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SYMPOSIUM ARTICLE: HOW YOUNG AMERICAN ATHLETES CAN BEST CHALLENGE A BUREAUCRACY THAT PREVENTS THEM FROM EARNING A LIVING

*Marc Edelman**

INTRODUCTION

Young American football and basketball players are the victims of a complex bureaucracy that prevents them from earning a living based on their athletic prowess. In the first instance, these athletes are denied the opportunity to earn money while attending college based on the NCAA Principle of Amateurism – a principle that maintains the wealth of college sports “in the hands of a select few administrators, athletic directors, and coaches.”¹ In the second instance, these same athletes are also denied the opportunity to compete in high-profile professional sports leagues such as the NFL and NBA based on collectively bargained age and education requirements that are adopted by sports leagues and their players’ unions.²

For generations, American society simply ignored the harms caused by concerted efforts to deprive young athletes of their free market opportunities. However, in recent years there has been an increased understanding that America’s treatment of its young athletes is troublesome because it deprives them of financial opportunities that only

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1. Marc Edelman, note, *Reevaluating Amateurism Standards in Men’s College Basketball*, 35 U. MICH. J. L. REFORM 861, 864 (2002).

2. See, e.g., NFL Collective Bargaining Agreement, Art. 6, Sec. 2(b), at 17, available at <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> (stating that “[n]o player shall be permitted to apply for special eligibility for selection in the Draft, or otherwise be eligible for the Draft, until three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier”).

exist for an ephemeral period of time.³ Moreover, for those young athletes that suffer an injury while playing college sports, the American sports bureaucracy may forever prevent them from realizing the fruits of their labor.⁴

In light of the foregoing, this symposium article discusses how young American athletes could best challenge the bureaucracy that delays their ability to earn a livelihood. Part I of this symposium article discusses how young American athletes could effectively challenge the NCAA 'no pay' rules under federal antitrust law as an illegal restraint of trade. Part II then addresses the possibility of these same athletes challenging professional sports leagues' age requirements under both antitrust law and labor law.

I. CHALLENGING THE NCAA 'NO PAY' RULES UNDER SECTION ONE OF THE SHERMAN ACT

Antitrust Overview

For a young American athlete that seeks to profit from playing his sport, the starting point for challenging the bureaucracy that prevents him from doing so involves bringing a lawsuit against the NCAA. Even though the NCAA Principle of Amateurism is long entrenched in college athletics, its longevity, of course, does not necessarily signal its legality.

Section One of the Sherman Act, in pertinent part, states that "[e]very contract, combination . . . or conspiracy in the restraint of trade or commerce . . . is declared to be illegal."⁵ When applying this section of antitrust law, a court must decide whether a particular restraint is illegal by applying a well-established process. An antitrust plaintiff bears the initial burden of showing that the restraint involves "concerted action between two legally distinct economic entities," and that the restraint unduly suppresses competition within some relevant

3. See, e.g., Warren Zola, *Transitioning to the NBA: Advocating on Behalf of Student-Athletes for NBA & NCAA Rule Changes*, 3 HARVARD J. OF SPORTS & ENT. L. 159 (2012) (discussing how the current NBA and NCAA rules work to the detriment of student-athletes who want to earn a livelihood); Darren Heitner, *Money and Sports, Economic Realities of Being an Athlete*, 8 DEPAUL J. OF SPORTS L. & CONTEMPORARY PROBLEMS 161, 161 (2012) (explaining that college athletics is a "billion-dollar business" that is "built on the backs of amateur athletes").

4. See generally Kristen Chiger, *Calling Personal Foul on a Workers' Compensation System, NCAA Student Athletes are Being Denied the Protection They Deserve*, U. OF DENV. SPORTS & ENT. L. J. (2013) (publication forthcoming), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257274 (explaining how the young athletes injured while performing in college sports have sometimes been denied workers' compensation).

5. Sherman Act, 15 U.S.C. §§ 1-7 (2000).

market.⁶ Then, if the plaintiff is able to meet this burden, the defendants may raise affirmative defenses to attempt to negate the finding of an antitrust violation. Examples of potential affirmative defenses may include that the restraint is procompetitive on its economic merits or that the restraint falls within an antitrust law exemption such as the non-statutory labor exemption.⁷

When applying Section One of the Sherman Act to the NCAA Principle of Amateurism, a court might find the principle to be illegal – not only because it involves more than 1200 separate colleges fixing the pay of student-athlete labor at a predetermined amount, but also because it serves as a form of group boycott against any college that refuses to abide by this wage restraint.⁸

Board of Regents of the University of Oklahoma v. NCAA

The most well-known court decision to support a finding that the NCAA ‘no pay’ rules violate Section One of the Sherman Act is a Supreme Court case from nearly thirty years ago – *Board of Regents of the University of Oklahoma v. NCAA*.⁹ There, the Supreme Court held that the NCAA’s attempt to limit the number of games that any NCAA member may broadcast on television violated Section One of the Sherman Act. That case, originally filed in the U.S. District Court for the District of Oklahoma, lays an important framework for understanding the NCAA for what it truly is – a monopolistic trade association that is fully subject to, and sometimes in violation of, antitrust law.

Many subsequent court decisions have attempted to limit the *Board of Regents* holding to simply prohibiting broadcast restraints; however, a close reading of *Board of Regents* reveals that it truly stands for a far broader proposition – that any commercial agreement imposed by NCAA members that results in the expulsion of a non-com-

6. *Prime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92, 103 (2d. Cir. 2000); see also Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s ‘No Pay’ Rules Violate Section One of the Sherman Act*, 64 CASE W. RES. L. REV. (2013) (publication forthcoming), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226541, at *11.

7. For a discussion of the various affirmative defenses cited frequently in sports antitrust cases, see Marc Edelman, *Does the NBA Still Have Market Power: Exploring the Antitrust Implications of an Increasingly Global Market for Men’s Basketball Labor*, 41 RUTGERS L. J. 549, 554-60 (2010).

8. See Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s ‘No Pay’ Rules Violate Section One of the Sherman Act*, 64 CASE WESTERN RESERVE LAW REVIEW — (2013) (publication forthcoming), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226541, at *15-24.

9. *Nat’l Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85 (1984).

plying member is subject to Rule of Reason inquiry.¹⁰ Indeed, the district court opinion in *Board of Regents* held, among other things, that the NCAA's television arrangement was illegal because it included "mechanisms for punishing cartel members" that fail to comply with the restraint.¹¹ The opinion also stated that "[a]s a practical matter, membership in the NCAA is a prerequisite for an institution wishing to sponsor a major, well-rounded athletic program," and thus any attempt to ban a program from the NCAA presents substantial antitrust risk.¹²

The U.S. Court of Appeals for the Tenth Circuit thereafter affirmed the district court's conclusions in *Board of Regents* – explaining that the NCAA's restriction on the number of games that a member could play on television was indeed illegal, and that the threat of expelling members that refused to go along with the plan "clearly ha[s] anticompetitive potential."¹³ This latter conclusion is critical to overturning the NCAA 'no pay' rules because, much like the NCAA broadcast restraints, the NCAA 'no pay' rules are enforced by the threat of member expulsion.

The Supreme Court thereafter again affirmed *Board of Regents*, although it never directly addressed the antitrust argument against threatening to expel members. The Supreme Court, of course, did not have to address that argument because it separately found the NCAA restraints on television broadcasts to be sufficient grounds for affirming an antitrust violation.¹⁴ Nevertheless, the Supreme Court also did nothing to imply that the NCAA's threat of expelling a member for non-compliance would survive under antitrust scrutiny – meaning

10. *C.f.* National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 99 (1984) (explaining that "by participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another").

11. Board of Regents of the Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1301 (D.C. Okl. 1982).

12. Board of Regents of the Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1288 (D.C. Okl. 1982).

13. Board of Regents of the Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n, 707 F.2d 1147, 1161 (10th Cir. 1983).

14. Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 108-109 (1984) (finding the NCAA's television plan illegal because it "eliminates competitors from the market, since only those broadcasters able to bid on television rights covering the entire NCAA can compete," and further explaining that "when there is an agreement in terms of price or output, no elaborate industry analysis is needed to demonstrate the anticompetitive characteristics of such agreement").

that, to this day, the presumptions made by the Tenth Circuit in *Board of Regents* still remain in place, at least within the Tenth Circuit.¹⁵

Law v. NCAA

Since the Supreme Court's 1984 decision in *Board of Regents*, several subsequent decisions have applied language from that case to find other types of NCAA conduct to similarly violate Section One of the Sherman Act. Most importantly in the context of labor markets, the U.S. Court of Appeals for the Tenth Circuit held in *Law v. NCAA* that it was illegal for NCAA members to fix salaries of relatively junior assistant coaches.¹⁶ In addition, the court in *Law* rejected numerous affirmative defenses raised by the NCAA with respect to purported procompetitive benefits of the restraint. For example, the court in *Law* found that the NCAA could not defend a coaching salary cap as a cost cutting mechanism because "cost-cutting by itself is [never] a valid procompetitive justification."¹⁷ In addition, the court found that the NCAA could not cap assistant coach's salaries on social policy grounds because if social policy was deemed to be an affirmative defense, it would emasculate the entire doctrine of antitrust law.¹⁸

15. For purposes of full disclosure, it is important to point out that there is dictum in the Supreme Court's *Board of Regents* opinion noting that the NCAA's non-payment of its student-athletes "can be viewed as procompetitive." *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 102 (1984). However, based on the context, it seems clear that the Court is merely stating that the NCAA 'no pay' rules are subject to Rule of Reason review and are not *per se* illegal. *See id.* Thus, the Court is unlikely making any judgment on the merits about the NCAA's 'no pay' rules. *See id.* Moreover, the Supreme Court further notes that "the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 120 (1984). However, this language, once again, is completely irrelevant to assessing the ultimate legality of the NCAA's 'no pay' rules, as it simply is a statement with regard to public policy, and not economics with respect to any particular issue. *See id.*; *see also Nat'l Society of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978) (explaining that a proper antitrust analysis is based exclusively on economic effects and not on public policy).

16. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998).

17. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1022 (10th Cir. 1998).

18. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1021-22 (10th Cir. 1998) (explaining that "[w]hile opening up coaching positions for younger people may have social value apart from its affect (sic) on competition, we may not consider such values unless they impact upon competition"). For further discussion of why modern courts will not allow social policy justifications to save otherwise anticompetitive conduct, *see National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (explaining that "[t]he assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain-quality, service, safety, and durability-and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers," and that "[e]ven assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad").

Prospective Legal Challenge to NCAA 'No Pay' Rules

Based on the holdings of *Board of Regents* and *Law*, Tenth Circuit courts may provide the best forum to challenge the NCAA 'no pay' rules. Playing off the favorable language from the lower court opinions in *Board of Regents* and *Law*, a prospective plaintiff's complaint against the NCAA should allege that the NCAA has market power over college basketball labor markets and that the NCAA members have restrained trade in those markets by fixing college athlete salaries below the free-market rate and using the threat of expelling members to ensure the restraint's enforcement.

It is critical to note, however, that any prospective plaintiff seeking to bring an antitrust suit against the NCAA should absolutely file in the Tenth Circuit because many courts outside of the Tenth Circuit have taken a more deferential view toward the NCAA Principle of Amateurism.¹⁹ A few courts, such as those based in the First, Third, and Sixth Circuits, have even gone as far as to dismiss antitrust challenges against the NCAA as early as the motion to dismiss stage – foreclosing plaintiffs' antitrust claims before even getting to the full merits.²⁰

For those interested in a far more detailed discussion about each of the above points – including a thorough discussion of why the Supreme Court's holding in *Board of Regents* is truly favorable to a plaintiff seeking to challenge the NCAA Principle of Amateurism – I encourage you to read my upcoming law review article, *A Short Trea-*

19. See, e.g., *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180 (3d. Cir. 1998) (upholding NCAA bylaws related to academic eligibility for athletes that wish to play a sport while attending graduate school); *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338 (5th Cir. 1988) (rejecting an antitrust challenge to the NCAA's death penalty sanction that was filed by an alumnus, college football players, and cheerleaders at Southern Methodist University); *Hennessey v. Nat'l Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir. 1977) (finding that an NCAA limit on the number of college coaches per team fails under the Rule of Reason); *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426 (6th Cir. 2008) (upholding a rule that required colleges to consult with the NCAA before hiring coaches with previous rules infractions); *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F.Supp. 356, 382, n. 17 (D. Ariz. 1983) (upholding an NCAA bylaw that disqualified the University of Arizona football team from post-season play because football players had accepted benefits such as free transportation and lodging).

20. See, e.g., *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 185, (3d. Cir. 1998) (holding that "the Sherman Act does not apply to the NCAA's promulgation and enforcement of eligibility requirements"); *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426 (6th Cir. 2008) (describing an NCAA restraint on hiring previously sanction coaches as "anti-commercial"); *Gaines v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 740 (M.D. Tenn. 1990)) (holding that a plaintiff wishing to return to college football after entering the NFL draft could not bring an antitrust challenge); *Jones v. Nat'l Collegiate Athletic Ass'n*, 392 F.Supp. 295 (D. Mass. 1975) (holding that NCAA eligibility guidelines are "non-commercial" and thus exempt from antitrust challenge).

tise on *Amateurism and Antitrust Law*, which will be published this fall in the *Case Western Reserve Law Review*.²¹

II. CHALLENGING PRO SPORTS LEAGUES' AGE REQUIREMENTS UNDER ANTITRUST AND LABOR LAW

In addition to filing an antitrust challenge against the NCAA 'no pay' rules, young athletes may also attempt to free themselves from the American sports bureaucracy by challenging professional sports leagues' age requirements under either antitrust or labor law.

Antitrust Challenge to Sports Leagues' Age Requirements

The likelihood of successfully using antitrust law to overturn sports leagues' age requirements depends on how broadly the reviewing court interprets the non-statutory labor exemption to antitrust law. This is an issue that has been the source of many law review articles, but few judicial opinions.²²

The only sports case to directly explore the application of the non-statutory labor exemption to a collectively bargained age requirement was *Clarett v. National Football League* – a Second Circuit decision that held the NFL age requirement was entirely exempt from antitrust scrutiny because it was a product of the collective bargaining process.²³ Nonetheless, *Clarett* was decided by a circuit that has traditionally applied the non-statutory labor exemption more broadly than most others.²⁴ Thus, at least some circuits may disagree with that case's holding.

Of particular note, the Third, Sixth, Eighth and D.C. Circuits have each adopted a far more rigid test for the non-statutory labor exemp-

21. See Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's 'No Pay' Rules Violate Section One of the Sherman Act*, 64 CASE W. RES. L. REV. (2013) (publication forthcoming), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226541.

22. See, e.g., Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?* 115 PENN ST. L. REV. 341 (2010); Marc Edelman & Brian Doyle, *Antitrust and "Free Movement" Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403 (2009); Ryan Rodenberg, *The NBA's Latest Three Point Play: Age Eligibility Rules, Antitrust, and Labor Law*, 25 ENT. AND SPORTS LAWYER 14 (2008); Michael McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L. J. 113 (2004); Michael McCann, *Illegal Defense: The Law and Economics of Banning High School Players from the NBA Draft*, 1 VA. SPORTS & ENT. L. J. 295 (2002).

23. See *Clarett v. Nat'l Football League*, 369 F.3d 124, 125 (2d. Cir. 2004).

24. See Marc Edelman & Brian Doyle, *Antitrust and "Free Movement" Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403, 427 (2009) (explaining that as compared to the U.S. Court of Appeals for the Second Circuit, "[m]ost other U.S. courts have taken a far more narrow view of the non-statutory labor exemption").

tion, which makes the challenge of a sports league's age requirement perhaps more feasible. In each of these four circuits, courts will only apply the non-statutory labor exemption where three separate conditions apply: (1) the restraint involves a mandatory subject of bargaining; (2) the restraint primarily affects the parties involved in the collective bargaining relationship; and (3) the restraint is reached through bona-fide arms' length bargaining.²⁵ Applying this more exacting test for the non-statutory labor exemption, one could reasonably conclude that collectively bargained age requirements lie outside of the exemption because they fail under the second prong of the relevant test – they do not primarily affect only the parties to the collective bargaining process.²⁶

Presuming that a plaintiff is able to navigate his way around these murky waters, the rest of the legal argument becomes far more tenable.²⁷ Indeed, outside the context of the non-statutory labor exemption, just about every court to review a sports league's age requirement has found the requirement to violate antitrust law.²⁸ For example, in *Denver Rockets v. All-Pro Management*, the U.S. District Court for the Central District of California held that the NBA's old age requirement that kept players out the league for four years after graduating from high school was illegal because "by pooling their economic power, the individual members of the NBA have [illegally] established their own private government."²⁹ Similarly, in *Linseman v. World Hockey Association*, the U.S. District Court for the District of Connecticut overturned the defunct World Hockey Association's age requirement, explaining that the "[e]xclusion of traders from the mar-

25. See Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?* 115 PENN ST. L. REV. 341, 366 (2010) (discussing this more narrow view of the non-statutory labor exemption, adopted by the Third, Sixth, Eighth and D.C. Circuits).

26. See generally *Allied Chem. & Alkali Workers of America v. Local Union No. 1*, 404, U.S. 157, 172-73 (determining that retired employees are not part of the collective bargaining relationship because they did not have a vote in choosing either side's representatives).

27. One remaining antitrust hurdle involves proving that the sports league exercises power over the relevant labor market – an argument that is perhaps more difficult to make against the NBA than against the NFL, given the increasing number of overseas employers of premier professional basketball labor. See Marc Edelman, *Does the NBA Still Have Market Power: Exploring the Antitrust Implications of an Increasingly Global Market for Men's Basketball Labor*, 41 RUTGERS L. J. 549 (2010).

28. See, e.g., *Denver Rockets v. All-Pro Management*, 325 F. Supp.1049 (C.D. Cal. 1971); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1322 (D. Conn. 1977); *Boris v. United States*, Cv. 83-4980 LEW, 1984 WL 894 (C.D. Cal., Feb. 28, 1984) (each finding a sports league's age requirement that was implemented outside the scope of collective bargaining to violate Section One of the Sherman Act).

29. *Denver Rockets v. All-Pro Management*, 325 F. Supp.1049, 1061 (C.D. Cal. 1971).

ket by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins."³⁰

Labor Law Challenge to Sports Leagues' Age Requirements

Finally, a labor law challenge to a sports league's age requirement would turn on whether a court were to find that a players union breached its duty to provide fair representation by agreeing to an age requirement. Although no young professional athlete has ever attempted to challenge a collectively bargained age requirement under labor law, the idea of such a challenge was briefly broached in dicta of Judge Sotomayor's Second Circuit Court of Appeals opinion, *Clarett v. NFL*, which noted that the union's right to treat certain categories of players superiorly to others is "subject of course to the representative's duty of fair representation."³¹

Nevertheless, even a labor law claim is not without its own set of legal challenges. As discussed above, it is not entirely settled whether a court would find a players union to legally represent prospective league entrants that are deemed too young to enter the league draft.³² In addition, even if a union is deemed to adequately represent all those that seek to enter the league, it is not entirely settled whether a sports union's decision to impose an age requirement would be deemed impermissible.

Various Supreme Court decisions have explained that a union only breaches its duty of fair representation if the union acts arbitrarily, discriminatorily, or in bad faith.³³ However, few courts have put forth a clear definition, in this context, of the term "discriminatorily."³⁴ Some courts imply that union conduct is only discriminatory if it harms a statutorily protected class such as one based on race or gender – a view that forecloses any labor law challenge to sports leagues'

30. *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1322 (D. Conn. 1977) (internal citations and quotations omitted).

31. *Clarett v. Nat'l Football League*, 369 F.3d 124, 139 (2d. Cir. 2004).

32. See Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?* 115 PENN ST. L. REV. 341, 365-67, 369 (2010) (explaining how case law seems to be split on whether a union may represent non-employees).

33. See, e.g., *Marquez v. Screen Actors Guild* 525 U.S. 33 (1998); *Vaca v. Snipes*, 386 U.S. 171, 177 (1967).

34. See Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?* 115 PENN ST. L. REV. 341, 371-73 (2010) (discussing the various meanings courts have adopted for the term "discriminatory").

age requirements. Meanwhile, other courts, including those based in the Second and Tenth Circuits, have implied that any union decision that harms a group with minority voting interest, or no voting interest, would be deemed as discriminatory.³⁵ Applying this far broader test for whether union conduct is discriminatory, it would seem illegal for a union to determine worker preferences based on any classification that is irrelevant to job performance. Thus, one could surmise that age requirements in professional sports leagues are illegal so long as there is no evidence to show a meaningful link between one's age and his job performance as a professional athlete.³⁶

CONCLUSION

Based on the foregoing, young American football and basketball players have various legal alternatives to challenge the bureaucracy that delays their ability to earn an income as athletes. One alternative would be to file an antitrust lawsuit against the NCAA under Section One of the Sherman Act, alleging that the NCAA Principle of Amateu-rism serves as an illegal restraint of trade that fixes student-athlete pay at a predetermined amount. This first type of legal claim is strongest if filed in a federal district court based in the Tenth Circuit because of the favorable antitrust precedent set by the *Law and Board of Regents* decisions.

A second alternative would be for a prospective plaintiff to bring an antitrust challenge against a sports league's age requirement, contending that the age requirement serves as a form of illegal group boycott. This second type of antitrust challenge is strongest if filed in either the Third, Sixth, Eighth or D.C. circuits based on these circuits' seemingly more narrow application of the non-statutory labor exemption. Meanwhile, an antitrust challenge to a sports league's age requirement would almost certainly fail if brought in the Second Circuit

35. See, e.g., *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d. Cir. 1974) (noting that for a union to avoid a lawsuit under the duty of fair representation, the union must "provide procedural safeguards for minority members in the collective bargaining unit" – defining the term "minority" in a manner far broader than merely a statutorily protected class); *Aguinaga v. United Food & Commercial Workers*, 993 F.2d 1463, 1470 (10th Cir. 1990) (holding that it is a violation of the duty of fair representation for a union to determine worker preferences based on any classification that is not directly relevant to job performance).

36. For an example of one study that seems to discount the argument that student-athletes benefit from the college experience, see, e.g., Michael McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 V.A. SPORTS & ENT. L. J. 113 (2004) (concluding that on average, over the duration of their careers, the NBA players who are drafted directly from high school outperform those who enter the league after completing at least some college).

based on the unfavorable precedent set by that circuit in *Clarett v. Nat'l Football League*.

Finally, a third legal alternative for a young athlete would be to sue either the NFL or NBA players union for agreeing with the league to implement a minimum age requirement in violation of the union's duty of fair representation. To succeed on this final type of claim, a court would need to make a broad determination about how widely the union's representation powers apply, as well as about the proper meaning of the term "discriminatory." This final potential claim has the strongest likelihood of success if filed by a prospective plaintiff in either the Second or Tenth Circuits. However, a court would likely reject this claim in most other circuits.

Overall, the challenge of uprooting America's longstanding sports bureaucracy will be complex, yet perhaps feasible. It will require both a willing plaintiff and plaintiffs' lawyers that are armed with a thorough understanding of the nuances in labor and antitrust law, as well as how these laws differ between the circuits.

The time may be ripe to challenge the bureaucracy that prevents young athletes from earning a living; however, the strategy in doing so must be carefully orchestrated. Only with a carefully designed legal plan that is based on an understanding of legal nuances will young American football and basketball players have a reasonable likelihood of success in challenging the bureaucracy that delays their ability to earn a livelihood. And, only by allowing young athletes the opportunity to sell their athletic services in the free market will a segment of society that is so idolized by many be able to secure for themselves their fair due.

