Hearing Before the Committee on Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions and Subcommittee on Higher Education and Workforce Development on "Safeguarding Student-Athletes from NLRB Misclassification"

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Thank you for the invitation to discuss the misclassification of student-athletes as employees under the National Labor Relations Act (NLRA). On behalf of the member institutions of the NCAA, I want to extend our sincere gratitude for your time, expertise, and consideration of this complex issue.

My name is Jill Bodensteiner, and I serve as the Vice President and Director of Athletics at Saint Joseph's University in Philadelphia. Prior to my current position, I was a senior administrator in Notre Dame Athletics for nine years; prior to that role, I practiced labor and employment law for fifteen years. I had the honor of serving as a judicial clerk for The Honorable Catherine Perry in the U.S. District Court for the Eastern District of Missouri. I also come from a family of proud laborers – specifically, farmers (on my dad's side) and unionized employees in the meat processing industry (on my mom's side).

As a threshold issue, I want to acknowledge that the NCAA and its member institutions must continue to reimagine college athletics, including (in my opinion) the provision of additional resources to some student-athletes. President Baker's recent proposal signals the need and willingness to explore this very issue. It is clear that neither the prior nor the current way of conducting college athletics remains viable. That being said, I am convinced that the unionization of a handful of student-athletes around the country is not the answer.

One of the factors that make the issues facing college athletics extremely complex is the diversity of institutions of higher education that sponsor Division I sports. Colleges and universities differ significantly in a variety of ways, including the opportunities offered to student-athletes and the benefits from athletics realized by institutions from athletics.

Saint Joseph's University has 480 student-athletes, which equates to approximately 10% of our student body. Saint Joseph's is a proud member of the Atlantic 10 conference. We offer 20 intercollegiate sports as part of our broad-based athletics program (21 with the addition of women's golf in Fall 2024); we do not offer football. We differ from Power 5 and other Division I institutions in many ways, with the financial model being among the most significant. While Power 5's annual athletic expense budgets all exceed $100 million and some are closer to $250 million, our annual athletic expense budget – which includes student-athlete financial aid, salary and benefits, and operating expenses – is just over $20 million. The largest of those expenses is

student financial aid by a wide margin. Our revenue, while growing, does not match our expenses. In fact, the University subsidizes the department of athletics to the tune of 80% per year. The athletics financial model at Saint Joseph's University is consistent with that of other DI-AAA and FCS institutions, which make up the vast majority of Division I.

In light of my legal background and deep knowledge of the structure and day-to-day operation of college athletics, I believe that the National Labor Relations Board (NLRB) Regional Director's decision in the *Dartmouth* case was an overly broad interpretation of the definition of "employee" under the NLRA. The opinion is so broad that there is very real potential that NCAA Division II and III student-athletes would be deemed employees. In fact, in light of the scope of the *Dartmouth* decision, many high school student-athletes also would be employees – a result that would have disastrous consequences for K-12 education and scholastic and youth sports. I also firmly believe that the student-athletes at Saint Joseph's University are not employees under the NLRA. I agree with the analysis presented by Dartmouth in its Request for Review, and will not reiterate the points made in this written testimony.

Instead, I would like to address a fundamental question: is the unionization of some college students-athletes (it will never be close to all student-athletes) good for student-athletes and college athletics as a whole? To help evaluate this question, I set forth four issues to consider.

<u>Competition Is an Inherent Aspect of College Athletics</u>
As noted by the NLRB in its *Northwestern University* (2015) decision, the core of college athletics is competition. It is impossible to exist in a head-to-head competitive environment when teams are playing by entirely different rules. And it is clear that colleges and universities would be playing under different rules.

Under existing law, there are at least three impediments to ensuring that all student-athletes would be members of a union: 1) the NLRA does not have jurisdiction over public institutions of higher education[1]; 2) the NLRB's *Bethany College* (2020) decision would allow private, religiously affiliated institutions of higher education to consider asserting that they are not subject to the NLRA; and 3) even if the laws were different, just because student-athletes can unionize does not mean that they will. Since the NLRB decision in *Columbia University* (2016) allowed for bargaining units of student assistants, including both graduate and undergraduate students, only a handful of undergraduate student unions have formed, and even fewer have successfully negotiated collective bargaining agreements.

The Atlantic 10 conference, to which Saint Joseph's University belongs, has 15 member institutions; more than half of those institutions are religiously affiliated and four are public

[1] I understand that there are joint and multi-employer theories that some are asserting, but those theories have not been adjudicated to date.

institutions. That would potentially leave only a few institutions subject to the jurisdiction of the NLRA, thereby causing them to operate an entirely different model of college athletics than those schools against whom they directly compete – not only on the courts and fields, but for coaches, support staff, and student-athletes.

Additional Legal Considerations

One of the most significant concerns regarding unionization of college student-athletes is the influence of politics on NLRB decisions. If student-athletes are deemed employees under the NLRA when one political party is in power, there is a very real possibility that such a decision would be reversed upon election of a President in the other political party. This holds true not only for the fundamental decision of whether student-athletes are "employees," but also for existing and future decisions regarding religiously affiliated institutions of higher education, joint employer, and multi-employer issues. Flipping back and forth – potentially every four years – from a unionized to a non-unionized environment would be an untenable result for college athletics.

Without Congressional involvement, an additional legal consideration is the possibility that student-athletes at some institutions could be "employees" under the NLRA, not "employees" under the Fair Labor Standards Act, and may or may not be "employees" under their state's workers' compensation laws.

Finally, Title IX applies to virtually all institutions of higher education, and those obligations (appropriately) remain in place regardless of the presence of a collective bargaining agreement. It is possible that different bargaining units for men's and women's basketball (for example) could negotiate for different benefits, which an institution would be unable to provide without conflicting with its Title IX obligations.

Would Student-Athletes Actually Benefit?

If the *Dartmouth* decision becomes controlling law and additional student-athletes elect to unionize, there are very real questions about the actual benefits for those student-athletes. There is a litany of issues that could negatively impact student-athletes under an employment model, including:

- If unionized student-athletes want to continue to compete in NCAA athletics, the institution and union remain subject to NCAA rules related to eligibility; if negotiations result in terms and conditions that violate those rules, the team would need to find an alternative league or association for competition.
- Federal, state and local taxation of student-athletes' "wages" and other "benefits," if applicable, would add considerable costs for student-athletes; such taxation coupled with

likely reduction in financial aid would lead to reduced access to higher education for many student-athletes.

- Collective bargaining in minor league professional sports and the very few examples of collective bargaining agreements for undergraduate student workers have not led to substantial increase in the level of compensation or benefits.
- Student-athletes currently have rich insurance and medical expense coverage through their institutions and the NCAA's catastrophic insurance policy; the entire model of medical care would change due to workers' compensation and the likely inability of institutions to procure "accident plans" – which we currently use to cover student-athletes for varsity athletics-related injuries – for employees.
- The likely inability of international student-athletes, the majority of whom are in the United States on F-1 student Visas, to compete as "employees."

Impact on Sport Sponsorship

College athletics as it currently exists, including the number of sports and teams supported, is not structured with the understanding or expectation that student-athletes would do work to benefit the institution and receive compensation for that work. Current NCAA rules require institutions to sponsor a minimum number of sports to compete in Division I. Several institutions (including Saint Joseph's) exceed the minimum required sports, so they can maximize the benefits of intercollegiate athletics for the student-athletes who participate. Those additional sports most often do not generate revenue for institutions. If colleges and universities are required to deploy the resources necessary to support an athlete workforce, such as human resources personnel to manage hundreds (or thousands, at some institutions) of student-athlete job postings; compensable time; hiring, termination and discipline; union negotiations; workers' compensation; and more, those institutions likely will not be able to support many sports that do not generate revenue for the institution. The outcome, therefore, could be many fewer opportunities for student-athletes to participate in collegiate athletics at all.

Conclusion

In sum, I believe that the *Dartmouth* decision was overly broad in a manner that resulted in the misclassification of the men's basketball student-athletes as employees, and could have significant implications throughout college athletics and beyond, including K-12 and youth sports. Furthermore, as explained above, there are significant concerns about the ability of college athletics to continue to provide opportunities for fair competition and comply with Title IX in an environment in which a handful of unions represent a few student-athletes. The benefits such unions could potentially seek for a small group of athletes simply would not outweigh the considerable negative impact on college athletics and student-athletes.

Again, I want to offer my heartfelt appreciation to the members of the Committee and other members of Congress for your interest in the future of college athletics, and for understanding the importance of our viewpoint.