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Committee on Education & Workforce
Subcommittee on Health, Employment, Labor, and Pensions

Hearing on "Game Changer: The NLRB, Student Athletes and the Future of College Sports"

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Chairman Allen, Ranking Member DeSaulnier, and members of the Subcommittee:

Thank you for the opportunity to testify today. I am a lawyer who has practiced in the field of labor and employment law for over 30 years. For most of my career, I have been engaged on legal matters affecting the sports industry, including serving as counsel on behalf of sports leagues, individual teams, college conferences, and other sports organizations and associations. I have had extensive experience in the negotiation and administration of collective bargaining agreements in professional sports, as well as in administrative and court proceedings under the labor and employment laws, including the National Labor Relations Act, the Fair Labor Standards Act, and other federal and state laws. I wish to emphasize that my testimony and the views I express today are solely my own.

My testimony will focus on the question whether college students who play intercollegiate sports should be treated as employees under the federal labor and employment laws. Historically, student participation in college athletics has never been deemed to create an employment relationship between the students and their

respective schools under any potentially applicable law. Rather, like other extracurricular activities, athletics have always been viewed as part of the students' educational experience while at school. Decades of well-established law have consistently recognized this principle. *See*, *e.g.*, *Carroll v. Blinken*, 957 F.2d 991, 1000 (2d Cir. 1992) (Intercollegiate athletics are "a particular and of course quite common vision of the university as more than the sum of classes in its course catalog—as a sort of sanctuary where young adults grow in a myriad of ways."). This university "atmosphere" includes "extracurricular activities" as a "critical aspect of campus life." *Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring). Indeed, most universities have "embraced an educational philosophy that the education of students extends beyond that which takes place in the classroom." *Carroll*, 957 F.2d at 1000 (quoting *Veed v. Schwartzkopf*, 353 F. Supp. 149, 152 (D. Neb. 1973)).

Nevertheless, there have been efforts in recent years to change students who play intercollegiate sports into employees akin to professional athletes. As the Subcommittee knows, there has been considerable litigation claiming that college athletes should be paid as employees and entitled to form and join labor unions. Most notably, in *NCAA v. Alston*, 594 U.S. 69, 108, 111 (2021), Justice Kavanaugh suggested, in a concurring opinion, that "student athletes could potentially engage in collective bargaining" as a solution to the plethora of antitrust lawsuits that have been filed against the NCAA and the colleges in recent years. Shortly thereafter, the National Labor Relations Board, prompted by its General Counsel under the prior

Administration, sought to reverse decades of precedent by declaring that certain college athletes—particularly FBS Division I football players—should be reclassified as employees under the National Labor Relations Act. *See* NLRB General Counsel Memorandum 21-08 (Sept. 29, 2021) ("Statutory Rights of Players at Academic Institutions (Student-Athletes) under the National Labor Relations Act"). And following that directive, the NLRB conducted a union election involving the men's basketball players at Dartmouth College (*Trs. of Dartmouth Coll. & Serv. Emps. Int'l Union, Local 560*, NLRB No. 01-RC-325633 (Feb. 5, 2024)), and its General Counsel filed a complaint alleging that the football and basketball players at the University of Southern California should be reclassified as employees (*Univ. of Southern California*, *et al* and *Nat'l Coll. Players Ass'n*, Case No. 31-CA-290326 (2023)).

Although both the *Dartmouth* and *USC* cases were withdrawn following the recent change in Administration, the effort to reclassify student athletes as employees has by no means been abandoned by those who seek to professionalize college sports. Just as the NLRB General Counsel under the prior Administration sought to change established law, there is nothing stopping future such attempts. Moreover, the employment status of student athletes remains an unsettled issue and will continue to have far-reaching implications under other federal laws and regulations, including, among other unanswered questions: (1) whether student athletes should be paid minimum wages and overtime under the Fair Labor Standards Act (*e.g.*, *compare Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285 (7th Cir. 2016) (student athletes are not employees under the FLSA) and *Dawson v.*

NCAA, 932 F.3d 905 (9th Cir. 2019) (NCAA and Pac-12 Conference did not "employ" student athletes for purposes of the FLSA) with *Johnson v. Nat'l Collegiate Athletic Ass'*n, 108 F.4th 163 (3d Cir. 2024) (declining to dismiss complaint alleging that student athletes are employees under the FLSA)); (2) whether the scholarships and other financial aid received by student athletes would be subject to taxation under the Internal Revenue Code (*see* IRS Revenue Ruling 77-263 (athletic scholarships that are "primarily to aid the recipients in pursuing their studies" are excludable from income under IRC section 117)); and (3) whether the visas provided to international students would permit participation in intercollegiate sports as employees.

In my view, there is an urgent need for Congress to address this issue and reaffirm, consistent with decades of settled law, that the students who participate in intercollegiate sports are *not* employees under any federal or (under preemption principles) any state law. That is not to say that student athletes should not benefit from the revenue available in college sports. Recent amendments to the rules of the NCAA permit student athletes to receive compensation for their name, image and likeness ("NIL"), and the antitrust settlement agreement pending in California will, if approved, provide additional significant benefits to student athletes without turning them into professional employees. But these changes, and others that have been implemented or may also be under consideration, do not and should not require a wholesale change in the predominately educational relationship between the student athletes and their schools. In fact, the opposite is true—the refrain that we should "treat the students just like the pros" fundamentally misunderstands the law

and ignores the consequences that such a profound change would have at the colleges and universities throughout the country.

1. Despite claims that they are no different than professionals, student athletes have never been considered employees under longstanding and well-established law.

For example, unlike professional athletes hired for the sole purpose of playing sports in exchange for compensation, student athletes do not meet the basic common law test of employment that the Supreme Court has made clear must be applied under the National Labor Relations Act. *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995) (holding that only employees under the common law are covered by the NLRA). Unlike professionals, student athletes are not "hired" as employees to play sports; rather, they must first be admitted *as students* under their school's academic standards. Once admitted, student athletes are by no means concerned only with playing sports but must remain in good standing as students on track to obtain a degree in order to be eligible to participate in sports. Nor can student athletes be "fired" for poor performance on the field or the court or lose their athletic scholarship if they become physically unable to perform. *See Northwestern University*, 362 NLRB No. 167, 1353 (Aug. 17, 2015) ("scholarship players are unlike athletes in undisputedly professional leagues, given that the scholarship players are required, inter alia, to be enrolled full time as students and meet various academic requirements").

The same conclusion has been reached under other federal and state laws, including the Fair Labor Standards Act, Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964, the Internal Revenue Code and other related federal and state laws. *See, e.g.*, *Berger v. NCAA*, 843 F.3d 285, 293 (7th Cir. 2016) (holding scholarship college athletes "participate in their sports for reasons wholly unrelated to immediate compensation" and "student-athletic 'play' is not 'work'"); *Bingler v. Johnson*, 394, U.S. 741, 755-56 (1969) (noting tuition scholarships are not "taxable compensation," but rather "excludable scholarships" under § 117 of the Internal Revenue Code); *Kavanagh v. Trs. of Boston University*, 795 N.E.2d 1170, 1175 (Mass. 2003) (noting "scholarships are not wages," "[n]or does a scholarship student 'work for' the school in exchange for that scholarship"); *Waldrep v. Tex. Emp'rs Ins. Ass'n*, 21 S.W. 3d 692, 700 (Tex. Ct. App. 2000) (holding student-athlete was not an employee under state workers' compensation law because "there [wa]s no evidence that [the player] expected a salary," as opposed to a scholarship); *Townsend v. State of Cal.*, 237 Cal. Rptr. 146, 150 (Cal. Ct. App. 1987) (holding student-athlete was not a public employee of his state university); *State Compensation Ins. Fund v. Indus. Comm'n of Colorado*, 314 P.2d 288, 289-290 (Colo. 1957) (holding student-athlete was not an employee under his state's workers' compensation law).

2. The principal argument that has been offered to challenge this established law is that college sports programs have become "big business" and that it is unfair that student athletes do not share in the revenue in the same way as the

athletes do in professional sports. To be clear, these arguments have primarily been offered on behalf of only the student athletes whose sports generate the most revenue, particularly football and basketball. And they ignore that, unlike a commercial business whose revenue is distributed to its shareholders as profit, the revenue received by the schools related to sports like football or basketball helps provide scholarships and other financial support to *all* their student athletes, including the many Olympic and women's sports programs.

The colleges and universities themselves are in a better position to explain in more detail the impact that reclassifying student athletes as employees would have on their ability to support all their athletic programs, including those that generate little or no revenue. But it has certainly been the case that the proponents of employee status (including the former General Counsel of the NLRB) have disregarded the impact that such "revenue sharing" proposals would have on other students who are equally dedicated to their intercollegiate sports. It is also difficult to understand why, in the context of providing an education to all students in the university environment, "fairness" would require the schools to provide student athletes their "share" of the revenue generated by only their sports programs without regard to the impact on their fellow students.

In any event, the revenue generated by some college sports programs, however significant, provides no basis to disregard or change established law. Under longstanding principles, "revenue" is not and has *never* been a factor in determining whether someone should be treated as an employee. *See Dawson v. NCAA*, 250 F.

Supp. 3d 401, 407 (N.D. Cal. 2017) ("[T]he premise that revenue generation is determinative of employment status is not supported by the case law."); *see also Jochim v. Jean Madeline Educ. Ctr. of Cosmetology, Inc.*, 98 F. Supp. 3d 750, 759 (E.D. Pa. 2015) ("[Defendant's] alleged profit from its clinical program does not change our analysis under the FLSA."); *Townsend v. State of Cal.*, 191 Cal.App.3d 1530, 1532 (1987), 237 Cal. Rptr. at 146 (rejecting the argument that "since intercollegiate athletics are 'big business' and generate large revenues for the institutions who field teams in such competition, the athletes who represent those institutions should be considered to be employees or agents of those institutions under the doctrine of respondeat superior").

Nor did the Supreme Court's decision in *Alston* change the law on employment even though the case has been frequently—and incorrectly—cited as a ruling by the Court that college athletes are employees. However, *Alston* involved only an antitrust challenge to the NCAA's rules regarding the availability of "education-related benefits" to "student-athletes." 594 U.S. at 69-70. The Court's opinion nowhere held that the NCAA, the conferences, or the schools were the employer of the student-athletes. Justice Kavanaugh's concurrence suggesting that "student athletes could potentially engage in collective bargaining" to avoid antitrust scrutiny was at most dicta that no other Justice joined. *Id.* at 108, 111.

3. Because revenue is not a factor in the legal test of employment, there also would seemingly be no legal basis to distinguish student athletes who participate in sports like football and basketball from their fellow student athletes who are

equally committed to college athletics (as well as other intercollegiate activities including, for example, marching band, dance, theater programs and the like). In fact, before the *Dartmouth* and *USC* cases, that was the position of the NLRB General Counsel. *See* NLRB General Counsel Memorandum GC 12-01 (Jan. 31, 2017) (recognizing that it may well be impossible to treat "[FBS] football players . . . differently from equally committed athletes in non-revenue sports or students participating in equally time-consuming non-athletic activities").

Nevertheless, most of the efforts at reclassifying student athletes as employees have virtually ignored the impact of such a significant change on all other students who play intercollegiate sports, not just in terms of the potential loss of financial support, but also as to the legal status of the students who participate in "non-revenue" sports. *Dartmouth* involved only the men's basketball team. In the *USC* case, the NLRB General Counsel alleged only that the students who played football and basketball were employees, even though the arguments (other than revenue) on which the claim was based, including the time spent on athletics and the control over the students purportedly exercised by the school and its coaches, were equally applicable to the school's other varsity intercollegiate sports. But, if students in the "revenue-generating" sports were required to be classified as employees under the law, there would be a significant question whether the other students who are equally dedicated to their intercollegiate sports—and indeed those participating in other extracurricular activities requiring a similar commitment—would also have to be

treated as employees under the law.[1] And the implications of such a change to the schools and those students would obviously be profound.

4. Even if student athletes were reclassified as employees (which, for the reasons described above, would require a change in existing law), there would be no plausible way for collective bargaining to work in college sports.

The contrast between the recent *Dartmouth* case and the NLRB's prior decision in *Northwestern* provides an apt illustration. In *Dartmouth*, an NLRB Regional Director certified a union election involving the men's basketball team at only one college that plays in the Ivy League Conference. In doing so, the Regional Director strained to overcome established law by finding that things like the athletic gear the team provided and the students' opportunity to get an "early look" at admission amounted to "compensation" under the common law test of employment. *Dartmouth*, NLRB No. 01-RC-325633, at 19. But, apart from this (incorrect) finding of employee status, the decision to hold a union election of one team's players disregarded that, when it comes to sports, the NLRB has *never* certified a collective bargaining unit of only a single team.

That has been for good reason. In the *Northwestern* case, the NLRB recognized that "even if scholarship players were regarded as analogous to players for

[1] The NLRB General Counsel Memorandum that called for a change in the law declared that "*scholarship* football players" are employees under the NLRA because (notwithstanding the IRS rules to the contrary) their scholarships amounted to "compensation" for employment under the common law. *See* NLRB GC 21-08 at 9. However, the complaint involving USC later alleged that so-called "walk-on" non-scholarship players should also be considered employees under the NLRA.

professional sports teams who are considered employees for purposes of collective bargaining, such bargaining has never involved a bargaining unit consisting of a single team's players …." *Northwestern*, 362 NLRB No. 167, 1353 (2015). Rather, it has long been acknowledged that sports necessarily require common rules of competition and compliance among teams "to ensure the uniformity and integrity of individual games, and thus league competition as a whole." *Id.* Consequently, the NLRB declined to assert jurisdiction over the election petition among the Northwestern football players, observing that "[m]any terms applied to one team therefore would likely have ramifications for other teams . . . [and] it would be difficult to imagine any degree of stability in labor relations if we were to assert jurisdiction in this single-team case." *Id.* at 1354 (quoting *North American Soccer League*, 236 NLRB 1317, 1321-22 (1978)).[2]

This well-established precedent shows why collective bargaining in college sports, at least under current law, is simply a non-starter. Even if the student athletes in sports like football or basketball were considered employees, collective bargaining involving only a single sports team would not be viable, nor would it be plausible to establish a "league-wide" bargaining unit because many, if not most, of the educational institutions within the broader college divisions and conferences are public or religiously affiliated institutions that are outside the jurisdiction of the

[2] The NLRB also noted that "all previous Board cases concerning professional sports involve leaguewide bargaining units." *Id.* (citing prior cases involving league-wide bargaining units of athletes from various professional sports leagues).

NLRB. *See NLRB v. Natural Gas Utility Dist. of Hawkins Cty.*, 402 U.S. 600, 604-05 (1971) (The NLRA does not apply to entities "administered by individuals who are responsible to public officials or to the general electorate.") (citations omitted); *Bethany College*, 369 NLRB No. 198 (2020) (holding that the NLRB lacked jurisdiction over the faculty at religious institutions of higher education). In addition, many public universities reside in states that limit collective bargaining among public employees, further precluding any way to establish a legally recognizable collective bargaining unit.[3]

5. Beyond these jurisdictional impediments to establishing an appropriate collective bargaining unit among student athletes, there are a host of other reasons why the way collective bargaining works in the professional ranks is not easily transferable to college sports.

Here, again, the proponents of student athlete unionization have not even attempted to meaningfully address the many questions that would necessarily arise in the context of collective bargaining among student athletes even if they were considered employees. For example, who would be entitled to union representation and who would not? Only football and basketball players, as suggested by the *Dartmouth* and *USC* cases? If, for example, there is collective bargaining limited to

[3] For example, Ohio and Michigan statutes provide that student-athletes at public universities are not employees. *See* Ohio Rev. Code Sec. 3345.56; Mich. Comp. Laws Sec. 423.201 (1)(e)(iii). Wisconsin and other states limit public employee collective bargaining. *See* Wis. Stat. Sec. 111.91(3)(a). Others prohibit public employee collective bargaining entirely. *See* N.C. Gen. Stat. Ann. Sec. 95-98; Tex. Gov't Code Sec. 617.002(a); Ga. Code Ann. 20-2-989.10.

sports like football and basketball in which the stated goal has been for the players to be paid based on the revenue generated by their respective sports programs, would the many students who participate in the other intercollegiate sports have any say in how that affects them, including, among others, the Olympic and women's sports? Or would they be entitled to insist that, under the law, they have as much of an interest and must be included in collective bargaining?

There are also even more fundamental questions about how collective bargaining would impact the academic relationship between the student athletes and the schools and even with their fellow students. Could a union insist on bargaining over whether and to what extent compliance with the school's academic standards is required—something that obviously is not an issue in professional sports (and why, as explained above, student athletes should not be classified as employees in the first place)? What impact would treating student athletes as professional employees have on their scholarships and other benefits? Would scholarships still be available or become subject to taxation as "pay-for-play" income? And what would happen if, as is often the case in more commercial labor disputes, the parties exercise their rights to engage in strikes or lockouts? Would students still be required or entitled to attend classes under their scholarships? These are only a few of the important questions for which, at least thus far, the advocates for student athlete unionization have offered virtually no answers.

And apart from these issues related to collective bargaining, applying the labor laws to student athletes more generally could have the effect of eroding the academic

relationship between the schools and their students. For example, in the *USC* case, the NLRB General Counsel alleged that provisions of the "USC Student Athlete Handbook" regarding media interviews and the use of social media violated the NLRA. Among the provisions contained in the Handbook were suggestions to "be respectful about upcoming opponents" and to "praise your teammates," and guidance that "social media postings can follow you for life" and the recommendation not to post anything that "would upset your parents." According to the NLRB complaint, provisions like these impermissibly interfered with the students' rights to discuss their "terms and conditions of employment."

While the NLRA may appropriately regulate an "employee handbook" promulgated for the traditional workplace, it should have no application to the educational environment. *See NLRB v. Yeshiva University*, 444 U.S. 672, 679 (1980) (The "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'"). The NLRB (or a labor union for that matter) is ill-positioned to assess a university's judgments about how to educate its students, including in how its extracurricular activities should be conducted. Yet this is precisely the kind of impact that would inevitably result if a student's participation in extracurricular sports is equated to professional employment.

6. Finally, I want to make clear that my testimony today is not intended and should not be understood as a criticism of labor unions. I have worked closely with and respect the unions who ably represent athletes in the professional sports, who are mature individuals employed by their teams solely to play their respective

sports. But I can say with certainty from my experience in both professional and college athletics that the young students who attend college and participate in extracurricular activities, including intercollegiate sports, are not remotely equivalent to the "pros," and that treating them as such would not solve the issues facing college sports today. If anything, the misconceptions and uncertainty surrounding this issue have been an impediment to the ability of the colleges to effect change in a way that preserves the fundamentally educational relationship with their students.

I welcome the Subcommittee's questions.