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Athletic Favoritism in the Context of the Covid-19 Pandemic

Cover Page Footnote

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I. INTRODUCTION

When the coronavirus made its way to the United States, sports fans experienced something like never before. As leagues postponed their playoffs and season openers, and schools and universities cancelled games, the future looked grim. Another blow came to fans as a travel ban was imposed on the country, bringing foreign travel to a halt. Even if the major leagues could find a way to play following the guidelines in place, the question remained whether beloved foreign players would be able to return and compete. Highschool seniors worried about scholarships they expected based on their senior year performance and college players wondered how they would catch their big breaks without a season.

With foreign athletes making up a large percentage of certain American Sports leagues, it came as no surprise that the government stepped in to make exceptions to allow those players back into the country amidst the COVID-19 pandemic. The hard-work and extraordinary ability these players display qualified them for a government exemption to a travel ban, while many others were left in the dust.

II. GENERAL SUMMARY

This article is written to draw attention to the inequality between general immigration policies in comparison to those deemed to be of national interest. Specifically, this article focuses on the distinction drawn between immigration for standard purposes and immigration for professional athletes with extraordinary abilities, who were exempt from the presidential proclamations during the Coronavirus pandemic.

First, this article will discuss the impact of foreign-born athletes in U.S. sports leagues. Next, it will discuss the types of visas available to these athletes. Then, the article will discuss the coronavirus pandemic and the proclamations regarding travel into the United States during the pandemic. The article will address national interest and the process and scope of authority to make a national interest exception. Finally, the legal implications of making such exceptions, as well as the legal implications of cancelling high school sporting events, will be addressed.

III. PROFESSIONAL SPORTS LEAGUES AND ATHLETE VISAS

A. Foreign Athletes in U.S. Sports Leagues

As of March 19, 2020, it was reported that 72.5% of National Hockey League (“NHL”) players, 31% of Major League Baseball (“MLB”) players, and 26.1% of National Basketball Association (“NBA”) players have foreign nationalities.¹ Tony Parker, born in Bruges, Belgium, holds four NBA titles and was the first non-American player to be named NBA Finals MVP and

¹ Jeff Tracy, *Coronavirus Travel Bans Could Strand Foreign Athletes in U.S. Sports Leagues*, Axios (Mar. 20, 2020), www.axios.com/coronavirus-sports-travel-bans-foreign-athletes-3722ebe1-5afc-46b8-84fd-e6c4a6afb8b5.html.

leads all international players in scoring, assists, and steals in NBA playoff history.² Luis Aparicio, from Venezuela, played shortstop for the Chicago White Sox. Aparicio was voted on to the All-Star team ten times and collected over 2,000 hits and led the American League in stolen bases 9 times in his career.³ He was inducted into the National Baseball Hall of Fame in 1984.⁴ Swedish-born Nicklas Lidstrom, former Red Wings defenseman, played in the NHL for twenty seasons.⁵ Lidstrom won seven Norris Trophies as the NHL's best defenseman, was chosen to participate in twelve NHL All-Star Games, and helped lead the Red Wings to four Stanley Cup Championships.⁶ The list goes on, with countless exceptional foreign athletes achieving the highest praises in American sports leagues.

As major sports leagues continue to globalize their rosters, revenues continue to grow as well.⁷ "NBA revenues have increased by over 3,000% (inflation adjusted) since 1982."⁸ Inclusion of foreign athletes on American sports teams has enhanced the quality of the games being played and attracts more fans, domestically and internationally.⁹ "Why is foreign talent so important to the United States?'... 'For the same reason the Boston Red Sox don't limit themselves to players born in Boston: The larger the pool you draw from, the larger the supply of exceptional talent.'"¹⁰

B. Types of U.S. Visas for Foreign Born Athletes

To enter the United States, a citizen of a foreign country must first obtain a U.S. visa.¹¹ There are two main categories of U.S. visas: (1) nonimmigrant visas and (2) immigrant visas.¹² Nonimmigrant visas allow for travel to the United States on a temporary basis, whereas immigrant visas allow for permanent residence.¹³ There are four categories of U.S. visas commonly utilized by athletes: B, H, O, and P.¹⁴

² Tony Parker, *Basketball Reference* (Last visited June 5, 2020) <https://www.basketball-reference.com/players/p/parketo01.html>.

³ Teddy Mitrosilis, *Foreign-Born Players In Baseball's Hall Of Fame*, *ThePostGame* (Feb 17, 2011), www.thepostgame.com/blog/throwback/201102/foreign-born-players-baseballs-hall-fame.

⁴ *Id.*

⁵ Brad Kurtzberg, *The NHL's 50 Greatest Non-North American Players*, *Bleacher Report* (Sept. 20, 2012), bleacherreport.com/articles/1340173-the-nhls-50-greatest-non-north-american-players.

⁶ *Id.*

⁷ National Foundation for American Policy, *The Contributions of Immigrants to Sports in America* (July 2020), nfap.com/wp-content/uploads/2020/07/The-Contributions-of-Immigrants-to-Sports-in-America.NFAP-Policy-Brief.July-2020.pdf.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* quoting, L. Rafael Reif, *I'm the President of M.I.T. America Needs Foreign Students*, *New York Times* (July 14, 2020).

¹¹ *What is a U.S. Visa?*, U.S. Department of State, travel.state.gov/content/travel/en/us-visas/visa-information-resources/frequently-asked-questions/what-is-us-visa.html (last visited June 3, 2021).

¹² *Id.*

¹³ *Id.*

¹⁴ *US Athlete Visa: B1, B2, H1B, H2B, O1 And P1 Visa*, *VisaPro*, www.visapro.com/resources/article/us-visa-for-athletes/ (last visited June 3, 2021).

The B visa category is broken into the B-1 Business Visitor Visa and the B-2 Visitor Visa.¹⁵ An athlete is permitted to enter the United States as a B-1 Business Visitor if their visit will include business activities that are professional or commercial, such as contract negotiations or participating in short-term training.¹⁶ Three classes of foreign national athletes can enter the United States using the B-1 Visa for Athletes: individual professional athletes, athletes or team members who are a part of a foreign based team, and amateur hockey players.¹⁷ “The B-2 Visitor Visa allows for travel to the United States for ‘pleasure,’” such as visiting friends and family or for traveling through the United States.¹⁸ Amateur athletes are permitted to enter the United States on a B-2 visa but professional athletes may not.¹⁹ However, the B Visa is a viable option for foreign professional golfers attempting to enter the United States to play in professional golf tournaments.²⁰

Athletes coming to the United States for specific events related to their trade may qualify for the P-1 visa category.²¹ The player, his team, and the event his team is participating in must all be “internationally recognized.”²² Additionally, the athlete’s “essential support personnel” can accompany them for the specific event under the P-1S visa category.²³

“The O-1 visa category allows individual athletes with extraordinary ability in athletics to come to the United States to participate or compete in events that are in the area of extraordinary ability.”²⁴ To qualify for the O-1 visa, the athlete must demonstrate that they have “sustained national or international acclaim and have risen to the top of their fields.”²⁵ “Coaches, managers, and/or trainers may be eligible for an O-2 [visa] if they can show that they have skills that are critical and essential to the O-1 athlete.”²⁶

If an athlete is only coming to the United States for a specific event or the sports’ season and they have a certification from the U.S. Department of Labor, they can qualify for an H-2B visa.²⁷ “The H-1B visa category allows athletes who are members of a ‘specialty occupation’ to come to the U.S. to compete or participate in events.”²⁸ Immigration attorneys from VisaPro define specialty occupation as one that “requires the theoretical and practical application of a body of specialized knowledge and a bachelor’s degree, or the equivalent in the specific specialty.”²⁹

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Immigration Options For Foreign Collegiate Golfers (Updated)*, Seltzer Chadwick Soefje & Ladik, PLLC, www.realclearcounsel.com/single-post/2019/06/04/immigration-options-for-foreign-collegiate-golfers-updated, (last visited June 3, 2021).

²¹ *Supra* note 14.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

IV. THE CORONAVIRUS PANDEMIC AND RESTRICTED TRAVEL TO THE UNITED STATES

According to the New York Times, on January 20, 2020, the first confirmed case of the Coronavirus in the United States was reported in Washington State.³⁰ Soon after, on January 30, the World Health Organization declared a global health emergency.³¹ The next day, the Trump administration restricted travel from China by suspending entry into the United States by any foreign nationals who had traveled to China in the past 14 days.³² Immediate family members of American citizens or permanent residents were excluded from this suspension.³³ On March 13, President Trump declared a national emergency.³⁴

To address the threat to the nation posed by the Coronavirus, President Trump issued Proclamations 9984, 9992, 9993, and 9996, suspending the entry of all aliens who were physically present within the People’s Republic of China (excluding the Special Administrative Regions of Hong Kong and Macau), the Islamic Republic of Iran, the Schengen Area, the United Kingdom, and the Republic of Ireland, during the 14-day period preceding their entry or attempted entry into the United States.³⁵

President Trump signed another proclamation suspending entry into the United States of certain immigrants and nonimmigrants who presented a risk to the United States labor market.³⁶ President Trump stated in his proclamation that without intervention, the United States “faces a potentially protracted economic recovery with persistently high unemployment if labor supply outpaces labor demand.”³⁷ “The vast majority of immigrant visa categories do not require

³⁰ Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, The New York Times (March 17, 2021), www.nytimes.com/article/coronavirus-timeline.html.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *President Trump Declares State of Emergency for COVID-19*, National Conference of State Legislatures (March 25, 2020), <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/president-trump-declares-state-of-emergency-for-covid-19.aspx>.

³⁵ *National Interest Exemption From Presidential Proclamations 9984, 9992, 9993, and 9996 Regarding Novel Coronavirus for Certain Professional Athletes and Their Essential Staff and Dependents*, Department of Homeland Security (May 22, 2020), [www.dhs.gov/publication/national-interest-exemption-presidential-proclamations-9984-9992-9993-and-9996-regarding#:~:text=To%20address%20the%20threat%20to,of%20Hong%20Kong%20and%20Macau\)%2C](http://www.dhs.gov/publication/national-interest-exemption-presidential-proclamations-9984-9992-9993-and-9996-regarding#:~:text=To%20address%20the%20threat%20to,of%20Hong%20Kong%20and%20Macau)%2C).

³⁶ *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*, National Archives and Records Administration (Apr. 22, 2020), trumpwhitehouse.archives.gov/presidential-actions/proclamation-suspending-entry-immigrants-present-risk-u-s-labor-market-economic-recovery-following-covid-19-outbreak/.

³⁷ *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*, National Archives and Records Administration (Apr. 22, 2020), trumpwhitehouse.archives.gov/presidential-actions/proclamation-suspending-entry-immigrants-present-risk-u-s-labor-market-economic-recovery-following-covid-19-outbreak/.

employers to account for displacement of U.S. workers.”³⁸ The proclamation states that “[w]hile some employment-based visas contain a labor certification requirement, because visa issuance happens substantially after the certification is completed, the labor certification process cannot adequately capture the status of the labor market today.”³⁹ Moreover, it states that “introducing additional permanent residents when our healthcare resources are limited puts strain on the finite limits of our healthcare system at a time when we need to prioritize Americans and the existing immigrant population.”⁴⁰ In sum, President Trump made it clear, through his proclamations, that immigrants would have to stand by while the United States took care of its citizens first.

However, one subset of the immigrant community experienced priority treatment. In May, only 2 months after the pandemic began, Acting Secretary of Homeland Security, Chad Wolf used his power to sign an order which exempted certain foreign professional athletes from the proclamations which barred their entry otherwise.⁴¹ The order states that it is in the national interest to exempt these aliens.⁴² The Department of State also granted national interest exceptions for qualified travelers seeking to enter the United States for purposes related to humanitarian travel, public health response, and national security.⁴³

Shortly thereafter, the President continued his trend of restricting immigrants in other categories. In December 2020, President Trump used his power to declare Proclamation 10052, which “suspended the entry of certain temporary workers who are outside the United States and not in possession of a valid visa from seeking admission to the United States.”⁴⁴ This proclamation applies to H-1B, H-2B, L, and J-1 visas.⁴⁵ The administration amended the proclamation to exempt only those H-1B, H-2B, L-1, or J-1 visa holders who possessed a valid visa in the same category as of the effective date of the proclamation.⁴⁶ The Department of State has released guidance on national interest exceptions to the proclamation.⁴⁷ As of April 1, 2021, President Biden has not addressed his plan of dealing with President Trump’s Proclamation.⁴⁸

To that end, the immigrant community faced a series of harsh restrictions due to the Trump administration’s COVID-19 response. Athletes within this community, however, did not.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Acting Secretary Wolf Signs Exemption Allowing Entry of Certain Foreign Professional Athletes into the US*, Department of Homeland Security (May 22, 2020), www.dhs.gov/news/2020/05/22/acting-secretary-wolf-signs-exemption-allowing-entry-certain-foreign-professional.

⁴² *Id.*

⁴³ *National Interest Exceptions for Certain Travelers from from China, Iran, India, Brazil, South Africa, Schengen Area, United Kingdom, and Ireland*, U.S. Department of State (May 27, 2021), <https://travel.state.gov/content/travel/en/News/visas-news/national-interest-exceptions-for-certain-travelers-from-china-iran-india-brazil-south-africa-schengen-area-united-kingdom-and-ireland.html>.

⁴⁴ Michelle D. Grimm & Matthew W. Hoyt, *Summary of National Interest Exceptions to Presidential Proclamation 10052 for H-1B and L-1 Visa Applicants*, Lexology (Aug. 20, 2020), www.lexology.com/library/detail.aspx?g=8287816f-c591-4b7c-ba25-b154acbd25f8.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Proclamation Suspending Entry of Certain H, J, and L Nonimmigrants*, NAFSA (Apr. 1, 2021), www.nafsa.org/regulatory-information/proclamation-suspending-entry-certain-h-j-and-l-nonimmigrants.

This comes as a surprise, especially in light of the Coronavirus pandemic bringing the sports industry to a halt.

V. THE IMPACT OF THE CORONAVIRUS PANDEMIC ON THE SPORTS INDUSTRY

A. Cancelled, Postponed, or Suspended Events

“In April 2020, only 1% of scheduled sports events with attendance of at least 5,000 were projected to have taken place, but in January 2020, that figure was 100%.”⁴⁹

All across Europe, events were cancelled such as the Euro 2020 football tournament, national football leagues, the Six Nations rugby tournament, the London Marathon, the Giro d’Italia cycling tour, UK Grand National horse race, and Wimbledon tennis tournament.⁵⁰ The United States cancelled or postponed most professional sporting events, including whole seasons.⁵¹ The Tokyo Olympics were postponed.⁵² In countries around the world, such as South America and Australia, professional sporting events that people looked forward to were either cancelled or postponed indefinitely.⁵³

All of these live sporting events are vital revenue-generators for so many other industries.⁵⁴ “Revenues for the global sports industry in 2020 are currently projected to reach only 54% of those projected before the COVID-19 pandemic.”⁵⁵

B. Labor and Employment Issues

“In the United States, the CARES Act provides tax credits for ‘eligible employers,’ including those whose trade or business operations fully or partially shut down due to COVID-19-related government orders, in order to incentivize businesses to retain their employees through the crisis.”⁵⁶ Salaries were reduced for major and minor league players in the MLB.⁵⁷ While the NBA cut salaries by 25%, the pandemic did not affect players’ salaries in the NHL.⁵⁸ As for arena staff, teams are trying to make up for the lost wages as best they can, such as paying their staff through the shutdown or setting up funds to assist the staff while they’re not working.⁵⁹

⁴⁹ Louise Skinner & Nicholas Moore, *Sports Organizations: Consider These Actions During and After COVID-19*, Morgan Lewis (Apr. 24, 2020), www.morganlewis.com/pubs/2020/04/sports-organizations-consider-these-actions-during-and-after-covid-19-cv19-lf.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

C. Access to COVID-19 Testing

The NFL generates more than \$15 billion in annual revenue.⁶⁰ The NBA's average revenue per team for the 2018-2019 season was \$292 million.⁶¹ In 2019, the MLB saw a record \$10.7 billion in revenues.⁶² It should come as no surprise that this amount of money can buy teams top-of-the-line medical care, including access to quick testing for the novel Coronavirus. "If there is enough money at the right price, you can get a lab to stand up and meet your needs," said Rex Archer, the health director for Kansas City, Mo."⁶³

In July 2020, in central Florida, a patient fearing he had contracted COVID-19 was tested for the virus, but sixteen days later he still had not received his results.⁶⁴ On the same day, in Orlando, FL, approximately 180 players and staff members from four Major League Soccer ("MLS") teams were tested for the virus upon checking into their hotel, and their results came back within hours.⁶⁵

BioReference Laboratories is a private lab located in Elmwood Park, NJ.⁶⁶ BioReference was contracted by the NBA and the MLS to do their tests and provide results within hours.⁶⁷ While under contract with BioReference, the MLS had about 1,300 players and staff tested every other day, while the NBA was requiring the lab to perform several hundred tests daily for 22 teams and their staff.⁶⁸

"From Nov. 8 to 14, the NFL administered 43,148 tests to 7,856 players, coaches and employees."⁶⁹ MLB conducted 170,000 tests during its shortened season.⁷⁰

Controversy has been building about the abundant availability of tests to professional athletes and the lack of testing available to healthcare workers on the front lines. Ezekiel Emanuel, professor of health policy and medical ethics at the University of Pennsylvania, thinks it is "absolutely essential" to bring back sports amidst the pandemic, but done "in a responsible way when we're dealing with a scarce resource the whole country needs."⁷¹

⁶⁰ Kent Babb, *As Thousands of Athletes Get Coronavirus Tests, Nurses Wonder: What about Us?*, The Washington Post (Dec. 3, 2020), www.washingtonpost.com/sports/2020/11/27/nurses-athletes-sports-coronavirus-tests/.

⁶¹ Forbes Press Releases, *The Business of Basketball: Forbes Releases 22nd Annual NBA Team Valuations*, Forbes (Feb. 11, 2020) www.forbes.com/sites/forbespr/2020/02/11/the-business-of-basketball-forbes-releases-22nd-annual-nba-team-valuations/?sh=56dda68775ff.

⁶² Maury Brown, *MLB Sees Record \$10.7 Billion In Revenues For 2019*, Forbes (Dec. 21, 2019), www.forbes.com/sites/maurybrown/2019/12/21/mlb-sees-record-107-billion-in-revenues-for-2019/?sh=4cdf5fbd5d78.

⁶³ Louise Radnofsky, et al., *Is It a Problem That Sports Gets Fast Test Results and You Don't?*, The Wall Street Journal (July 16, 2020), www.wsj.com/articles/is-it-a-problem-that-sports-gets-fast-test-results-and-you-dont-11594897200.

⁶⁴ Kevin Baxter, *Pro Athletes in Florida Get Their COVID Test Results in Hours. Everyone Else Has to Wait Days*, Los Angeles Times (July 19, 2020), www.latimes.com/world-nation/story/2020-07-19/https-www-latimes-com-national-coronavirus-testing-0718.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Supra* note 60.

⁷⁰ *Id.*

⁷¹ *Supra* note 63.

“According to some public officials, sports teams are not exactly jumping the line for testing because there is not a line to jump.”⁷² Rather, the United States lacks a unified testing infrastructure.⁷³ The big question is where the priorities of testing should be. Jon Cohen, executive chairman of BioReference Laboratories, said processing tests for health-care providers and other essential workers has been made a priority since March 13, 2020.⁷⁴ Cohen stated that the number of tests BioReference conducted for NBA was “minimal” when compared to BioReference’s daily testing capacity.⁷⁵ Cohen also noted that because the league was closely located to one of BioReference’s labs, turnaround time was shorter.⁷⁶

Similar to the preferential immigration policies during the COVID-19 pandemic, athletes also experienced preferential testing and precautionary measures, all during a time where sports were at a standstill.

VI. LEGAL IMPLICATIONS

A. Legal Implications of Cancelling or Restricting the Playing of Sports

“On Wednesday, March 11, 2020, hundreds of students and parents stormed the offices of the Connecticut Interscholastic Athletic Conference (CIAC) to protest the cancellation of the state basketball tournaments and other winter sports championships...”⁷⁷ When CIAC announced their decision, angry protesters responded by throwing food and garbage at the building.⁷⁸ By that evening, petitions began circulating gaining as many as 90,000 signatures.⁷⁹ Following the decision in Connecticut, more protests erupted across the United States in response to similar decisions to cancel or postpone high school sporting events.⁸⁰ In addition to the protesting and petitions, some players and parents threatened litigation.⁸¹

Currently, there are no appellate court cases that have been decided in federal or state courts that are directly on-point regarding the authority of state actors to postpone or cancel scholastic sports competitions during a global pandemic.⁸² There are however, “several rulings from which a generalized prediction might be deduced regarding the outcome of a lawsuit by student-athletes, parents, or other constituents attempting to overturn efforts to protect public health and safety during an event like the coronavirus outbreak.”

In *Kelly v. Legislative Coordinating Council*, “the Kansas Supreme Court struck down a GOP measure by the state legislature allowing in-person church services in violation of coronavirus restrictions issued by Governor Laura Kelly limiting such services, like all other

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Lee Green, *Sports Law Issues Related to COVID-19 Pandemic*, NFHS (May 13, 2020), www.nfhs.org/articles/sports-law-issues-related-to-covid-19-pandemic/.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

public gatherings, to a maximum of 10 people.”⁸³ The court held that state law gave the governor the power to make the decision to declare a state of disaster for as long as deemed necessary.⁸⁴

In *Kunkel v. Northern Kentucky Health Department*, the Kentucky Court of Appeals upheld a lower court’s refusal to allow a student-athlete to participate in their sport during an outbreak for which he was not vaccinated against. The court held that “control measures banning unvaccinated, non-immune students from participating in extracurricular activities were ‘reasonable, appropriate, and necessary to control the spread of a highly infectious disease.’”⁸⁵

In *Phillips v. City of New York*, the U.S. Second Circuit Court of Appeals held in favor of the nation’s largest school district’s efforts to mitigate an outbreak of chickenpox.⁸⁶ Here, the school district imposed restrictions on students who were either unvaccinated against or non-immune to chickenpox.⁸⁷ “The appellate court ruled that the unvaccinated students’ rights to free exercise of their religion were outweighed by the public safety threat posed by the outbreak and, therefore, the mandated restrictions were a constitutionally permissible exercise of the state’s police power.”⁸⁸

The most relevant U.S. Supreme Court decision to the coronavirus pandemic dates back to 1905 during an outbreak of smallpox.⁸⁹ In 1905, the Court held in favor of compulsory vaccination laws, subject to some exemptions, in *Jacobson v. Massachusetts*.⁹⁰ The Court explained that the welfare of public health and safety takes precedent over individual liberties given the circumstances.⁹¹ In its ruling, the Court stated, “[O]f paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”⁹²

Given the aforementioned cases, it is likely that a court today deciding a case directly on-point regarding the authority of state actors to postpone or cancel scholastic sports competitions during a global pandemic, would hold in favor of the state and uphold restrictions on sports and events of that nature. If a court would likely uphold a state’s restrictions on sports during a pandemic, it does not make sense to also give athletes preferential immigration treatment. If there is no season, there is no justifiable reason permitting athletes entry into the United States over people who do not qualify simply because they do not possess the same “extraordinary ability.”

Without the opportunity to put their extraordinary ability to use, foreign athletes seeking entry into the United States are in the same position as everyone else trying to return to the United States and should be treated as such.

⁸³ *Id.* citing *Kelly v. Legislative Coordinating Council*, 311 Kan. 339, 460 P.3d 832 (2020).

⁸⁴ *Id.*

⁸⁵ *Id.* citing *Kunkel v. N. Ky. Indep. Health Dist.*, 140 S. Ct. 1295 (2020).

⁸⁶ *Id.* citing *Phillips v. City of N.Y.*, 775 F.3d 538 (2d Cir. 2015).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* citing *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

B. Legal Implications of Limiting or Restricting Immigration for Certain Classes of People

On January 27, 2017, President Trump passed a number of executive orders and proclamations that discriminate against the Muslim community.⁹³ On March 15, 2017, in accordance with the Muslim Ban 2.0, the Secretary of State called for “enhanced screening” of nationals of the six countries included in that ban.⁹⁴ In accordance with this “enhanced screening,” the Office of Management and Budget approved discretionary use of “extreme vetting questions.”⁹⁵ On September 27, 2017, the Trump administration lowered the annual refugee admission cap by 65,000.⁹⁶ Finally, on November 19, 2018, President Trump issued a ban which targeted asylum-seekers at the United States’ Southern border.⁹⁷

President Trump issued the aforementioned proclamations by invoking his authority under the Immigration and Nationality Act (“INA”) § 212(f) to restrict the entry of certain noncitizens so long as he asserted that allowing them into the United States would be “detrimental to the interests of the United States.”⁹⁸ Plaintiffs responded by filing several suits arguing that the Muslim Ban and the government’s actions of refusing to issue visas under 22 CFR §§ 41.121 and 42.81 conflicted with the proclamation and the statutory authority of the Secretary of State in INA § 104.⁹⁹

INA § 212(f) is titled “Suspension of entry or imposition of restrictions by President,” and states in relevant part:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem appropriate.¹⁰⁰

INA § 104 lays out the powers and duties of the Secretary of State.¹⁰¹ Although under the Constitution, the President determines U.S. foreign policy, the Secretary of State, appointed by the President with the advice and consent of the Senate, is the

⁹³ *Understanding Trump’s Muslim Bans*, National Immigration Law Center (Mar. 8, 2019), www.nilc.org/issues/immigration-enforcement/understanding-the-muslim-bans/.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Angelo A. Paparelli, *Pursuing a National Interest Exception to the Presidential Entry Bans on Economic Grounds - Not A Fool’s Errand*, Seyfarth Shaw LLP (July 8, 2020), www.bigimmigrationlawblog.com/2020/07/pursuing-a-national-interest-exception-to-the-presidential-entry-bans-on-economic-grounds-not-a-fools-errand/.

⁹⁹ *Id.*

¹⁰⁰ 8 U.S.C. § 1182.

¹⁰¹ 8 U.S.C. § 1104.

President's chief foreign affairs adviser.¹⁰² The Secretary carries out the President's foreign policies through the State Department, and some of their duties include: serving as the President's principal adviser on foreign policy, conducting negotiations relating to foreign affairs, granting and issuing passports to American citizens and exequaturs to foreign consuls in the United States, advising the President on the appointment of U.S. ambassadors, ministers, consuls, and other diplomatic representatives, and supervising the administration of U.S. immigration laws abroad.¹⁰³ Additionally, the Secretary of State retains domestic responsibilities that Congress entrusted to the State Department, including the preparation of certain presidential proclamations.¹⁰⁴

Following President Trump's executive order that suspended the entry of foreign nationals from countries previously identified by Congress as posing "heightened terrorism risks," the State of Hawaii entered a temporary restraining order to block those restrictions.¹⁰⁵ The State of Hawaii argued that the proclamation violated provisions of the INA and the Establishment Clause of the First Amendment.¹⁰⁶ The Supreme Court heard the case and held that the president was acting within his authority under 8 U.S.C.S. § 1182(f) when he issued a presidential proclamation placing entry restrictions on nationals from eight foreign states as their entry was detrimental to the United States' interests.¹⁰⁷

C. Legal Implications of the National Interest Exception

"National Interest" is never defined in the INA or the Code of Federal Regulations. It is defined in the dictionary as "the interest of a nation as a whole held to be an independent entity separate from the interests of subordinate areas or groups and also of other nations or supranational groups."¹⁰⁸ Senators Bob Graham, John McCain, and Pat Roberts, along with several other government officials, academics, and think-tank analysts have classified vital U.S. interests into five categories.¹⁰⁹ The first category of interests are interests that "prevent, deter, and reduce the threat of nuclear, biological, and chemical weapons attacks on the United States or its military forces abroad."¹¹⁰ The second category of interests captures interests that "ensure U.S. allies survival and their active cooperation with the United States in shaping an international system in which we can thrive."¹¹¹ The third category of interests are interests that "prevent the

¹⁰² *Duties of the Secretary of State*, U.S. Department of State, www.state.gov/duties-of-the-secretary-of-state/#:~:text=The%20Secretary%20of%20State%2C%20appointed,Service%20of%20the%20United%20States (last visited June 4, 2021).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *National Interest*, Merriam-Webster, www.merriam-webster.com/dictionary/national%20interest (last visited June 4, 2021).

¹⁰⁹ *What Are America's National Interests?*, Belfer Center for Science and International Affairs, www.belfercenter.org/publication/what-are-americas-national-interests (last visited June 4, 2021).

¹¹⁰ *Id.*

¹¹¹ *Id.*

emergence of hostile major power or failed states on U.S. borders.”¹¹² The fourth category of interests include interests that “ensure the viability and stability of major global systems (trade, financial markets, supplies of energy, and the environment).”¹¹³ The fifth and final category of interests are interests that “establish productive relations, consistent with American national interests, with nations that could become strategic adversaries, such as those with China and Russia.”¹¹⁴

“Exceptional ability” is defined as a “degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.”¹¹⁵ When the Board of Immigration Appeals evaluates requests for national interest waivers, petitioners have a list of items they must show. First, the petitioner must show “that he seeks employment in an area of substantial intrinsic merit.”¹¹⁶ Second, the petitioner must prove “that the proposed benefit will be national in scope.”¹¹⁷ Lastly, the petitioner must maintain that “requiring labor certification would negatively affect the national interest.”¹¹⁸ Nevertheless, the President has the power, through proclamation, to suspend the entry of any alien when he deems such entry would be “detrimental to the interests of the United States.”¹¹⁹

As of August 2020, immigrants accounted for 13.7% of the U.S. population.¹²⁰ In 2019, more than 157 million Americans were a part of the workforce.¹²¹ In 2017, 21.2 million lawful immigrants contributed to the U.S. workforce.¹²² With COVID-19 running rampant throughout the country, the President made a decision to distinguish between classes of immigrants based on almost arbitrary reasons. Although there is no doubt that professional sports were a light at the end of a dark tunnel that everyone was coasting through for so many months, this distinction hurt so many people at the same time. In the case of *Milligan v. Pompeo*, COVID-19 and the travel ban proclamations had kept apart 153 U.S. citizens and their foreign-born fiancé(e)s.¹²³ As hundreds of people were being kept apart from their loved ones, athletes and their staff were being welcomed back with open arms.

For the first three months of the pandemic, the U.S. Citizenship and Immigration Services (“USCIS”) closed their offices for service to the public and then only began reopening in certain locations.¹²⁴ Following the closures, all interviews for immigration benefit applications

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 8 C.F.R. § 204.5(k)(2).

¹¹⁶ *Repaka v. Beers*, 993 F. Supp. 2d 1214 (S.D. Cal. 2014) (citing *In re New York State Dept Of Transp.*, 22 I. & N. Dec. 215 (B.I.A. August 7, 1998)).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ 8 USC § 1182(f).

¹²⁰ Abby Budiman, *Key Findings about U.S. Immigrants*, Pew Research Center (Aug. 20, 2020), www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/.

¹²¹ Drew DeSilver, *10 Facts about American Workers*, Pew Research Center (29 Aug. 29 2019), www.pewresearch.org/fact-tank/2019/08/29/facts-about-american-workers/.

¹²² *Supra* note 120.

¹²³ *Milligan v. Pompeo*, Civil Action No. 20-2631 (JEB), 2020 U.S. Dist. LEXIS 217947 (D.D.C. Nov. 19, 2020).

¹²⁴ Jorge Loweree, et al., *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System*, American Immigration Council (Sept. 30 2020), www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system.

and asylum applications were cancelled and to be rescheduled, causing tens of thousands of immigrants to be delayed on their path to citizenship.¹²⁵ The back-up from the closures is so severe that many other immigrants are still being delayed in this process.¹²⁶ The State Department has reported that as of February 2021, there was “an extensive backlog of 473,000 applications for people seeking to immigrate to the United States permanently, and that number even excludes cases where applicants have not had an interview or are still working on gathering the required documents.”¹²⁷

In a country where immigration is a cornerstone of our diversity, this distinction will lead to years of questioning; if athletes can be exempt during a time of a national emergency, what else can they be exempt from? It can take years for individuals to secure the visas they need to enter this country, sometimes for reasons pertaining to work but other times for necessary refuge. By leaving “national interest” undefined, the government controls the ability to allow anything to fall under that category if or when they so choose.

VII. CONCLUSION

Throughout American history, professional sporting events have played a vital role at unifying the country when it is needed most.

Think back to the unifying impact on September 21, 2001, of the New York Mets’ Mike Piazza hitting an eighth inning, go-ahead, two-run homer at Shea Stadium against the Braves in the first professional game played after the 9/11 terror attacks; the healing power of Drew Brees leading the New Orleans Saints to the 2006 NFC Championship Game after the team’s year of exile from the Big Easy following the devastation of Hurricane Katrina; and the redemptive power of Big Papi’s exquisitely-worded message forcing the concept of “Boston Strong” to a sellout crowd at Fenway Park before an April 20, 2013 game against the Kansas City Royals, the first home contest for the Red Sox since the marathon bombing five days earlier.¹²⁸

Now, when the country faces another monumental moment of history, are sports the only thing people can count on to bring us back to happier times?

Should the welfare of American sports leagues and the morale of the American people rank higher than immigration issues in our country? Although the pandemic caused a state of confusion and worry, allowing athletes to surpass governmental proclamations sheds light on the priorities we may hold too high.

¹²⁵ *Id.*

¹²⁶ Nicole Narea, *Foreign Workers Blocked by Trump are No Longer Banned from Entering the US*, Vox (Apr. 1, 2021), www.vox.com/policy-and-politics/2021/4/1/22360589/trump-foreign-workers-ban-h1b-biden.

¹²⁷ *Id.*

¹²⁸ *Supra* note 77.