# Three Strikes, You're Out! How College Athletes Are Winning the Labor Law Battle Against the NCAA

## Introduction

Historically, the National College Athletic Association (NCAA) has fought to intentionally strip labor rights from players at academic institutions (PAIs)[1] to control the wealth and revenue generated by college sports.[2] Nothing exemplifies this than the term "student-athlete." In the 1950s, the NCAA coined the well-known term "student-athlete" to suggest PAIs were simply students engaging in "amateur" gameplay.[3] Designating PAIs as "amateurs," the NCAA distinguished PAIs from professional athletes, stripping them of federal labor protections.[4] The NCAA's misclassification of PAIs as "student-athletes" and "amateurs" allowed them to restrict their compensation and day-to-day activities without violating federal labor statutes.[5] Recently, however, there has been a drastic shift in the narrative as PAIs were granted protection under the National Labor Relations Act (NLRA or Act).[6]

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[1] This paper will adopt General Counsel Abruzzo's description of "student-athletes" as "Players at Academic Institutions" because the term "student-athletes" was "created [by the NCAA] to deprive those individuals of workplace protections." NAT. LABOR RELATIONS BOARD, OFF. OF THE GENERAL COUNSEL, GC 21-08, STATUTORY RIGHTS OF PLAYERS AT ACADEMIC INSTITUTIONS (STUDENT-ATHLETES) UNDER THE NATIONAL LABOR RELATIONS ACT at 1 n.1 (2021). (hereinafter GC 21)

[2] See infra Part I.A.

[3] The term "student-athlete" was first used to deny a college football player's widow workers compensation for the death of her husband after an injury he received during a game. Molly Harry, A Reckoning for the Term "Student-Athlete", https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete (Aug. 25, 2020).

[4] Id.; See infra Part I.B-D.

[5] See infra Part.I.A-D.

[6] See infra Part I.B-D.

On September 29, 2021, Jennifer Abruzzo, the General Counsel of the National Labor Relations Board (NLRB or Board), released Memorandum GC 21-08 (GC 21) which classified PAIs as employees protected under the NLRA.[7] GC 21 dispels the myth that PAIs are "amateur student-athletes" by defining PAIs as employees under the control of their employer, the NCAA.[8] GC 21, however, is a culmination of a long-standing Board controversy regarding PAIs' status under the Act. Abruzzo's reasoning in GC 21 largely relies on a previously released General Counsel Memorandum, GC 17-01 (GC 17).[9]

On January 31, 2017, then-NLRB General Counsel, Richard F. Griffin, Jr., released Memorandum GC 17-01 (GC 17), bringing new breadth to the NCAA and PAI controversy.[10] GC 17 was released shortly after the Board's nondecision in Northwestern v. National College Athletes Association. In Northwestern, the Board declined to decide whether Division I (D1) Football Players at Northwestern University were employees, citing jurisdictional restraints.[11] After the nondecision, GC 17 proclaimed the Northwestern football players were employees protected under the NLRA.[12] Although no official decision had been reached, GC 17 argued had Northwestern gone forward, the evidentiary record would contain enough evidence to classify players as employees under the NLRA.[13] GC 17's precedent, however, would not last long.

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[7] GC 21 at 3-4.
[8] See id. at 1 n.1.
[9] Id. at 3-4.
[10] See generally NAT. LAB. RELATIONS BOARD, OFF. OF THE GENERAL COUNSEL, GC 17-01, GENERAL COUNSEL'S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT (2017). (hereinafter GC 17).
[11] See 362 N.L.R.B. 167, slip op at 1 (2015).
[12] Id. at 16-21; See infra Part I.B.iii.
[13] GC 17 at 16-21.

On December 1, 2017, GC 17 was rescinded by then-General Counsel Peter Robb's Memorandum GC 18-02 (GC 18).[14] Robb effectively stripped PAIs' employee status under the NLRA without explanation.[15] GC 18, however, would later be rescinded in GC 21. The release of GC 21 reinstated GC 17, rekindling the controversy between PAIs and the NCAA.[16] As of now, PAIs are considered employees under the NLRA.[17] This paper will discuss the validity of GC 21 by analyzing the treatment of PAIs through the NLRA and various other federal labor statutes. Part I will discuss the history of the NCAA's policies in relation to PAIs. Further, it will outline the treatment of PAIs under the NLRA, the Sherman Antitrust Act (Sherman Act), and the Fair Labor Standards Act (FLSA). Part II argues for the Board's formal adoption of GC 21 and discusses why the NCAA's "amateur" defense should be abolished. It also suggests employees protected under the Sherman Act and FLSA should be protected under the NLRA, granting PAIs protection under the greater federal labor law framework.

## I. The NCAA, PAIs, and Protected Classes Under Labor Law Statutes

Two questions are of particular importance when thinking of employee protections under federal labor laws: who qualifies for protection under the NLRA, Sherman Act, and FLSA, and how do these statutes relate to one another, if at all? Before analyzing the laws, however, it is helpful to discuss the relationship between PAIs and the NCAA. After an overview of the NCAA's policies, there will be a discussion of how the Board and courts determine who is protected by the NLRA, Sherman Act, and FLSA and the status of PAIs under each statute.

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[14] NAT. LABOR RELATIONS BOARD, OFF. OF THE GENERAL COUNSEL, GC 18-02, MANDATORY SUBMISSIONS TO ADVICE (2017) (hereinafter GC 18).
[15] See GC 18. Robb simply stated, "New General Counsels have often identified novel legal theories that they
want explored through mandatory submissions to Advice. I have not yet identified any such initiatives, but I have decided that the following memos shall be rescinded"
[16] GC 21 at 3-4.
[17] Id.

### A. The NCAA's History, Practices, and Policies Regarding PAIs

For the last century, the NCAA has controlled the entirety of college sports, growing into a "sprawling enterprise" consisting of 1,100 colleges and universities, separated into three divisions.[18] Division I (D1) teams are comprised of 350 schools divided into 32 conferences and provide the most talented athletes and generate the most revenue.[19] Specifically, D1 football and basketball bring in the most earnings, with the NCAA's March Madness basketball tournament broadcasting contract generating in $1.1 billion annually.[20] Overall, the NCAA is a multi-billion dollar industry and have no other market competitors.[21] The NCAA's board and university coaches receive yearly salaries in the millions.[22] Despite the massive amount of revenue and high paying executive and coaching salaries, the NCAA restricts PAIs' compensation.

The NCAA was created in 1905 with the specific purpose to limit PAIs' compensation benefits.[23] Before the NCAA's inception, PAIs enjoyed independent revenue from endorsements and monetary compensation for their play.[24] Players could receive paid vacations, dinners, and even job offers in exchange for their athletic performance.[25] When the NCAA formed, however, they enacted a policy which would stop "tramp athletes" who "roamed the country making cameo athletic appearances" by restricting their ability to receive "directly or indirectly, any money, or financial concession."[26] Despite this rule, players continued to receive unrestricted

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[18] See NCAA v. Alston, 141 S. Ct. 2141 (slip op., 1, 7) (2021).
[19] Id.
[20] Id.
[21] See id.
[22] Id. (discussing the salaries of NCAA board members and college coaching positions ranging from $2 to $11 million per year).
[23] Id. at 1.
[24] Id.
[25] Id.
[26] Id. at 4 (quoting Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII, §3 (1906)).

compensation as a result of increased revenue and marketing for college sports throughout the 20th century.[27] In 1956, however, the NCAA voted to only allow compensation in the form of educational benefits such as tuition, room, board, books, and fees.[28] Any other form of compensation received by a player could lead to suspension or expulsion from their school and the NCAA.[29] Since then, the NCAA's restriction on PAI activities has only increased.

In addition to compensation, the NCAA's policies largely control players' day-to-day lives and activities through its Bylaws.[30] The Bylaws mandate PAIs to participate in Countable Athletic Related Activities (CARA) which are recorded by timesheet.[31] CARA activities require PAIs to attend practices, competitions, and meetings.[32] Additionally, non-CARA activities, such as travelling, meals, physical rehabilitation, dressing, and showering, are imposed on PAIs.[33] Overall, CARA and non-CARA activities add up to thirty to forty hours of a D1 athlete's weekly schedule.[34] Further, the Bylaws require PAIs to engage in Required Athletically Related Activities such as fundraising and community service programs.[35] Failure to participate in CARA, non-CARA, and RARA can lead to disciplinary action by the school and NCAA such as suspension or expulsion from the team or school.[36] Oftentimes, PAIs must forego certain majors

[27] Id.
[28] Id. at 5.
[29] Id.
[30] Johnson v. Nat'l Collegiate Athletic Ass'n, Civil Action 19-5230, 1 (E.D. Pa. Aug. 25, 2021).
[31] Id. at 2.
[32] Id.
[33] Id.
[34] Id. at 3.
[35] Id.
[36] Id.

or classes in order to satisfy the Bylaw requirements or else face disciplinary action.[37] Thus, not only does the NCAA's policies restrict compensation, they control players' daily lives.

The NCAA justifies their policies by stating PAIs are "amateurs," not professionals like National Basketball Association or National Football League players.[38] They claim the "amateur" relationship has been the set policy for a century, and the long-standing tradition defines the economic reality of the relationship between students and schools.[39] In order to receive the protections under the NLRA, Sherman Act, and FLSA, PAIs must overcome the "amateurism" defense to distinguish themselves as employees.

**B. Defining "Employee" Under the NLRA: A History of Student Employee Status**

On July 5, 1935, Congress passed the NLRA, guaranteeing rights for workers to unionize and engage in collective bargaining.[40] The Act's codified policy is to:

> …mitigate and eliminate [certain substantial obstructions to the free flow of commerce] …by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own

[37] Id.; I can personally attest to the rigorous schedule the NCAA imposes on PAIs. As a former D1 Diver at Boston College, I scheduled my classes around my practice and competition schedule which took over twenty hours of my week, including weekends. Additionally, I was required to return to campus halfway through breaks to participate in a two-week training program with a minimum of six hours of practice a day. I withdrew from the pre-medical program after my freshman year because my athletic commitment and rigorous coursework were too much to balance; I was at a disadvantage with my classmates who could dedicate more time to their studies and lab work.

[38] Harry, supra note 3; See Alston, 141 S. Ct. 2141, slip op at 5-7; Johnson, Civil Action 19-5230 at 6.

[39] Johnson, Civil Action 19-5230 at 6 (citing Berger v. National Collegiate Athletic Association, 843 F.3d 285 (7th Cir. 2016)).

[40] Clyde W. Summers, Labor Law as the Century Turns: A Changing of the Guard, 67 Neb. L. Rev. 9 (1988); National Labor Relations Act (1935), NAT. ARCHIVES, https://www.archives.gov/milestone-documents/national-labor-relations-act (last visited Mar. 25, 2022).

> choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[41]

Congress accomplished this policy, not through statutory law, but by granting workers the right to organize and collectively bargain.[42] The Act also authorizes the Board to "arbitrate deadlocked labor-management disputes, guarantee democratic union elections, and penalize unfair labor practices by employees."[43] The NLRB essentially serves as a referee between union and employer disputes.[44] The Board regularly releases guidance documents (e.g., GC 21) to clarify existing rules promulgated through adjudication.[45] It is important to note since guidance documents are exempt from the rulemaking process of the Administrative Procedure Act,[46] they are not binding on parties under the NLRA, but provide insight into adjudicative rules.[47] More importantly, only "employees" are able to receive these protection from the Board.

i. Statutory and Common Law Determinations of "Employee" Status

Defining "employee" under the NLRA has proven to be one of the most litigious aspects of the Act.[48] The struggle begins with the Act's statutory definition which defines "employee" as "any employee…unless the Act explicitly states otherwise."[49] The broad definition of

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[41] 29 U.S.C. § 151 (1935)
[42] Summers, supra note 40 at 9.
[43] See NAT. ARCHIVES, supra note 18.
[44] See NAT. ARCHIVES, supra note 22.
[45] See GC 17; GC 18; GC 21.
[46] See 5 U.S.C. §553-54. The rulemaking process for agencies to create binding rules typically requires notice and comment hearings or adjudications. Guidances are in neither of these processes, and are therefore, nonbinding.
[47] See e.g., GC 21 (providing guidance on whether PAIs are employees under the NLRA).
[48] Michael Pego, The Delusion of Amateurism in College Sports: Why Scholarship Student Athletes Are Destined to Be Considered Employees under the NLRA, 13 FIU L. REV. 277 (2018) ("'[few] problems in the law have given greater variety of application and conflict in results than [in] cases arising' from the question of who is an employee") (quoting N.L.R.B. v. Hearst Publ'ns, Inc., 322 U.S. 111, 121 (1944)).
[49] 29 U.S.C. §152(3).

"employee" is accompanied by an exhaustive list of excluded workers, such as independent contractors, domestic hospitality workers, agricultural laborers, and supervisors.[50] Absent a distinct definition of "employee," it is best to look at what the common law dictates.

Federal courts are granted the power to review Board decisions on employee status.[51] Since reliance on the broad definition alone proves to be a difficult task, courts have adopted the common law agency to help determine who is an employee under the NLRA.[52] In 1989, the Supreme Court in Community for Creative Non-Violence v. Reid produced thirteen factors it would use to determine whether a petitioner was an "employee," with a greater reliance on the employer's right to control the manner and means of production.[53] Through an examination of the presence of some or all of the factors described above, federal courts began using the common law agency test to determine who was an "employee" under the NLRA.[54]

Since Community for Creative Non-Violence, the federal courts have expounded the use of the common law agency test and relevant factors. In 1995, the Supreme Court signaled its intention to expand the inclusiveness of the term "any employee." In N.R.L.B. v. Town & Country Electric, Inc., the Court found that applicants for employment were considered

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[50] Id.
[51] See 29 U.S.C. §160(e)-(f).
[52] Pego, supra note 48 at 285 n.44 and 286 n.47.
[53] The thirteen factors are: (1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required, (3) the source of the instruments and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party. Id. at 285-86.
[54] See id.

"employees" under the NRLA.[55] The Court reached this decision by creating a three-part test out of the common law agency test and the Board's definition of "employee."[56] The Town & Country agency test found the plaintiff was an "employee" if they satisfied three indicia: (1) when a servant performs services for another, (2) under the other's control or right of control, (3) and in return for payment.[57] The Court found an applicant is not only covered by the agency test, but also found protecting an applicant is well within the purpose of the NLRA[58] and upholding Court precedent.[59] The Board has adopted the Town & Country test for their own "employee" analysis.[60] Thus, the broad statutory definition of "employee" and simplistic agency test has the potential to protect a large group of workers under the NLRA.

ii. Classifying Students as "Employees" in Academic Institutions

During the turn of the 21st century, the Board expanded NLRA protections to students employed by universities. In Boston Medical Center Corp. (NLRB 1999)[61] and Columbia University (NLRB 2016),[62] the Board used the broad definition of "employee" and the Town & Country agency test to designate student workers as employees. Since PAIs are also students, the Boston Medical and Columbia decisions are crucial in analyzing PAIs' employee status.

In 1999, the Board in Boston Medical designated medical student assistants as employees, overturning previous precedent in Cedars-Sinai.[63] The Board in Cedars-Sinai held

[55] Id. at 286; see also 516 U.S. 85, 88 (1995).
[56] Pego, supra note 48 at 287.
[57] Id.
[58] Id.
[59] Pego, supra note 48 at 287; see Phelps v. Dodge Corp. v. N.L.R.B., 313 U.S. 177, 185-86 (1941) (holding that the statutory term "employee" should apply to applicants because the Section 8 prohibition on "discrimination in regard to hire" would "serve no function.").
[60] See infra Part I.B.ii-iii.
[61] Boston Medical Center Corp., 330 N.L.R.B. 152 (1999) (hereinafter Boston Medical)
[62] Trs. of Columbia University, 364 N.L.R.B. No. 90 (2016) (hereinafter Columbia).
[63] See Boston Medical

medical residents were primarily students because their work was required for their degree, and therefore, they were not employees.[64] In Boston Medical, the Board adopted the dissent in Cedars-Sinai that reasoned student status should not affect employee status.[65] The Board found granting medical residents employee protections would advance the policies of the Act: to protect those who perform services for another.[66] The Board found medical residents fall within the definition of "any employee."[67] Applying the Town & Country agency test, the Board found the students perform acts under the control of an employer and are compensated by an hourly wage.[68] This analysis for medical students would later be applied to other student workers.

In 2000, the Board in New York University (NLRB) adopted the Boston Medical decision to determine NYU student research assistants are employees.[69] The NYU decision overturned a nearly thirty-year precedent. In 1974, the Board in Stanford University (NLRB) claimed student research assistants were not employees because they were not under the control of the university.[70] Further, although financial aid could be seen as compensation, the students were ultimately receiving credit for their work, and, therefore, were considered students first.[71] In NYU, however, the Board stated student status should not affect employee status.[72] Applying the Town & Country agency test and the Boston Medical decision, the Board claimed the administration controls and expects graduate assistants to perform to a certain caliber in

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[64] See id. at 160.
[65] Id.
[66] Id.
[67] Id.
[68] Id.
[69] New York University, 332 N.L.R.B. 1205 (2000) (hereinafter NYU).
[70] The Leland Stanford Junior University, 214 N.L.R.B. 621, 622 (1974) (explaining that students were able to research topics of their own choice and work during their own hours) (hereinafter Stanford).
[71] Id.
[72] NYU at 1217-18.

exchange for taxable income.[73] In 2004, the Board in Brown University (NLRB) reverted back to Stanford, reasoning the denial of students' employee status comports with the "overall purpose and aim of the Act…to remove the burden on interstate commerce caused by *industrial* unrest."[74] The Board opined the principles developed in the industrial setting "cannot be imposed blindly on the academic world."[75] The Brown decision set the precedent for students until Columbia.

The Board's 2016 decision in Columbia reverted back to NYU.[76] The Board found that all student-petitioners, consisting of undergraduate, Masters, and PhD student assistants, qualified as "employees" under the NLRA through the common law agency test stating "[t]eaching and research occur with the guidance of a faculty member or under the direction of an academic department."[77] The Board also denied Columbia's defense that payments are merely "financial aid" because students are required to work to receive the assistance and the pay is taxable income.[78] Further, the Board stated students who are working to advance their degree "could not negate an employment relationship."[79] Thus, not only did the Board reinstate NYU's holding in Columbia, they did so with the added breadth and broadness allowed by the statutory definition of "employee" and the common law agency test.

The Boston Medical and Columbia decisions help conceptualize how the Board uses the statutory definition of "employee" and the common law agency test. It also demonstrates the issues that materialize when applying them to student employees. The next sections will discuss

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[73] Id.
[74] Brown University, 342 N.L.R.B. 483,487 (2004) (emphasis added) (hereinafter Brown).
[75] Id.; NLRB v. Yeshiva University, 444 U.S. 672, 680-81 (1980) (citing Syracuse University, 204 NLRB 641, 643 (1973)).
[76] See generally Columbia, 364 N.L.R.B. No. 90.
[77] Id.at *13
[78] Id. at *13-15.
[79] Id. at *17.

the recent developments on employment status of PAIs and the Board's reliance on Boston Medical and Columbia.

iii. Northwestern University Football Player's Petition for Union Status

In 2014, scholarship players on Northwestern University's football team petitioned their regional board for union recognition.[80] The regional board used the statutory definition and agency test to determine whether the scholarship athletes were protected by the NLRA.[81] They concluded the players were employees under the Act, reasoning the athletes worked for, and were controlled by, the NCAA and Northwestern to perform athletic services and received scholarships as compensation, despite NCAA Bylaws prohibiting PAIs from receiving compensation.[82] Their decision detailed the numerous hours of meetings, practices, traveling, training camps, and press conferences scholarship football players were required to attend in order to retain their scholarship.[83] The Regional Board recognized the unit and granted an election for the Northwestern football players.[84]

Northwestern appealed the regional board's decision to the NLRB.[85] Upon review, the Board declined to determine whether the football players were "employees" because the Act failed to grant the Board jurisdiction to hear the case.[86] The Board stated "because of the nature of sports leagues…and composition and structure of [D1 Football Bowl Subdivision] (in which the overwhelming majority of competitors are public colleges), it would not promote stability in

[80] Northwestern Univ., Case No. 13-RC-121359 (2015).
[81] Id.
[82] See id. at 1363.
[83] Id. at 1358.
[84] Id. at 1367-68.
[85] See id. at 1350.
[86] Id. at 1352.

labor relations to assert jurisdiction in this case."[87] This "punt"[88] on whether to classify scholarship football players as "employees" was later answered in GC 17.

iv. The Aftermath of the Northwestern Board's Indecision and Issuance of GC 21

In 2017, the Board responded to the Northwestern indecision by releasing GC 17. The guidance used the reasoning in Columbia and Boston Medical to officially adopt the Regional Board's decision in Northwestern.[89] General Counsel Richard Griffin stated the Northwestern football players were employees under the statutory and common law term "because they perform services for their college and the NCAA, subject to their control, in return for compensation."[90] Griffin went on further to state this decision was not precluded by the Board's decision to deny jurisdiction over the initial petition, therefore establishing Northwestern scholarship football players as "employees."[91] Although Griffin narrowed his decision to designate only D1 scholarship football players at Northwestern, the logic could be applied to any scholarship PAI. The victory for PAIs, however, was short-lived.

In December 2017, General Counsel Peter Robb, appointed by Trump, would rescind GC 17 not a year after its release.[92] The recission, announced in GC 18, gave no explanation nor further elaborated on why Robb decided to go back on the previous policy.[93] Employer-side legal experts praised the reversion claiming Robb was correcting "an agency determined to

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[87] Id.
[88] Many journal and news articles playfully refer to the Board's nondecision in Northwestern as a "punt," an action taken in a football game to transfer possession over to the other team.
[89] See generally GC 17.
[90] Id. at 19.
[91] Id. at 20.
[92] Id.
[93] The rescission was given a single line non-explanation "I have not yet identified any such [novel legal theories I want to explore], but I have decided that the following memos shall be rescinded." GC 18 at 5.

advance a [sic] extreme ideological framework regardless of the practical consequences to stakeholders."[94] As one could predict, the effect of GC 18 would be brief.

GC 21 rescinded GC 18 and reinstated GC 17 with added teeth. Abruzzo not only reverted back to GC 17's regarding the Northwestern players' employee status, she went further to claim that public institutions could be subject to the Board's jurisdiction through the joint employer theory.[95] The joint employer theory claims "where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are considered joint employers for the purposes of the Act."[96] Abruzzo contends the NCAA and athletic conferences (i.e., Atlantic Coast Conference), who are private institutions created by a mixed group of public and private institutions, fall within the Act's jurisdiction as joint employers and could be held liable for violations of the Act.[97] Further, Abruzzo made it a separate NLRA violation for employers to misclassify PAIs as "student-athletes."[98] Thus, not only has GC 21 reinstated PAIs as employees under the Act, it held the door wide open to impose jurisdiction on public institutions and created a new violation.

Abruzzo justified her decision in GC 21 by citing to the current activity of PAIs engaging in unprecedented levels of collective action, the reasoning in Columbia and Boston Medical, and the Supreme Court's recent unanimous decision in NCAA v. Alston.[99] It is important to note

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[94] Eric C. Stuart, Newly-Appointed NLRB General Counsel Moves to Roll Back Agency Overreach and Activism, OGLETREE DEAKINS, https://ogletree.com/insights/newly-appointed-nlrb-general-counsel-moves-to-roll-back-agency-overreach-and-activism/ (Dec. 5, 2017).
[95] GC 21 at 9 n.34.
[96] Jonathan Fox Harris, Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future, 13 N.Y. CITY L. REV. 107, 120 (2009).
[97] GC 21 at 9 n.34.
[98] Id. at 3.
[99] GC 21 at 5-7.

Alston is a case regarding a violation of the Sherman Act, which naturally brings our attention to what is the Sherman Act, who does it protect, and how does it relate to PAIs and the NLRA.

### C. PAI Protections under the Sherman Act

In 1890, Congress passed the Sherman Act to protect consumers against any "monopolization, attempted monopolization, or conspiracy or combination to monopolize."[100] Section 1 (§1) promotes this purpose by outlawing "every contract, combination, or conspiracy in restraint of trade."[101] The Sherman Act grants a civil cause of action for §1 violations.[102] To prevail, a plaintiff must show: (1) there's an agreement between two or more business entities; and (2) such an agreement would unreasonably restrain competition in some economic market.[103] Although there is no statutory definition of "employee" in the Sherman Act, it inherently protects employees by removing restrictive policies and granting greater autonomy in the labor market.

Originally, §1 violations were used by employers to gain greater advantage in the market by restricting or dismantling its market competitors. Recently, however, employees use §1 violations to obtain more favorable terms of employment and economic freedom.[104] For example, employees are currently claiming non-compete and anti-poaching agreements place a restriction on market competition by allowing employees to work intra-franchise or at other companies within their industry.[105] If non-compete and no-poach agreements are found to

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[100] 15 U.S.C. §2.
[101] Id. at §1.
[102] The Antitrust Laws, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws.
[103] Michael Iadevaia, Poach-No-More: Antitrust Considerations of Intra-franchise No-Poach Agreements, 35 ABA J. OF LAB. & EMPLOYMENT LAW (2020).
[104] Id.
[105] Id.; Recently, President Biden, the Department of Justice, and the Federal Trade Commission have expressed their intent to pursue criminal charges on companies who engage in fixing

violate §1, employees within those industries are granted greater market autonomy. More importantly, PAIs are using §1 to dismantle the NCAA's monopsony on college sports.

In 2021, the Supreme Court decided Alston v. NCAA, sending a shockwave throughout the nation. PAI-plaintiffs claimed the NCAA's cap on compensation restricted their market autonomy.[106] In analyzing whether the restraint was unreasonable, the district court applied the "rule of reason" test which requires: (1) a plaintiff to prove the restraint has a substantial anticompetitive effect; (2) the defendant to show a procompetitive rationale for the restraint; and (3) the plaintiff to show the procompetitive goals could be acquired through different anticompetitive means.[107] The PAIs satisfied the first element, showing the NCAA enjoyed "near complete dominance of, and exercise[s] monopsony power in, the relevant market…" and had the "power to restrain student-athlete compensation in any way and at any time they wish."[108] In response, the NCAA claimed the procompetitive justification for the restraints is that their "rules preserve amateurism, which widens consumer choice by providing a unique product."[109] The NCAA failed to prove classifying PAIs as "amateurs" and capping their compensation would affect consumer demand.[110] The PAIs then asked for compensation unrelated to education, but were denied.[111] Instead, the Court only lifted the cap on *education-related* compensation and benefits.[112] Thus, although PAIs were not allowed to receive

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salaries and no-poach agreements. See Colin Kass, et. al., It's Not A Threat, It's A Promise: Timeline of The DOJ's Statement and Actions Against Wage Fixing and No Poach Agreements.

[106] Alston, 141 S. Ct. 2141, slip op at 8.

[107] Id. at 24 (quoting Ohio v. American Express Co., 585 U. S. ___, ___ (2018) (slip op., at 9)).

[108] Id. at 9.

[109] Id. at 10.

[110] Id.

[111] Id. at 11.

[112] Id.

monetary compensation akin to athletes in professional leagues, they were able to receive more education-related benefits.

The outcome in Alston was marred by the "education-related" qualifier. The Court justified their decision using the NCAA's "amateur" argument, reasoning that allowing PAIs access to "professional-level payments…could blur the distinction between college sports and professional sports."[113] In his concurrence, Justice Kavanaugh rejected the "amateur" argument, stating the idea "that colleges may decline to pay student athletes because the defining feature of college sports…is that student athletes are not paid…is circular and unpersuasive."[114] In response, Kavanaugh offered a different solution. He suggested the ill-effects of unfair compensation could be resolved by "engaging in collective bargaining."[115] Thus, Kavanaugh endorsed the idea that Sherman Act violations can be resolved through NLRA solutions.

Kavanaugh's concurrence is the most groundbreaking development in the pursuit for PAI protections under the NLRA. Not only did he explicitly suggest NLRA protections as a solution to §1 violations, but he also rejected the "amateur" argument as "circular and unpersuasive."[116] In rejecting the NCAA's historically oppressive "amateur" argument,[117] Kavanaugh effectively dismantled the NCAA's greatest tool in denying guaranteed protection under labor law statutes. The next section will discuss the impact of Kavanaugh's concurrence on PAI protections under the FLSA, and how this relates to PAI protections under the NLRA.

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[113] Id. at 12 (citing the district court's decision).
[114] Id. at 3 (Kavanaugh, J., concurring).
[115] Id. at 5.
[116] Id.
[117] See Introduction.

**D. PAI Protection and Employee Status Under the FLSA**

In 1938, Congress granted more protections to employees through the FLSA. The FLSA's preamble states its intent to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[118] Since the NLRA only granted *procedural* protections, like the right to collective bargaining, employees were oftentimes still the weaker party in the negotiation.[119] Thus, where collective bargaining fails to protect the weaker party, the FLSA became the guardian.[120] The FLSA resolved this issue by creating "floors on basic workplace conditions," such as guaranteed minimum wage, which gave union workers a starting point for negotiations.[121] The FLSA's statutory protections offered a safety net for unions, but only for "employees."

The FLSA defines "employee" as "any individual employed by an employer," subject to limited exclusions.[122] Like the NLRA, the broad definition encouraged courts to adopt common law tests to help determine employee status. Currently, circuit courts are split between two tests. The Seventh and Ninth Circuit use the economic reality test which analyzes the relationship between the plaintiff and defendant using a totality of the circumstances with an emphasis on the "right to control."[123] The Second Circuit uses a primary beneficiary test produced in Glatt ex rel. Situated v. Fox Searchlight Pictures, Inc., which analyzes the relationship using seven factors.[124]

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[118] Harris, supra note 96, at 123 (citing 29 U.S.C. § 202(a) (2006).
[119] See Summers, supra note 40 at 10.
[120] See id.
[121] Harris, supra note 96, at 123-24.
[122] 29 U.S.C. § 203.
[123] See Berger v. NCAA, 843 F.3d 285, 290-91 (7th Cir. 2016); Dawson v. NCAA, No. 17-15973 (9th Cir. 2019).
[124] There are seven factors: (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee-and vice versa; (2) The extent to which the internship provides training that would be similar to that which would be given in an educational

No one factor is dispositive, but the weight of factors combined is used to determine the plaintiff's employee status.[125] Current litigation is evaluating PAIs' status under the FLSA.

The Seventh and Ninth Circuit do not recognize PAIs as employees under the FLSA. In Berger v. NCAA, the court used the economic reality test and found the relationship between PAIs and the NCAA is too tenuous for an employee-employer relationship.[126] The Berger court refused to use Glatt's primary beneficiary test, claiming it failed to consider the longstanding tradition of "amateurism" between the PAIs and the NCAA, and does not capture the relationship essential to PAIs' existence.[127] The Ninth Circuit reached a similar decision in Dawson v. NCAA, and found the NCAA was a regulator, not an employer.[128] The Dawson court refused to use the Glatt primary beneficiary test because it was used to discuss employee status of student interns receiving course credit in exchange for work, not for PAIs.[129] Thus, the Seventh and Ninth Circuits claim PAIs are not protected under the FLSA. The Eastern District Court of Pennsylvania in Johnson v. NCAA, however, had a different outcome using both tests.

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environment, including the clinical and other hands-on training provided by educational institutions; (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit; (4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar; (5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; (6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; (7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.
Glatt ex rel. Situated v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d Cir. 2015).

[125] Id.
[126] Berger, 843 F.3d at 290.
[127] Id. at 291
[128] Dawson, No. 17-15973
[129] Id. at 291.

In 2021, the District Court in Johnson used both the economic realities test and Glatt's primary beneficiary test to find PAIs were employees under the FLSA.[130] Under the primary beneficiary test the court found more factors weighed in PAIs' favor.[131] The third factor was satisfied through the fact that sports are not tied to a students' formal education program.[132] The fourth factor was satisfied through the fact PAIs are not accommodated; their commitment of thirty-plus hours a week actually burdens PAIs, placing limits on which courses PAIs can take and what majors they can pursue.[133] PAIs satisfied the sixth factor because they receive no educational benefit (e.g., academic credit) for their participation and the amount of time interferes and inhibits their ability to keep up with classes.[134] Under the economic realities test, the court held the PAIs were under the control of NCAA's Bylaws and PAIs who received scholarships expected payment in the form of tuition.[135] Thus, the court held PAIs were employees. More importantly than the decision itself, however, is the court's reliance on Alston.

The District Court reached its decision by relying on Kavanaugh's concurrence in Alston.[136] In Johnson, the NCAA claimed PAIs were "amateurs," and not employees entitled to wages under the FLSA.[137] The District Court rejected the NCAA's "amateur" defense, citing to Kavanaugh's concurrence to claim the defense is "circular and unpersuasive."[138] The court's reliance on Alston in an FLSA case demonstrates how different labor law statutes interact with

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[130] See Johnson, Civil Action 19-5230 at 23, 29.
[131] Id. at 29 (explaining that three of seven factors weighed in favor of PAI plaintiffs, two were neutral, and one weighed in favor of the NCAA).
[132] Id. at
[133] Id. at 27.
[134] Id.
[135] Id.
[136] Id. at 11.
[137] Id. at 10-11.
[138] Id. at 11.

one another. A finding in one case can affect a finding in another case. Johnson, however, is not permanent law, as an interlocutory appeal is scheduled for a hearing in the Third Circuit.[139]

The Johnson decision marks an important step toward PAI protection under the FLSA and a departure from Berger and Dawson. On a larger scale, Johnson demonstrates another avenue for PAIs to receive protection from the restrictive policies of the NCAA. More importantly, it grants protection for PAIs using the same reasoning in Alston and GC 21.[140]

## II. PAIs Deserve Protections Under Federal Labor Statutes

There is undoubtedly a movement toward granting PAIs protections under federal labor laws. PAIs are seeking multiple avenues to relieve themselves from the restrictive NCAA policies, and Alston, Johnson, and GC 21 are all steps in the right direction. This section will begin by discussing why GC 21 was correct in classifying PAIs as employees. Then, it will offer another way to discredit the NCAA's "amateur" defense. Finally, it will argue employees protected under the Sherman Act and FLSA should guaranteed protection under the NLRA.

### A. The Reasoning in GC 21 Should be Upheld to Protect PAIs under the NLRA

The importance and weight of General Counsel Memoranda (GC) cannot be understated. The General Counsel of the Board has "extensive, unreviewable discretion in the issuance of complaints and is the gatekeeper in determining which cases advance to the Board for decision."[141] Furthermore, although guidances are not binding law,[142] the General Counsel is responsible for setting national policy in the regional districts, giving broad weight to their

[139] Peter Hayes, NCAA Granted Quick Review of College Athlete Employee Ruling, BLOOMBERG LAW, https://news.bloomberglaw.com/us-law-week/ncaa-granted-quick-review-of-college-athlete-employee-ruling (Feb. 4, 2022).
[140] See supra Part I.B.-C.
[141] Stuart, supra note 92.
[142] See supra Part I.B.

guidances.[143] Analyzing the purpose of the NLRA, the statutory definition of "employee," the common law test, and recent Board decisions, Abruzzo's guidance granting PAIs employee status comports with the purpose of the Act, and should be adopted by the Board.

The original purpose behind the NLRA was to empower workers to organize and negotiate for fair employment terms and conditions.[144] In a world where corporations held significant power over an employee's conditions of employment, the NLRA created a cure by granting employees the right to collectively bargain for fair compensation and working conditions.[145] The NCAA's total control of PAIs' work environment, restriction on day-to-day activities, and unfair compensation is the exact type of relationship congress sought to remedy.[146] While the NCAA receives billions of dollars of revenue, the players responsible for the revenue receive a fraction of the share yet are under the complete control and mercy of the NCAA's Bylaws and policies.[147] Although hundreds of thousands of dollars in college tuition may seem fair, when tuition is artificially inflated by university racketeering practices, it cannot be deemed fair compensation.[148] The heart of the Act is to empower employees who otherwise have no control over their terms of employment.[149] PAIs fit this narrative.[150] Thus, PAIs should be allowed the right to collectively bargain and negotiate their terms of employment to fulfill the purpose of the NLRA.

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[143] See Stuart, supra note 92.
[144] See supra Part I.B.
[145] Id.
[146] See supra Part I.A.
[147] Id.
[148] Stephanie Saul and Anemona Hartcollis, Lawsuit Says 16 Elite Colleges Are Part of Price-Fixing Cartel, N.Y. TIMES, https://www.nytimes.com/2022/01/10/us/financial-aid-lawsuit-colleges.html (Jan. 10, 2022).
[149] See supra Part I.B.
[150] See supra Part I.A.

PAIs fit well within the statutory definition of the Act. Defining "employee" as "any employee" grants the right to organize and collectively bargain to anyone who works for an employer. Additionally, Congress added an exhaustive list of workers excluded from the protections of the Act.[151] The list does not include PAIs despite the NCAA-PAI relationship existing before the Acts passage.[152] If Congress intended to exclude PAIs from the Act, they would have added them to the list of excluded workers. Additionally, if the current Congress wished to exclude PAIs, they could amend the Act to include them in the list like they did to supervisors and independent contractors.[153] Congress's initial decision not to exclude PAIs and its continued inaction proves PAIs are employees under the statutory definition.

PAIs are employees under the common law agency test in Town & Country. PAIs must satisfy three indicia: (1) someone performs an act for another (2) under the other's control or right of control (3) in return for payment.[154] First, PAIs perform for the NCAA by competing, practicing, training, and attending press conferences.[155] Second, PAIs are under the control of the NCAA Bylaws through mandatory CARA, non-CARA, and RARA activities.[156] Third, PAIs receive payment in the form of tuition.[157] Since PAIs satisfy all three indicia of the common law agency test, they are employees under the Act.

Furthermore, GC 21 was correct in applying the Board's reasoning from Columbia and Boston Medical. Even though PAIs are enrolled as students, their student status does not negate

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[151] See supra Part. I.B.
[152] See supra Part I.A-B.
[153] See Labor Management Relations Act, 1947 (Taft-Hartley Act) (amending NLRA by adding supervisors and independent contractors to the list of excluded employees in §2(3)).
[154] See supra Part I.B.i.
[155] See supra Part I.A.
[156] Id.
[157] Id.

their role as employees for the NCAA.[158] The Columbia Board noted student researchers were under the control and expectations of professors and university administration.[159] PAIs are controlled not only by universities, but by the NCAA, a sprawling business entity.[160] Second, PAIs do not even receive academic credit for their work nor is their work helping them advance toward a degree.[161] Therefore, PAIs vastly surpass the Columbia and Boston Medical watermark for student employee protection under the NLRA, and GC 21 should remain precedent.

**B. The NCAA's Malicious Misclassification of PAIs as "Amateurs" Needs to End**

Historically, the NCAA has used an "amateur" defense to justify their restrictive control over PAIs and deny them labor law protections.[162] The NCAA's Bylaws offer no definition of "amateur" or "amateurism;"[163] however, the NCAA claims the "revered tradition of amateurism in college sports" allows them to create an "elaborate system of eligibility rules."[164] "Amateurism," like "student-athlete,"[165] is just another malicious tactic used by the NCAA to denigrate the nature of the PAI's employee status and deny PAIs employee protections.[166] The "amateur" defense is incorrect and should never be used by courts or the Board to evaluate the employment relationship between PAIs and the NCAA.

Although I agree with Kavanaugh's concurrence on the circular reasoning of "amateurism,"[167] I propose a textual analysis to dismiss the argument. Absent an NCAA

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[158] See supra Part I.B.ii.
[159] Id.
[160] See supra Part I.A.
[161] See supra Part I.D.
[162] See supra Part I.C-D.
[163] See Alston, 141 S. Ct. 2141, slip op. at 29-30.
[164] See Berger, at 291.
[165] See GC 21 at 1 n.1.
[166] See supra Part I.A-D.
[167] See supra Part I.C.

definition of "amateur" or "amateurism," I look to the dictionary. The Oxford dictionary defines "amateur" as "a person who engages in a pursuit, especially a sport, on an unpaid rather than professional basis" or a "person who is incompetent or inept at a particular activity."[168] PAIs do not fit either of these descriptions. First, PAIs are paid through educational benefits.[169] Second, PAIs are not incompetent nor inept in their chosen sport. Personally, I dedicated my life to my sport, diving at least fifteen hours a week since age nine under the instruction of Olympians Greg Louganis and Andy Kwan. Such dedication and expertise are typical of scholarship recipients, many of whom compete in the Olympics during their enrollment in college[170] or forego graduating to compete in professional leagues.[171] Defining PAIs' level of skill as "amateur" is not only incorrect in the literal sense, but, when used by a monolithic and oppressive business entity to deny PAIs statutory rights and protections, it is intentionally malicious. PAIs are nothing short of professional athletes. Therefore, there is no valid argument that PAIs should not be afforded employee protections due to their "amateurism," and the legal world must dispel this false narrative once and for all.

### C. The NLRA, FLSA, and Sherman Act Should Be Read Together to Protect PAIs

The statutory protections offered by the Sherman Act, NLRA, and FLSA are mutually inclusive and form a lattice framework woven to protect the vulnerable employees of the United

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[168] Amateur, Oxford Languages (2022) (available at https://www.google.com/search?client=chrome-b-1-d&q=amateur).
[169] See Alston, 141 S. Ct. 2141 slip op. at 1; see also GC 21
[170] Julia Elbaba, Meet the College Athletes Competing for Team USA at the Olympics, NBC N.Y., https://www.nbcnewyork.com/news/sports/beijing-winter-olympics/ncaa-student-athletes-represented-2022-winter-olympics/3550322/ (Feb. 13, 2022).
[171] Steven Lassan, 2021 NFL Draft: College Football Players Leaving Early for NFL, ATHLON SPORTS, https://athlonsports.com/college-football/2021-nfl-draft-college-football-players-leaving-early-nfl (Dec. 28, 2020).

States. Thus, those who are protected by the Sherman Act or FLSA should be protected by the NLRA, unless explicitly excluded in the statutes themselves or through case law.

i. Protection Under the Sherman Act Requires Protection Under the NLRA

Although the Sherman Act was not created specifically with the NLRA in mind,[172] they still share similar goals. The Sherman Act states its purpose to outlaw restraint on free trade.[173] Similarly, the NLRA's preamble states its purpose to allow "for the free flow of commerce."[174] The Sherman Act achieves this purpose by removing restrictive policies from the market through §1 violations and the NLRA protects free trade by allowing employees to negotiate for protection. The mechanisms used to achieve these purposes are closely related. For example, if courts find non-compete agreements are illegal, then employees can organize and collectively bargain with potential employers under the NLRA (assuming they are not excluded by the Act). By removing the restrictive non-compete agreements, courts grant employees the ability to exercise their NLRA rights. So, although the Sherman Act does not provide a statutory definition of "employee," it inherently protects employees' ability to bargain in the free market.[175] However, this only works if employees are granted protection under the NLRA.

Kavanaugh's concurrence in Alston highlights the relationship between Sherman Act and NLRA protections in the free market.[176] The majority opinion, however, exposed a major flaw: What good is uncapped compensation if the employee cannot negotiate a higher compensation? In other words, Alston granted PAIs the right to receive more compensation with no way to guarantee it. Since PAIs were not considered employees under the NLRA, they were unable to

[172] See supra Part I.C.
[173] Id.
[174] See supra Part I.B.
[175] See supra Part I.C.
[176] See supra Part I.C.

engage in collective bargaining to guarantee higher compensation. Naturally, without any perceivable labor law consequences, the NCAA has no incentive to raise PAIs' compensation. Kavanaugh's concurrence posits if the PAIs were protected under the NLRA, they could negotiate for higher compensation, therefore guaranteeing the rights granted to them by the Alston decision.[177] It makes sense for employees protected under the Sherman Act to receive NLRA rights to collectively bargain. NLRA protections ensures employees can guarantee the rights granted to them by Sherman Act litigation.

The NLRB's actions support the mutual inclusivity of Sherman Act and NLRA protections. GC 21 granted PAIs the right to collectively bargain.[178] Abruzzo used Kavanaugh's concurrence to justify her decision to grant PAIs NLRA protections.[179] Now that PAIs have the right to organize and collectively bargain, they can take steps to secure a higher compensation from the NCAA. Additionally, if PAIs achieve higher compensation through collective bargaining, both acts' purposes are fulfilled. The Sherman Act's purpose is fulfilled by abolishing restrictive price-fixing practices, thus granting free market autonomy to PAIs. The NLRA's purpose is satisfied by protecting the right for PAIs to organize and negotiate the fair terms and conditions of employment. Therefore, Abruzzo's reliance on Alston was correct, and the Board should rely on Sherman Act decisions to grant employee statuses going forward.

ii. The FLSA was Created Specifically to Assist Employees Protected by the NLRA

The FLSA was specifically created to work with the NLRA as a floor for bargaining working conditions and wages.[180] Although the FLSA grants protection to a larger pool of

[177] See supra Part I.C.
[178] See supra Part I.B.iv.
[179] Id.
[180] See supra Part I.D.

employees, such as public employees, there is overlap between the two.[181] The similarities in the purposes of the NLRA and FLSA, their statutory definitions of "employee," and common law tests supports the idea that employees protected under the FLSA should be protected under the NLRA, unless explicitly excluded in statutory language or case law.

Both the NLRA and FLSA were created to protect employee working conditions. The FLSA protects employees by setting a "minimum standard for labor conditions necessary for health, efficiency, and general well-being of workers."[182] Similarly, the NLRA grants protections to employees by "encouraging the practice and procedure of collective bargaining… for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[183] Additionally, both preambles mention the intent to allow for "the free the free flow of commerce."[184] The difference between the two acts is the way by which employees receive protections. The FLSA grants substantive statutory rights, like minimum wage and working hours,[185] while the NLRA grants procedural rights, leaving the onus on employees to collectively bargain for protections.[186] Although the acts offer protection through different mechanisms, they still offer protection to employees. The similar purposes of the NLRA and FLSA suggests employees under one act are protected under the other, unless stated otherwise.

The NLRA and FLSA have similar statutory definitions of "employee". The FLSA defines "employee" as "any individual employed by an employer."[187] The NLRA defines

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[181] See e.g., NLRA & FLSA: What do They Cover? LAWINFO., https://www.lawinfo.com/resources/labor-law/.
[182] See supra Part I.D.
[183] See supra Part I.B.
[184] See supra Part I.B and D.
[185] See supra Part I.D.
[186] Harris, supra note 96 at 123.
[187] See supra Part I.D.

"employee" as "any employee."[188] Both definitions are broad, mostly because the purpose of both acts was to protect all employees unless explicitly excluded in the act.[189] Congress rarely acts without purpose, so the fact they placed a broad definition in both acts signals an understanding that someone who is considered an "employee" under one act is protected under the other act, unless specifically excluded. Thus, by statutory definition, employees protected under the FLSA should be protected under the NLRA.

The common law tests used in FLSA and NLRA litigation consider similar factors to determine who is an "employee." The NLRA agency test asks whether the plaintiff is someone who performs an act for another, under the control or right of control, in return for payment.[190] And, although the applications are different, both the FLSA's Glatt and economic realities tests focus on the "right to control" and compensation.[191] These factors are also present in the NLRA's Town & Country agency test used in Columbia, Boston Medical, and GC 17 and 21.[192] The nature of all three tests is consistent with one another. All three examine the working relationship between the plaintiff and defendant, considering factors such as control and compensation. Therefore, the similarities in the common law tests suggest employees protected under the FLSA should be protected under the NLRA.

Taking the similarities into consideration, if PAIs are protected under the FLSA, they should also be protected by the NLRA. In other words, if Johnson is upheld in the Third Circuit, the Board should use the case to further support PAIs' employee status. The overall reasoning

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[188] See supra Part I.B.
[189] See supra Part I.B. and I.D.
[190] See supra Part I.B.ii-iv.
[191] Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA), DEP'T OF LAB. https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship (rev. Mar. 2022).
[192] See supra Part I.B.i.

used in Johnson and GC 21 are nearly identical. Therefore, the NLRA should use Johnson to further support their decision that PAIs are employees under the NLRA and should use FLSA decisions to determine who is an employee under the NLRA.

## III. Conclusion: Moving Forward With GC 21

The American legal system is finally catching up to the reality that PAIs deserve protection under federal labor law statutes. Considering the NCAA's restrictive policies and malicious tactics used to oppress PAIs, it is only reasonable the NLRB and courts intervene and offer relief. GC 21, along with Alston and Johnson, grant specific federal protections under the NLRA, Sherman Act, and FLSA. When combined, these statutory protections will help PAIs overcome the NCAA's vice grip on compensation and working conditions. The battle, however, is not yet over. GC 21 is only as strong as the last memorandum and can be rescinded with the appointment of a new General Counsel. To ensure PAIs receive protections under the NLRA, they will need to organize quickly and petition regional boards for union certification and adoption of GC 21. Recently, PAIs at USC and UCLA filed a petition with their regional board, alleging USC and UCLA committed unfair labor practices by failing to identify USC and UCLA PAIs as employees.[193] Thus, all eyes are on USC-UCLA and the Johnson case as PAIs close in on full federal labor protections. Regardless of the outcome, there has never been a more exciting time in history to spectate PAIs on and off the field.

[193] Sarah K. Wake, et. al., Student Athletes File NLRB Charges Claiming Employee Status, MCGUIREWOODS, https://www.mcguirewoods.com/client-resources/Alerts/2022/2/student-athletes-file-nlrb-charges-claiming-employee-status (Feb. 10, 2022).