (quoting 29 U.S.C. § 203(d)).

[28] *Id.* (quoting 29 U.S.C. § 203(g)).

[29] *Id.* (quoting Martin v. Selker Bros., 949 F.2d 1286, 1293 (3d Cir. 1991)).

[30] *Id.* (quoting Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947)) (citing Haybarger v. Lawrence Cnty. Adult Prob. & Parole, 667 F.3d 408, 418 (3d Cir. 2012)).

[31] *Id.* at 177 (emphasis omitted).

[32] *Id.* at 177–80.

[33] *Id.* at 180 (alteration in original) (citations omitted) (quoting Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 598 (1944); Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985)).

[34] *Id.* Among other things, Judge Restrepo noted that the interns in *Glatt* "[could] greatly benefit" from their unpaid internships through educational or vocational training "that [is] not necessarily expected with all forms of employment." *Id.* (quoting Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 535–36 (2d Cir. 2016)). This contrasted with the benefits cited by the NCAA, such as "increased discipline, a stronger work ethic, . . . time management, leadership, . . . and a greater ability to work collaboratively," which are skills "typically acquire[d] in a work environment." *Id.*

Judge Restrepo then turned to the NCAA's "tradition of amateurism" assertion "that colleges may decline to pay student athletes because the defining feature of college sports . . . is that the student athletes are not paid."[35] He held that the NCAA's continued reliance on the "frayed tradition" of amateurism could not preclude college-athlete employment status as a matter of law,[36] directly rebuking a 2016 Seventh Circuit opinion[37] on that question.[38] Judge Restrepo concluded his opinion by noting the importance of employing an economic-realities test that draws a line between "play" and "work."[39]

Judge Porter concurred in the judgment but took issue with Judge Restrepo's lack of elaboration.[40] He argued that the majority's "definitional test [did] not adequately probe the distinction between play and work, nor explain how district courts should do so."[41] He then proceeded through Judge Restrepo's economic-realities test.[42]

On the first factor (service), he posited that the majority failed to clarify the difference between "service," "labor," and "work."[43] All college athletes "serve" on their respective teams, he explained, but that does not create an employee-employer relationship.[44] He argued the second factor (primary beneficiary) failed to account for direct versus attenuated benefits to the university.[45] The third factor (right of control) did not distinguish Division I athletes from Division III athletes,[46] the latter of whom are almost certainly not employees. For the fourth prong (expectation of compensation), Judge Porter pointed out that the

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[35] *Id.* at 181 (alteration in original) (quoting NCAA v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring)).

[36] *Id.* at 182 (quoting Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring)).

[37] *Berger*, 843 F.3d at 291. The Ninth Circuit also disagreed with the Seventh Circuit's analysis of tradition in *Berger*, *see* Dawson v. NCAA, 932 F.3d 905, 908 n.2 (9th Cir. 2019), though it came out opposite *Johnson* on the question of whether college athletes could be employees under the FLSA, *id.* at 909, 911.

[38] *Johnson*, 108 F.4th at 182 (quoting *Berger*, 843 F.3d at 291). Judge Restrepo took issue with the *Berger* court's analogy to the indentured servitude of prisoners, *Berger*, 843 F.3d at 291 (citing Vanskike v. Peters, 974 F.2d 806, 806, 809 (7th Cir. 1992)), and refused to equate indentured servitude to the college athlete–university relationship. *Johnson*, 108 F.4th at 182 (quoting *Berger*, 843 F.3d at 291).

[39] *Johnson*, 108 F.4th at 182 (citing *Berger*, 843 F.3d at 294 (Hamilton, J., concurring)).

[40] *Id.* at 187 (Porter, J., concurring in the judgment). Judge Porter also argued the predominantly factual nature of the legal question at hand should have precluded the interlocutory appellate review. *Id.* at 183–84. He questioned Judge Restrepo's use of common law agency principles in crafting the novel multifactor balancing test, arguing that such principles had not previously applied in the FLSA context, *id.* at 187–89, and "[o]nly the Supreme Court can abrogate its precedents," *id.* at 188 (citing State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)). He also criticized the majority's "seventeen-page discussion" of the history of intercollegiate athletics, which was not included in the appellate record. *Id.* at 185–86.

[41] *Id.* at 187 (footnote omitted).

[42] *Id.* at 189–92.

[43] *Id.* at 189.

[44] *Id.*

[45] *Id.* at 189–90.

[46] *Id.* at 190.

majority did not indicate how lower courts should assess non-revenue-generating sports.[47] He argued that revenue generation was likely an essential factor in determining the "economic reality" of the relationship between a college athlete and their university.[48]

Judge Porter concluded his concurrence by identifying several unaddressed implications of the majority's reasoning.[49] He cited the decades of precedent that declared college athletes were not employees[50] to argue the changed circumstances of Division I football and basketball should animate distinctions within the *Johnson* test.[51] He also explained that the majority's test may fit "uneasily" with other bodies of statutory law.[52] For example, he posited that if only some college athletes are employees, Title VII of the Civil Rights Act of 1964[53] and Title IX of the Education Amendments Act of 1972 could clash.[54] This is because while Title VII prohibits employment discrimination "because of . . . sex,"[55] Title IX requires that sex be taken into account to ensure "equal 'participation opportunities.'"[56]

Judge Porter's observations are helpful but fail to answer a key question Justice Kavanaugh raised in his *Alston* concurrence: "How would any compensation regime *comply* with Title IX?"[57] As Judge Porter recognized, the boundary between revenue-generating sports (men's football and men's basketball) and non-revenue-generating sports may be the most logical line to draw between "play" and "work."[58] If this delineation falls along gendered lines, Title IX regulations and their central equity principle could require proportional pay-for-play compensation between the sexes.[59] This outcome would cripple the NCAA's financial system[60] and evinces the necessity for reform by Congress or the NCAA to avoid the dissolution of Division I college athletics.

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[47] *Id.* at 190–92.

[48] *Id.* at 192 (citing Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring); NCAA v. Alston, 141 S. Ct. 2141, 2166–69 (2021) (Kavanaugh, J., concurring)).

[49] *Id.* at 193.

[50] *Id.* at 192–93 (collecting cases).

[51] *Id.* at 193 (citing O'Bannon v. NCAA, 802 F.3d 1049, 1056 (9th Cir. 2015)).

[52] *Id.*

[53] 42 U.S.C. §§ 2000e to 2000e-17.

[54] *Johnson*, 108 F.4th at 193 (Porter, J., concurring in the judgment) (quoting and citing Michael E. Rosman, *Gender Identity, Sports, and Affirmative Action: What's Title IX Got to Do with It?*, 53 ST. MARY'S L.J. 1093, 1119–39 (2022)).

[55] 42 U.S.C. § 2000e-2(a)(1).

[56] *Johnson*, 108 F.4th at 193 (Porter, J., concurring in the judgment) (quoting and citing Rosman, *supra* note 54, at 1119–39). Judge Porter also highlighted how college athlete employment status could "roil the percolating debate under Title IX" regarding transgender college athletes. *Id.* (citing Bostock v. Clayton County, 140 S. Ct. 1731 (2020)).

[57] NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) (emphasis added).

[58] *See Johnson*, 108 F.4th at 191–92 (Porter, J., concurring in the judgment).

[59] *See* Sara Levien, Note, *There's a Crack in the NCAA's Amateurism Shield:* Johnson v. NCAA *May Shatter It Completely. What Then?*, 57 SUFFOLK U. L. REV. 175, 198 (2024).

[60] *See supra* note 10.

It is unlikely that courts applying the *Johnson* test will find that all Division I athletes are employees.[61] Drawing on Judge Porter's insights, the first (service) and third (control) factors of *Johnson*'s test are probably satisfied for all Division I athletes.[62] *Johnson*'s second (primary benefit) and fourth (expectation of compensation) prongs help draw the distinction between "work" and "play" that Judge Porter identified as crucial.[63] The threshold to satisfy the "benefit" factor likely hinges on "whether a university's sports team is . . . economically comparable to . . . profit-seeking businesses, or . . . essentially an extra-curricular activity."[64] Similarly, the expectation-of-compensation prong is likely met if an athlete's sport is "essential" to the "university's business," rather than "incidental" to it.[65] When these two factors are combined, it is logical to use revenue generation as a metric to assess whether they are satisfied.[66]

Division I football and men's basketball players are probably the only college athletes that generate enough revenue to satisfy all four *Johnson* prongs.[67] Both are comparable to a profit-seeking business and essential to the NCAA and universities' athletic departments.[68] If the district court finds these players are employees, the FLSA would mandate the NCAA and universities to pay athletes competing in those sports.[69] However, it is unlikely that female college athletes would qualify as employees under *Johnson*.[70] Paying only male athletes could

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[61] *See Johnson*, 108 F.4th at 192 (Porter, J., concurring in the judgment).

[62] For the first factor, "perform[ing] services for another party," *id.* at 180 (majority opinion), Judge Porter correctly pointed out that this applies to all college athletes. *See id.* at 189 (Porter, J., concurring in the judgment). Similarly, the very nature of team sports satisfies the third prong of the *Johnson* test, "under [the University's] control or right of control," *id.* at 180 (majority opinion) (citing Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 598 (1944)), for all athletes in organized sport. *Id.* at 190 (Porter, J., concurring in the judgment).

[63] *Id.* at 189–90 (Porter, J., concurring in the judgment).

[64] *Id.* at 190.

[65] *Id.* at 192.

[66] *See id.*; NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring); Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring).

[67] *See Johnson*, 108 F.4th at 192 (Porter, J., concurring in the judgment) (citing *Berger*, 843 F.3d at 294 (Hamilton, J., concurring); *Alston*, 141 S. Ct. at 2166–69 (Kavanaugh, J., concurring); Agnew v. NCAA, 683 F.3d 328, 340–41 (7th Cir. 2012)); Garthwaite et al., *supra* note 10, at 1; George Malone, *Which College Sports Make the Most Money?*, YAHOO! FINANCE (Mar. 21, 2022), https://finance.yahoo.com/news/college-sports-most-money-130012417.html [https://perma.cc/24Y3-USWE] (reporting men's football as the highest revenue-generating sport by a wide margin).

[68] *See supra* note 10.

[69] *See* 29 U.S.C. § 206(a).

[70] The scarce case law has not indicated a potential revenue threshold to tip the scale from student-athlete to employee. However, in 2019, men's basketball and football net revenue totaled approximately three and eight times as much as women's basketball revenue. *See* David Berri, *Tapping Into Potential of NCAA Women's Basketball*, GC4WOMEN (Mar. 21, 2022), https://gc4women.org/2022/03/21/tapping-into-potential-of-ncaa-womens-basketball [https://perma.cc/RH2D-5W9R]; *see also* Buzuvis, *supra* note 10, at 321.

implicate Title IX's regulations and policy interpretations,[71] as most universities are subject to Title IX.[72]

Given the novelty of pay-for-play compensation, it is unclear how Title IX could regulate such payments. College athletes already receive indirect compensation through two major channels: athletic scholarships[73] and NIL deals.[74] Title IX requires that "if a college awards athletic scholarships, it must ensure that male and female athletes receive those scholarships 'in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.'"[75]

While some commentators believe it is "crystal clear" that Title IX would require proportional pay-for-play payments,[76] they recognize that the "details can seem pretty complicated."[77] Professor Andrew Haile argues that disproportionate payments between the sexes would not produce Title IX issues under the current regulations.[78] He explains that Subpart D of the regulations, which bars schools from "limit[ing] eligibility for [financial] assistance . . . , apply[ing] different criteria, or otherwise discriminat[ing],"[79] does not capture pay-for-play payments.[80] Haile further posits that if such payments fall under Subpart E of the regulations, which governs employment,[81] the universities and the NCAA could "justify differences in pay by demonstrating that those differences are 'based on any factor other than sex,'"[82] such as revenue.[83]

However, revenue generation may not be a justifiable factor to delineate compensation. Professor Erin Buzuvis argues that the status quo, wherein the majority of high–market value college athletes are male, reflects the inequitable investment and opportunity afforded to

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[71] *See* Andrew J. Haile, *Equity Implications of Paying College Athletes: A Title IX Analysis*, 64 B.C. L. REV. 1449, 1467–68 (2023).

[72] *See* 20 U.S.C. § 1687(2)(A) (codifying Title IX's application to all university activities).

[73] *Scholarships*, NCAA, https://www.ncaa.org/sports/2014/10/6/scholarships.aspx [https://perma.cc/LY62-C8W2].

[74] Brutlag Hosick, *supra* note 4. Given NIL's novelty, it is potentially more insightful to assess how Title IX constrains the longstanding practice of athletic scholarships. *See Johnson*, 108 F.4th at 171–72.

[75] Haile, *supra* note 71, at 1468 (quoting 34 C.F.R. § 106.37(c) (2020)).

[76] Claudine McCarthy, *Consider How Title IX Could Apply to Employment of Student-Athletes*, COLL. ATHLETICS & L., Jan. 2023, at 1, 4.

[77] *Id.* at 4.

[78] *See* Haile, *supra* note 71, at 1468.

[79] *Id.* at 1470 (quoting 34 C.F.R. § 106.37(a)(1)).

[80] *Id.* at 1472. Even if the pay-for-play payments do classify as "financial assistance," Haile explains that Subpart D may require only athletic scholarships to be proportional. *Id.* at 1473.

[81] *Id.* at 1493–98.

[82] *Id.* at 1495 (quoting 29 U.S.C. § 206(d)(1)).

[83] *Id.* The Ninth Circuit used a disparate revenue rationale to reject an unequal pay claim by coaches of the University of Southern California women's basketball team. *Id.* at 1496; Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1318, 1323 (9th Cir. 1994). Courts could reject similar arguments made by future female-athlete litigants on the same logic. Haile, *supra* note 71, at 1498. However, coaches and players are not perfect analogs. Coaches are hired for the sole purpose of leading their respective teams. College athletes compete in their sport while pursuing a degree.

female athletes.[84] Thus, tainted by past sexism and arguable Title IX violations,[85] revenue generation may be an inapt nondiscriminatory factor. Intervenors in a recent NCAA settlement made a similar argument[86]: In that case, the NCAA agreed to a system in which college athletes would receive pay-for-play payments consistent with their market value.[87] Like revenue generation, market value is seemingly sex neutral. However, if disparities in both categories result from historically inequitable investment, such metrics may be tainted, and their use could violate Title IX.[88]

If the *Johnson* test produces a dividing line along revenue generation as Judge Porter predicted, Title IX's application to pay for play will become a live question and the NCAA's system could be in jeopardy.[89] Whether or not Title IX's present regulations require proportional pay-for-play compensation between the sexes, refusing to pay female athletes while paying their male counterparts is arguably against the *spirit* of Title IX[90]: "that our daughters will have the same opportunities as our sons."[91] Paying one sex and not the other directly contradicts this aspiration. But, if all college athletes received even minimum wage, the NCAA model would crumble.[92]

It should not be surprising that legislation and regulations drafted when the fair compensation of college athletes was only a burgeoning aspiration would not adequately design a system in which pay-for-play compensation is dispensed equitably and practicably. It is time for policymakers to either rethink the inclusion of certain sports in the traditional NCAA model or revamp the model in its entirety.

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84 *See* Buzuvis, *supra* note 10, at 330–32; *see also* Robert Grimmett-Norris, Comment, *Roadblocks: Examining Title IX & the Fair Compensation of Division I Intercollegiate Student-Athletes*, 34 ST. LOUIS U. PUB. L. REV. 435, 461 (2015) ("External factors do not excuse a university's 'responsibility to ensure equal athletic opportunities in accordance with Title IX.'" (quoting Daniels v. Sch. Bd., 985 F. Supp. 1458, 1462 (M.D. Fla. 1997))); Haile, *supra* note 71, at 1504–05.

85 Buzuvis, *supra* note 10, at 326–27, 330–32.

86 *See* Michael McCann, House *Settlement Faces New Onslaught of Athlete Challenges*, SPORTICO (Aug. 11, 2024, 4:13 PM), https://www.sportico.com/law/analysis/2024/house-ncaa-settlement-athlete-objections-1234793035 [https://perma.cc/5XA3-KS9H].

87 *Id.*

88 The recent viral sensation that is Caitlin Clark evinces the strength of the market for star female athletes. A recent study predicts that women's elite sports revenue will eclipse $1 billion in 2024. Morgan Smith, *Women's Sports Could Bring In over $1 Billion in 2024 — Record-Breaking Viewership, Stars like Caitlin Clark Are Driving Growth*, CNBC: MAKE IT (Mar. 20, 2024, 3:25 PM), https://www.cnbc.com/2024/03/08/womens-sports-could-bring-in-over-1-billion-in-2024-whats-driving-growth.html [https://perma.cc/P3H7-XKKZ].

89 *See supra* note 10.

90 Professor Ellen Staurowsky argues the NCAA has manipulated the athletic-scholarship system to contravene Title IX for decades. *See* Ellen J. Staurowsky, *"A Radical Proposal": Title IX Has No Role in College Sport Pay-for-Play Discussions*, 22 MARQ. SPORTS L. REV. 575, 595 (2012).

91 *Title IX: Building On 30 Years of Progress: Hearing Examining the Implementation and Progress of Title IX of the Education Amendments Act of 1972, Which Prohibits Sex Discrimination in All Aspects of Education Before the S. Comm. on Health, Educ., Lab. & Pensions*, 107th Cong. 23 (2002) (statement of Sen. Birch Bayh).

92 *See supra* note 10.