THE BILLION-DOLLAR WORKFORCE: BUSINESS AND TAX IMPLICATIONS OF STUDENT-ATHLETE EMPLOYMENT

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I. INTRODUCTION

Whether college athletes qualify as employees under the Fair Labor Standards Act (FLSA) has become a critical labor law issue as commercialization has become the norm in collegiate athletics, where the National Collegiate Athletic Association (NCAA) and member institutions stand to profit substantially from student-athletes.[1]

In *Johnson v. National Collegiate Athletic Association*, the Third Circuit rejected amateurism as a categorical defense to FLSA coverage and held that college athletes may be employees when they "(a) perform services for another party, (b) 'necessarily and primarily for the [other party's] benefit,' (c) under that party's control or right of control, and (d) in return for 'express' or 'implied' compensation or 'in-kind benefits,'" though the ultimate question remains whether the cumulative circumstances reveal the economic reality of an employer–employee relationship.[2] The court in *Johnson* rejected the NCAA's amateurism defense to FLSA coverage, splitting with *Berger v. National Collegiate Athletic Association*, which held as a matter of law that college athletes are not employees because the "long-standing tradition" of amateurism "defines the economic reality of the relationship between student athletes and their schools," and aligning instead with *Dawson v. National Collegiate Athletic Association*, in which the Ninth Circuit expressly refused to adopt *Berger*'s premises and rested its own dismissal on the narrower ground that the NCAA and Pac-12 function as regulators rather than employers, leaving open whether the athlete's school employed him.[3]

The Third Circuit's decision in *Johnson* correctly applied the established FLSA doctrine to expose contradictions in college athletics' amateur model, and despite anticipated university resistance, the resulting business and tax implications demonstrate the need for a systematic transformation into a transparent commercial enterprise with employed student-athletes. That reading applies the Supreme Court's economic realities test from *Tony & Susan Alamo Foundation v. Secretary of Labor*, aligns with the Court's rejection of circular amateurism defenses in *National Collegiate Athletic Association v. Alston*, and focuses on commercial reality rather than institutional labels.[4] The

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1. Christopher S. Bouriat et al., *Third Circuit Holds That NCAA Athletes Can Be Considered Employees Under FLSA*, REED SMITH LLP (July 12, 2024), https://www.reedsmith.com/en/perspectives/2024/07/third-circuit-holds-that-ncaa-athletes-employees-under-flsa/.

2. Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163, 180–82 (3d Cir. 2024).

3. *Id.* at 181–82; Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 907, 908 n.2, 910–11 (9th Cir. 2019); Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 291, 293 (7th Cir. 2016) (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984)).

4. Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985); *see* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 109 (2021) (Kavanaugh, J., concurring).

FLSA's broad definitions turn employee status on economic reality rather than formal employment designations.[5]

Employee classification would impose major operational and financial obligations on universities: federal employment tax compliance, including income tax withholding and Social Security contributions, alongside existing name, image, and likeness (NIL) compensation frameworks and Title IX requirements.[6] These obligations would reshape athletic departments' financial and administrative responsibilities and accelerate the shift toward a more regulated and transparent system of athlete compensation.[7]

This Note traces the commercial evolution of college athletics, analyzes the facts, posture, and reasoning in *Johnson*, explains why the Third Circuit correctly applied Supreme Court precedent, examines the business and tax consequences for universities, and predicts how the Court might resolve the circuit split.[8]

II. THE TRANSFORMATION OF COLLEGIATE ATHLETICS

A. Amateur Activity to Multibillion-Dollar Enterprise

Universities exercise systematic control over student-athletes' daily lives while those athletes generate substantial economic value for their institutions, a dynamic suggesting an employment relationship rather than a student–university relationship.[9] Collegiate athletics operates in markets, including collegiate education services, where schools compete for recruits, and in licensing opportunities, where student-athletes profit from their names, images, and likenesses.[10] The NCAA's March Madness broadcast contract alone generates over one billion dollars annually.[11]

By the early 1980s, the NCAA's control over broadcasting drew antitrust scrutiny, and the Supreme Court held in *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma* that the NCAA's television plan operated as horizontal price fixing and output

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5. 29 U.S.C. § 203(e)(1); *Tony & Susan Alamo Found.*, 471 U.S. at 301.

6. *See* 20 U.S.C. § 1681; 26 U.S.C. §§ 3111(a)–(b), 3401; In re Coll. Athlete NIL Litig., 803 F. Supp. 3d 959, 975–76, 1010 (N.D. Cal. 2025) (describing the settlement's revenue-sharing pool and limits on third-party NIL payments, and noting that schools remain free to allocate benefits and compensation in compliance with Title IX to the extent it governs).

7. Julia Licona, *NCAA Compliance: Changes to Agreed-Upon Procedures Impact Finance Reporting*, CLIFTONLARSONALLEN LLP (CLA) (Aug. 19, 2026), https://www.claconnect.com/en/resources/articles/25/ncaa-compliance-changes-to-agreed-upon-procedures-impact-finance-reporting/.

8. *See* Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163, 180–81 (3d Cir. 2024).

9. John Wolohan, *A Reexamination of College Athletes: Are Athletes Students or Employees?*, 53 U. MEM. L. REV. 835, 882–83 (2023).

10. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1056–57 (9th Cir. 2015).

11. Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 79 (2021).

limitation, restricting the number of games member institutions could broadcast and dictating their terms.[12] Commercial interests in college athletics had grown large enough to trigger federal antitrust intervention.[13]

That reality departs sharply from college athletics' amateur origins. After the 1953 *University of Denver v. Nemeth* decision classified a football player as an employee entitled to workers' compensation, the NCAA created and mandated the term "student-athlete" to forestall future judicial recognition of athletes as employees.[14] Recent NIL and employment classification challenges have exposed the tension between the NCAA's amateurism rationale and the commercial reality of Division I athletics, and commentators argue that college athletes satisfy the definition of "employee" under both the common law right-to-control test and the economic realities test because they render services under institutional control in exchange for compensation.[15]

B. Legal Challenges to the Compensation Restrictions

Compensation restrictions faced mounting legal challenges as the NCAA evolved from its founding principles of amateurism into a "massive business," and *Board of Regents* opened the door by establishing that NCAA activities are subject to antitrust scrutiny.[16] Federal courts have since recognized that NCAA student-athlete transactions are commercial relationships subject to antitrust scrutiny, rejecting amateurism defenses characterizing them as purely educational.[17] NIL rights marked a further shift, as impending state legislation pushed the NCAA to adopt an interim policy, effective July 1, 2021, permitting college athletes to profit from endorsements, autograph sales, and public appearances, all of which the NCAA had

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12. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 99–100 (1984).

13. *See id.* at 111–13.

14. Robert A. McCormick & Amy C. McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 83–85 (2006); *see* Univ. of Denver v. Nemeth, 257 P.2d 423, 427–28 (Colo. 1953) (upholding a workers' compensation award to a student employee whose paid campus job was contingent on playing football, and whose injury therefore arose out of that employment).

15. Alexandra K. Gilchrist, Note, *A Field of [Employment] Dreams: Advocating for the Treatment of Student-Athletes as Employees in Iowa*, 110 IOWA L. REV. 867, 881–83 (2025); Wolohan, *supra* note 9, at 858, 864–66 (discussing Justice Kavanaugh's concurrence in *Alston* and the district court's rejection of the NCAA's amateurism defense in Johnson v. Nat'l Collegiate Athletic Ass'n, 556 F. Supp. 3d 491 (E.D. Pa. 2021), *aff'd in part, vacated in part, remanded*, 108 F.4th 163 (3d Cir. 2024)).

16. *Alston*, 594 U.S. at 79–80; Wolohan, *supra* note 9, at 864–65; *see Bd. of Regents*, 468 U.S. at 100–01 (finding NCAA's television plan "horizontal price fixing and output limitation").

17. *Alston*, 594 U.S. at 107–08 (Kavanaugh, J., concurring); Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 341 (7th Cir. 2012) (finding NCAA student-athlete transactions "commercial in nature").

previously prohibited.[18] The resulting circuit split on FLSA classification created the doctrinal conflict *Johnson* addresses.[19]

III. FACTS AND PROCEDURAL POSTURE OF THE *JOHNSON* CASE

A. Factual Record Demonstrating Commercial Characteristics

The factual record in *Johnson* demonstrates the commercial characteristics supporting employee classification under the established FLSA doctrine. The plaintiffs, former Division I athletes from multiple universities, alleged that their athletic participation constituted compensable work requiring minimum wage payments under federal law.[20] Lead plaintiff Ralph Johnson, a Villanova University football player, alleged that his mandatory athletic obligations—including required weekday activities from 5:45 a.m. to 11:30 a.m. during football season—constituted compensable work under the FLSA because these commitments locked him out of hundreds of available classes and prevented him from enrolling in prerequisites for certain academic degrees.[21] Studies document that Division I athletes far exceed the NCAA's twenty-hour weekly limit for countable activities, with football players devoting 40 to 50 hours per week and Pac-12 athletes averaging 50 hours.[22]

The commercial structure of the university–athlete relationship revealed characteristics inconsistent with traditional educational activities.[23] Universities generated substantial revenue through television contracts, ticket sales, merchandise licensing, and conference distributions, while athletes received scholarships and benefits valued below the market rate for their services.[24] Athletes performed under comprehensive institutional control, following detailed practice

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18. Wolohan, *supra* note 9, at 865–66; *see* Cal. Educ. Code § 67456(a) (barring schools and athletic associations from preventing athletes from earning compensation for the use of their name, image, likeness, or athletic reputation, operative Sept. 1, 2021); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1055 (9th Cir. 2015) (describing the prior prohibition on athletes receiving pay from boosters, endorsers, or NIL licensors).

19. Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163, 181–82 (3d Cir. 2024).

20. *Id.* at 167 ("Appellees contend that they are entitled to minimum wage under the FLSA for time spent on their sport-related activities.").

21. *Id.* at 174.

22. Allen Sack & Gerald Gurney, *Excessive and Exploitative Demands*, INSIDE HIGHER ED. (Mar. 21, 2016), https://www.insidehighered.com/views/2016/03/22/college-athletes-must-spend-unreasonable-amount-time-their-sports-essay.

23. *Johnson*, 108 F.4th at 180 (describing the multibillion-dollar revenue generated by college athletics and noting that plaintiffs alleged "interscholastic athletics are not part of any academic curriculum" and that athletic commitments "regularly interfered with their learning").

24. *Id.* at 167, 169–70; *see* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 112 (2021) (Kavanaugh, J., concurring) (observing businesses cannot "get away with agreeing not to pay their workers a fair market rate").

schedules and extensive training requirements, and NCAA bylaws prescribed sanctions for violations, including suspension or termination.[25] That control extended to athletes' academic options: Practice took precedence over class attendance, limiting course selection; conditioning continued through the off-season; and players were discouraged from pursuing demanding majors.[26]

B. From District Court Dismissal to Third Circuit Appeal

Johnson reached the Third Circuit through an interlocutory appeal from the district court's denial of the NCAA's motion to dismiss.[27] The district court applied the Second Circuit's internship framework from *Glatt v. Fox Searchlight Pictures, Inc.*, asking whether the student-athletes were the "primary beneficiaries" of their athletic participation, and concluded, after balancing the seven factors, that they had plausibly alleged FLSA employee status.[28] The NCAA argued that the amateur tradition established the educational rather than commercial nature of the relationship and that athletes received compensation in the form of soft skills, such as discipline, leadership, and time management, rather than wages.[29] The athletes contended they were entitled to federal minimum wage for time spent on sport-related activities for their schools.[30] The Third Circuit found the internship framework inappropriate, adopted an economic realities test based on common law agency principles, and rejected educational justifications and amateurism traditions as bases for classification.[31]

IV. THE THIRD CIRCUIT'S REASONING AND HOLDING IN THE *JOHNSON* CASE

A. Adoption of the Economic Realities Test

The Third Circuit rejected the *Glatt* internship test because its "overall utility with respect to college athletes is undercut by its accurate presumption that unpaid interns all perform work for their

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25. *Johnson*, 108 F.4th at 174.

26. *Id.* at 180 (describing a plaintiff's weekday football obligations from 5:45 a.m. to 11:30 a.m., which foreclosed hundreds of course options, and athletes' inability to declare preferred majors); *see* Wolohan, *supra* note 9, at 883–84 (describing scholarship players who could not miss practice for class, spent twelve to twenty-five hours per week on athletics in the off-season, and were discouraged from difficult majors so as to remain eligible).

27. *Johnson*, 108 F.4th at 175.

28. *Id.*; *see* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536–37 (2d Cir. 2016) (establishing primary beneficiary framework for determining intern employment status under FLSA).

29. *Johnson*, 108 F.4th at 174, 181.

30. *Id.* at 167.

31. *Id.* at 179–82 (holding that "we will not use a 'frayed tradition' of amateurism").

employers."[32] Distinguishing college athletics from properly designed internships, the court noted that "interscholastic athletics are not part of any academic curriculum" and that the educational benefits cited by defendants were "exactly the kinds of skills one would typically acquire in a work environment."[33] The court reasoned that the framework was inappropriate for relationships in which the alleged work activity might harm educational performance.[34]

The court instead adopted an economic realities analysis grounded in common law agency principles, drawing upon National Labor Relations Board (NLRB) precedent and Supreme Court FLSA doctrine.[35] Both the National Labor Relations Act (NLRA) and FLSA "use broad definitions of 'employee' and 'employer' to delineate statutory coverage," and the striking breadth of FLSA definitions brings within the Act's purview workers "who might not qualify as [employees] under a strict application of traditional agency law principles."[36] Common law agency doctrine, the court held, provides "a helpful analytical tool in evaluating college athletes' purported employer–employee relationships" under the FLSA.[37]

B. The Four-Part Test for Student-Athlete Classification

The Third Circuit established that college athletes may be employees under the FLSA when they "(a) perform services for another party, (b) 'necessarily and primarily for the [other party's] benefit,' (c) under that party's control or right of control, and (d) in return for 'express' or 'implied' compensation or 'in-kind benefits.'"[38] The court emphasized that the key test is whether the overall relationship between the athlete and college or NCAA reveals the economic reality of an employee–employer.[39] The court defined "work" under the FLSA as activities controlled by an employer and pursued mainly for that employer's benefit, noting physical or mental exertion is unnecessary for an activity to be compensable.[40] Putative employees are expected to receive either express or implied "in-kind" compensation for services rendered, consistent with *Tony & Susan Alamo Foundation*.[41]

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32. *Id.* at 180.
33. *Id.*
34. *Id.*
35. *Id.* at 178–79.
36. *Id.* at 179.
37. *Id.*
38. *Id.* at 180.
39. *Id.*
40. *Id.* at 178.
41. Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985).

C. Commercial Reality and Rejection of Amateurism Defenses

The Third Circuit rejected amateurism as a bar to FLSA coverage, declining to let a "frayed tradition" with such dubious history define the economic reality of athletes' relationships to their schools.[42] The court noted that *Alston* had unanimously held that *Board of Regents* did not expressly approve every NCAA limit on athlete compensation, that the NCAA had not adopted any consistent definition of amateurism, and that its "rules and restrictions on compensation have shifted markedly over time."[43]

The court also rejected the Seventh Circuit's approach in *Berger*, which had compared college athletes to prisoners in the context of involuntary servitude, stating: "We disagree with our sister circuit court's comparison of college athletes to prisoners and refuse to equate a prisoner's involuntary servitude, as authorized by the Thirteenth Amendment, to 'the long-standing tradition' of amateurism in college athletics."[44] The Third Circuit held that college athletes "cannot be barred as a matter of law from asserting FLSA claims simply by virtue of a 'revered tradition of amateurism' in D-I athletics."[45]

D. Judge Porter's Concurring Opinion and Institutional Concerns

Judge Porter concurred in the judgment but argued that the court should not have accepted this interlocutory appeal because the question presented was "too fact-intensive" for resolution under 28 U.S.C. § 1292(b).[46] Porter emphasized that "determining whether nearly 200,000 Division I student-athletes playing on nearly 6,700 teams can be employees under the Fair Labor Standards Act requires us to assess countless facts," and criticized the majority's historical and sociological survey as inappropriate on a Rule 12(b)(6) appeal because it included "fifty-five references to news articles, books, journal articles, and online sources—none of which are in the appellate record."[47] He stressed the heterogeneity among student-athletes, noting that the economic ties of a Power Four conference football quarterback probably differ from those of a Conference USA bowling team member.[48] Porter further warned that FLSA employee status would affect Title VII, Title IX regulations, tax advantages, student aid eligibility, and immigration status, and that these "potentially disruptive collateral effects implicate

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42. *Johnson*, 108 F.4th at 182 (citing Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring)).

43. *Id.* at 181 (quoting Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 101–02 (2021)).

44. *Id.* at 182.

45. *Id.*

46. *Id.* at 183 (Porter, J., concurring).

47. *Id.* at 183, 185–86 (Porter, J., concurring).

48. *Id.* at 184 (Porter, J., concurring).

many other statutory schemes," revealing the legislative rather than adjudicative nature of plaintiffs' claims.[49]

V. LEGAL ANALYSIS OF THE COURT'S METHOD

A. Correct Application of FLSA Precedent to Collegiate Athletics

Johnson represents a doctrinally sound application of established Supreme Court precedent to the evolved commercial reality of college athletics.[50] Its reliance on the economic realities test follows directly from *Tony & Susan Alamo Foundation*, which held that FLSA employee status turns on economic dependence and the totality of circumstances, and that workers entirely dependent on an entity that expected in-kind benefits in exchange for services were employees despite their protests.[51] The court correctly applied the Supreme Court's instruction to look to the economic realities of the relationship instead of traditional labels.[52]

The court's rejection of educational justifications aligns with precedent holding that trainees are not employees when their work serves only their own interests and confers no immediate advantage on the employer.[53] In *Walling v. Portland Terminal Co.*, the Court held that trainees similar to "students in a school" were not covered by the FLSA because their activities were driven by educational benefits rather than employer advantage.[54] Under that framework, the extensive institutional control and commercial character of Division I athletics distinguish it from the extracurricular model.[55] Its four-part test properly incorporates common law agency principles while maintaining the FLSA's broad coverage mandate, which "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."[56]

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49. *Id.* at 193 (Porter, J., concurring).

50. *Id.* at 178–80 (applying the economic realities test from Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985), which held that workers receiving in-kind benefits in exchange for services are employees despite protests of volunteer status).

51. *Tony & Susan Alamo Found.*, 471 U.S. at 301.

52. *Johnson*, 108 F.4th at 176 (citing Martin v. Selker Bros., 949 F.2d 1286, 1293 (3d Cir. 1991)).

53. Walling v. Portland Terminal Co., 330 U.S. 148, 152–53 (1947) (holding that railroad trainees were not FLSA employees because their training served only their own ends, displaced no regular workers, and gave the railroad no immediate benefit).

54. *Id.*

55. *See Johnson*, 108 F.4th at 180 (setting out the four-factor framework and noting that interscholastic athletics are not part of any academic curriculum).

56. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992); *see Johnson*, 108 F.4th at 176, 179.

B. Why the Circuits Erred and Why Employee Classification Is Inevitable

The circuits divide over amateurism's role in the employment inquiry: The Third Circuit refused to let a tradition of amateurism define the economic reality of athletes' relationships with their schools, a premise the Ninth Circuit had also declined to adopt, while agreeing with the Seventh Circuit in a limited sense that existing multifactor tests are inadequate.[57] *Berger* relied on a longstanding tradition of amateurism to define economic reality, elevating institutional preferences over objective commercial analysis and contradicting *Alston*'s instruction that compensation restrictions must be evaluated based on their procompetitive benefits rather than historical justifications.[58] *Dawson* limited its economic reality analysis by holding that revenue generation does not automatically establish an employment relationship, without fully examining whether the totality of commercial circumstances—including substantial university profits from athlete performance—required FLSA protection.[59]

The Supreme Court's decision in *Alston* had already eliminated the primary legal justification for maintaining amateur restrictions by rejecting circular amateurism defenses, and Justice Kavanaugh's concurrence emphasized that "[n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate."[60] Where universities exercise comprehensive control over student-athlete activities, generate substantial revenue from athletic performance, and provide in-kind benefits for services that primarily benefit the institution, each element of the four-part test is satisfied, and the economic dependence identified as the touchstone of FLSA coverage is present.[61] That analysis is not limited to revenue-generating sports because the test turns on control, institutional benefit, and in-kind compensation—elements present across university athletic department operations.[62]

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57. *Johnson*, 108 F.4th at 182 (citing Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring), and citing Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 908 n.2 (9th Cir. 2019)).

58. Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 98 (2021); *Berger*, 843 F.3d at 291.

59. *Dawson*, 932 F.3d at 910 (holding that revenue generated by college sports does not unilaterally convert relationships into employment despite acknowledging substantial financial benefits to NCAA and conferences); *see id.* at 908 n.2.

60. *Alston*, 594 U.S. at 109–12 (Kavanaugh, J., concurring).

61. Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985); *see Johnson*, 108 F.4th at 180–81.

62. *Johnson*, 108 F.4th at 169–71, 180–81.

VI. BUSINESS AND TAX IMPLICATIONS FOR UNIVERSITY OPERATIONS

A. Comprehensive Administrative Restructuring Requirements

If student-athletes are classified as employees, universities must implement comprehensive payroll systems covering federal income tax withholding and Federal Insurance Contributions Act (FICA) obligations.[63] Beyond minimum wage obligations, *Johnson* leaves unresolved whether student-athlete employees would be entitled to overtime pay, workers' compensation, and other employee benefits, creating compliance exposure across multiple athletic programs.[64] Universities face liability for unpaid minimum wages and overtime compensation, plus an additional equal amount in liquidated damages.[65] Institutions implementing the NIL settlement must also coordinate student-athlete compensation through the revenue-sharing pool system while managing existing NIL payment obligations.[66] Universities should therefore align athletic operations with employment and Title IX requirements and implement risk management strategies before classification.[67]

B. Tax Compliance and System Integration Challenges

Employment classification triggers federal tax compliance obligations requiring universities to withhold income taxes and pay employer FICA contributions.[68] Section 3401 of Title 26 of the U.S. Code requires employers to withhold income tax from wages, but excludes certain educational benefits, leaving universities to decide which student-athlete payments are taxable or excludable benefits.[69] Section 3111 of Title 26 of the U.S. Code imposes employer FICA taxes of 6.2% for Social Security and 1.45% for Medicare on wages, creating direct institutional cost.[70] Student-athlete compensation also creates dual tax-reporting requirements: Employee wages are subject to W-2

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63. *See* 26 U.S.C. §§ 3111, 3121, 3401.

64. *See* Bouriat et al., *supra* note 1.

65. 29 U.S.C. § 216(b).

66. In re Coll. Athlete NIL Litig., 803 F. Supp. 3d 959, 975–76 (N.D. Cal. 2025).

67. *See* Jennifer Cluverius & Michael DiLiello, *They're in the Game: Johnson v. NCAA and Possible College Athlete FLSA Coverage*, MAYNARD NEXSEN (Aug. 2, 2024), https://www.maynardnexsen.com/publication-theyre-in-the-game-johnson-v-ncaa-and-possible-college-athlete-flsa-coverage; Jonathan D. Wohlwend, Jake M. Gipson & Rudy Hill, *Work Hard, Play Hard: Third Circuit Establishes Test for Analyzing Employee Status of NCAA College Athletes Under FLSA*, BRADLEY ARANT BOULT CUMMINGS LLP (July 24, 2024), https://www.bradley.com/insights/publications/2024/07/third-circuit-establishes-test-for-analyzing-employee-status-of-ncaa-college-athletes-under-flsa.

68. *See* 26 U.S.C. §§ 3111(a)–(b), 3121(a)(18)–(20), 3401(a).

69. *See* 26 U.S.C. § 3401(a), (a)(18)–(19).

70. 26 U.S.C. § 3111(a)–(b); *see* 26 U.S.C. § 3121(a).

withholding, while NIL and revenue-sharing payments are treated as self-employment income reported on Form 1099.[71] Employers generally must file quarterly Form 941 returns reporting withholding and FICA obligations.[72]

Employee classification would also likely convert the excludable portion of an athletic scholarship into taxable wages because § 117(c) denies the exclusion for amounts paid for services required as a condition of the award, and the regulation sustained in *Bingler v. Johnson* limits "scholarship" to disinterested grants exacting no substantial quid pro quo.[73] Universities would need to sort each payment into one of three categories—compensation for athletic services, constituting wages subject to withholding and employment taxes; scholarship amounts excludable under § 117; and nonqualified scholarship amounts includible in gross income but not treated as wages—a determination § 3401(a)(19) requires the institution to make at the time of payment, forcing coordination between payroll and financial aid administration.[74]

C. Workers' Compensation and Employee Benefits Integration

Classification raises unresolved questions about whether workers' compensation would cover athletic injuries and whether student-athlete employees would receive health insurance, retirement benefits, and other employment-based benefits separate from existing educational support programs.[75] Unemployment exposure is narrower than it first appears. The Federal Unemployment Tax Act excludes services performed for governmental and § 501(c)(3) employers, and it separately excludes services performed for a school by its own enrolled students; state unemployment laws, however, must extend coverage to

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71. *See* Ryan C. Furtick et al., *House Settlement and Student-Athlete Tax Considerations*, LEWIS RICE (Sept. 22, 2025), https://www.lewisrice.com/house-settlement-and-student-athlete-tax-considerations.

72. Treas. Reg. § 31.6011(a)-1 (prescribing Form 941 for quarterly FICA returns); Treas. Reg. § 31.6011(a)-4 (requiring quarterly returns of withheld income tax); *see* Topic No. 758, Form 941, Employer's Quarterly Federal Tax Return and Form 944, Employer's Annual Federal Tax Return, INTERNAL REVENUE SERVICE (Sept. 20, 2025), https://www.irs.gov/taxtopics/tc758.

73. 26 U.S.C. § 117(c); Treas. Reg. § 1.117-4(c); Bingler v. Johnson, 394 U.S. 741, 751, 757–58 (1969) (sustaining Treas. Reg. § 1.117-4(c) as comporting with the ordinary understanding of scholarships as disinterested, "no-strings" grants requiring no substantial quid pro quo, and holding that payments bargained for as a quo in return for services rendered are not excludable); *see* Rev. Rul. 77-263, 1977-2 C.B. 47 (excluding athletic scholarships where the university expected but did not require participation, required no activity in lieu of participation, and did not cancel the award if the student could not participate).

74. *See* 26 U.S.C. §§ 117(a)–(c), 3401(a)(19); Treas. Reg. § 1.117-4(c); *see also* Rev. Rul. 77-263, 1977-2 C.B. 47 (applying the distinction to athletic scholarships).

75. Robert W. Pritchard et al., *Pay to Play? Third Circuit Holds NCAA Athletes Can Be Considered Employees*, LITTLER MENDELSON P.C. (July 16, 2024), https://www.littler.com/news-analysis/asap/pay-play-third-circuit-holds-ncaa-athletes-can-be-considered-employees; *see* Bouriat et al., *supra* note 1.

many governmental and nonprofit employers, so whether student-athlete employees could claim benefits would turn on whether state law adopts a parallel student exclusion.[76]

D. Title IX Coordination: Creating Institutional Complexity

Employee classification creates uncertain intersections with Title IX's sex discrimination prohibition, raising unresolved questions about whether Title IX would require equal pay for student-athlete employees on comparable teams of different genders and how to coordinate Title IX participation requirements with FLSA wage obligations.[77] Institutions must balance employment compensation obligations against Title IX's three-part accommodation test—substantial proportionality between athletic opportunities and student enrollment, continuing program expansion responsive to developing interests and abilities, or full and effective accommodation of the underrepresented gender's athletic interests—while preserving competitive standing within conference and NCAA governance structures.[78]

More broadly, *Johnson* raises collateral legal issues across multiple statutory schemes, potentially impacting student-athletes' eligibility for federal student aid, state workers' compensation regimes, immigration status, and the tax treatment of athletic scholarships.[79] Legal uncertainty arising from inconsistent judicial approaches to student-athlete employment status requires universities to prepare for patchwork results across jurisdictions.[80]

VII. THE SUPREME COURT'S LIKELY TREATMENT OF THE *JOHNSON* FRAMEWORK

A. Doctrinal Factors Favoring the Johnson Framework

Although *Johnson* itself returned to the district court on remand, the circuit split it created substantially increases the probability that the Court will grant certiorari in a future case presenting the question, because conflicts among the federal courts of appeals "on the same important matter" are among the compelling reasons the Court

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76. 26 U.S.C. §§ 3301, 3306(c)(7), (c)(8), (c)(10)(B), 3309(a).

77. Pritchard et al., *supra* note 75; *see* 20 U.S.C. § 1681(a); Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163, 180–81 (3d Cir. 2024).

78. *See* 34 C.F.R. § 106.41(c)(1); Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, Fed. Reg. 71413, 71418 (Dec. 11, 1979); Cohen v. Brown Univ., 991 F.2d 888, 897–98 (1st Cir. 1993).

79. *Johnson*, 108 F.4th at 193 (Porter, J., concurring).

80. *See* Ashley E. Sykes, *Johnson v. NCAA: Student-Athlete Employment Status in the Second Trump Administration*, VENABLE LLP (Jan. 28, 2025), https://www.venable.com/insights/publications/2025/01/johnson-v-ncaa-student-athlete-employment.

identifies for granting review.[81] The Third Circuit's economic realities framework in *Johnson* applies Supreme Court precedent establishing that employment status turns on economic reality rather than formal labels, that compensation agreements may be implied from long-term dependence on in-kind benefits, and that subjective protestations of nonemployee status cannot defeat statutory coverage.[82] That foundation likely favors the *Johnson* framework, given the Court's recent rejection of amateurism as a binding legal principle in *Alston*, where the Court unanimously held that the NCAA's compensation restrictions lack a consistent definition and that "businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of [its] product."[83]

The Court has also recognized the FLSA's "striking breadth," which extends employee coverage beyond traditional agency law principles, and has declined to create industry-specific exceptions, requiring the Act to apply even to those who would decline its protections.[84] *Johnson*'s recognition that college athletics has become a multibillion-dollar commercial enterprise provides the factual basis for applying that legal doctrine.[85]

B. Institutional Resistance and the Likely Resolution

Universities and the NCAA argue that employee classification would create substantial economic disruption, requiring wage-and-hour timekeeping and compliance with workers' compensation, immigration, OSHA, antidiscrimination, and significant tax obligations.[86] They further contend that nonrevenue sports consistently operate at a loss and depend on subsidization from revenue-generating programs.[87] The compliance costs of employee status would therefore fall on programs that already run deficits, at institutions where only 2.26% of NCAA members turn a profit on athletics at all.[88] But they must be weighed against the FLSA's remedial purpose and against *Alston*'s

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81. Craig W. Canetti & Michael John Garcia, CONG. RSCH. SERV., R48369, *The United States Courts of Appeals: Background and Circuit Splits from 2024*, at 6 (2025) (citing Sup. Ct. R. 10(a)); *see Johnson*, 108 F.4th at 167 (remanding for application of an economic realities analysis).

82. Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985); *see Johnson*, 108 F.4th at 180.

83. Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 110 (2021) (Kavanaugh, J., concurring).

84. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992); *see Tony & Susan Alamo Found.*, 471 U.S. at 296, 302; *Johnson*, 108 F.4th at 175–76.

85. *Johnson*, 108 F.4th at 169–70 (noting that college athletes generate approximately $3 billion annually, and at least 38 NCAA schools gross over $100 million in sports revenue).

86. Sykes, *supra* note 80.

87. Nick Tremps, *The Memorandum Heard Around the College Athletics World: Why Student-Athletes in Non-Revenue-Generating Sports Should Not Enjoy the Status of "Employee" Under the NLRA*, 14 WAKE FOREST L. REV. ONLINE 47, 61–62 (2024).

88. *Id.* at 61.

holding that the NCAA had "not adopted any consistent definition" of amateurism and that its "rules and restrictions on compensation have shifted markedly over time."[89]

Congress, for its part, has so far declined to answer the question. On September 28, 2026, the Senate passed the Protect College Sports Act of 2026 by a vote of 77–22.[90] The bill would authorize institutions to pay student-athletes directly for the use of their names, images, and likenesses, subject to a cap tied to the NIL settlement's revenue-sharing pool, and would shield compliance with that cap from antitrust liability.[91] Yet the bill expressly provides that its student-athlete title "is neutral on, and does nothing to alter, employee or non-employee status for student athletes," and it instead directs a congressional commission to study "the positive and negative implications associated with a collective bargaining structure and employment status for student athletes."[92] The Senate thus left unresolved a question that Judge Porter's concurrence described as legislative rather than adjudicative in nature.[93] The SCORE Act pending in the House takes the opposite approach: It would bar treating athletes as employees based on their athletic participation and would preempt state laws regulating their employment status, whereas the Senate bill does not list employment status among the matters it preempts.[94] Should the Senate bill become law, direct institutional payments would make the compensation element of the *Johnson* test easier to satisfy while leaving the ultimate question of employee status to the courts.[95] As of this writing, the House has not acted on the bill.[96]

Judge Porter's concurrence suggests that any test gauging economic reality must be sensitive to the difference between the revenue-generating and nonrevenue sports, while acknowledging that

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89. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 101 (2021); *Johnson*, 108 F.4th at 175–76.

90. Protect College Sports Act of 2026, S. 4668, 119th Cong. (as passed by Senate, Sept. 28, 2026); 172 Cong. Rec. S5044 (daily ed. Sept. 28, 2026) (recording passage by a vote of 77 to 22).

91. S. 4668 §§ 100(19), 101(c), 114(a)(1)(A), 118(a)(1); *see id.* § 114(a)(2)(A) (permitting an institution to exceed the revenue share cap by up to $22.5 million per academic year to retain student-athletes).

92. S. 4668 § 122; *id.* § 116(d)(1)(A).

93. *See Johnson*, 108 F.4th at 193 (Porter, J., concurring).

94. *Compare* SCORE Act, H.R. 4312, 119th Cong. §§ 8, 10(a)(1) (as reported by H. Comm. on Energy & Com., Sept. 11, 2025) (providing that "no individual may be considered an employee of an institution, a conference, or an interstate intercollegiate athletic association based on the participation of such individual on a varsity sports team or in an intercollegiate athletic competition as a student athlete," and preempting conflicting state laws that regulate the "employment status of a student athlete"), *with* S. 4668 § 121(a) (limiting preemption to state laws that conflict with the title or that regulate association rules on name, image, and likeness compensation, transfers, and eligibility).

95. *See Johnson*, 108 F.4th at 180; S. 4668 §§ 101(c), 122.

96. *S.4668 - 119th Congress (2025-2026): Protect College Sports Act of 2026*, CONGRESS.GOV, https://www.congress.gov/bill/119th-congress/senate-bill/4668 (last visited Oct. 12, 2026) (noting that the bill was held at the desk in the House on October 5, 2026).

determining the economic reality of the parties' relationship, considering the whole activity, remains the proper FLSA test.[97] A court applying the *Johnson* framework might therefore distinguish Football Bowl Subdivision (FBS) football and Division I basketball from nonrevenue sports, but that line would be difficult to administer within integrated athletic departments because the test applies the same elements—services for the university's benefit, university control, and in-kind benefits—across programs.[98] The likelier outcome is applying *Johnson* as written, under which "the touchstone remains whether the cumulative circumstances of the relationship between the athlete and college or NCAA reveal an economic reality that is that of an employee–employer."[99]

Either way, the commercial evolution continues. Employee classification would formalize college athletics' transformation from amateur education to commercial enterprise, a reality the Supreme Court recognized in *Alston* by noting that NCAA compensation rules have "shifted markedly over time" and that the organization is "organized to maximize revenues."[100] Universities would face immediate pressure to restructure athletic operations to address disruptive collateral effects across multiple statutory schemes, including Title IX.[101] Judicial rejection would not address that evolution, in which college athletics revenues grew from approximately $963 million in 1985 to over $13.5 billion by 2016.[102]

VIII. CONCLUSION

The Third Circuit correctly applied established FLSA doctrine to modern college athletics, declining to let amateurism define the economic reality where the Supreme Court had already declined to disturb findings that the NCAA maintained no consistent definition of the term, and asking instead whether services performed for the institution's benefit, institutional control, and express or implied compensation reveal an employment relationship.[103] That holding carries substantial operational consequences, including minimum wage liability, workers' compensation, overtime, Title IX coordination, employment tax obligations, and other "potentially disruptive collateral effects" across multiple statutory schemes.[104] The circuit split with *Berger* may draw Supreme Court review, but the commercial

97. *Johnson*, 108 F.4th at 184–85, 189, 192 (Porter, J., concurring).
98. *Id.* at 180.
99. *Id.*
100. *Alston*, 594 U.S. at 90, 93–94, 101–02.
101. *Johnson*, 108 F.4th at 193 (Porter, J., concurring).
102. *Alston*, 594 U.S. at 93–94; *see Johnson*, 108 F.4th at 169–70.
103. *Alston*, 594 U.S. at 101; *Johnson*, 108 F.4th at 176–77, 180–82.
104. *Johnson*, 108 F.4th at 192–93 (Porter, J., concurring).

transformation *Alston* documented will continue either way.[105] Therefore, regardless of whether the Court ultimately adopts *Johnson*'s framework or the House abandons the neutrality the Senate adopted, one thing is hard to escape: College athletics has spent decades profiting by billions of dollars from the labor of student-athletes while hiding behind an amateur framework that the money itself long ago abandoned.

105. *Id.* at 181–82; *see Alston*, 594 U.S. at 93–94; Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 291 (7th Cir. 2016).