
No. 16-1558

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

GILLIAN BERGER and TAYLOR HENNIG,
on their own behalf and on behalf of similarly situated persons

Plaintiff-Appellants

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, a/k/a the NCAA, and
certain NCAA Division I Member Schools, in their respective incorporated names or
in the name of their respective Boards of Regents/Trustees ⁱ

Defendant-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
Case No. 1:14-CV-1710
The Honorable William T. Lawrence

**PETITION FOR REHEARING *EN BANC* OF
PLAINTIFF-APPELLANTS**

Paul L. McDonald
P L MCDONALD LAW LLC
1800 JFK Boulevard, Suite 300
Philadelphia, PA 19103
(267) 238-3835

Counsel for Plaintiff-Appellants

ⁱ Defendant-Appellee NCAA Division I Member Schools, including private and semi-public schools not immune to this federal lawsuit under the *Eleventh Amendment*, are listed in the Short Appendix. A. 1-3.

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Cir. R. 26.1, the undersigned counsel for Plaintiff-Appellants state:

1. The full names of every party that the undersigned attorneys represent in this case are:

Gillian Berger
Taylor Hennig

2. The names of all law firms whose partners or associates have appeared for the parties in the case or are expected to appear for the parties in this court are:

Paul L. McDonald
P L MCDONALD LAW LLC
1800 JFK Boulevard, Suite 300
Philadelphia, PA 19103
(267) 238-3835

3. The parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties represented by the undersigned attorneys: n/a.

Respectfully submitted,

s/ Paul L. McDonald

Paul L. McDonald
P L MCDONALD LAW LLC

Counsel for Plaintiff-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
RULE 35(b)(1) STATEMENT	1
ARGUMENT	2
I. The Opinion Conflicts with Decisions in This and Other Circuits on Employee Status As A Fact-Intensive Inquiry	2
II. The Panel’s Conflicting Opinion on Employee Status As A Fact-Intensive Inquiry Relies upon Misapplication of <i>Thirteenth Amendment</i> Decisions in This and Other Circuits	6
III. The Opinion Conflicts with Decisions of the Supreme Court and Circuits by Granting Deference to Putative Employer Characterization of “Economic Reality” <i>In Lieu</i> of Employee Tests	11
CONCLUSION	15
CERTIFICATE OF COMPLIANCE	16
CERTIFICATE OF SERVICE	17
APPENDICES	
<i>Summary Exhibit</i> Defendant Websites Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports (A. 388-418)	App. A
Panel Opinion (Doc. 50, 12/5/16)	App. B

TABLE OF AUTHORITIES

CASES

<i>Alexander v. Stratus Bldg. Sols.</i> , No. 4:14 CV 921, 2014 U.S. Dist. LEXIS 164194 (E.D. Mo. Nov. 24, 2014)	5
<i>Allen v. Mayberg</i> , No. 1:06-cv-01801, 2008 U.S. Dist. LEXIS 101963 (E.D. Cal. Dec. 4, 2008)	8
<i>Arbaugh v. Y& H Corp.</i> , 380 F.3d 219, 229 (5th Cir. 2004), <i>rev'd on other grounds</i> 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)	5
<i>Bennett v. Frank</i> , 395 F.3d 409 (7th Cir. 2005)	7
<i>Bonnette v. California Health & Welfare Agency</i> , 704 F.2d 1465 (9th Cir. 1983)	7, 9
<i>Brennan v. Partida</i> , 492 F.2d 707 (5th Cir. 1974)	13
<i>Callahan v. City of Chi.</i> , 813 F.3d 658 (7th Cir. 2016)	10
<i>Cole v. U.S. Capital, Inc.</i> , 389 F.3d 719 (7th Cir. 2004)	6
<i>Coronado v. D N.W. Hous., Inc.</i> , No. H-13-2179, 2014 U.S. Dist. LEXIS 83763 (S.D. Tex. June 19, 2014)	13
<i>Danneskjold v. Hausrath</i> , 82 F.3d 37 (2d Cir. 1996)	10
<i>Douglas v. Aramark</i> , No. 1:09-cv-00912, 2009 U.S. Dist. LEXIS 113381 (S.D. Ind. Dec. 2, 2009)	7
<i>Doyle v. City of New York</i> , 91 F. Supp. 3d 480 (S.D.N.Y. 2015)	10
<i>Gibson v. Kronzer</i> , No. 93-1987, 1995 U.S. App. LEXIS 7814 (7th Cir. Apr. 5, 2015)	7

<i>Guy v. Casal Inst. of Nev.</i> , No. 2:13-cv-02263, 2016 U.S. Dist. LEXIS 113033 (D. Nev. Aug. 16, 2016)	5-6
<i>Hamilton v. Dart</i> , 13 C 1053, 2013 U.S. Dist. LEXIS 43171 (N.D. Ill. Mar. 27, 2013)	7
<i>Isom v. Wesley Med. Ctr.</i> , No. 2:14-CV-190, 2015 U.S. Dist. LEXIS 127550 (S.D. Miss. Sep. 23, 2015)	5
<i>Knight v. United Farm Bureau Mut. Ins. Co.</i> , 950 F.2d 377 (7th Cir. 1991)	3
<i>Love v. JP Cullen & Sons, Inc.</i> , 779 F.3d 697 (7th Cir. 2015)	2
<i>Martin v. Selker Bros., Inc.</i> , 949 F.2d 1286 (3d Cir. 1991)	4
<i>Mathis v. Hous. Auth. of Umatilla Cnty.</i> , 242 F. Supp. 2d 777 (D. Or. 2002)	13
<i>McBroom v. HR Dir. Franklin Cty. Bd. of Elections</i> , No. 2:12-CV-01074, 2014 U.S. Dist. LEXIS 3422 (S.D. Ohio Jan. 10, 2014)	5
<i>McLaughlin v. Bos. Harbor Cruise Lines, Inc.</i> , 419 F.3d 47 (1st Cir. 2005)	4
<i>McMaster v. Minnesota</i> , 819 F. Supp. 1429 (D. Minn. 1993)	8
<i>Miles v. Univ. of the Dist. of Columbia</i> , No. 12-378, 2013 U.S. Dist. LEXIS 155236 (D.D.C. Oct. 30, 2013)	6
<i>Miller v. Advanced Studies, Inc.</i> , 635 F. Supp. 1196 (N.D. Ill. 1986)	1, 3
<i>Montoya v. S.C.C.P. Painting Contractors, Inc.</i> , 589 F. Supp. 2d 569 (D. Md. 2008)	13
<i>Morales v. M. Alfonso Painting Corp.</i> , No. 11. Civ. 1263, 2013 U.S. Dist. LEXIS 134219 (S.D.N.Y. Sep. 19, 2013)	4
<i>Mosley v. LeBlanc</i> , No. 10-0385, 2010 U.S. Dist. LEXIS 70607 (M.D. La. June 18, 2010)	8
<i>Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Lambert</i> , 462 F. App'x 299 (4th Cir. 2012)	8

<i>O'Bannon v. NCAA</i> , 7 F. Supp. 3d 955 (N.D. Cal. 2014), <i>aff'd in part and rev'd in part</i> , 802 F.3d 1049 (9th Cir. 2015)	11
<i>O'Bannon v. NCAA</i> , 802 F.3d 1049 (9th Cir. 2015)	14
<i>Real v. Driscoll Strawberry Assocs., Inc.</i> , 603 F.2d 748 (9th Cir. 1979)	13
<i>Riley v. Doyle</i> , 06-C-574-C, 2006 U.S. Dist. LEXIS 75526 (W.D. Wis. Oct. 16, 2006)	7
<i>Rutherford Food Corp. v. McComb</i> , 331 U.S. 722, 729, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947)	13
<i>Sanders v. Hayden</i> , 544 F.3d 812 (7th Cir. 2008)	7
<i>Sec'y of Labor v. Lauritzen</i> , 835 F.2d 1529 (7th Cir.1987)	10
<i>Sherman v. Am. Eagle Express, Inc.</i> , No. 09-575, 2012 U.S. Dist. LEXIS 30728 (E.D. Pa. Mar. 8, 2012)	4
<i>Sigala v. Abrof VA, Inc.</i> , No. GJH-15-1779, 2016 U.S. Dist. LEXIS 55174 (D. Md. Apr. 21, 2016)	4
<i>Skidmore v. Swift & Co.</i> , 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944)	2
<i>Strom v. Strom Closures, Inc.</i> , No. 06 C 7051, 2008 U.S. Dist. LEXIS 90663 (N.D. Ill. Nov. 7, 2008)	3
<i>Tony & Susan Alamo Found v. Sec'y of Labor</i> , 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985)	1, 12
<i>Usery v. Pilgrim Equip. Co.</i> , 527 F.2d 1308 (5th Cir. 1976)	13
<i>Vanskike v. Peters</i> , 974 F.2d 806 (7th Cir. 1992)	1-3, 6-10
<i>Villarreal v. Woodman</i> , 113 F.3d 202 (11th Cir. 1997)	9

Watson v. Graves,
909 F.2d 1549 (5th Cir. 1990) 13

Weissenberger v. Watters,
07-C-415-C, 2007 U.S. Dist. LEXIS 57595 (W.D. Wis. Aug. 3, 2007) 7

STATUTES

U.S. Const. amend. XIII iii, 1, 3, 6-10

U.S. Const. amend. XIV14

Fair Labor Standards Act,
29 U.S.C. §§ 201 *et seq.* (2007) 1, 3-4, 6-9, 11-15

Plaintiff-Appellants hereby move, through undersigned counsel, for rehearing *en banc* of the opinion of this Court issued on December 5, 2016 (Doc. 50).

RULE 35(b)(1) STATEMENT

The opinion conflicts with decisions of this Court and of the Supreme Court. Consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

In addition, the opinion presents questions of exceptional importance because it conflicts with authoritative decisions of other Circuits, yet could be misapplied to a similar case in the Ninth Circuit: *Dawson v. NCAA*, No. 3:16-cv-05487 (N.D. Cal. Sept. 26, 2016).

- (1) The opinion conflicts with decisions in this and other Circuits, which establish employee status is a fact-intensive inquiry and, thus, not suitable for dismissal before discovery is applied to an employee test to determine “economic reality.” *See, e.g., Miller v. Advanced Studies, Inc.*, 635 F. Supp. 1196, 1200 (N.D. Ill. 1986).
- (2) The panel's conflicting opinion that employee status is not a fact-intensive inquiry relies upon misapplication of *Thirteenth Amendment* decisions in this and other Circuits, which establish that the *Constitution's* singular allowance for unpaid involuntary servitude precludes only prisoners from proving any set of facts to establish employee status. *See, e.g., Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992).

The opinion grants NCAA-defined amateurism rules the same claim preclusion as the *Thirteenth Amendment* and, in effect, confers upon student athletes a legal status similar to prisoners.

- (3) The opinion conflicts with decisions of the Supreme Court and Circuits, which establish that putative employer characterization of an “economic reality” outside FLSA coverage, even if acceded to by a putative employee, cannot waive employee protections under the FLSA *in lieu* of application of discovery to an employee test. *See, e.g., Tony & Susan Alamo Found v. Sec'y of Labor*, 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985).

- (4) The opinion conflicts with decisions of the Supreme Court and Circuits, which establish that nonregulatory guidelines of agencies are not dispositive – rather, at most, can persuade upon a record demonstrating “thoroughness evident in its consideration, the validity of its reasoning [and] its consistency.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

Here, there is no such deliberative record regarding the Department of Labor Field Operations Handbook § 10b03(e). (1993) To the contrary, there is only speculation that it includes NCAA-regulated sports in its list of student-run groups that ordinarily do not create an employer-employee relationship, *i.e.*, dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural athletics and interscholastic club sports.

Indeed, in statements on defendants’ websites, attached to Appellants’ Reply Br. as a Summary Exhibit w/hyperlinks, A 388-418 (App. A), defendants acknowledge significant differences between student-run groups and NCAA-regulated sports supervised by full-time coaches. Such differences are relevant to putative employer right to control and direct work, “the ‘most important’ consideration in ascertaining the existence of an employer-employee relationship.” *Love v. JP Cullen & Sons, Inc.*, 779 F.3d 697, 703 (7th Cir. 2015).

ARGUMENT

I. The Opinion Conflicts with Decisions in This and Other Circuits on Employee Status As A Fact-Intensive Inquiry

The panel stated:

We briefly conclude by addressing Appellants’ argument that employment status is an inherently fact-intensive inquiry and thus should not be decided at the motion-to-dismiss stage. We reject this argument.

Op. at 12.

The panel relied upon *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992) to reject Appellants’ argument. *Id.*

But, for reasons set forth in detail, *infra*, and Appellants' Br. at 11-12 and Reply Br. at 2-4, *Vanskike*, by its terms, only applies to prisoners under the Thirteenth Amendment, and its rationale cannot deny anyone, not "duly convicted," of opportunity to prove facts to establish employee status.

In fact, during this litigation, *Vanskike* is the only case cited that disposed of an employee status claim on a motion to dismiss.

All other cases cited by defendants were decided after discovery at summary judgment or trial.

As stated in Appellants' Br. at 27-28, the reason all cited cases, except *Vanskike*, proceeded to discovery is clear:

It is well-settled that, "no matter what test applies, a plaintiff's status as an 'employee' under Title VII¹ can be determined *only* upon careful analysis of the myriad facts surrounding the employment relationship in question," that ordinarily "this cannot be done from the face of the complaint," and, thus, a motion to dismiss should be denied as premature. *Miller v. Advanced Studies, Inc.*, 635 F. Supp. 1196, 1200 (N.D. Ill. 1986) (emphasis in original).

It is a bedrock principle of labor law that employee status is a fact-intensive inquiry; *see, e.g.*:

¹ This Circuit has recognized "'employee' is given a broader interpretation under the FLSA than under Title VII." *Strom v. Strom Closures, Inc.*, No. 06 C 7051, 2008 U.S. Dist. LEXIS 90663, at *7-8 (N.D. Ill. Nov. 7, 2008) (citing *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 380 (7th Cir. 1991)).

First Circuit

McLaughlin v. Bos. Harbor Cruise Lines, Inc., 419 F.3d 47, 51 (1st Cir. 2005):

[I]nterpretation of the FLSA or its regulations, at this stage of the proceedings, would be error because it would be premature [W]e decline the Secretary's invitation for us to adopt her preferred interpretation of the regulations now, before any factual context has been developed. The statute, the regulations, and the case law, by contrast, outline an approach that is quite fact-intensive.

Second Circuit

Morales v. M. Alfonso Painting Corp., No. 11. Civ. 1263, 2013 U.S. Dist.

LEXIS 134219, at *9-10 (S.D.N.Y. Sep. 19, 2013):

In this Circuit, the question of “whether an employer-employee relationship exists” is a fact-intensive inquiry

Third Circuit

Sherman v. Am. Eagle Express, Inc., No. 09-575, 2012 U.S. Dist. LEXIS

30728, at *33 (E.D. Pa. Mar. 8, 2012) (citing *Martin v. Selker Bros., Inc.*, 949 F.2d 1286 (3d Cir. 1991), noting Pennsylvania courts adopted case law and tests utilized by federal courts under the FLSA, and “undertake a fact-intensive, multi-factor examination to determine whether a worker is an employee”).

Fourth Circuit

Sigala v. Abrof VA, Inc., No. GJH-15-1779, 2016 U.S. Dist. LEXIS 55174, at

*18 (D. Md. Apr. 21, 2016):

[D]etermination of whether Plaintiffs fall into the statutory definition of “employee” is one best made after discovery has been completed.

Fifth Circuit

Isom v. Wesley Med. Ctr., No. 2:14-CV-190, 2015 U.S. Dist. LEXIS 127550, at

*6 (S.D. Miss. Sep. 23, 2015):

“[D]etermining whether an individual is an ‘employee’ for Title VII² purposes is a fact-intensive inquiry” *Arbaugh v. Y& H Corp.*, 380 F.3d 219, 229 (5th Cir. 2004), *rev’d on other grounds* 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). That being the case, the Court concludes that it would be imprudent to ... dismiss Plaintiff’s Title VII claims before the parties have conducted discovery

Sixth Circuit

McBroom v. HR Dir. Franklin Cty. Bd. of Elections, No. 2:12-CV-01074, 2014

U.S. Dist. LEXIS 3422, at *11-12 (S.D. Ohio Jan. 10, 2014):

In the Sixth Circuit, an employment relationship is defined, in practice, by a fact-intensive balancing test

Eighth Circuit

Alexander v. Stratus Bldg. Sols., No. 4:14 CV 921, 2014 U.S. Dist. LEXIS

164194, at *1 (E.D. Mo. Nov. 24, 2014):

[T]he question of whether an employer-employee relationship exists is fact-intensive and cannot be determined at the current stage in the proceedings. The motion to dismiss will be denied.

Ninth Circuit

Guy v. Casal Inst. of Nev., No. 2:13-cv-02263, 2016 U.S. Dist. LEXIS 113033,

at *12-13 (D. Nev. Aug. 16, 2016):

[T]he question of whether there is an employer/employee relationship is a fact-intensive question

² See n.1, *supra*.

Therefore, the Court does not find that Plaintiffs cannot as a matter of law, establish that they were employees under the FLSA merely because they were students

D.C. Circuit

Miles v. Univ. of the Dist. of Columbia, No. 12-378, 2013 U.S. Dist. LEXIS

155236, *26 (D.D.C. Oct. 30, 2013):

[T]he employment status test applied in the [FLSA] context comprise[s] fact-intensive inquiries that center largely on the amount of control an employer has over an employee.

The panel's rejection of this bedrock principle of labor law represents a sea-change, denying plaintiffs in this Circuit the same fundamental opportunity to prove facts to establish employee status that is afforded in other Circuits.

II. The Panel's Conflicting Opinion on Employee Status As A Fact-Intensive Inquiry Relies upon Misapplication of *Thirteenth Amendment* Decisions in This and Other Circuits

As stated in Appellants' Reply Br. at 2-4:

The Complaint, "should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 724 (7th Cir. 2004). Moreover, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.*

In *Vanskike*, plaintiff could not clear this low hurdle because of the "economic reality" dictated by the *Thirteenth Amendment*:

[T]he relationship between the DOC [Department of Corrections] and a prisoner is far different from a traditional employer-employee relationship, because ... inmate labor belongs to the institution. The *Thirteenth Amendment* excludes convicted criminals from the prohibition of involuntary servitude, so

prisoners may be required to work. Further, there is no Constitutional right to compensation for such work

[L]iteral application of the *Bonnette* [*v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983)] factors in the present context fail to capture the true nature of the relationship for essentially they presuppose a free labor situation [T]he *Thirteenth Amendment*'s specific exclusion of prisoner labor supports the idea that a prisoner performing required work for the prison is actually engaged in involuntary servitude, not employment

Prisoners are essentially taken out of the national economy upon incarceration Because Vanskike's allegations reveal that he worked in the prison and for the DOC pursuant to penological work assignments, the economic reality is that he was not an "employee" under the FLSA.

974 F.2d at 809-10. (internal citations omitted)

Indeed, of the 8 dismissals of well-plead, non-duplicative FLSA complaints relying upon *Vanskike* in this Circuit, all but the underlying district court opinion here involved detainees who can state no claim for relief under the FLSA by virtue of this singular exception to the *Thirteenth Amendment*.³

Other Circuits use this rationale to preclude a prisoner's complaint for employee status; *see, e.g.*:

³ *Sanders v. Hayden*, 544 F.3d 812 (7th Cir. 2008); *Bennett v. Frank*, 395 F.3d 409 (7th Cir. 2005); *Gibson v. Kronzer*, No. 93-1987, 1995 U.S. App. LEXIS 7814 (7th Cir. Apr. 5, 2015); *Hamilton v. Dart*, 13 C 1053, 2013 U.S. Dist. LEXIS 43171 (N.D. Ill. Mar. 27, 2013); *Douglas v. Aramark*, No. 1:09-cv-00912, 2009 U.S. Dist. LEXIS 113381 (S.D. Ind. Dec. 2, 2009); *Weissenberger v. Watters*, 07-C-415-C, 2007 U.S. Dist. LEXIS 57595 (W.D. Wis. Aug. 3, 2007); *Riley v. Doyle*, 06-C-574-C, 2006 U.S. Dist. LEXIS 75526 (W.D. Wis. Oct. 16, 2006).

Fourth Circuit

Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Lambert, 462 F. App'x 299, 303

(4th Cir. 2012):

We looked to *Vanskike* with approval when we rejected an inmate's argument that he was covered by the FLSA's definition of "employee."

Fifth Circuit

Mosley v. LeBlanc, No. 10-0385, 2010 U.S. Dist. LEXIS 70607, at *4-6

(M.D. La. June 18, 2010):

It is well-settled that inmates may be required to work as a part of their sentence, and that such a requirement does not violate any prohibition against slavery contained in the *Thirteenth Amendment* [P]laintiff's labor "belongs to the prison" [P]laintiff is not an "employee" entitled to a reasonable wage within the meaning of the FLSA

Eighth Circuit

McMaster v. Minnesota, 819 F. Supp. 1429, 1438 (D. Minn. 1993):

[T]he *Thirteenth Amendment's* exclusion of prisoner labor from the prohibition on involuntary servitude is a strong indication that as a matter of economic reality, prisoners working for the prison itself are not employed by the prison within the meaning of the FLSA.

Ninth Circuit

Allen v. Mayberg, No. 1:06-cv-01801, 2008 U.S. Dist. LEXIS 101963, at *31

(E.D. Cal. Dec. 4, 2008):

[T]he [FLSA] does not protect the prisoner The law is clear that prisoners may be required to work and that any compensation for their labor exists by grace of the state.

(citing *Vanskike*)

Eleventh Circuit

Villarreal v. Woodman, 113 F.3d 202, 206 (11th Cir. 1997):

[T]he “economic reality” test does not apply in the inmate-jailer context because the FLSA presupposes a free-labor situation constrained by the *Thirteenth Amendment*, which does not apply to convicted inmates We agree with this approach and adopt the reasoning articulated by the Seventh Circuit in *Vanskike*, 974 F.2d at 809-12, in rejecting the *Bonnette* four factor standard in the prison context.

But, there is no authority, nor precedent, for extending this rationale to deny anyone, not “duly convicted,” of opportunity to prove facts to establish employee status.

Nonetheless, the panel relied upon *Vanskike* to deny this opportunity to student athletes:

The court then discussed our decision in *Vanskike*, in which we rejected the strict application of a similar multifactor test in favor of a more flexible standard. 974 F.2d at 809.

We have declined to apply multifactor tests in the employment setting when they “fail to capture the true nature of the relationship” between the alleged employee and the alleged employer. *Id.* In *Vanskike*, we considered whether an inmate at a state prison was an employee under the FLSA. *Id.* at 806. Like Appellants here, the inmate in *Vanskike* urged us to apply a multifactor test to determine whether an employment relationship existed. We rejected the application of that test because it was “not the most helpful guide in the situation presented.” *Id.* at 809. Rather than follow a specific test, we examined the economic reality of the alleged employment relationship and concluded that the prisoner was not an employee. *Id.* at 809–10.

The district court followed the reasoning of *Vanskike* and held that the “factors used in the trainee and private-sector intern context fail to capture the nature of the relationship between the Plaintiffs, as student athletes, and Penn.” (R. 238 at 15). We agree with the district court

Op. at 6-7. (footnotes omitted)

The panel misapplied *Vanskike*.

Vanskike, and similar authorities, countenance dismissal *in lieu* of application of discovery to an employee test only if the *Thirteenth Amendment* dictates that the “economic reality” is unpaid involuntary servitude.

In the absence of this singular exception, discovery must be applied to an employee test, “to determine the economic reality of the nature of the working relationship.” *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir.1987).⁴

For reasons set forth in detail *infra*, the opinion conflicts with decisions of the Supreme Court and Circuits by granting deference to putative employer characterization of “economic reality” *in lieu* of employee tests.

In fact, the opinion goes even farther, granting employer characterization of “economic reality” the same claim preclusion as the *Thirteenth Amendment*.

Here, the panel’s deference to NCAA-defined amateurism rules in effect confers upon student athletes a legal status similar to prisoners.

⁴ The panel asserts that this Circuit rejected application of *Lauritzen*’s multifactor test in *Callahan v. City of Chi.*, 813 F.3d 658, 662 (7th Cir. 2016). Op. at 6 n.3. But, in that case, decided on summary judgment, the plaintiff taxicab driver could not prove the City was even in the business of transportation by taxicab, or municipal commerce codes granted the City the right to control and direct the work of independent taxicab drivers. Here, colleges are in the business of NCAA sports, and full-time coaches have the right to direct and control the performance of student athletes akin to employees. See, e.g., [NLRB Advice Memo Re: Northwestern University, Case 13-CA-157467, Sept. 22, 2016](#).

The panel also asserts, “Other courts have likewise rejected the stringent application of multifactor tests in certain settings.” Op. at 6 n.3. But both examples cited – *Danneskjold v. Hausrath*, 82 F.3d 37 (2d Cir. 1996) and *Doyle v. City of New York*, 91 F. Supp. 3d 480 (S.D.N.Y. 2015) – involved plaintiffs under supervision of the criminal justice system.

III. The Opinion Conflicts with Decisions of the Supreme Court and Circuits by Granting Deference to Putative Employer Characterization of “Economic Reality” *In Lieu* of Employee Tests

As stated in Appellants’ Br. at 13-16:

There is no amateurism exception either enumerated or defined in the FLSA, let alone any incorporation into the FLSA of NCAA-defined amateurism rules that historically have not been consistent in content or application.⁵

Neither “amateur” nor “amateurism” appears in the text of the FLSA.

⁵ Also stated in Appellants’ Br. at 14 n.3:

In their opposition to dismissal, Plaintiff-Appellants elaborated on District Judge Claudia Wilken’s findings after trial in *O’Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff’d in part and rev’d in part*, 802 F.3d 1049 (9th Cir. 2015):

Regarding the NCAA’s contention that its restrictions on student athlete pay “preserv[e] its tradition of amateurism,” Judge Wilken noted that NCAA’s amateurism rules have not been consistent in content or application. For example, in 1956, NCAA amateurism rules permitted cash for incidental expenses as part of a full grant-in-aid. *Id.* at 974. In 1975, the NCAA removed cash for incidental expenses from the full grant-in-aid. *Id.* In 2013, the NCAA amended its amateurism rules to permit ... Division I tennis recruits to earn up to ten thousand dollars per year in prize money from athletic events before they enroll *Id.*

A. 66-67, Pls.’ Mem. in Opp’n to Defs.’ Mots. to Dismiss and Strike, at 20-21.

NCAA-defined amateurism rules also permit student athletes qualifying for, and competing in, the Olympics to be paid stipends or prize money under the U.S. Olympic Committee’s Operation Gold Grant program, including \$25,000 for each gold medal, \$15,000 for each silver medal, and \$10,000 for each bronze medal. *See* NCAA Division I Bylaw 12.1.2.1.4.1.2. Operation Gold Grant. NCAA-defined amateurism rules also permit some student athletes to be paid as counselors in college sports camps or clinics. *See* NCAA Division I Bylaw 12.4.3. Camp/Clinic Employment, General Rule.

It is also clear from decisions in the Supreme Court and Circuits that putative employer characterization of an “economic reality” outside FLSA coverage, even if acceded to by a putative employee, cannot waive employee protections under the FLSA *in lieu* of application of discovery to an employee test.

In *Tony & Susan Alamo Found v. Sec’y of Labor*, 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985), a nonprofit religious organization characterized the “economic reality” of its relationship to associates as volunteerism, and associates agreed. But, the Supreme Court affirmed the district court’s application of facts to an employee test and its determination that, in “economic reality,” an employer-employee relationship existed:

An associate ... “testified convincingly that she considered her work in the Foundation’s businesses as part of her ministry,” and that she did not work for material rewards. This same associate also testified that “no one ever expected any kind of compensation, and the thought is totally vexing to my soul.”

Nevertheless, these protestations, however sincere, cannot be dispositive. The test of employment under the Act is one of “economic reality”

That the associates themselves vehemently protest coverage under the Act makes this case unusual, but the purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work “voluntarily,” employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act.

Id. at 300-302.

The Southern District of Texas elaborated in the colorful case of *Coronado v. D N.W. Hous., Inc.*, No. H-13-2179, 2014 U.S. Dist. LEXIS 83763, at *6-7 (S.D. Tex. June 19, 2014), citing several Circuits and the Supreme Court:

The intent of the worker and the employer, and the label they use to describe their working relationship, does not control whether the worker is an employee or an independent contractor. *See Watson v. Graves*, 909 F.2d 1549,1554 (5th Cir. 1990) (“We must . . . look to the substantive realities of the relationship, not to mere forms or labels ascribed to the laborer by those who would avoid coverage.”); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) (“[T]he subjective intent of the parties to a labor contract cannot override the economic realities reflected in the factors described above.” (citing *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1315 (5th Cir. 1976); *Brennan v. Partida*, 492 F.2d 707, 709 (5th Cir. 1974)); *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F. Supp. 2d 569, 577 (D. Md. 2008) (“[N]either the subjective intent of the worker in forming the employment relationship nor the label affixed by the putative employer controls the question whether a worker is an employee under the FLSA.”); *Mathis v. Hous. Auth. of Umatilla Cnty.*, 242 F. Supp. 2d 777, 785 (D. Or. 2002) (recognizing that “it is ‘well-settled that subjective intent cannot override the economic realities’”) (quoting *Real*, 603 F.2d at 755). The fact that a worker and her employer use the “independent contractor” label does not determine the outcome of the economic realities test or the application of the FLSA. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947) (“[P]utting on an ‘independent contractor’ label does not take the worker from the protection of the [FLSA].”).

As stated in Appellants’ Reply Br. at 26:

It is apparent that no employer-defined concept of amateurism, or volunteerism, is – or could be – given deference or employers could effectively, and unilaterally, opt out of FLSA coverage.

Moreover, as also stated in Appellants' Reply Br. at 4:

“Traditions” that are not codified in federal law have a dubious record as legitimate bases for maintaining *status quo* denial of rights or protections *in lieu* of searching analyses. This has been most apparent in matters implicating the *Fourteenth Amendment*. But it has also been true under the FLSA; for example, until the recent, rising tide of intern litigation, most internships had been unpaid based upon “tradition,” rather than the application of developed facts to an employee test.

The panel's deference to the NCAA's self-defined, and self-serving, amateurism rule *in lieu* of an employee test constitutes error in a FLSA case.

In fact, all cases cited by defendants and the panel for the proposition that a “long-standing tradition [of amateurism] defines the economic reality of the relationship between student athletes and their schools,” Op. at 7, concern Antitrust analyses that are inapplicable to FLSA claims, e.g., Rule of Reason. See Appellants' Reply Br. at 26.

Even though Antitrust analyses are irrelevant here, under the most recent Antitrust precedent, *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), the NCAA-defined amateurism rules, uniformly applicable to all student athletes, violate Antitrust law.

In any event, as noted in Appellants' Reply Br. at 27-28, under the FLSA, student athletes would be paid on the same minimum-wage scale, and in the same work study system, as their fellow students, so the specter of “professionalizing” amateur sports is false.

CONCLUSION

For foregoing reasons, the opinion should be vacated, and this appeal reheard or granted.

Dated: December 16, 2016

Respectfully submitted,

s/ Paul L. McDonald

Counsel for Plaintiff-Appellants

Paul L. McDonald
P L McDONALD LAW LLC
1800 JFK Boulevard, Suite 300
Philadelphia, PA 19103
(267) 238-3835

CERTIFICATE OF COMPLIANCE

I, Paul L. McDonald, hereby certify that Plaintiff-Appellants' Petition for Rehearing *En Banc* complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A), because it contains 3,899 words, excluding the parts exempted by Fed. R. App. P. 32(f).

s/ Paul L. McDonald

Paul L. McDonald
P L MCDONALD LAW LLC

Counsel for Plaintiff-Appellants

CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiff-Appellants hereby certifies that on December 16, 2016, a true and correct copy of the foregoing Plaintiff-Appellants' Petition for Rehearing *En Banc* was served on counsel by filing via the CM/ECF system, which will send an email notice to registered parties.

s/ Paul L. McDonald

Paul L. McDonald
P L McDONALD LAW LLC

Counsel for Plaintiff-Appellants

APPENDICES**TABLE OF CONTENTS***Summary Exhibit*Defendant Websites | Student-Run Interscholastic Club Sports *v.*

NCAA-Regulated Sports (A. 388-418) App. A

Panel Opinion (Doc. 50, 12/5/16) App. B

App. A

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

ABILENE CHRISTIAN UNIVERSITY Interscholastic Club Sports are listed in the Student-Run Group Directory under category “Special Interests” and grouped with Intramural Sports: “We offer a Champ League for the more competitive athlete, as well as a Rec League if you prefer a more fun atmosphere. Several teams have competed in regional tournaments, each proving ACU’s impressive athleticism versus programs from much larger universities.” NCAA-regulated Sports are not listed in the Student-Run Group Directory, nor grouped with Intramural Sports.	AMERICAN UNIVERSITY Interscholastic Club Sports are listed on a Club Sports webpage: “Each club is formed, developed, governed, and administered by the student membership of that particular club.... Club Sports are governed by the rules and regulations established for all recognized student organizations on the American campus” NCAA-regulated Sports are not listed in the Student-Run Group Directory, nor listed on the Club Sports webpage.
BAYLOR UNIVERSITY Interscholastic Club Sports are listed in the Student-Run Group Directory under category “Spirit/Sport,” and on a Club Sports webpage. The Sport Club Manual, at 2, states: “Sport Clubs are student run and student led, so the key to its success lies in the degree of student leadership and participation. Students within each club are responsible for the internal administration of their club to include decision making in such areas as equipment, facilities, finances, game schedules, membership, practices, and safety.” NCAA-regulated Sports are not listed in the Student-Run Group Directory, nor listed on the Club Sports webpage.	BELMONT UNIVERSITY Interscholastic Club Sports are listed in the Student-Run Group Directory under category “Sports Clubs.” NCAA-regulated Sports are not listed in the Student-Run Group Directory.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

BETHUNE-COOKMAN UNIVERSITY

No information about Interscholastic Club Sports.

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#).

BOSTON COLLEGE

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) and on a [Club Sports webpage](#).

[Club Sports FAQ](#) state:

“Varsity sports [i.e., NCAA sports] must follow NCAA and ACC rules and regulations. Practices and games are mandatory and travel is required to play other universities Also, varsity sports usually require a full year commitment A club sport is a student-run organization Club sports generally practice multiple times per week and travel to compete against other colleges and universities, but they are not part of the NCAA or ACC. Although many have coaches, the team officers and athletes are responsible for all aspects of team management including scheduling games and practices, managing finances, selecting coaches, and making travel plans.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

BOSTON UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

“We have 34 different student-run club sports teams. Some play casually for the fun of it. Others practice regularly for intercollegiate and tournament competition.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

BRADLEY UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) and on a [Club Sports webpage](#):

“The term Club Sports, at Bradley University, is used to identify registered student organizations which exist to provide opportunities for members to engage in various sporting and recreational activities. These clubs vary in the ways in which their participation occurs. Some are competitive in nature and include a schedule of contests against clubs representing other colleges and universities. While similar, in some ways, to varsity teams, these club sports do not have varsity status.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

BRIGHAM YOUNG UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “BYUSA - Athletic/Recreation,” and on an [Extramural Sports webpage](#).

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Extramural Sports webpage.

BROWN UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sports,” and on a [Club Sports webpage](#):

“A Club Sport at Brown University is a student organization derived by and sustained through the interest and leadership of students Club Sport teams offer an important outlet for students who seek a higher level of competition than on-campus intramurals provide, but without the rigorous time commitment of varsity sports. Club Sport teams hold practices on or around campus and compete against other schools both on and off campus.”

The [Club Sports Philosophy & Mission Statement](#) further states:

“[T]he structure, organization, and execution of each Club Sport’s practices and competitions are primarily the responsibility of students Most of our teams compete extensively in extramural competition, and many hold memberships in athletic conferences.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

BRYANT UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#), under categories “Sports Clubs” and “Special Interest Groups,” and on a [Recreation | Club Sports webpage](#).

The [Club Sports Handbook](#), at 4, states:

“Club Sports ... bridge[] the gap between existing intramural sports and intercollegiate programs Club Sports are Bryant University recognized student organizations that establish their own leadership, structure, membership requirements, competition schedules, dues, and fundraising events.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Recreation | Club Sports webpage.

BUCKNELL UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“You can enjoy the recreational, instructional, or competitive atmosphere of sports without the commitment of a varsity program. These clubs are run by students for students”

NCAA-regulated Sports are **not** listed in the Student Organization Directory,* **nor** listed on the Club Sports webpage.

* The student Bison Good Sports campaign to “promote appropriate fan conduct” is listed. Accompanying event and roster information does not reflect NCAA events or rosters.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

BUTLER UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“Most club sports practice 2–3 times a week and compete on-campus and possibly regionally/nationally with other universities.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

CAMPBELL UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#).

[Club Sports FAQs](#) state:

“A club sport is a student-run organization, whose sole purpose is to serve as an alternative to Varsity Sports, and Intramural Sports. Basically, you are a group of students who share a love for a particular sport, but want to be more competitive than Intramurals Some of our clubs participate in tournaments at regional or national levels, while others only hold recreational games against surrounding schools.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

CANISIUS COLLEGE

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Recreational Clubs,” and on a [Club Sports webpage](#).

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

CHARLESTON SOUTHERN UNIVERSITY

No information about Interscholastic Club Sports.

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#).

COLGATE UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sports and Recreation,” and on a [Club Sports webpage](#).

The [Department of Recreational Sports](#) states:

“Colgate’s diverse club sports offerings ... are led by student officers and most are student coached. Many clubs compete against area colleges.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

COLUMBIA UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“Club Sports are formed by groups of individuals who share a common interest in recreation and sport, who organize and collectively pursue these activities [T]heir activities range from informal play to regular practice or instruction, to intercollegiate and tournament competition.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

CORNELL UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sport Club - Competitive,” and on a [Sport Clubs webpage](#):

“The sport club may be recreational, instructional, and/or competitive in nature. Members may display a variety of skill levels and may place varying degrees of emphasis on extramural competition The sport club is student-initiated, administered and funded, and responsible for its own membership requirements.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sport Clubs webpage.

CREIGHTON UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sports,” and on a [Sport Clubs webpage](#).

NCAA-regulated Sports are **not** listed in the Student Organization Directory,* **nor** listed on the Sport Clubs webpage.

* A student sports fan engagement campaign is listed. Accompanying event and roster information does not reflect NCAA events or rosters.

DARTMOUTH COLLEGE

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“Club Sports are student-run organizations that offer a wide variety of recreational activities, ranging from skill instruction to local, regional, and national club intercollegiate contests.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

DAVIDSON COLLEGE

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Intramural and Club Sports,” and on a [Club Sports webpage](#):

“[F]eatures of the Club Sport Program that make it unique are: self-motivation, self-administration, self-support and self-regulation.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

UNIVERSITY OF DAYTON

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Recreation,” and on a [Sport Clubs webpage](#).

Sport Clubs are “student driven,” involving members in “fundraising, public relations, organization, administration, budgeting and scheduling, as well as ... development of skills in their particular sport.”

The [Club Officer Manual](#), at 5, states:

“Our 36 sport clubs participate in events locally, regionally, nationally, and internationally ...”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sport Clubs webpage.

UNIVERSITY OF DENVER

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “DU Club Sports,” and on a [Club Sports webpage](#).

The [Ritchie Center for Sports and Wellness](#) states:

“As DU’s largest student organization, club sports sets you up with regular practice and game schedules that allow you to compete on local, regional and national levels. Through club sports, you have the opportunity to blend your athletic skills with real-world leadership experiences. Our club officers create an annual team budget, fundraise, schedules games and practices and promote their teams to increase the number of competitive opportunities available for DU students.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

DEPAUL UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sport,” and on a [Club Sports webpage](#):

“As student-run organizations, club sports provide an opportunity for students with common interests to participate and compete in a variety of activities.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

UNIVERSITY OF DETROIT MERCY

No information about Interscholastic Club Sports.

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#).

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

DRAKE UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sport Club,” and on a [Sport Clubs webpage](#):

“All sport clubs are initiated and run by students.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sport Clubs webpage.

DREXEL UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“Club Sports are student organizations created by [] students with the goal of competing against other recognized undergraduate collegiate clubs in the region.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

DUKE UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sports & Recreation,” and on a [Sport Clubs webpage](#):

“The clubs are funded by its members, Duke Student Government, and the Gorter Family, whose endowment makes many clubs able to compete at Regional or National levels. The Sport Clubs Program is designed to provide opportunities for students with similar interests to participate in various sports or recreational activities. Each club is organized by students and is student run”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sport Clubs webpage.

DUQUESNE UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“The objectives of Club Sports are to fill the recreational and extramural competitive needs of students. The program can emphasize instruction and/or competition. Club Sports are special interest groups in which the students accept the responsibility for the organizational responsibilities of the club.”

NCAA-regulated Sports are **not** listed in the Student Organization Directory,* **nor** listed on the Club Sports webpage.

* A student sports fan engagement campaign is listed. Accompanying event and roster information does not reflect NCAA events or rosters.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

ELON UNIVERSITY Interscholastic Club Sports are listed in the Student-Run Group Directory and on a Club Sports webpage: “The Club Sports program allows students the opportunity to compete against collegiate club teams throughout the southeast Each club is formed, developed, governed and administered by the elected student officers” NCAA-regulated Sports are not listed in the Student-Run Group Directory, nor listed on the Club Sports webpage.	UNIVERSITY OF EVANSVILLE No information about Interscholastic Club Sports. NCAA-regulated Sports are not listed in the Student-Run Group Directory.
FAIRFIELD UNIVERSITY Interscholastic Club Sports are listed on a Club Sports webpage: “Club sports are organized and managed by students [and] club sport teams play other colleges” NCAA-regulated Sports are not listed in the Student-Run Group Directory, nor listed on the Club Sports webpage.	FAIRLEIGH DICKINSON UNIVERSITY Interscholastic Club Sports are listed in the Student-Run Group Directory under category “Sport Clubs,” and on a Club Sports webpage: “Club Sports are student-initiated activities that require students to be responsible for organization, leadership and decision making. Club activities range from informal play to regular practice and intercollegiate and tournament competition.” NCAA-regulated Sports are not listed in the Student-Run Group Directory, nor listed on the Club Sports webpage.
FORDHAM UNIVERSITY Interscholastic Club Sports are distinguished from Varsity Sports, i.e., NCAA-regulated Sports, on the Athletics webpage: “Our 22 men’s and women’s varsity sports teams compete big time in a big market. We are NCAA Division I But varsity sports isn’t the only outlet for our athletically-inclined students. A variety of club sports pits Fordham teams against other local colleges and universities, and intramurals from flag football to dodgeball are a great way to have fun, stay active, and relieve some midterm stress.” NCAA-regulated Sports are not listed in the Student-Run Group Directory.	FURMAN UNIVERSITY Interscholastic Club Sports are listed in the Student-Run Group Directory under category “Club Sports,” and on a Club Sports webpage: “Furman has close to two dozen club teams, ranging in everything from aikido to ultimate Frisbee. Open to all students, these sports typically involve regular practice and a substantial time commitment, not to mention intercollegiate competition.” NCAA Football and Men’s Soccer are listed in the Student Organization Directory. But the other 16 NCAA-regulated Sports are not similarly listed. None are listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

GARDNER-WEBB UNIVERSITY

No information about Interscholastic Club Sports.

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#).

GEORGE WASHINGTON UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “UnderGrad Club Sports,” and on a [Club Sports webpage](#):

“Club Sports are registered student organizations established by students Students in each club are responsible for the internal organization and conduct of their club activities The management and organization of a Club Sport is an educational experience providing many challenges for students such as; writing their own constitution and by-laws, conducting club meetings, establishing dues to offset club expenditures, planning fund raising projects, coordinating practices, competition and special events, participating in community service projects, publicizing club events Club Sports should not be mistaken for an intercollegiate sport administered by the Department of Athletics & Recreation [*i.e.*, a NCAA sport]. In a club, the members assume the organizational and management responsibilities.”

The [Club & Intramural Sports](#) homepage notes:

“A number of GW’s club teams compete regionally and nationally.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

GEORGETOWN UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“Teams are student-run organizations and are managed by an advisory board composed of club athletes.”

NCAA-regulated Sports are **not** listed in the Student Organization Directory,* **nor** listed on the Club Sports webpage.

* A student sports fan engagement campaign “to provide ... the best possible home game experience” is listed. Accompanying event and roster information does not reflect NCAA events or rosters.

GONZAGA UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sports Club,” and on a [Club Sports webpage](#):

“[C]lubs bridge the gap between intramurals and varsity athletics as competitive (intercollegiate) teams Our thirty-three (33) Club Sport programs are entirely student run and often include nationwide travel, regional competition”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

HAMPTON UNIVERSITY

No information about Interscholastic Club Sports.

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#).

UNIVERSITY OF HARTFORD

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Athletics.”

The [Blackhawks Club Football](#) homepage notes:

“For those who are not yet familiar with intercollegiate Club Sports in general, these teams are student organizations formed for the simple purpose of allowing students to participate and compete. Club teams differ from varsity programs in many ways. They are student-run organizations, overseen by a Student Activities department rather than Athletic Department. Clubs are not required to comply with Title IX, NCAA.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory.

HARVARD UNIVERSITY

Interscholastic Club Sports are linked to the [Student-Run Group Directory](#) (“Club Sports recognized by Harvard’s Department of Athletics can be found [here](#).”) and listed on a [Club Sports webpage](#):

“Club sports are formed by groups of undergraduates It is a student-initiated activity that relies on the students to be responsible for leadership, decision-making, organization, and supervision of all club actions. Clubs are organized on instruction, recreational, and competitive levels and their activities range from informal play and practice to intercollegiate and tournament competition.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

HIGH POINT UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

“Each team has been formed, organized and conducted by a group of students and run through the athletics department at High Point University. Students competing with the HPU Club Sports program compete successfully in local, state and national events.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

HOFSTRA UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports.”

The [Club Sports Handbook](#), at 2, states:

“Club Sports are student organizations [T]hey are self-managed by student leaders from within the club All sport clubs are funded by student fees and governed by the Student Government Association (SGA) Competitive sport clubs are those in which teams choose to compete against other schools or programs through leagues and organized play.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory.

COLLEGE OF THE HOLY CROSS

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“Teams practice on average of twice per week, and their games are mostly held on the weekends. Competitive teams travel throughout the region, and some even travel Nationally Club Sports are student run Recognized Student Organizations Each club sport has an E-Board The E-Board is in charge of attending monthly meetings, making financial decisions, handing in the team’s paperwork and waivers, and ultimately making sure the club remains in good standing with the College.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

HOUSTON BAPTIST UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

“Take your love of sports and competition to the next level – sign up through Campus Recreation for one of HBU’s Club Sports and compete against other colleges and universities across the state. There is a registration fee for participating in Club Sports; this fee only covers one sport per sport. All fees will be deducted from your HBU Student Account.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

HOWARD UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sport,” and grouped with [Intramural Sports](#):

“With the cancellation of the baseball program, the Howard University Club Baseball Association formed. The club eventually joined the NCBA, National Club Baseball Association. This is a college level association that has teams from all over the country.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** grouped with Intramural Sports.

IONA COLLEGE

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory.

JACKSONVILLE UNIVERSITY

No information about Interscholastic Club Sports.

NCAA-regulated Sports are **not** listed in the [Student Organization Directory](#).*

* A student sports fan engagement campaign is listed. Accompanying event and roster information does not reflect NCAA events or rosters.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

LA SALLE UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

“Club Sports provide students with the opportunity to compete with other schools in a variety sports. La Salle University club sports are student-run, student led sport based organizations”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

LAFAYETTE COLLEGE

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sports Clubs and Groups,” and on a [Sports Clubs webpage](#):

“Sports clubs at Lafayette are student-initiated and student-run organizations which depend on a membership who is fully involved in the club’s leadership, decision-making, and organization.”

The [Sports Clubs FAQs](#) further state:

“Varsity sports [*i.e.*, NCAA sports] are sponsored by the College and funded through the operating budget, NCAA funding, revenue generated through various events, and gifts from generous donors. Sports clubs are not sponsored by the college, but by Student Government in response to student interest and initiative. The primary sources of funding for sports clubs are student activity fees (distributed at the discretion of Student Government), sport club member dues, fundraising activities, and gifts from generous donors. Unlike varsity sports, sport clubs are student-run organizations who decide for themselves their level of competitiveness, whether or not they will hire a coach or instructor, how often they will practice, and if they will continue to exist at all [Sport clubs] participate in competitions with clubs from other institutions (in many cases as a member of a specific league), and others enter a variety of weekend tournaments.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sports Club webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

LEHIGH UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

“[T]he intention is to offer club competition at the highest level and student commitment, including expanded practice and extramural competitions on a regular and formal basis within the club sport model The primary differences between Club Sports and Varsity Intercollegiate Sports [*i.e.*, NCAA sports] are the funding sources associated with participation and the wide range of commitment levels regarding time and competitiveness. At the intercollegiate level, the institution has made the commitment to sponsor the sport under NCAA and Patriot League Division I guidelines. A Club Sport is one that is initiated and must be sustained by student interest. The club is self-directed under the Club Sports guidelines with a combination of resources from student senate funds, dues and/or their own fundraising initiatives.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

LIBERTY UNIVERSITY

Interscholastic Club Sports are distinguished from NCAA-regulated Sports on the [Athletics webpage](#):

“Liberty’s NCAA Division I program has won more than 140 conference titles Liberty’s Club Sports program has teams that have participated in and won national tournaments and placed in regional events.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#).

LIPSCOMB UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

“Traveling Sport Clubs at Lipscomb University are registered student organizations initiated and run by students The concept of this program is to provide students the opportunity to compete against other students outside of Lipscomb University.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

LONG ISLAND UNIVERSITY, BROOKLYN

No information about Interscholastic Club Sports.

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#).

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

LOYOLA MARYMOUNT UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“Club Sports are recognized student clubs Open to all students, regardless of skill level Its members learn new skills, refine existing ones, engage in competition against other colleges/universities”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

LOYOLA UNIVERSITY CHICAGO

Interscholastic Club Sports are listed under [IMs \(Intramurals\) and Sports Clubs](#):

“Sports Clubs are student organizations that practice together as a team and compete against other universities’ sports clubs and/or local sports clubs”

The [Sport Club Handbook](#), at 2, further states:

“Our clubs participate in events, locally, regionally and nationally Each Sport Club will determine its own membership guidelines Students are directly and ultimately responsible for all aspects of operating and managing a successful organization.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed under IMs and Sports Clubs.

LOYOLA UNIVERSITY MARYLAND

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“Loyola’s Club Sport teams bridge the gap between intramurals and varsity athletics, allowing you to enjoy extramural competition without the pressures of highly-structured varsity sports. Clubs are student directed, with members being required to assume responsibility for organizing contests and fundraising activities, while also providing a great opportunity to develop leadership skills. Most club teams compete in leagues against other local and regional teams and some teams even compete in national competitions.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

MANHATTAN COLLEGE

No information about Interscholastic Club Sports.

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#).

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

MARIST COLLEGE

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sports Advisory,” and on a [Club Sports webpage](#):

“Club Sports at Marist College compete on an intercollegiate level, but they do not compete under the NCAA guidelines. Each club sport has head and assistant coaches and is completely student run. Club presidents, vice presidents, secretaries, and treasurers are elected on an annual basis and are responsible for the scheduling of all practices and games, the ordering of all equipment and uniforms, and all other organizational tasks that are necessary for a club sport team to function on an intercollegiate level.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

MARQUETTE UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club and Recreational Sports,” and on a [Club Sports webpage](#):

“A club sport is a registered student organization conducted by elected student officers that coordinate club activities. The basic structure of clubs allow members numerous opportunities for involvement with fundraising, public relations, budgeting, administration and scheduling Many clubs compete against other clubs, colleges and universities while others offer an instructional atmosphere.”

NCAA-regulated Sports are **not** listed in the Student Organization Directory,* **nor** listed on the Club Sports webpage.

* A student sports fan engagement campaign is listed. Accompanying event and roster information does not reflect NCAA events or rosters.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

MERCER UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports/Recreation,” and on a [Club Sports webpage](#).

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

UNIVERSITY OF MIAMI

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Athletic/Health Wellness,” and on a [Club Sports webpage](#):

“The Club Sports Program promotes opportunities for students to engage in sporting events, activities, and competitions in the state of Florida, the Southeast, as well as throughout the United States.”

The [Club Sports Handbook](#), at 4, further states:

“The success and strength of the club sports program is based upon the initiative set forth by the elected student leadership and the total involvement of club members. A club offers students the opportunity to become directly involved with the administration and supervision of their organization. They collectively have the responsibility for:

- √ Writing their constitution and by-laws
- √ Setting up organizational meetings
- √ Informing new members of the club’s direction
- √ Establishing club dues
- √ Raising funds to support the club’s activities
- √ Planning and promoting the club’s events.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

MONMOUTH UNIVERSITY Interscholastic Club Sports are listed in the Student-Run Group Directory and on a Club Sports webpage: “The Club Sports Program at Monmouth University provides opportunities for students who desire a more in-depth experience of sports participation than is provided in the Intramural or informal Recreation Program. The goal of the Club Sports Program is to blend the aspects of learning new skills, practicing with club members, and possibly competing with other clubs and universities.” NCAA-regulated Sports are not listed in the Student-Run Group Directory, nor listed on the Club Sports webpage.	MOUNT ST. MARY’S UNIVERSITY Interscholastic Club Sports are listed in the Student-Run Group Directory under category “Club Sports,” and on a Club Sports webpage: “If you are looking for a higher level of activity in a student-run setting, then the club sports program at Mount St. Mary’s University might be the place for you. Our teams generally practice two to three times a week and play other colleges and universities throughout Maryland, Pennsylvania, Virginia and Washington, D.C. All of the teams at the Mount are run by a group of student leaders. Their responsibilities include working alongside a coach/advisor, handling finances, scheduling practices/games, completing fundraising/community service activities, and more. As this list indicates, running a club sports team is a lot like running your own business.” NCAA-regulated Sports are not listed in the Student-Run Group Directory, nor listed on the Club Sports webpage.
NIAGARA UNIVERSITY Interscholastic Club Sports are listed in the Student-Run Group Directory under category “Club Sports,” and on a Club Sports webpage. The Club Sport Program Handbook, at 1, states: “All clubs are self-administered by elected student officers and are supported by membership dues, fundraising activities, student government, donor contributions, and sponsorship. It is the responsibility of the students to work with the university administrator for club sports to coordinate activities, classes, practice, competition schedules, tournament transportation, publicity, and all other factors for successful operation.” NCAA-regulated Sports are not listed in the Student-Run Group Directory, nor listed on the Club Sports webpage.	NORTHEASTERN UNIVERSITY Interscholastic Club Sports are listed in the Student-Run Group Directory under category “Club Sport,” and on a Club Sports webpage. NCAA-regulated Sports are not listed in the Student-Run Group Directory, nor listed on the Club Sport webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

NORTHWESTERN UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sports/Recreation,” and on a [Sport Clubs webpage](#):

“The Sport Club program offers the opportunity to compete in extramural competition against other clubs, schools, colleges, and universities.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sport Clubs webpage.

UNIVERSITY OF NOTRE DAME

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Athletic Clubs,” and on a [Club Sports webpage](#):

“Looking to engage in competition with teams from across the country? From rowing to volleyball, rugby to boxing, our club sports are a great way to engage in physical activity on and off campus.”

The [Club Sports Policies & Procedures](#) further states that the Club Sports program:

“allows the student an opportunity to take part in the leadership, responsibility and decision making process of club activities It is expected that all clubs will be student run”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

ORAL ROBERTS UNIVERSITY

No information about Interscholastic Club Sports.

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#).

UNIVERSITY OF THE PACIFIC

Interscholastic Club Sports are listed on a [Sport Clubs webpage](#):

“A Sport Club is a student organization designed to promote interest, participation, and competition in a specific athletic or recreation activity.”

The [Sports Club Operations Manual](#), at 1, further states:

“The level of structure and time commitment varies among the sport clubs as some choose to compete against other universities and in local/regional leagues The Sports Club program is designed to foster leadership through the members’ active involvement in budgeting, scheduling, planning, organization, and fundraising.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Sport Clubs webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

UNIVERSITY OF PENNSYLVANIA

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sports & Recreational,” and on a [Sport Clubs webpage](#):

“All sport club teams at the University of Pennsylvania are ‘recognized student organizations’”

....

“[T]he clubs’ elected membership (president, vice-president, secretary and treasurer) usually manages all aspects of the sport club”

....

“[Competitive] clubs are interested in scheduling and hosting tournaments, leagues or structured events. Clubs such as these operate in a manner similar to varsity teams.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sports Club webpage.

PEPPERDINE UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

“Club Sports offer students a more competitive environment with regular practices, dedicated coaches, and the opportunity to travel and compete against teams from other universities. Club Sports are officially recognized student organizations that provide students with opportunities to develop their leadership skills.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

UNIVERSITY OF PORTLAND

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory.

PRESBYTERIAN COLLEGE

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Special Interest.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

PRINCETON UNIVERSITY

Interscholastic Club Sports are linked to the [Student-Run Group Directory](#) (“click on the appropriate link to learn more about student activities and organizations sponsored by other offices ... [club and intramural sports](#)”) and listed on a [Sport Clubs webpage](#):

“Sport Clubs are open to all Princeton University students of any skill level and offer the opportunity to compete with other colleges throughout the Northeast and nationally.”

The [Sport Clubs Handbook](#), at 3, further states:

“Sport Clubs are student initiated and student-governed. Clubs compete with other collegiate clubs and organizations but are not to be confused with varsity athletics [*i.e.*, NCAA sports]. Varsity teams are subject to NCAA and conference rules, have paid full time coaches, and generally require a higher level of commitment for participation.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sports Club webpage.

PROVIDENCE COLLEGE

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sports & Recreation,” and on a [Club Sports webpage](#):

“Club sports are non-varsity teams and organizations, which employ coaches, play, and practice using the College’s facilities, and are members of various leagues competing against club and varsity teams of other schools.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

QUINNIPIAC UNIVERSITY

No information about Interscholastic Club Sports.

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#).

RICE UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Recreational/Sport” and on a [Club Sports webpage](#).

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

UNIVERSITY OF RICHMOND

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sport Club,” and on a [Sport Clubs webpage](#).

The [Sport Club Manual](#), at 5, states:

“Participation in sport clubs is a learning experience for the members through their involvement in the administration, organization, budgeting, scheduling, fund-raising, and public relations A sport club is a student organization Clubs compete with other clubs, organizations, colleges, and universities but should not be confused with a varsity sport administered by the Athletic Department [*i.e.*, a NCAA sport]. Varsity teams must follow NCAA rules and regulations, are usually fully funded, have paid coaches and athletic trainers, practices and competitions are mandatory, and today’s varsity sports usually require a full year commitment. Sport clubs often compete with other universities but are not affiliated with the NCAA, the majority of their funds are self-generated, coaches are often volunteers, and the organization and administration of the club is determined by the club officers.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sports Club webpage.

RIDER UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“Because clubs are student-managed and organized, you’ll have the opportunity to participate in the sports you love while learning leadership skills you’ll always value.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

ROBERT MORRIS UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“These teams compete against local and regional colleges and universities in organized leagues and associations. Some teams even travel outside of the region to compete.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

SACRED HEART UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#).

A [Club Sports Manual](#) describes student management of club teams and requires that teams “compete against other non-Sacred Heart affiliated teams.”

A webpage sidebar - [Club Sports vs. Div. 1 Sports](#) - includes a chart of differences between club sports and NCAA-regulated sports, incl. qualifications / eligibility, practices, competition, games, roster limits and offseason.

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

SAMFORD UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Recreational/Club Sports,” and on a [Sports Clubs webpage](#).

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sports Clubs webpage.

UNIVERSITY OF SAN DIEGO

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under categories “Sports Clubs” and “Sport Club-Changemaker,” and on a [Sports Clubs webpage](#):

“USD’s Sports and Recreation Clubs are managed and run by student leaders. As such, members of each club develop valuable life-long skills in management and leadership [U]nlike intramurals, Sports Clubs compete against other schools. Clubs generally are competitive, practice two or three times per week and have coaches. Many teams compete nationally with other colleges and universities, and often bring back titles and trophies.”

The [Sport Clubs Handbook](#),3-4, further states:

“Sports Clubs are student organizations Stewardship of a Sports Club is the responsibility of its student participants and their elected leadership.”

....

“Competitive Sport Clubs require substantial financial support by its members in the areas of fund raising and membership dues Competitive Sport Clubs generally practice two or three times a week, may have volunteer coaches or coaches paid with Sport Club funds, and compete against other college club teams.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sports Clubs webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

UNIVERSITY OF SAN FRANCISCO

Interscholastic Club Sports are listed on a [Sport Clubs webpage](#).

“University of San Francisco supports 25 Sport Clubs, many of which compete in intercollegiate competition, regional and national tournaments.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Sport Clubs webpage.

SANTA CLARA UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#).

The [Club Sports Handbook](#), at 2, states:

“Clubs are student-initiated and student-managed so members are actively involved in determining the objectives and procedures of their club. The decision-making duties are the responsibility of the student members and officers Our clubs compete with clubs from other universities [but] are not [NCAA] sports teams. Club Sport teams do not offer scholarships to participants. Club Sport teams do not have the ability to grant potential recruits guaranteed acceptance to the University”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

SEATTLE UNIVERSITY

Interscholastic Club Sports are listed on a [Sport Clubs webpage](#).

The [Sport Club Handbook](#), at 3, states:

“Sport Clubs are student-run organizations and offer the opportunity to compete with other colleges throughout the state, region and nation.”

....

“Sport Clubs differ from [NCAA] athletics in that Sport Clubs are student run organizations, are typically not scholarship-based, and are completely voluntary in nature. Unlike [NCAA] athletics, Sport Clubs are responsible for their own administration and for many of their own expenses.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Sport Clubs webpage.

SETON HALL UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

“[Clubs] participate in extramural competition [but] should not be mistaken for [NCAA] sports that are also supported by the department. In a club, the members assume the financial responsibilities and assist in organization. There are no athletic scholarships available for club sport participants.”

The [Club Sport Manual](#), at 1, further states:

“Students in each club are responsible for the internal organization and conduct of their club The management and organization of a club sport is an educational experience providing many challenges for students, such as: writing their constitution and by-laws, conducting club meetings, establishing dues to offset club expenditures, planning fund raising projects, coordinating practices, competition and special events, publicizing club events”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

SIENA COLLEGE Interscholastic Club Sports are listed in the Student-Run Group Directory under category “Athletic.” NCAA-regulated Sports are not listed in the Student-Run Group Directory.	UNIVERSITY OF SOUTHERN CALIFORNIA Interscholastic Club Sports are listed in the Student-Run Group Directory and on a Club Sports webpage: “The University of Southern California Club Sports Program serves over 2500 members in 58 student-run clubs Club Teams are designed for amateur athletes who enjoy intercollegiate athletic competition and are organized in tiers based on size, budget and competitive level. Club sports meet for regular practices during the week and competitive clubs hold games and matches against students from other universities.” NCAA-regulated Sports are not listed in the Student-Run Group Directory, nor listed on the Club Sports webpage.
SOUTHERN METHODIST UNIVERSITY Interscholastic Club Sports are listed in the Student-Run Group Directory under category “Sports,” and on a Sport Clubs webpage: “Student members administer each sport club The competitive sport clubs compete against other regional and national colleges including UT-Austin, Texas A&M, Texas Tech, Oklahoma State, Rice and Baylor. Opponents also include other amateur clubs in the region.” NCAA Women’s Rowing is listed in the Student Organization Directory. But the other 14 NCAA-regulated Sports are not similarly listed. None are listed on the Sport Clubs webpage.	ST. BONAVENTURE UNIVERSITY Interscholastic Club Sports are grouped along with Student Clubs & Organizations under an Associate Director for Intramurals, Club Sports and Student Engagement, and listed on a Club Sports webpage describing competition, “against other colleges and universities.” NCAA-regulated Sports are not grouped with Student Clubs & Organizations, nor listed on the Club Sports webpage.
ST. FRANCIS COLLEGE BROOKLYN No information about Interscholastic Club Sports. NCAA-regulated Sports are not listed in the Student-Run Group Directory.	SAINT FRANCIS UNIVERSITY Interscholastic Club Sports are listed in the Student-Run Group Directory under category “Club Sports.” NCAA-regulated Sports are not listed in the Student-Run Group Directory.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

ST. JOHN'S UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

Proposals for recognition of a Club Sport, "must show evidence of ... [a]vailability of adequate competition within a reasonable geographical range from campus ... [d]emonstration of student leadership within the club ... [c]apacity of the club to meet financial responsibilities of the club beyond what is provided by the Campus Recreation Department. (i.e.: fund-raising)."

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

SAINT JOSEPH'S UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

"Voluntarily organized by students, club sports exist for the purpose of furthering a common interest in a physical activity through competition, instruction, or participation. Students elect their own officers, draft their own constitution, request facility space, get approval for and make travel arrangements, schedule contests with other teams, develop contracts with officials, fundraise and manage their budget."

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

SAINT LOUIS UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category "Club Sports," and on a [Sport Clubs webpage](#):

"[S]port clubs compete against other colleges and universities across the nation."

The [Sport Clubs Manual](#), at 3-4, further states:

"[T]he most important concept of a sport club is that it is a student organization. The existence of a sport club relies heavily upon the club members' initiative, organization, administration, and leadership. Participation in the administration of a sport club provides a tremendous opportunity to further a student's education in program planning, business management, and organizational behavior Funding comes through student fees distributed by Student Government, club fundraising, dues, donations, and special events."

NCAA-regulated Sports are **not** listed in the Student Organization Directory,* **nor** listed on the Sport Clubs webpage.

* A student sports fan engagement campaign is listed, encouraging students to, "balance all of that studying [by attending] a Billiken game to watch those who do it best." Accompanying event and roster information does not reflect NCAA events or rosters

ST. MARY'S COLLEGE OF CALIFORNIA

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

"Each team is registered with local or national league affiliations and is led by SMC students."

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

ST. PETER'S UNIVERSITY

No information about Interscholastic Club Sports.

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#).

STANFORD UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category "Athletic-Club Sport," and on a [Club Sports webpage](#):

"The Club Sports program allows students to compete against skilled athletes from other colleges and universities. Alongside competition and performance, club sports place emphasis on student initiative and team management, allowing participants to shape their own experience."

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

STETSON UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category "Other," and on a [Club Sports webpage](#) that is linked to the Student-Run Group Directory under "More Student Organizations."

The [Club Sports Participant Guide](#), at 3, states:

"The program's overall goal is to foster an environment of learning and development through involvement in teamwork, fundraising, service projects, budgeting, scheduling, and, of course, practicing and competing Each Club Sport is a student-oriented and student-run organization The students within each Club, specifically the Club's Officers, are responsible for the internal administration of their Club."

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

SYRACUSE UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category "Sports/Recreation," and on a [Sport Club webpage](#).

The [Sport Club Handbook](#), at 4, states:

"A Sport Club is a registered student organization Sport Clubs are organized and conducted by students The key to success of Sport Clubs is student leadership, interest, involvement and participation. Clubs may be instructional, recreational, competitive or a combination. Characterized as being student-initiated and student-managed, the structure of Sport Clubs allows athletes opportunities for leadership, decision-making and enhancing transferable skills."

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sport Club webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

TEXAS CHRISTIAN UNIVERSITY

Interscholastic Club Sports are listed on a [Sport Clubs webpage](#):

“Sport Clubs are recognized student organizations Most current clubs compete in an organized local or regional league against other colleges and Universities The student members create, administer and govern the clubs themselves, which provides them an opportunity to develop and enhance not only their athletic skills, but also their leadership and organizational skills.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Sport Clubs webpage.

TULANE UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

“Tulane Club Sports are student organizations that are geared toward instructional, recreational or competitive play. Club sports are recognized campus organizations that are run by the students. Each club has regular practice times and some compete in local or national leagues.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

UNIVERSITY OF TULSA

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#).

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory.

VALPARAISO UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#):

“If you crave extramural competition Some clubs travel to other campuses; some compete in off-campus tournaments”

The [Club Sports Handbook](#), at 2, further states:

“A Club Sport must be approved by the Recreational Sports Office and a recognized organization by the Student Senate. The Club Sport is formed, developed, governed, and administered by the student officers of each Club Sport, for the purposes of student recreation, fellowship, sportsmanship, and competing with the club sports’ of other higher education institutions. Each Club Sport is responsible for leadership activities including, but not limited to: scheduling, fiscal management, and compliance with University policies.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

VANDERBILT UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports.”

The [Club Sports Handbook](#), at 1-2, states:

“Club Sports [are] recognized student organizations Each Club Sport has been founded, organized, managed and maintained by volunteer student leaders The members are actively involved in the leadership, responsibility and decision-making process of club activities.”

....

“[Competitive Clubs] are members of a recognized collegiate league or conferenceor organization that has national championship affiliation.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory.

VILLANOVA UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#).

A [Club Sports Manual](#), at 2, describes student management of club teams and requires that teams “[p]articipate[] in external competition.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

WAGNER COLLEGE

No information about Interscholastic Club Sports.

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#).

WAKE FOREST UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#).

The [Club Sport Handbook](#), at 1, states:

“[C]lub sport teams ... range from the very competitive, which travel and play at the intercollegiate level, to the recreational and instructional The Club Sports program is the largest student group at Wake Forest University and is entirely student organized. Each Club Sport team is a chartered student organization run and administered by Wake Forest University’s students”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

WOFFORD COLLEGE

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Special Interest,” and grouped with [Intramural Sports](#).

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** grouped with Intramural Sports.

XAVIER UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“[I]nvolvement in the Clubs is structured to be a learning experience for the members through their involvement in the organization and administration of club activities as well as the development of sports skills The teams hold practices two to four times per week and all of clubs are required to have a coach. Our clubs do not have large budgets; therefore the clubs must fundraise and charge membership dues to subsidize their existence. The teams compete against other club teams from universities throughout the Midwest such as Indiana University, University of Kentucky, Ohio State University, Miami of Ohio and the University of Cincinnati. Many of the club sports play in leagues and can compete for a national championship.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

YALE UNIVERSITY

Interscholastic Club Sports are listed on a [Club Sports webpage](#).

The [Club Sports Program Handbook](#), at 1-2, states:

“Although some club sports are solely recreational, most are highly competitive. National Collegiate Championships have been won by Croquet, Cycling, Fishing, Polo, Rugby, Sailing, Skeet shooting, and Wrestling.”

....

Club Sports, “provide a valuable learning experience through student involvement in fund raising, public relations, organization, administration, budgeting, leadership, teaching, and scheduling in addition to athletic skill in a particular sport.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

UNIVERSITY OF DELAWARE

Interscholastic Club Sports are listed on a [Club Sports webpage](#).

The [Club Sports Policies & Procedures Manual](#), at 1-2, states:

“Club Sports are student run, and within each club the students are directly responsible for all aspects of managing and operating a successful competitive organization. As a result, Club Sports present a unique opportunity for students to develop both their athletic and leadership abilities.”

....

“There must be a viable number of opponents and competitions within the region. Primary competitors must be other university affiliated teams.”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Club Sports webpage.

UNIVERSITY OF NEW HAMPSHIRE

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sport Clubs,” and on a [Sport Clubs webpage](#).

The [Sport Clubs Policy Manual](#), at 1, states:

“[A]ctivities range from informal play to regular practice/instruction and intercollegiate competition [T]he emphasis is on student leadership and development. Students are directly and ultimately responsible for operating and managing a successful and competitive organization. As a result, Sport Clubs present a unique opportunity for students to develop both athletic and leadership abilities”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sport Clubs webpage.

PENNSYLVANIA STATE UNIVERSITY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Sport/Physical Activity,” and on a [Club Sports webpage](#).

The [Club Sports Policies & Procedures Manual](#), at 1-2, states:

“Club sport organizations meet regularly for practices ... and may compete in regional and national championships.

Motto

‘For the students, by the students’ is more than a slogan in the Club Sports Program - it is our philosophy. Club sport organizations are first and foremost student organizations”

....

“All organizational decisions must be made by full-time student, elected leaders”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

UNIVERSITY OF PITTSBURGH

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Recreational Sport,” and on a [Club Sports webpage](#).

The [Club Sports Handbook](#), at 3, states:

“Sport clubs are student-initiated, student-led and student-managed, providing an opportunity for the development of leadership and other life skills and to contribute to the overall college experience.

Competitive Clubs

Competitive clubs compete against outside competition, usually other collegiate clubs, as part of a structured regional or national league Competitive club sports also typically involve a greater financial commitment and time commitment, both in number of days per week and a longer period of time for the season.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

Student-Run Interscholastic Club Sports v. NCAA-Regulated Sports

UNIVERSITY OF RHODE ISLAND

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) and on a [Club Sports webpage](#):

“Each team is organized and managed by students The Club Sports program is partially funded through student activity fees. Additional funding is derived from membership dues, fund-raising events and activities Team members are required to help offset the cost of travel, equipment, uniforms, and officiating and game expenses. The University of Rhode Island Club Sports teams participate in a number of leagues and associations [M]any of our club sport teams travel regionally, nationally, and internationally to compete.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

RUTGERS, STATE UNIVERSITY OF NEW JERSEY

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Recreation Sport Clubs,” and on a [Sport Clubs webpage](#):

“Sport Clubs [are] student run organizations Sports Clubs may be instructional and/or competitive in nature, with the competitive clubs competing against other schools and leagues all around the country.”

[Club Basics](#) further explain that Clubs, “are student organized, student led and student funded,” and “must strive to ... [p]rovide leadership development opportunities for club members who wish to assume administrative duties within the club structure.”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Sport Clubs webpage.

TEMPLE UNIVERSITY

Interscholastic Club Sports are listed on a [Sport Clubs webpage](#):

“Clubs differ in scope and purpose and are classified as highly competitive, competitive, instructional, or recreational. The key element to the club program is that it is student-initiated and organized”

NCAA-regulated Sports are **not** listed in the [Student-Run Group Directory](#), **nor** listed on the Sport Clubs webpage.

UNIVERSITY OF VERMONT

Interscholastic Club Sports are listed in the [Student-Run Group Directory](#) under category “Club Sports,” and on a [Club Sports webpage](#):

“UVM club sports are not for the meek - many of the clubs compete at regional and national levels against other college and universities”

NCAA-regulated Sports are **not** listed in the Student-Run Group Directory, **nor** listed on the Club Sports webpage.

App. B

In the
United States Court of Appeals
For the Seventh Circuit

No. 16-1558

GILLIAN BERGER, et al.,

Plaintiffs-Appellants,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 14-cv-1710 — **William T. Lawrence**, Judge.

ARGUED SEPTEMBER 28, 2016 — DECIDED DECEMBER 5, 2016

Before KANNE, SYKES, and HAMILTON, *Circuit Judges*.

KANNE, *Circuit Judge*. Former student athletes at the University of Pennsylvania (“Penn”) sued Penn, the National Collegiate Athletic Association (“NCAA”), and more than 120 other NCAA Division I universities and colleges alleging that student athletes are employees who are entitled to a minimum wage under the Fair Labor Standards Act (“FLSA”). The district court disagreed. We agree with the

district court and hold that student athletes are not employees and are not covered by the FLSA.

I. BACKGROUND

Gillian Berger and Taylor Hennig (“Appellants”) are former students at Penn who participated on Penn’s women’s track and field team. Like many collegiate athletic teams across the country, Penn’s women’s track and field team is regulated by the NCAA. The NCAA is a member-driven, unincorporated association of 1121 colleges and universities. It is divided into three divisions—Divisions I, II, and III—based roughly on the size of the schools and their athletic programs. Penn’s women’s track and field team competes in Division I, which includes the largest colleges and universities in the country.

Appellants sued Penn, the NCAA, and more than 120 other NCAA Division I member schools (“Appellees”), alleging that student athletes are “employees” within the meaning of the FLSA, 29 U.S.C. § 201. Accordingly, Appellants contend that the NCAA and its member schools violated the FLSA by not paying their athletes a minimum wage. Appellees moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

The district court granted Appellees’ motions, holding that (1) Appellants lacked standing to sue any of the Appellees other than Penn, and (2) Appellants failed to state a claim against Penn because student athletes are not employees under the FLSA. This appeal followed.

II. ANALYSIS

The district court first dismissed Appellants’ suit against all of the Appellees except Penn for lack of standing. We re-

No. 16-1558

3

view *de novo* a district court's dismissal of a complaint for lack of standing. *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016).

In every case, the plaintiff has the burden of establishing the three elements of standing: that "(1) [he or she] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). To meet this burden and to survive a challenge to standing under Rule 12(b)(1), a plaintiff must plead sufficient factual allegations, taken as true, that "plausibly suggest" each of these elements. *Silha v. ACT, Inc.*, 807 F.3d 169, 174 (7th Cir. 2015).

Under the FLSA, alleged employees' "injuries are only traceable to, and redressable by, those who employed them." *Roman v. Guapos III, Inc.*, 970 F. Supp. 2d 407, 412 (D. Md. 2013). Appellants attended Penn. Their connection to the other schools and the NCAA is far too tenuous to be considered an employment relationship: "the only fair reading of the Amended Complaint is that [Appellants] are alleging that they are employees of only Penn, not of the other Defendants." (R. 238 at 5.) Thus, Appellants have not plausibly alleged any injury traceable to, or redressable by, any defendant other than Penn. So they lack standing to sue those other defendants.

We now turn to the merits with regard to Penn, over which no one disputes that we have jurisdiction. The district

court dismissed Appellants' suit against Penn for failure to state a claim. We review *de novo* a district court's dismissal of a complaint for failure to state a claim. *Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 862 (7th Cir. 2016). In evaluating the sufficiency of the complaint, "we construe it in the light most favorable to the nonmoving party, accept well-pleaded facts as true, and draw all inferences in [the nonmoving party's] favor." *Bell v. City of Chicago*, 835 F.3d 736, 738 (7th Cir. 2016) (quoting *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1146 (7th Cir. 2010)). Although a party need not plead "detailed factual allegations" to survive a motion to dismiss, mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Instead, "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

The FLSA requires "[e]very employer" to pay "his employees" a minimum wage of \$7.25 per hour. 29 U.S.C. § 206(a)(1)(c). Section 203(e)(1) defines "employee" in an unhelpful and circular fashion as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). Section 203(g) broadly defines "employ" as "to suffer or permit to work." 29 U.S.C. § 203(g). Thus, to qualify as an employee for purposes of the FLSA, one must perform "work" for an "employer."¹ "Work" is not defined by the Act.

¹ Section 203(d) of the FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee" 29 U.S.C. § 203(d).

No. 16-1558

5

Under the FLSA, the plaintiff bears the burden of establishing that he or she performed work for an employer and is therefore entitled to compensation. *Melton v. Tippecanoe Cty.*, 838 F.3d 814, 818 (7th Cir. 2016). Here, to survive the motions to dismiss, Appellants had to allege facts, which taken as true, establish that they were employees and performed work for Penn.

Although “[t]he Supreme Court has instructed the courts to construe the terms ‘employee’ and ‘employer’ expansively under the FLSA,” *Vanskike v. Peters*, 974 F.2d 806, 807 (7th Cir. 1992) (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992)), the Court has also held that the definition of “employee” “does have its limits.” *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 295 (1985). “Because status as an ‘employee’ for purposes of the FLSA depends on the totality of circumstances rather than on any technical label, courts must examine the ‘economic reality’ of the working relationship” between the alleged employee and the alleged employer to decide whether Congress intended the FLSA to apply to that particular relationship. *Vanskike*, 974 F.2d at 808.

To guide this inquiry, courts have developed a variety of multifactor tests. For example, we have applied a seven-factor test to determine whether migrant laborers are employees for purposes of the FLSA. *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1535–538 (7th Cir. 1987). Similarly, the Second Circuit created a “non-exhaustive set of [seven] considerations” to help determine when an intern is an employee under the FLSA. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2015). Appellants liken student athletes to interns and contend that we should use the Second Cir-

cuit's test set forth in *Glatt* to determine whether student athletes are employees under the FLSA. We disagree.

It is true, as Appellants note, that the district court cited the Second Circuit's test favorably. But the district court also declined to follow that test here. Instead, the court concluded correctly that our approach "to determining who is an employee under the FLSA is ... a flexible one." (R. 238 at 15.) The court then discussed our decision in *Vanskike*, in which we rejected the strict application of a similar multifactor test in favor of a more flexible standard. 974 F.2d at 809.²

We have declined to apply multifactor tests in the employment setting when they "fail to capture the true nature of the relationship" between the alleged employee and the alleged employer. *Id.* In *Vanskike*, we considered whether an inmate at a state prison was an employee under the FLSA. *Id.* at 806. Like Appellants here, the inmate in *Vanskike* urged us to apply a multifactor test to determine whether an employment relationship existed. We rejected the application of that test because it was "not the most helpful guide in the situation presented." *Id.* at 809. Rather than follow a specific test, we examined the economic reality of the alleged employment relationship and concluded that the prisoner was not an employee. *Id.* at 809–10.³

² The multifactor test rejected in *Vanskike* comes from *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

³ Similarly, in *Callahan v. City of Chicago*, we rejected the application of *Lauritzen's* multifactor test when the alleged employee's suit didn't "require a choice between employment and independent-contractor status." 813 F.3d 658, 662 (7th Cir. 2016). Other courts have likewise rejected the stringent application of multifactor tests in certain settings. *See e.g.*,
(continued...)

No. 16-1558

7

The district court followed the reasoning of *Vanskike* and held that the “factors used in the trainee and private-sector intern context fail to capture the nature of the relationship between the Plaintiffs, as student athletes, and Penn.” (R. 238 at 15). We agree with the district court and decline to apply the test set forth in *Glatt* here.

As the Supreme Court has noted, there exists “a revered tradition of amateurism in college sports.” *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984). That long-standing tradition defines the economic reality of the relationship between student athletes and their schools. To maintain this tradition of amateurism, the NCAA and its member universities and colleges have created an elaborate system of eligibility rules. *See O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1054–55 (9th Cir. 2015) (outlining the development of these rules). We have held that these rules “define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of” collegiate athletics. *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 343 (7th Cir. 2012). The multifactor test proposed by Appellants here simply does not take into account this tradition of amateurism or the reality of the student-athlete experience. In short, it “fail[s] to capture the true nature of the relationship” between student athletes and

(...continued)

Danneskjold v. Hausrath, 82 F.3d 37 (2d Cir. 1996); *Doyle v. City of New York*, 91 F. Supp. 3d 480, 486 (S.D.N.Y. 2015) (“[I]n certain contexts, application of a multifactor test can cause a court to miss the forest for the trees.”).

their schools and is not a “helpful guide.” *Vanskike*, 974 F.2d at 809.

A majority of courts have concluded—albeit in different contexts—that student athletes are not employees. *See generally* Adam Epstein and Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 Marq. Sports L. Rev. 287, 297 (2016) (collecting cases and concluding that “the courts have been consistent finding that student athletes are not recognized as employees under any legal standard, whether bringing claims under workers’ compensation laws, the NLRA or FLSA”). For example, most courts have held that student athletes are not employees in the workers’ compensation context and are thus not entitled to compensation from their schools for injuries they suffer while playing their respective sports. *See e.g.*, *Rensing v. Ind. State Univ. Bd. of Trustees*, 444 N.E.2d 1170 (Ind. 1983); *State Comp. Ins. Fund v. Indus. Comm’n*, 314 P.2d 288 (Colo. 1957); *Waldrep v. Tex. Emp’rs Ins. Ass’n*, 21 S.W.3d 692 (Tex. App. 2000); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983).

Although two courts reached the opposite conclusion over fifty years ago, they did so, at least in part, because the student athletes in those cases were also separately employed by their universities. *See Univ. of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953); *Van Horn v. Indus. Accident Comm’n*, 33 Cal. Rptr. 169 (Cal. Dist. Ct. App. 1963). Moreover, in 1965, the California legislature, in apparent disagreement with the California District Court of Appeal in *Van Horn*, amended the state’s labor code to explicitly exclude student-athletic participants as employees for purposes of worker’s compensation. *See Shephard v. Loyola Marymount*

No. 16-1558

9

Univ., 125 Cal. Rptr. 2d 829, 832–34 (Cal. Ct. App. 2002) (discussing the legislature’s amendment).

The Department of Labor, through its Field Operations Handbook (“FOH”), has also indicated that student athletes are not employees under the FLSA. The FOH “is an operations manual that provides Wage and Hour Division ... investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance.” *Field Operations Handbook (FOH)*, United States Dep’t of Labor, <https://www.dol.gov/Whd/FOH/index.htm>. Appellants argue that the FOH “cannot form the basis for *any* dismissal.” (Appellants’ Reply Br. at 11.) We agree with Appellants that the provisions in this handbook are not dispositive, but they certainly are persuasive. In fact, we have cited this handbook as persuasive authority several times. See *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1075 (7th Cir. 2014); *Yi v. Sterling Collision Ctrs, Inc.*, 480 F.3d 505, 508 (7th Cir. 2007).

Chapter ten of the FOH “contains interpretations regarding the employment relationship required for the [FLSA] to apply.” *Field Operations Handbook (FOH)*, § 10a00. Section 10b24 specifically addresses the employment status of university or college students. This section is broken into two subsections—subsection (a) and subsection (b).

Subsection (a) discusses situations when university or college students are not treated as employees under the FLSA. Under this subsection, “University or college students who participate in activities generally recognized as *extra-curricular* are generally not considered to be employees within the meaning of the [FLSA].” § 10b24(a) (emphasis added).

This subsection then cross-references another section, § 10b03(e), which states the following:

As part of their overall educational program, public or private schools ... may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and *interscholastic athletics* and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by [the FLSA] and do not result in an employer-employee relationship between the student and the school”

(emphasis added).

Subsection (b), “[o]n the other hand” discusses situations in which “an employment relationship will generally exist with regard to students” § 10b24(b). Under this subsection, students who participate in a work-study program and, for example, “work at food service counters or sell programs or usher at athletic events, or who wait on tables or wash dishes in dormitories in anticipation of some compensation” are “generally considered employees under the [FLSA].” *Id.*

Appellants compare NCAA-regulated athletes to the work-study participants of § 10b24(b) and argue that these athletes should be deemed employees under the FLSA. In so doing, Appellants contend that § 10b24(a)’s reference to “extracurricular” activities and § 10b03(e)’s reference to “inter-

No. 16-1558

11

scholastic athletics” refer only to “student-run, interscholastic club sports,” and not to NCAA-regulated sports. (Appellants’ Br. at 18). To support this argument, Appellants point to the many differences between club sports and NCAA-regulated sports—the most obvious of which being that club sports are largely student-run, whereas NCAA-regulated sports are heavily supervised by university-employed staff. We agree that NCAA-regulated sports are very different from club sports, but we disagree that this warrants different treatment under the clear language of the FOH.

Section 10b24(a) categorically states that students who participate in “extracurricular” activities are generally not considered employees. Section 10b03(e) includes “interscholastic athletics” in a list of activities that do not constitute “work.” These references are not limited to activities that are entirely student run. In fact, most of the activities included in § 10b03(e)’s list are not student run. Appellants have not presented any persuasive argument to suggest that the Department of Labor intended to limit this language to student-run activities. We therefore reject Appellants’ linguistic limitation.

Because NCAA-regulated sports are “extracurricular,” “interscholastic athletic” activities, we do not believe that the Department of Labor intended the FLSA to apply to student athletes. We find the FOH’s interpretation of the student-athlete experience to be persuasive.

Appellants in this case have not, and quite frankly cannot, allege that the activities they pursued as student athletes qualify as “work” sufficient to trigger the minimum wage requirements of the FLSA. Student participation in collegiate athletics is entirely voluntary. Moreover, the long tradition

of amateurism in college sports, by definition, shows that student athletes—like all amateur athletes—participate in their sports for reasons wholly unrelated to immediate compensation. Although we do not doubt that student athletes spend a tremendous amount of time playing for their respective schools, they do so—and have done so for over a hundred years under the NCAA—without any real expectation of earning an income. Simply put, student-athletic “play” is not “work,” at least as the term is used in the FLSA. We therefore hold, as a matter of law, that student athletes are not employees and are not entitled to a minimum wage under the FLSA.

We briefly conclude by addressing Appellants’ argument that employment status is an inherently fact-intensive inquiry and thus should not be decided at the motion-to-dismiss stage. We reject this argument. Because we conclude, as a matter of law, that student athletes are not employees under the FLSA, no discovery or further development of the record could help Appellants. Appellants did not and could not allege facts, even taken as true, that give rise to a cause of action. *See Vanskike*, 974 F.2d at 813 (affirming the district court’s grant of a motion to dismiss because plaintiffs had failed to establish the existence of an employment relationship).

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court’s grant of Appellees’ motions to dismiss.

No. 16-1558

13

HAMILTON, *Circuit Judge*, concurring. I join Judge Kanne's opinion for the court but wish to add a note of caution. The plaintiffs in this case were students who participated in track and field at the University of Pennsylvania. Like other Ivy League schools, Penn does not offer athletic scholarships. Also, as far as I know, track and field is not a "revenue" sport at Penn or any other school. In this case, therefore, the economic reality and the sometimes frayed tradition of amateurism both point toward dismissal of these plaintiffs' claims. See generally, e.g., *O'Bannon v. National Collegiate Athletic Ass'n*, 802 F.3d 1049, 1054–55 (9th Cir. 2016) (holding that NCAA compensation rules for Division I men's basketball players and Football Bowl Subdivision football players violated federal antitrust laws).

Because the plaintiffs in this case did not receive athletic scholarships and participated in a non-revenue sport, they pursued a broad theory. The logic of their claim would have included not only any college athlete in any sport and any NCAA division, but also college musicians, actors, journalists, and debaters. That broad theory is mistaken, as Judge Kanne's opinion explains. I am less confident, however, that our reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men's basketball and FBS football. In those sports, economic reality and the tradition of amateurism may not point in the same direction. Those sports involve billions of dollars of revenue for colleges and universities. Athletic scholarships are limited to the cost of attending school. With economic reality as our guide, as I believe it should be, there may be room for further debate, perhaps with a developed factual record rather than bare pleadings, for cases addressing employment status for a variety of purposes.