Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 32 *XXXII*
Number 3

Article 4

2022

# Olympians as Laborers: How Unionizing Can Help Athletes Bargain for Compensation and Better Structural Support

Sherif Farrag

# Olympians as Laborers: How Unionizing Can Help Athletes Bargain for Compensation and Better Structural Support

## Cover Page Footnote

J.D., Fordham University School of Law Class of 2021. I want to thank Professor Marc Edelman for his assistance in writing this Note. I also want to thank the IPLJ Editorial Staff, Elliot Fink, and Sara Mazurek in particular, for their guidance throughout the writing process. Finally, thank you to my mom, Safinaz Elgamal and my stepdad Abdel Aziz, for their love and support throughout law school. Inspiration for this Note came from my journey as an athlete with Team USA and Team Egypt, culminating in my representing Egypt at the 2012 London Olympics.

# Olympians as Laborers: How Unionizing Can Help Athletes Bargain for Compensation and Better Structural Support

Sherif Farrag*

*Team USA athletes suffer poor structural support and inadequate compensation despite constituting irreplaceable labor for the multi-billion-dollar Olympic sports industry. This poor support is evident in recent complaints made by Olympic stars of the poor mental health support provided by the United States Olympic & Paralympic Committee and in its failure to prevent nearly two decades of sexual abuse perpetrated on USA Gymnastics gymnasts. The inadequate compensation is apparent as athletes continue to receive no wages for their participation in the Olympics or Olympic-sanctioned events, generally struggle financially, and face restrictions on licensing their name, image, and likeness to partners during the Olympics. Theoretically, athletes can challenge some of these problems through antitrust or employment law claims. However, relevant case law makes those paths difficult, at best. Several circuits have found an antitrust exemption for the United States Olympic & Paralympic Committee and similarly situated National Collegiate Athletic Associate athletes have failed thus far to hold the Association liable for wages under the Fair Labor Standards Act. The best path athletes can take to improve their lot comprehensively and holistically is labor law. Unionization can empower athletes to directly negotiate with the United States Olympic & Paralympic Committee*

* J.D., Fordham University School of Law Class of 2021. I want to thank Professor Marc Edelman for his assistance in writing this Note. I also want to thank the IPLJ Editorial Staff, Elliot Fink, and Sara Mazurek in particular, for their guidance throughout the writing process. Finally, thank you to my mom, Safinaz Elgamal and my stepdad Abdel Aziz, for their love and support throughout law school. Inspiration for this Note came from my journey as an athlete with Team USA and Team Egypt, culminating in my representing Egypt at the 2012 London Olympics.

*in search of better structural support and adequate wages. The unionization process, however, will most likely result in athletes of many, but not all, sports gaining the ability to unionize. Others will fail to qualify as employees under the National Labor Relations Act or will be exempt as "independent contractors." Nonetheless, labor law is the most appropriate and efficient way to improve the lot of Team USA athletes as they pursue their dreams.*

INTRODUCTION ..... 691
I. BACKGROUND ..... 698
*A. History and Evolution of Olympic Athlete Amateurism* ..... 698
*B. Athlete Grievances: An Inadequate Structural Support System and Compensation* ..... 702
*C. Legal Background: Structure of the Olympics* ..... 705
*D. Areas of Law Theoretically Helpful to Athletes' Predicament* ..... 708
1. Antitrust Law ..... 708
2. Employment Law ..... 710
3. Labor Law ..... 711
II. CURRENT LAW OFFERS INADEQUATE RECOURSE FOR ATHLETES ..... 715
*A. Inadequacy of Antitrust Law as Applied to the USOPC and Its NGBs* ..... 715
*B. Inadequacy of the FLSA as Applied to Athletes Similarly Situated to U.S. Olympic Athletes* .. 717
III. UNIONIZATION ..... 721
*A. The Board Will Only Allow a Bargaining Unit of Olympic Athletes and Hopefuls (National Team Members) to Unionize If They Are "Employees" of the USOPC Under the NLRA* ..... 724
1. First Requirement of "Employee": Engagement in Activity Generating an Objective Expectation of Compensation. 725
2. Second Requirement of "Employee": Contract for Hire ..... 726
3. Third Requirement of "Employee": Right of

Control ..... 727
4. Fourth Requirement of "Employee": Work for Payment ..... 731
*B. Joint Employment Analysis* ..... 732
1. The Pre-2020 Test ..... 732
2. The Post-2020 Test ..... 739
*C. What Is the Appropriate Bargaining Unit?* ..... 742
*D. Independent Contractor Exemption to the NLRA* ..... 744
*E. The Board May Still Decline to Assert Jurisdiction Regardless of the Employer-Employee Analysis* ..... 750
CONCLUSION ..... 754

## INTRODUCTION

In April 2012, a group of around seventy people embarked from northern Africa in an attempt to cross the Mediterranean and reach Europe.[1] Unfortunately, the boat ran out of gasoline mid-route and drifted in open water until an Italian rescue ship came across it.[2] Although the ship threw out ropes to assist the passengers, at least one person drowned in the process.[3] The decedent's story is not rare: thousands of people from poverty-stricken, warring, or oppressive regions of Africa drown in attempts to cross the Mediterranean Sea.[4] But the death of Samia Omar, a passenger on the 2012 ship, was

---

1 Heather Saul, *Samia Omar, the Displaced but Determined Olympic Athlete Who Drowned Trying to Cross the Med*, INDEPENDENT (Aug. 6, 2016, 2:47 PM), https://www.independent.co.uk/news/people/samia-omar-the-olympic-athlete-who-drowned-while-trying-to-cross-the-mediterranean-a7175961.html [https://perma.cc/55JM-XEQF].

2 *Id*.

3 Teresa Krug, *The Story of Samia Omar, the Olympic Runner Who Drowned in the Med*, GUARDIAN (Aug. 3, 2016, 3:00 AM), https://www.theguardian.com/world/2016/aug/03/the-story-of-samia-omar-the-olympic-runner-who-drowned-in-the-med [perma.cc/48UR-QYJC].

4 Samantha Raphelson, *More than 3,100 Migrants Died Crossing Mediterranean in 2017*, NPR (Jan. 6, 2018, 1:18 PM), https://www.npr.org/sections/thetwo-way/2018/01/06/576223035/more-than-3-100-migrants-died-crossing-mediterranean-in-2017 [https://perma.cc/27VZ-H6AE].

unique because Omar was an Olympic sprinter.[5] Even more surprising was that Omar risked her life by boarding an overcrowded boat in the perilous waters of the Mediterranean—one of the deadliest routes to Europe—in hopes of securing adequate training and financial support prior to the London Olympics.[6] Being an Olympian did not save Omar from financial insecurity. After her unnecessary death, Omar's sister Hodan relayed that "[Samia] decided to go by boat, and we told her not to, and my mother tried to tell her not to . . . [b]ut Samia was very determined and asked for our mother's forgiveness, and my mother gave it, and she took the boat, and she died."[7]

Financial needs encumber both Olympians and Olympic hopefuls alike, irrespective of whether they reside in Somalia or the United States. Many American athletes have spoken out in support of changing the structural support system and revenue distribution policies of the United States Olympic and Paralympic Committee ("USOPC"), previously the United States Olympic Committee ("USOC").[8] In this Note, the phrase "structural support system" refers to governance structures, such as policies and standard operating procedures, that aim to protect an athlete's physical, emotional, and mental well-being. Regarding the USOPC system, Michael Phelps stated that the committee "hasn't done anything to help [athletes] transition after an Olympics."[9] Basketball players Ray Allen

---

5 Teresa Krug, *Grieving for Somali Olympian Samia Omar*, ALJAZEERA (Aug. 27, 2012), https://www.aljazeera.com/sport/olympics/2012/08/2012826142635318631.html [https://perma.cc/3UPC-J68A]. Samia Omar competed in the 200-meter race at the 2008 Beijing Olympics. *Id.*

6 Saul, *supra* note 1.

7 *Id*.

8 *See* David Zirin & Jules Boykoff, *Olympic Workers of the World Unite!*, NATION (Apr. 29, 2020), https://www.thenation.com/article/society/ioc-finances-study/ [https://perma.cc/GAD3-CV3N]; *see also* Lynn Zinser, *Wade, Allen Want to Be Paid to Play in Olympics*, N.Y. TIMES (Apr. 11, 2012, 5:45 PM), https://offthedribble.blogs.nytimes.com/2012/04/11/wade-allen-want-to-be-paid-to-play-in-olympics/ [https://perma.cc/Y929-3YGF]. The name change occurred in 2019 to celebrate Paralympic athletes. Mark Jones, *U.S. Olympic Committee Changes Name to U.S. Olympic & Paralympic Committee*, TEAM USA (June 20, 2019, 12:50 PM), https://www.teamusa.org/media/news/usopc/062019-US-Olympic-Committee-changes-name-to-US-Olympic-and—Paralympic-Committee [https://perma.cc/EQZ8-GTN9].

9 Cindy Boren, *'I Straight Wanted to Die': Michael Phelps Wants USOC to Help Athletes Cope with Depression*, WASH. POST (Mar. 28, 2018),

and Dwyane Wade both specifically spoke out at the London 2012 Olympics about the lack of compensation for Olympic participation.[10] Wade said, "[i]t's a lot of things you do for the Olympics . . . .We play the whole summer. I do think guys should be compensated. Just like I think college players should be compensated as well."[11] He explained that being compensated is not in opposition with playing for love or patriotism.[12] Clarifying himself on Twitter, Wade wrote, "[w]hat I was referencing is there is a lot of Olympic business that happens that athletes are not a part of . . . ."[13]

While Wade and Allen do not receive compensation for Olympic participation, they do make a living through the National Basketball Association.[14] Most Olympic athletes, however, are not so lucky. There are approximately 15,000 athletes in every Olympic event, many of whom earn very little from their athletic abilities.[15] For example, only half of the top ten nationally ranked U.S. track and field athletes make more than $15,000 annually from the sport.[16] Others in more obscure sports make no money at all.[17] Olympic athletes and hopefuls generally survive through a hodge-podge of part-time jobs, grants, prize money, and/or apparel contracts.[18] There are

---

https://www.washingtonpost.com/news/early-lead/wp/2018/03/28/i-straight-wanted-to-die-michael-phelps-wants-usoc-to-help-athletes-cope-with-depression/ [https://perma.cc/H6D2-RQQD].

10 *See* Andy Hutchins, *Dwayne Wade, Ray Allen Think They Should Be Paid to Play for Team USA*, SBNATION (Apr. 11, 2012, 5:42 PM), https://www.sbnation.com/nba/2012/4/11/2942084/dwyane-wade-ray-allen-olympics-pay-team-usa [https://perma.cc/N2Q7-8N2F].

11 Michael Wallace, *Dwayne Wade Eyes Olympic Pay*, ESPN (Apr. 11, 2012), https://www.espn.com/nba/truehoop/miamiheat/story/_/id/7801502/nba-olympians-compensated [https://perma.cc/7DRA-YGTC].

12 *Id*.

13 *Id.*

14 *See Miami HEAT Salary Archive—2012/13*, BASKETBALL INSIDERS, http://www.basketballinsiders.com/miami-heat-team-salary/miami-heat-salary-archive-201213/ [https://perma.cc/G5RR-A9S7] (Aug. 19, 2021).

15 Adam Taylor, *Here's How Much Olympic Athletes Really Get Paid*, BUS. INSIDER (Jul. 19, 2012, 10:26 AM), https://www.businessinsider.com/heres-how-much-olympic-athletes-really-get-paid-2012-7 [https://perma.cc/DT5F-4L49].

16 *Id.*

17 *Id.*

18 Charles Riley, *Olympians Face Financial Hardship*, CNN MONEY (July 10, 2012, 5:37 PM), https://money.cnn.com/2012/07/10/news/economy/olympic-athletes-financial/index.htm [https://perma.cc/M38J-C5UA].

numerous documented incidents of Olympic hopefuls applying for food stamps and unemployment assistance.[19] Further, many can be found sleeping on friends or relatives' couches because they cannot afford rent.[20] Even though their performances in a globally televised sports extravaganza create billions of dollars in revenue, many athletes are close to poverty.[21] The reason lies in the compensation system that the International Olympic Committee ("IOC") uses to pay athletes. The system can be summarized in a few words: there is not one.[22] Despite the IOC generating an average of more than a billion dollars per year, no money goes directly to the athletes as payments for their performances.[23] Instead, IOC revenues are filtered through various parties, such as international sports federations, National Olympic Committees, and National Governing Bodies ("NGBs"), with some money going indirectly to fund athletic training for the next Olympic cycle.[24]

Looking at 2016 alone, the IOC made $3.56 billion in profits, mostly from television deals.[25] The IOC spent $2.85 billion of that amount, with $2.03 billion going to National Olympic Committees and other sporting federations, for each Olympic sport.[26] These

---

[19] *See* Tim Struby, *Rower Megan Kalmoe Is an Olympic Medalist—and She Lives Just Above the Poverty Line*, ESPN (Apr. 28, 2016), https://www.espn.com/espnw/sports/story/_/id/15421001/us-rower-megan-kalmoe-money-struggles-olympians [https://perma.cc/Q96K-8BLP].

[20] *Id.*

[21] *See* Rachel Axon, *Can Olympic Organizers Be Trusted to Make the Right Call on Tokyo Games?*, USA TODAY (Mar. 23, 2020, 6:58 PM), https://www.usatoday.com/story/sports/olympics/2020/03/16/olympics-can-organizers-trusted-make-right-call-tokyo-games/5049637002/ [https://perma.cc/9F3D-JV8Y] (noting that the 2012–2016 cycle, the IOC made more than $4 billion in revenue just from broadcast rights).

[22] *How Olympic Athletes Make a Living*, SPORTS MGMT. DEGREE HUB, https://www.sportsmanagementdegreehub.com/olympic-athletes-salaries/ [https://perma.cc/QS8V-X22M].

[23] Mark Cuban, *Some Olympic Thoughts*, BLOG MAVERICK (Apr. 22, 2012), https://blogmaverick.com/2012/04/22/some-olympic-thoughts/ [https://perma.cc/J25L-3NZW].

[24] Emma Baccellieri, *Where Does the IOC's Money Go?*, DEADSPIN (Feb. 13, 2018, 11:00 PM), https://deadspin.com/where-does-the-iocs-money-go-1822983686 [https://perma.cc/3BYX-ZTL9].

[25] *Id.*

[26] *Id.*; *see also* Angela Gamalski, *An Olympic Joke: Sanctioning the Olympic Movement*, 27 MICH. ST. INT'L. L. REV. 305, 314 (2019).

organizations purport to use the money to "promote and protect the Olympic movement,"[27] but often engage in corruption.[28] For instance, members of multiple National Olympic Committees sold Olympic event tickets on the black market, even though the IOC provided the tickets for distribution to athletes' relatives and friends.[29] In another example, a group of Moldovan athletes and coaches alleged that the Moldovan Olympic Committee took commissions on Olympic Solidarity payments earmarked for Moldovan athletes.[30] These stories represent only a fraction of the corrupt dealings that reduce the benefits and funds rightfully belonging to athletes. The number of public corruption claims is not exponentially larger because athletes know their allegations would (and do) result

---

27 *National Olympic Committees*, INT'L OLYMPIC COMM., https://www.olympic.org/ioc-governance-national-olympic-committees [https://perma.cc/F5BG-ZT4G].

28 *See* Justin Mattingly, *Q&A: Why Are Corruption and the Olympics So Tied Together?*, RICHMOND TIMES-DISPATCH (Feb. 14, 2018), https://www.richmond.com/sports/q-a-why-are-corruption-and-the-olympics-so-tied/article_2cff458e-6bf1-5d2c-9a0b-f905a9d719d4.html [https://perma.cc/BZM6-SGLH].

29 The official athletes' guide encouraged the athletes to acquire their allotted tickets from their National Olympic Committees. *See* LONDON ORG. COMM. OF THE OLYMPIC GAMES & PARALYMPIC GAMES, LONDON 2012 ATHLETES' AND TEAM OFFICIALS' GUIDE (2012); *Allegations of Black Market for Olympic Tickets*, CBS NEWS (June 16, 2012, 9:07 PM), https://www.cbsnews.com/news/allegations-of-black-market-for-olympic-tickets/ [https://perma.cc/8EG3-4EQV]; *IOC Probes London Games Ticket Allegations*, ALJAZEERA (June 16, 2012), https://www.aljazeera.com/news/europe/2012/06/201261622344340456.html [https://perma.cc/D478-BXTN]; Louise Ridley, *Inquiry Launched into NOC Olympic Ticket Corruption*, CAMPAIGN (June 18, 2012), https://www.campaignlive.com/article/inquiry-launched-noc-olympic-ticket-corruption/1136838 [https://perma.cc/H4J6-Z9RK].

30 Liam Morgan, *Group of Athletes and Coaches Make Corruption Allegations Against National Olympic Committee of the Republic of Moldova*, INSIDE THE GAMES (July 28, 2019), https://www.insidethegames.biz/articles/1082759/moldova-noc-facing-corruption-claims [perma.cc/D8X7-SZ8Z]; *Moldova: National Olympic Committee Accused of Stealing Money, Intended for Athletes*, REG'L ANTI- CORRUPTION INITIATIVE (Aug. 2017), http://www.rai-see.org/moldova-national-olympic-committee-accused-of-stealing-money-intended-for-athletes/ [https://perma.cc/K3M7-78YP]; *see also* Gamalski, *supra* note 26, at 309–10; Brian Alexander, *It's Time to Disband the U.S. Olympic Committee*, OUTSIDE (Mar. 2, 2018), https://www.outsideonline.com/culture/opinion/usoc-has-long-way-go/ [https://perma.cc/9K8K-HZZ6] (criticizing athlete support structures and lack of compensation).

in official or unofficial suspension—or, more discreetly, deselection from tournaments and a "coincidental" scarcity of training funds.[31]

Due to the monopolistic nature of the Olympic movement and IOC policies that give organizations such as international sports federations, National Olympic Committees, and NGBs great power, athletes are left without much ability to determine their structural support system or to receive adequate compensation. One recent example of inadequate structural support is the USOPC and USA Gymnastics' ("USAG") cataclysmic failure to prevent nearly two decades of sexual abuse by a sanctioned team physician.[32] The athletes' inability to craft an adequate support system or receive direct compensation for their labor is in stark contrast with their integral place in Olympic revenue generation.[33] With specific regard to the American Olympic movement, there are two major problems that U.S. Olympians and hopefuls face (collectively "National Team Members").[34] The first is an inadequate structural support system on

---

[31] *See* Alexandra Starr, *Olympic Athletes Fear Retaliation If They Speak Out*, NPR (July 25, 2018, 4:22 PM), https://www.npr.org/2018/07/25/631581295/olympic-athletes-fear-retaliation-if-they-speak-out [https://perma.cc/HT63-J49Z]. Three-time shooting Olympian Keith Sanderson discussed athlete grievances in an interview, saying, "[The USOPC] have a total monopoly on who the Olympians are," and that was the reason athletes feared speaking publicly. *Id.* After this interview, he says he was suspended and locked out of the U.S. Olympic training center as retaliation. *Id.* Triathlete Steve Sexton said he experienced retaliation as well. *Id.* He was removed in 2016 from his role as an elected athlete representative at USA Triathlon after he lobbied Congress for Olympic reform. Other athletes choose to remain silent. *Id.*

[32] *See* Marc Edelman & Jennifer M. Pacella, *Vaulted into Victims: Preventing Further Sexual Abuse in U.S. Olympic Sports Through Unionized and Improved Governance*, 61 ARIZ. L. REV. 463, 463 (2019).

[33] *See* Starr, *supra* note 31.

[34] In this Note, National Team Members means national team members of all the NGBs. The author uses this particular grouping to signify "Olympians and Olympic hopefuls" because generally speaking, Olympic selection is narrower than National Team selection. As a result, National Team Members are made up of Olympians and Olympic hopefuls. National Teams compete in various competitions, including World Championships of their sport, but selection for the Olympics, the most prestigious tournament for most Olympic sports, is made by selecting certain members of the National Team. Because National Team Members, even before they become Olympians, make great sacrifices to qualify for the Olympics, later in this Note, "National Team Members" will constitute the appropriate bargaining unit for unionization purposes. *See, e.g.*, Nicole Jomantas, *Meet Team USA's Olympic Fencing Qualifiers*, USA FENCING (Apr. 14, 2021, 1:30 PM), https://www.usafencing.org/news_article/show/1158021 [https://perma.cc/Y76T-9KMN]; *Men's Foil*, USA FENCING, https://www.usafencing.org/selection-criteria

the NGB and USOPC level, which leads to abuses such as those perpetrated by former USAG physician Larry Nassar.[35] The second is financial: the USOPC fails to directly compensate National Team Members which leads to impoverishment for some and financial struggle for most. Both problems are rooted in athlete powerlessness and a completely lopsided power dynamic between athletes and the managers and owners of the Olympic movement.

This Note argues that athletes must find a way to bargain for a more athlete-centered structural support system and for fairer, more direct forms of compensation. To accomplish these goals, some legal paths are much better than others. Antitrust law is probably the least promising path.[36] Multiple circuit courts have clearly stated that the USOPC enjoys an implicit exemption from antitrust laws.[37] One plausible but still unfavorable path is employment law.[38] National Team Members would have to argue in court that they are, as athletes funded by the USOPC, employees of the Olympic committee and thus subject to minimum wage and employment law protections. Unfortunately, this path is problematic, especially considering the recent failure of the National Collegiate Athletic Association ("NCAA") athlete employment lawsuits.[39] The third and most promising path is athlete unionization.[40] Although NGB National Team Members have never attempted unionization, case law indicates that National Team Members of at least some NGBs can successfully unionize.[41] Unionization facilitates collective bargaining, giving athletes the power to bargain for an adequate structural support system and more direct methods of compensation. In Part I, this

---

[https://perma.cc/3M5X-NYLF] (demonstrating how the USA Fencing Olympic team selection excludes some athletes who qualify for the National Team competing at Senior World Championships).

35 *See Who Is Larry Nassar? A Timeline of His Decades-Long Career, Sexual Assault Convictions and Prison Sentences*, USA TODAY, https://www.usatoday.com/pages/interactives/larry-nassar-timeline/ [https://perma.cc/W9CL-AH6E].

36 *See infra* Part I.D.1.

37 *See* Gold Medal LLC v. USA Track & Field, 899 F.3d 712, 715–17 (9th Cir. 2018); *see also* Behagen v. Amateur Basketball Ass'n of U.S., 884 F.2d 524, 525 (10th Cir. 1989); JES Props., Inc. v. USA Equestrian, Inc., 458 F.3d 1224, 1228 (11th Cir. 2006).

38 *See infra* Part I.D.2.

39 *See infra* Part II.B.

40 *See infra* Part II.

41 *See infra* Part III.

Note describes the background, history, and evolution of Olympic amateurism and how it has contributed to athletes' current financial problems and disempowerment. Part II discusses how the law, including antitrust and employment law, fails to assist athletes in gaining financial stability and other forms of empowerment. Part III argues that labor law would allow athletes to bargain for a stronger structural support system and greater financial compensation. It then explains the intricacies of why, under labor law, athletes for some sports can successfully unionize.

## I. BACKGROUND

### *A. History and Evolution of Olympic Athlete Amateurism*

The USOPC's failure to pay athletes for their participation in Olympic games, in tandem with the Olympic movement's singular focus on athletic performance to the detriment of athletes' well-being, are major reasons for their discontent.[42] Such practices are linked to the concept of amateurism——the practice of sport for "sport's sake," instead of compensation.[43] Some have argued this idea dates back to the ancient Hellenistic Olympics.[44] However, Professor David C. Young of the University of Florida and others have largely debunked this belief.[45] Young writes of "no mention of amateurism in Greek sources, no reference to amateur athletes, and no evidence that the concept of 'amateurism' was even known in antiquity."[46] In effect, there were no known bars to compensation in the ancient Greek games.[47] Instead, modern amateurism began in the

---

[42] *See* Sally Jenkins, *Michael Phelps Says Olympians Face Greater Mental Health Risks. Does the USOPC Care?*, WASH. POST (Feb. 11, 2020), https://www.washingtonpost.com/sports/olympics/michael-phelps-says-olympians-face-greater-mental-health-risks-does-the-usopc-care/2020/02/11/72afec9c-4ce9-11ea-b721-9f4cdc90bc1c_story.html [https://perma.cc/8L3A-9NBY].

[43] Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 560 (2009).

[44] *See* Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L & POL'Y REV. 181, 184 (2017).

[45] *Id.*

[46] *Id.*

[47] Fitt, *supra* note 43, at 560.

high-class English society of the early 1800s.[48] Likely as a means to exclude the masses from participation, young aristocratic men espoused the notion that glory, not compensation, was the only true athletic motivation.[49] As such, aristocratic amateurs became true sportsmen while the working class were lowly "professionals,"[50] as they could not afford to devote many hours to an "amateur" sport.[51] The aristocracy viewed professionals as being of "questionable character."[52] Sports historian Allen Guttmann of Amherst College concurs with this general premise.[53] He asserts that the Victorian middle and upper classes invented amateurism to "exclude the 'lower orders' from the play of the leisure class."[54] Noted sports law author Kenneth Shropshire expounded on this point: when "an amateur lost a contest to a working man he lost more than the race . . . he lost his identity . . . his life's premise disappeared; namely that he was innately superior to the working man in all ways."[55]

This nineteenth century amateurism ideal became foundational for the Olympic movement, despite the reality that engaging in contests for money was the dominant societal practice in western Europe.[56] Not only did the Olympic movement fail to pay athletes, but it prevented professionals from competing altogether.[57] The 1892 inaugural Olympic congress redefined amateurism to restrict those who profited from competing in a sport.[58] This rule, of course, resulted in the exclusion of the working class who, unlike the upper

---

48 Crabb, *supra* note 44, at 184.

49 *Id.*

50 Professor Kenneth Shropshire of Arizona State University explained that in Victorian England, "professional" became indicative of one's lower social class. *See id.* at 184–85.

51 *Id.* at 184.

52 *Id.*

53 *See* L.A. Jennings, *For Love or for Money: A History of Amateurism in the Olympic Games*, VICE (June 7, 2016, 2:25 PM), https://www.vice.com/en_us/article/gvaqdm/for-love-or-for-money-a-history-of-amateurism-in-the-olympic-games [https://perma.cc/9BEQ-VWJV].

54 *Id.*

55 Crabb, *supra* note 44.

56 *See id.*

57 Jennings, *supra* note 53.

58 *Id.*

classes, could not afford to devote hours training and competing for free.[59]

In 1981, the IOC dropped the word "amateur" from the Olympic Charter, allowing international sports federations to determine their own eligibility rules for each sport.[60] This did not mean that the IOC or National Olympic Committees paid athletes; rather, athletes who previously received payment for athletic performance (i.e., professionals) became eligible for the Olympics in some sports, depending on each international sports federation's decision. Basketball inaugurated its first "professional" team in 1992.[61] The "Dream Team" included Michael Jordan, Charles Barkley, and Larry Bird and rendered the Olympics an even greater international spectacle (naturally generating more revenue).[62] When the International Boxing Association allowed professional boxers to compete in 2016, the Olympic movement became fully open to professional athletes' participation.[63] Even though the IOC never compensated athletes for such participation, the eligibility of professional athletes diluted the original amateurism ethos. The Olympics is no longer about amateur athletes in a traditional sense. It has transformed into athletes being "amateur" for the sake of patriotism.[64] Instead of playing for money, Olympic athletes "patriotically" play for their countries.

---

59 *See id.*

60 *See* Crabb, *supra* note 44, at 187.

61 *See id.* This team was not compensated for their labor in the way that workers, or professional athletes, normally are. *See* Thomas Heath, *Win or Lose, Dream Team Strikes Gold*, WASH. POST (May 15, 1996), https://www.washingtonpost.com/archive/politics/1996/05/15/win-or-lose-dream-team-strikes-gold/92a886b5-892d-4854-90c5-ac37a3aaf9d6/ [https://perma.cc/ZA3J-WS39]. "Professionals" delineates a team of players who were previously paid to play basketball, such as by the NBA. *See* Bob Greene, *What Changed the Olympics Forever*, CNN (July 23, 2012), https://www.cnn.com/2012/07/22/opinion/greene-olympics-amateurs/index.html [https://perma.cc/5L77-95B6].

62 Crabb, *supra* note 44, at 187; Bill Bender, *Inside the 'Dream Team': A Complete Roster & History of USA's 1992 Olympic Men's Basketball Team*, SPORTING NEWS (May 6, 2020), https://www.sportingnews.com/us/nba/news/dream-team-roster-history-usa-1992-olympics/4o78v2slilky1inrskk8h6wkb [https://perma.cc/M4LJ-PUDE].

63 *See* Crabb, *supra* note 44, at 187.

64 For a discussion of patriotism and the Olympics, *see* Kathleen E. Powers, *Do the Olympics Promote Nationalism—and International Conflict? Here's the Research.*, WASH. POST (July 26, 2021, 7:45 AM), https://www.washingtonpost.com/politics/2021/07/26/do-olympics-promote-nationalism-international-conflict-heres-research/ [https://perma.cc/2RV3-HRVC].

In 2019, yet another change occurred that impacted athletes. The IOC allowed athletes to use their name, image, and likeness ("NIL") in limited fashion during the Olympics to advertise for independent entities.[65] The IOC altered Rule 40, a thirty-year old rule that protects official Olympic sponsors by restricting athletes' abilities to use their NIL rights to advertise for any other entity.[66] The amended rule states: "[c]ompetitors . . . may allow their person, name, picture or sports performances to be used for advertising purposes during the Olympic Games in accordance with the principles determined by the IOC Executive Board."[67] The amendment delegated specific processes to the National Olympic Committees.[68] The USOPC, for example, gave its own guidance outlining a process of registration and compliance for each athlete and their personal sponsors.[69] As a result, U.S. athletes can now provide and receive congratulatory messages from personal sponsors during the Games.[70] Athletes' commercial partners can also engage in generic advertising during the Olympics.[71] Olympic and national team logos remain off-limits to sponsors and are subject to penalties if they violate the terms of the revised Rule 40 arrangement.[72]

---

65 Jia Jung, *A Relaxed Rule 40 Will Allow Athletes Greater Endorsement Opportunities at Tokyo Games*, SWIMMING WORLD (May 24, 2021, 5:11 AM), https://www.swimmingworldmagazine.com/news/a-relaxed-rule-40-will-allow-athletes-greater-endorsement-opportunities-at-tokyo-games/ [https://perma.cc/64TZ-C9WH].

66 *Id.*

67 Michael Pavitt, *Rule 40 Guidelines to Be Sent to NOCs as IOC Claim Balance Reached Between Athletes and Commercial Rights*, INSIDE THE GAMES (June 27, 2019), https://www.insidethegames.biz/articles/1081272/rule-40-guidelines-to-be-sent-to-nocs-as-ioc-claim-balance-reached-between-athletes-and-commercial-rights [https://perma.cc/79U3-FCYJ].

68 *Id.*

69 U.S. OLYMPIC & PARALYMPIC COMM., RULE 40 GUIDANCE FOR THE UNITED STATES 2 (2019), https://www.teamusa.org/Team-USA-Athlete-Services/Athlete-Marketing/-/media/18EB7B007444471AA81FF5B4296A0430.ashx [https://perma.cc/5ZP3-3H3X].

70 Ed Dixon, *US Olympians Able to Promote Personal Sponsors as Rule 40 Is Relaxed*, SPORTSPRO (Oct. 9, 2019), https://www.sportspromedia.com/news/team-usa-usopc-olympics-rule-40-athletes-sponsorship-tokyo-2020-ioc [https://perma.cc/DFT2-F57M].

71 *Id*.

72 *See* James Johnston, *Wait, There's a Catch: Rule 40 Personal Sponsor Commitment Issued Ahead of 2020 Tokyo Olympics*, GALA L. (Feb. 12, 2020), http://blog.galalaw.com/post/102fyop/wait-theres-a-catch-rule-40-personal-sponsor-commitment-issued-ahead-of-2020-t [https://perma.cc/B2GF-DEKH].

### *B. Athlete Grievances: An Inadequate Structural Support System and Compensation*

Athletes' new ability to license their NIL was merely a minor change and did not resolve the two main problems athletes face. Athletes still have trouble collecting compensation to prepare for and compete in the Olympic Games.[73] Further, the structural support system does not prioritize athletes' health and well-being.[74]

Due to the lack of an Olympic compensation structure, some athletes necessarily resort to food stamps, part-time jobs, and loans from relatives for support.[75] Even in the era of billion-dollar television contracts, rower Caroline Lind, winner of two gold medals in 2008 and 2012, struggled on $12,000 per year earned from babysitting work.[76] The Track and Field Athletes Association found that half the athletes highly ranked in their sport only earned about $15,000 annually from all income sources.[77] Witnessing and experiencing this lopsidedness, Olympian August L. Wolf lobbied Congress to no avail for legislation requiring or incentivizing the distribution of half of USOPC's revenue directly to Team USA athletes and coaches for income, training, and medical care.[78]

One retort to allegations of exploitation is that athletes do receive funding through the USOPC and indirectly through NGBs.[79] This funding is not described by the USOPC and NGBs as a "wage"

---

[73] *See How Olympic Athletes Make a Living*, *supra* note 22.

[74] *See* Matthew Futterman, *Michael Phelps: 'I Can't See Any More Suicides,'* N.Y. TIMES (July 30, 2021), https://www.nytimes.com/2020/07/29/sports/olympics/michael-phelps-documentary-weight-of-gold.html [https://perma.cc/59XR-UNVM].

[75] August L. Wolf, Opinion, *U.S. Olympic Committee Has Run off the Rails. Time to Refocus on Putting Athletes First*, USA TODAY (Apr. 2, 2018, 11:20 AM), https://www.usatoday.com/story/opinion/2018/04/02/olympic-committee-gymnastics-sex-scandal-pay-athletes-column/476965002/ [https://perma.cc/7HVP-HDZB].

[76] *Id.*

[77] Kurt Badenhausen, *The Highest-Paid Athletes at the Rio Summer Olympics*, FORBES (Aug. 3, 2016, 9:00 AM), https://www.forbes.com/sites/kurtbadenhausen/2016/08/03/the-highest-paid-summer-olympic-athletes-at-rio/#6eaaf0dd1584 [https://perma.cc/JV79-EUHZ].

[78] Wolf, *supra* note 75.

[79] *See* Will Hobson, *USOPC Asked for $200 Million in the Coronavirus Stimulus Bill to 'Sustain American Athletes,'* WASH. POST (Mar. 26, 2020), https://www.washingtonpost.com/sports/2020/03/26/usopc-asked-200-million-federal-stimulus-money/ [https://perma.cc/86AS-82GW].

or a "salary," but is instead characterized as a "stipend" or "award" to encourage training in preparation for the next Olympic Games.[80] Such stipends and awards do not adequately reflect the value of these athletes to IOC revenue generation.[81] While professional league athletes receive nearly fifty percent of revenues, Olympic athletes globally receive less than ten percent of IOC revenues.[82] In fact, a study by the U.S. Athlete Trust found that the USOPC distributed less than six percent of its revenues to athletes in 2012.[83] In 2016, the USOPC increased that number to a paltry seven to eight percent.[84]

In addition to exploitation, athletes struggle due to the lack of adequate structural mechanisms to support their health and well-being. Speaking about the mental illness that he and other athletes experienced over their careers, swimming legend Michael Phelps said, "looking back on my career, I don't think anybody really cared to help us . . . [a]s long as we were performing, I don't think anything else really mattered."[85] As of July 2020, the USOPC has merely three mental health officers on its staff—theoretically serving 1,000 athletes of the Winter and Summer Olympics and countless others who prepare to qualify and do not compete.[86]

Structural problems also exist on the NGB level. USAG, for example, was shown to lack reporting channels for gymnasts to raise claims of abuse or other misconduct during Larry Nassar's tenure.[87] Nassar was a USAG and Michigan State University doctor who

---

80 *See U.S. Olympic Committee Spent $27M on Athlete Stipends, $66M on Grants*, ESPN (Aug. 31, 2018), https://www.espn.com/olympics/story/_/id/24538572/us-olympic-committee-spent-27m-athlete-stipends-66m-grants [https://perma.cc/T93F-3VWW]; *see also* USA WEIGHTLIFTING, THE USA WEIGHTLIFTING STIPEND SYSTEM: A METHOD TO SUPPORT OUR ELITE &TRAINING EXPENSES 2018–2020 (Dec. 2017), https://www.teamusa.org/-/media/USA_Weightlifting/Documents/2017-2020-Selection-Procedures/11_17_17/2018-Stipend_Update.pdf?la=en&hash=69DA4DAC4CACD4038E7E2B57004B69CD4DCE34D1 [https://perma.cc/W5U2-V8UJ].

81 Wolf, *supra* note 75.

82 *Id.*

83 *Id.*

84 *Id.*

85 Futterman, *supra* note 74.

86 *Id.*

87 *See* Edelman & Pacella, *supra* note 32, at 479.

sexually abused more than 150 women.[88] Both internal and external reporting channels in USAG were absent during the years Nassar committed the abuse.[89] Allegations of abuse finally surfaced in 2015, when American gymnast Maggie Nichols discussed her concerns about Nasser's treatments.[90] Nichols' coach overheard her and reported the alleged conduct to USAG officials.[91] The USAG did not notify law enforcement but instead hired a private investigator—which resulted in the USAG concluding that there was no "reasonable suspicion" of any crime.[92] "In late 2016, the USAG hired Indianapolis-based law firm, Krieg DeVault LLP, to conduct an independent review of [its] policies, procedures, and practices regarding sexual misconduct . . . ."[93] The law firm partnered with Praesidium, an organization focusing on sexual abuse prevention in youth and vulnerable adult organizations, to conduct the report.[94] The resulting report revealed that the USAG did not require its members to report suspected child abuse and lacked any system to ensure that its various constituents and member clubs adhere to the organization's membership requirements.[95] More stringent rules governing abuse report processing may have resulted in an independent inquiry, a police investigation, and a suspension of Nassar's medical service during the investigation process.[96] The report recommended a "complete" cultural shift within the organization to prioritize the safety and well-being of its athletes, as opposed to solely focusing on athletes' success on the mat.[97]

---

88 Hadley Freeman, *How Was Larry Nassar Able to Abuse so Many Gymnasts for So Long?*, GUARDIAN (Jan. 26, 2018, 8:47 AM), https://www.theguardian.com/sport/2018/jan/26/larry-nassar-abuse-gymnasts-scandal-culture [https://perma.cc/34YS-JS9N].

89 *See* Edelman & Pacella, *supra* note 32, at 479.

90 *Id.* at 480–81.

91 *Id.*

92 *Id.* at 481.

93 *Id.*

94 *Id.*

95 *Id.* at 482.

96 *Id.*

97 *Id.*

### C. Legal Background: Structure of the Olympics

In 1978, Congress passed the Amateur Sports Act, now known as the Ted Stevens Olympic and Amateur Sports Act.[98] This Act appointed the USOPC as the coordinating body for all Olympic-related athletic activity in the United States, including athletic activity related to international competition, such as the sports of the Olympic, Paralympic, Pan American, and Parapan American Games.[99] The Act included provisions delineating how the NGBs, under the aegis of the USOPC, can acquire certification and maintain that certification.[100]

Globally, the IOC is empowered to grant revenues to international sports federations and National Olympic Committees, among others, to facilitate the development of the Olympic Movement.[101] Other organizations include the World Anti-Doping Association and the International Court for Arbitration of Sport, which were founded by the IOC and are now semi-autonomous entities within the IOC bureaucracy.[102] The National Olympic Committees receive some part of this revenue and distribute some of it either to their national team athletes directly or, more often, to the NGBs for the Olympic sports.[103] The NGBs distribute a portion of revenue to their athletes.[104] Through this system, no athlete is paid directly for their

---

98 *See* S. REP. NO. 105–325, at 1 (1998).

99 *See History*, TEAM USA, https://www.teamusa.org/about-the-usopc/history [https://perma.cc/9TFM-LBEQ].

100 *Id.*

101 *See* Jens Weinreich, *How Federations Share the Revenues from the Olympic Games*, PLAY THE GAME (Mar. 4, 2020), https://www.playthegame.org/news/news-articles/2020/0644_how-federations-share-the-revenues-from-the-olympic-games/ [https://perma.cc/3KQ8-GA3R].

102 *See History of the CAS*, CT. OF ARB. FOR SPORT, https://www.tas-cas.org/en/general-information/history-of-the-cas.html [https://perma.cc/MY5N-LRBG]; *see also Funding*, WORLD ANTI-DOPING AGENCY, https://www.wada-ama.org/en/funding [https://perma.cc/3YL4-CGXZ].

103 *See Facts and Figures*, CONG. OLYMPIC & PARALYMPIC CAUCUS, https://olympicparalympiccaucus-langevin.house.gov/facts-and-figures [https://perma.cc/BB6K-LZ5T].

104 *See* Robert Dineen, *Olympic Movement Criticized for 'Hiding' Finances as Athletes Struggle*, TELEGRAPH (Apr. 23, 2020, 11:30 AM), https://www.telegraph.co.uk/olympics/2020/04/23/olympic-movement-criticised-hiding-finances-athletes-struggle/ [https://perma.cc/4PNC-B3A7]; *Majority of U.S. Olympic Sports Applied for Government Coronavirus Relief Money*, TAMPA BAY TIMES (May 8, 2020),

labor as a performer in the Olympics, or any other Olympic-sanctioned event; however, some national team athletes receive training stipends, awards, or other general performance-based support.[105] This largely-decentralized power structure allows the IOC to operate on a global scale while retaining ultimate control over the direction of the Olympic Movement.[106] The IOC exerts control over international sports federations and National Olympic Committees, who in turn exert control over NGBs.[107] The IOC "asserts that control inasmuch as it benefits the IOC, its image, and bank accounts."[108]

Sexually abused athletes' lawsuit against USAG and the USOPC demonstrates how this decentralized structure helps the USOPC avoid liability and refuse athlete-led calls for a better structural support system.[109] Originally, sexual abuse survivors rejected a $215 million settlement offer made by the USAG on January 30, 2020, in part because it included a release for the USOPC.[110] The release would have precluded all current and future claims against the Committee and would have absolved current and former officials within the organization from offering testimony in the form of court depositions.[111] This release offer was problematic considering that,

---

https://www.tampabay.com/news/health/2020/05/08/majority-of-us-olympic-sports-applied-for-government-coronavirus-relief-money/ [https://perma.cc/Z2SU-M8SC].

105 *See* Dineen, *supra* note 104.

106 "The Olympic Movement" is how the International Olympic Committee describes "the concerted, organi[z]ed, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism." *Olympic Movement*, INT'L OLYMPIC COMM., https://www.olympic.org/the-ioc/leading-the-olympic-movement [https://perma.cc/S88G-QY2Q].

107 *See National Olympic Committees*, *supra* note 27; *About the U.S. Olympic & Paralympic Committee*, TEAM USA, https://www.teamusa.org/about-the-usopc/structure [https://perma.cc/3CQH-DC6J].

108 Gamalski, *supra* note 26, at 311.

109 Nancy Armour & Tom Schad, *USOPC Suing Insurance Carriers, Blaming Them for Lack of Settlement with Nassar Survivors*, USA TODAY (Oct. 9, 2020, 5:38 PM), https://www.usatoday.com/story/sports/olympics/2020/10/09/usopc-sues-insurance-carriers-larry-nassar-settlement/5940262002/ [https://perma.cc/FG9B-MEXL].

110 *Id.*

111 John Barr & Dan Murphy, *Court Documents: Simone Biles a Plaintiff in Abuse Lawsuit*, ABC NEWS (June 15, 2020, 11:19 AM), https://abcnews.go.com/Sports/court-documents-simone-biles-plaintiff-abuse-lawsuit/story?id=71257489 [https://perma.cc/FA5P-3RFY].

according to the victims' attorneys, Nassar continued his serial sexual assaults—victimizing more than 100 girls and young women—*after* Olympic officials were warned of Nassar's behavior.[112] The USOPC was suing its insurance carriers in a separate lawsuit, alleging that they failed to fulfill their contractual obligations to pay legal and other costs and settle the lawsuits with the sexual assault victims in a good faith manner.[113] All parties have since reached settlement agreements.[114]

The USOPC's suspect role in the scandal and its protracted attempt to avoid legal responsibility demonstrates how the organization's structure renders the Committee relatively unbeholden to athletes. Because the USAG relies on the USOPC for both funding and its NGB certification, the USAG is incentivized to protect the USOPC in its settlement negotiations.[115] In fact, the USOPC began a decertification proceeding against the USAG in light of the Nassar scandal, but that proceeding was suspiciously halted after the USAG's Chapter Eleven proceeding.[116] In this proceeding, the USAG offered a settlement that would require gymnasts to release the USOPC from liability related to the claims.[117] In response, Attorney Michelle Simpson Tuegel, who represented more than two dozen survivors of Nassar's abuse, said:

---

112 *Id.*

113 Armour & Schad, *supra* note 109.

114 *Nassar Victims Reach $380 Million Settlement with USA Gymnastics*, CNBC (Dec. 13, 2021, 2:26 PM), https://www.cnbc.com/2021/12/13/nassar-victims-reach-380-million-settlement-with-usa-gymnastics.html [https://perma.cc/5DVF-DT5J].

115 *See* Scott M. Reid, *Records Show USA Gymnastics Safe Sport Funding Continues to Lag*, ORANGE CNTY. REG. (Apr. 24, 2019, 1:50 PM), https://www.ocregister.com/2020/03/18/records-show-usa-gymnastics-safe-sport-funding-continues-to-lag/ [https://perma.cc/BQC4-TTJU].

116 *See* Scott M. Reid, *Senate Wants USOC to Explain Halt in Decertification of USA Gymnastics*, ORANGE CNTY. REG. (Apr. 24, 2019, 1:50 PM), https://www.ocregister.com/2019/04/24/senate-wants-usoc-to-explain-halt-in-decertification-of-usa-gymnastics/ [https://perma.cc/82EV-UZPP]; *see also* Zachary Zagger, *USOC Moves to Pull USA Gymnastics' Governing Body Status*, LAW 360 (Nov. 5, 2018, 9:42 PM), https://www-law360-com.fls.idm.oclc.org/articles/1099211/usoc-moves-to-pull-usa-gymnastics-governing-body-status (last visited Mar. 31, 2022).

117 Vince Sullivan, *USA Gymnastics Floats $215 Ch. 11 Fund for Nassar Victims*, LAW 360 (Jan. 30, 2020, 10:12 PM), https://www-law360-com.fls.idm.oclc.org/articles/1239358/usa-gymnastics-floats-215m-ch-11-fund-for-nassar-victims (last visited Mar. 31, 2022).

> USA Gymnastics and the USOC's failure to . . . rectify the wrongs done . . . shows they have not really turned over a new leaf . . . cultural problems in the sport persist . . . survivors remain outside the circle of decision making, and both the process and timeframe for investigating allegations of abuse, remain . . . inadequate.[118]

Michael Phelps and other top competitors voiced similar sentiments.[119] The USOPC offers access to sports psychologists, but athletes say the focus is on enhancing medal performance, not dealing with afflictions like depression.[120] When former skeleton World Cup champion Katie Uhlaender was dealing with various health issues in 2018, partially resulting from a teammate's suicide, the USOPC directed her to a sports performance psychologist who told her, "[y]ou seem to perform better from a dark place."[121] The USOPC's protocols direct athletes to sign medical waivers that grant the Committee broad rights to share private health information with their coaches, officials in charge of team selection, and nonmedical staff.[122]

### *D. Areas of Law Theoretically Helpful to Athletes' Predicament*

#### 1. Antitrust Law

One theoretical option for aggrieved athletes is bringing an antitrust claim against the USOPC. Antitrust laws are designed to "preserve a competitive marketplace and protect consumer economic welfare."[123] "Competition is hurt when conduct harms the market's ability to present lower prices, better products, or more efficient

---

118 David Wharton, *Simone Biles and Aly Raisman React Angrily to Settlement in Larry Nassar Sexual Abuse Scandal*, L.A. TIMES (Mar. 2, 2020, 11:37 AM), https://www.latimes.com/sports/story/2020-03-02/simone-biles-aly-raisman-decry-settlement-in-larry-nassar-scandal [https://perma.cc/S4N4-RCFR].

119 *See* Jenkins, *supra* note 42.

120 *Id.*

121 *Id.*

122 *Id.*

123 MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 260, 227 (3d ed. 2013).

production methods to the consumer."[124] The key issue in the sports context is whether the conduct at issue has predominantly anticompetitive effects—harming consumers—or whether the competitive restraint benefits consumers more than unrestrained market competition.[125] To fall within the main antitrust law, the Sherman Act, challenged activity must be: (1) concerted (involving two or more parties); (2) cause an unreasonable restraint; and (3) affect interstate commerce.[126] Theoretically, antitrust law applies to the USOPC and its NGBs for activities such as sponsorship agreements.[127] Such an agreement (1) is concerted, because it is between the organization and a sponsor; (2) causes an unreasonable restraint because athletes are unable to make agreements with other parties; and (3) affects interstate commerce due to these organizations' business activities.

In analyzing Sherman Act claims, courts choose between various tests.[128] Because the nature of sports business requires some necessary restraints, the court usually uses a rule of reason analysis.[129] This refers to a fact-specific analysis inquiring into whether the challenged restraint has a substantially adverse competitive effect.[130] Under this test, the plaintiff must prove the anticompetitive effects of the challenged restraint.[131] If the plaintiff's showing is sufficient, the defendant then must prove the restraint achieves

---

124 *See* Jill K. Ingels, Comment, *Do Not Pass Go and Do Not Collect $200: Nike's Monopoly on USATF Violates Antitrust Laws and Prevents Athletes from Living at Park Plac*e, 27 MARQ. SPORTS L. REV. 171, 186 (2016).

125 *Id.*

126 *Id.* at 187.

127 *See id.* at 171–72.

128 *See Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, BONA L., https://www.bonalaw.com/insights/legal-resources/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quick-look-tests [https://perma.cc/WPD6-KXZN].

129 The necessary restraints that entities might need to establish include such rules and regulations as involving the size and texture of the playing field, the time of the games, the design of the uniforms, and so on. *See* Colin Ahler & Mary Colleen Fowler, *U.S. Supreme Court Unanimously Rules Against NCAA in Antitrust Case, Providing Valuable Insights on the Rule of Reason Standard*, JDSUPRA (June 23, 2021), https://www.jdsupra.com/legalnews/u-s-supreme-court-unanimously-rules-1930875/ [https://perma.cc/5PXR-3YJM].

130 Ingels, *supra* note 124, at 187.

131 *See* Michael A. Carrier, *The Four Step Rule of Reason*, 33 ANTITRUST, no. 2, Spring 2019, at 50, https://www.antitrustinstitute.org/wp-content/uploads/2019/04/ANTITRUST-4-step-RoR.pdf [https://perma.cc/K4UF-6SUC].

procompetitive effects.[132] If the defendant does so, the burden shifts to the plaintiff to show that the restraint is not reasonably necessary to achieve the claimed procompetitive effects, or that such effects can be achieved in a substantially less restrictive way.[133] If the plaintiff meets its burden, the jury balances the anticompetitive and procompetitive effects to determine the net effect.[134] If the net economic effect is negative, the challenged activity is deemed an unlawful and unreasonable restraint.[135]

As an example, Olympic athletes who want to challenge Rule 40 as an illegal restraint must establish the foregoing elements. Hence, they would have to show actual adverse effects on consumers resulting from the Rule's restraint on athletes' full participation in independent sponsors' advertisements. They might argue the Rule decreases the value of athlete sponsorships, which restricts sponsors' abilities to advertise during the commercially valuable period of the Olympic Games. The USOPC would likely respond that the restrictions on an athlete's sponsors enhance product qualities promoted by the official sponsors.[136] Alternatively, they may argue that official sponsorship agreements provide USOPC athletes with more financial support by increasing USOPC revenue.[137] However, both arguments are weak. It is highly questionable that official Olympic sponsors somehow advertise superior products to the consumer over individual athlete sponsors. Further, it is suspect, at best, that official sponsors provide athletes with more financial support when USOPC athletes receive merely seven to eight percent of USOPC revenue in contrast to around fifty percent of league revenue that professional athletes generally receive.[138]

### 2. Employment Law

A second possible solution is employment law. Employment law governs the relationships between individual employees and

---

132 *Id.*
133 *Id.* at 50–51.
134 Ingels, *supra* note 124124, at 188.
135 *Id.*
136 *See id.* at 190.
137 *See id.*
138 Wolf, *supra* note 75.

employers.[139] One significant legislation affecting employment law is the Fair Labor Standards Act ("FLSA").[140] The FLSA established minimum wage, overtime pay, and recordkeeping standards affecting employees in the private sector.[141] Covered workers are entitled to $7.25 per hour minimum wage.[142] Many states have minimum wage laws where employees are entitled to the higher of the state or federal minimum wage.[143]

To make out an FLSA claim, a plaintiff must show that an "employer" failed to pay an "employee" minimum wage and/or overtime pay.[144] The test of employment is one of "economic reality," that accounts for the circumstances of the whole activity rather than "isolated factors" being dispositive.[145] Courts have considered factors such as the expectation of compensation, the power of the "employer" to fire and hire, and evidence that an arrangement was conceived or carried out to evade the law.[146]

3. Labor Law

A third path, labor law, has been well trodden by professional athletes even if unionization bids have yet to affect the USOPC.[147] Labor law largely concerns collective action and the rights of workers as a group.[148] The most important and relevant labor law for

---

139 *See Labor and Employment Law: Career Path Introduction*, CHI.-KENT COLL. OF L., https://www.kentlaw.iit.edu/career-development/paths/labor-and-employment-law [https://perma.cc/4W85-LMFV].

140 *See Wages and the Fair Labor Standards Act*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/flsa [https://perma.cc/JU8V-48KT].

141 *Id.*

142 *Id.*

143 *Id.*

144 *See* Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 908 (9th Cir. 2019).

145 *Id.* at 909.

146 *Id.*

147 Unions represent athletes in the NFL, NBA, NHL, and many other professional sports leagues. Michael Macklon, *How Labor Unions Changed Pro Sports*, INVESTOPEDIA (June 25, 2021), https://www.investopedia.com/financial-edge/0711/the-rise-of-labor-unions-in-pro-sports.aspx [https://perma.cc/27Q5-JZQT].

148 *National Labor Relations Act: An Overview*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/national_labor_relations_act_nlra [https://perma.cc/TX4A-ER4A].

purposes of this Note is the National Labor Relations Act ("NLRA").[149] The NLRA seeks to constrain strife among employers, employees, and labor organizations to encourage industry-wide peace and economic production.[150] The NLRA defined "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan" which exists for the purpose of engaging with employers concerning "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[151]

A union is one example of a labor organization. The idea behind a union is to use workers' collective power to amass bargaining power against an employer possessing financial power.[152] Unions argue this strategy achieves higher pay, better benefits, and stronger voices on the job.[153] Unions attempt to achieve such goals by negotiating collective bargaining agreements ("CBAs"), or written legal contracts between employers and a union on the topics of wages, hours, and terms and conditions of employment.[154] The NLRA guarantees employees the right to organize and bargain collectively with employers through representatives of their own choosing.[155] It further establishes a procedure where employees can exercise their choice to join a union in a secret-ballot election conducted by the National Labor Relations Board ("the Board").[156] The Board is an

---

[149] *Id.*; *see generally Major Laws Administered/Enforced*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/laws-and-regulations/laws [https://perma.cc/27JX-RWXT].

[150] *See* 29 U.S.C. § 151. The NLRA was enacted on July 5, 1935. *See* NLRB, ORGANIZATION AND FUNCTIONS 204, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/organdfunctions.pdf [https://perma.cc/332A-3YKX].

[151] 29 U.S.C. § 152.

[152] *See* Kenneth G. Dau-Schmidt & Benjamin C. Ellis, *The Relative Bargaining Power of Employers and Unions in the Global Information Age: A Comparative Analysis of the United States and Japan*, 20 IND. INT'L & COMP. L. REV 1, 3–4 (2010).

[153] *What Is a Union?*, UNION PLUS, https://www.unionplus.org/page/what-union [https://perma.cc/22F7-MY7K].

[154] *What Is a Collective Bargaining Agreement?*, SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/collectivebargainingagreement.aspx (last visited Mar. 31, 2022).

[155] *See* 29 U.S.C. § 151; *see also id.* § 159.

[156] *See id.* § 159.

independent federal agency created to enforce the NLRA.[157] It is composed of five members who are appointed by the President of the United States, with the Senate's approval, for five-year terms.[158] In addition, the President, with the Senate's approval, also appoints the General Counsel, who supervises attorneys employed by the Board as well as officers and employees of the Regional Offices, for four-year terms.[159] The Regional Director of each Regional Office is appointed by the Board on the recommendation of the General Counsel.[160] Considering the Board's jurisdiction over unionization matters, including when an employer refuses to recognize a union, Olympic athletes and hopefuls may consider unionizing during the tenure of a sympathetic pro-labor Board. The timing is of particular importance because the Board, in contrast to many other federal agencies, is less committed to case precedent.[161]

Employers can always voluntarily recognize a labor organization as its workers' representative if there is evidence that a majority of the workers support it.[162] If an employer does not recognize a labor organization, workers can apply for certification with the Board and obligate an employer to bargain with them.[163] To gain certification, the Board must recognize the workers as employees under the NLRA.[164] In determining an employer-employee relationship, the Board often uses the common law employment test.[165] This test measures whether someone conducted: (1) performance of a service

---

157 *See Frequently Asked Questions—NLRB*, NLRB, https://www.nlrb.gov/resources/faq/nlrb [https://perma.cc/MCU4-MB37].

158 NLRB, *supra* note 150.

159 *Id.* at 206. *See also* ROBERT A. GORMAN ET AL., COX AND BOK'S LABOR LAW CASES AND MATERIALS 73 (16th ed. 2016).

160 NLRB, *supra* note 150, at 205, 207–08.

161 *See* Robert Iafolla, *Labor Board Repeatedly Topples Precedent Without Public Input*, BLOOMBERG L. (July 12, 2019, 6:15 AM), https://news.bloomberglaw.com/daily-labor-report/labor-board-repeatedly-topples-precedent-without-public-input [https://perma.cc/HJ87-A6UZ].

162 *Your Right to Form a Union*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/your-right-to-form-a-union [https://perma.cc/5MHS-GBDA].

163 *See id.*

164 *See* National Labor Relations Act § 1, 29 U.S.C. § 151.

165 Edelman & Pacella, *supra* note 32, at 493.

(2) under a contract of hire (3) subject to the other's control or right of control (4) in return for payment.[166]

The Board may also carry out a "joint employment" analysis because athletes may be jointly employed by the relevant NGB and the USOPC.[167] This "joint employment" test is the subject of changing administrative law.[168] The older test analyzed whether a common law employment relationship existed, and then analyzed whether the putative employer shared or codetermined matters that were essential terms and conditions of employment.[169] "Direct and immediate" control over workers was not necessary; reserved and indirect control, such as through contractual provisions, could be sufficient for a joint employer-employee finding.[170] The newest version of the test is more employer-friendly. It specifically lists essential terms and conditions and requires that at least one be shared or codetermined.[171] Sharing or codetermining provisions requires that a putative employer actually exercised that right.[172] Furthermore, the putative joint employer must have substantial direct and immediate control over the terms and conditions.[173] Finally, the putative employer's sharing or codetermining of essential terms and conditions must meaningfully affect matters relating to the employment relationship.[174]

The Board must also determine the appropriate bargaining unit. In determining whether a group of employees should be allowed to

---

166 *Id.* at 493–94.

167 *See* GORMAN ET AL., *supra* note 159, at 291.

168 *See* Mark G. Kisicki, *Long-Awaited NLRB Joint-Employer Rule Sets Employer-Friendly Standard for Joint-Employer Determinations*, OGLETREE DEAKINS (Feb. 27, 2020), https://ogletree.com/insights/long-awaited-nlrb-joint-employer-rule-sets-employer-friendly-standard-for-joint-employer-determinations/ [https://perma.cc/5S23-337C].

169 Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 1599, 1600 (D.C. Cir. 2015), *rev'd on other grounds*, Browning-Ferris Indus. of Cal., Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018).

170 *Id.*

171 *See NLRB Issues Joint-Employer Final Rule*, NLRB (Feb. 25, 2020), https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-joint-employer-final-rule [https://perma.cc/DT3N-8XCJ].

172 29 C.F.R. § 103.40 (2021).

173 *Id.*

174 *Id.*

act as a bargaining unit, the Board uses a "community of interest" analysis.[175] This community is composed of workers who have the same or substantially similar interests concerning wages, hours, and working conditions.[176]

## II. CURRENT LAW OFFERS INADEQUATE RECOURSE FOR ATHLETES

The first two areas of law discussed above, antitrust law and employment law, unfortunately fail to assist National Team Members in their quest to improve Olympic revenue distribution and create optimal structural support systems. For example, an antitrust claim against the USOPC to contest the restrictions placed on athletes' sponsor advertisements or to challenge the lack of compensation would likely fail. While these actions can theoretically constitute illegal "unreasonable restraints" under antitrust law, the USOPC enjoys an antitrust exemption, at least in the Ninth, Tenth, and Eleventh Circuits.[177] Employment law, while more promising than antitrust law, is also problematic because NCAA athletes, who are in many ways similar to National Team Members, have been ruled to be non-employees of the NCAA. After discussing these two areas of law, this Note will analyze labor law to show how it can empower athletes to improve revenue distribution and the existing structural support system.

### *A. Inadequacy of Antitrust Law as Applied to the USOPC and Its NGBs*

Despite the availability of antitrust law for athletes challenging restrictions, courts are likely to dismiss such claims due to a long-recognized antitrust exemption to the Ted Stevens Act.[178] At

---

175 *See* NLRB v. Catherine McAuley Health Ctr., 885 F.2d 341, 344–45 (6th Cir. 1989).

176 *See* NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT (1997), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf [https://perma.cc/YC7J-UB8K].

177 *See* Bruce D. Sokler, *Ninth Circuit Finds Implied Antitrust Immunity for USATF and USOC in Advertising Restriction Case*, MINTZ (Aug. 10, 2018), https://www.mintz.com/insights-center/viewpoints/2018-08-ninth-circuit-finds-implied-antitrust-immunity-usatf-and-usoc [https://perma.cc/H46X-BUHA]; *see infra* Part I.A.

178 The Ted Stevens Act established the USOC. *See* Sokler, *supra* note 177.

present, three appellate courts have found such an exemption.[179] In *Gold Medal LLC v. USA Track & Field*, a chewing gum company alleged the USOC and USA Track & Field ("USATF") restricted it from sponsoring athletes during the Olympic trials through an illegal anticompetitive conspiracy in violation of antitrust law.[180] Gold Medal LLC (d/b/a/ "Run Gum") argued that such limitations, imposed by the USOC and enforced by the USATF, excluded scores of individual sponsors from the marketplace—where the USOC had monopoly power—in violation of Section 1 of the Sherman Act.[181] The Ninth Circuit recognized that implied antitrust immunity is generally unfavorable and can only be justified by a convincing showing of "clear repugnancy between the antitrust laws and the regulatory system."[182] But the court held that in light of the considerable authority bestowed upon NGBs to fund the "Olympic Mission," applying antitrust law to enjoin advertising and logo restrictions on advertisers would "unduly interfere" with the mission of protecting the value of corporate sponsorships and maximizing sanctioned fundraising.[183] As long as NGBs create rules integral to the organizations' Olympic mission, they are free from antitrust law's reach.[184]

The Tenth Circuit also ruled that the USOC and NGBs have an implied antitrust exemption in *Behagen v. Amateur Basketball Association*.[185] There, basketball player Ronald Behagen challenged a rule that prohibited a player from being reinstated as an amateur more than once after playing professionally.[186] The Tenth Circuit ruled that under Congress's clear intent, the Association's decision to deny reinstatement due to amateur status was necessary and therefore exempt from federal antitrust law.[187] The clear intent of Congress manifests in the Ted Stevens Act, which authorizes an NGB

---

179 *See id.*
180 Gold Medal LLC v. USA Track & Field, 899 F.3d 712, 713 (9th Cir. 2018).
181 *See* Sokler, *supra* note 177; *Gold Medal LLC*, 899 F.3d at 713–14.
182 *See Gold Medal LLC*, 899 F.3d at 715.
183 *See id.*
184 *See* Sokler, *supra* note 177.
185 *See* Behagen v. Amateur Basketball Ass'n, 884 F.2d 524, 530 (10th Cir. 1989).
186 *Id.* at 525.
187 *Id.* at 530.

to designate individuals and teams to represent the United States and certify the amateur eligibility of those individuals and teams.[188]

In *JES Properties., Inc. v. USA Equestrian, Inc.*, the Eleventh Circuit found immunity for the United States Equestrian Federation ("USEF") when the plaintiff equestrian event promoter was unable to secure a date for equestrian competitions in Florida due to the USEF's Mileage Rule.[189] The Rule barred any recognized A-rated competition from competing within 250 miles of another recognized A-rated competition on the same date.[190] The court ruled that the district court properly granted summary judgment in favor of the USEF because the USEF and equestrian event promoters were immune from antitrust liability due to implications of the Ted Stevens Olympic and Amateur Sports Act.[191] Antitrust law is therefore unfavorable to athletes seeking to challenge sponsorship restrictions and other restraints on trade established by the USOPC.

### *B. Inadequacy of the FLSA as Applied to Athletes Similarly Situated to U.S. Olympic Athletes*

Even though no National Team Member has made an FLSA claim against the USOPC, there is some dissuading case precedent in similarly situated NCAA athlete claims. NCAA athletes have brought multiple unsuccessful FLSA claims against the NCAA in attempts to receive compensation for their integral role in the multi-billion-dollar college sports industry.[192] In *Dawson v. National Collegiate Athletic Association/Pac-12 Conference*, the Ninth Circuit held that neither the NCAA nor the Pac-12 Conference were the athletes' employers and, thus, were not required to compensate them.[193]

---

188 *Id.* at 528.

189 *See* JES Props., Inc. v. USA Equestrian, Inc., 458 F.3d 1224, 1227–28 (11th Cir. 2006).

190 *Id.* at 1226–27.

191 *Id.* at 1228.

192 *See* Eben Novy-Williams, *College Sports*, BLOOMBERG, https://www.bloomberg.com/quicktake/college-sports-ncaa [https://perma.cc/XF3S-75LZ] (Sept. 27, 2017, 11:11 AM).

193 *See* Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 908 (9th Cir. 2019); Lisa Nagele-Piazza, *College Football Player Isn't NCAA Employee*, SHRM (Aug. 29, 2019), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/college-football-player-is-not-ncaa-employee.aspx [https://perma.cc/Y6DK-97GY].

The court applied the "economic realities" test which, among many other factors, considers the plaintiff's expectation of compensation, the alleged employer's power to hire and fire, and evidence that an arrangement was conceived of or carried out to evade the law.[194] The court found that NCAA regulations limiting scholarships did not create any expectation of compensation.[195] Further, the court emphasized that the athletes did not adequately show the NCAA or Pac-12 had the power to hire or fire them, nor that NCAA rules were an attempt to evade the law.[196] Finally, the court ruled the revenue generated by the NCAA did not by itself create an employment relationship between student-athletes and the NCAA.[197] In a Seventh Circuit case, *Berger v. National Collegiate Athletic Association*, the court reached a similar conclusion.[198]

There is some optimism, however, that the Third Circuit will rule differently for NCAA athletes. Trey Johnson, a former Villanova defensive back football player, is currently suing the NCAA and many of its member schools in an ongoing case.[199] The lawsuit is in the Eastern District of Pennsylvania and alleges minimum-wage law violations.[200] Johnson has survived summary judgment, allowing him to proceed with his minimum-wage claim.[201] His lawsuit is promising because it relies heavily on a 2018 case, also in the Eastern District of Pennsylvania, whose underlying analysis questions the applicability of the economic realities test that defeated the

---

194 *See Dawson*, 932 F.3d at 909; *see also Fact Sheet*, U.S. DEP'T OF LABOR (July 2008), https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship [perma.cc/NAU7-HJQL].

195 *See Dawson*, 932 F.3d at 909.

196 *See id.* at 910.

197 *See id.*

198 *See generally* Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285 (7th Cir. 2016); Christian Dennie, *Berger v. NCAA: Student-Athletes Are Not Employees Under the FLSA*, BG&S (Dec. 8, 2016, 10:14 PM), https://bgsfirm.com/berger-v-ncaa-student-athletes-are-not-employees-under-the-flsa/ [https://perma.cc/GJ4S-EJ9J].

199 *See* Billy Witz, *N.C.A.A. Is Sued for Not Paying Athletes as Employees*, N.Y. TIMES (Nov. 6, 2019), https://www.nytimes.com/2019/11/06/sports/ncaa-lawsuit.html [https://perma.cc/2LSR-SHVH].

200 *See id.*

201 *See* Nagele-Piazza, *supra* note 193.

claims in *Berger* and *Dawson*.[202] *Livers v. National Collegiate Athletic Association* was dismissed for exceeding the statute of limitations, but the court determined that a more holistic application of the economic realities test was more appropriate.[203] The court also refrained from denying the possibility that a different multi-factor test could be identified for evaluating whether a student athlete who receives a scholarship is "an employee" for FLSA purposes.[204]

Taking these cases into account, it appears that employment law is, at best, a problematic avenue for National Team Members seeking to gain minimum wage and other employment law protections. Even though no Olympic athletes have tried to sue for greater compensation, *Dawson* demonstrates how current case law would be unfriendly to such an endeavor. The court concluded that NCAA regulations providing a limitation on scholarships did not create an expectation of compensation because Dawson's school, rather than the NCAA, provided it.[205] The court also concluded that Dawson could not demonstrate the NCAA or Pac-12 had the power to fire or hire him, because the record did not show they choose the players on any Division 1 football team.[206] Further, Dawson provided no evidence that NCAA rules were conceived to evade the law.[207] The court also rejected Dawson's argument that revenue generated by college sports converted the relationship between student athletes and the NCAA into an employment relationship.[208] As such, the NCAA and Pac-12 were regulatory bodies, not employers of student athletes under the FLSA.[209]

Applying the *Dawson* court's analysis to National Team Members, a similar case seeking compensation from the USOPC, though possible, is unlikely to prevail. While the Division 1 college football players failed to establish an "expectation of compensation,"[210] the

---

202 *See* Livers v. Nat'l Collegiate Athletic Ass'n, No. 17-4271, 2018 U.S. Dist. LEXIS 83655, at *45–46 (E.D. Pa. May 17, 2018).
203 *Id.* at *49–50.
204 *Id.*
205 *Dawson*, 932 F.3d at 909.
206 *Id.* at 910.
207 *Id.*
208 *Id.*
209 *Id.* at 911.
210 *Id.* at 909.

USOPC arguably does provide compensation. National Team Members receive Direct Athlete Support from the USOPC and receive other stipends and awards from their NGBs.[211] Thus, a court may find the "expectation of compensation" factor in the economic reality test fulfilled.

The "power to fire or hire" factor would be more contested. The USOPC certainly possesses a right to "hire, fire, and discipline,"[212]—or more specifically, to select, deselect, and discipline the athletes who generate its revenue. The USOPC by-laws clearly express this policy: the USOPC *requires* the NGBs to establish athlete selection procedures "approved by a Designated Committee . . . *and by the corporation*"[213] for the Olympic, Paralympic, or Pan American Games and "timely *recommend*" to the corporation athletes for the Olympic, Paralympic, and Pan American Games.[214] This language illustrates the USOPC's ultimate control over athlete selection and deselection for the Olympic, Paralympic, and Pan American Games. However, the USOPC rarely uses this power because it leaves selection criteria to the NGBs or selects athletes based on well-defined criteria.[215]

Under the last prong, plaintiffs would have difficulty proving that the USOPC created its compensation rules to evade the FLSA. The USOPC was chartered by the Ted Stevens Act and its rules appear to comply with it, rather than an attempt to somehow evade employment law.[216] Additionally, if plaintiffs try to use the same revenue-related factor in their argument, they will likely fail. According to the Ninth Circuit, "precedent demonstrates that revenue does not automatically engender or foreclose the existence of an employment relationship under the FLSA."[217] In sum, this case demonstrates that employment law is a problematic path for National Team

---

211 *See Athlete Support Programs*, USA ARCHERY, https://www.usarchery.org/high-performance/athlete-support-programs [https://perma.cc/3J67-X2RG].

212 *See* Browning-Ferris Indus. of Cal. v. NLRB, 362 N.L.R.B. 1599, 1605 (2015).

213 U.S. OLYMPIC & PARALYMPIC COMM., BYLAWS § 8 (2020) [hereinafter U.S. OLYMPIC & PARALYMPIC BYLAWS]; *see also* 36 U.S.C. § 220501.

214 *Id*.

215 *See Team Selection*, TEAM USA, https://www.teamusa.org/team-usa-athlete-services/team-selection [https://perma.cc/J75U-PRHX].

216 *See generally* 36 U.S.C. § 220502.

217 Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 910 (9th Cir. 2019).

Members attempting to achieve greater compensation from the USOPC and their NGBs. Nonetheless, the *Johnson* case is promising and may result in case precedent that Olympic athletes can utilize to make an employment law claim.[218]

## III. UNIONIZATION

A third area of law provides a friendlier path than antitrust law and employment law for resolving the problems that Olympic athletes face. Labor law would not only allow National Team Members to exert the type of pressure necessary to bargain for fairer revenue distribution but, unlike employment law, would provide the ability to bargain for a more adequate structural support system.[219] Labor law contains the necessary mechanisms to help resolve these issues due to the protections it grants to workers advocating for better wages, hours, and working conditions.[220] Compensation and structural support fall under the categories of wages and working conditions.

Instead of settling for insufficient training stipends and "awards," National Team Members, if deemed to be employees under the NLRA, should bargain for an actual salary. This salary would compensate them for the effort and time spent in preparing for a quadrennial event that the IOC uses to generate billions of dollars.[221] This salary would ideally reflect USOPC and IOC revenues. National Team Members are athletes that earn their way onto their respective sport's National Team. As such, they are in the best

---

[218] *See generally* Johnson v. Nat'l Collegiate Athletic Ass'n, No. CV 19-5230, 2021 WL 3771810 (E.D. Pa. Aug. 2021), *motion to certify appeal granted*, No. CV 19-5230, 2021 WL 6125095 (E.D. Pa. Dec. 2021).

[219] *See* Rachel Bachman, *Olympic Athletes Ask: Should We Start a Union?*, WALL ST. J. (Feb. 26, 2019, 10:09 AM), https://www.wsj.com/articles/olympic-athletes-ask-should-we-start-a-union-11551193784 [https://perma.cc/JXA5-2VMH].

[220] *See* Poster of Employee Rights Under the National Labor Relations Act, U.S. DEP'T OF LAB., https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/eo_posters/employeerightsposter11x17_2019final.pdf [https://perma.cc/USQ2-MCMX].

[221] From 2005 to 2008, the IOC generated nearly $6 billion of revenue. Gus Lubin, *Olympics, Inc: Inside the Secretive, $6 Billion World of The International Olympic Committee*, BUS. INSIDER (Feb. 17, 2010, 11:51 AM), https://www.businessinsider.com/olympics-inc-inside-the-business-of-the-ioc [https://perma.cc/YT6B-NZHR]. In 2016, the IOC made $3.56 billion. Baccellieri, *supra* note 24.

position to qualify for the Olympics among lower-ranked competitors and are undoubtedly a necessary ingredient for Olympic revenue. Without their hard work, there would not be sufficiently trained athletes to compete at the quadrennial Games. In American sports leagues, management and athletes typically share in revenue almost equally.[222] In 2012, the USOPC allocated only six percent of its spending to athletes as cash payments.[223] Athletes should bargain for an exponential increase in that number.

Regarding the structural support system, athletes should demand that the USOPC make greater investments into mental health and wellness professionals. There must be contractual protections preventing such professionals from sharing confidential information with USOPC management and coaches. By facilitating these protections, athletes will be more comfortable receiving the help they need.

Athletes may also demand that some types of claims against USOPC officials and staff, such as physical or sexual abuse, trigger mandatory internal investigations—with certain findings resulting in a mandatory external investigation.[224] A set-up such as this would have likely prevented or minimized Larry Nassar's abuse. Professors Marc Edelman, of the Zicklin School of Business of Baruch College, and Jennifer Pacella, of the Kelley School of Business of Indiana University, suggest a robust whistleblower protection program.[225] This protection program should have specific measures in place to prevent retaliatory conduct that alters team selection and funding. Gymnasts, like other NGB athletes, fear reprisal despite

---

222 *See* Cheri Bradish et al., *Olympic Commercialization and Player Compensation: A Review of Olympic Financial Reports*, TED ROGERS SCH. OF MGMT. (Dec. 6, 2019), https://mcusercontent.com/84af2d82b4ff06bd42452dbf8/files/39f1fd06-9ec8-4ca3-85b1-a9d392aefaad/2020.04.22_Olympic_Commercialization_and_Player_Compensation_FINAL.pdf [https://perma.cc/UV33-GTQX].

223 Will Hobson, *Olympic Executives Cash in On a 'Movement' That Keeps Athletes Poor*, WASH. POST (July 30, 2016), https://www.washingtonpost.com/sports/olympics/olympic-executives-cash-in-on-a-movement-that-keeps-athletes-poor/2016/07/30/ed18c206-5346-11e6-88eb-7dda4e2f2aec_story.html [https://perma.cc/EPS8-VWQ6].

224 Edelman & Pacella, *supra* note 32, at 482.

225 *Id.* at 482–83.

USAG's whistleblowing policy in place since 2014.[226] It is important that this system be one bargained for and structured by athletes. Without pressure coming directly from athletes, those in charge are less inclined to enforce regulations that serve no interest to them. For example, the corporation Enron had a code of conduct, compliance program, and a set of core values promoting ethical behavior in the years leading up to its bankruptcy.[227] However, these policies failed due "in large part," to their non-enforcement, lack of directorial oversight, and various unaddressed conflicts of interest within the corporation.[228] Likewise, the USOPC and its NGBs will not implement important reforms without pressure.

Below, this Note will argue that National Team Members of many Olympic sports are employees under the NLRA because they fulfill the four requirements of the common law definition of employment, which the Board often uses in its analysis.[229]

The counterargument—that the NGB is the athletes' employer rather than the USOPC—may succeed. However, even if the appropriate NGB is ruled to be the employer, the USOPC would still likely constitute an employer under the Board's joint employment analysis.

In this scenario, if the Board uses the recent, more employer-friendly test in its analysis,[230] fewer National Team Members will be deemed employees. This is because the new test requires substantial direct and immediate control over terms and conditions of employment.[231] Further, many National Team Members will be excluded due to the independent contractor exemption, which involves consideration of the worker's "entrepreneurial opportunity."[232] But undoubtedly, the National Team Members of many Olympic sports would be deemed employees under the NLRA and thus allowed to unionize.

---

226 *Id.* at 483.
227 *Id.* at 484.
228 *Id.*
229 *Id.* at 493–94.
230 *See infra* Part III.C.2.
231 *See infra* Part III.C.2.
232 *See infra* Part III.E.

### *A. The Board Will Only Allow a Bargaining Unit of Olympic Athletes and Hopefuls (National Team Members) to Unionize If They Are "Employees" of the USOPC Under the NLRA*

To gain the right to unionize, at least in the scenario where the USOPC refuses to *voluntarily* recognize the athletes' chosen collective bargaining representative, the Board must ultimately interpret them to be employees of the USOPC.[233] In order to be employees under the Board's definition, athletes must be statutory employees under Section 2(3) of the NLRA.[234] The Section states, "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer . . . but shall not include . . . any individual having the status of an independent contractor."[235] Most of the relevant language is the circular assertion that "employee" shall include "any employee."[236] To analyze who fits the definition, the Board looks at the language protecting the "exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing[,]" as well as the broad statutory definitions of "employer" and "employee."[237] In answering this question, the Board applies a single federal law: the federal common law.[238]

To begin, the Board often analyzes each situation under the common law test of employment.[239] There are four requirements of the common law definition of employee—and National Team Members satisfy each one.[240] This includes: (1) engagement in an activity from which a reasonable person would generally expect compensation, (2) under a "contract for hire," (3) ceding a "right of control," (4) in return for "payment."

---

233 *See* Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1089 (2016); *see also* Edelman & Pacella, *supra* note 32, at 493.

234 Brown Univ., 342 N.L.R.B. 483, 490, n.27 (2004) (citation omitted); *see also* Edelman & Pacella, *supra* note 32, at 494.

235 *See* National Labor Relations Act § 2(3), 29 U.S.C. § 152.

236 *See id.*

237 *See Trs. Of Columbia Univ.*, 364 N.L.R.B. at 1081.

238 *Brown Univ.*, 342 N.L.R.B. at 493.

239 *See* Edelman & Pacella, *supra* note 32, at 493–94.

240 *Id.* at 494.

1. First Requirement of "Employee": Engagement in Activity Generating an Objective Expectation of Compensation

The first requirement is engagement in an activity for which a reasonable person, absent any coercion, would generally expect compensation.[241] This objective test historically excludes scenarios where individuals perform work in the context of an educational program such as job training.[242] Regarding the expectation of "compensation," in *Tony & Susan Alamo Foundation v. Department of Labor*, the Supreme Court held that even individuals considering themselves "volunteers" might constitute employees, legally speaking, if they could reasonably expect payment in exchange for services rendered.[243]

This first requirement asks whether "a reasonable person…would generally expect compensation" for engaging in this activity.[244] The tremendous number of hours during which National Team Members strive to qualify for and compete in the Games—including the practice and training, competitions, and the Olympics themselves—all while partially or wholly sacrificing their non-athletic careers, demonstrates activity for which a reasonable person would expect compensation. This conclusion is particularly strong considering that the athletes' engagement in this "activity" generates hundreds of millions in revenue for the USOPC and their NGBs.[245]

Principles of intellectual property law also support the contention that a "reasonable person, absent any coercion, would generally expect compensation" in such situations.[246] Intellectual property is based on the principle that if you create something, it is yours to exploit.[247] More specifically, the Lockean property theory recognizes intellectual property rights as fundamentally similar to

---

241 *Id.*

242 *Id.*

243 *Id.* at 496.

244 *See* Edelman & Pacella, *supra* note 32, at 494.

245 *See* Larry Eder, *How Well Are US Athletes Supported by the USOC? And 11 Other Olympic Questions*, *Written by Nathan Ikon Crumpton, for the USAthleticTrust.org*, RUNBLOGRUN (Sept. 19, 2013, 11:46 PM), https://www.runblogrun.com/2013/09/how-well-are-us-athletes-supported-by-the-usoc-and-11-other-olympic-questions-written-by-nathan-ikon.html [https://perma.cc/UGC6-KSDK].

246 *See* Edelman & Pacella, *supra* note 32, at 494.

247 *Id.* at 497.

property rights in physical assets.[248] Intellectual goods are a result of a person's "value-creating, productive labor," and, as such, Locke expressly recognized copyright as property.[249] An athlete, as a creator of a copyrightable performance, theoretically can be argued to "own" his or her performance rights in events that generate revenue. Therefore, a reasonable person in the athletes' position would expect compensation for working to create intellectual property.

2. Second Requirement of "Employee": Contract for Hire

The second requirement of the common law employee test is the existence of a "contract for hire."[250] Case precedent indicates this contract can be implied-in-law, even absent any actual agreement, so long as general principles of fairness and equity would support such a result.[251] In any case, there are numerous explicit contracts that tie athletes to the USOPC.[252] For example, Olympians sign contracts agreeing to participate in the Olympics.[253] These agreements include promises to maintain eligibility, dress and behave a certain way, abide by the rules and regulations of the OSOPC, and grant the USOPC the right to profit from their name, image, and likeness in events that generate millions in revenue.[254] In return, athletes receive publicity and the opportunity to be medal winners and receive bonuses.[255] Olympic hopefuls also sign contracts to gain funding from their NGB—funding the NGB itself receives from the

---

248 Adam Mossoff, *Why Intellectual Property Rights? A Lockean Justification*, L. & LIBERTY (May 4, 2015), https://lawliberty.org/forum/why-intellectual-property-rights-a-lockean-justification/ [https://perma.cc/53JU-G6CY].

249 *Id.*

250 *See* Edelman & Pacella, *supra* note 32, at 497.

251 *Id.* at 494–95.

252 *See, e.g.*, United States Curling Association National Team Athlete Agreement, U.S. CURLING ASS'N, https://www.teamusa.org/-/media/USA_Curling/Documents/Championships-1819/National-Team-Athlete-Agreement-201819.pdf [https://perma.cc/3XBN-DUPB] [hereinafter US Curling Agreement].

253 *See Athletes' Agreements FAQ*, OLYMPICS ATHLETE 365, https://olympics.com/athlete365/faq-athletes-agreements/ [https://perma.cc/7WLE-GBLK].

254 *See* Edelman & Pacella, *supra* note 32, at 498.

255 *See* Brandon Penny, *U.S. Olympic Committee Significantly Increases Payments to Athletes for Olympic/Paralympic, World Medals*, TEAM USA (Dec. 13, 2016, 6:19 PM), https://www.teamusa.org/News/2016/December/13/US-Olympic-Committee-Significantly-Increases-Payments-To-Athletes-For-Olympic-World-Medals [https://perma.cc/27YR-KVYZ].

USOPC—as well as contracts to receive funding directly from the USOPC in exchange for their efforts.[256]

3. Third Requirement of "Employee": Right of Control

The third common law requirement to qualify as an employee is the "right of control."[257] This involves the employer limiting freedoms of alleged employees in a significant manner.[258] For example, Region 13 of the Board recently held that Northwestern University exercised the requisite "control" over its grant-in-aid football players when they engaged in forty to fifty hours per week of football-related activities during their fall semester.[259] In that unionization effort, the Regional Director solely used the common law employee definition in his analysis.[260] He determined that players who receive scholarships were under "strict and exacting" control by their employer throughout the entire year.[261] He also considered that the coaches monitored the players to enforce adherence to NCAA and team rules and disciplined them for infractions.[262]

There is a similar right of control in the athlete-USOPC relationship.[263] The USOPC sometimes exercises the right of control directly, as evidenced by direct reference to that right in NGB contracts, as well as indirectly through the NGB itself.[264] An example of direct rights can be found in the 2018–2019 United States Curling Association National Team Agreement, where athletes pledged to not commit any anti-doping violation as defined by the IOC, the World Curling Federation, the World Anti-Doping Agency, the United States Anti-Doping Agency, and the USOC.[265] This

---

256 *See* US Curling Agreement, *supra* note 252.

257 Edelman & Pacella, *supra* note 32, at 498; *see also* Northwestern Univ., 362 N.L.R.B. 1350, 1363 (2015).

258 Edelman & Pacella, *supra* note 32, at 495.

259 *Id.*

260 *Northwestern Univ.*, 362 N.L.R.B. at 1364.

261 *Id.* at 1363–64.

262 *Id.* at 1364.

263 Edelman & Pacella, *supra* note 32, at 498.

264 *See* U.S. OLYMPIC COMM., U.S. OLYMPIC COMMITTEE POLICY NGB ATHLETE AGREEMENTS (2017), https://www.teamusa.org/-/media/Legal/USOC-Policy—-NGB-Athlete-Agreements—-7-14-17.pdf?la=en&hash=5585EAF3BB46A72B76673883B9F9ADB9409C8951 [https://perma.cc/X8LC-Q6X9].

265 *See* US Curling Agreement, *supra* note 252, at 3.

requirement is a significant limitation on athlete freedom because the anti-doping rules are quite expansive and do not involve a small number of chemical agents, but rather an assortment of compounds that often function as ingredients in over-the-counter and prescription medications.[266] In the sections governing compensation, and time and training expenses, the agreement includes a covenant that the athlete will comply with "the terms and conditions set forth in [the] Agreement and established by the USOC."[267] USOPC direct rights of control are also evident in non-Olympic years. The USOPC contracts with National Team Members to provide funding in exchange for promises to follow USOC by-laws, terms, and conditions restricting their behavior and the promise to compete in the Games if they qualify.[268] Although control over practice schedule, diet, and other variables differ by sport, all National Team Members can be suspended or have their funding cut for violations of NGB and USOPC rules.[269]

One may argue that NGBs are independent employers of National Team Members and that the USOPC lacks the requisite right of control. However, indirect "right of control" can be established through a creative analysis of NGBs as agents of the USOPC. An NGB's viability as an amateur athletic organization depends wholly on the USOPC because young athletes are lured to these sports, partially or mostly due to their Olympic appeal.[270] Without NGB certification, an amateur sports organization would hemorrhage members quickly. If an NGB like the USAG did not allow gymnasts to qualify for the Olympics, young athletes would flock to whichever amateur gymnastics organization the USOPC subsequently designated the "national governing body." The USOPC by-laws (the "By-laws"), effective January 1, 2020, demonstrate the committee's power over these organizations. Section 8.1 states: " . . . the Board

---

266 *See How Athletes Can Safely Use Cold and Flu Products*, U.S. ANTI-DOPING AGENCY (Mar. 19, 2019), https://www.usada.org/spirit-of-sport/education/how-athletes-can-safely-use-cold-and-flu-products/ [https://perma.cc/325K-MNNB].

267 *See* US Curling Agreement, *supra* note 252, at 4.

268 *See* U.S. OLYMPIC COMM., *supra* note 264.

269 *See* US Curling Agreement, *supra* note 252, at 5.

270 *See Students Flock to Texas Gym Run by Family of Simone Biles*, EAGLE (Aug. 23, 2016), https://theeagle.com/students-flock-to-texas-gym-run-by-family-of-simone-biles/article_fa552cc1-ef87-53f6-be3c-3d1cabeda3b4.html [https://perma.cc/E3CX-36WH]

has the power to certify qualified organizations as NGBs" and grants the Board power to review all matters relating to an NGB's continued certification.[271] Only one NGB is recognized in each sport and that organization must be a member of an international sporting federation recognized by the IOC.[272] Any organization that becomes an NGB "must cooperate with and satisfy all aspects of the corporation's NGB Certification program. Any entity not so certified, and any entity decertified by the corporation will automatically be ineligible for membership."[273] The USOPC exerts extensive and thorough control through certification. An NGB must fulfill all responsibilities as an NGB as established by the By-laws; adopt and maintain governance policies complying with the By-laws' requirements; satisfy such other requirements set forth by the corporation; establish clear athlete, team, and team official selection procedures approved by the corporation; and recommend to the corporation athletes, teams, and team officials for the Olympic, Paralympic, and Pan American Games teams.[274] The By-laws require athlete representatives to make up at least twenty percent of positions on the NGB's Board of Directors, executive board, and other governing boards.[275] These athlete representatives must themselves fulfill very specific criteria, such as having competed in the Olympic or Pan American Games.[276] Altogether Section 8 of the By-laws contains no less than ten pages of specific control that is exerted by the USOPC over NGBs.[277] That control is further enforced in Section 10, which outlines the process for NGB members to file a complaint against the NGB with the USOPC based on NGB noncompliance with Section 8.[278]

Ultimately, the Ted Stevens Act establishes the relationship between the USOPC and the amateur sports organizations that are NGB-certified.[279] The Ted Stevens Act gives the USOPC the power

---

271 U.S. OLYMPIC & PARALYMPIC BYLAWS, *supra* note 213, § 8.1.
272 *Id.* § 8.3.
273 *Id.* § 8.7.
274 *Id.* §§ 8.7.1(a)(i)–(ii), (ix), (d)(ii), (iv).
275 *Id.* § 8.8.1.
276 *Id.* § 8.8.2.
277 *Id.* § 8.
278 *Id.* § 10.
279 *See* 36 U.S.C. §§ 220503–220504.

to recognize amateur sports organizations as national governing bodies.[280] It also grants a review of that recognition and power to take whatever action the USOPC considers appropriate, including placing conditions on continued recognition.[281] All NGBs have extremely thorough duties.[282]

Therefore, any right of control granted to NGBs by National Team Members is, by extension, a right of control possessed by the USOPC. When considering the "right of control" requirement, at the very least, courts should interpret NGB rights of control as jointly-held by the USOPC. Ultimately, a court may decide that the NGB and the USOPC are joint employers of the National Team Members and that a bargaining representative should negotiate with both entities. Regardless of whether courts will come to view the NGBs as agents of the USOPC or will regard both as joint employers, it is clear that many NGBs exert great control over their National Team Members. Professor Edelman and Professor Pacella call the time commitments that the USAG places on elite gymnasts and the great limitations on their general freedom "a strong case in favor of finding the exercise of control by a purported employer."[283] The USAG requires its competitive gymnasts to train "seven hours per day, six days a week"—a similar time commitment to that required of the Northwestern University grant-in-aid college football players who Region 13 found to be "employees."[284] In addition, elite female gymnasts competing for the USAG are required to surrender decision-making power over their nutrition, medical treatment, and access to doctors.[285] Even worse, the USAG's intensive regiment has encouraged and even forced young gymnasts to "go to bed hungry."[286] Ultimately, all or at least some of that control is exerted by the USOPC, either directly through oversight and discipline, or indirectly through each NGB's athletic training, coaching, and facilities. The USAG, however, is only one NGB. Other NGBs may have

---

280 *See id.* § 220521(a)(1).
281 *See id.* § 220521(d).
282 *See id.* § 220524.
283 *See* Edelman & Pacella, *supra* note 32, at 498.
284 *Id.*
285 *Id.*
286 *Id.*

less control over their athletes. This third requirement would be highly influential because, depending on the nature of control in each NGB, some National Team Members may be deemed employees under the NLRA, while others may not.

4. Fourth Requirement of "Employee": Work for Payment

The fourth requirement of the common law definition of "employee" is to work "in return for payment."[287] As a matter of law, payment need not be monetary in nature.[288] For example, in *Northwestern University*, Region 13 of the Board held that the players constituted employees and, as such, implicitly received payment from their college in the form of academic scholarships.[289] The *Northwestern University* case specifically involved football players who depended on their scholarships to pay for "basic necessities, including food and shelter," because NCAA regulations made it difficult for them to otherwise profit from their athletic abilities.[290] The scholarships were "tied to the player's performance of athletic services as evidenced by the fact that scholarships can be immediately canceled if the player voluntarily with-[drew] from the team or abus[ed] team rules."[291]

Regarding National Team Members, it is well known that both the NGBs and the USOPC give athletes training stipends and awards.[292] The opportunity to receive funds, awards, and endorsement deals would all count as "payment."[293] In great part, funds and awards are allocated by the USOPC in a symbiotic-type relationship.[294] For example Appendix C of the United States Curling

---

287 *Id.*

288 *See id.* at 496; *see also* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303–04 (1985).

289 Edelman & Pacella, *supra* note 32, at 496; *see also* Northwestern Univ., 362 N.L.R.B. 1350, 1363 (2015).

290 *See Northwestern Univ.*, 362 N.L.R.B. at 1363.

291 *Id.* Similarly, in *Alamo Foundation*, workers were deemed employees by the NLRB when the foundation provided them with "food, clothing, shelter, and other benefits" in exchange for their services. *Tony & Susan Alamo Found.*, 471 U.S. at 298, 301.

292 *See* Edelman & Pacella, *supra* note 32, at 496.

293 *Id.* at 496–97.

294 *See Financial Resources*, TEAM USA, https://www.teamusa.org/Team-USA-Athlete-Services/Financial-Resources [https://perma.cc/KE4N-XTZN].

Association National Team Agreement explains that funding in the form of value-in-kind allocation is received from the USOC on a specific date.[295] After review of athlete submissions, this funding is later disbursed to the athletes.[296] The Committee can revoke these funds based on violations related to conduct and performance.[297] The "work" portion of the fourth requirement is therefore fulfilled.

Ultimately, if the Board, a Regional Office, or a court applies the common law definition of employee, U.S. National Team Members of many NGBs would likely be categorized as employees of the USOPC.

### *B. Joint Employment Analysis*

Because both NGBs and the USOPC theoretically employ athletes, the Board may undertake a "joint employment" analysis to determine whether the employer designation is valid.[298] This analysis would only apply if the Board were to determine that the NGB is the primary employer of the athletes. The applicable joint employment test perfectly demonstrates the politicization of the Board; the new post-election Board established its current incarnation in 2020.[299] To accommodate the changing nature of this test, which can be modified by incoming Board members, it is important to discuss both the pre-2020 test and the post-2020 test.[300] Indeed, a future pro-labor Board may return to the old standard.[301]

#### 1. The Pre-2020 Test

The Board established the pre-2020 test in the 2015 case, *Browning Ferris Industries of California, Inc v. National Labor Relations Board.*[302] *Browning Ferris* concerned a recycling plant, Browning Ferris Industries ("BFI"), that employed sixty unionized

---

295 *See* US Curling Agreement, *supra* note 252, at 14.

296 *See id.*

297 *See id.*

298 *See* GORMAN ET AL., *supra* note 159, at 291.

299 *See NLRB Issues Joint-Employer Final Rule*, *supra* note 171.

300 *See* William N. Cooke & Frederick H. Gautschi III, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. RELS. REV. 539, 539–40 (1982).

301 *See id.*

302 *See* Browning-Ferris Indus. of Cal. v. NLRB, 362 N.L.R.B. 1599 (2015).

workers.[303] BFI contracted with Leadpoint, which supplied about 240 full- and part-time workers to sort materials, perform housekeeping duties, clean screens, and so on.[304] In its analysis, the Board began by emphasizing the broad nature of the NLRA, which provides that the term "employee" is not to be limited to employees of a particular employer, unless the NLRA explicitly states otherwise.[305] The Board also emphasized the NLRA's ultimate purpose: to encourage collective bargaining.[306] It noted, "[t]o best promote this policy, [the] joint-employer standard—to the extent permitted by the common law—should encompass the full range of employment relationships wherein meaningful collective bargaining is, in fact, possible."[307]

The Board then overruled prior precedent and articulated a new two-factor test.[308] This test analyzed whether a common law relationship existed and, if so, whether the putative joint employer shared or codetermined matters that were essential terms and conditions of employment.[309] Diverging from prior precedent, the Board would no longer require "direct and immediate" control over workers to establish a joint-employer relationship.[310] Instead it would consider both reserved and indirect control, such as through contractual provisions, as potentially sufficient evidence to establish a joint-employer relationship, regardless of whether the right to control is ever exercised.[311] However, to be a joint employer under *Browning Ferris*, there must have been at least a common law employment relationship between the parties, as well as shared or codetermined matters that are essential terms and conditions of employment, so as to facilitate meaningful bargaining.[312] After all, a Board order that an employer bargain with a union over the employment's terms and conditions would be ineffective if another party not subject to the

303 *Id.* at 1600.
304 *Id.* at 1600–01.
305 *Id.* at 1609.
306 *Id.* at 1610.
307 *Id.* at 1611.
308 *Id.* at 1613–14.
309 *Id.* at 1613.
310 *See id.* at 1614.
311 *Id.*
312 *Id.* at 1613.

order exercised the final say over a working condition or could simply override a choice negotiated in a collective-bargaining agreement.[313]

The Board found BFI a joint employer by relying on three matters, codetermined by BFI, that were "essential terms and conditions of employment."[314] One was hiring, firing, and discipline.[315] By virtue of the two parties' agreement, BFI retained the right to require Leadpoint to "meet or exceed [BFI's] own standard selection procedures and tests," requiring all applicants pass drug tests and proscribing the hiring of workers deemed by BFI ineligible for rehire.[316] BFI did not participate in Leadpoint's day-to-day hiring process, however, it was irrelevant because BFI codetermined the process's outcome by imposing specific conditions on Leadpoint's ability to make hiring decisions.[317] BFI also possessed the same unqualified right to fire.[318] Again the Board did not put much value in the actual use of that right (which occurred only twice), but instead emphasized that the outcome of those disciplinary proceedings, resulting in two employees being fired, "was preordained by BFI's ultimate right under the terms of the [a]greement to dictate who works at its facility."[319] The second matter the Board looked at was supervision, direction of work, and hours.[320] The Board found "particular importance" in BFI's unilateral control over the speed of the streams and specific sorting productivity standards.[321] Finally, the Board analyzed the matter of wages.[322] It found that BFI played a significant role in determining wages.[323] Specifically, BFI prevented Leadpoint from paying employees more than that which it paid BFI employees performing comparable work.[324] The court found these three matters

---

313 Browning-Ferris Indus. of Cal. v. NLRB, 911 F.3d 1195, 1200 (D.C. Cir. 2018).
314 *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. at 1613.
315 *Id.* at 1616.
316 *Id.*
317 *Id.*
318 *Id.*
319 *Id.*
320 *Id.*
321 *Id.*
322 *Id.* at 1617.
323 *Id.*
324 *Id.*

were adequately "shared and codetermined" such that it designated both Leadpoint and BFI as joint employers obligated to collectively bargain with the employees' labor representative.[325]

The USOPC, as demonstrated, is likely a common law employer of many NGB National Team athletes. However, if the Board determines that the NGB is the appropriate employer, the Board may undertake a joint employment analysis of the USOPC. The question would be whether the USOPC codetermines the "essential terms and conditions of employment."[326] The USOPC certainly possesses a right to "hire, fire, and discipline,"[327] or more specifically, select, deselect, and sanction the athletes who generate its revenue.[328] The USOPC By-laws clearly express this policy; the USOPC requires the NGBs to establish clear athlete, team, and team official selection procedures approved by the corporation[329] and recommend athletes, teams, and team officials for the Olympic, Paralympic, and Pan American Games teams.[330] This language illustrates the USOPC's ultimate control over athlete selection and deselection for the Olympic, Paralympic, and Pan American Games.

The ultimate source of the corporation's powers is the Ted Stevens Act.[331] The Ted Stevens Act delineated the USOPC's powers as pertaining to amateur athletics and the Olympic Games.[332] There are six powers in number, but the most relevant powers regarding the right to "hire, fire, and discipline," are the third, fifth, and sixth powers.[333] The third enumerated power is to "organize, finance, and control the representation of the United States in the competitions

---

325 *Id.* at 1618.

326 *Id.* at 1613.

327 *Id.*

328 *See* 36 U.S.C. § 220505(c).

329 "Corporation" means the United States Olympic and Paralympic Committee. *See id.* § 220501.

330 *See* U.S. OLYMPIC & PARALYMPIC BYLAWS, *supra* note 213, § 8.7.1(d).

331 *See* Will Hobson, *Senator Dianne Feinstein Calls for Changes to Olympic Sports Law to Protect Children from Abuse*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/news/sports/wp/2017/02/22/senator-dianne-feinstein-calls-for-changes-to-olympic-sports-law-to-protect-children-from-abuse/ [https://perma.cc/QF2U-RRTH].

332 *See* 36 U.S.C. § 220505(c).

333 *See id.* § 220505(c)(3), (5)–(6).

and events of the Olympic Games . . . and obtain, directly or by delegation to the appropriate national governing body, amateur representation."[334] By controlling the representation, the USOPC has ultimate authority over team selection (i.e., hiring, firing, and disciplining). Even if the USOPC often delegates these tasks to the NGBs, the USOPC *at least* shares or codetermines them. The fifth power is to "facilitate . . . the resolution of conflicts or disputes that involve any of its members and any amateur athlete . . . that arise in connection with their eligibility for and participation in the Olympic Games."[335] Since many conflicts or disputes surround an athlete's selection, deselection, and discipline, this power is indicative of the USOPC's ultimate authority over these issues.

In addition, disciplinary language is found in NGB national team agreements.[336] For example, in the USA Climbing Athlete 2021 Agreement, the U.S. Olympic Committee, together with USA Climbing's CEO and the High Performance Staff, reserve the right to discipline the athlete if he or she fails to comply with contractual provisions.[337] Disciplinary action, which is explicitly non-progressive, includes a verbal and written warning, repayment of all costs associated with a competition, suspension from the team or competition, dismissal from the team trip or training camp with the responsibility of covering travel costs, stipend reduction or forfeiture, and elimination from future USA Climbing events.[338] The USOPC also exerts control over the selection process by providing "financial assistance to any organization or association . . . in furtherance of the purposes of the corporation."[339] By providing or not providing its financial assistance to NGBs, the USOPC exerts control over the selection process. More funding can mean more incentives for

---

334 *See id.* § 220505(c)(3).

335 *See id.* § 220505(c)(5).

336 *See USA Climbing Athlete Agreement*, USA CLIMBING TEAM (2021), https://usaclimbing.org/wp-content/uploads/2021/07/2021-Athlete-Agreement-04132021.pdf [https://perma.cc/G2QG-LVAM].

337 *See id.*

338 *See id.*

339 *See* 36 U.S.C. § 220505(c)(6).

competitors to vie for placement, and reduced funding can mean fewer incentives.[340]

Supervision is another matter essential to the terms and conditions of employment. The USOPC supervises and directs the training of the athletes, both indirectly through the NGBs and directly at training camps, training centers, and in competitions.[341] This supervision is sometimes carried out virtually, such as through the USOC Elite Athlete Monitoring System.[342] If an athlete is injured, the USOPC may require them to undergo a thorough examination by a USOC doctor and the injured athlete must comply with the full rehabilitation process as prescribed by the NGB or the USOC.[343] The statutory grant for supervision and "direction of work," is found in Section 220505(c) of the Ted Stevens Act; Congress provided that the corporation may "serve as the coordinating body for amateur athletic activity in the United States directly related to international amateur athletic competition"; and "organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games."[344] Supervision and training of athletes is further engrained in the USOPC's By-laws.[345] Under the By-laws, an NGB will not be given NGB status unless it maintains and executes a "strategic plan that is capable of supporting athletes in achieving sustained competitive excellence, and in growing the sport" and maintains and implements "effective plans for successfully training Olympic, Paralympic, and Pan American Games athletes."[346] These requirements are stringent. The By-laws establish that standards and particular measures to evaluate compliance will

---

340 *See* Bria Felicien, *Team USA Announces New Women's National Team Expansion*, FANSIDED (July 25, 2019), https://highposthoops.com/2019/07/27/team-usa-announces-new-womens-national-team-trainings-showcases/ [https://perma.cc/RNX4-CHC8].

341 *See About the Colorado Springs Olympic & Paralympic Training Center*, TEAM USA, https://www.teamusa.org/about-the-usopc/olympic-paralympic-training-centers/csoptc/about [https://perma.cc/D6Y7-7EED]; *see also US Olympic & Paralympic Training Center in Colorado Springs*, VISIT COLO. SPRINGS, https://www.visitcos.com/things-to-do/history-and-heritage/landmarks/us-olympic-training-center-colorado-springs/ [https://perma.cc/S3SU-NYNC].

342 *See* USA FENCING ATHLETE AGREEMENT, add. A (2018–2019) (on file with author).

343 *Id.*

344 *See* 36 U.S.C. § 220505(c).

345 *See* U.S. OLYMPIC & PARALYMPIC BYLAWS, *supra* note 213, § 8.7.1.

346 *See id.* § 8.7.1(d).

be "set out in the corporation's NGB Certification Standards Policy."[347] This policy details very specific compliance requirements that the corporation's NGB Compliance team oversees. The NGB Compliance team may prosecute an NGB decertification action or implement a series of compliance steps for application and develop a set of recommended corporation compliance actions.[348] These indirect measures, in addition to direct supervision and training direction that the USOPC carries out, are another way the corporation supervises and directs the work of National Team Members.

Another matter constituting an essential term and condition of employment is the determination of payment. While *Browning Ferris* analyzed "wages,"[349] payment is a more appropriate category here. The USOPC "pays" athletes indirectly by funding NGBs so they may fund athletes.[350] Less funding results in lower payments for athletes, while greater funding results in greater athlete payments. In order for a U.S. Fencing National Team Member to receive financial support, the athlete must sign an annual Athlete Agreement, which includes an intent to train for the upcoming Olympic Games qualification and the completion of necessary USOC paperwork.[351] Some of the funding outlined in the agreement is Direct Athlete Support, which is financial support that the USOC provides directly.[352] The USOPC also offers United States Olympic Committee Elite Athlete Health Insurance for high achievers.[353]

The USOPC provides other types of payments as well. It "pays" athletes by altering the consideration in their agreements. For example, in October 2019, the USOPC decided to allow American athletes to publicly thank their sponsors during the Games.[354] Sponsors can issue congratulatory messages and produce generic ads that do

---

347 *See id.* § 8.7.1.

348 *See id.* § 8.19.1.

349 *See* Browning-Ferris Indus. of Cal. v. NLRB, 362 N.L.R.B. 1599, 1617 (2015).

350 *See USOPC Opens Books, Gives More Detail About Sports Funding*, ESPN (Aug. 3, 2020), https://www.espn.com/olympics/story/_/id/29588864/usopc-opens-books-gives-more-detail-sports-funding [https://perma.cc/36DD-L9UD].

351 *See* USA FENCING ATHLETE AGREEMENT, *supra* note 342, add. C.

352 *See id.*

353 *See id.*

354 *See* U.S. OLYMPIC & PARALYMPIC COMM., *supra* note 69; *see also* Dixon, *supra* note 70.

not show Olympic and national team logos.[355] They must sign a contract agreeing to penalties if they violate the terms of the new arrangement.[356] The USOPC plays a very significant role in determining payment through a combination of funding NGBs, directly funding athletes, and altering what is provided in exchange for representing the United States in the Olympics.[357] Therefore, under this pre-2020 test, National Team Members of NGBs deemed valid employers would likely be considered jointly employed by the USOPC for labor law purposes.

2. The Post-2020 Test

However, the Board issued a final rule that became effective on April 27, 2020, which changed the joint employer test.[358] The new rule returns to the agency's prior, more restrictive standard.[359] Like the employee-friendly pre-2020 test, the new rule also requires sharing or codetermining the essential terms and conditions of employment of another employer's workers.[360] However, there are several other conditions. For one, the essential terms and conditions are explicitly listed, and *at least one* must be shared or codetermined.[361] The conditions are wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.[362] To share or codetermine with regard to these terms and conditions means that the putative joint employer must not only have the right to exercise control, but must have *actually* exercised that right.[363] Second, the alleged employer must exercise substantial direct and immediate control over those terms and conditions.[364] This characterization means regular,

355 U.S. OLYMPIC & PARALYMPIC COMM., *supra* note 69.
356 *Id.*
357 *See USOPC Opens Books, Gives More Detail About Sports Funding*, ESPN (Aug. 3, 2020), https://www.espn.com/olympics/story/_/id/29588864/usopc-opens-books-gives-more-detail-sports-funding [https://perma.cc/36DD-L9UD].
358 *See NLRB Announces Final Joint Employer Rule*, MINTZ (Feb. 26, 2020), https://www.mintz.com/insights-center/viewpoints/2226/2020-02-nlrb-announces-final-joint-employer-rule [https://perma.cc/FHV7-MVQZ].
359 *See* Browning-Ferris Indus. of Cal. v. NLRB, 362 N.L.R.B. 1599, 1613–14 (2015).
360 *Id.*
361 *See NLRB Issues Joint-Employer Final Rule*, *supra* note 171.
362 29 C.F.R. § 103.40(b) (2021).
363 *Id.* § 103.40(a).
364 *Id.*

rather than sporadic, control.[365] Finally, the sharing or codetermining must meaningfully affect matters relating to the employment relationship,[366] specifically making a material difference in the relationship upon consideration of the totality of circumstances.[367] Unlike the *Browning Ferris* standard, indirect control is no longer determinative of joint-employer status but can supplement the evidence outlined above.[368]

Under this new standard, it will be more difficult, yet still possible for athletes to show that USOPC is a joint employer if the Board designates the NGB as a primary and separate employer. As discussed above, the USOPC *regularly* determines "wages," of funded athletes through Direct Athlete Support programs.[369] Even if the Board refuses to understand this funding as "wages," it still obviously "benefits"—another listed essential term and condition of employment.[370] The control over funding is regularly exercised and may be substantially direct and immediate.[371] Of course, athletes must demonstrate "direct and immediate control" that is "regular" for each NGB through financial documentation tracing the flow of funding from the USOPC to the athlete.[372] Control over funding makes a material difference in the relationship because without this funding, many, if not most, National Team athletes would discontinue training. On the other hand, the USOPC can argue that funding the NGB, which then funds the athletes, does not constitute "direct and immediate control" because the specifics of the funding process are determined by the NGB. The details of the funding process, and how specifically tailored the funding is would be highly relevant to the analysis.

---

365 *Id.* § 103.40(d).

366 *Id.* § 103.40(a).

367 *See id.*

368 *Id.*

369 *See supra* note 211 and accompanying text. *See* USA FENCING ATHLETE AGREEMENT, *supra* note 342, add. C.

370 29 C.F.R. § 103.40(c)(2).

371 *See USOPC Opens Books, Gives More Detail About Sports Funding*, USA TODAY (Aug. 3, 2020, 12:26 PM) https://www.usatoday.com/story/sports/740lympics/2020/08/03/usopc-opens-books-gives-more-detail-about-sports-funding/42095383/ [https://perma.cc/4KYA-QJFM].

372 29 C.F.R. § 103.40(d) (2021).

The USOPC likely directly determines the hours of work for some athletes, such as at the National Training Centers and NGB training facilities.[373] Again, this control makes a material difference in the relationship because athletes must relocate to a national training center or NGB training facility to train.[374] "Hiring" and "discharging" are regularly exercised activities of the USOPC when the it determines selection criteria.[375] Of course, the USOPC can argue it is not actually involved in hiring and discharging, but rather setting *minimum standards* through qualification requirements. If minimum standards do not constitute actual hiring and discharging, or exercising "substantial direct and immediate control," then those terms or conditions fail the analysis. Discipline is apparently sometimes directly and sometimes indirectly controlled because actual USOPC involvement in discipline of National Team Members appears to vary across NGBs.[376] Therefore, discipline might be harder to prove, since indirect contractual rights are insufficient under the new rule.[377] Finally, the USOPC directly and regularly exercises material supervision and direction over athletes at national training centers or through virtual and remote methods such as the Elite Athlete Monitoring System.[378] This system allows the USOPC to make funding and other decisions based on "athlete injuries, illnesses and fitness."[379] It would be up to the athletes to show such remote systems are regularly used for supervision and direction to affect the athletes in a material way.[380]

---

373 *See About the Colorado Springs Olympic & Paralympic Training Center*, *supra* note 341; *see also US Olympic & Paralympic Training Center in Colorado Springs*, *supra* note 341.

374 *See About the U.S. Olympic & Paralympic Committee*, TEAM USA, https://www.teamusa.org/About-the-USOPC/Olympic-Paralympic-Training-Centers/CSOPTC/About [https://perma.cc/JM28-8Z22].

375 *See* U.S. OLYMPIC & PARALYMPIC BYLAWS, *supra* note 213, § 8.7.1.(d).

376 *See 2021 USA Climbing Athlete Agreement*, *supra* note 336; *see also* 36 U.S.C. § 220505(c)(3).

377 *See* 29 C.F.R. § 103.40(a) (2021).

378 *See* USA FENCING ATHLETE AGREEMENT, *supra* note 342.

379 *See id*.

380 *See* Morgan Tonafon, *The NLRB's Final Joint-Employer Rule Will Soon Be in Effect*, JDSUPRA (Apr. 24, 2020), https://www.jdsupra.com/legalnews/the-nlrb-s-final-joint-employer-rule-34561/.

To summarize, the new test raises multiple questions. First, does funding constitute "wages" or "benefits," as listed in the new rule? Second, is USOPC funding directly and immediately controlled? Third, does the USOPC exercise sufficient control over hiring and discharging? Fourth, are hours of work, discipline, supervision, and direction directly and immediately controlled for each NGB's National Team Members? Therefore, it is much harder for National Team Members to satisfy the new test. In the event the Board rules that NGBs are primary and separate employers from the USOPC, there are fewer sports that can satisfy this test than under the pre-2020 test.

### *C. What Is the Appropriate Bargaining Unit?*

Regarding the appropriate bargaining unit, the Board may or may not accept a bargaining unit composed of all athletes who are National Team Members of any NGB. It may be advantageous for athletes to apply for certification under such a broad bargaining unit because their strike-power is particularly powerful when multiple sports are involved. The IOC's brand is largely dependent on hosting numerous sports at the same time.[381] As a result, the threat of National Team Members striking who are part of an NGB such as the USAG is less threatening to the USOPC than the threat of a multi-sport unit striking. On the other hand, athletes in the top revenue-generating sports, such as basketball, may prefer to unionize as a separate unit. They may prioritize a favorable collective bargaining agreement that features negotiated working conditions as good as, if not better than, the NBA's current agreement. If they negotiate as part of a unit with less commercially valuable sports, the result may be a weaker bargaining position. Agreeing to worse working conditions than the NBA would set bad precedent for unionized team sports generally. Additionally, a large unit with employees of differing skills and interests may create more conflicts of interest and strains on the union's ability to represent all unit employees

[381] *About the Olympic Games*, TOKYO 2020, https://tokyo2020.org/en/games/olympic-games-about/ [https://perma.cc/FAA8-XUXE].

fairly.[382] In smaller and more homogenous units, the individual worker is more effectively represented.[383]

If the USOPC and the bargaining representative cannot mutually agree on a bargaining unit, the Regional Director would work with the parties to define the unit.[384] Section 9b of the NLRA states that in order to assure employees have the fullest freedom to exercise rights guaranteed by the NLRA, the Board shall decide whether the employer unit, craft unit, plant unit, or a subdivision thereof is appropriate for the purposes of collective bargaining.[385] The courts have interpreted this provision to mean the Board must only delineate some appropriate bargaining unit; not the *most* appropriate or optimal.[386] The Board may say that National Team Members of an NGB are the bargaining unit, or that it is some other division, such as a class defined by an amount range of revenue generated during an Olympic cycle.[387] It is up to the union to carefully demonstrate why a particular bargaining unit *cannot* be an appropriate bargaining unit.[388]

A bargaining representative seeking a larger bargaining unit can make a strong argument in front of the Board. In determining whether a group of employees should be allowed to act as a bargaining unit, the Board uses a "community of interest" analysis.[389] A bargaining unit's members share a "community of interest" when they share an interest in wages, hours, and other conditions of employment.[390] The Board considers the following factors: (1) similarity in skills, interests, duties, and working conditions; (2) functional integration of the plant, including interchange and contact among employees; (3) the employer's organizational and supervisory

382 *See* GORMAN ET AL., *supra* note 159, at 262.
383 *See id*.
384 *See id*. at 263.
385 *See* National Labor Relations Act § 9(b), 29 U.S.C. § 159(b).
386 *See* GORMAN ET AL., *supra* note 159, at 261.
387 For example, high-revenue generating sports in one bargaining unit and low-revenue generating sports in another.
388 *See* Blue Man Vegas, LLC v. NLRB, 529 F.3d 417, 421 (2008).
389 NLRB v. Catherine McAuley Health Ctr., 885 F.2d 341, 344–45 (6th Cir. 1989).
390 *See id.* at 345.

structure; (4) bargaining history; and (5) extent of union organization among the employees.[391]

Certainly, National Team athletes can argue their wages, hours, and working conditions are all determined by the USOPC, irrespective of sport. Looking at the five factors, National Team Members are all elite athletes sharing a similarity in elite athletic skills, interests, training duties, and working conditions. Even though they only make official contact with each other at the Games, National Team Members need each other to put on Olympic Games that encompass many sports. The Olympics would not be the Olympics with only basketball or even basketball, tennis, and volleyball; all the sports are functionally integrated together. The USOPC's organizational and supervisory structure applies universally to all NGBs, as demonstrated by the Ted Stevens Act, USOPC By-laws, and practical organization and supervision. While there is no bargaining history or union organization among the athletes, if they begin to organize and bargain, these factors would be in their favor.

The counterargument may be convincing as well. The USOPC may argue the interests and working conditions of athletes differ drastically among different sports due to varying scales of revenue-generation and myriad levels of control exerted on the athletes. One can argue there is no functional integration among sports because athletes perform in separate events and the supervisory structure differs between sports. Ultimately, since 1960, the Board has preferred smaller units because they assure "greater homogeneity of employee interest" and maximize "employee self-determination."[392]

### *D. Independent Contractor Exemption to the NLRA*

Perhaps the most significant hurdle to unionization is the independent contractor exemption. The NLRA explicitly excludes independent contractors.[393] This analysis has been a subject of changing case law.[394] There are two important tests to consider. The more

---

391 *Id.*

392 GORMAN ET AL., *supra* note 159, at 263.

393 *See* National Labor Relations Act § 2(3), 29 U.S.C. § 152(3).

394 *See NLRB Invites Briefs Regarding Independent Contractor Standard*, NLRB (Dec. 27, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-invites-briefs-regarding-independent-contractor-standard [https://perma.cc/ZNQ3-DZHY].

employer-friendly test, re-adopted on January 25, 2019, makes it easier to establish independent contractor relationships.[395] The older and more employee-friendly test makes it harder to establish independent contractor relationships.[396] This test pre-dates January 25, 2019, but might be adopted in the future by a more labor-friendly Board.[397] It is important to understand both tests because the Board may make rule changes in the future that impact the analysis.

For the older, employee-friendly test, the Board and courts considered ten factors pertaining to employer control.[398] Additionally, they analyzed a putative contractor's "entrepreneurial opportunity," but only when "some factors cut one way and some the other."[399] No factor is decisive and "all of the incidents of the relationship" are assessed and weighed.[400] Regarding the "entrepreneurial opportunity" tiebreaker, the courts look at whether the putative contractor has: (1) a realistic ability to work for other companies; (2) a proprietary or ownership interest in one's work; and (3) control over

---

395 *See* SuperShuttle DFW, Inc., 367 N.L.R.B. No.75, at 7 (2019).

396 *See* FedEx Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009).

397 *Id.*

398 *See* Steven M. Swirsky, *NLRB Replaces Its Test for Distinguishing Between Employees and Independent Contractors—Returns to Pre-2014 Common Law Based Test*, EPSTEIN BECKER GREEN (Jan. 28, 2019), https://www.managementmemo.com/2019/01/28/nlrb-replaces-its-test-for-distinguishing-between-employees-and-independent-contractors-returns-to-pre-2014-common-law-based-test/ [https://perma.cc/63YC-PWS4].

399 *See* Chris Henry, *National Labor Relations Board Reverts to Previous Independent Contractor Standard*, TRUCKLOAD INDEXES (Mar. 19, 2019), https://www.freightwaves.com/news/national-labor-relations-board-reverts-to-previous-independent-contractor-standard [https://perma.cc/C7SJ-V9J8]. The ten non-exhaustive factors are: (1) the extent of control the master may exercise over the details of work; (2) whether or not the employee is engaged in a distinct occupation or business; (3) the kind of occupation, specifically whether the work is usually done under the direction of the employer in that location or by a specialist without supervisions; (4) the skill required in the particular occupation; (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time the person is employed; (7) the method and timing of payment; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating the relation of master and servant; and (10) whether the principal is in business. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. L. INST. 1958); *see also FedEx Home Delivery*, 563 F.3d at 506.

400 *FedEx Home Delivery*, 563 F.3d at 496.

important business decisions.[401] In *FedEx Home Delivery v. National Labor Relations Board*, the court cited *Corporate Express Delivery Systems v. National Labor Relations Board*, which concluded that where a taxi company barred its taxi drivers from employing others to do the company's work and using their own vehicles for other jobs, *and* the ten factors were inconclusive, the drivers lacked all entrepreneurial opportunity.[402] Therefore, the taxi drivers were deemed employees and not independent contractors.[403]

In applying the common law factors to National Team Members, some factors favor independent contractor relationships and others do not. Some of those factors vary for *different* national teams. The extent of control that the supervisor may exercise over the details of the work differs for the USAG, for example, as opposed to USA Fencing. USA gymnasts are controlled by USAG and USOPC coaches and trainers in a very stringent manner.[404] On the other hand, USA fencers generally train at private fencing clubs with private coaches that are not employed by the USA Fencing National Team or by the USOPC.[405] The second factor—whether workers are engaged in a distinct occupation or business—varies as to whether the work is usually done under an employer's direction or instead by a specialist without supervision.[406] The fifth factor—whether the employer supplies the instrumentalities, tools, and the place of work for the person doing the work—varies for different national teams.[407] The USAG likely supplies the equipment and environment necessary for gymnastic training.[408] However, USA Fencing supplies very little of that environment, or at least does so only sporadically, because fencers generally train at private clubs sanctioned by

---

401 *See* Allen Smith, *NLRB Changes Definition of 'Independent Contractor*,*'* SHRM (Jan. 29, 2019), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/nlrb-changes-definition-of-independent-contractor.aspx [https://perma.cc/WN48-RSPB].

402 *See FedEx Home Delivery*, 563 F.3d at 498.

403 *Id.*

404 *See* Edelman & Pacella, *supra* note 32, at 498.

405 *See, e.g.*, *Welcome to Fencers Club*, FENCERS CLUB, http://fencersclub.org/about/welcome/ [https://perma.cc/K678-FM6B].

406 *See id*.

407 *See, e.g.*, Edelman & Pacella, *supra* note 32, at 498.

408 *See id*.

USA Fencing that are not funded by the USOPC, whether directly or indirectly.[409]

The fourth factor—the skill required in the particular occupation—probably favors an independent contractor relationship because athletes, regardless of USOPC supervision, have a high level of athletic skill and ability.[410] The seventh factor—method of payment—also would favor independent contracting because the method of payment is more related to "doing the job" rather than "time."[411] Athletes are generally funded based on performance in competition, not hours in training.[412] The tenth factor—whether the principal is in business—may favor an independent contractor relationship. The Ted Stevens Act explicitly creates the USOPC to fulfill various objectives, yet it restricts the corporation from engaging "in business for profit."[413] Legally, if the USOPC does not engage in business "for profit," then the USOPC can try to argue that they are "not in business."[414]

The sixth factor—duration of employment—favors athletes. They are employed by the USOPC in that their labor is in pursuit of Olympic achievement through USOPC funding as National Team Members for many years and, for some athletes, for longer than a decade.[415] The eighth factor—whether the work is part of the employer's regular business—favors athletes because the work is absolutely part of the regular business of the employer. In fact, the work is quite literally the central product the USOPC sells. The ninth factor—whether the parties believe they are creating the relation of master and servant—may favor athletes. Assessing the tremendous financial revenue that the USOPC acquires due to the labor of their

---

409 *See Welcome to Fencers Club*, *supra* note 405.

410 Generally, low skill is more amenable to an employer-employee relationship and high skill is more conducive to an independent contracting relationship. *See* Ariz. Republic, 349 N.L.R.B. 1040, 1046 (2007).

411 *See* Villalpando v. Exel Direct Inc., No. 12-cv-04137, 2015 U.S. Dist. LEXIS 118065, at *142 (N.D. Cal. Sept. 3, 2015).

412 *See* USA FENCING ATHLETE AGREEMENT, *supra* note 342, add. C.

413 36 U.S.C. § 220507.

414 *See id.*

415 *See Team USA Fund*, TEAM USA, https://www.teamusa.org/us-olympic-and-paralympic-foundation/team-usa-fund [https://perma.cc/CDF9-YMUN].

athletes, and the little athletes receive in return, one can argue that belief in the creation of a master-servant relationship exists.[416]

The ten factors clearly conflict. Depending on how a court or the Board weighs each factor, a court using the employee-friendly pre-2020 test may use "entrepreneurial opportunity" as a determinative factor. Although many aspects of Olympic athletic training are akin to the entrepreneurial spirit, the nature of the USOPC's dominance of amateur athletics in the United States give some athletes little-to-no "significant entrepreneurial opportunity for gain or loss."[417]

In *Corporate Express*, the court pointed to the full-time cook and executive, who were deemed employees—not independent contractors—because they did not have the adequate degree of economic risk-taking with a corresponding opportunity to profit from "working smarter, not just harder."[418] On the other hand, a lawn-care provider is an independent contractor.[419] In *Corporate Express*, the court found that owner-operators of delivery vehicles could neither use their vehicles for other jobs nor hire someone to drive their route.[420] Therefore, they lacked all entrepreneurial opportunity.[421]

Olympic athletes and hopefuls in many national teams are under monopolistic control by the USOPC and do not have any degree of opportunity to profit from their skills.[422] USA Basketball Players can use their skills to work for other employers, such as the NBA. However, National Team Members in smaller sports find little opportunity away from events directly sanctioned by the USOPC or indirectly sanctioned by the USOPC through the sport's NGB.[423] As a result, many NGB's National Team Members can argue they are not independent contractors due to their lack of "significant entrepreneurial opportunity for gain or loss," at least the aspect of entrepreneurial opportunity pertaining to the acquisition of outside work.

---

416 *See* Edelman & Pacella, *supra* note 32, at 498–99.

417 *See* Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (2002) (internal citations omitted).

418 *See id.*

419 *Id.*

420 *Id.* at 780–81.

421 *Id.*

422 *See* Alexander, *supra* note 30.

423 *See How Olympic Athletes Make a Living*, *supra* note 22.

On the other hand, the USOPC may argue that an athlete's job is first and foremost to "work smarter, not just harder" and that an athlete is a great example of the "significant entrepreneurial opportunity for gain or loss" because he or she is compensated for discovering creative ways to score and win.

Under the Board's new employer-friendly test, athletes are more likely to be deemed independent contractors and not employees of the USOPC. The new test does not affect the ten common law factors, but alters the "entrepreneurial opportunity" tiebreaker.[424] Under the new employer-friendly test, entrepreneurial opportunity, like employer control, is an underlying principle to evaluate the overall effect of the common law factors on a putative contractor's independence to pursue economic gain.[425] This alteration decreases the strength of the relationship characteristic from a "super-factor" to an underlying principle.[426] In the case that established the new test, *SuperShuttle DFW, Inc.*, the Board interpreted "entrepreneurial opportunity" to mean entrepreneurial *potential*.[427] The Board found drivers of a SuperShuttle to be independent contractors based upon their "freedom to keep all fares they collect, coupled with their unfettered freedom to work whenever they want."[428] The most relevant factors in the case were extent of control, method of payment,[429] and the potential to generate more revenue through the calculated choices each driver makes.[430]

In the case of National Team Members, a court applying the new employer-friendly test would be unable to disregard the reality that many athletes do not have the independence to use their skillset for economic gain for another employer due to the monopolistic control that the USOPC exerts over amateur sports.[431] Certainly, some athletes, such as basketball players and star swimmers have great potential to acquire lucrative sponsorships resulting from the

---

424 *See* SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, at 8 (Jan. 25, 2019).
425 *See id.* at 9.
426 *See id.*
427 *See id.* at 7.
428 *See id.* at 13.
429 *See id.* at 12.
430 *See id.* at 7.
431 *See* Alexander, *supra* note 30.

calculated decisions during training, which lead to medal-winning Olympic performances.[432] Many Olympic athletes in sports with less popular appeal are unable to use their athletic abilities professionally within another sports body. In any case, a tribunal would likely find that the USOPC exerts control, under the ten control factors, over athletes in many NGBs. Again, depending on the court or Board's analysis, the independent contractor exemption is likely to exclude some athletes from unionizing, but unlikely to exclude others, depending on how the USOPC controls each NGB's National Team Members.

One noteworthy procedural aspect is differing standard deference courts give to agency decisions for questions concerning an independent contractor designation. Because the Board has no jurisdiction over independent contractors whatsoever, courts will only uphold a Board determination if they find the Board "made a choice between two fairly conflicting views."[433] This doctrine favors appellants in situations where the Board makes decisions with which federal courts sharply disagree due to the court's expansive standard of review to change the agency's decision.[434]

### *E. The Board May Still Decline to Assert Jurisdiction Regardless of the Employer-Employee Analysis*

Even if the Board deems athletes to be statutory employees, there are notable exceptions to the NLRA aside from the independent contractor exemption. One way to disqualify employees is by deeming them "temporary employees."[435] Temporary employees must be employed for one job only or for a set duration.[436] In addition, they must be notified that they should not have a substantial expectation of continued employment.[437] The "temporary employees" doctrine is interpreted in a very narrow fashion.[438] For example,

---

[432] *See How Olympic Athletes Make a Living*, *supra* note 22.

[433] *See* FedEx Home Delivery v. NLRB, 563 F.3d 492, 496 (2009) (internal citations omitted).

[434] *See id.*

[435] *See* Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1099 (2016).

[436] *Id.*

[437] Northwestern Univ., 362 N.L.R.B. 1350, 1366 (2015).

[438] *See Trs. of Columbia Univ.*, 364 N.L.R.B. at 1120–21.

one court found a scholarship athlete of four years had been playing for too long to be a "temporary employee."[439] Another exemplary case is the unionization effort of a group of student janitors at an arts school.[440] A court determined they were temporary employees, partially because they worked only twenty hours per week and frequently resigned[441] to focus on their studies.[442] Olympic athletes, on the other hand, do not have a set duration to their employment.[443] They regularly exert themselves over twenty hours per week and rarely resign.[444] Qualifying for the Olympics requires long-term dedication and sacrifice. Further, the USOPC does not provide a more primary service, such as the education the art school provided the student janitors.[445]

There are two other ways the Board can still decline jurisdiction. First, the Board can decline jurisdiction over any group of employees if it believes asserting jurisdiction does not promote stability in labor relations or fundamentally interferes with broader national policy.[446] One of the ways the Board used the first declination is in the Northwestern football players unionization petition discussed above.[447] The Board ruled that granting unionization would upset the on-field balance of power among Northwestern's football team and the college football teams of the other thirteen public colleges that play in the "Big Ten."[448] The other thirteen schools were public and their athletes would have been unable to apply for unionization under the NLRA.[449] As a result, incoming student-athletes would have presumably flocked to Northwestern and ignored the other

---

439 *See Northwestern Univ.*, 362 N.L.R.B. at 1366.

440 *See id.* at 1353 n.11; *see also* S.F. Art Inst., 226 N.L.R.B. 1251, 1252 (1976).

441 *See S.F. Art Inst.*, 226 N.L.R.B. at 1251.

442 *See id.* at 1252.

443 Jessica Booth, *How Many Hours Do Olympic Athletes Practice? Prepare Your Jaw to Drop*, HELLOGIGGLES (Feb. 12, 2018, 7:57 PM), https://hellogiggles.com/awards-events/olympics/how-many-hours-do-olympic-athletes-practice/ [https://perma.cc/WFV5-SBJH].

444 *See id.*

445 *See Northwestern Univ.*, 362 N.L.R.B. at 1367.

446 *See* Edelman & Pacella, *supra* note 32, at 499.

447 *See Northwestern Univ.*, 362 N.L.R.B. at 1350.

448 *See* Edelman & Pacella, *supra* note 32, at 499–500; *see also Northwestern Univ.*, 362 N.L.R.B. at 1354.

449 *See Northwestern Univ.*, 362 N.L.R.B. at 1354.

ununionized teams in the conference. The Board noted this was their only basis for declining jurisdiction.[450] In fact, the Board explicitly emphasized that their ruling had no bearing on alternative situations where unions petition on behalf of all Football Bowl Subdivision scholarship football players.[451] The holding was limited "to the particular circumstances of this case,"[452] which concerned "jurisdiction in this single-team case."[453]

However, *Northwestern* is distinguishable from a National Team Member unionization effort. For National Team Members in the United States, there would be no instability in labor relations because the USOPC is, for many sports, the entire labor market.[454] Even if the Board takes the radical step of viewing the labor market as global—a view it has never adopted—there would be no real instability because athletes do not generally cross borders to represent other countries.[455] There is a small number of athletes who have done so (including the author of this Note), but the number of dual-citizens is too small to create instability in labor relations.[456]

The second exclusion is fundamental interference with broader national policy, which the Board generally applies to cases concerning foreign policy.[457] For example, the Board declined to assert jurisdiction over American employees physically based in controlled territories out of concern for the impact on American foreign relations with those controlled territories.[458] In the present case, however, foreign policy would not be affected in this way. Counsel for the USOPC may try to argue otherwise, asserting that the unionization of Team USA athletes would negatively affect the IOC's relationship with the USOPC. However, this argument would probably

---

450 *See id.*

451 *See id.* at 1355.

452 *Id.* at 1350.

453 *Id.* at 1354.

454 *See* Edelman & Pacella, *supra* note 32, at 497.

455 *See id.* at 500.

456 Brandon Wiggins, *Why Some Olympians Can Compete for Countries They Are Not From*, INSIDER (Feb. 23, 2018, 1:39 PM), https://www.businessinsider.com/why-some-olympic-athletes-have-competed-for-multiple-countries-2018-2 [https://perma.cc/97RP-HF3Y].

457 *See* Edelman & Pacella, *supra* note 32, at 499.

458 *See id.*; *see also* Contract Servs., Inc., 202 N.L.R.B. 862, 865 (1973).

be irrelevant to the broader national policy exclusion because the Board excludes based on broader *American* national policy. The text of the NLRA is evidence that broader American national policy encourages collective bargaining.[459]

A more innovative argument the USOPC may assert is that the United States has a broader national policy in increasing viewership in the Games that unionization would harm.[460] This argument would be premised on the idea that viewers watch the Olympics because they are interested in watching unpaid amateur athletes; courts have accepted this line of reasoning in NCAA antitrust cases.[461] The Board would likely reject this argument because there is no known broader national policy to increase viewership in the Games. The Ted Stevens Act is concerned with increasing American *participation* in athletics, not necessarily *viewership*.[462] This legislative language indicates that Congress did not intend the USOPC to concern itself with "consumer demand."[463] And even if there is a legislative intent to cater to "consumer demand," the connection between consumer demand and viewership of unpaid athletes is weak.[464] Most Olympians are professionals in the sense that they are compensated by other employers and sponsors, even if they do not receive direct compensation from National Olympic Committees.[465] Viewers know this and watch in large numbers every Olympic cycle.[466] As a result, it would be difficult to demonstrate that collective bargaining for direct compensation would weaken the already diluted brand of Olympic "amateurism" in viewers' eyes.

---

459 *See* National Labor Relations Act § 1, 29 U.S.C. § 151.

460 *See* 36 U.S.C. § 220503.

461 *See In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap. Antitrust Litig., 958 F.3d 1239, 1246 (9th Cir. 2020).

462 *See* 36 U.S.C. § 220503.

463 *See id.*

464 *See* Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, ATLANTIC (July 25, 2012), https://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/ [https://perma.cc/MUN9-DAV3].

465 *See id.*

466 *See* Scott Roxborough, *Rio Olympics Worldwide Audience to Top 3.5 Billion, IOC Estimates*, HOLLYWOOD REP. (Aug. 18, 2016, 5:12 AM), https://www.hollywoodreporter.com/news/rio-olympics-worldwide-audience-top-920526 [https://perma.cc/88QM-QGJ4].

All in all, the Board has plenty of policy reasons to exert jurisdiction. The purpose of the NLRA is to protect weak employees against powerful employers.[467] In this situation, there exists a weak party of glorified, low-income workers that are financially exploited by the USOPC.[468] Unionization is a way for National Team Members of USOPC NGBs to bargain for a better structural support system and fairer compensation mechanisms.

## CONCLUSION

The Board should accept a unionization bid for National Team Members of Olympic sports that qualify for unionization as "employees" under the NLRA. Unionization would help National Team Members improve their compensation and structural support systems. Unionizing promises a high likelihood of success for many NGB athletes, especially considering the obstacles present through other legal options. Unfortunately, many people balk at the idea of economically empowering U.S. Olympic athletes. Yet, no one questions the patriotism of military personnel because they receive payment for their services. No one questions the patriotism of IOC and USOPC executives because they earn lucrative salaries.[469] So how can people question the patriotism of athletes seeking compensation for the services they provide? Doing so is nothing but veiled advocacy for increasing the wealth of USOPC and IOC executives. As Mark Cuban said on the issue, "nothing is more American than getting paid for your labor."[470] Americans should support any effort by athletes to improve their lot considering the quadrennial thrills, inspiration, and pride they provide.

Collective bargaining can help achieve a better structural support system, benefits, and compensation. The main obstacles to unionization for some NGBs' National Team Members include the "right of control" common law employee requirement as part of the Board's analysis of whether National Team Members are employees of the USOPC. Another obstacle is the joint employment analysis,

---

467 *See* National Labor Relations Act § 1, 29 U.S.C. § 151.
468 *See* Edelman & Pacella, *supra* note 32, at 500.
469 *See* Hobson, *supra* note 223.
470 *See* Cuban, *supra* note 23.

which applies if the NGB is deemed a separate primary employer from the USOPC. Even if some NGBs' National Team Members qualify under this analysis, they must still survive the independent contractor exemption, likely excluding some NGBs' National Team Members. The exemption would be due to the USOPC's lack of adequate control of athletes, as evaluated through the ten non-exhaustive common law factors for determining independent contractor status. Ultimately, some NGBs' National Team Members may be able to hurdle these obstacles, allowing for collective bargaining with the USOPC.