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GENERAL COUNSELS IN SPORTS: AN UPDATED AND EXPANDED ANALYSIS OF THE RESPONSIBILITIES, DEMOGRAPHICS, AND QUALIFICATIONS

JAKE P. MANTIN^{*}
CHRISTOPHER R. DEUBERT^{**}
GLENN M. WONG^{***}

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ABSTRACT

This Article builds upon the prior findings of our 2017 article, General Counsels in Sports: An Analysis of the Responsibilities, Demographics, and Qualifications.¹ That Article provided an in-depth analysis of the responsibilities, demographics, and qualifications for General Counsels of the clubs in the National Football League (NFL), Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL). This Article updates that work, examines the role of General Counsel within a Major League Soccer (MLS) club, and compares the backgrounds of the present MLS General Counsels to the General Counsels of the other leagues. Additionally, this Article discusses the Women's National Basketball Association (WNBA) and the National Women's Soccer League (NWSL); however, currently, the majority of clubs within these two leagues do not have enough internal legal counsel to provide comprehensive data for a complete analysis.

As to the NFL, MLB, NBA, and NHL, we found the following changes: (1) an increase in the number of Black/African American General Counsels, but only a very slight increase for other

¹ Glenn M. Wong, Christopher R. Deubert, & Kevin J. Hansen, *An Analysis of the Responsibilities, Demographics, and Qualifications*, 6 ARIZ. ST. SPORTS & ENT. L.J. 229 (2017).

racial/ethnic groups; (2) an increase in gender diversity, with significantly more women General Counsels today; (3) an increase in General Counsels with prior legal experience in the sports industry; (4) an increase in General Counsels with prior experience at prominent sports law firms, most of whom assume roles within the NFL; and (5) an increase in the number of General Counsels with prior experience in an Associate Counsel role.

Additionally, when examining the MLS General Counsels in comparison to their counterparts in the other leagues, we found that MLS General Counsels are generally: (1) younger and have fewer years of prior legal experience before assuming the role; (2) of greater racial/ethnic diversity, specifically Asian/Asian American and Hispanic heritage; (3) include notably more women; (4) more likely to come from law schools and law firms of lower prestige and ranking; and (5) more likely to have prior experience working at a league office or in a prior role as an Associate Counsel.

Lastly, this Article discusses possible changes to the role of General Counsel as it adapts to broader developments in the sports industry, emerging technologies, and the changes across the legal field. In total, this Article provides an updated and expanded comprehensive understanding of the role of General Counsel.

INTRODUCTION

The General Counsel of a professional sports team has been described as “the proverbial 12th man in every department of the organization.”² Assisting in the work of various departments, the General Counsel is one of few roles where the individual has “deep involvement in every primary area of the sports business.”³ This breadth of work—coupled with the novel issues facing a professional sports organization—makes the role a coveted position among many. Additionally, as noted by Ram Padmanabhan, COO & General Counsel of the Chicago Bulls, the position is desirable for reasons beyond the work product itself: “In the sports industry, we deal with something a lot of people are passionate about. We’re in the paper every day, people watch us on TV and they talk about us on the radio. . . that’s what makes this business so novel.”⁴

² *Why Do Sports Organizations Need In-House Legal Teams? A Point of View from a General Counsel*, LAWINSPORE (Mar. 11, 2015), <https://www.lawinsport.com/> [<https://perma.cc/3VTX-JPDJ>].

³ *Id.*

⁴ Benjamin Gleisser, *Running with the Bulls*, MCGILL NEWS, <https://mcgillnews.mcgill.ca/> [<https://perma.cc/3FNU-ZCVF>].

In our 2017 analysis of General Counsels across the four major North American sports leagues—the National Football League (NFL), Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL) (collectively, the “Big Four”)⁵—we found, among other trends, that a significant portion of General Counsels attended a top-25 law school (49.5%); the majority of General Counsels previously worked at a law firm of at least 101 attorneys (66.4%); prior experience at a law firm with a substantial sports law practice or within a league office was beneficial, but not essential; and that more gender and racial diversity was needed, with only 18.6% women and 14.1% non-white representation among such General Counsels at that time.

Additionally, we outlined the primary work areas for General Counsels: contracts; corporate transactions; compliance; labor and employment; corporate governance; intellectual property; litigation; and law department management. With these findings in mind, we made recommendations and guidance for those seeking to secure one such position.

This Article proceeds from these initial findings to discuss the changes and developments in the industry since 2017. Additionally, it seeks to provide more comprehensive data and information through the inclusion of Major League Soccer (MLS), the Women’s National Basketball Association (WNBA) and the National Women’s Soccer League (NWSL).

Part I analyzes the demographics and experience of the General Counsels in the Big Four as of April 2023 and compares the data to that of the 2017 General Counsels.⁶ Overall, there has been (1) an increase in the number of Black/African American General Counsels but only a minimal increase for other racial/ethnic groups; (2) a significant increase in the number of women General Counsels; (3) an increase of General Counsels with prior legal experience in the sports industry; (4) an increase in General Counsels with prior experience at prominent sports law firms; and (5) an increase of General Counsels with prior experience as an Associate Counsel.

Part II goes beyond the Big Four and analyzes the MLS General Counsels, explores this role and how it differs from the role as it pertains to the Big Four, and compares the experience and demographics of the personnel in these positions to that of the

⁵ Wong et al., *supra* note 1.

⁶ Part I is segmented into two sections: the areas where change is found in the experience and demographics of the General Counsels, and the areas where there was no meaningful change.

General Counsels in the Big Four as of April 2023. Overall, MLS General Counsels are: (1) younger and have fewer years of prior legal experience; (2) more diverse across racial/ethnic groups; (3) notably more women; (4) more likely to have attended law schools of lower rank and worked at law firms of a smaller size; and (5) more likely to have prior experience in a league office or as an Associate Counsel.

Part III briefly discusses the WNBA and the NWSL. Although these growing leagues currently do not have many in-house General Counsels—limiting the ability to compare the leagues to the five men’s leagues discussed—they are nonetheless worthwhile to examine as they represent an expanding sector of the sports industry that is likely to create additional in-house legal positions in the future. Consequently, they merit inclusion for a more comprehensive understanding of the role of General Counsel in professional sports in North America.

Part IV discusses the recent changes in the General Counsel role and areas of future work-types likely on the horizon for the role.

Lastly, we conclude with final remarks directed at those seeking to enter into the highly sought-after General Counsel role of a major professional sports club.

I. THE BIG FOUR LEAGUES

This Part provides an analysis of the demographics and prior experiences of General Counsels as they have evolved over the past six years. To do so, this Article compares the demographic data of General Counsels in 2017 to the data of General Counsels in 2023.

At the outset, it is important to explain the methodology for this data’s collection. In 2016, we created a database of all General Counsels for NFL, MLB, NBA, and NHL clubs; this database was last updated in January 2017, shortly before the publication of our first Article. We determined the General Counsels by utilizing the clubs’ websites, media guides where applicable, and LinkedIn. To gather personal and professional data about the General Counsels, we reviewed biographies available online, media guides, and individual LinkedIn pages. Although these sources were predominantly comprehensive, for a minority of General Counsels we supplemented additional information from reliable sources, such as reputable news outlets.

Using this same methodology, we gathered data on the General Counsels from 2022 to 2024. We use this data as a basis for comparison with that of our prior findings in 2017. The 2023

General Counsels database utilized for this article was last updated in April 2023.

Over the past six years, our research has identified five pivotal areas of meaningful change across the experience and demographics of General Counsels: race/ethnicity; gender; prior industries worked in; prior experience at a sports law firm; and prior experience as an Associate Counsel. These findings are discussed in Section A of this Part.

In Section B of this Part, we shift our focus to experience and demographics, both of which have experienced little notable change. These areas include: age; age when hired as General Counsel; current law school ranking; years of legal experience prior to becoming General Counsel; prior law firm experience by size (number of attorneys); and league office experience.

A. AREAS OF CHANGE

After comparing the 2017 General Counsels' data to the 2023 data, although there were no meaningful differences in some areas, there were five areas of change worth discussing. The following is a brief description of our findings:

1. Race/Ethnicity: Although there has been no significant change in most racial/ethnic groups, we have found a substantial and meaningful increase in the number of Black/African American General Counsels.
2. Gender: The number of women General Counsels has nearly doubled.
3. Prior Industries Worked In: There is a slight increase in the number of attorneys coming from other sports legal roles prior to becoming General Counsel.
4. Prior Experience at A Sports Law Firm: Although the dataset is small, there is an increase in General Counsels coming from the law firm of Covington & Burling LLP. Notably, they are all in the NFL, for which Covington & Burling is long-time outside counsel.
5. Experience as Associate Counsel: There is a meaningful increase in the number of General

Counsels that have prior experience as Associate Counsel.

Below is a more detailed analysis of these five areas of change.

1. RACE/ETHNICITY

Professional sports today are generally more racially diverse than the general population—depending on the league, the athletes themselves are generally comprised of more racial and ethnic minorities than the general population.⁷ This statistic has led commentators to acknowledge that, in some respects, this is “a multi-billion-dollar industry that is literally built on the talents of many Black and Hispanic athletes” and that front office diversity should be reflective of the racial demographics of the athletes.⁸ However, historically, this diversity has notably been missing from the front office:⁹ the very people in charge of putting a product on the field that appeals to such a diverse fanbase.

In recent years, actors in the sports industry have made significant efforts to “drive change” and “implement initiatives and processes that encourage a more diverse representation within the sports industry.”¹⁰ However, the Supreme Court’s 2023 decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*¹¹ may slow progress in the sports industry, as it has in other industries. In that case, the Court held that “the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause” and that although universities may consider “an applicant’s discussion of how race affected his or her life,” it could not be done in the manner that schools previously used to implement racial considerations into their admissions process.¹²

⁷ The Learning Network, *What’s Going on in This Graph? | Diversity in Professional Sports*, N.Y. TIMES (Jan. 28, 2021), <https://www.nytimes.com/> [https://perma.cc/H8P5-UBBZ].

⁸ See, e.g., Preetam Sen, *Front Offices Should Reflect Diversity of Fans, Athletes*, SPORTS BUS. J. (Aug. 10, 2020), <https://www.sportsbusinessjournal.com/> [https://perma.cc/9PUB-E65A].

⁹ Shalise Manza Young, *As ‘More of a Movement’ Forms Around Diversity in Sports Leadership, Progress is Stalling*, GLOBAL SPORT MATTERS (Aug. 22, 2022), <https://globalsportmatters.com/> [https://perma.cc/XXH6-Y57N].

¹⁰ See Sen, *supra* note 8.

¹¹ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

¹² *Id.* at 230.

Although the “majority opinion does not address corporate DEI programs,”¹³ there nonetheless exists the potential for corporate programs to be impacted in the future. Sports leagues and teams will have to be mindful of their practices and potentially alter them in the future.¹⁴¹⁵ The confusion and concerns are evidenced by the fact that, although the chair of the Equal Employment Opportunity Commission (appointed by President Biden) stated that it “remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace,”¹⁶ the Attorneys General of 13 states (all Republicans)¹⁷ issued a statement to Fortune 100 CEOs “remind[ing] [them] of [their] obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of ‘diversity, equity, and inclusion’ or otherwise.”¹⁸

Despite the changed manner which companies may have to conduct their hiring practices in the future, it is nevertheless worth discussing the change that has occurred regarding the racial composition of General Counsels—in part, due to DEI programs. Indeed, there have been increases in the racial/ethnic diversity of General Counsels in the Big Four. Tables 1(a) to 1(e) below provide

¹³ *Seven Pressing Questions Following the Supreme Court’s Admissions Decision*, PERKINS COIE (July 5, 2023), <https://www.perkinscoie.com/> [<https://perma.cc/P594-H7NB>].

¹⁴ *See id.*

¹⁵ Although not directed at the professional sports organizations at this time, other corporate DEI programs have become the target of litigation since the SCOTUS decision noted above. (*E.g.*, litigation has been initiated against Morrison and Foerster LLP and Perkins Coie LLP over their summer association Diversity Fellowship programs. Darreonna Davis, *Two Law Firms Sued Over DEI Programs After Affirmative Action Overturned*, FORBES (Aug. 22, 2023, 6:42 PM), <https://www.forbes.com/> [<https://perma.cc/486F-CHVJ>].

¹⁶ Andrea Hsu, *Corporate DEI Initiatives are Facing Cutbacks and Legal Attacks*, NPR (Aug. 19, 2023, 7:01 am), <https://www.npr.org/> [<https://perma.cc/ZG29-NB9J>].

¹⁷ Kris Kobach of Kansas; Jonathan Skrmetti of Tennessee; Steve Marshall of Alabama; Tim Griffin of Arkansas; Todd Rokita of Indiana; Mike Hilgers of Nebraska; Brenna Bird of Iowa; Alan Wilson of South Carolina; Daniel Cameron of Kentucky; Patrick Morrissey of West Virginia; Lynn Fitch of Mississippi; Andrew Bailey of Missouri; Austin Knudsen of Montana.

¹⁸ Catherine Lewis et al., *Race and Ethnic Categories: A Brief Review of Global Terms and Nomenclature*, NCBI (June 1, 2023), <https://www.ncbi.nlm.nih.gov/> [<https://perma.cc/27LW-ZEPD>].

a comparison of the racial/ethnic demographics of General Counsels in 2017 to those in 2023.

As noted in our original Article on this subject, we acknowledge the complex issues surrounding this topic. More specifically, we recognize that “traditional racial or ethnic categories might not be able to fully capture the complexity of an individual’s identity”¹⁹ and that the “definition of race and ethnicity is an ever-changing concept.”²⁰ Even so, because we believe this data and analysis are significant, we undertook to collect it in the most responsible manner possible. To obtain this data, we researched the General Counsels’ backgrounds,²¹ focusing, where possible, on self-reported information.²² At times, we made assumptions based on the names of individuals—an admittedly imperfect practice but one used across research through various established methods²³ and with greater accuracy amongst names of generally distinct origins.²⁴ Ultimately, we believe our data collection and analysis to be fair and valuable, despite its challenges.

For our purposes here, we largely adhered to the race and ethnicity standards used by the U.S. Census Bureau.²⁵ As in our prior Article, we nevertheless have incorporated an additional category for Hispanic/Latino, a description that research has found preferential by many Americans.²⁶

Additionally, we modified our classification from our initial paper to now denote those of Asian heritage as “Asian/Asian

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (noting that “[a]lthough race and ethnicity are complex and multifaced concepts, data is more reliable when self-reported by an individual.”)

²² *E.g.*, discussion of one’s background in the context of an interview would be considered as “self-reported” information as it is how the individual defines or considers oneself.

²³ See Rosenman, E.T.R., Olivella, S. & Imai, K., *Race and Ethnicity Data for First, Middle, and Surnames*, 10 SCI. DATA 299 (2023), <https://www.nature.com/> [<https://perma.cc/RYG4-JRU9>].

²⁴ See Evan Rosenman et al., *Race and Ethnicity Data for First, Middle, and Last Names*, HARV. DATAVERSE (2022), <https://dataverse.harvard.edu/> [<https://perma.cc/3JXU-92U5>].

²⁵ *About the Topic of Race*, U.S. CENSUS BUREAU, <https://www.census.gov/> [<https://perma.cc/NZ2H-45XT>].

²⁶ See *About the Hispanic Population and its Origin*, U.S. CENSUS BUREAU <https://www.census.gov/> [<https://perma.cc/965F-37E7>]; See also Ana Gonzalez-Barrera & Mark Hugo Lopez, *Is Being Hispanic a Matter of Race, Ethnicity or Both?*, PEW RSCH. CTR. (June 15, 2015), <http://www.pewresearch.org/> [<https://perma.cc/2K2W-LR2Z>].

American.” In using this more precise terminology we hope to first acknowledge and recognize the high portion of foreign-born individuals of Asian heritage that reside within the U.S.,²⁷ while recognizing the “Asian American” terminology that many believe to be more reflective of their individual identity categorization.²⁸

Table 1(a): Race/Ethnicity – NFL

	2017	2023
Asian/Asian American ²⁹	1	0
Black/African American	4	7
Hispanic/Latino	0	2
Native Hawaiian/Pacific Islander	0	0
White	25	23
Total	30 ³⁰	32

Table 1(b): Race/Ethnicity – MLB

	2017	2023
Asian/Asian American	1	2
Black/African American	2	1
Hispanic/Latino	1	1
Native Hawaiian/Pacific Islander	0	0
White	23	25
Total	27 ³¹	29 ³²

²⁷ Lindsay M. Monte & Hyon B. Shin, *Broad Diversity of Asian, Native Hawaiian, Pacific Islander Population*, U.S. CENSUS BUREAU (May 25, 2022), <https://www.census.gov/> [<https://perma.cc/66DC-43TL>].

²⁸ Neil G. Ruiz et al., *What It Means to Be Asian in America*, PEW RSCH. CTR. (Aug. 2, 2022), <https://www.pewresearch.org/> [<https://perma.cc/GK22-K95C>].

²⁹ “Asian” includes the Indian subcontinent. *See* U.S. CENSUS BUREAU, *supra* note 25.

³⁰ At the time the 2017 data was collected, the Kansas City Chiefs and San Diego Chargers did not have an in-house General Counsel.

³¹ At the time the 2017 data was collected, the Cincinnati Reds, Cleveland Indians, and the Kansas City Royals did not have an in-house General Counsel.

³² At the time this data was compiled, the Baltimore Orioles did not have a General Counsel.

Table 1(c): Race/Ethnicity – NBA

	2017	2023
Asian/Asian American	1	1
Black/African American	4	5
Hispanic/Latino	1	1
Native Hawaiian/Pacific Islander	0	0
White	23	23
Total	29 ³³	30

Table 1(d): Race/Ethnicity – NHL

	2017	2023
Asian/Asian American	1	1
Black/African American	0	5
Hispanic/Latino	0	0
Native Hawaiian/Pacific Islander	0	0
White	26	23
Total	27 ³⁴	29 ³⁵

Table 1(e): Race/Ethnicity – Big Four Aggregate

	Total 2017	Total 2023
Asian/Asian American	4 (3.5%)	4 (3.3%)
Black/African American	10 (8.8%)	18 (15.0%)
Hispanic/Latino	2 (1.8%)	4 (3.3%)
Native Hawaiian/Pacific Islander	0 (0.0%)	0 (0.0%)
White	97 (85.8%)	93 (77.5%)
Total	113	120

Although the General Counsels of professional sports clubs are largely white (77.5%), there has been a notable increase in non-white General Counsels from 2017 to 2023: ten total, to be exact.

³³ At the time the 2017 data was collected, the OKC Thunder did not have an in-house General Counsel.

³⁴ At the time the 2017 data was collected, Calgary Flames, Chicago Blackhawks, and the St. Louis Blues did not have an in-house General Counsel.

³⁵ At the time this data was compiled, the St. Louis Blues did not have a General Counsel.

Across the Big Four there was an increase in non-white General Counsels in every league except MLB—which saw no change. The NFL gained three Black/African American and two Hispanic/Latino General Counsels—an overall increase from five non-white General Counsels to nine. The NBA increased its number of Black/African American General Counsels by one—an overall increase from six non-white General Counsels to seven. Lastly, the NHL added five Black/African American General Counsels—an overall increase from one non-white General Counsel to nine. The change within the NHL is perhaps most notable as the league is predominantly white: in 2022, 83.6% of the workforce was white³⁶ with “more than 90% of players and nearly all coaches and officials [being] white.”³⁷ Moreover, in 2020, with the exception of the LA Kings, 55–75% of fans of the respective NHL teams were white.³⁸ In total, six of the 29 (20.7%) current General Counsels are non-white. In the aggregate, the number of non-white General Counsels increased from 16 out of 113 in 2017 (14.2%), to 26 out of 120 in 2023 (21.7%).

The Institute for Diversity and Ethics in Sport (TIDES)—a leader in research surrounding “racial and gender hiring practices in amateur, collegiate and professional sports and the media”³⁹—releases an annual report card as an “assessment of hiring practices of women and people of color in most of the leading professional and amateur sports and sporting organizations in the United States.”⁴⁰ Although not specific to the General Counsel’s role, these reports give insight into the overall hiring trends of the leagues. Notably, the NBA received an A+ in its 2023 Racial and Gender Report Card concerning its hiring of racial minorities.⁴¹ By

³⁶ Stephen Whyno, *NHL, Its Workforce 84% White, Sets Baseline to Up Diversity*, ASSOCIATED PRESS (Oct. 18, 2022, 4:49 PM), <https://apnews.com/> [<https://perma.cc/Z29P-9RX7>].

³⁷ *Id.*

³⁸ Christina Gough, *NHL Fans Ethnicity in the U.S. as of 2020, By Team*, STATISTA (Sept. 20, 2021), <https://www.statista.com/> [<https://perma.cc/WM4Y-RBVU>].

³⁹ *The Institute for Diversity and Ethics in Sports*, TIDES: THE INST. FOR DIVERSITY AND ETHICS IN SPORT, <https://www.tidesport.org/> [<https://perma.cc/JC8C-2D5S>].

⁴⁰ *The Racial Gender Report Card*, TIDES: THE INST. FOR DIVERSITY AND ETHICS IN SPORT, <https://www.tidesport.org/> [<https://perma.cc/S2L5-VSMR>].

⁴¹ Richard E. Lapchick et al., *The 2023 Racial and Gender Report Card | National Basketball Association*, TIDES: THE INST. FOR DIVERSITY AND ETHICS IN SPORT (2023), <https://www.tidesport.org/> [<https://perma.cc/6CFW-3RU4>].

comparison, the NFL received a B+ in its 2022 and 2023 Racial and Gender Report Card,⁴² and the MLB received a B in its 2023 Racial and Gender Report Card.⁴³ Additionally, in 2022, the NHL, which has historically not commissioned a TIDES Racial and Gender Report Card,⁴⁴ “shared its first-ever comprehensive diversity and inclusion report” indicating that 83.6% of the league’s employees identify as white. Interestingly, the NFL has a slightly higher percentage of non-white General Counsels than the NBA, despite its lower grade. MLB, in line with its B, had the lowest percentage of non-white General Counsels across the leagues.

This increased diversity in the role of General Counsel functions as a catalyst for further diversification efforts across the Big Four. David Kelly, Executive VP and Chief Legal Officer of the Golden State Warriors and a Black man, has argued that mentorships are critical in the advancement of non-white individuals into such roles.⁴⁵ Within his organization, Kelly operates a diversity legal internship program that is intended to diversify the legal department of the organization.⁴⁶ Similarly, Joe Pierce, the Black Senior VP and General Counsel of the Atlanta Falcons, has recognized that he always wants to be “conscious of the contributions [he] make[s] to the community and the impact that [he] can have.”⁴⁷ This goal, he notes, can be achieved through mentoring and giving guidance to individuals with an interest in the law or in the sports industry in general. In Pierce’s view, providing

⁴² Richard E. Lapchick et al., *The 2023 Racial and Gender Report Card | National Football League*, TIDES: THE INST. FOR DIVERSITY AND ETHICS IN SPORT (2023), <https://www.tidesport.org/> [<https://perma.cc/8DPL-DBF5>]. At the time, TIDES had not yet published a 2023 Report for the NFL.

⁴³ Richard E. Lapchick et al., *The 2023 Racial and Gender Report Card | Major League Baseball*, TIDES: THE INST. FOR DIVERSITY AND ETHICS IN SPORT (2023), <https://www.tidesport.org/> [<https://perma.cc/S3CN-NRHA>].

⁴⁴ See Alex Silverman, *NHL Issues First-Ever Diversity & Inclusion Report*, SPORTS BUS. J. (Oct. 18, 2022), <https://www.sportsbusinessjournal.com/> [<https://perma.cc/NL37-K5UW>].

⁴⁵ The State Bar of California, *Be a Lawyer. Make a Difference. Interview with Golden State Warriors General Counsel David Kelly*, YOUTUBE (Dec. 4, 2020), <https://www.youtube.com/> [<https://perma.cc/VSK5-F8UF>].

⁴⁶ *Id.*

⁴⁷ Quinton Wash, *Black History Month Employee Feature: Meet Joe Pierce*, NBA (Feb. 27, 2018), <https://www.nba.com/> [<https://perma.cc/Z9A8-MJSU>].

this education can assist these individuals in fulfilling their potential and inspire others.⁴⁸

Lastly, as was also the case in 2017, the Big Four’s demographic statistics are slightly better than those of attorneys generally. In 2020, the American Bar Association—utilizing data from the United States Census—found that 86% of attorneys were white, 5% were African American, and 2% were Asian.⁴⁹

2. GENDER

As with racial/ethnic diversity, gender⁵⁰ diversity has been an issue of focus for industry leaders in professional sports. Lara Pitaro Wisch—the first woman General Counsel in the history of MLB’s league office⁵¹—notes: “people are really conscious these days that diversity in the workforce needs to be a priority.” On this point, she believes that the industry is “making strides.”⁵²

The progress across the Big Four is apparent in the data. Tables 2(a) to 2(e) below provide a comparison of the gender demographics of General Counsels in 2017 to those in 2023.

Table 2(a): Gender – NFL

	2017	2023
Women	6	9
Men	24	23
Total	30	32

Table 2(b): Gender – MLB

	2017	2023
Women	5	10
Men	22	19
Total	27	29

⁴⁸ *Id.*

⁴⁹ *ABA Profile of the Legal Profession*, AM. BAR ASS’N (2020), <https://www.americanbar.org/> [<https://perma.cc/JP9H-4TW6>].

⁵⁰ The term “gender” is utilized instead of “sex” to better capture identity and expression. *See Sex & Gender*, NAT’L INST. OF HEALTH, <https://orwh.od.nih.gov/> [<https://perma.cc/SR3D-2A6C>].

⁵¹ *Lara Pitaro Wisch | MLB Executives*, MLB, <https://www.mlb.com/> [<https://perma.cc/TD63-X5RD>].

⁵² Eddie Moran, *Women in Sports Roundtable: Female Executives Share Their Experiences Working at Leagues*, FRONT OFF. SPORTS (Sept. 17, 2019), <https://frontofficesports.com/> [<https://perma.cc/ETW8-YZ8L>].

Table 2(c): Gender – NBA

	2017	2023
Women	5	9
Men	24	21
Total	29	30

Table 2(d): Gender – NHL

	2017	2023
Women	5	11
Men	22	18
Total	27	29

Table 2(e): Gender – Big Four Aggregate

	Total 2017	Total 2023
Women	21 (18.5%)	39 (32.5%)
Men	92 (81.4%)	81 (67.5%)
Total	113	120⁵³

Between 2017 and 2023, there has been a significant increase of women General Counsels across the Big Four. In the aggregate, the number of women General Counsels nearly doubled, from 21 in 2017 to 39 in 2023, an 85.7% increase. Notably, this results from increases in women General Counsels in every league. The NHL had the largest increase, with six new women General Counsels.

Vicky Neumeyer, the Senior VP and General Counsel of the New Orleans Saints and Pelicans, has noted that the “number of women has grown by leaps and bounds, both with front office staff and also club counsel. Looking at the membership of the Sports Lawyers Association the number of women is amazing.”⁵⁴ As gender diversity increases within the higher levels of the Big Four clubs, it additionally serves to promote future growth and diversity, as often such individuals are active in boards, committees, and initiatives to provide additional opportunities for women in the space. For example, Suzanne Spellacy, General Counsel of the

⁵³ The increase in total General Counsels is due to the overall increase in number of head legal officers across the league. In previous years, there have been fewer individuals in such a role.

⁵⁴ After the Buzzer, *Episode 4: Nona Lee and Vicky Neumeyer*, THOMPSON COBURN LLP, at 19:33 (Nov. 9, 2018), [https://www.thompsoncoburn.com/\[https://perma.cc/S8YR-TKH6\]](https://www.thompsoncoburn.com/[https://perma.cc/S8YR-TKH6]).

Minnesota Timberwolves, serves on the “Women in Sports Leadership” committee within her organization that focuses on diversity, equity, and inclusion.⁵⁵ As Raquel Libman, Executive VP and Chief Legal Officer of the Miami Heat, has noted: if there are not women in decision-making positions throughout your organization’s hierarchy, then your organization “need[s] to take steps to make it so.”⁵⁶

Looking at the TIDES reports for the leagues gives additional insight into the overall gender hiring trends, albeit not specific to the role of General Counsel. Notably, in terms of gender hiring, the NBA received a B+ in its 2023 Racial and Gender Report Card,⁵⁷ the NFL received a B in its 2022⁵⁸ Racial and Gender Report Card,⁵⁹ and the MLB received a C in its 2023 Racial and Gender Report Card.⁶⁰ The NHL, in its 2022 internally generated survey, which was “overseen by Deloitte,” indicated that 36.81% of its workforce was women.⁶¹

Put into additional context, in 2020, according to the American Bar Association, 63% of lawyers were male and 37% were women. Given the small sample-size of 120 General Counsels, the number of women General Counsels across the Big Four is similar—but still less than—the men-to-women demographics of the legal profession generally.

3. *PRIOR INDUSTRY EXPERIENCE*

The General Counsel role requires considerable experience. Consequently, one would expect that trends emerge regarding General Counsels’ industry experience prior to assuming the role. Additionally, despite the primary trends, there are also industries of prior experience that were meaningful for some General Counsels in their ability to attain their current role—a defining difference that set them apart from other candidates. The following tables provide an overview of the industries in which Big Four General Counsels previously worked.

⁵⁵ Todd Melby, *Taking Center Court | This Summer, Suzanne Spellacy ‘92 Became General Counsel of the Minnesota Timberwolves and Lynx*, MINN. LAW (2021), <https://minnesotalawmag.law.umn.edu/> [<https://perma.cc/K6XX-WB6G>].

⁵⁶ Raquel Libman, *Miami Heat and American Airlines Arena*, SPORTS BUS. J. (Oct. 19, 2020), <https://www.sportsbusinessjournal.com/> [<https://perma.cc/766A-4KFS>].

⁵⁷ See Lapchick et al., *supra* note 41.

⁵⁸ At the time, TIDES had not yet published a 2023 Report for the NFL.

⁵⁹ See Lapchick et al., *supra* note 42.

⁶⁰ See Lapchick et al., *supra* note 43.

⁶¹ See Silverman, *supra* note 44.

Table 3(a): Prior Industry Experience – NFL

	NFL 2017	NFL 2023
Academia	0	0
Government	4	8
Private Law Practice	25	27
Non-Profit (Legal)	0	0
Sports (Legal)	16	18
Sports (Non-Legal)	3	4
Other (Legal)	7	8
Other (Non-Legal)	3	3
Total	58	68

Table 3(b): Prior Industry Experience – MLB

	MLB 2017	MLB 2023
Academia	2	2
Government	10	5
Private Law Practice	27	28
Non-Profit (Legal)	1	1
Sports (Legal)	11	11
Sports (Non-Legal)	4	2
Other (Legal)	5	7
Other (Non-Legal)	4	1
Total	64	57

Table 3(c): Prior Industry Experience – NBA

	NBA 2017	NBA 2023
Academia	1	0
Government	10	9
Private Law Practice	24	23
Non-Profit (Legal)	1	0
Sports (Legal)	11	17
Sports (Non-Legal)	5	7
Other (Legal)	11	12
Other (Non-Legal)	3	4
Total	66	72

Table 3(d): Prior Industry Experience – NHL

	NHL 2017	NHL 2023
Academia	1	2
Government	5	4
Private Law Practice	24	23
Non-Profit (Legal)	1	2
Sports (Legal)	9	16
Sports (Non-Legal)	5	3
Other (Legal)	11	12
Other (Non-Legal)	5	3
Total	61	65

Table 3(e): Prior Industries Worked In – Big Four Aggregate

	Total 2017	Total 2023
Academia	4 (3.5%)	4 (3.3%)
Government	29 (25.7%)	26 (21.5%)
Private Law Practice	100 (88.5%)	101 (83.5%)
Non-Profit (Legal)	3 (2.7%)	3 (2.5%)
Sports (Legal)	47 (41.6%)	62 (51.2%)
Sports (Non-Legal)	17 (15.0%)	16 (13.2%)
Other (Legal)	34 (30.1%)	39 (32.2%)
Other (Non-Legal)	15 (13.3%)	11 (9.1%)
Total	249	262

As has historically been the case—and it remains so today—working in private law practice, i.e., for a law firm, is something that the vast majority of General Counsels have done (88.5% in 2017 and 83.5% today).

There has, though, been a slight uptick in the number of attorneys coming from other sports, legal and non-legal experiences. Clay Allen, the General Counsel of the Houston Rockets, worked in Marketing and Promotions roles within the Rockets organization for nearly six years before attending law school and eventually later returning to the legal department of the organization.⁶² By comparison, Katie Pothier, the Executive Vice President (EVP) and General Counsel (GC) of the New York Mets

⁶² Clay Allen, LINKEDIN, <https://www.linkedin.com/> [https://perma.cc/3TS3-JCMM].

worked as the EVP and GC of the San Diego Padres and the Texas Rangers prior to assuming her current role in New York.

When looking at the nature of the sports industry, this trend toward greater sports experience makes sense. Sports is a relatively small industry, in terms of the number of employees, where word-of-mouth carries significant weight; by having prior positive experience in the industry and connections who can vouch for them during a career move, prospective employees stand a better chance of being hired. Further, this prior experience shows an organization that you know the industry on a level unlikely to be matched by newcomers to sports.

In addition to this prior experience, a noteworthy percentage of General Counsels have had prior experience in government roles. Mark Fabiani, Special Counsel to the Los Angeles Chargers, previously spent time in various political roles—notably, as the Los Angeles Mayor’s Chief of Staff and as the Deputy Mayor of Los Angeles.⁶³ This prior experience was of significant value to the club, as he was hired during the club’s relocation from San Diego to Los Angeles. Heidi Thomas Bundren, the Chief Legal Officer of the Nashville Predators, worked as a Staff Attorney for the Court of Appeals for the First District of Texas before transitioning into private practice and ultimately in-house within professional sports.⁶⁴

Lastly, there are, of course, more atypical routes to the role of General Counsel. Scott Wilkinson, Executive VP and Chief Legal Officer of the Atlanta Hawks, served as Assistant GM from 2006–2015.⁶⁵ Shannon Torgerson, Vice President and General Counsel of the Boston Bruins, previously served as the Associate General Counsel for the San Diego Zoo Wildlife Alliance for eight years.⁶⁶ And John Corvino, the Vice President and General Counsel at Chicago White Sox, spent 15 out of the 17 years of his pre-White Sox career working in the corporate sector for CRL Industries, Inc. and Holden Industries, Inc.⁶⁷

⁶³ *Mark D. Fabiani*, WIKIPEDIA, [https://en.wikipedia.org/\[https://perma.cc/QV67-A9WK\]](https://en.wikipedia.org/[https://perma.cc/QV67-A9WK]).

⁶⁴ *Heidi Thomas Bundren*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/84K3-Q2RK\]](https://www.linkedin.com/[https://perma.cc/84K3-Q2RK]).

⁶⁵ *Scott Wilkinson | EVP & Chief Legal Officer at Atlanta Hawks*, THE ORG, [https://theorg.com/\[https://perma.cc/M3K8-2Y99\]](https://theorg.com/[https://perma.cc/M3K8-2Y99]).

⁶⁶ *Shannon Torgerson*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/T6A2-AZ7Z\]](https://www.linkedin.com/[https://perma.cc/T6A2-AZ7Z]).

⁶⁷ *John Corvino*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/D9WF-W2YP\]](https://www.linkedin.com/[https://perma.cc/D9WF-W2YP]).

As sports entities are deeply entwined with their communities, government relations are crucial for a successful operation—in fact, many sports and entertainment entities have individuals dedicated to this work, or they consult other organizations.⁶⁸ A General Counsel with this prior experience is all the better.

4. *PRIOR EXPERIENCE AT A SPORTS LAW FIRM*

As mentioned above, General Counsels of sports teams have typically worked in private practice before. It would be expected, then, that at least some of them would have worked at law firms specializing in sports. Indeed, that is the case.

We examined the number of General Counsels with prior experience working at one or more of eight law firms. Our prior article, *General Counsels in Sports: An Analysis of the Responsibilities, Demographics, and Qualifications*, gave a detailed summary of our reasoning for selecting these firms. The following is a brief overview: (1) Akin Gump is listed as the NFL's counsel in a significant number of reported case decisions dating back nearly 40 years,⁶⁹ and historically many of the NFL's in-house attorneys practiced at Akin Gump Strauss Hauer & Feld LLP;⁷⁰ (2) Covington & Burling has represented the NFL in numerous reported cases, dating back to at least 1961,⁷¹ and Paul Tagliabue (now retired), prior to becoming NFL Commissioner from 1989 to 2006, worked at Covington & Burling;⁷² (3) Foley & Lardner has a historic track record of providing counsel in the purchase and sale of sports clubs and stadium issues,⁷³ and served as advisor to MLB Commissioner

⁶⁸ *Crispus Gordon III*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/4V6N-QAF4\]](https://www.linkedin.com/[https://perma.cc/4V6N-QAF4]) (noting that Monumental Sports and Entertainment—the owning entity of the Washington Capitals, Wizards, etc.—has a dedicated Director Of Government Relations and Community Affairs—Crispus Gordon III).

⁶⁹ *See, e.g.*, Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527 (2d Cir. 2016); *Matthews v. Nat'l Football League Mgmt. Council*, 688 F.3d 1107 (9th Cir. 2012); *Powell v. Nat'l Football League*, 690 F. Supp. 812 (D. Minn. 1988).

⁷⁰ *See* Wong et al., *supra* note 1, at 268.

⁷¹ *See, e.g.*, *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010); *Brown v. Pro Football, Inc.*, 812 F. Supp. 237 (D.C. Cir. 1992); *Am. Football League v. Nat'l Football League*, 27 F.R.D. 264 (D. Md. 1961).

⁷² *Paul J. Tagliabue*, COVINGTON & BURLING LLP, [https://www.cov.com/\[https://perma.cc/BD97-AS99\]](https://www.cov.com/[https://perma.cc/BD97-AS99]).

⁷³ *See Jonathan L. Israel*, FOLEY & LARDNER LLP, [https://www.foley.com/\[https://perma.cc/DZ9S-UMN6\]](https://www.foley.com/[https://perma.cc/DZ9S-UMN6]); *Kevin R. Schulz*, FOLEY & LARDNER LLP, [https://www.foley.com/\[https://perma.cc/8JZM-V7X7\]](https://www.foley.com/[https://perma.cc/8JZM-V7X7]).

Emeritus Bud Selig during his time as owner of the Milwaukee Brewers;⁷⁴ (4) Kirkland & Ellis has represented sports clubs in an assortment of corporate and litigation matters;⁷⁵ (5) Latham & Watkins is a preeminent firm in counseling sports leagues and clubs on media deals;⁷⁶ (6) Paul Weiss notably represented the NFL in the class action lawsuit of former players concerning concussions⁷⁷ and has handled a variety of investigative matters regarding allegations and conduct of sports clubs and executives;⁷⁸ (7) Proskauer Rose has been dominant in terms of outside counsel work for over 50 years assisting with transactions, negotiations and litigations;⁷⁹ and (8) Skadden Arps has been a leader in antitrust legal work for professional sports clubs.⁸⁰

Table 4(a): Prior Experience at Sports Law Firm – NFL

	2017	2023
Akin Gump Strauss Hauer & Feld LLP	1	0
Covington & Burling LLP	1	3
Foley & Lardner LLP	0	0
Kirkland & Ellis LLP	0	0
Latham & Watkins LLP	1	0

⁷⁴ Rich Kirchen, *Despite Selig's Retirement, Foley & Lardner Hopes to Keep MLB Work*, MILWAUKEE BUS. J. (Oct. 2, 2013, 4:41 PM), <https://www.bizjournals.com/ml/https://perma.cc/S3FC-YLYM>.

⁷⁵ *Law 360 2015 Practice Group of the Year: Sports*, KIRKLAND & ELLIS LLP, <https://www.kirkland.com/https://perma.cc/JAC7-V62W>.

⁷⁶ *See Entertainment, Sports & Media*, LATHAM & WATKINS LLP, <https://www.lw.com/https://perma.cc/EC7L-NT4D>.

⁷⁷ *See In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2015), *aff'd*, 821 F.3d 410 (3d Cir. 2016).

⁷⁸ *See Ken Belson, Inquiry Questions Actions of N.B.A. Union Chief, But Finds No Criminality*, N.Y. TIMES (Jan. 17, 2013), <https://www.nytimes.com/https://perma.cc/29RU-MURF>; Jacob Gershman, *NFL Taps Attorney Ted Wells to Lead 'Deflategate' Probe*, WALL ST. J. (Jan. 23, 2015, 3:33 PM), <https://www.wsj.com/https://perma.cc/Y26V-N22W>.

⁷⁹ *The Gold Standard for Sports Law*, PROSKAUER ROSE LLP, <https://www.proskauer.com/https://perma.cc/C39X-GUF3>.

⁸⁰ *Sports*, SKADDEN, <https://www.skadden.com/https://perma.cc/Z5KQ-Z5X7>.

Paul, Weiss, Rifkind, Wharton & Garrison LLP	0	0
Proskauer Rose LLP	2	2
Skadden, Arps, Slate, Meagher & Flom LLP	0	1
Total	5	6

Table 4(b): Prior Experience at Sports Law Firm – MLB

	2017	2023
Akin Gump Strauss Hauer & Feld LLP	0	0
Covington & Burling LLP	0	0
Foley & Lardner LLP	1	1
Kirkland & Ellis LLP	1	0
Latham & Watkins LLP	2	1
Paul, Weiss, Rifkind, Wharton & Garrison LLP	0	1
Proskauer Rose LLP	0	0
Skadden, Arps, Slate, Meagher & Flom LLP	1	0
Total	5	3

Table 4(c): Prior Experience at Sports Law Firm – NBA

	2017	2023
Akin Gump Strauss Hauer & Feld LLP	0	0
Covington & Burling LLP	0	1
Foley & Lardner LLP	0	0
Kirkland & Ellis LLP	1	1
Latham & Watkins LLP	1	1
Paul, Weiss, Rifkind, Wharton & Garrison LLP	0	0
Proskauer Rose LLP	3	3
Skadden, Arps, Slate, Meagher & Flom LLP	0	0

Total	5	6
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Table 4(d): Prior Experience at Sports Law Firm – NHL

	2017	2023
Akin Gump Strauss Hauer & Feld LLP	0	0
Covington & Burling LLP	0	1
Foley & Lardner LLP	0	0
Kirkland & Ellis LLP	0	0
Latham & Watkins LLP	0	2
Paul, Weiss, Rifkind, Wharton & Garrison LLP	1	0
Proskauer Rose LLP	1	1
Skadden, Arps, Slate, Meagher & Flom LLP	0	0
Total	2	4

**Table 4(e): Prior Experience at Sports Law Firm – Big Four
Aggregate**

	2017	2023
Akin Gump Strauss Hauer & Feld LLP	1	0
Covington & Burling LLP	1	4
Foley & Lardner LLP	1	1
Kirkland & Ellis LLP	2	1
Latham & Watkins LLP	4	4
Paul, Weiss, Rifkind, Wharton & Garrison LLP	1	1
Proskauer Rose LLP	6	6

Skadden, Arps, Slate, Meagher & Flom LLP	1	1
Total	17	19

As noted, with a significant majority of General Counsels having prior private practice experience, it is unsurprising that the top law firms practicing in the sports industry have seen attorneys leave their ranks to work in-house for a professional team. These individuals are undoubtedly positive candidates, as they gain specific experience working on the legal issues sports organizations face while simultaneously building relationships with their clients. Additionally, these are some of the leading firms in the world and are highly selective in their recruitment efforts, predominantly drawing top students from the top law schools.

Although the dataset is small, there has been an increase in General Counsels coming from Covington & Burling—from one in 2017 to four in 2023. Two of them are now in the NFL: Mali Friedman, CLO and SVP, Business Affairs of the Washington Commanders,⁸¹ and Brandon Etheridge, SVP and GC of the Baltimore Ravens. The other is now in the NBA and NHL: Jamaal Lesane, EVP, GC of MSG Sports Corp., which operates the New York Knicks and Rangers.

This is perhaps unsurprising, as Covington & Burling’s sports group is headed by Gregg Levy, the principal outside counsel for the NFL for three decades.⁸² With this strong link between the firm and a professional sports league, Covington & Burling’s attorneys have, among other work, defended the 2011 NFL lockout,⁸³ secured dismissal of a collusion claim brought by the NFL Players Association,⁸⁴ and represented the league in *Brady v. National Football League*—the “Deflategate” case,⁸⁵ among other major matters.

After working on such matters, the NFL—and the other sports leagues and organizations—know the type of lawyers they are working with and, importantly, their ability to effectively secure the goals of the league and its clubs.

⁸¹ Mali Friedman, WASHINGTON COMMANDERS FRONT OFF., <https://www.commanders.com/> [<https://perma.cc/4EYA-VLLR>].

⁸² Gregg H. Levy, COVINGTON <https://www.cov.com/> [<https://perma.cc/MX3X-3TEL>].

⁸³ See *Brady v. National Football League*, 644 F.3d 661 (2011).

⁸⁴ See *Reggie White v. National Football League*, 129 F.Supp.3d 683 (2015).

⁸⁵ See *Brady*, 644 F.3d 661.

5. *EXPERIENCE AS ASSOCIATE COUNSEL*

Lastly, there has been a meaningful increase in the number of General Counsels that have prior experience as Associate Counsel for a sports team. Although job-hopping has become a notable trend in recent years, with many reported benefits for employees,⁸⁶ there are certainly benefits for employers to look within to fill a role. The following are some such notable benefits: (1) “in-house candidates are low risk” as the company has access to their prior work and history; (2) “trust is already established” as they are already integrated into the workplace; (3) it is cheaper than external recruiting; (4) company morale is improved as employees are aware of their ability to advance their careers within; (5) it is a cyclical investment in the individual; and (6) there is a shorter learning curve for the individual in their new role.⁸⁷ The following tables provide an overview of the trends of General Counsels with prior experience as an Associate Counsel.

Table 5(a): Experience as Associate Counsel – NFL

	2017	2023
For an NFL Club	5	8
For an MLB Club	1	0
For an NBA Club	0	1
For an NHL Club	0	0
Total	6	9

Table 5(b): Experience as Associate Counsel – MLB

	2017	2023
For an NFL Club	0	0
For an MLB Club	5	9
For an NBA Club	1	0
For an NHL Club	0	0
Total	6	9

⁸⁶ Ethan Steinberg, *Want A Pay Raise? Switching Jobs Has Much More Upside Amid Soaring Inflation, Report Finds*, FORBES (Jul. 28, 2022), <https://www.forbes.com/> [<https://perma.cc/8CWZ-6646>].

⁸⁷ Laura Spawn, *Why You Should Promote from Within Your Company*, BUSINESS.COM (Mar. 22, 2023), <https://www.business.com/> [<https://perma.cc/XLQ6-8XZW>].

Table 5(c): Experience as Associate Counsel – NBA

	2017	2023
For an NFL Club	1	1
For an MLB Club	0	0
For an NBA Club	3	6
For an NHL Club	0	0
Total	4	7

Table 5(d): Experience as Associate Counsel – NHL

	2017	2023
For an NFL Club	0	1
For an MLB Club	0	0
For an NBA Club	0	1
For an NHL Club	3	5
Total	3	7

Table 5(e): Experience as Associate Counsel – Big Four Aggregate

	2017	2023
For an NFL Club	6	10
For an MLB Club	6	9
For an NBA Club	4	8
For an NHL Club	3	5
Total	19	32

As alluded to above, many were the Associate Counsel of their current team before being promoted into their position as head legal counsel of their organization. Shannon Gilligan, the VP and Sr. Associate Counsel of the Charlotte Hornets, was the Associate Counsel of the Hornets before being promoted to her current role.⁸⁸ Marcus Banks, Basketball Strategy and Team Counsel of the LA Clippers, previously worked as the Basketball Legal Coordinator and Associate Team Counsel of the Clippers.⁸⁹

However, others were able to leverage their role as Associate Counsel at one club to make the jump to a higher position within another organization. Marcus LeBeouf, the VP & GC of the

⁸⁸ *Shannon (Finucane) Gilligan*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/D83C-GLY9\]](https://www.linkedin.com/[https://perma.cc/D83C-GLY9]).

⁸⁹ *Marcus Banks*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/4RSB-KTPQ\]](https://www.linkedin.com/[https://perma.cc/4RSB-KTPQ]).

Chicago Blackhawks, previously worked as the Assistant General Counsel of the Charlotte Hornets.⁹⁰ Similarly, Cassie (Sadowitz) McBride, the SVP & GC of the San Jose Sharks, worked as the Associate Counsel of the Tampa Bay Buccaneers and the General Counsel of the Jacksonville Jaguars before making the move to the NHL.

Overall, there has been an increase in the number of General Counsels with experience as Associate Counsel from 19 in 2017 to 32 in 2023—a 68.4% increase. Notably, this increase is not attributable to any league in particular, as it is a trend across the Big Four: the NFL went from six to nine, as did MLB, the NBA went from four to seven, and the NHL went from three to seven. It is probable that at least some of this increase can be attributed to the overall growth of sports teams' legal departments in the past two decades or so. As clubs have added more lawyers, they have created a population of Associate Counsels ready to take the next step.

B. AREAS WITHOUT MEANINGFUL CHANGE

Although there are notable changes in the previously discussed categories, there are also many areas where we did not find a meaningful change in the demographics or professional experiences of General Counsels. This could partly be attributed to the relatively short time between 2017 and 2023 and the fact that many General Counsels of 2017 remain their respective organization's top legal counsel today.

The areas with no meaningful change—discussed below—are: Age; Age when Hired as General Counsel; Current Law School Ranking; Years of Legal Experience Prior to Becoming General Counsel; Prior Law Firm Experience by Size; and League Office Experience.

1. *AGE*

Most General Counsels are aged 30 to 59 (73.5% in 2017 and 75.7% in 2023). The remainder are largely over 60 (19.5% in 2017 and 12.4% in 2023), with only two General Counsels under 30 in 2017 (1.8%) and one under 30 in 2023 (0.9%).

⁹⁰ *Marcus LeBeouf*, LINKEDIN, <https://www.linkedin.com/perma.cc/JT3D-HVLU>].

Table B(1): Age – Big Four Aggregate

	2017	2023
Under 30	2 (1.8%)	1 (0.9%) ⁹¹
30–39	22 (19.5%)	14 (12.5%)
40–49	39 (34.5%)	43 (38.4%)
50–59	28 (24.8%)	39 (34.8%)
Over 60	22 (19.5%)	15 (12.4%)
Total	113	112

2. AGE WHEN HIRED AS GENERAL COUNSEL

Similarly, the age at which General Counsels are first hired has remained consistent. The vast majority of General Counsels are hired between 30 and 49 (75.9% in 2017 and 85.2% in 2023). Few General Counsels were hired under 30, with only 8% in 2017 and 2.8% in 2023. The remaining 16.1% in 2017 and 12.0% in 2023 were hired aged over 50.

Table B(2): Age When Hired as General Counsel – Big Four Aggregate

	2017	2023
Under 30	9 (8.0%)	3 (2.8%)
30–39	55 (49.1%)	46 (42.6%)
40–49	30 (26.8%)	46 (42.6%)
50–59	14 (12.5%)	12 (11.1%)
Over 60	4 (3.6%)	1 (0.9%) ⁹²
Total	112	108

3. CURRENT LAW SCHOOL RANKING

Consistent with the historic trend across sports, the competitive industry derives a significant portion of its General Counsel personnel from top-tier law schools. Provided, however, that a multitude of law schools are no longer cooperating with the predominant ranking services, such as U.S. News and World

⁹¹ Emma Compton, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/N75W-UW5F\]](https://www.linkedin.com/[https://perma.cc/N75W-UW5F]) (showing Compton’s position as Counsel at Cincinnati Bengals).

⁹² Vegas Golden Knights, *Vegas Golden Knights name Charles “Chip” Seigel III Chief Legal Officer*, NHL (Mar. 1, 2021) [https://www.nhl.com/goldenknights/\[https://perma.cc/SUS4-HXU2\]](https://www.nhl.com/goldenknights/[https://perma.cc/SUS4-HXU2]).

Report,⁹³ due to arguments that the current system “value[s] students with high test scores at the expense of those with other worthy attributes.”⁹⁴ For example, “a lot of law schools, in order to boost their rankings, focus more on giving financial aid to students with high test scores than they do on helping those from low-income backgrounds.”⁹⁵ Accordingly, if this trend continues, this data could potentially become less correlative, or otherwise less analytically impactful, in the future as the ranking space changes.

In 2017, 49.5% of General Counsels came from a Top 25 law school; this remained consistent in 2023, with 51% coming from schools of this current ranking. A significant portion of the remainder of General Counsels came from schools ranked 26–100 (35.2% in 2017 and 34.7% in 2023). The remaining few coming from law schools currently ranked over 100 (15.2% in 2017 and 14.4% in 2023)—such as Frank Pulice, the EVP & Chief Legal Officer of Pacers Sports and Entertainment, who attended Hofstra University (Deane),⁹⁶ currently ranked #140 in Best Law Schools;⁹⁷ and Jill Kelley, the General Counsel & Vice President, Legal Affairs of the New York Jets, who attended Suffolk University Law School,⁹⁸ currently ranked #133 in Best Law Schools.⁹⁹

⁹³ See Debra Cassens Weiss, *Which Law Schools are Now Boycotting US News Rankings? Some Say They're Staying in Notably*, ABA J. (Nov. 28, 2022), <https://www.abajournal.com/> [<https://perma.cc/ZQT8-HHTG>].

⁹⁴ Jack Stripling, *Yale Sparked a U.S. News Rankings Revolt. Here's What Happened Next.*, WASH. POST (Dec. 4, 2023, 6:00 AM), <https://www.washingtonpost.com/> [<https://perma.cc/M6J8-L3KY>].

⁹⁵ *Id.*

⁹⁶ Frank Pulice, LINKEDIN, <https://www.linkedin.com/> [<https://perma.cc/69WH-ZPSX>].

⁹⁷ Hofstra University (Deane), U.S. NEWS & WORLD REP. (2023), <https://www.usnews.com/best-graduate-schools/top-law-schools/hofstra-university-03108> [<https://perma.cc/W46S-QLDG>].

⁹⁸ Jill Kelley, LINKEDIN, <https://www.linkedin.com/> [<https://perma.cc/6UPK-NBVN>].

⁹⁹ Suffolk University, U.S. NEWS & WORLD REP. (2023), <https://www.usnews.com/best-graduate-schools/top-law-schools/suffolk-university-03077> [<https://perma.cc/FH9M-DV3U>].

Table B(3): Current Law School Ranking – Big Four Aggregate

	2017	2023
Top 10¹⁰⁰	29 (27.6%)	29 (27.9%)
11–25	23 (21.9%)	24 (23.1%)
26–50	16 (15.2%)	9 (8.7%)
51–100	21 (20.0%)	27 (26.0%)
Over 100	16 (15.2%)	15 (14.4%)
Total	105	104

4. *YEARS OF LEGAL EXPERIENCE PRIOR TO BECOMING GC*

As noted in our initial Article, the role of General Counsel is demanding and requires an experienced attorney. Consequently, General Counsels require several years of prior legal experience before assuming the role. As such, there has been no meaningful change in this area from 2017 to 2023.

A significant portion of General Counsels do not take the role until after they have had 11 or more years of legal experience—55.8% in 2017 and 65% in 2023. That said, the position remains highly attainable for those with ten or less years of experience—44.2% in 2017 and 35% in 2023. One thing remains constant, however: significant experience is crucial to attain the role of General Counsel.

¹⁰⁰ The U.S. News & World Report 2023–2024 Best Law Schools ranks the top ten, in order, as follows: Stanford University; Yale University; University of Chicago; University of Pennsylvania (Carey); Duke University; Harvard University; New York University; Columbia University; University of Virginia; and—tied for number 10—Northwestern University (Pritzker); University of California, Berkeley; and University of Michigan—Ann Arbor. *See 2023–2024 Best Law Schools*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> [<https://perma.cc/L5D3-FWP6>].

Table B(4): Years of Legal Experience Prior to Becoming GC – Big Four Aggregate

	2017	2023
10 or less	50 (44.2%)	41 (35.0%)
11–20	41 (36.3%)	52 (44.4%)
21–30	14 (12.4%)	23 (19.6%)
Over 30	8 (7.1%)	1 (0.9%) ¹⁰¹
Total	113	117

5. *PRIOR LAW FIRM EXPERIENCE BY SIZE*

Next, it remains consistent that General Counsels often have prior experience at some of the biggest law firms nationally and internationally. Of all General Counsels with available data, 42.7% in 2017 and 47.6% in 2023 had prior experience at a law firm with 500 or more attorneys. Outside this echelon, an additional 31.5% in 2017 and 28.2% in 2023 had prior experience at a firm with 26–499 attorneys. Beyond these firms, fewer General Counsels have had prior experience at small firms of less than 26 attorneys (14.5% in 2017 and 14.5% in 2023), and even fewer have no prior law firm employment at all (only 11.3% in 2017 and 9.7% in 2023). It remains crucial to spend time working at a law firm if one wishes to become a General Counsel in sports, and the bigger the better.

Nevertheless, individuals have proven that it is possible to become the counsel of a team without a history of law firm employment. For example, Ed Wildermuth—General Counsel of the Florida Panthers—worked in finance for approximately 20 years before deciding to attend law school.¹⁰² While “conducting his [post-graduate] job search, he got a call from Alan Cohen, the pharmaceutical entrepreneur who’d recently bought the Panthers, [as] an NHL expansion team” and who had heard of Wildermuth’s prior experiences as a tax expert and organizer within professional sports.¹⁰³ A “year after accepting Cohen’s offer, the General

¹⁰¹ Daniel Grisby, the Chief Legal Officer, General Counsel & Chief Integrity Officer of the Los Angeles Lakers. Grisby spent his entire career in private practice working at a variety of firms. In his most advanced role, Grisby was a Partner and Chairman of the National Sports Law Group for Jeffer, Mangels, Butler & Mitchell LLP. *See Daniel Grisby*, LINKEDIN <https://www.linkedin.com/> [<https://perma.cc/E7DV-F345>].

¹⁰² *The University of Toledo College of Law Transcript*, UNIV. TOLEDO LAW 1, 38 (2008), <https://www.utoledo.edu/> [<https://perma.cc/B55C-ZNZV>].

¹⁰³ *Id.*

Counsel position was created for him.”¹⁰⁴ Wildermuth attained this role quickly into his legal career by leveraging his non-legal experience.

Table B(5): Prior Law Firm Experience by Size – Big Four Aggregate

	2017	2023
500+	53 (42.7%)	59 (47.6%)
101–499	29 (23.4%)	23 (18.5%)
26–100	10 (8.1%)	12 (9.7%)
Less than 26	18 (14.5%)	18 (14.5%)
No Law Firm Employment	14 (11.3%)	12 (9.7%)
Total	124	124

6. LEAGUE OFFICE EXPERIENCE

Lastly, it remains true that some, but not many, General Counsels of Big Four teams have had prior experience working within a league office of one of the Big Four. In fact, the number of General Counsels with such prior experience is down from ten in 2017 to eight in 2023. More interestingly, though, is that the majority of General Counsels with such experience have something in common: their prior experience was within the NFL league office (60% in 2017 and 57.1% in 2023¹⁰⁵). This reflects the fact that the NFL’s legal department is generally the largest, and its NFL Management Council, which focuses on player/labor issues, functions like a mini-law firm. Among the notable individuals with prior NFL league office experience is Adolpho Birch III, the Chief External & League Affairs Officer of the Tennessee Titans,¹⁰⁶ who spent 24 years at the league office—most recently as Senior VP of Labor Policy and League Affairs¹⁰⁷—before returning to Nashville, where he was raised and attended law school.¹⁰⁸

¹⁰⁴ *Id.* at 39.

¹⁰⁵ *Brandon Etheridge*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/B2NS-M5EW\]](https://www.linkedin.com/[https://perma.cc/B2NS-M5EW]); *Ted Tywang*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/XZM3-4NNF\]](https://www.linkedin.com/[https://perma.cc/XZM3-4NNF]); *Ed Policy: Biography*, PACKERS, [https://www.packers.com/\[https://perma.cc/L2U6-5QVW\]](https://www.packers.com/[https://perma.cc/L2U6-5QVW]); *Adolpho A. Birch III*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/NZ5Q-KEN3\]](https://www.linkedin.com/[https://perma.cc/NZ5Q-KEN3]).

¹⁰⁶ *Adolpho A. Birch III*, *supra* note 105.

¹⁰⁷ Grace Renshaw, *Adolpho Birch III '91 Joins Tennessee Titans as Chief Legal Officer*, VANDERBILT UNIV. (Jun. 29, 2020, 2:39 PM), [https://law.vanderbilt.edu/\[https://perma.cc/U2N3-GUJU\]](https://law.vanderbilt.edu/[https://perma.cc/U2N3-GUJU]).

¹⁰⁸ *Id.*

Table B(6): League Office Experience – Big Four Aggregate

	2017	2023
Experience at NFL	6	4
Experience at MLB	1	0
Experience at NBA	2	2
Experience at NHL	1	1
Total	10	7 ¹⁰⁹

II. THE MLS

In 2015, MLS Commissioner Don Garber declared: “Our goal [is] to make America a soccer nation, to get people to grow up and want to be fans of their local MLS team.”¹¹⁰ MLS seems to have achieved at least some success toward that goal.¹¹¹ Today, the average attendance at an MLS game is over 20,000 fans,¹¹² the league is home to a billion-dollar franchise¹¹³—Los Angeles Football Club (LAFC)—and the league recently signed a reported \$2.5 billion broadcast deal with Apple TV.¹¹⁴ MLS is additionally poised to attempt to capitalize on growth opportunities created by the 2026 FIFA World Cup, set to take place in North America.¹¹⁵

¹⁰⁹ Amanda Green, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/2WTH-BP7N\]](https://www.linkedin.com/[https://perma.cc/2WTH-BP7N]); Brandon Etheridge, *supra* note 105; Ted Tywang, *supra* note 105; Ed Policy: Biography, *supra* note 105; Myles Pistorius, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/XKE2-DBMK\]](https://www.linkedin.com/[https://perma.cc/XKE2-DBMK]); Adolpho A. Birch III, *supra* note 105; Mali Friedman, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/AG6U-DF66\]](https://www.linkedin.com/[https://perma.cc/AG6U-DF66]).

¹¹⁰ Don Garber Insists MLS Will Be One of World’s Best Leagues in 10 Years or Less, SBI (Sept. 9, 2015), [https://sbisoccer.com/\[https://perma.cc/X5QP-UGM9\]](https://sbisoccer.com/[https://perma.cc/X5QP-UGM9]).

¹¹¹ But see Christopher R. Deubert, *Major League Soccer at Twenty-Five: Legal and Financial Considerations for the Next Quarter Century*, 12 ARIZ. ST. SPORTS & ENT. L.J. 1 (2022) (discussing a variety of legal and financial challenges for the league).

¹¹² 2023 MLS Attendance, SOCCER STADIUM DIG., [https://soccerstadiumdigest.com/\[https://perma.cc/Z6KW-QVU3\]](https://soccerstadiumdigest.com/[https://perma.cc/Z6KW-QVU3]).

¹¹³ Justin Birnbaum, *Major League Soccer’s Most Valuable Clubs 2023: LAFC is the First Billion-Dollar Franchise*, FORBES (Feb. 2, 2023, 6:30 AM), [https://www.forbes.com/\[https://perma.cc/ZQ9T-G67E\]](https://www.forbes.com/[https://perma.cc/ZQ9T-G67E]).

¹¹⁴ Adam Gostomelsky, *A Breakdown of Apple’s Major League Soccer Deal*, SPORTS MEDIA WATCH (2022), [https://www.sportsmediawatch.com/\[https://perma.cc/8ACJ-C5S3\]](https://www.sportsmediawatch.com/[https://perma.cc/8ACJ-C5S3]).

¹¹⁵ See Kyle Bonagura, *The World Cup Confirmed What MLS has been Saying: It’s Already One of the Best Leagues in the World*, ESPN (Jan. 24, 2023, 9:33 AM), [https://www.espn.com/\[https://perma.cc/3VNJ-WJMT\]](https://www.espn.com/[https://perma.cc/3VNJ-WJMT]).

Although there has been growth in terms of reputation, revenue, and team valuation (now at an average of \$582 million)¹¹⁶—considerations which generally translate into additional legal work—the league is uniquely positioned as materially smaller than the Big Four,¹¹⁷ but materially larger than the leagues positioned after it, such as the Women’s National Basketball Association (WNBA) (with an average team value of approximately \$66 million),¹¹⁸ the National Women’s Soccer League (NWSL) (with an average team value of approximately \$66 million),¹¹⁹ or the United Soccer League (USL) (with team valuations under \$100 million).¹²⁰ Consequently, clubs are able to have at least one in-house counsel, but that attorney may be stretched thinner than compatriots at Big Four clubs due to the limited resources in MLS.

These differences impact the makeup of MLS General Counsels and the pool of individuals seeking to enter the space. First, for some, MLS is viewed as a stepping-stone: attorneys use an MLS club General Counsel position as a launching pad to a bigger job in sports and, conversely, some attorneys leave their lower-level position at another sports team to step into the role of head legal officer at an MLS club to advance their future career. Second, MLS General Counsels—as a whole—are younger, more diverse, and include more women than their counterparts in the Big Four leagues.

¹¹⁶ *MLS Soccer Team Value Ranking*, SPORTICO (2023), <https://www.sportico.com/> [<https://perma.cc/L5HE-4HJ2>].

¹¹⁷ *See NFL Team Values Ranking List*, SPORTICO (2023), <https://www.sportico.com/> [<https://perma.cc/XME4-UC6N>] (noting that NFL team valuations range from \$4 billion to \$9.2); *see also MLB Team Values Rankings List*, SPORTICO (2023), <https://www.sportico.com/> [<https://perma.cc/5GJK-PJ6F>] (noting that MLB team valuations range from \$1.07 billion to \$7.13 billion); *see also NHL Team Values Ranking List*, SPORTICO (2023), <https://www.sportico.com/> [<https://perma.cc/258T-8K3Y>] (noting that NHL team valuations range from \$675 million to \$2.65 billion); *see also NBA Team Values Ranking List*, SPORTICO (2023), <https://www.sportico.com/> [<https://perma.cc/RLP6-XPmZ>] (noting that NBA team valuations range from \$1.63 billion to \$7.56 billion).

¹¹⁸ Scott Soshnick & Eben Novy-Williams, *Warriors to Pay Record \$50M to Secure WNBA Expansion Team*, SPORTICO (Oct. 5, 2023, 1:07 PM), www.sportico.com/ [<https://perma.cc/3FSW-MCZ6>].

¹¹⁹ *See NWSL Soccer Team Value Ranking*, SPORTICO (2023), <https://www.sportico.com/> [<https://perma.cc/PD84-J94T>].

¹²⁰ Alex Silverman, *USL Extension with Sportfive Part of Bright Future*, SPORTS BUS. J. (Mar. 13, 2023), <https://www.sportsbusinessjournal.com> [<https://perma.cc/G4AY-RAWJ>], (discussing the goal to hit valuations of \$100 million by 2028).

A. WORK-TYPE & EXPERIENCE: SURVEY OF CLUB COUNSELS

Before discussing the prior experience and demographics of the head legal officers of MLS Clubs, it is worthwhile to consider the position’s demands and how it may differ from the role of General Counsel for a club in the Big Four. This is important, as the job duties of the role impact the necessary skillset of the General Counsel, which in turn factors into the backgrounds of those ultimately hired.

One author, Christopher Deubert, while General Counsel of D.C. United, surveyed MLS club counsels in 2020. Below are the survey results from the highest-ranking attorney of 18 clubs (there were 26 clubs at the time). Notably, prior to the inclusion of the following information in this Article, the respondents to the survey were emailed about the planned usage of the data in this Article, and no one objected.

Table II(A)(1)

Which of these titles do you hold (check all that apply)?	
General Counsel	16 (88.9%)
Assistant General Counsel	0 (0%)
Counsel/Legal Counsel/ Associate Counsel	0 (0%)
Senior Vice President	2 (11.1%)
Vice President	6 (33.3%)
Other	1 (5.6%)

Not surprisingly, almost all the attorneys held the title General Counsel, with some additional titles sprinkled in.

Table II(A)(2)

To whom do you directly report within your organization (check all that apply)?	
Other Legal Counsel	0 (0%)
Chief Business Officer	5 (27.8%)
Chief Executive Officer	9 (50.0%)
Owner/Chairperson	4 (22.2%)
Other	4 (22.2%)

To whom the General Counsel reports sheds light into General Counsel’s role within the club. General Counsels who report directly to the owner will likely have greater influence on club

matters. Conversely, General Counsels who report to a Chief Business Officer have a diminished role. The most common structure is where the Chief Business Officer and General Counsel are on the same footing, reporting to the Chief Executive Officer, who, in turn, reports to the owner.

Table II(A)(3)

How many attorneys in your organization do legal work on behalf of an MLS club?	
One	11 (66.1%)
Two	4 (22.2%)
Three	3 (16.7%)
Four or more	0 (0%)

The majority of MLS clubs operate with a single attorney. This is different from the Big Four. A sample of five random clubs from each league (20 clubs total) reveals that the average legal department in the Big Four consists of 2.55 attorneys. It is not just the legal departments. MLS club staffs are generally smaller than their counterparts in every department. MLS clubs also generally pay less, including for their General Counsels, which often results in General Counsels feeling overstretched and underpaid.

Table II(A)(4)

What percent of your time is devoted to the organization's MLS club and the stadium in which it plays?	
76% or more	8 (44.44%)
51–75%	4 (22.22%)
25–50%	5 (27.78%)
25% or less	1 (5.56%)

Although most counsels (66.66%) spend over 51% of their time devoted to their organization's MLS club and stadium, a significant portion of counsels (33.34%) spend less than half of their time devoted to these interests. This is because many MLS club owners own other significant business entities and professional sports teams, sometimes wrapping their legal counsel under a broader entity that oversees the legal work of the respective businesses. This includes, but is not limited to: Atlanta United, under the same ownership as the Falcons; New England Revolution, under the same ownership as the Patriots; and Toronto FC, under the same ownership as the Raptors and Maple Leafs. As such, it is noteworthy

that many MLS club counsels do substantial work in their role that is entirely unrelated to MLS.

What that work entails is demonstrated by the data in Table II(A)(5) below:

Table II(A)(5)

For what other business interests within your organization do you do legal work (check all that apply)?	
USL Affiliate	6 (33.3%)
Other Professional Soccer Club	4 (22.2%)
Big Four Club	6 (33.3%)
Other Sports Interest	6 (33.3%)
Real Estate	6 (33.3%)
Other	6 (33.3%)
None	3 (16.67%)

In 2020, USL affiliates were a growing part of the professional soccer ecosystem in the United States. But that has now changed. To understand why, it is essential to explain the complicated structure of American soccer.

First, soccer in the United States is not organized like the Big Four. In 1978, Congress passed the Amateur Sports Act,¹²¹ which granted what is today known as the United States Olympic and Paralympic Committee (“USOPC”), the authority to govern all Olympic-related athletic activity in the United States. The statute authorized the USOPC to certify a national governing body (“NGB”) for each sport.¹²² The USOPC has certified the United States Soccer Federation (“USSF”) as the NGB for soccer in the United States.¹²³ While NGBs for football, baseball, basketball, and hockey exist in the United States, the professional leagues preceded those organizations and do not derive their standing from those NGBs.

In contrast, MLS and USL are formed pursuant to and governed by USSF Bylaws and Policies. Importantly, USSF Policies dictate that there shall be three levels of men’s professional soccer

¹²¹ 36 U.S.C. § 2205.
¹²² 36 U.S.C. § 220521.
¹²³ *U.S. Soccer Reaching New Heights*, U.S. SOCCER, <https://www.ussoccer.com/> [<https://perma.cc/6JE5-JUS7>].

(“Divisions I, II, and III”).¹²⁴ The Divisions are separated by different standards for cities of play, stadium sizes, financial viability, television broadcasts, and so forth.¹²⁵ For example, a Division I league (such as MLS), requires at least 14 teams and stadiums that hold at least 15,000 fans.¹²⁶ Division II stadiums are only required to hold 5,000 people.¹²⁷

While MLS is the only league ever certified as Division I,¹²⁸ there has been a rotating cast of Division II and III leagues.¹²⁹ Today, the USL Championship (“USLC”) is the sole Division II league, and USL League 1 (“USL1”) and the National Independent Soccer Association (“NISA”) are the two Division III leagues.¹³⁰

Importantly, the current structure is the subject of ongoing litigation. The North American Soccer League (“NASL”), a Division II league from 2011 through 2017, has an ongoing lawsuit against USSF, MLS, and the USL, alleging that the three parties violated antitrust law by illegally conspiring to divide up the American soccer market.¹³¹ The NASL folded after it failed to obtain a preliminary injunction,¹³² but the suit is ongoing.¹³³ The NASL’s departure paved the way for the USLC to move from Division III to Division II and for the creation of USL1.

The American soccer market appeared to be stabilizing with the NASL out of the picture. In 2015, MLS folded its own Division III Reserve League and reached an agreement with the USL to

¹²⁴ See *United States Soccer Federation Professional League Standards*, U.S. SOCCER FEDERATION 1 (2023), <https://www.ussoccer.com/> [<https://perma.cc/4NJ9-S5FM>].

¹²⁵ Young, *supra* note 9.

¹²⁶ *Id.*

¹²⁷ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, (2023).

¹²⁸ Ben Miller, *Attempting to Make Sense of the Various U.S. Soccer Leagues*, THE MANE LAND (Oct. 27, 2017), <https://www.themaneland.com/> [<https://perma.cc/2CCV-XWRL>].

¹²⁹ See *id.*

¹³⁰ *Id.*

¹³¹ George Dudley, *NASL Takes US Soccer Federation to Court*, SPORTSPRO (Sept. 21, 2017), <https://www.sportspromedia.com/> [<https://perma.cc/P9VW-7BDU/>].

¹³² See *N. Am. Soccer League, LLC v. USSF, Inc.*, 883 F.3d 32, 45 (2d Cir. 2018).

¹³³ See Defendant Major League Soccer, L.L.C.’s Motion for Summary Judgment Dismissing the Amended Complaint, *N. Am. Soccer League, LLC v. USSF, Inc.*, No. 17-cv-5495 (E.D.N.Y. Apr. 13, 2021).

coordinate on player development.¹³⁴ In the 2021 season, USLC had 32 clubs, ten of which were owned, controlled, or otherwise affiliated with MLS clubs.¹³⁵ USL1 had 12 clubs, four of which were affiliated with MLS clubs.¹³⁶ Consequently, American soccer seemed to be morphing into a major and minor league structure similar to that which exists in baseball, hockey, and basketball.¹³⁷ Indeed, like minor league baseball, the USL has had success building smallish stadiums in small and mid-size cities as part of economic development plans.¹³⁸

Finally, we reach MLS clubs' involvement in the USL. The MLS LLC agreement contains a covenant not to compete. The covenant provides that where each MLS club agrees, among other things, not to "anywhere in North America, carry on, own, manage, join, operate or control, or participate in the ownership, management, operation or control of, or be connected as a director, officer, employee, partner, member, consultant or otherwise with, or permit its name to be used by or in connection with, any soccer-related business which, directly or indirectly, competes with or is otherwise similar to the business of [MLS]."¹³⁹ Therefore, MLS must approve—and historically has approved—each MLS club's involvement in the USL. This provision could potentially be subject to antitrust attack, as rules prohibiting sports team owners from owning teams in other sports leagues have previously been struck down.¹⁴⁰ Nevertheless, the rule stands.

¹³⁴ Liviu Bird, *As USL Grows, Partnership with MLS Seeks to Ramp Up Youth Development*, SPORTS ILLUSTRATED (May 26, 2015), <https://www.si.com/> [<https://perma.cc/CRB8-G486/>].

¹³⁵ See *2021 Clubs | USL Championship*, USL, (Dec. 14, 2021), <https://www.uslchampionship.com/> [<https://perma.cc/4HYN-66XH/>].

¹³⁶ See *2021 Clubs | USL League One*, USL1, (Dec. 14, 2021), <https://www.usleagueone.com/> [<https://perma.cc/X7YN-BS4W/>].

¹³⁷ See, e.g., MINOR LEAGUE BASEBALL, <https://www.milb.com/> (last visited Sept. 30, 2022); ECHL, <https://www.echl.com/en/> (last visited Sept. 30, 2022); AM. HOCKEY LEAGUE (AHL), <https://theahl.com/> (last visited Sept. 30, 2022); NBA G LEAGUE, <https://gleague.nba.com/> (last visited Sept. 30, 2022).

¹³⁸ The Millionaires Podcast, *Episode #69: The Impact of Sport on Real Estate with Justin Papadakis*, AUDIBLE (Dec. 14, 2021), <https://www.audible.com/> [<https://perma.cc/GM7G-2R52/>]; Michael LoRé, *USL Expansion Centered On Stadium-Anchored Entertainment Districts*, FORBES (Mar. 3, 2020, 8:00 AM), <https://www.forbes.com/> [<https://perma.cc/B4PU-ZVRE/>].

¹³⁹ See Defendant Major League Soccer, LLC's Motion to Dismiss, Exhibit 1 at 48, *Nowak v. MLS, LLC*, No. 14-cv-3503 (E.D. Pa. Apr. 20, 2015).

¹⁴⁰ *N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982).

The MLS and USL development partnership ended at some uncertain recent date, possibly due to the NASL litigation. However, in 2022, MLS announced it was going to operate its own Division III league named MLS NEXT Pro.¹⁴¹ To populate the league, the clubs previously playing in either the USLC or USL1 and which were owned by or affiliated with an MLS club will be leaving the USL immediately or in the near future.¹⁴² Consequently, USL clubs are a decreasing part of an MLS club General Counsel's portfolio.

Table II(A)(6)

What other departments within your organization directly report to you (check all that apply)?	
Human Resources	2 (11.1%)
Finance	0 (0%)
Operations	1 (5.6%)
Community Relations	1 (5.6%)
Information Technology	1 (5.6%)
Ticket Sales	0 (0%)
Partnerships	0 (0%)
Marketing	0 (0%)
Communications	0 (0%)
Digital/Media	0 (0%)
Events	0 (0%)
Other	2 (11.1%)
None	15 (83.3%)

General Counsels rarely oversee other departments. Most other departments have a business focus and thus report within a structure that leads to a person responsible for the business and its profitability. The one exception sometimes is Human Resources. Regardless of its reporting structure, Human Resources in any industry often works closely with the legal department to ensure compliance with various federal, state, and local employment laws and to appropriately handle sensitive matters, such as internal investigations and terminations. Thus, it is not surprising that at least some MLS club General Counsels oversee Human Resources.

¹⁴¹ Jeff Rueter, *MLS Next Pro: 'We're Going to Use This New League as a Way to Test Concepts'*, THE ATHLETIC (Dec. 6, 2021), <https://theathletic.com/> [https://perma.cc/U2CN-QF6D].

¹⁴² Jeff Rueter, *MLS to Launch Reserves League Beginning Play in 2021, Sources Say*, THE ATHLETIC (Oct. 13, 2020), <https://theathletic.com/> [https://perma.cc/4BT5-GZAG].

Otherwise, General Counsels likely oversee other departments due to a stretched executive structure.

Table II(A)(7)

In what areas do you regularly practice in your role (as opposed to seeking outside counsel)?	
Litigation	6 (33.3%)
Transactional/Contracts	18 (100%)
Intellectual Property	14 (77.8%)
Real Estate	3 (16.7%)
Insurance	11 (61.1%)
Labor/Employment	16 (88.9%)
Immigration	0 (0%)
Tax/Financial Regulation	1 (5.6%)
Other	4 (22.2%)

The role of in-house counsel is notoriously generalist. Table II(A)(7) above reflects that reality for MLS club General Counsels. Unsurprisingly, all 18 respondents engaged in transactional/contract work. Drafting and negotiating contracts is one of the core functions of most in-house counsel, particularly in sports.

Next, nearly all of the General Counsels performed labor/employment and intellectual property work. Both of these practice areas come with MLS-specific notes.

Unlike in the Big Four, MLS is the counterparty to player contracts, not MLS clubs. Consequently, while club personnel negotiate the contract amounts, MLS counsel handle the formalization of those amounts in a contract, not club counsel. Thus, the labor/employment work done by MLS counsel generally only concerns non-player personnel.

Next, concerning intellectual property, MLS owns all club trademarks. MLS clubs have a license from MLS to sublicense their trademark to sponsors. This exchange of intellectual property rights is a core revenue stream for MLS clubs and, thus, is a core duty of MLS club counsel.

Table II(A)(8)

In what areas are you most likely to utilize outside counsel (as opposed to handling internally)?	
Litigation	15 (83.3%)
Transactional/Contracts	0 (0%)

Intellectual Property	2 (11.1%)
Real Estate	10 (55.6%)
Insurance	2 (11.1%)
Labor/Employment	5 (27.8%)
Immigration	16 (88.9%)
Tax/Financial Regulation	8 (44.4%)
Other	0 (0%)

In contrast to the work that the counsels regularly do within their role, there are notable areas of work where outside counsel is most likely to be utilized. The most common areas of law where work is likely to be outsourced are: immigration matters (88.9%), which are generally handled by the league; litigation (83.3%), which is typically handled by outside counsel; and real estate (55.6%), which is also typically handled by outside counsel, given its ties to broader business operations and often—depending on the locale—government relations considerations. Additionally, it is common for many counsels to engage outside representation in more specialized areas of the law where a specific expert is better suited for the issues implicated, such as for tax/financial regulation matters, labor/employment issues, intellectual property, and insurance. Unsurprisingly, no respondents are likely to utilize outside counsel for transactional/contract work—the precise work that the in-house General Counsel role is designed to cover.

B. PERSONNEL DATA & DEMOGRAPHICS AS COMPARED TO THE BIG FOUR

Although there are many similarities between the 28 MLS General Counsels and their 121 Big Four counterparts, noteworthy distinctions emerge. On average, MLS General Counsels are younger, have fewer years of prior legal experience before becoming General Counsel, are of a greater racial/ethnic diversity, include more women, are more likely to come from law schools and law firms of lower prestige and ranking, and are more likely to have prior experience within a professional league office or in a role as an Associate Counsel. This section explores the similarities and differences between the attorneys in these roles.

1. *AGE*

As compared to the Big Four General Counsels, there is a notable difference in the average age of the individuals. Overall, it is apparent that a greater percentage of MLS GCs are younger, particularly in the 30–39 range.

Table II(B)(1): Age

	Big Four 2023	MLS 2023
Under 30	1 (0.9%) ¹⁴³	0 (0.%)
30–39	14 (12.5%)	6 (30.0%)
40–49	43 (38.4%)	8 (40.0%)
50–59	39 (24.8%)	6 (30.0%)
Over 60	15 (12.4%)	0 (0.0%)
Total	112	20 ¹⁴⁴

The 30–39 age range for MLS, which comprises 30% of all General Counsels with an ascertainable¹⁴⁵ age, is significantly greater than their counterparts in the Big Four—at only 12.5%. This disparity indicates a greater willingness for MLS clubs to hire or promote younger attorneys to a role as the top legal counsel within the club. For example, Brandon Briggs of Inter Miami CF—within the 30–39 age range as a 2012 undergraduate graduate, and a 2015 law school graduate—was hired by the club as Deputy General Counsel in 2021, after previously working as Associate Counsel of the Miami Dolphins and Hard Rock Stadium.¹⁴⁶ Once at Inter Miami, he was quickly promoted to Vice President, Legal and Human Resources in July of 2022.¹⁴⁷

2. AGE WHEN FIRST HIRED

Given the age differences of MLS General Counsels as compared to their Big Four counterparts, there are notable differences in the trends with regard to the age at which such

¹⁴³ *Emma Compton Joins Cincinnati Bengals as Team’s First GC*, SPORTS LITIG. ALERT (Sept. 9, 2022), [https://sportslitigationalert.com/\[https://perma.cc/Y3HP-8MJK\]](https://sportslitigationalert.com/[https://perma.cc/Y3HP-8MJK]).

¹⁴⁴ When researching the MLS general counsels, for certain individuals there was a degree of limited information. Accordingly, the listed denominator has fluctuations where no data was available for certain general counsels.

¹⁴⁵ Most individuals do not have their specific age listed online; accordingly, the available age ranges are generally based on an estimated calculation utilizing the year in which such individuals matriculated at their undergraduate institution (*E.g.*, if an individual began college in 2010, presumably they began at around 18 years of age, resulting in an estimated birth year of 1992, resulting in a current age of approximately 31).

¹⁴⁶ *Brandon Briggs*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/D7LT-FBLN\]](https://www.linkedin.com/[https://perma.cc/D7LT-FBLN]).

¹⁴⁷ *Id.*

counsels were first hired by their respective organization. The below table provides an overview.

Table II(B)(2): Age When First Hired

	Big Four 2023	MLS 2023
Under 30	3 (2.8%)	0 (0.0%)
30–39	46 (42.6%)	6 (32.0%)
40–49	46 (42.6%)	12 (63.0%)
50–59	12 (11.1%)	1 (5.0%)
Over 60	1 (0.9%)	0 (0.0%)
Total	108	19

Somewhat surprisingly, more General Counsels in the Big Four leagues are hired under age 40 (45.4%) than in MLS (32.0%). There is, however, a noticeably larger amount of MLS General Counsels hired age 40–49 (63.0% as compared to 42.6% in the Big Four). This disparity is primarily driven by the fact that MLS clubs rarely hire counsel over 50. Such attorneys are likely too expensive for MLS clubs.

For some, the ability to transition in-house at an early age is, in part, due to relevant prior experience. For example, Ted Tywang—Chief Administrative Officer & General Counsel at Haslam Sports Group—serves as the General Counsel for Columbus Crew SC.¹⁴⁸ In 2016—while under the age of 40—he left Proskauer Rose to accept a role with the Cleveland Browns, also owned by Haslam Sports Group, a move he called a “lifelong dream.”¹⁴⁹ Notably, MLS is a Proskauer Rose client.¹⁵⁰ Undoubtedly Tywang’s experience at Proskauer Rose was important to his having been hired by the Haslam Sports Group.

3. *CURRENT LAW SCHOOL RANKING*

Although MLS General Counsels come from the Top 10 ranked law schools at a nearly identical percentage to their counterparts in the Big Four, there is a drop-off in the law school rankings for most MLS General Counsels. The below table provides an overview.

¹⁴⁸ *Ted Tywang*, *supra* note 105.
¹⁴⁹ *Ted Tywang Makes His Mark on Ohio Sports*, MOD. COUNS. (Aug. 30, 2019), <https://modern-counsel.com/> [<https://perma.cc/VDL4-K3ZH>].
¹⁵⁰ *Id.*

Table II(B)(3): Current Law School Ranking

	Big Four 2023	MLS 2023
Top 10	29 (27.9%)	7 (27.0%)
11–25	24 (23.1%)	3 (12.0%)
26–50	9 (8.7%)	3 (12.0%)
51–100	27 (26.0%)	8 (31.0%)
Over 100	15 (14.4%)	5 (19.0%)
Total	104	26

As the data shows, half of MLS General Counsels went to a law school currently ranked 51st or worse, whereas only 40.4% of Big Four General Counsels did.¹⁵¹

Law school ranking is, of course, not necessarily a predictor of skill. For example, Andrea Kimball—the VP and General Counsel of Sporting Kansas City—attended the University of Toledo College of Law, which is currently ranked 141st by U.S. News & World Report.¹⁵² Kimball has been in her role since 2016 after having previously been a partner at a major international law firm.¹⁵³ Similarly, Caesar Lopez—the Chief Administrative Officer and General Counsel of Orlando City SC—attended the Elisabeth Haub School of Law at Pace University, which is currently ranked 131st by U.S. News & World Report.¹⁵⁴ Lopez has been with the club since 2018, after a two-and-a-half year stint as counsel at MLS.¹⁵⁵

The disparity in law school ranking between Big Four General Counsels and MLS General Counsels reflects the differences between the leagues. First, there is less overall interest in the MLS as a smaller and less popular league; it could comparably be viewed as choosing a smaller firm over a larger firm—something atypical from graduates of elite law schools. Additionally, the role of MLS General Counsel pays, often significantly, less than alternative legal

¹⁵¹ *Rankings and Advice*, U.S. NEWS & WORLD REP., <https://www.usnews.com/> [<https://perma.cc/CAZ9-AELF>] (noting that all rankings are from the U.S. News & World Report, a leader in education rankings since it began reporting in 1983).

¹⁵² *University of Toledo*, U.S. NEWS & WORLD REP., <https://www.usnews.com/> [<https://perma.cc/BU4L-EF4M>].

¹⁵³ *Andrea Kimball*, LINKEDIN, <https://www.linkedin.com/> [<https://perma.cc/E7B3-GVP4>].

¹⁵⁴ *Pace University (Haub)*, U.S. NEWS & WORLD REP., <https://www.usnews.com/> [<https://perma.cc/8TRP-BSDB>].

¹⁵⁵ *Caesar Lopez*, LINKEDIN, <https://www.linkedin.com/> [<https://perma.cc/E325-XEEB>].

positions; for many, this is certainly less desirable, particularly in light of heightened salary opportunities for graduates of elite institutions.

However, this also highlights an opportunity for individuals who attend lower-ranked schools or otherwise take atypical career paths, to one day become the top legal counsel of a professional sports team. For example, Kimball of Sporting Kansas City was asked what advice she would give her 25-year-old self. Her response aptly conveys this point: “I would tell myself to never give up on your dream job. Some lawyers get into sports law in the beginning of their career and work their way up. I chose a different path and that worked for me.”¹⁵⁶ After focusing on civil and intellectual property litigation throughout her career, she eventually transitioned into the role of VP and GC of the team and remarks that her work prior work experience allowed her to “garner[] experience in IP, licensing, contract review and dispute resolution, insurance, and employment litigation—all subject areas [she] now deal[s] with on a daily basis as general counsel.”¹⁵⁷

While counsel positions for MLS clubs are undoubtedly still in high demand, they do not generally attract the same level of interest as Big Four teams. Consequently, in filling these positions, clubs likely focus more on the best organizational fit and an attorney capable of doing the work required at a high level and for lower pay rather than a particular focus on requiring a certain educational background.

4. YEARS OF LEGAL EXPERIENCE PRIOR TO BECOMING GC

In line with the largely similar data concerning the age of General Counsels when they first assumed the position, MLS General Counsels have similar years of prior experience before assuming the role when compared to their Big Four counterparts.

Table II(B)(4): Years of Legal Experience Prior to Becoming GC

	Big Four 2023	MLS 2023
10 or less	41 (35.0%)	10 (40.0%)
11–20	52 (44.4%)	11 (44.0%)
21–30	22 (18.8%)	3 (12.0%)
Over 30	2 (1.7%)	1 (4.0%)
Total	117	25

¹⁵⁶ Andrea Kimball, DENTONS, <https://www.dentons.com/> [<https://perma.cc/T2AT-U787>].
¹⁵⁷ *Id.*

The vast majority of General Counsels among all five leagues tend to have 20 or fewer years of experience before starting their role—79.4% for the Big Four and 84.0% for MLS. This data is consistent with the fact that in-house counsel transitioning from a law firm generally do so before becoming a partner at the firm. The typical career path is for an attorney to gain several years of experience at a law firm before transitioning to an entry-level in-house counsel position. Those attorneys either move up within that organization or move to another to become General Counsel. The compensation for partners at law firms generally far exceeds that of General Counsels in sports. Consequently, it is rare for people in those positions to make the transition in-house. This is particularly true if those attorneys can provide outside counsel services to the teams.

5. *PRIOR LAW FIRM EXPERIENCE BY SIZE*

As discussed above, most in-house counsels start their careers at law firms. However, MLS club General Counsel are slightly more likely to have eschewed the traditional path than their counterparts in the Big Four.

Table II(B)(5): Prior Law Firm Experience by Size

	Big Four 2023	MLS 2023
500+	59 (47.6%)	14 (42.4%)
101–499	23 (18.5%)	8 (24.2%)
26–100	12 (9.7%)	2 (6.1%)
Less than 26	18 (14.5%)	4 (12.1%)
No Law Firm Employment	12 (9.7%)	5 (15.1%)
Total	124	33

MLS General Counsels come from the biggest law firms at approximately the same percentage as those in the Big Four (42.4% in MLS as compared to 47.6% in the Big Four). As in the Big Four, clubs often use these national and international major law firms as outside counsel. As noted above, this gives the attorneys at these firms an opportunity to do work on behalf of the organization—and potentially make connections within the clubs—before attempting to move in-house.

This high-level experience also prepares the individual for doing work beyond the specific day-to-day of a general attorney. Eric Hagen—Chief Legal Officer of Austin FC—left an equity

partnership¹⁵⁸ at DLA Piper¹⁵⁹ to have the unique “chance to launch a professional sports team.”¹⁶⁰ Entering into this role at the early stages, then, Hagen and Austin FC focused on crucial elements of a sports club, such as building founding-level partnerships. As Hagen pointed out, “[c]ommunity is everything in soccer. Getting the right partners is important because we want partners who connect with our community and resonate with our supporters.”¹⁶¹ To do this type of work, his prior legal experience at DLA Piper—a global law firm with over 4,000 attorneys and over 90 offices¹⁶²—in the practice areas of intellectual property, and sports, media, entertainment, and technology¹⁶³ played to his benefit, as he utilized it to oversee the negotiations of the naming and branding deals within the club.

If not at a large law firm, the remaining General Counsels are often likely to have experience in medium-sized law firms. 30.3% of MLS General Counsels had prior experience at a firm with 26–499 attorneys, as compared to 28.2% of Big Four General Counsels. For example, Jennifer O’Sullivan—COO & Chief Legal & Administrative Officer, NYCFC—spent portions of her career at the boutique firm Hand Baldachin & Associates, “where she was head of the firm’s Sports and Entertainment Practice Group.”¹⁶⁴ Positions within such firms often allow attorneys the opportunities to get more experience in niche practice areas, such as sports law, as well as a higher likelihood of client face-time; these factors better prepare an individual, likely helping facilitate a move in-house.

Firm experience—in particular, big law experience—is, at a minimum, seen as a significant positive for an attorney’s resume as they seek to move in-house. However, it is certainly not a requirement. For example, Caesar Lopez—of Orlando City SC—went directly in-house out of law school¹⁶⁵ with Biersdorf, a global skin care company.¹⁶⁶ Similarly, Brandon Briggs—of Inter Miami CF—became the Associate Counsel for the Miami Dolphins and

¹⁵⁸ Philip Edsel, *Eric Hagen on the New Team in Town*, PROFILE (May 17, 2021), <https://profilemagazine.com/> [<https://perma.cc/N5LH-KYDY>].

¹⁵⁹ *Eric Hagen*, LINKEDIN, <https://www.linkedin.com/> [<https://perma.cc/KBE2-SYQB>].

¹⁶⁰ See Edsel, *supra* note 158.

¹⁶¹ *Id.*

¹⁶² *DLA Piper*, VAULT, <https://vault.com/> [<https://perma.cc/ESY5-VP9Q>].

¹⁶³ See *Eric Hagen*, *supra* note 159.

¹⁶⁴ *Meet the Speaker: Jennifer O’Sullivan, COO & Chief Legal & Administrative Officer, NYCFC*, BRIT. AM. BUS., <https://www.babinc.org/> [<https://perma.cc/Q4TC-3J8Y>].

¹⁶⁵ See *Caesar Lopez*, *supra* note 155.

¹⁶⁶ See *About Us*, BEIERSDORF, <https://www.beiersdorf.com/> [<https://perma.cc/Z52F-KN23>].

Hard Rock Stadium directly from law school.¹⁶⁷ Accordingly, such individuals have immediate experience as an in-house attorney which would be highly transferrable into their current roles.

It is also unsurprising that a slightly higher percentage of MLS General Counsels have no law firm experience (15.1%) than their Big Four counterparts (9.7%). As discussed above, MLS clubs are generally less prestigious and pay less. Attorneys who have never experienced the generally higher pay of law firms would thus be less concerned about taking such a position.

6. LEAGUE OFFICE EXPERIENCE

Perhaps one of the most significant differences between the General Counsels at Big Four clubs versus the MLS is the percentage of those who have prior experience working in a league office.

Table II(B)(6): League Office Experience

	Big Four 2023	MLS 2023
Experience at NFL	4	3
Experience at MLB	0	0
Experience at NBA	2	0
Experience at NHL	1	1
Experience at MLS	0	2
Total	7	6

Six MLS club counsels have such experience (21.4% of respondents), whereas only eight counsels from the Big Four have this experience—a strikingly low 6.25%. Importantly, MLS General Counsels do not have this experience merely within the MLS league office. Rather, this experience often came from working for the Big Four leagues. Most notably, half of this group (three of the six) has this experience from working at the NFL.¹⁶⁸ This data elucidates the powerhouse that is the in-house legal department of the NFL—which, based on a cursory LinkedIn

¹⁶⁷ See *Brandon Briggs*, *supra* note 146.

¹⁶⁸ Ted Tywang of Columbus Crew was previously a Law Clerk at the NFL. See *Ted Tywang*, *supra* note 105. Jennifer O’Sullivan of NYCFC was previously a Staff Attorney at the NFL. See *Jennifer Pogorelec O’Sullivan*, LINKEDIN, <https://www.linkedin.com/> [https://perma.cc/K56X-HD9F]. Heather Davis of the Portland Timbers was previously Senior Counsel at NFL. See *Heather Davis*, LINKEDIN, <https://www.linkedin.com/> [https://perma.cc/ZL7E-JL7K].

search, currently boasts nearly 40 attorneys. Given the relatively low turnover rates across high level legal executives within sports, many utilize their prior experience within the NFL's legal department as a springboard to move to other clubs and leagues, either as a lateral move or as an opportunity to enter a higher position at their new organization.

This data indicates the relative commonality of attorneys with prior league experience being able to move in-house with an MLS club at a high level. For example, Jennifer O'Sullivan—COO of New York City Football Club (NYCFC)—began her legal career as a Staff Attorney/Law Clerk at the NFL, had significant success across a variety of law firms, corporations, and sports entities, and joined NYCFC directly in her current role.¹⁶⁹ Similarly, Heather Davis—CEO¹⁷⁰ of the Portland Timbers (and Portland Thorns of the NWSL)—was Senior Counsel with the NFL before moving to the Timbers. In both cases, their prior league experience was surely invaluable to their ability to secure high-level positions within an MLS club.

7. RACE/ETHNICITY

Another difference between the MLS and the Big Four is the racial and ethnic demographics. To compile this information for MLS General Counsels, we utilized the same methodology of focusing on self-reported identifiers where possible, made assumptions based on names—an established and utilized practice across various forms of research—and made certain assumptions based on additional available information. This process is admittedly imperfect; however, short of fully self-reported data—which is unavailable—the methods utilized are recognized as beneficial to “enable consistent comparison or aggregation of the data across multiple entities.”¹⁷¹ Thus, it is the best available method to collect and attempt to better understand the trends across the professional sports leagues, which is important to fully understand the nature and history of the role of General Counsel. The following table provides an overview.

¹⁶⁹ Jennifer Pogorelec O'Sullivan, *supra* note 168.

¹⁷⁰ *Timbers Club*, PORTLAND TIMBERS, <https://www.timbers.com/> [<https://perma.cc/UDK7-LTVF>]. Although the CEO of an organization is unlikely to be considered the General Counsel of an organization, in this instance it appears that the club's only other in-house attorney is the Club Counsel—Rachel Cohn; this gives the presumption that the Club Counsel reports directly to Heather Davis on legal matter.

¹⁷¹ *Race, Ethnicity, and Language Data: Standardization for Health Care Quality Improvement*, AHRQ, <https://www.ahrq.gov/> [<https://perma.cc/S4C2-NZD2>] (May 2018).

Table II(B)(7): Race/Ethnicity

	Big Four 2023	MLS 2023
Asian/Asian American	4 (3.3%)	2 (7.0%)
Black/African American	18 (15.0%)	4 (14.0%)
Hispanic/Latino	4 (3.3%)	3 (11.0%)
Native Hawaiian/Pacific Islander	0 (0.0%)	0 (0.0%)
White	93 (77.5%)	19 (68.0%)
Total	120	28

Thirty-two percent of MLS General Counsels are of a non-white racial/ethnic background, whereas only 22.5% of Big Four counsels have a similar background. This distinction is most prominent for those of Asian/Asian American or Hispanic descent. In the Big Four, only 3.3% of General Counsels are of Asian/Asian American background, and only 3.3% are of Hispanic/Latino background. In contrast, 7% of MLS General Counsels are Asian/Asian American—such as Paula Boggs Meuthing, the Chief Legal and Administrative Officer of FC Cincinnati¹⁷²—and 11% are Hispanic/Latino—such as Carlos Montoya, the SVP and General Counsel of Philadelphia Union.¹⁷³ The higher presence of Hispanic/Latino General Counsels in MLS is perhaps not surprising given soccer’s popularity in that community. Additionally, the MLS General Counsels are 14% Black/African American, nearly identical to the 15% of their counterparts in the Big Four.

The demographic split across MLS is largely representative of the U.S. population as a whole; in 2023, the U.S. Census Bureau estimated that the general population was 6.3% Asian, 13.6% Black or African American, 19.1% Hispanic or Latino, 0.3% Native Hawaiian or Pacific Islander, and 77.5% White.¹⁷⁴ MLS, notably, is more diverse than the general U.S. attorney population which, in 2022, was estimated at 5% Asian, 5% African American, 6%

¹⁷² *Paula Boggs Meuthing*, LINKEDIN [https://www.linkedin.com/\[https://perma.cc/7X8M-KK46\]](https://www.linkedin.com/[https://perma.cc/7X8M-KK46]).

¹⁷³ *Carlos Montoya*, LINKEDIN [https://www.linkedin.com/\[https://perma.cc/3H6N-FG3E\]](https://www.linkedin.com/[https://perma.cc/3H6N-FG3E]).

¹⁷⁴ *See Quick Facts*, U.S. CENSUS BUREAU, [https://www.census.gov/\[https://perma.cc/PN5H-GH2B\]](https://www.census.gov/[https://perma.cc/PN5H-GH2B]). Note: the percentages do not add up to 100% as the reporting criteria allow options to self-identify as one or more groups.

Hispanic, 0% Hawaiian/Pacific Islander,¹⁷⁵ and 81% Caucasian/White.¹⁷⁶

Notably, TIDES awarded MLS an overall A grade for racial hiring in its 2022 Racial and Gender Report Card, with a score of 90.8.¹⁷⁷

8. GENDER

In addition to the racial/ethnic diversity found in the MLS, the General Counsels also notably include more women than their Big Four counterparts. The following table provides an overview.

Table II(B)(8): Gender

	Big Four 2023	MLS 2023
Women	39 (32.5%)	12 (43.0%)
Men	81 (67.5%)	16 (57.0%)
Total	120	28

Currently, only 32.5% of Big Four General Counsels are women, whereas 43% of MLS General Counsels are women. Based on these percentages, the MLS General Counsels are more diverse than the general attorney population, which, in 2022, was only 38% women.¹⁷⁸ In TIDES’ 2022 Racial and Gender Report Card for MLS, the overall league score in Gender Hiring was a B, with 81.2 points. Although notably lower than its racial score, this score is nonetheless a positive trend from its 2021 score of 74.7 points.¹⁷⁹

It is apparent that MLS has created an environment that allows women to excel in ways that may have been historically limited by the sports industry. For example, Michelle Hull Hyncik was formerly Senior Counsel for MLS and General Counsel of Real Salt Lake, before being named the President of the Utah Royals of the NWSL in 2023.¹⁸⁰ Similarly, Kari Cohen, the General Counsel of

¹⁷⁵ Given that the data presented is rounded to the nearest whole number, it is presumed that a more accurate interpretation of this number is that the figure is less than 0.5%, but not true zero.

¹⁷⁶ ABA National Lawyer Population Survey, ABA (2022), <https://www.americanbar.org/> [https://perma.cc/86SH-SVTR].

¹⁷⁷ Richard E. Lapchick, *The 2022 Racial and Gender Report Card Major League Soccer*, TIDES: THE INST. FOR DIVERSITY AND ETHICS IN SPORT (2022), <https://www.tidesport.org/> [https://perma.cc/7X4G-BLF8].

¹⁷⁸ See *Meet the Speaker*, *supra* note 164.

¹⁷⁹ See Richard E. Lapchick, *supra* note 177.

¹⁸⁰ Michelle Hull Hyncik, LINKEDIN, <https://www.linkedin.com/> [https://perma.cc/3SRR-PXAP].

the New York Red Bulls¹⁸¹ and previously part of the Brooklyn Nets’ organization, appeared on the Sports Business Journal’s 2020 “Game Changer” list, recognizing women at the top of the sports industry.¹⁸² This environment is mirrored within the MLS league office where Anastasia Danias Schmidt—who spent over 18 years as an attorney at the NFL’s league office—is the current Executive Vice President and General Counsel of MLS.

9. *PRIOR INDUSTRIES WORKED IN*

As is true in the Big Four, having prior work experience in private law practice is virtually essential for General Counsels. However, like with the Big Four, certain counsels have leveraged their prior experience to fit into their current role. The following table provides an overview.

Table II(B)(9): Prior Industries Worked In

	Big Four 2023	MLS 2023
Academia	4 (3.3%)	3 (11.1%)
Government	26 (21.5%)	6 (22.2%)
Private Law Practice	101 (83.5%)	24 (88.9%)
Non-Profit (Legal)	3 (2.5%)	0 (0.0%)
Sports (Legal)	62 (51.2%)	12 (44.4%)
Sports (Non-Legal)	16 (13.2%)	1 (3.7%)
Other (Legal)	39 (32.2%)	8 (29.6%)
Other (Non-Legal)	11 (9.1%)	0 (0.0%)
Total	262	54

As expected, 83.5% of Big Four General Counsels and 88.9% have prior law firm experience. When asked how he prepared himself for a career in the sports industry, Joe Kennedy—the General Counsel of Nashville Soccer Club—acknowledged how it is “important to have a transactional background so getting law firm exposure to any type of business transactions is helpful.”¹⁸³ Having

¹⁸¹ Kari Cohen, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/7V58-4YFH\]](https://www.linkedin.com/[https://perma.cc/7V58-4YFH]).

¹⁸² *New York Red Bulls General Counsel Kari Cohen Named to The Sports Business Journal 2020 'Game Changer' List Recognizing Top Women in Sports Industry*, N.Y. RED BULLS (Sept. 10, 2020, 12:38 PM), [https://www.newyorkredbulls.com/\[https://perma.cc/Y2UZ-2XGW\]](https://www.newyorkredbulls.com/[https://perma.cc/Y2UZ-2XGW]).

¹⁸³ Bryce Goodwyn, *An Inside Look into The Life of Major League Soccer’s Legal Counsel – Nashville SC*, CONDUCT DETRIMENTAL (Sept.

an understanding of the core work of the industry is crucial for working in-house for a professional sports club.

Beyond prior law firm experience—unsurprisingly, prior sports (legal) experience—is also common across General Counsels. For example, 51.2% of Big Four General Counsels and 44.44% of MLS General Counsels have such previous experience. For some, their prior sports (legal) experience functions as a method to advance their careers. For example, Joe Connaughton, General Counsel of Los Angeles Football Club, previously worked as Counsel for the Oklahoma City Thunder before moving into a higher position in his current role within an MLS club.¹⁸⁴

There is a reasonably high percentage of General Counsels who previously worked in the government sector. Paula Boggs Meuthing, Chief Legal and Administrative Officer of FC Cincinnati, worked in a variety of governmental roles within Cincinnati, namely as an Attorney, City Solicitor, and City Manager for the City of Cincinnati over a period of approximately 13 years.¹⁸⁵ This level of experience, particularly in the club’s city, is undoubtedly of benefit to the organization as it provides insight and knowledge of the workings of the local government that would allow the club to operate within the community more effectively.

10. *PRIOR EXPERIENCE AT SPORTS LAW FIRM*

Although MLS General Counsels are similarly likely to have had prior experience at a 500+ attorney law firm as General Counsels for Big Four clubs, they are less likely to have prior experience at one of the major law firms with a prominent sports law group. The following table illustrates this distinction.

Table II(B)(10): Prior Experience at Sports Law Firm

	Big Four 2023	MLS 2023
Akin Gump Strauss Hauer & Feld LLP	0	0
Covington & Burling LLP	5	1
Foley & Lardner LLP	1	0
Kirkland & Ellis LLP	1	1
Latham & Watkins LLP	4	0

16, 2022), <https://www.conductdetrimental.com/> [<https://perma.cc/KJB2-E5YW>].

¹⁸⁴ Joe Connaughton, LINKEDIN, <https://www.linkedin.com/> [<https://perma.cc/33QS-36KA>].

¹⁸⁵ Paula Boggs Meuthing, *supra* note 172.

Paul, Weiss, Rifkind, Wharton & Garrison LLP	1	0
Proskauer Rose LLP	6	1
Skadden, Arps, Slate, Meagher & Flom LLP	1	0
Total	19	3

Only three (10.7%) MLS General Counsels have prior experience at the major sports law firms,¹⁸⁶ whereas 19 (15.7%) Big Four General Counsels do. While MLS clubs do use these firms as outside counsel, they do not do so in the same volume as Big Four clubs. This is at least partly because these law firms are some of the most expensive in the world and MLS clubs—almost all of whom operate at a loss—have to be more cost-conscious than the generally profitable clubs in the Big Four.

Next, working in MLS likely is not as appealing to attorneys from these firms as working in the Big Four leagues. This perception is evidenced by the economic realities: MLS clubs are valued between approximately \$390 million and \$900 million,¹⁸⁷ whereas the Big Four clubs are valued approximately as follows—MLB: \$1 to 7 billion;¹⁸⁸ NHL: \$465 million to \$2 billion;¹⁸⁹ NBA: \$1.6 to \$7.5 billion;¹⁹⁰ and NFL: \$4 to 9 billion.¹⁹¹ Additionally, unlike in the Big Four, where the respective leagues are undoubtedly the best in the world for their given sports, MLS falls well below the level of play of the top soccer leagues across the globe.¹⁹²

¹⁸⁶ Eric Hagen, of Austin FC, previously was a Partner at Kirkland and Ellis LLP. *Eric Hagen*, *supra* note 159. Ted Tywang of Haslam Sports Group, of which the Columbus Crew is part, was previously an Associate at Proskauer Rose LLP. *Ted Tywang*, *supra* note 105. Heather Davis, of Portland Timbers, was previously an Associate at Covington & Burling LLP. *Heather Davis*, *supra* note 168.

¹⁸⁷ 2022 *MLS Franchise Valuations Ranking*, SPORTICO, <https://www.sportico.com/> [<https://perma.cc/U9K7-3M6L>].

¹⁸⁸ 2023 *MLB Franchise Valuation Ranking*, SPORTICO (Mar. 26, 2024), <https://www.sportico.com/> [<https://perma.cc/37HQ-C8GT>].

¹⁸⁹ 2022 *NHL Franchise Valuation Ranking*, SPORTICO (Nov. 8, 2023), <https://www.sportico.com/> [<https://perma.cc/25PW-DT7V>].

¹⁹⁰ 2022 *NBA Franchise Valuation Ranking*, SPORTICO (Dec. 13, 2023), <https://www.sportico.com/> [<https://perma.cc/GF7M-VW48>].

¹⁹¹ 2023 *NFL Franchise Valuation Ranking*, SPORTICO (Aug. 8, 2023), <https://www.sportico.com/> [<https://perma.cc/PQ7K-KYEQ>].

¹⁹² Derek Reese, *MLS Losing National Audience but Winning as Local Entertainment*, WORLD SOCCER TALK (May 13, 2023), <https://worldsoccertalk.com/> [<https://perma.cc/5JZ8-CL33>].

Additionally, unlike the Big Four clubs which have significant national and international notoriety, the majority of MLS clubs are far more local in their fanbase and relevance.¹⁹³

For attorneys looking to work in professional sports, there are certainly many who would not consider the MLS for a variety of these reasons. For those with prior experience at a top sports law firm, the perception and desire to work elsewhere is arguably even more amplified. Many would probably prefer to wait for an opening with a Big Four club.

11. *EXPERIENCE AS ASSOCIATE COUNSEL*

Lastly, MLS General Counsels are more likely to have prior experience in an Associate Counsel position for another professional sports club as compared to Big Four General Counsels.

Table II(B)(11): Experience as Associate Counsel

	Big Four 2023	MLS 2023
For an NFL Club	10	2
For an MLB Club	9	1
For an NBA Club	8	3
For an NHL Club	5	1
For an MLS Club	0	2
Total	32	9

Ten MLS General Counsels (35.7%) previously worked as an Associate Counsel. Importantly, they did so across all major leagues, and seven of the ten did so at a club in the Big Four. For example, Kari Cohen was previously the Vice President & Deputy General Counsel of BSE Global¹⁹⁴ —“the parent company of Barclays Center, the Brooklyn Nets, the New York Liberty, NBA G League team the Long Island Nets, and NBA 2K League affiliate NetsGC”¹⁹⁵—before becoming the General Counsel of the New York Red Bulls.¹⁹⁶ In contrast, only 32 (26.4%) of Big Four General Counsels had prior experience as an Associate Counsel.

The two MLS General Counsels who previously held Associate Counsel positions are Brandon Briggs of Inter Miami CF¹⁹⁷ and

¹⁹³ *Id.*

¹⁹⁴ *Kari Cohen, supra* note 181.

¹⁹⁵ *BSE Global*, LINKEDIN, <https://www.linkedin.com/> [<https://perma.cc/66FJ-VSBD>].

¹⁹⁶ *Kari Cohen, supra* note 181.

¹⁹⁷ *Brandon Briggs, supra* note 146.

Felipe Mendez of Seattle Sounders FC.¹⁹⁸ Both were in the Associate Counsel position at their current club, before being promoted internally. These career trajectories indicate the league's, and its clubs', interest in looking internally when deciding who will hold higher-level roles.

III. THE NWSL & WNBA

Contemporaneous with the growth of MLS, the NWSL (established in 2012) and WNBA (established in 1996) have established themselves as the country's leading women's professional sports leagues. With this in mind, we looked to these two leagues to determine whether, like MLS, there has been an increase in the number of in-house legal roles within the respective clubs.

There has not. Of the 12 WNBA teams, seven have no identified counsel,¹⁹⁹ and the remaining five share counsel with their respective NBA team affiliate.²⁰⁰ Similarly, of the 12 NWSL teams

¹⁹⁸ *Felipe M. Mendez*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/B9PQ-54QA\]](https://www.linkedin.com/[https://perma.cc/B9PQ-54QA]).

¹⁹⁹ These teams are the Atlanta Dream; Chicago Sky; Connecticut Sun; Dallas Wings; Las Vegas Aces; Los Angeles Sparks; and Seattle Storm. *See Front Office*, ATL. DREAM, [https://dream.wnba.com/\[https://perma.cc/Y43C-H7FB\]](https://dream.wnba.com/[https://perma.cc/Y43C-H7FB]); *Staff Directory*, CHI. SKY, [https://sky.wnba.com/\[https://perma.cc/TBU4-7VDV\]](https://sky.wnba.com/[https://perma.cc/TBU4-7VDV]); *Staff Directory*, CONN. SUN, [https://sun.wnba.com/\[https://perma.cc/H9PE-EVKZ\]](https://sun.wnba.com/[https://perma.cc/H9PE-EVKZ]); *Front Office*, DALL. WINGS, [https://wings.wnba.com/\[https://perma.cc/8KHA-DJ23\]](https://wings.wnba.com/[https://perma.cc/8KHA-DJ23]); *Front Office*, LAS VEGAS ACES, [https://aces.wnba.com/\[https://perma.cc/98VV-Z6KJ\]](https://aces.wnba.com/[https://perma.cc/98VV-Z6KJ]); *Front Office*, L.A. SPARKS, [https://sparks.wnba.com/\[https://perma.cc/53P3-MX7C\]](https://sparks.wnba.com/[https://perma.cc/53P3-MX7C]); *Front Office*, SEATTLE STORM, [https://storm.wnba.com/\[https://perma.cc/ZY8V-GWAY\]](https://storm.wnba.com/[https://perma.cc/ZY8V-GWAY]).

²⁰⁰ These teams are the Washington Mystics; Indiana Fever; Minnesota Lynx; New York Liberty; and Phoenix Mercury. *Abby Blomstrom*, MONUMENTAL SPORTS, [https://monumentalsports.com/\[https://perma.cc/A9DU-5MKU\]](https://monumentalsports.com/[https://perma.cc/A9DU-5MKU]); *Frank Pulice*, *supra* note 96; *Suzanne Spellacy*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/Q8CD-DB8C\]](https://www.linkedin.com/[https://perma.cc/Q8CD-DB8C]); *Jeffrey Gewirtz*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/R7Q4-H822\]](https://www.linkedin.com/[https://perma.cc/R7Q4-H822]); *Staff*, PHX. SUNS, [https://www.nba.com/\[https://perma.cc/DK2E-KQPA\]](https://www.nba.com/[https://perma.cc/DK2E-KQPA]).

who played in 2023, seven had no identified counsel,²⁰¹ and three shared counsel with their respective MLS team affiliate.²⁰²

However, two NWSL teams have independent in-house counsel listed: the Kansas City Current and Washington Spirit. It is important to recognize these individuals and their backgrounds:

Shameeka Quallo, *VP & General Counsel*, Washington Spirit: A 2012 graduate of Rutgers Law School, Ms. Quallo assumed this role in April 2023, where she “counsel[s] and advise[s] across all areas of the organization, including overseeing human resources.”²⁰³ In a press release, Spirit owner Michele Kang noted that Quallo “brings a wealth of experience in her legal and diversity, equity and inclusion expertise, particularly in sports” and would be “spearheading” the team’s efforts of advancing the club.²⁰⁴ Prior to joining the Spirit, Quallo served in legal roles for the Ladies Professional Golf Association, the International Speedway Corporation (ISC), and most recently with the Chicago Cubs.

Maggie Walters, *General Counsel*, Kansas City Current: A 2013 graduate of The University of

²⁰¹ These teams are Angel City FC; Chicago Red Stars; NJ/NY Gotham FC; North Carolina Courage; OL Reign; Racing Louisville FC; and San Diego Wave. *See Technical Staff*, ANGEL CITY FC, <https://angelcity.com/> [<https://perma.cc/2CCE-76NP>]; *Front Office*, CHI. RED STARS, <https://chicagoredstars.com/> [<https://perma.cc/HU7S-G52R>]; *Front Office*, NJ/NY GOTHAM FC, <https://www.gothamfc.com/> [<https://perma.cc/PSA8-R8HR>]; *Front Office*, N.C. COURAGE, <https://www.nccourage.com/> [<https://perma.cc/CL5M-52W6>]; *Roster*, SEATTLE REIGN FC, <https://www.reignfc.com/> [<https://perma.cc/Y2W2-P4ZB>]; *Racing Louisville FC Front Office*, RACING LOUISVILLE FC, <https://www.racingloufc.com/> [<https://perma.cc/M7KH-J93M>]; *Front Office Staff*, SAN DIEGO WAVE FC, <https://sandiegowavefc.com/> [<https://perma.cc/6Z7X-HTFB>].

²⁰² These teams are Orlando Pride; Portland Thorns FC; and Houston Dash. *Front Office*, ORLANDO CITY SC, <https://www.orlandocitysc.com/> [<https://perma.cc/74WW-B6DZ>]; *Front Office*, PORTLAND THORNS, <https://www.timbers.com/> [<https://perma.cc/H8UX-7YR6>]; *Front Office*, HOUS. DASH, <https://www.houstondynamofc.com/> [<https://perma.cc/KXE3-Q5SK>].

²⁰³ *The Washington Spirit Hires Shameeka Quallo, Esq. as VP and General Counsel*, WASH. SPIRIT (Apr. 14, 2023), <https://washingtonspirit.com/> [<https://perma.cc/5ZPZ-X225>].

²⁰⁴ *Id.*

Law, London, Moorgate (LLB) and the University of Missouri-Kansas City School of Law (LLM), Walters was appointed as General Counsel June 2022. Walters made a name for herself in the industry after beginning her career as a Legal Assistant with Sporting Kansas City of MLS²⁰⁵ and later joining Kroenke Sports & Entertainment—which controls, among other entities, the Colorado Avalanche (NHL), Denver Nuggets (NBA), Colorado Rapids (MLS) and Colorado Mammoth (NLL).²⁰⁶ On her hiring, team president Allison Howard noted: “She has an excellent track record across many different sports teams and leagues. We are thrilled to welcome her back to Kansas City.”²⁰⁷

Although there are currently limited opportunities within the NWSL and WNBA, these two leagues indicate the potential for growth in the space. As these leagues further develop and expand, new legal opportunities will likely emerge.

IV. THE EVOLVING WORK OF THE GENERAL COUNSEL

The role of General Counsel within a professional sports club is,²⁰⁸ at its core, no different than that of in-house counsel within any other industry—an attorney where the “organization is [their] only client.”²⁰⁹ In addition to the primary work areas discussed in our prior Article, and touched on throughout this Article, “a critical function of the GC is to serve as a trusted business advisor to the management team.”²¹⁰ Consequently, General Counsels in sports benefit from and must develop a working knowledge of a wide range of sports business issues, including facility operations, ticketing strategy, sponsorships, broadcast technologies, communications, accounting, and more. As the sports industry

²⁰⁵ *Maggie Walters*, LINKEDIN, [https://www.linkedin.com/\[https://perma.cc/9BRR-R4AP\]](https://www.linkedin.com/[https://perma.cc/9BRR-R4AP]).

²⁰⁶ *Kansas City Current Appoints Maggie Walters Foltz as New General Counsel*, KAN. CITY CURRENT (Jun. 7, 2022), [https://www.kansascitycurrent.com/\[https://perma.cc/J4SM-BGNK\]](https://www.kansascitycurrent.com/[https://perma.cc/J4SM-BGNK]).

²⁰⁷ *Id.*

²⁰⁸ Norman Wain, *The 12th Teammate – The Role of the Sports GC*, ACC DOCKET (Aug. 1, 2015), [https://docket.acc.com/\[https://perma.cc/CZC7-G4SE\]](https://docket.acc.com/[https://perma.cc/CZC7-G4SE]).

²⁰⁹ MODEL RULES OF PRO. CONDUCT r. 1.13 (AM. BAR ASS’N 2023).

²¹⁰ *Id.*

evolves and adapts to changes in the business model and new technologies, the following areas of expertise will likely become increasingly important for individuals hoping to attain the role of General Counsel within a club: data privacy; real estate and mixed-use development; and issues presented by the changing cultural and technological landscape.

A. DATA PRIVACY

The advancements in technological data collection—and the issues raised through emerging opportunities and efforts to monetize certain data—have been impactful on the sports industry. As the legal and regulatory schemes change—internationally, domestically, and locally—General Counsels need to be mindful that they understand the evolving landscape to ensure that their clubs remain compliant.

At the top level, such understanding involves the recognition that the data processed can often, at least in part, be of a highly sensitive nature.²¹¹ This concern is so substantial that “data protection in sport was the theme of the annual Forum on Sport and Human Rights” for 2023, a forum organized by the “Enlarged Partial Agreement on Sport (EPAS) in collaboration with the Data Protection Unit of the Council of Europe.”²¹² This recognition is substantially the result of the European Union’s 2016 passage of the General Data Protection Regulation (GDPR) that “imposes obligations onto organizations anywhere, so long as they target or collect data related to people in the EU.”²¹³ Such obligations include, but are not limited to, minimizing the data collected for legitimate and limited purposes, ensuring up-to-date accuracy of collected information, implementing technical and organizational measures for security, and obtaining unambiguous consent to utilize collected data.²¹⁴ As an enforcement mechanism, “GDPR will levy harsh fines against those who violate its privacy and security standards, with penalties reaching into the tens of millions of euros.”²¹⁵

In the United States, “in the absence of a comprehensive federal law,” states have enacted their own comprehensive privacy

²¹¹ *Data Protection at the Centre of the Forum on Sport and Human Rights*, COUNCIL OF EUR. PORTAL (Jun. 30, 2023), [https://www.coe.int/\[https://perma.cc/W2AN-FXAX\]](https://www.coe.int/[https://perma.cc/W2AN-FXAX]).

²¹² *Id.*

²¹³ *What Is GDPR, the EU's New Data Protection Law?*, GDPR.EU, [https://gdpr.eu/\[https://perma.cc/9RKR-KWKD\]](https://gdpr.eu/[https://perma.cc/9RKR-KWKD]).

²¹⁴ *Id.*

²¹⁵ *Id.*

measures.²¹⁶ As of November 27, 2023, there are “15 states – California, Virginia, Connecticut, Colorado, Utah, Iowa, Indiana, Tennessee, Oregon, Montana, Texas, and Delaware – that have comprehensive data privacy laws in place” and during the “2022–23 legislative cycle, at least 16 states have introduced privacy bills that address a range of issues, including protecting biometric identifiers and health data.”²¹⁷

California was the first to enact such comprehensive legislature through the California Consumer Privacy Act of 2018 (CCPA), which, since its enactment, has been amended by the California Privacy Rights Act of 2020 (CPRA).²¹⁸ This legislation created “an array of consumer privacy rights and business obligations with regard to the collection and sale of personal information.”²¹⁹ The primary consumer rights under the CCPA and CPRA are as follows:

- The right to know about the personal information a business collects about them and how it is used and shared;
- The right to delete personal information collected from them (with some exceptions);
- The right to opt-out of the sale or sharing of their personal information;
- The right to non-discrimination for exercising their CCPA rights;
- The right to correct inaccurate personal information that a business has about them; and
- The right to limit the use and disclosure of sensitive personal information collected about them.²²⁰

Sports teams collect lots of data about their fans. This data is collected through ticket and merchandise purchases or any other way in which fans engage with the club. The data is typically

²¹⁶ *Which States Have Consumer Data Privacy Laws?*, BLOOMBERG L. (Mar. 18, 2024), <https://pro.bloomberglaw.com/> [<https://perma.cc/PWM2-767B>].

²¹⁷ *Id.*

²¹⁸ *Data Collection & Management, Overview – CCPA and CPRA FAQs*, BLOOMBERG L., <https://www.bloomberglaw.com/> [<https://perma.cc/GXE2-99SJ>].

²¹⁹ *Id.*

²²⁰ *California Consumer Privacy Act (CCPA)*, STATE OF CA. DEP’T OF JUST. OFF. OF THE ATT’Y GEN. (Mar. 13, 2024), <https://oag.ca.gov/> [<https://perma.cc/S9VJ-7GSG>].

aggregated in a large customer relations management software and used by the teams in their marketing efforts.

Nevertheless, sports teams in recent years have had to review and revise their websites' privacy policies and various methods of collecting data to ensure they comply with the law. Most notably, teams have had to provide fans the opportunity to opt out of having their data collected. Moreover, sports teams must carefully consider how fan data may be transferred to or from different vendors with which they work. The transmission of such data, particularly when part of a commercial transaction, could potentially violate some laws.

The fact that a team is not based in a state with a data privacy law is irrelevant. Teams have data on fans across the United States and, via their websites and social media, effectively market themselves worldwide. Consequently, teams must comply with the laws of each place from which they might receive fan data, including the European Union.

As for a team's players, some have argued that "professional sport is pushing the envelope in gathering and using player biometric data and will increasingly come up against player privacy issues."²²¹ In response to these concerns, players' unions have sought to constrain the collection and use of player health data in the collective bargaining agreements. For example, Article 39, Section 14 of the NFL-NFLPA Collective Bargaining Agreement, governs biospecimen data collection, defined as the "effort to collect, monitor, analyze information on or in connection with the blood, urine or other biospecimen."²²² Such data explicitly "shall not be used by [a] Club or any third-party for any purpose other than supporting player health and/or performance."²²³ Similarly, the NBA-NBPA Collective Bargaining Agreement provides for a joint committee to evaluate and approve wearable technologies teams may request players to wear.²²⁴ Accordingly, General Counsels may have to ensure that staff are not collecting or utilizing player health data in a prohibited manner.

²²¹ Matthew Hennessy et al., *Professional Sports May Run Afoul of Privacy Law in Collecting Player Biometric Data*, DENTONS, <https://www.dentons.com/> [<https://perma.cc/67S6-6VX3>].

²²² NAT'L FOOTBALL LEAGUE PLAYERS ASS'N-NAT'L FOOTBALL LEAGUE MGMT. COUNCIL, COLLECTIVE BARGAINING AGREEMENT, Art. 39, § 14 [hereinafter NFLPA-NFL CBA].

²²³ *Id.*

²²⁴ NAT'L BASKETBALL ASS'N-NAT'L BASKETBALL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT, Art. XXII, § 13 (2023), [hereinafter NBA-NBPA CBA].

Concerns about player health data are running up against the apparent possibilities of monetizing such data. Leagues and teams “have realized significant new revenue streams as they have sold live competition data to the data companies that have emerged to distribute data to end users such as the sports betting industry.”²²⁵ To date, this data has been focused on the gameplay (such as speed) rather than a player’s health (such as heart rate). However, there are growing discussions about the possibility of gathering and publicly disseminating such information for entertainment (e.g., betting) purposes. Team General Counsels will undoubtedly continue to be involved in such discussions and make sure that any such monetization complies with applicable law.

B. REAL ESTATE & MIXED-USE DEVELOPMENT—TEAM EXPANSION OF PROPERTY HOLDINGS

It is no secret, or new trend, that “professional sports franchises are constantly looking to maximize revenue—including gate receipt revenue, their second largest revenue stream—and for new sources of game day revenue, and that starts with their stadiums and arenas.”²²⁶ However, changing trends in the development of stadiums and arenas have resulted in the emergence of “stadium anchored mixed-use development” as the current dominant model.²²⁷ This focus is centered on creating “cutting-edge venues with indoor-outdoor features and capabilities to maximize franchise profits, provide fans with the ultimate game day experiences, and improve the economic health of the surrounding communities.”²²⁸ These monumental endeavors include the developments of SoFi Stadium by the Los Angeles Rams and Chargers at a total cost of over \$5.5 billion, “easily the most expensive stadium ever built”; Allegiant Stadium, home to the Las Vegas Raiders at a cost of \$1.9

²²⁵ David Manek & Jonny Gray, *United States: Monetizing Sports Data and Protecting Athlete Privacy: Where is the Balance?*, MONDAQ (Feb. 14, 2023), <https://www.mondaq.com/> [<https://perma.cc/CGZ4-RJEE>].

²²⁶ Terry Banike, *Stadium Anchored Mixed-Use Development: Part 2*, REALOGIC (Jan. 10, 2023), <https://www.reallogicinc.com/> [<https://perma.cc/7S3H-X822>].

²²⁷ Terry Banike, *Stadium Anchored Mixed-Use Development: Part 3*, REALOGIC (Jan. 19, 2023), <https://www.reallogicinc.com/> [<https://perma.cc/P7X6-5NCT>] [hereinafter Banike, *Part 3*].

²²⁸ Alexander Chester & Robert Davydov, *The Revolution of NFL Stadiums: An Analysis of Deal Structure & Related Rewards*, DUANE MORRIS (Sept. 7, 2023), <https://www.duanemorris.com/> [<https://perma.cc/ZLA6-N7BU>].

billion;²²⁹ and the Washington Wizards and Capitals active nonbinding agreement which could result in the development of a \$2 billion, 12-acre mixed-use complex in Alexandria's Potomac Yard in Northern Virginia.²³⁰

In part, the shift to mixed-use development came as a result of “taxpayers and politicians. . . becoming increasingly resistant to the idea of using public funds to finance new stadiums for private businesses.”²³¹ As such, the focus has become not only on the stadium itself, but on the opportunities and benefits of “redevelopment of the area around the stadium.”²³² This allows clubs to utilize their land as a revenue generating system where “people can live, work, shop, dine, drink, and play” in a more fully encompassing system.²³³ Overall, the “diversified income streams—by way of an ancillary real estate portfolio—present attractive value opportunities....”²³⁴

Depending on the league, such holdings can be a significant portion of the club's overall valuation. In fact, for MLS clubs, “the predominant value in most cases involves training complexes and new stadiums owned by teams....”²³⁵ The value of these holdings is crucial to MLS clubs and the United Soccer League, a lower-level professional league, as they seek to give a “first class fan experience” to drive market growth and expansion.²³⁶ Moreover, in some instances there are team-related businesses specific to stadium development and operation, such as “Cowboys owner Jerry Jones’

²²⁹ *Id.*

²³⁰ Sam Fortier et al., *Monumental, Youngkin Announce Deal to Move Caps, Wizards to Virginia*, WASH. POST (Dec. 13, 2023), <https://www.washingtonpost.com/> [<https://perma.cc/YH48-BTBL>].

²³¹ Banike, *Part 3*, *supra* note 227.

²³² *Id.*

²³³ Tom Dart, ‘*The Stadium Is Secondary*’: *How US Sports Teams Became Real-Estate Speculators*, THE GUARDIAN (Dec. 6, 2023), <https://www.theguardian.com/> [<https://perma.cc/5K6C-8WCH>].

²³⁴ Jack Hogan, *Economic Considerations of Sports-Anchored, Mixed-Use Developments*, MORTENSON (May 26, 2023), <https://www.mortenson.com/> [<https://perma.cc/M8VF-68TD>].

²³⁵ 2022 MLS Franchise Valuations Ranking, SPORTICO (Sept. 28, 2022), <https://www.sportico.com/> [<https://perma.cc/EXT5-WJ8B>].

²³⁶ The Millionacres Podcast, *supra* note 138. This model is further seen across the United Soccer League (USL), which is “in active conversations with 30 markets across the U.S.,” working to grow its professional league. Michael LoRé, *USL Expansion Centered on Stadium-Anchored Entertainment Districts*, FORBES (Mar. 3, 2020), <https://www.forbes.com/> [<https://perma.cc/B4PU-ZVRE>].

20%-plus interest in Legends Hospitality, a stadium operations corporation[.]”²³⁷

Accordingly, a working knowledge of real property law, including local government considerations²³⁸ and potential associated tax opportunities²³⁹ will become increasingly important to General Counsels as clubs expand their holdings and developments. This development has likely led to clubs viewing prior real estate experience as a positive attribute of potential candidates for General Counsel. By way of example, Keirstin Beck, the current EVP, General Counsel at Kroenke Sports & Entertainment, owner of several sports teams, including the Los Angeles Rams, was hired into the organization in 2021 from her prior role as Special Counsel at Foster Graham Milstein & Calisher, where her transactional practice “focuse[d] mainly on land use, real estate, and business.”²⁴⁰

C. CHANGING CULTURAL & TECHNOLOGICAL LANDSCAPE

Lastly, as the cultural and technological landscape change, so do the issues presented to the sports teams. Among the most notable recent trends are sports betting, cannabis legalization, changes in allowable club ownership schemes, and the advancement of fintech and cryptocurrencies.

First, since the Supreme Court struck down the Professional and Amateur Sports Protection Act (PASPA) in 2018,²⁴¹ the sports betting industry across the United States has changed significantly.²⁴² As of January 11, 2024, now 38 states and D.C. have live sports betting operations, and four more states have active legislation or ballot initiatives regarding sports betting.²⁴³ In some instances, these operations are more ancillary to the clubs; however,

²³⁷ 2023 NFL Franchise Valuations Ranking, *supra* note 191.

²³⁸ See John Garcia, *House Committee to Hear Legislation in Support of Chicago Bears' Plans to Move to Arlington Heights*, ABC7 CHI. (May 15, 2023), <https://abc7chicago.com/> [<https://perma.cc/ELD9-ZJFY>].

²³⁹ See, e.g., *Chicago Bears Hold Off on Tax Break Pursuit for New Stadium*, FOX32 CHI. (Sept. 14, 2023), <https://www.fox32chicago.com/> [<https://perma.cc/9CNV-QWFC>].

²⁴⁰ Keirstin Beck, LINKEDIN, <https://www.linkedin.com/> [<https://perma.cc/3B8X-YMBY>].

²⁴¹ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 486 (2018).

²⁴² Patrick Everson, *Regulated Sports Betting Industry Booming Five Years After PASPA's Repeal*, FOX SPORTS (May 19, 2023), <https://www.foxsports.com/> [<https://perma.cc/WEF6-P7UG>].

²⁴³ *Interactive U.S. Map: Sports Betting*, AM. GAMING ASS'N, <https://www.americangaming.org/> [<https://perma.cc/CKZ9-F9XT>].

there are states wherein there is a more direct link. For example, in Arizona “House Bill 2772 and amended Tribal-State Gaming Compacts directed the Arizona Department of Gaming (ADG) to adopt rules and act as the primary regulator and enforcement body for event wagering and fantasy sports contests.”²⁴⁴ Under this system, ten of the available 20 event wagering licenses can go to an “Arizona professional sports team or franchise.”²⁴⁵ The Arizona Diamondbacks, for instance, have partnered with Caesars Sportsbook.²⁴⁶ In addition, several stadiums actively host sports books. For example, BetMGM Sportsbook is at State Farm Stadium, home of the Arizona Cardinals²⁴⁷ and FanDuel Sportsbook is at Footprint Center, home of the Phoenix Suns.²⁴⁸

To the extent sports teams are actively involved in sports betting, they must ensure they remain compliant in one of the most heavily regulated and scrutinized industries in the country. Obtaining a sports betting license is a lengthy and detailed process that exposes a team and its principal owners to lengthy investigations and background checks. The team and its sports betting partner will also need to demonstrate comprehensive security protocols for money, data, people, and more. General Counsels, working with outside counsel specializing in gaming, are crucial to this process.

Finally, sports betting is now one of the most lucrative sponsorship opportunities for sports teams. League rules are evolving in this newish area, and General Counsels will be at the frontline of ensuring compliance with state and local laws and league rules while also helping the business team maximize revenues.

Second, in recent years, legalizing cannabis has been a trend across the United States, at least in certain capacities. As of April 24, 2023, “38 states, three territories and the District of Columbia allow the medical use of cannabis products”²⁴⁹ and, as of November 8, 2023, 24 states, two territories, and the District of Columbia

²⁴⁴ *General Information*, ARIZ. DEP’T OF GAMING, <https://gaming.az.gov/> [https://perma.cc/38QN-DAQ2].

²⁴⁵ *Id.*

²⁴⁶ Stefan Krysa, *Caesars Sportsbook at Chase Field: Guide, Promos & More*, BET ARIZ. (Mar. 28, 2024), <https://www.betarizona.com/> [https://perma.cc/KR3M-FTH3].

²⁴⁷ *BetMGM Sportsbook at State Farm Stadium*, ARIZ. CARDINALS, <https://www.azcardinals.com/> [https://perma.cc/ZM6G-3FB7].

²⁴⁸ *FanDuel Sportsbook*, FANDUEL, <https://www.fanduel.com/> [https://perma.cc/FV7N-M2K2].

²⁴⁹ *State Medical Cannabis Laws*, NAT’L CONF. OF STATE LEGISLATURES (June 22, 2023), <https://www.ncsl.org/> [https://perma.cc/J8Y5-FKAB].

permit recreational use.²⁵⁰ This trend has trickled into professional sports where, in some instances, bans have been lifted, and testing has become suspended. The testing of cannabis has even begun in a medicinal way for player health.²⁵¹ Most recently, the NBA-NBPA CBA permits passive player investment in cannabis companies²⁵² and sponsorship opportunities in the CBD and cannabis space.²⁵³ As with sports betting, General Counsels will need to be mindful of complex regulatory landscape concerning cannabis, while also seeking to assist the club in monetizing the space if possible.

Third, in recent years, leagues have dramatically altered their rules concerning permissible ownership structures.²⁵⁴ The NFL historically required that its clubs be family-owned, *i.e.*, that a particular family owned at least 51% or more of the club's equity.²⁵⁵ These rules were derived from, and helped sustain, the family dynasties that created and ran the league, including the Chicago Bears' Halas family, the New York Giants' Mara family, the Pittsburgh Steelers' Rooney family, and the Kansas City Chiefs' Hunt family.²⁵⁶ These rules precluded ownership by public shareholders, public corporations, nonprofit organizations, and private equity firms.²⁵⁷ The Green Bay Packers are a famous exception to the rules, as the club is publicly owned by more than 500,000 stockholders, mostly fans.²⁵⁸

The NFL has been forced to bow to reality and change these rules several times since the 1980s.²⁵⁹ First, in that decade, the required ownership percentage for the controlling owner was reduced from 51% to 30%.²⁶⁰ Then, to enable succession planning,

²⁵⁰ *Id.*

²⁵¹ Jake Mantin, *Professional Athletes: The Spark to Ignite Medical Marijuana Reciprocity*, 12 ARIZ. ST. SPORTS & ENT. L. J. 111, 113 (2022).

²⁵² See NBA-NBPA CBA, *supra* note 224, at Art. VI, § 20.

²⁵³ See, e.g., Terry Lefton, *MLB Approves CBD Sponsorships in Landmark Change for Sports Leagues*, SPORTS BUS. J. (June 22, 2022), <https://www.sportsbusinessjournal.com/> [<https://perma.cc/H3KS-DNCN>].

²⁵⁴ Daniel Kaplan, *NFL Pares Ownership Rule*, SPORTS BUS. J. (Oct. 26, 2009) <https://www.sportsbusinessjournal.com/> [<https://perma.cc/3NZT-QP5X>]; see also Erik Jackson, *The 32: What Does it Take to Become an NFL Owner?*, SPORTICO (Sept. 13, 2022), <https://www.sportico.com/> [<https://perma.cc/9VSZ-YFHS>].

²⁵⁵ See Kaplan, *supra* note 254.

²⁵⁶ *Id.*

²⁵⁷ See Jackson, *supra* note 254.

²⁵⁸ *Id.*

²⁵⁹ See Kaplan, *supra* note 254.

²⁶⁰ *Id.*

the NFL lowered the threshold to 10% for teams that had been owned for at least ten years by the same family, provided that other family members owned at least 20% of the club.²⁶¹ In recent years, that figure was reduced to 5% and then finally just 1% in 2022.²⁶²

The exponential rise in franchise values has driven changes to these rules. According to Sportico, the average NFL franchise is worth \$4.14 billion.²⁶³ The Denver Broncos were recently sold to Rob Walton of Walmart fortune for a record \$4.65 billion.²⁶⁴ These high prices make it extremely challenging for even the wealthiest people to buy controlling stakes in NFL clubs. As a result, the league now permits buyers to obtain up to \$1 billion in debt financing.²⁶⁵ Moreover, clubs can have up to 25 people in an ownership group.²⁶⁶

For other sports leagues with similar problems, the answer has come in the form of private equity.²⁶⁷ In the past two years, the NBA, MLB, NHL, and MLS have all changed their ownership rules to permit private equity funds to buy passive, minority stakes in clubs.²⁶⁸ Existing private equity firms and new sports-focused firms have since begun buying stakes in clubs, including Dyal HomeCourt and Arctos Sports Partners.²⁶⁹ The valuations and sale prices of sports teams have seemed both unstoppable and uncorrelated with other markets, making them attractive investments. Indeed, when the Phoenix Suns were recently sold for \$4 billion, Dyal achieved a 158% return on investment in just 18 months.²⁷⁰

Finally, even players want in on the action. The new NBA-NBPA CBA provides that “the Players Association or an affiliate of the Players Association may invest on behalf of all NBA players in one or more private investment funds approved by the NBA to acquire passive, non-voting minority interests in one or more NBA Teams.”²⁷¹

²⁶¹ See Kaplan, *supra* note 254; Jackson, *supra* note 254.

²⁶² See Kaplan, *supra* note 254; Jackson, *supra* note 254.

²⁶³ Kurt Badenhausen, *NFL Team Valuations 2022: Cowboys Rule at \$7.6B as Average Tops \$4B*, SPORTICO (Aug. 1, 2022), <https://www.sportico.com/> [<https://perma.cc/3HZQ-2G6V>].

²⁶⁴ *Id.*

²⁶⁵ See Jackson, *supra* note 254.

²⁶⁶ *Id.*

²⁶⁷ Eben Novy-Williams, *Suns \$4B Sale Sees Dyal Cash Out in First NBA Private Equity Exit*, SPORTICO (Feb. 8, 2023), <https://www.sportico.com/> [<https://perma.cc/4PQD-SEB7>].

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ NBA-NBPA CBA, *supra* note 224, at Art. XXIX, § 12.

Given the growing importance of private equity to sports teams, experience in this area of the law will likely become more important for General Counsels.

Fourth, the advancements in the fintech and cryptocurrency industries have also affected sports. Both industries have become major sponsors in recent years. For example, Crypto.com became the exclusive cryptocurrency partner of FIFA and the 2022 World Cup,²⁷² and the Staples Center was renamed to the Crypto.com Arena.²⁷³ As such, there has been an intersection of the two areas that is present in sponsorship deals, fan involvement, and even athlete salary and bonuses in certain instances.²⁷⁴ In part, this is because of the potential for such overlap to attract younger demographics that are more likely to be interested in the cryptocurrency space.²⁷⁵ This intersection, however, has brought with it substantial issues—most notably, the “now infamous FTX” scandal.²⁷⁶ FTX was a crypto platform that collapsed into bankruptcy after it came to light that a majority of assets held by FTX’s sister company, Alameda Research, was not in fiat currency, which led to investors and customers pulling funds from FTX, which led to a multitude of criminal charges and civil actions.²⁷⁷ This scandal has implicated not only professional athletes as sponsors,²⁷⁸ but also clubs themselves. Litigation efforts have been

²⁷² Flugelsoft Group of Companies, *Crypto Sponsorships Take Center Stage in Sports and Entertainment*, LINKEDIN (Aug. 28, 2023) <https://www.linkedin.com> [https://perma.cc/DKA2-PWEP].

²⁷³ Jabari Young, *Crypto.com Buys Naming Rights to Lakers’ Staples Center in a \$700 Million Deal*, CNBC (Nov. 17, 2021), <https://www.cnbc.com/> [https://perma.cc/S6DY-PQJH].

²⁷⁴ FM Contributors, *Crypto’s Influence on Sports: Exploring the Intersection of Finance and Athletics*, FIN. MAGNATES (Apr. 8, 2023), <https://www.financemagnates.com/> [https://perma.cc/2PG3-TTFN].

²⁷⁵ Simon Yu, *Why Sports and Crypto Getting Together Is a Win-Win*, COINDESK (Sept. 19, 2023), <https://www.coindesk.com/> [https://perma.cc/53FL-EALU].

²⁷⁶ Jeff Birren, *The Sports World and the Collapse of the FTX House of Cards*, SPORTS LITIG. ALERT (Feb. 24, 2023), <https://sportslitigationalert.com/> [https://perma.cc/PDN9-B2QT].

²⁷⁷ Nathan Reiff, *The Collapse of FTX: What Went Wrong with the Crypto Exchange?*, INVESTOPEDIA (Mar. 28, 2024), <https://www.investopedia.com/> [https://perma.cc/BDR7-W539].

²⁷⁸ Kurt Badenhausen, *Tom Brady’s Failed FTX Sponsorship Worth \$55M, per Michael Lewis*, SPORTICO (Oct. 2, 2023), <https://www.sportico.com/> [https://perma.cc/V7LU-6W8X].

directed at a club, the Golden State Warriors,²⁷⁹ which is the subject of a complaint filed in San Francisco on November 21, 2022.²⁸⁰

As changes in these areas and other aspects of the social and technological landscape evolve, the clubs will face new and emerging challenges. General Counsels need to be mindful of how these changing systems impact their clubs to ensure overall compliance.

CONCLUSION

As noted in the 2017 article *General Counsels in Sports: An Analysis of the Responsibilities, Demographics, and Qualifications*, there is no clear and direct path to general counsel. However, the updated and expanded analysis in this Article provides certain themes and trends regarding the path to General Counsel in the leagues identified as the Big Four—NFL, NHL, NBA, and MLB. Additionally, in recognition of the significant growth of professional soccer and women's sports, we have addressed the MLS, WNBA, and NWSL. These trends, coupled with emerging and evolving areas of practice within the industry, provide insight into where the role is now and where it has the potential to go.

Within the Big Four, there were two primary changes from 2017 to 2023. First, there was increased diversity: (a) there was an overall increase in the number of Black/African American General Counsels and a slight increase across other racial/ethnic groups; and (b) there was a significant increase in the percentage of women General Counsels. Second, there was an increase in the number of General Counsels who had some aspect of previous experience within the sports industry prior to entering their current role, namely having: (a) prior legal experience within the industry; (b) previously worked for a prominent sports law firm, or (c) prior experience in an Associate Counsel role.

Otherwise, concerning General Counsels in the Big Four, there have not been meaningful changes in the past six years across the following categories: age, age when first hired as General Counsel, current law school ranking, years of legal experience prior to becoming General Counsel, prior law firm experience by size, and league office experience. Across these domains, the present Big Four General Counsels are comparable to their counterparts from six years prior (indeed, many individuals appear in both analyses).

Turning to the MLS, WNBA, and NWSL, the addition of research into these leagues has yielded some interesting findings. In

²⁷⁹ See Birren, *supra* note 276.

²⁸⁰ *Id.*

addition to the obvious—that is, adding more General Counsel positions to be sought after—these leagues show a trend towards hiring individuals of more varied backgrounds.²⁸¹

When examining MLS General Counsels and comparing them to their Big Four counterparts, there were three primary trends. First, there was an overall greater diversity of General Counsels, both as to racial/ethnic diversity—specifically those of Asian/Asian American and Hispanic heritage—and with a significantly greater number of women. Second, there is an overall skew towards individuals with lesser experience or prestige, namely that MLS General Counsels are, on average, younger, have fewer years of prior legal experience before entering the role, and tend to come from law schools and law firms of lower rank and prestige. Third, notwithstanding the preceding, they are more likely to have more directly related prior work experiences, specifically having more prior experience in a league office or Associate Counsel position.

Outside of the data categories themselves, another interesting finding is that General Counsels in the MLS, WNBA, and NWSL often end up in the role from non-traditional lateral moves. Thus, although it remains the most common path to begin working in a private practice firm position to establish expertise and proficiency, many have successfully taken a different path and approach to reach the General Counsel position. For a role that emerged only recently within the context of professional sports—with the 1970s and 1980s being the beginning of in-house counsel in the industry, with individuals such as Jan Volk of the Boston Celtics, who joined the team and worked in an ever-expanding capacity from “traveling secretary, [to] manager of equipment purchases, [to] general counsel, [to] assistant general manager, and finally, in 1984, [to] GM”²⁸²—the transformation of the pathway to the role of General Counsel, and the role itself, is extremely intriguing.

Lastly, for students or practitioners who one day hope to attain the role of General Counsel within the sports industry, it is beneficial to focus on becoming proficient in the types of work product that are most applicable to the given organization in sight.

²⁸¹ Although presently there are not enough General Counsels specific to WNBA or NWSL clubs to provide for a significant analysis, the individuals in these roles seem to mirror the MLS insofar as being of more diverse backgrounds and experiences than their Big Four counterparts. See Wong et al., *supra* note 1.

²⁸² Stan Grossfeld, *Jan Volk Used to Be Red Auerbach's Right-Hand Man. Now, He's Got a New Passion: Sports Photography*, BOS. GLOBE (May 19, 2020), <https://www.bostonglobe.com/> [<https://perma.cc/X53P-W3RM>].

That said, there are certainly areas of personal advancement or attainment of expertise that, based on the evolving needs of the industry, would make one a more valuable applicant. Specifically, over recent years, there has been a growing increase in the need for a working knowledge of data privacy, real estate and mixed-use development, and the legal and business operations that have adapted to the cultural and technological landscape—most recently, within the areas of sports betting, cannabis, club ownership structures, and fintech and cryptocurrency. The significance of these changes will impact the front office of professional sports teams, including the General Counsel office. Some of these changes have already occurred, and this Article demonstrates how these changes will continue to develop for years to come. An important takeaway for attorneys is to conform their practice based on the increased breadth of issues that General Counsel offices are handling; one method of doing so is expanding one's portfolio where possible.

In conclusion, this Article provides insight into the trends within the General Counsels themselves. Further, this Article provides insight into the work product needs within the industry, which, in addition to being a product of changing cultural and technological trends, is informed by trends regarding the size and value of franchises, coupled with clubs working to diversify their income streams—characteristics which will naturally lead to additional legal issues requiring the services of the General Counsel office. Moreover, although not reported specifically in the body of this Article, we recognize as a result of this expanded work that many of the Big Four teams have two to four attorneys in their General Counsel office; this trend entails that organization and management are now a part of the General Counsel position, as some now oversee a team of attorneys.

Beyond the scope of this Article, we have also identified various areas of future research to be done: (i) the percentage of time that Big Four General Counsels spend on different areas of the law during their typical work; (ii) in multi-attorney in-house offices, how work is apportioned across the different attorneys; (iii) the variations in compensation levels for different attorneys within the General Counsel office; (iv) the number of attorneys, and their experiences and backgrounds, within professional sports in roles underneath the General Counsel; and (v) trends regarding the usage of outside counsel, including, but not limited to, when, how, why, and on what projects they are typically utilized.

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**COLLEGIATE CHEER & DANCE TEAMS: ACCESSORIES FOR
THE FIELD, OR DESERVING AS RECOGNITION AS SPORTS?**

KRISTINA MAJOR*

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INTRODUCTION

Currently, collegiate cheer and dance do not receive Title IX protections despite their immense growth since Title IX was first applied to athletic departments in the 1970s. The NCAA, an intercollegiate athletics association, does not designate cheer and dance as sports, so they are not automatically presumed to be sports for the Office of Civil Rights' Title IX purposes. Courts have had a recent influx of lawsuits filed by student-athletes against their colleges and universities for failure to adhere to Title IX requirements, but it has been almost a decade since a court decided a case regarding collegiate cheer or dance teams' status under Title IX. Almost no colleges and universities satisfy their Title IX

requirements in general—which is technically a requirement to continue receiving federal funds—yet have faced no repercussions or fund withdrawal.

This Article first discusses the history and evolution of collegiate cheer and dance, demonstrating that modern forms of these sports are extremely distinct from the sports' origins regarding athleticism, skill, and dangers to the athletes' mental and physical health. It then details Title IX's history, sport qualification requirements, and the ways institutions can demonstrate compliance. It evaluates the ways collegiate cheer and dance arguably satisfy the NCAA's requirements for Title IX sports. It concludes that Title IX protections for collegiate cheer and dance teams are not only necessary to protect the athletes' health and wellness, but will also allow colleges and universities to comply more easily with their requirements under Title IX. Finally, it evaluates potential drawbacks to recognizing collegiate cheer and dance as sports. To achieve these important goals, the NCAA should recognize collegiate cheer and dance as "Emerging Sports" due to the immense growth the industries have undergone in the 21st Century.

I. THE EVOLUTION OF COLLEGIATE CHEER & DANCE

Although collegiate cheer and dance are vastly different today than they were at their inceptions, many still view them as existing primarily to support men's sports, which has delayed protection for the athletes on their teams. This section first walks through the origins of collegiate cheer and dance. Next, it details the vast changes the sports¹ have undergone over the past decade, including the intense requirements for auditions and the level of skill necessary.² Finally, this section addresses the perceptions that have relentlessly followed the sports throughout the years, despite the amount of growth they have undergone.

¹ This article will occasionally refer to collegiate cheer and dance as "sports," although the activities have not been designated as official sports by the NCAA. When discussing "sports" under the NCAA's designation, this article will differentiate when discussing cheer and dance, often by referring to them as "activities." Dictionary.com defines a sport as "an athletic activity requiring skill or physical prowess and often of a competitive nature," a definition that cheerleading and dancing fit into well. *See Sport*, DICTIONARY.COM, <https://www.dictionary.com/browse/sport>.

² It is common for dancers and cheerleaders to begin training and developing these skills at extremely young ages.

A. THE HISTORY OF COLLEGIATE CHEER & DANCE

Today, cheerleading is dominated by women, even though women were not allowed to cheer for decades following the sport's beginning.³ Various forms of dance have extensive histories outside of the collegiate setting, but college dance teams originated during the same decade that women were first allowed to cheer.⁴

1. COLLEGIATE CHEER: THE ORIGINS

Cheerleading began in the form of all-male pep clubs to cheer at football games.⁵ These teams went by a variety of names, including but not limited to pep teams, pep squads, drill teams, spirit squads, pom squads, and pom teams. In 1869, the first intercollegiate football game occurred between Princeton University and Rutgers University.⁶ The first all-male pep club was formed around 1880 at Princeton University, performing rehearsed chants during football games.⁷ Later, a Princeton graduate introduced the concept to University of Minnesota football fans, and cheerleading began spreading across the United States.⁸ As football and other collegiate sports grew in popularity, cheerleading continued expanding.⁹ However, women were not permitted to cheer on these squads until 1923.¹⁰

The introduction of women onto the sidelines of college football games corresponded with the introduction of tumbling routines and flashcards, both at the University of Minnesota.¹¹ Women first joined these cheerleading squads in large numbers, surpassing men's participation in the 1940s, when many college-aged men joined the military to fight in World War II.¹² Shortly following the war, the first cheerleading camp materialized and began to grow.¹³

Beginning in the 1960s, thousands of college cheerleaders attended camps to focus on dance, stunt, synchronization, and ways

³ *Being a Cheerleader – History of Cheerleading*, VARSITY (Oct. 20, 2014), <https://www.varsity.com/> [<https://perma.cc/9UJS-UUSC>].

⁴ *Dance Team History*, EPIC SPORTS, <https://www.cheer.epicsports.com/> [<https://perma.cc/UZN6-XDXL>].

⁵ *Being a Cheerleader*, *supra* note 3.

⁶ *Id.*

⁷ MB Roberts, *The Birth of Modern Cheerleading*, AM. PROFILE (Sept. 11, 2013) <https://americanprofile.com/> [<https://perma.cc/2E4Z-VVRK>].

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Being a Cheerleader*, *supra* note 3.

¹³ *Id.*

to promote school spirit.¹⁴ The National Cheerleaders Association (NCA), incorporated in 1961, remains one of the main organizations through which college, high school, and youth cheerleaders develop their skills and passion for the sport.¹⁵ The Universal Cheerleaders Association (UCA), founded in 1974, accomplishes these same goals and champions acrobatic feats.¹⁶ The same founder established the governing bodies for the sport and displayed the UCA's first National Championship on television in 1982.¹⁷ Today, the NCA and UCA host competitions where cheerleaders incorporate acrobatics, high-flying stunts, and gymnastics-style tumbling passes.¹⁸

2. COLLEGIATE DANCE: THE ORIGINS

Dance teams originated with the pep clubs of the 1920s, and the activity's popularity grew as a result of the push to increase school spirit during the Great Depression.¹⁹ These squads were comprised of both men and women, with women making up the majority.²⁰ At football games, the teams performed synchronized dances to the marching band music with swing aspects, both in the stands and on the field, often during halftime.²¹ Their dances included marching band and R.O.T.C.²² drill moves, plus popular dances of the times.²³ Eventually, these teams evolved to focus more on the dance aspect of their choreography and less on incorporating military drills.²⁴ They helped keep football fans engaged during halftime, and some

¹⁴ *Id.*

¹⁵ *Id.* Both the National Cheerleaders Association and the Universal Cheerleaders Association have corresponding organizations governing dance: The National Dance Alliance (NDA) and the Universal Dance Association (UDA). These organization offer opportunities similar to NCA and UCA.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Dance Team History*, EPIC SPORTS, <https://cheer.epicsports.com/dance-history.html> [https://perma.cc/T99R-J5FN].

²⁰ *Id.*

²¹ *Id.*

²² The Reserve Officers' Training Corps (R.O.T.C.) prepares young adults in colleges to become officers in the United States Military. The program is offered at nearly two thousand colleges and universities throughout the country. See *Reserve Officers' Training Corps (ROTC) Program*, TODAY'S MIL.: EDUC. & TRAINING, <https://www.todaysmilitary.com/> [https://perma.cc/L4HB-J653].

²³ *Dance Team History*, *supra* note 19.

²⁴ *Id.*

teams were even invited to perform on television shows, at bowl games, and in parades.²⁵

However, dance has existed for almost as long as humans, and is prevalent across all cultures as a form of physical expression.²⁶ It allows people to “release energy, express emotion, connect with other people, or enjoy the feeling of movement.”²⁷ Much of today’s dance finds its origins in ballet, which began as a story-telling art form in the eighteenth century.²⁸ However, it has lost some of its more restrictive elements in newer forms like modern, contemporary, lyrical, and jazz dance.²⁹

The Universal Dance Association, formerly Universal Dance Camps, was founded in 1980 to train drill teams in summer camps and clinics.³⁰ It is the sister organization to the UCA.³¹ The National Dance Alliance (NDA) was founded in 1976 as the NCA’s sister company, but its name became finalized in 1999.³² Collegiate dance teams primarily performed in the jazz, pom, and kick line styles for decades.³³ College dance focuses more on technique, while college cheer focuses more on stunt and tumbling.³⁴ The incorporation of hip hop elements into these styles significantly expanded in the 2010s, with UDA and NDA competitions allowing teams to compete in four categories: jazz, hip hop, pom, or “team,” which combines the three preceding categories.³⁵

²⁵ *Id.*

²⁶ *History of Dance: Universal Elements and Types of Dance*, MASTER CLASS (Nov. 18, 2021), [https://www.masterclass.com/\[https://perma.cc/53XX-FNM9\]](https://www.masterclass.com/[https://perma.cc/53XX-FNM9]).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See id.*

³⁰ *About Universal Dance Association*, UNIVERSAL DANCE ASSOC., [https://www.varsity.com/uda/\[https://perma.cc/L7BB-LCFQ\]](https://www.varsity.com/uda/[https://perma.cc/L7BB-LCFQ]).

³¹ *UCA College Nationals*, UNIVERSAL CHEER ASSOC., [https://www.varsity.com/uca/\[https://perma.cc/US46-WDDD\]](https://www.varsity.com/uca/[https://perma.cc/US46-WDDD]).

³² *About Us*, NAT’L DANCE ALL., <https://web.archive.org/web/20141006034425/http://nda.varsity.com/AboutUs.aspx> [https://perma.cc/JNF7-EGKY].

³³ Samantha Bellerose, *What is Pom Dance*, DANCE PARENT 101, <https://danceparent101.com/> [https://perma.cc/5Y75-WHKA]; *Kickin It Up a Notch*, DANCE SPIRIT (Nov. 5, 2008), [https://dancespirit.com/\[https://perma.cc/NS4X-HQTN\]](https://dancespirit.com/[https://perma.cc/NS4X-HQTN]).

³⁴ Meghan McFerran, *The Biggest Misconceptions About Being on a College Dance Team*, DANCE MAG. (Sept. 26, 2017), [https://www.dancemagazine.com/\[https://perma.cc/H6D5-E2SS\]](https://www.dancemagazine.com/[https://perma.cc/H6D5-E2SS]).

³⁵ Emma Bolton, *History of Hip-Hop Dance*, DANCE BIBLES (May 8, 2020), [https://dancebibles.com/\[https://perma.cc/89TJ-GP6G\]](https://dancebibles.com/[https://perma.cc/89TJ-GP6G]); UDA vs.

B. COLLEGIATE CHEER & DANCE TODAY

1. *CHEERLEADING*

Television and movies have made major contributions to the popularity, growth, and increasingly athletic nature of cheerleading. Bill Seely, USA Cheer's executive director, "[credits] much of the growth of cheerleading with getting the competitions on TV, ESPN in particular."³⁶ When studying the growth of cheerleading over the past few decades, the 2000 movie *Bring It On*³⁷ cannot be overlooked. In a 2019 article, reporter Savannah Cooper says "[t]his film offered a look into the coveted cheer world, while also offering both social commentary and slight satire that inspired millions of viewers across the country to pick up the closest pair of pompoms."³⁸ Cooper asserts that the movie inspired many to either pursue cheerleading or aim for leadership positions, discussing the camaraderie and teamwork inherent in each of the six *Bring It On* series films.³⁹ Rather than focusing directly on the school spirit aspect of cheerleading, the films do so in the context of preparing for, and hopefully winning, upcoming cheerleading competitions.⁴⁰ *Bring It On* is not the only piece of media focusing on cheerleaders and cheer competitions in the 21st Century. Other enduring media popularizing cheerleading that has stood the test of time includes *Fired Up!*, *Gotta Kick It Up!*, *Jennifer's Body*, *Glee*, *The Replacements*, *Hellcats*, *Fab Five: The Texas Cheerleader Scandal*, *Kim Possible*, and *Hit the Floor*.⁴¹ The public's interest in cheerleading remains alive and strong, as demonstrated by the 2020 Netflix documentary *Cheer*,⁴² which has been nominated for nine Emmys, and won three: Outstanding Directing For A Reality

NDA, PA. STATE UNIV. (Dec. 4, 2014), [https://sites.psu.edu/\[https://perma.cc/2D3E-FXP5\]](https://sites.psu.edu/[https://perma.cc/2D3E-FXP5]).

³⁶ *Being a Cheerleader*, *supra* note 3.

³⁷ *BRING IT ON* (Beacon Pictures 2000).

³⁸ Savannah Cooper, *Cult Film Crash Course: 'Bring It On'*, BAYLOR LARIAT (Apr. 1, 2019), [https://www.baylorlariat.com/\[https://perma.cc/E7E6-D8XH\]](https://www.baylorlariat.com/[https://perma.cc/E7E6-D8XH]).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Mary Sollosi, *15 of the Best Cheerleader Movies and TV Shows*, ENT.WKLY. (June 8, 2022, 5:03 PM), [https://ew.com/\[https://perma.cc/3EBK-MMQL\]](https://ew.com/[https://perma.cc/3EBK-MMQL]); Jasmine Ting & Katherine J. Igoe, *15 Cheerleader Movies and TV Shows That *Scream* Team Spirit*, COSMOPOLITAN (Sept. 28, 2022), [https://www.cosmopolitan.com/\[https://perma.cc/S7BP-J4P9\]](https://www.cosmopolitan.com/[https://perma.cc/S7BP-J4P9]).

⁴² *CHEER* (One Potato Productions, Boardwalk Pictures & Caviar 2020).

Program – 2020, Outstanding Picture Editing For An Unstructured Reality Program – 2020, and Outstanding Unstructured Reality Program – 2020.⁴³

Today, the physical requirements to “make”⁴⁴ a cheerleading team far surpass what they were at the beginning of the sport, when it mostly consisted of crowd-leading and chanting with megaphones. At the University of Virginia, making the team requires cheerleaders to be able to perform a standing tuck, a round-off tuck, a tumbling pass, a stretch full-down, a quick toss, and a toss liberty.⁴⁵ These skills involve many gymnastic elements like flips and round-off handsprings, along with stunts that involve a group throwing a cheerleader into the air while they twist and flip precisely before being caught.⁴⁶ These skills are extremely physically demanding and carry high rates of difficulty and injury, which will be discussed further in a later section of this Article.⁴⁷

2. DANCE

While cheerleading competitions became popular starting in the 1970s, collegiate dance has experienced unprecedented growth during the early 21st Century. The prevalence of dance in popular culture, thanks in large part to television shows that gave non-dancer members of the public additional insight into the dance world, played a significant role in its evolution.⁴⁸

The popular FOX show *So You Think You Can Dance* first aired in 2005.⁴⁹ The show hosts auditions across the country, assesses dancers’ abilities across dance styles and to pick up choreography

⁴³ *Cheer: Awards & Nominations*, TELEVISION ACADEMY (last visited Nov. 13, 2022), <https://www.emmys.com/shows/cheer> [https://perma.cc/G6UY-J3U9].

⁴⁴ “Making” a cheerleading team refers to participating in tryouts and being accepted onto the team by the judges a team uses to select its members. This is similar to applying to a school and being accepted or auditioning for a play and receiving a role.

⁴⁵ Elizabeth Timms, *Cheerleading: The Physical Evolution of the Sport*, UVA HEALTH (Sept. 30, 2020), <https://blog.uvahealth.com/> [https://perma.cc/RPZ3-9297].

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Happy Sharer, *Exploring the History, Audition Process and Cultural Influence of So You Think You Can Dance*, THE ENLIGHTENED MINDSET (Jan. 14, 2023) <https://www.lihpao.com/> [https://perma.cc/Q66F-GER7].

⁴⁹ Suzannah Friscia, *The “So You Think You Can Dance” Effect: How a TV Show Changed the Dance World*, DANCE MAG. (June 4, 2017), <https://www.dancemagazine.com/> [https://perma.cc/4X2P-QTW8]; *So You Think You Can Dance* (19 Entertainment, MRC Live & Alternative 2005).

quickly, and selects a final group of dancers to compete on the live show, where the audience and judges vote for their favorite dancers.⁵⁰ The wide variety of dance styles showcased on the show has helped to expose the public to many dance styles, connect people, and inspire young dancers and potential dancers.⁵¹ Karla Garcia, *So You Think You Can Dance* season five contestant, noted that dancers “are always seen behind an artist or in an ensemble,” but the show allows them to take the spotlight to showcase their stories—a significant change from dancers’ typical roles.⁵²

I began dancing in the year 2000, when I was three years old. I remember watching *So You Think You Can Dance* in its early seasons and feeling inspired by the incredible choreography and emotional performances. I idolized the performers on the show, as did many of my peers at my own Massachusetts dance studio. I remember deciding to dedicate myself to dance by paying better attention in class, stretching, and working on my strength and technique, and developing my own emotional expression through our routines. Dance kept me grounded even past college, and I honestly don’t know if I would have had the same love and connection to it if not for the media I consumed, which pushed me to be my best.

I was not alone in this experience. Like the media surrounding cheerleading, many have commented that *So You Think You Can Dance* changed the landscape of dance.⁵³ In the early 21st Century, other shows centered around dance emerged as dancers were placed in the spotlight, instead of being relegated to the background.⁵⁴

⁵⁰ Happy Sharer, *supra* note 48.

⁵¹ *Id.*

⁵² Friscia, *supra* note 49. Tate McRae, a season 13 *So You Think You Can Dance: The Next Generation* finalist, is changing this. After winning third place on the show, she debuted as a pop star. On her tour, she often performs complex choreography while performing her own songs, putting a spotlight on her impressive dance abilities. See August Brown, *Singer, Songwriter and Killer Dancer, Triple-Threat Tate McRae is Poised for Pop Stardom*, L.A. TIMES (Dec. 6, 2023, 3:00 AM), <https://www.latimes.com/> [<https://perma.cc/7NYK-VRHX>]; Uber Arena (@uberarena), *We are Obsessed*, TIKTOK (May 7, 2024), <https://www.tiktok.com/@uberarena/video/7366369776433777952?q=tate%20mcrae%20dancing&t=1717090671329> [<https://perma.cc/C4MS-HRZA>].

⁵³ Happy Sharer, *supra* note 48; Friscia, *supra* note 49; Brian Schaefer, *But is it Good for Dance? ‘So You Think You Can Dance’ at 15*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/> [<https://perma.cc/TR2B-AM8U>].

⁵⁴ See Schaefer, *supra* note 53.

Dancing With the Stars, *Dance Moms*, the *Step Up* movie franchise, *So Sharp*, *Dallas Cowboys Cheerleaders: Making the Team*, and *World of Dance* are only a few examples of other popular media resulting from a boom of interest in different forms of dance.⁵⁵ *Dance Moms* centered around a group of young dancers ages seven to 13, their mothers, and their instructor Abby Lee Miller, who demanded nothing but the best from the dancers.⁵⁶ One of Miller's most famous lines from the show is her admonition that "second place is the first to lose."⁵⁷ The show premiered in July of 2011, right before I entered my freshman year of high school and after I had been accepted to my school's varsity dance team. Every Thursday before practice began, my teammates and I would discuss not only Miller's ridiculous demands, but also the incredible athletic and artistic abilities of the young dancers on the show, particularly Maddie Ziegler and Chloe Lukasiak. Although these dancers were several years younger than us, they were constantly winning competitions, including at the national level, and executing skills we had only dreamed of learning.⁵⁸ Many of us began pushing ourselves to achieve similar heights, pursuing challenging tricks such as fouettés, leg-hold turns, and aerial cartwheels. Dancers across the country posted videos online of their attempts to master not only these tricks, but also routines that Ziegler and Lukasiak performed in competition.⁵⁹ Dancers still recreate these iconic dances on TikTok in 2023.⁶⁰

⁵⁵ *Dancing with the Stars* (BBC Studios Los Angeles 2005); *Dance Moms* (Collins Avenue Entertainment 2011); *STEP UP* (Touchstone Pictures, Summit Entertainment & Offspring Entertainment 2006); *So Sharp* (Collins Avenue Entertainment 2017); *Dallas Cowboys Cheerleaders: Making the Team* (Triage Entertainment 2006); *World of Dance* (Nuyorican Productions, World of Dance & Universal Television Alternative 2017).

⁵⁶ *Dance Moms* (Collins Avenue Entertainment 2011).

⁵⁷ Peter Economy, *9 Lessons for Success from Abby Lee Miller of 'Dance Moms,'* INC. (Feb. 20, 2015), [https://www.inc.com/\[https://perma.cc/PEJ8-C8HE\]](https://www.inc.com/[https://perma.cc/PEJ8-C8HE]).

⁵⁸ *Dance Moms* (Collins Avenue Entertainment 2011).

⁵⁹ Ti & Me TV, *Learn Maddie Ziegler's Cry Solo from Dance Moms – Full Dance Tutorial*, YOUTUBE (July 15, 2020), https://www.youtube.com/watch?v=QZm_dBTPvLw [<https://perma.cc/FN2B-5XRU>].

⁶⁰ See Gabby Zinkan (@gabbyzinkan), *POV: Me in 3rd Grade Performing Maddie's Solo "Cry" for my Grandma at Her House*, TIKTOK (Feb. 13, 2023), https://www.tiktok.com/@gabbyzinkan/video/7199753971966250286?_r=1&_t=8abQHWIJouw [<https://perma.cc/33WT-PL8J>].

As the public, including dancers, felt more inspired by and connected to dance, people dedicated more time and thought to the activity. Dancers began pushing themselves and mastering more advanced skills, developing new ones, choreographing, and sharing this progress online. Many competitive dances now include acrobatic dance tricks in various forms. Some examples include handsprings, aerials, kip-ups, headsprings, rubber bands, head stands, walkovers, and various types of flips and tumbling moves.⁶¹ This list is not exhaustive, and also does not include more traditional dance moves like pirouettes, turn sequences, turning disc jumps, leaps, toe-touches, and leg-hold turns.⁶² With these skills in their arsenals, dancers are more advanced and more competition-oriented than the dancers of the 20th Century. The recent significant changes in the field of dance, including college dance, make it necessary and likely that the sport's eligibility for Title IX protections will be reevaluated.

C. STEREOTYPES & PERCEPTIONS PLAGUING COLLEGIATE CHEER & DANCE

Many people who have never participated in cheer and dance only view these athletes on the sidelines and are unaware of their training and skill; this leads many to believe the teams act exclusively in a crowd-leading capacity, despite this being only a small portion of their focus in practice. Unfortunately, this erroneous perception has resulted in harmful stereotypes that continue to plague cheerleaders and dancers. While media portrayals of cheerleaders and dancers have helped popularize the sports, many contributed to contradictory stereotypes. Cheerleaders are often over-sexualized by fans and perceived as being snobby, peppy, unintelligent, unskilled, and less committed than other athletes to their activities—which may not even be acknowledged as sports.⁶³ Lily Langman, author at Honi Soit, the University of Sydney's student newspaper, contrasts the media's archetypal

⁶¹ Kimberly Hegeman, *The Tricks Studio Dancers Need to Learn Before Joining a College Dance Team*, DANCE SPIRIT (Apr. 19, 2020), <https://dancespirit.com/> [<https://perma.cc/Z3DE-42HL>].

⁶² *Id.*

⁶³ Giulia Gravia, *10 Cheerleading Stereotypes Proved Wrong*, BULL'S EYE <https://bullseyeab.wixsite.com/> [<https://perma.cc/BZ3W-X2XP>]; Emily Book and Ciara Phonsana, *Cheerleaders Face a Lot of Stereotypes*, THE WEST OTTAWAN (Oct. 6, 2021), <https://thewestottawan.com/> [<https://perma.cc/6MLR-4XUT>].

cheerleader with the modern cheerleader.⁶⁴ She describes the cheerleaders' portrayals in *Bring It On* and *American Beauty*⁶⁵ as "patriotically wholesome but vapid, virginal yet seductive," and discusses how Australia's competitive cheerleading industry works to combat this characterization.⁶⁶

Dancers are also over-sexualized, and many perceive them as pretentious, dramatic, weak, delicate, starved, and unintelligent.⁶⁷ Unfortunately, my 23 years of dancing have taught me that if I tell a man I'm a dancer without providing any additional context, he will respond with an eyebrow wiggle and make a sexual comment. It is not uncommon for people of any gender to sexualize dancers. However, the dancers' and cheerleaders' presence on the sidelines at sporting events has led many football and basketball fans to perceive them as mere accessories who are there to look pretty and provide entertainment, rather than skilled athletes. Not only does this dehumanize the athletes, but it also increases industry pressure to look a certain way if one wants to be successful. It detracts from the hard work that dancers put into developing their techniques and skillsets, especially when these pressures enter the classroom and affect the athletes' self-esteem and health by causing them to focus excessively on their appearance.

The ongoing controversy around the Dallas Cowboys Cheerleaders provides an in-depth look into many of the issues plaguing both cheer and dance teams. The *Dallas Cowboys Cheerleaders: Making the Team* television show details the tryout process athletes go through to have the privilege of performing with the team and donning their iconic two-piece white and blue uniforms.⁶⁸ Shea Duffy and Catherine Sigurdsson's opinion piece for The Hockaday School's student newspaper, The Fourcast, sums up and responds to a main argument criticizing the Dallas Cowboys Cheerleaders:

⁶⁴ Lily Langman, *Cheerleading: More Than a Hollywood Stereotype*, HONI SOIT (Oct. 26, 2017), <http://honisoit.com/> [<https://perma.cc/S5P8-T7RF>].

⁶⁵ Langman, *supra* note 64; *BRING IT ON* (Beacon Pictures 2000); *AMERICAN BEAUTY* (Jinks/Cohen Company 1999).

⁶⁶ Langman, *supra* note 64.

⁶⁷ Gianluca Russo, *10 Dancer Stereotypes We're So Tired of Hearing*, DANCE SPIRIT (Mar. 28, 2018), <https://dancespirit.com/> [<https://perma.cc/2V5Y-PJ6A>]; Jake Wood, *Challenging Stereotypes in Dance*, VOICE (July 4, 2017), <https://www.voicemag.uk/> [<https://perma.cc/ZAE8-PKHB>].

⁶⁸ *Dallas Cowboys Cheerleaders: Making the Team* (Triage Entertainment 2006).

One of the most common arguments against the cheerleaders is that they promote the sexualization of women and are exploited by the team and fans alike. However, the intensive training the cheerleaders undergo to perform, especially given their iconic jump-splits are broadcast on the largest screen in the NFL, should not be ignored. Discrediting their talent, passion and hard work under the guise of over-sexualization only reveals a larger issue with society's need to objectify women, not with the women themselves.⁶⁹

The Dallas Cowboys Cheerleaders are one of the most renowned NFL cheerleading squads. Many dancers and cheerleaders choose to audition for the team knowing that they will need another job to support themselves.⁷⁰ Members of the Dallas Cowboys Cheerleaders are “attorneys, nurses, medical school students, accountants, business owners, dance instructors, doctors, and more.”⁷¹ They are the prime example that these common stereotypes are not true, yet they continue to be affected by the lack of recognition for the sport at all levels.⁷²

In evaluating these issues and their intersection with the lack of Title IX protections for cheer and dance teams, the situation appears to be a Catch-22: Title IX protections would help people recognize cheer and dance as sports, but because they are not recognized as sports, they do not receive Title IX protections. The lack of Title IX protections is not the source of the stereotypes—cheer and dance teams preceded Title IX protections—but recognizing collegiate cheer and dance as sports for the purposes of Title IX would likely help chip away at harmful stereotypes and offer greater recognition for these athletes' extraordinary skill, ushering in necessary improvements for these athletes.

II. TITLE IX: EQUAL OPPORTUNITY IN ATHLETICS THROUGH THE YEARS

When collegiate cheer and dance are viewed in light of stereotypes connected with their origins, Title IX appears

⁶⁹ Shea Duffy, *Dallas Cowboys Cheerleaders: Female Idols or Symbols of Sexism*, THE FOURCAST (Dec. 13, 2019), [https://hockadayfourcast.org/\[https://perma.cc/7HPL-BQ9M\]](https://hockadayfourcast.org/[https://perma.cc/7HPL-BQ9M]).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

incompatible with these activities. Title IX protections are not applied to collegiate cheer and dance teams because those teams are considered ancillary to men's sports due to their roles as sideline performers at men's basketball and football games. However, this assumption is based on outdated notions, as many believe this is the only activity in which college cheerleaders and dancers participate. This section details the history of Title IX, the requirements for a sport to receive Title IX protections, and why collegiate cheer and dance have not yet received these protections.

A. TITLE IX'S FOUNDATIONS

Title IX of the Education Amendments was implemented in 1972 with the goal of providing women and men equitable opportunities at schools receiving federal funding.⁷³ The statute is enforced by the U.S. Department of Education's Office for Civil Rights (OCR).⁷⁴ Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."⁷⁵ Its origins are found in attempts to remedy the unequal treatment and discrimination towards women students and professors.⁷⁶ At first, Title IX did not explicitly include intercollegiate athletics programs, but "has long been interpreted to apply to all aspects of an institution's operations."⁷⁷ In Title IX's final form, it includes an amendment providing for "reasonable provisions considering the nature of particular sports," through the U.S. Department of Health, Education, and Welfare (HEW)

⁷³ *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC.: OFF. FOR C.R. (Aug. 20, 2021), <https://www2.ed.gov.html> [<https://perma.cc/LN4B-L3XR>].

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Sarah Pruitt, *How Title IX Transformed Women's Sports*, HISTORY (June 23, 2022), <https://www.history.com/> [<https://perma.cc/U6J2-LE5U>]. Title IX's primary author was Representative Patsy Mink, the first Asian American and woman of color ever elected to the United States House of Representatives; the bill was also authored and sponsored by Representatives Edith Green and Birch Bayh. Claire Kuwana, *50 Years of Title IX: The Defining Moments of Women's Sports*, SPORTS ILLUSTRATED (June 9, 2022), <https://www.si.com/> [<https://perma.cc/DW4P-P55T>].

⁷⁷ *Ohlensehlen v. University of Iowa*, 509 F.Supp.3d 1085, 1088 (S.D. Iowa 2020) (citing *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 271-72 (6th Cir. 1994), which cites to 20 U.S.C. § 1687(2)(A)).

regulations.⁷⁸ Universities receiving federal financial assistance have Title IX obligations in their athletic departments, but not all sports help schools qualify for this funding.⁷⁹

1. HISTORY: WOMEN'S ATHLETICS & TITLE IX'S RELEVANCE

Prior to Title IX and beginning in the late 1800s and early 1900s, women athletes typically competed against other women at their colleges or universities through intramural-type matches or “play days.”⁸⁰ However, as women began engaging in competitive sports, colleges and universities attempted to downplay the competitive aspects of women's sports, instead emphasizing inclusion and “play for play's sake.”⁸¹ The Division for Girls and Women in Sport had long banned intercollegiate women's athletics, only first encouraging intercollegiate programs for women beginning in 1963.⁸² Any progress made by the feminist movement of the 1920s was undone by the Great Depression, and little further progress was made until Title IX's implementation.⁸³

In 1971, the year before Title IX's implementation, fewer than 30,000 college women participated in sports at colleges and universities, as compared with over 170,000 college men participating in sports.⁸⁴ This resulted from the failure of colleges to offer women's teams.⁸⁵ Immediately after Title IX's adoption, it was unclear whether it applied to athletics departments. The NCAA argued that it did not, as those departments received no federal funds

⁷⁸ *Title IX: History of Title IX*, WOMEN'S SPORTS FOUND., <https://www.womenssportsfoundation.org/> [https://perma.cc/9UEY-49VU].

⁷⁹ *Requirements Under Title IX of the Education Amendments of 1972*, U.S. DEP'T OF EDUC.: OFF. FOR C.R. (Jan. 10, 2020), <https://www2.ed.gov.html> [https://perma.cc/SK38-PBTX].

⁸⁰ Genevieve Carlton, *How Title IX Impacts Women's Equality in College Athletics*, BEST COLLS. (Nov. 19, 2021) <https://www.bestcolleges.com/> [https://perma.cc/EB43-3K8G]; Richard C. Bell, *A History of Women in Sport Prior to Title IX*, THE SPORT J. (Mar. 14, 2008), <https://thesportjournal.org/> [https://perma.cc/75R5-CFTV].

⁸¹ Bell, *supra* note 7.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Carlton, *supra* note 80; *Title IX and Athletics*, THE NAT'L COAL. FOR WOMEN AND GIRLS IN EDUC.: TITLE IX AT 40, <https://www.ncwge.org/> [https://perma.cc/37ZT-D6HX].

⁸⁵ *Id.*

directly.⁸⁶ In the late 1970s, women's sports advocates successfully pushed to apply Title IX to collegiate athletics departments.⁸⁷ However, in 1984 the Supreme Court limited the scope of Title IX with its decision in *Grove City College v. Bell*, holding Title IX applied only to programs directly receiving federal funding—vindicating the NCAA's original opposition to the bill.⁸⁸ Subsequently, Congress passed the Civil Rights Restoration Act in 1988, undoing the effects of the Supreme Court's ruling by explicitly requiring all institutions that receive federal funds to comply with the law with respect to all of their programs and activities.⁸⁹

While the number of women participating in collegiate sports remained below 30,000 in 1981, these numbers have since drastically increased.⁹⁰ In 1972, only two percent of collegiate-level athletic budgets were directed toward women athletes, who also received almost no athletic scholarships from their colleges and universities.⁹¹ More than 200,000 college women participated in sports by 2022, following a 25% increase in these numbers from 2006 to 2016 and the reinstatement of the NCAA's Gender-Equity Task Force in 2015.⁹² However, Championship Sport Participation across all divisions reflected an undergraduate women's participation rate that was 12.2% lower than undergraduate men's participation rate.⁹³

Although Title IX has significantly increased collegiate athletics opportunities for women since its implementation, women's participation levels have yet to reach the same level as men's, and not for a lack of interest. Despite this lack of equal participation, colleges and universities continue cutting programs, and consequently opportunities, for women to participate in their chosen sports. Yet still, no college or university has been penalized

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Kuwana, *supra* note 76.

⁸⁹ *Id.*

⁹⁰ Carlton, *supra* note 80.

⁹¹ Pruitt, *supra* note 76.

⁹² Kuwana, *supra* note 76. The NCAA first formed the Gender-Equity Task force in 1992, following a study that revealed significant gender-based disparities in athletics programs. However, it disbanded shortly after releasing its first report. Carlton, *supra* note 76; *Title IX 50th Anniversary: The State of Women in College Sports*, NCAA (June 23, 2022), <https://www.ncaa.org/> [<https://perma.cc/TP2J-74VP>].

⁹³ Men participated at a rate of 56.1%, while women participated at a rate of 43.9%. *Title IX 50th Anniversary*, *supra* note 92, at 17.

for these actions by having its federal funding withdrawn, as Title IX requires.

2. TITLE IX PROVISIONS: EQUAL OPPORTUNITY

Title IX requires that women studying at colleges and universities that receive federal funding are afforded opportunities equal to those granted to men, including in sports.⁹⁴ Both genders must receive equitable accommodation of student interests and abilities, scholarships, and athletic financial assistance.⁹⁵ Regarding athletics, women and men must receive equitable coaching, locker rooms, equipment, facilities for practice and competition, supplies, recruitment practices, housing, game and practice scheduling, travel opportunities, publicity, medical resources, training, dining facilities, and support services.⁹⁶ The Secretary of HEW issued a policy interpretation in 1979 to clarify “equal opportunity” in intercollegiate athletics.⁹⁷ This resulted in the three-part framework through which the OCR assesses compliance, discussed further in the following subsection.⁹⁸

In 1992, the Supreme Court’s holding in *Franklin v. Gwinnett County Public Schools* established that plaintiffs can use Title IX to sue for monetary damages.⁹⁹ This resulted in an increased number of lawsuits regarding Title IX violations, and a decrease in complaints made to enforcement agencies.¹⁰⁰ As athletes see their colleges and universities cut opportunities for women without consequence, they have taken matters into their own hands in an attempt to push their schools towards compliance.¹⁰¹

B. QUALIFYING FOR TITLE IX PROTECTIONS: INTERCOLLEGIATE ATHLETICS

Title IX requires colleges and universities to either provide equitable athletic opportunities to women and men or be denied federal funding.¹⁰² Most educational institutions do not comply, yet

⁹⁴ *Title IX and College Sports*, JUSTIA (July 2022), [https://www.justia.com/\[https://perma.cc/NT4Y-849Z\]](https://www.justia.com/[https://perma.cc/NT4Y-849Z]).

⁹⁵ *What is Title IX?*, WOMEN’S SPORTS FOUND. (Sept. 10, 2019), [https://www.womenssportsfoundation.org/\[https://perma.cc/SWS2-RXQ3\]](https://www.womenssportsfoundation.org/[https://perma.cc/SWS2-RXQ3]) [hereinafter WOMEN’S SPORTS FOUND.].

⁹⁶ *Id.*

⁹⁷ 44 Fed. Reg. 71,413–14 (Dec. 11, 1979).

⁹⁸ *Id.*

⁹⁹ Kuwana, *supra* note 76.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Title IX and College Sports*, *supra* note 94.

no school has lost its funding due to non-compliance with Title IX.¹⁰³ This subsection discusses the ways in which the OCR assesses whether a sport qualifies for protection and how higher-education institutions can demonstrate their compliance with Title IX.

1. *DISCUSSION: HOW SPORTS QUALIFY FOR PROTECTIONS*

To evaluate whether a sport qualifies for Title IX protection, the OCR looks at several factors.¹⁰⁴ Overall, a predominant factor in the OCR's determination is the activity's practices when compared with established intercollegiate or interscholastic varsity sports in the college or university's athletics department.¹⁰⁵ Throughout this determination, the OCR recognizes the differences between specific sports.¹⁰⁶ The OCR looks at whether the athletics department administers a team's budget, staff, and supportive services.¹⁰⁷ It also accounts for participant eligibility for athletic scholarships and awards, and the institution and activity's recruitment practices.¹⁰⁸ Additionally, the team's competition practices, practice opportunities, and opposing teams all factor into the OCR's considerations.¹⁰⁹ Within this analysis, the OCR looks at whether an athletic organization, conference, or consortium determines the number of competitions and length of play, the competitive schedule, whether the season is defined, and pre- and post-season competition opportunities.¹¹⁰ Finally, the OCR considers whether the sport's primary purpose is "to provide athletic competition at the intercollegiate or varsity levels, rather than to support or promote other athletic activities."¹¹¹

2. *COLLEGES & UNIVERSITIES: DEMONSTRATING TITLE IX COMPLIANCE*

For a school's athletic department to determine whether it can demonstrate compliance with Title IX, it can use the OCR's three-part compliance framework.¹¹² Component I evaluates sports

¹⁰³ *Id.*

¹⁰⁴ Lee Green, *Title IX Compliance – Part III: The Definition of a Sport*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS (Apr. 12, 2022), <https://www.nfhs.org/> [<https://perma.cc/4LLS-FVDC>].

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

participation offerings.¹¹³ The OCR employs another three-prong test to evaluate the available participation opportunities.¹¹⁴ Compliance can be assessed under any one of the three prongs.¹¹⁵

The first prong is substantial proportionality; substantial proportionality measures whether the participation opportunities offered to women are provided in substantially proportionate numbers relative to women's enrollment at the college or university.¹¹⁶ This consists of adding additional participation opportunities for women, like slots on a team or additional sports, rather than limiting participation for men in their sports,¹¹⁷ which "violates the spirit of Title IX."¹¹⁸ Under this prong, "participants" consist of athletes who receive the type of support institutions normally provide to their athletes throughout the sport's season, who regularly participate in organized training and practices during the sport's season, who are included on the team's eligibility or squad lists, or who cannot meet the preceding factors due to injury but continue receiving financial aid due to their athletic ability.¹¹⁹ The second prong is history and continuing practice of program expansion, which consists of institutions demonstrating their responsiveness "to the developing interest and abilities of the members of that sex."¹²⁰ The third and final prong under which an institution can demonstrate compliance is through effective accommodation of each gender's athletic interests and abilities.¹²¹ If the college or university is unable to demonstrate compliance under one of the first two prongs, compliance can be shown when the institution's current programs fully and effectively accommodate each gender's interests and abilities.¹²²

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *A Policy Interpretation: Title IX and Intercollegiate Athletics*, U.S. DEP'T OF EDUC.: OFF. FOR C.R. (June 29, 2020), <https://www2.ed.gov.html/> [<https://perma.cc/B8LY-P378>].

¹¹⁶ David Hoch, *Creating More Options for Title IX Compliance*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS (Apr. 28, 2021), <https://www.nfhs.org/> [<https://perma.cc/8VR5-TMGR>].

¹¹⁷ *Id.*

¹¹⁸ *Title IX and College Sports*, *supra* note 94.

¹¹⁹ *Ohlensehlen v. University of Iowa*, 509 F.Supp.3d 1085, 1094–95 (S.D. Iowa 2020).

¹²⁰ *A Policy Interpretation*, *supra* note 115.

¹²¹ Green, *supra* note 104.

¹²² *A Policy Interpretation*, *supra* note 115.

Component II evaluates financial aid flowing to athletes.¹²³ This component requires that financial assistance and scholarships “be available on a substantially proportional basis to the number of male and female participants in the institution’s athletic program.”¹²⁴ A presumption of compliance is established when an institution can demonstrate substantially equal “average per capita” expenditures between the genders regarding “readily financially measurable” opportunities.¹²⁵ If these benefits are not substantially equal, the institution can also establish a presumption of compliance if any disparities result from nondiscriminatory factors.¹²⁶ Alternately, this presumption is established when benefits and opportunities in non-financially measurable areas are comparable for women and men.¹²⁷

Component III evaluates other athletics benefits and opportunities while requiring equal opportunities for women and men.¹²⁸ This analysis considers multiple factors, including:

1. Provision and maintenance of equipment and supplies;
2. Scheduling of games and practice times;
3. Travel and per diem expenses;
4. Opportunity to receive coaching and academic tutoring;
5. Assignment and compensation of coaches and tutors;
6. Provision of locker rooms, practice and competitive facilities;
7. Provision of medical and training services and facilities;
8. Provision of housing and dining services and facilities; and
9. Publicity.¹²⁹

This list is not exhaustive and gives the Director of the OCR discretion to consider other factors or expand the list as necessary.¹³⁰ Colleges and universities can demonstrate their Title IX compliance under any single one of these prongs.¹³¹

Colleges and universities receiving federal funds are required to comply with Title IX; if they fail to do so, their federal funding will be withdrawn.¹³² However, this is not being enforced; the OCR has

¹²³ Green, *supra* note 104.

¹²⁴ *A Policy Interpretation*, *supra* note 115.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Green, *supra* note 104.

¹²⁹ *A Policy Interpretation*, *supra* note 115.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² WOMEN’S SPORTS FOUND., *supra* note 95.

never initiated a withdrawal of federal funds.¹³³ Today, eighty to ninety percent of all educational institutions are not in compliance with Title IX's athletic department requirements yet continue to receive federal funding.¹³⁴ However, some colleges and universities have been penalized in the form of substantial damages and attorneys' fees following suits regarding their noncompliance.¹³⁵ This will be discussed further in Section IV(A).

3. *THE NCAA'S EMERGING SPORTS FOR WOMEN DESIGNATION*

The NCAA's Emerging Sports for Women Designation was created in 1994 following the NCAA's Gender Equity Task Force recommendation and allows the NCAA to recognize a sport that aims to provide women student athletes with additional athletics opportunities.¹³⁶ It is managed by the Committee on Women's Athletics (CWA), which oversees applications and makes recommendations to each NCAA division.¹³⁷ Colleges and universities can use these emerging sports to meet the NCAA's minimum financial aid and sports sponsorship requirements.¹³⁸ The designation is intended to address collegiate athletic gender imbalances to help schools comply with their Title IX requirements.¹³⁹

The NCAA grants new sports seeking full NCAA status "Emerging Sports Status," which "allows the sport to grow its membership to at least 40 varsity programs prior to being granted full NCAA championship status."¹⁴⁰ Current Emerging Sports include Women's Rugby, Equestrian, Sand Volleyball, and Triathlon.¹⁴¹ An Emerging Sport receives full championship status when it is offered at 40 member institutions that agree to treat it "in

¹³³ *What is Title IX?*, THE MYRA SADKER FOUND., <https://www.sadker.org/> [<https://perma.cc/WSR6-FBTQ>] [hereinafter THE MYRA SADKER FOUND.].

¹³⁴ WOMEN'S SPORTS FOUND., *supra* note 95.

¹³⁵ THE MYRA SADKER FOUND., *supra* note 133.

¹³⁶ *Girls Play Sports Too: College Sports for Women*, ATHNET, <https://www.athleticscholarships.net/> [<https://perma.cc/ZDW5-KQRL>]; *NCAA Emerging Sports for Women Process Guide*, NCAA (Aug. 26, 2018), <https://www.ncaa.org/> [<https://perma.cc/852X-LDK3>].

¹³⁷ *NCAA Emerging Sports for Women Process Guide*, *supra* note 136.

¹³⁸ *Girls Play Sports Too*, *supra* note 136.

¹³⁹ *Id.*

¹⁴⁰ *NCAA Emerging Sport Initiative*, U.S. WOMEN'S RUGBY FOUND., <https://www.uswrf.org/> [<https://perma.cc/2WET-SQ22>].

¹⁴¹ *Id.*

a fully compliant manner as a varsity sport.”¹⁴² Some sports that have achieved full championship status include Bowling, Ice Hockey, and Water Polo.¹⁴³

The CWA provides a list of commonly used terms that they employ to manage the Emerging Sports for Women program:

Sport. A sport shall:

1. Be defined as an institutional activity, sponsored at the varsity or club level, involving physical exertion for the purpose of competition against teams or individuals within an intercollegiate competition structure.
2. Operate under standardized rules with rating/scoring systems ratified by at least one official regulatory agency and/or governing body.

Emerging sport for women. An emerging sport for women is a sport that:

1. Meets the definition of a sport.
2. Is accepted and recognized by the NCAA (as approved by its divisional governance processes) as an emerging sport for women.
3. Provides additional athletics opportunities to female student-athletes and demonstrates the NCAA’s commitment to gender equity among student-athletes.

Varsity intercollegiate sport. A varsity intercollegiate sport is a sport that has been accorded that status by the institution’s president or chancellor or committee responsible for intercollegiate athletics policy and satisfies the following conditions:

1. It is a sport that is administered by the department of intercollegiate athletics.
2. It is a sport for which the eligibility of the student-athletes is reviewed and certified by a staff member designated by the institution’s president or chancellor or committee responsible for intercollegiate athletics policy.
3. It is a sport in which qualified participants receive the institution’s official varsity awards.

¹⁴² *Id.*

¹⁴³ *Girls Play Sports Too*, *supra* note 136.

Club sport. A club sport is a sport that has been accorded that status by an institution and satisfies the following conditions:

1. It is a sport that has not been accorded varsity status.
2. It is a sport in which student-athletes compete in intercollegiate athletics.¹⁴⁴

The application for designation as an Emerging Sport for Women asks for the sport's season, whether it meets the above definition of a "sport," requests "official contest and participant results from at least 20 NCAA institutions that sponsor the sport at the varsity or club level," requests "letters of commitment from at least 10 NCAA institutions that either sponsor the sport at the varsity level... or intend to... during the academic year in which the application is reviewed," requests any official governing rules and regulations applied to the sport, whether representatives of the particular sport's governing organization have considered how NCAA regulations may govern the sport, and requests documentation demonstrating the sport's viability and ability to grow intercollegiate sport participation opportunities for women athletes, among other questions.¹⁴⁵

The application requirements do not appear to allow co-ed teams to be considered, but this is not stated explicitly; however, the application process and definitions place an emphasis on "female student-athletes." I emailed Gretchen Miron, Director of Inclusion for the NCAA Office of Inclusion, and she clarified that co-ed teams are not eligible for the Emerging Sport for Women designation. Co-ed teams and men's teams may still be added as NCAA sports but must proceed through the established legislative process based on the NCAA bylaws.

As the process is geared towards providing additional opportunities for women student-athletes, it is understandable that co-ed sports are excluded, as they will not necessarily be comprised mostly of women. However, Title IX calculates equal opportunities on an individual basis¹⁴⁶ rather than on a team or sport basis, so if co-ed teams were allowed to be designated Emerging Sports, they would likely still help schools reach their goals of gender equality. The ways in which collegiate cheer and dance teams can or do meet

¹⁴⁴ *NCAA Emerging Sports for Women Process Guide*, *supra* note 136.

¹⁴⁵ *Application for NCAA Emerging Sports for Women Program*, NCAA, <https://ncaaorg.s3.amazonaws.com/> [<https://perma.cc/T3H7-DW3M>].

¹⁴⁶ WOMEN'S SPORTS FOUND., *supra* note 95.

the Emerging Sport eligibility requirements will be discussed later, in Section II(B)(3).

C. WHY COLLEGIATE CHEER & DANCE DO NOT RECEIVE TITLE IX PROTECTIONS

As collegiate cheer and dance teams often perform on the sidelines at football and basketball games, they struggle to satisfy the factors necessary to receive Title IX protections. The OCR's consideration of team preparation and competition includes consideration of "whether the primary purpose of the activity is to provide athletic competition at the intercollegiate or interscholastic varsity levels rather than to support or promote other athletic activities."¹⁴⁷ The analysis of this factor includes several elements, per the guidance in the 2008 OCR Dear Colleague Letter: Criteria for a "Sport."¹⁴⁸ The first element is whether a specific set of rules adopted by a state, national, or conference organization govern the activity, including whether the rules are consistent with the standardized, objective judging criteria used in established varsity sport competitions.¹⁴⁹ The second element looks at whether the activity's schedules, coaching staff, and other resources are based on the team's competitive needs.¹⁵⁰ The third element evaluates the availability of post-season competition opportunities, and whether those relate to regular season results in a way that is consistent with established varsity sports.¹⁵¹ Finally, the fourth element considers whether participant or team selection "is based on factors related primarily to athletic ability."¹⁵² This determination likely varies school-to-school for collegiate cheer and dance teams, but the 2008 Dear Colleague Letter acknowledges that variation and conducts a case-by-case evaluation in determining an activity's status for Title IX purposes.

The OCR still has no official position regarding whether competitive spirit teams, which includes cheer and dance, are considered "sports" for Title IX's substantial proportionality requirements.¹⁵³ However, the NCAA's Division II membership elevated STUNT,¹⁵⁴ which removes the crowd-leading aspect of

¹⁴⁷ Green, *supra* note 104.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *About, STUNT THE SPORT*, <https://stuntthesport.org/> [<https://perma.cc/K73T-PBAA>]. STUNT, the NCAA Division II-recognized sport, is always referred to in all capital letters. *Id.*

cheer, to NCAA Emerging Sport status at the January 14, 2023, NCAA Convention.¹⁵⁵ The NCAA's Division I membership elevated STUNT to Emerging Sport status in April of 2023 and Division III followed on January 13, 2024.¹⁵⁶ STUNT was created to meet the interests of women athletes with the cheer skillset.¹⁵⁷ Currently, 51 colleges and universities offer STUNT, and this development will aid the sport's growth across the country.¹⁵⁸ Commissioner Tom Daeger commented:

These developments along with the great opportunity to support the female student-athlete demand for this emerging sport made the recent decision to sponsor STUNT an easy one. We couldn't imagine failing to bring this championship online considering this demand and substantial growth in high school and college STUNT sponsorship.¹⁵⁹

USA Cheer has stated that it considers STUNT to be fit for Title IX protections, while cheer is better positioned as a student activity.¹⁶⁰ However, this contributes to the perception that cheer and dance teams that also perform on the sidelines are not sports, which is a substantial roadblock for protecting the athletes on these teams. In her article *Not Just Pretty Girls with Pom Poms: An Argument for the NCAA and the Office of Civil Rights to Recognize Collegiate Dance Teams as a Sport*, Emily O. Price discusses the ways in which USA Cheer's decision to separate traditional sideline cheerleading and STUNT has created an obstacle to both traditional sideline cheerleading and dance teams in their quests for recognition as sports.¹⁶¹ However, I disagree with her assertion that "the dance team has suffered irreparable harm in the journey to become a

¹⁵⁵ *STUNT Moves Forward as NCAA DII Emerging Sport*, USA CHEER, <https://usacheer.org/> [<https://perma.cc/L572-A6KX>].

¹⁵⁶ *Emerging Sport Timeline*, STUNT THE SPORT: EMERGING SPORT HUB, <https://stunththesport.org/> [<https://perma.cc/UMH6-7VWU>].

¹⁵⁷ *STUNT Moves Forward*, *supra* note 155.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *STUNT Advances to Final Stage for NCAA Emerging Sports for Women Status*, USA CHEER (Aug. 10, 2021), <https://usacheer.org/> [<https://perma.cc/WN47-JVKL>].

¹⁶¹ EMILY O. PRICE, *NOT JUST PRETTY GIRLS WITH POM POMS: AN ARGUMENT FOR THE NCAA AND THE OFFICE OF CIVIL RIGHTS TO RECOGNIZE COLLEGIATE DANCE TEAMS AS A SPORT*, (Univ. of Miss. Sch. of L. 2022).

sport.”¹⁶² Instead, I view STUNT’s recognition as a Division II Emerging Sport as a step towards recognition for cheer and dance teams in their traditional forms. The OCR evaluates sports on a case-by-case basis. While removing an aspect from cheerleading to gain this designation is not ideal considering the larger efforts to move towards recognition as sports, I find that cheer and dance in their current forms could satisfy many of the NCAA’s criteria.

It will be interesting to see how and whether STUNT’s recognition affects participation on traditional collegiate cheer teams at the schools where STUNT teams offer an alternative way for these athletes to participate in their sport without the gameday aspect. Additionally, the impact on collegiate dance teams will be one to watch for, as they decide whether to remove the crowd-leading aspect by creating a solely-competition based route for their participants. Price may be correct that this will force “athletes to pick between performing for crowds or competing.”¹⁶³ However, I believe that an increased focus on the current forms of college cheer and dance will reveal that many can and do qualify for this recognition as well.

1. COURT DECISIONS REGARDING COMPETITIVE CHEERLEADING & TITLE IX

In 2013, the United States District Court for the District of Connecticut addressed the question of whether Quinnipiac University’s competitive cheerleading team qualified as a varsity sport for Title IX purposes in *Biediger v. Quinnipiac University*.¹⁶⁴ This was the most recent time this issue was extensively addressed by a court.¹⁶⁵ The University had planned to trim its athletics department budget by replacing the women’s volleyball team with a new varsity cheerleading program, which it rebranded as “women’s acrobatics and tumbling,” removing the sideline cheering aspect of the sport.”¹⁶⁶ The women’s volleyball team sued, alleging that the University had discriminated on the basis of sex with regards to its offered athletic participation opportunities.¹⁶⁷ Quinnipiac had created an intercollegiate organization with seven other schools, independent of any athletic conference, to encourage competitive cheer’s development.¹⁶⁸

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 419 (D. Conn. 2013).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 419–20.

¹⁶⁷ *Id.* at 419.

¹⁶⁸ *Id.* at 420.

In deciding that competitive cheer or acrobatics is not an intercollegiate varsity sport for Title IX purposes, the court emphasized the fact that the NCAA did not recognize it as a sport or an “emerging sport.”¹⁶⁹ It also noted ways in which the University’s cheer team detrimentally differed from its other varsity sports teams: the coach’s inability to recruit athletes off-campus, the team’s erratic season—which it found inconsistent—and the post-season competition that imposed new rules and did not rank or exclude teams based on their regular season performance.¹⁷⁰ The court found these areas essential to varsity team experiences.¹⁷¹ While Quinnipiac had implemented improvements to make the team more consistent with its varsity programs, the court still emphasized the lack of opportunity for the team to participate in an NCAA-sponsored championship.¹⁷² It also identified STUNT as competing with these schools’ acrobatics organizations, contributing to the sport’s slow development and inability to be recognized as an “emerging sport.”¹⁷³ Finally, it noted the difficulty the program had with off-campus recruiting due to the lack of high school-sponsored acrobatics programs, and the differences from established varsity sport recruiting strategies.¹⁷⁴

In making its determination, the court did note that Quinnipiac’s acrobatic “team budget, benefits and services, coaching staff, scholarships and awards, and practice opportunities were... consistent with established varsity sports.”¹⁷⁵ However, the changes the University had made to the team were not enough to qualify as a varsity sport for Title IX purposes.¹⁷⁶ It included the fact that the NCAA’s CWA had determined that cheer-based sports must resolve the differences between the competing factions in order to obtain recognition as emerging sports.¹⁷⁷ The court stated that “[s]o long as acknowledged authorities in intercollegiate athletics decline to recognize [acrobatics] as an authentic varsity sport, courts should hesitate before doing otherwise.”¹⁷⁸ Quinnipiac relied exclusively on the first prong of the three-part test in attempting to establish

¹⁶⁹ *Id.* at 420–22.

¹⁷⁰ *Id.* at 422.

¹⁷¹ *Id.*

¹⁷² *Id.* at 424.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 425.

¹⁷⁵ *Id.* at 454.

¹⁷⁶ *Id.* at 455.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 456.

Title IX compliance, so the court confined its analysis to prong one and its substantial proportionality assessment.¹⁷⁹

The *Beidiger* court's analysis emphasized many areas in which cheer-based sports were struggling to satisfy NCAA and Title IX varsity sport requirements. However, the recent recognition of STUNT demonstrates the significant changes these programs have made to their organizational structures to move towards qualification. The state of collegiate cheer and dance has changed drastically in the decade and a half since *Biediger v. Quinnipiac University*. Interested parties may see courts address this question again soon.

III. WHY COLLEGIATE CHEER & DANCE TEAMS DESERVE TITLE IX PROTECTIONS

Collegiate cheer and dance's explosions as competitive activities requiring high levels of skill and carrying a significant risk of injury over the past decade warrants re-evaluation of their qualifications for Title IX protections. This section details the ways in which collegiate cheer and dance teams arguably meet the criteria to qualify for Title IX protections. Additionally, it discusses the prevalent issues that have plagued the sports for decades that warrant increased respect and protection for these athletes.

A. HOW CHEER & DANCE TEAMS SATISFY TITLE IX'S CRITERIA TO BECOME PROTECTED SPORTS

By emphasizing a focus on cheer and dance teams' competition at Nationals and efforts to maintain their skill and athleticism, they qualify for Title IX protection much more than they would have when Title IX was first applied to athletic departments. In the 1970s, cheer was beginning to take off as a competitive activity.¹⁸⁰ Dance, on the other hand, took longer to explode in popularity. During its Title IX qualification analysis, the OCR compares the sport's practices with those of established intercollegiate varsity sports at the college or university.¹⁸¹ Much of this determination is school-specific, focusing on the athletics department's involvement with team budget, staff, and support services administration, participant eligibility for athletic scholarships, and recruitment practices.¹⁸² However, some aspects are more team specific, and will be applied generally for this analysis. Regarding team competition practices,

¹⁷⁹ *Id.* at 458.

¹⁸⁰ See *Being a Cheerleader*, *supra* note 3.

¹⁸¹ Green, *supra* note 104.

¹⁸² *Id.*

practice opportunities, and whether opposing teams qualify for Title IX protections, the latter would not currently be met, as no collegiate cheer or dance teams currently receive Title IX protections.¹⁸³

1. NATIONAL COMPETITION ELIGIBILITY

UCA and UDA Nationals

Cheer and dance teams are eligible to compete in the UCA or UDA College Nationals if they have a current USA Cheer Coach Membership or USA Dance Membership and can certify that the team's members meet their college or university's eligibility requirements to be current and active members of the participating team.¹⁸⁴ The college or university's registrar's office and school administrative supervisor must sign off on the team's eligibility form and have it notarized.¹⁸⁵ Additionally, cheer teams "must have at least one USA Cheer Coach that has completed the USA Cheer Safety and Risk Management course."¹⁸⁶

NCA and NDA Nationals

Cheer and dance teams can qualify to compete in the NCA or NDA College Nationals in several ways. First, they may qualify by successfully completing specific participation, conduct, and camp achievement requirements at NCA and NDA Collegiate Resident Camps, Day Camps, or Elite Home Camps.¹⁸⁷ To be considered for a Bid, teams must have at least eight participating team members participate in the same NCA or NDA Collegiate Summer Camp. Additionally, teams may qualify by submitting a Qualification

¹⁸³ This analysis of collegiate cheer and dance teams does not include STUNT, which recently received the NCAA Emerging Sports designation, as mentioned earlier in this article.

¹⁸⁴ *Eligibility Form*, COLL. CHEERLEADING & DANCE TEAM NAT'L CHAMPIONSHIP (Dec. 22, 2021), <https://varsitystaging.wpengine.com/uca/wp-content/uploads/2021/12/22-College-Eligibility-Form-002.pdf> [<https://perma.cc/82YE-K25A>].

¹⁸⁵ *Eligibility Form*, *supra* note 184; 2021–2022 College Cheerleading and Dance Team National Championship Rules, COLL. CHEERLEADING & DANCE TEAM NAT'L CHAMPIONSHIP, <https://varsitystaging.wpengine.com/uca/wp-content/uploads/2021/09/2021-2022-College-Rules-Final.pdf> [<https://perma.cc/SB84-BTHP>].

¹⁸⁶ *Eligibility Form*, *supra* note 184.

¹⁸⁷ 2023 NCA & NDA College Nationals, NAT'L DANCE ALL., <https://www.varsity.com/nda/school/competitions/college-nationals/> [<https://perma.cc/EME3-PBH5>].

Video.¹⁸⁸ The requirements for these videos differ based on the category or categories in which the team wishes to compete.¹⁸⁹ Teams that qualify through camps receive higher tier status and additional perks for Nationals registration, hotels, performance order placement, and practice time sign ups than video qualifiers.¹⁹⁰

2. NATIONALS: RULES, JUDGES, & SCORING

UCA and UDA Nationals

The UCA and UDA provide a handbook with specific rules and guidelines for teams competing in the National Championship.¹⁹¹ This handbook includes guidelines governing participation, music, coaches, disqualifications, sportsmanship, judging, routine safety, and much more.¹⁹² The UCA and UDA appoint judges who use the judging criteria to score each team.¹⁹³ The judges' scores are then averaged, and any deductions are applied.¹⁹⁴

For cheer teams, the cheer and "building skills" portions of a routine count for thirty five points each, with an "overall" assessment counting for fifteen points.¹⁹⁵ Additionally, teams are permitted to submit a video of specific skills in order to determine each skill's legality and safety.¹⁹⁶ The dance execution score sheet differentiates between movement, skills, synchronization, spacing, projection, and overall impression, granting each category a maximum of ten potential points, for a total of sixty potential points.¹⁹⁷ Certain skills are prohibited for dance teams, including front and back tucks, dive rolls, layouts, back handsprings, no-handed headsprings, toe pitch back tucks, and shushunovas.¹⁹⁸ There are also regulations regarding when pom poms, and specific types of pom poms, can be used during tricks.¹⁹⁹

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *2021–2022 College Cheerleading and Dance Team National Championship Rules*, *supra* note 185.

¹⁹² *Id.*

¹⁹³ *Id.* at 6.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 12.

¹⁹⁶ *Id.* at 13.

¹⁹⁷ *Execution Score Sheet*, UNIV. DANCE ASS'N, <https://varsitystaging.wpengine.com/uda/wp-content/uploads/2019/06/2021-Execution-Score-Sheet.pdf> [<https://perma.cc/FF4U-7Y8V>].

¹⁹⁸ *2021–2022 College Cheerleading and Dance Team National Championship Rules*, *supra* note 185, at 16.

¹⁹⁹ *Id.* at 6.

NCA and NDA Nationals

The NCA and NDA also provide a competition rule book for college teams competing in the National Championship.²⁰⁰ This rule book contains details on qualifying, eligibility, divisions, scoring guidelines, routine requirements, and more.²⁰¹ Their website provides information on the criteria used to select judges, and handling conflicts of interest.²⁰² The NCA provides an extensive document containing the scoring guidelines for different types of cheer teams.²⁰³

A sample score sheet for cheer teams shows that building skills like stunts, pyramids, and tosses, and tumbling skills like standing tumbling, running tumbling, and jumps, have maximum values of five points each.²⁰⁴ Additionally, an evaluation of overall performance is broken down into collegiate image, overall effect, and choreography, each with a maximum value of ten points.²⁰⁵ The total possible score is ninety points.²⁰⁶ A sample score sheet for dance teams allows a maximum of eighty points, with ten points possible for each category.²⁰⁷ These categories include collegiate image, performance impression, and execution and choreography

²⁰⁰ *Competition Rule Book for College Teams*, NAT'L CHEERLEADERS ASS'N AND NAT'L DANCE ALL., (Jan. 24, 2023), https://www.varsity.com/nca/wp-content/uploads/2023/02/23_college_rule_book_1.24.23.pdf [https://perma.cc/4H4K-X73E].

²⁰¹ *Id.*

²⁰² *School Rules and Scoring*, "NEW! Competition Resources, 'Criteria for Selecting Judges,'" NAT'L CHEERLEADERS ASS'N, <https://www.varsity.com/nca/school/competitions/rules-scoring/> [https://perma.cc/T5MD-XXN2].

²⁰³ *2022-2023 NCA College Scoring Guidelines*, NAT'L CHEERLEADERS ASS'N, https://www.varsity.com/nca/wp-content/uploads/2023/02/23_NCA_College_Nationals_Scoring_Guidelines.pdf [https://perma.cc/GS4E-6QEN].

²⁰⁴ *Sample Official Score Sheet*, NCA & NDA COLLEGIATE CHEER AND DANCE CHAMPIONSHIP 1 (Sept. 23, 2022), https://www.varsity.com/nca/wp-content/uploads/2022/09/23_NCA_College_Nationals_Sample_Scoresheets.pdf [https://perma.cc/RPV9-AX2G].

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

for the jazz, pom, and hip hop sections.²⁰⁸ The NDA also provides score sheets for the individual pom, hip hop, and jazz divisions.²⁰⁹

B. DIVISION 1 & 1A COMPETITIVE COLLEGE CHEER & DANCE TEAM PRACTICES, SKILLS, & BENEFITS

The below sample of college cheer and dance team practices is far from exhaustive and is meant to provide a glimpse into the skills and requirements of some of the most elite teams in the United States. There is a good amount of overlap for these teams when it comes to their seasons, practices, and the skills necessary to make the team. However, there is a large disparity in the benefits received by cheer teams as opposed to dance teams. The sampled cheer teams receive significant benefits from their colleges and universities, while the dance teams provided little information regarding benefits from their universities, possibly indicating a lack. The cheer teams promoted the benefits their members receive on their recruitment and tryout information pages, likely as an incentive to draw cheerleaders to their teams. As a result, it is unlikely that the below dance teams receive many benefits from their universities related to their dance team status.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 2–4.

Team	Division/ Competition Attended	Season/Practices	Tryout Skills	Benefits
Texas Tech University Co-Ed Cheer Squad	NCA Division 1A Large CoEd College Nationals ²¹⁰ (Champions: 2017, 2019) ²¹¹	Perform at football games, women's volleyball games, men's and women's home basketball games, women's soccer games; Travel to post season football bowl games, Big 12 tournament basketball games, NCAA/NIT basketball tournament games; University and community events. ²¹²	Personal Interview; Gameday Material; Tumbling Skills: Standing Back Tuck, Standing Full, Three Connected Jumps, Toe- Touch Back Tuck; Standing Tumbling Passes; Running Tumbling Passes; Stunt Skills. ²¹³	\$1,000 Scholarship; Out of State Tuition Waiver; Paid Uniforms, etc.; Paid Travel Expenses for Games; Meal Plan; Athletic Trainer & Team Doctor; Beauty Services & Sponsors; Academic Tutoring; Strength & Conditioning Program ²¹⁴
Ohio State University Coed Cheer Team	UCA Division 1A Large Coed College	Home and away football games, home men's & women's basketball games— BIG/NCAA Tournaments,	No Tryouts; Recruitment Process Only. Questionnaire & Video Require: All-Star Gym participation;	Athletic Scholarship Ranging from 15– 70% of In-State Tuition; National Buckeye Scholarship for Non-residents;

²¹⁰ *Co-Ed Cheer Tryouts*, TEX. TECH SPIRIT PROGRAM, https://www.depts.ttu.edu/centerforcampuslife/spiritsquads/CoEdcheer_tryouts.php [https://perma.cc/N8R3-BKU7].

²¹¹ *Id.*

²¹² *Texas Tech Co-Ed Cheerleaders*, TEX. TECH SPIRIT PROGRAM, https://www.depts.ttu.edu/centerforcampuslife/spiritsquads/coed_cheer.php [https://perma.cc/X6QT-TAYX].

²¹³ *Cheer Tryouts*, TEX. TECH SPIRIT PROGRAM, https://www.depts.ttu.edu/centerforcampuslife/spiritsquads/cheer_tryouts_kills.php [https://perma.cc/7G9P-K2Y2].

²¹⁴ *Co-Ed Cheer Tryouts*, *supra* note 210.

	Nationals²¹⁵ (Champions: 1981, 1983, 1993)²¹⁶ women's volleyball games; School & community events on and off campus; Select members UCA Nationals Team; Fall Practice Schedule: Mondays, Tuesdays, Thursdays, Fridays Spring Practice Schedule: Team practices 1-3 times / week 2-3 Strength and Conditioning Sessions per week²¹⁷	Question & Answers; Standing Tumbling Passes: Backhandspring, Tuck (no step), Backhandspring Back Tuck (no step); Elite Tumbling Passes: Standing Backhandspring Backhandspring Tuck/Layout/Full, Standing Backhandspring Layout/Full, Standing Fulls; Running Tumbling: Roundoff Handspring Series, Roundoff Handspring Tuck, Roundoff Handspring Layout, Roundoff Handspring Full; Coed Partner Stunts: Hand Stunts, Walk-in Stunts, Toss Stunts, Spinning Stunts, Flipping Stunts; Game Day (School Teams)²¹⁸	OSU Varsity Sport Status; Strength & Conditioning Coaches; Nike gear/equipment; Team Meals; Football Tickets; Priority Scheduling; Free Tutors/Printing; Sports Psychologist/Team Nutritionist; Sports Nutritionist; Fuel Zone Supplements; Specialized Career Guidance / Job Placement from Athletic Department Administration²¹⁹
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²¹⁵ *Cheerleading Program*, OHIO STATE BUCKEYES, <https://ohiostatebuckeyes.com/cheerleading-program/> [<https://perma.cc/4WWF-UXP4>].

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Cheerleading Recruitment Questionnaire*, OHIO STATE BUCKEYES, <https://ohiostatebuckeyes.com/cheerleading-recruiting-questionnaire/> [<https://perma.cc/B4JC-KDFR>].

²¹⁹ *Cheerleading Program*, *supra* note 215.

Boston University Dance Team	NDA Division 1 College Nationals: Team & Hip Hop Divisions ²²⁰ (Champions: 2016 Team Performance, 2014 Hip Hop) ²²¹	Practice, Games, Events, & Fundraisers: 12-20 hours per week Men's & women's home basketball games. August NDA camp. ²²²	Dancers learn 3 short dance combinations: jazz, pom, & hip hop. <u>Skills:</u> Leg hold, grant jete, second leaps, calypso leap, switch leap, toe-touch (or Russian), turning disc, double and triple pirouettes, fouetté turns, technical skills of the dancer's choice: extensions, hip hop, gymnastics skills, choreography by the dancers. <u>Observed on:</u> attitude, enthusiasm, projection, overall performance. ²²³	N/A
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²²⁰ *Join Us for a Free Class and Info Session!*, BOS. UNIV. DANCE TEAM (Apr. 14, 2022, 12:42 PM), [https://blogs.bu.edu/budt/\[https://perma.cc/2EBH-67L4\]](https://blogs.bu.edu/budt/[https://perma.cc/2EBH-67L4]).

²²¹ *Id.*

²²² *Id.*

²²³ *BU Dance Team Tryouts – Fall 2022*, GOOGLE DOCS, <https://docs.google.com/document/d/1IY11jHwY2JIWD-p5TLzO2dnrMAsdL3k4/edit> [https://perma.cc/V6L7-UVW4].

University of Louisville Ladybirds Dance Team	NDA Division 1A	Several summer practices, August camp, football and basketball home and away games, two personal training sessions per week (three times per week during Nationals season & two practices per day during spring break), several practices per week, community service, fundraising. ²²⁵	<u>Video</u> : Short introduction, 60 second solo in genre of dancer's choice, demonstration of technical skills/tricks: Right/left leg extensions, right/left leg hold turns, toe touch, right/left hurdler jumps, calypso, chaine leap, turning disk, switch open leap, right/left switch leaps, right/left tilt leaps, switch tilt/switch arabesque leap, double, triple, quad pirouettes, two 8-count advanced fouetté turn combinations, headspring to standing position, roll back kip to squat, rubber band, aerial cartwheel, suicide flip. ²²⁶	The University of Louisville provides a meager budget to the team to attend Nationals. ²²⁷
	(Champions: 2002, 2003, 2004, 2007, 2008, 2009, 2010, 2011, 2012, 2014, 2015, 2016 (double title), 2017 (double title), 2018 (double title), 2019) ²²⁴			However, the University of Louisville Ladybirds were the subject of the 2017 television show <i>So Sharp</i> , which followed them through their practices, performances, and competitions. ²²⁸

The OCR's 2008 "Dear Colleague" Letter ("the Letter") was intended to help determine which programs should qualify as sports

²²⁴ *Ladybirds*, LOUISVILLE CARDINALS, https://gocards.com/sports/2015/3/26/GEN_20140101183 [https://perma.cc/BVX7-DDNJ].

²²⁵ *University of Louisville Ladybirds Spill the Secrets of their Success*, DANCE SPIRIT (Mar. 18, 2009), <https://dancespirit.com/> [https://perma.cc/8UUT-EX2F].

²²⁶ *Ladybird Tryouts*, LOUISVILLE CARDINALS, <https://gocards.com/form/1137> [https://perma.cc/6HJ5-4P5X].

²²⁷ *Id.*

²²⁸ *So Sharp* (Collins Avenue Entertainment 2017).

under Title IX.²²⁹ It emphasized that athletics departments should administer the team's budget, coaches, and support services, and team members should be eligible for athletic scholarships if those are available to other varsity sports.²³⁰ The cheer teams above appear to satisfy these factors. However, this evaluation will be largely school-specific. Team members may need to address these administrative factors with their respective colleges and universities. The Letter also favors activities that recruit team members.²³¹ Of the above teams, only the Ohio State University coed cheer team recruits its members. It is likely that many of the most prestigious college cheer and dance teams could implement these practices, allowing a select group of teams to satisfy this factor.

The sampled teams have similar regularity of practice schedules and seasons, but primarily compete in one competition. While this alone is insufficient to satisfy the "primary purpose" factor, the Boston University Dance Team competes locally as well, indicating that it is not alone in this practice.²³² The governing bodies, UCA/UDA and NCA/NDA, have clearly established rules and regulations for the teams' national competitions. The most difficult factor for these teams to satisfy will be the requirement that the sport's primary purpose is intercollegiate varsity athletic competition, rather than supporting or promoting other activities.²³³ While team statements differ regarding whether their primary focus is spirit-based or competition-based, the rapid growth that cheer and dance teams have experienced imply that it is truly the latter. Cheer and dance teams were able to engage crowds long before the level of skill and technique required to participate in their activities exploded. Additionally, increasing feminist sentiments seem to imply that women and girls in the 21st Century participate in cheer and dance because they enjoy and feel empowered by it—and

²²⁹ Women's Sports Law | FOTC (@fotc_sports), *Breaking Down Why Cheer, Dance, and Other Spirit Programs Are Not Given Athletics-Related Title IX Protections*, INSTAGRAM (Apr. 28, 2021) https://www.instagram.com/p/CON5K-Eh8bN/?utm_medium=copy_link [<https://perma.cc/AS82-KZG8>] (explaining that the NAIA, but not the NCAA, sanctions competitive cheer and dance as sports, and that the NCAA has designated acrobatics and tumbling as "Emerging Sports for Women").

²³⁰ *Id.*

²³¹ *Id.*

²³² Women's Sports Law | FOTC, *supra* note 229; *Join Us for a Free Class and Info Session!*, *supra* note 220.

²³³ Women's Sports Law | FOTC, *supra* note 229.

because it allows them to continue engaging with their passions beyond high school—rather than for the purpose of catering to the male gaze of many sporting fans. Many cheerleaders and dancers do love the spirit-leading aspect of their activities, but their desire to continue participating in this facet of the sports should not prevent them from receiving Title IX protections. In light of the developments cheer and dance have undergone throughout the 2010s, the *Biediger* court’s assertion that “better organization and defined rules, might someday warrant recognition as a varsity sport” is worth revisiting.²³⁴

C. ISSUES FACING CHEER & DANCE WHICH WARRANT TITLE IX PROTECTION FOR THE SPORTS

Because Title IX does not apply, women on these teams do not receive the same opportunities to engage in their activities of interest and are subjected to harassment and high rates of injury due to coaching cultures that have gone unregulated.

1. *WHEN SCHOOLS DENY THESE ATHLETES THE CHANCE TO COMPETE, SOME TEAMS TAKE MATTERS INTO THEIR OWN HANDS*

While sideline performances and school spirit are significant aspects of cheer and dance team duties, many of these athletes, like athletes in protected sports, enjoy and benefit from competing with others.²³⁵ Competition, whether on high school affiliated teams or with separate All Star teams or dance studios, comprises much of collegiate cheerleaders’ and dancers’ backgrounds.²³⁶ Often, this is where these athletes spent years developing the extensive skillsets necessary to earn a spot on a collegiate team.²³⁷ Many athletes find that competing in their chosen sport inspires them to push themselves to reach the top of their game.

Dance

“Let’s talk about the cognitive dissonance of being nationally acclaimed but not university acclaimed—of being recognized as the best in the nation at what you do, but not being afforded the luxuries

²³⁴ *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 450–51 (D. Conn. 2013).

²³⁵ *Ohlensehlen v. University of Iowa*, 509 F.Supp.3d 1085, 1102–03 (S.D. Iowa 2020).

²³⁶ See *Dance Team – College Dance Team*, VARSITY (Feb. 22, 2018), <https://varsity.com/> [<https://perma.cc/825W-UYE3>].

²³⁷ *Id.*

other athletes at your own school got.”²³⁸ Maggie Schmaltz, former member of 17-time national champion University of St. Thomas dance team, expressed a sentiment experienced by many collegiate dancers across the nation.²³⁹

In January 2022, LSU’s Tiger Girls became the UDA D1A Hip Hop National Champions after their school refused to send them to the national competition. LSU justified refusing to send the dance team to nationals by blaming the “many constraints of COVID-19.”²⁴⁰ However, the team had still been required to perform at school and athletic events throughout the year.²⁴¹ In their Change.org petition, the Tiger Girls declared that the school had told them that its reason not to send them to nationals was due to the lack of athletic trainers available for their competition season—not COVID-19, as the school had previously claimed.²⁴² The team had received approval to participate in practices and games, followed the same pandemic and testing protocol as other LSU athletic teams, yet were prevented from participating in their competition while other teams were not.²⁴³ The Tiger Girls even “[adhere] to the same NCAA guidelines for academic eligibility, drug testing, [and] scholarships” as other LSU athletic programs.²⁴⁴

Many cheer and dance teams, including the Tiger Girls, lack the designated season that many other sports have, which contributes to the teams’ ineligibility to receive Title IX protections. It can seem counterintuitive to deny Title IX coverage to teams that participate in training, conditioning, learning choreography, and practicing from August to May in order to support their school’s athletics department.²⁴⁵ However, this is the reality for collegiate cheer and dance teams across the country. Tiger Girls alum and choreographer for the team’s winning UDA nationals routine said it best: “Taking

²³⁸ Maggie Schmaltz, *All My Blood, Sweat, and Tears | For Twenty-Some Years*, CALL ME MAGS (Sept. 14, 2022), [https://callmemags.substack.com/\[https://perma.cc/GH83-GF95\]](https://callmemags.substack.com/[https://perma.cc/GH83-GF95]).

²³⁹ FOTC | Women’s Sports Law (@fotc_sports), INSTAGRAM (Sept. 15, 2022), [https://www.instagram.com/p/CijS5mUNpGn/\[https://perma.cc/7TDH-6NH3\]](https://www.instagram.com/p/CijS5mUNpGn/[https://perma.cc/7TDH-6NH3]).

²⁴⁰ Lisa Antonucci, *LSU Tiger Girls Deliver Clear Message One Year After School Refuses to Send Them to Nationals*, NBC SPORTS: ON HER TURF (Jan. 20, 2022, 7:11 PM), [https://onherturf.nbcsports.com/\[https://perma.cc/A46T-J7LJ\]](https://onherturf.nbcsports.com/[https://perma.cc/A46T-J7LJ]).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

away this opportunity to compete and grow in their craft as dedicated athletes minimizes this program to only beautiful girls who stay on the sidelines supporting other athletes while never getting an opportunity to compete themselves.”²⁴⁶ McFadden is correct: without competition opportunities, the LSU Tiger Girls only perform in roles that are ancillary to other sports, reinforcing the current standard that deems them ineligible to receive Title IX protections and results in harmful stereotypes. Although the Tiger Girls were able to send themselves to nationals when the school would not, LSU actively contributed to the most significant roadblock collegiate cheerleaders and dancers face today.

Similarly, at the 2022 College Classic National Invitational, ASU’s Dance Team placed first in the D1A jazz competition and second in pom.²⁴⁷ However, this occurred after ASU’s administration prohibited the team from continuing their tradition of competing at UDA nationals.²⁴⁸ The school “cited budget issues, ‘personal feelings’ against the competition, and [argued] that the team’s participation in competition causes ‘too much drama’” to justify blocking the two-time world champion team from attending UDA nationals.²⁴⁹ The Instagram account that shared a post celebrating ASU Dance Team’s win noted that the administrators deliberately misunderstand the sport and athletes, viewing them solely based on gender stereotypes: “Would they ever say that male athletes or coaches wanting to compete and perform at the highest level were being ‘dramatic?’ I don’t think so.”²⁵⁰

2. HIGH RATES OF MENTAL ILLNESS & INJURY IN COLLEGIATE CHEER & DANCE

Cheerleading

Cheerleading environments, which do not receive Title IX protections, are linked to eating disorders and image dissatisfaction

²⁴⁶ *Id.*

²⁴⁷ Lina Washington, *ASU Dance Team Wins National Title*, 12NEWS (Apr. 16, 2022, 9:37 PM), [https://www.12news.com/\[https://perma.cc/L9P2-J727\]](https://www.12news.com/[https://perma.cc/L9P2-J727]). They did it again in 2024. *2024 National Championship | D1A Jazz*, THE COLLEGE CLASSIC, [https://www.thecollegeclassic.com/\[https://perma.cc/F6SH-TA8F\]](https://www.thecollegeclassic.com/[https://perma.cc/F6SH-TA8F]); *2024 National Championship | D1A Pom*, THE COLLEGE CLASSIC, [https://www.thecollegeclassic.com/\[https://perma.cc/GGD4-VMKF\]](https://www.thecollegeclassic.com/[https://perma.cc/GGD4-VMKF]).

²⁴⁸ FOTC | Women’s Sports Law (@fotc_sports), INSTAGRAM (Apr. 13, 2022), [https://www.instagram.com/p/CcSpsqaulwZ/\[https://perma.cc/YEF5-CEJE\]](https://www.instagram.com/p/CcSpsqaulwZ/[https://perma.cc/YEF5-CEJE]).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

for many participants.²⁵¹ A study published in 2022 examined woman cheerleaders' risk of developing eating disorders based on the type of team or squad and the athlete's position on the team, the uniforms, and perceptions by peers, parents, and coaches to gather information.²⁵² The study found that collegiate cheerleaders were at higher risk for developing eating disorders than their peers in All-Star programs.²⁵³ It also accounted for differences between co-ed teams and teams comprised entirely of women or girls.²⁵⁴ Furthermore, it found "cheerleaders felt that peers, parents, and coaches wanted them to be smaller than their perceived status," and that coaches tend to favor athletes whose body types align most closely with their personal desires and expectations for cheerleaders: smaller.²⁵⁵

The Netflix docuseries *Cheer* showcased just how brutal the sport can be on college cheerleaders' self-esteem and mental health.²⁵⁶ Constant focus on cheerleaders' physical appearances from coaches, parents, and peers can lead these athletes to develop poor self-esteem, negative self-talk practices, decreased motivation, severe depression and anxiety, and other mental health issues, along with major body image issues.²⁵⁷ While studies have also shown that cheerleading can lead to improvements in these areas as well,²⁵⁸ such prevalent issues in a field deserve the protections that Title IX gives athletes. Title IX can ensure that more teams, like *Cheer*'s Navarro, "encourage a growth mindset and focus on mental preparation for competition [to enable cheerleaders to] better handle the intense pressure of the moment."²⁵⁹ Good culture and coaching

²⁵¹ Allison B. Smith et al., *Investigation of Eating Disorder Risk and Body Image Dissatisfaction among Female Competitive Cheerleaders*, INT'L J. ENV'T RSCH. PUBLIC HEALTH 2196 (Feb. 15, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8872421/> [<https://perma.cc/ZP2Y-5TBW>].

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Caroline Bologna, *This is Your Body on Cheerleading*, HUFFPOST (Jan. 24, 2020), <https://www.huffpost.com/> [<https://perma.cc/A7FY-BBSP>].

²⁵⁷ *Id.*

²⁵⁸ Chenliang Deng et al., *Effects of 16 Weeks of Cheerleading on Physical Self-Esteem and Mental Health of Female College Students*, FRONTIERS PSYCH. (June 10, 2022), <https://www.frontiersin.org/> [<https://perma.cc/2K63-73XG>].

²⁵⁹ Bologna, *supra* note 256.

are essential to helping cheerleaders excel both mentally and physically.²⁶⁰

The execution of many of the skills required to participate in a collegiate cheer team can result in concussions, broken bones, and spine or head injuries.²⁶¹ According to one orthopedic surgeon, cheerleaders suffer more minor injuries like “strains, sprains, overuse injuries, and wrist or back hyperextensions” than soccer or softball players.²⁶² Similarly to gymnastics,²⁶³ cheerleading takes a toll on these athletes’ bodies due to the repetitive stress experienced during skill execution and practices.²⁶⁴ A kinesiology professor at Texas Tech University commented,

I can’t think of a sport that has such an enormous variety of physical demands in an extended period.... You’ve got cardiovascular exercise for those long football games, but then also high-intensity interval training with the stunts. The high flyers have to be so ready, and the ones who do the holding are pretty darn strong. Cheerleaders are in incredible shape.²⁶⁵

For cheerleaders to stay safe during their practice seasons, they do cardio, stretching, and strength training workouts.²⁶⁶ As cheerleading is a team sport, all members must be prepared, in sync, and in shape to decrease the risk of injury to their team members.²⁶⁷ If a cheerleader fails to pay proper attention or practices with an injury, it can result in death to one of their teammates; from 1991 to 2015, there was, on average, at least one death per year in cheerleading, which is tied with football for the “highest incidence of fatal injuries and accidents.”²⁶⁸

Dance

“Get over it.” This is a response that many dance teachers and choreographers have when their students express that they are

²⁶⁰ *Id.*

²⁶¹ Timms, *supra* note 45.

²⁶² *Id.*

²⁶³ *Protecting Gymnasts from Injury*, UWHEALTH (July 21, 2019), <https://www.uwhealth.org/> [<https://perma.cc/WRP5-5JF2>].

²⁶⁴ Timms, *supra* note 45.

²⁶⁵ Bologna, *supra* note 256.

²⁶⁶ *Protecting Gymnasts from Injury*, *supra* note 263.

²⁶⁷ *Id.*

²⁶⁸ *Cheerleading and Catastrophic Injuries: Is Cheerleading the Most Dangerous Female Sport?*, NEULIFE, <https://neuliferehab.com/> [<https://perma.cc/46YF-ABXK>].

struggling with mental health issues. Many dancers struggle with the same issues as cheerleaders: “depression, anxiety, self-doubt, substance abuse, several types of eating disorders, among other issues” like perfectionism.²⁶⁹ Some dance teachers shame dancers for their physical appearance, pointing out flaws in front of their peers and critiquing their weights.²⁷⁰ Many dancers grow up training in front of a mirror for hours on end, several days a week.²⁷¹ Studies have demonstrated that students practicing without mirrors had more positive body image than those who practiced in front of mirrors.²⁷² While mirrors are extremely beneficial for improving technique, precision, and synchronization, they contribute to a culture plagued by comparison, judgement, and unhealthy focus on physical appearance.²⁷³

Earlier, this Article discussed the increased levels of competition the dance world has seen in the 21st Century. This is celebrated, yet structures are not in place to support dancers as they struggle to constantly improve to keep up with the industry’s rapidly increasing demands.²⁷⁴ Advocates push for safer and more positive training for dancers to help them both improve skill-wise and build confidence.²⁷⁵ Granting Title IX protections to collegiate dance teams will help to ensure these athletes succeed and maintain good mental health in the process.

Dance takes a physical toll on dancers, to the point where many of their careers do not last past the age of 30.²⁷⁶ The sport often includes practicing repetitive motions for hours on end, with little recovery time due to year-round practice, which is common for many types of dancers.²⁷⁷ Overuse injuries are common, occurring primarily in the feet, ankles, legs, and lower back.²⁷⁸ Other injuries

²⁶⁹ Joao Ducci, *Mental Health in Dance – It’s Time to Break the Silence*, ESCHOLARSHIP (2019), <https://escholarship.org/> [<https://perma.cc/7ADD-6THE>]; Ashling Wahner, *Navigating Mental Health in the World of Dance*, MENTAL HEALTH MISSIONS (Apr. 2021), <https://mentalhealthmissions.com/> [<https://perma.cc/5HY4-EE96>].

²⁷⁰ Ducci, *supra* note 269.

²⁷¹ Wahner, *supra* note 269.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ See Ducci, *supra* note 269.

²⁷⁵ Wagner, *supra* note 269.

²⁷⁶ Ducci, *supra* note 269.

²⁷⁷ Amanda Greene & Andrea Lasner, *Common Dance Injuries and Prevention Tips*, JOHNS HOPKINS MED. <https://www.hopkinsmedicine.org/> [<https://perma.cc/WS6P-B2PG>].

²⁷⁸ *Id.*

occur in their hips and knees, and many suffer from stress fractures and arthritis.²⁷⁹ However, dancers' early training with intense jumping does lead to a significantly lower rate of injuries to the anterior cruciate ligament (ACL) than other athletes' experiences.²⁸⁰

Many of these injuries are preventable, but the intense nature of many college dance team practices leads to a focus on constantly improving, with less of a focus placed on rest, recovery, and prevention.²⁸¹ With Title IX coverage, many of these practices could be regulated and structured in a standardized way to ensure longevity and better physical health for dancers, while also allowing them to engage with the sport they love instead of taking time off due to an injury.

IV. COLLEGES & UNIVERSITIES ARE STRUGGLING TO COMPLY WITH TITLE IX

Federal funding is often not withdrawn even if a school is not satisfying its requirements under Title IX; however, recent lawsuits and an increasingly advocacy-based cultural shift have placed more attention on inequities in college athletics.²⁸² Many schools will not hold up under scrutiny regarding the opportunities provided to their students. Bringing college cheer and dance teams, especially women-only teams like the LSU Tiger Girls, under Title IX will allow schools to more easily satisfy the requirements to receive federal funding and will provide more equitable opportunities to their students.

A. RECENT LAWSUITS ADDRESSING TITLE IX NONCOMPLIANCE

Many athletic directors used the Covid-19 pandemic as an excuse to cut teams, but students across the United States have filed record numbers of Title IX lawsuits in attempts to remedy the inequity in college athletics departments.²⁸³

In a Title IX case filed against the University of Iowa, the court granted a group of female student-athletes' motion for a preliminary injunction to stop the university from eliminating women's

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Carrie N. Baker, *College Students Are Filing Record Number of Lawsuits to Fight Sex Discrimination in Athletics*, MS. MAGAZINE (Jan. 28, 2021), <https://msmagazine.com/> [<https://perma.cc/G5KN-T5Q2>].

²⁸³ *Id.*

intercollegiate athletics teams.²⁸⁴ The University had attempted to cut the women's swimming and diving team due to its inability to provide adequate financial support to all intercollegiate athletics programs because of the Covid-19 pandemic. Plaintiffs sought to enjoin the University from getting rid of these teams until they could definitively prove that the institution failed to comply with Title IX.²⁸⁵ In making its determination, the court flexibly weighed four factors: (1) the likelihood that the Plaintiffs would succeed on the merits of their Title IX claim, needing only a "fair chance" of doing so; (2) the threat of irreparable harm Plaintiffs would suffer without the injunction; (3) the balance of equities, comparing the harm Plaintiffs and the University would respectively suffer from the lack of an injunction or an injunction; and (4) the public interest.²⁸⁶ The court noted that the Equity in Athletics Data Analysis (EADA) reports, which may be appropriately relied on during the preliminary-injunction stage of a Title IX inquiry,²⁸⁷ "*always* overstate women's participation in intercollegiate athletics."²⁸⁸ The court conducted a fact-intensive inquiry, accounting for the University of Iowa's athletics participation data, rosters, competition data, financial aid scholarships to athletes, and future participation projections.²⁸⁹

The court granted Plaintiffs' motion for a preliminary injunction, finding that they demonstrated a fair chance of success on their Title IX inequitable participation opportunities claim, that the harm to Plaintiffs would be immediate and irreparable without one, that the harm to Plaintiffs outweighs the harm the University would suffer, and that the public has a compelling interest in eradicating sex discrimination.²⁹⁰ The court noted that Plaintiffs should not have to "give up a sport that has been a defining part of their identity since their early childhood... [and that] the grit and confidence and determination gained through athletic competition helps them excel academically," which could negatively impact their education.²⁹¹ Following the granting of the preliminary injunction, the Plaintiffs reached a settlement with the University of

²⁸⁴ *Ohlensehlen v. University of Iowa*, 509 F.Supp.3d 1085, 1088 (S.D. Iowa 2020).

²⁸⁵ *Id.* at 1093.

²⁸⁶ *Id.* at 1093–94.

²⁸⁷ *Balow v. Michigan*, 24 F.4th 1051, 1059 (6th Cir. 2022).

²⁸⁸ *Ohlensehlen*, 509 F.Supp.3d at 1095 (alteration in original).

²⁸⁹ *See id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 1102–03.

Iowa, and the women's swimming and diving team was reinstated in February 2021.²⁹²

In *Cohen v. Brown*,²⁹³ Amy Cohen filed a class-action lawsuit against the university on behalf of all women athletes at the school after two women's teams, including her gymnastics team, were cut.²⁹⁴ The court found that the school met none of Title IX's requirements under the three-part test and ordered the school to reinstate the cut programs, setting a precedent for college women's athletic participation opportunities. In 2022, Cohen was inducted into the Impact Fund Class Action Hall of Fame.²⁹⁵ She stated that the process motivated her to become a Title IX warrior after she realized the case's larger implications for women athletes.²⁹⁶ However, she and her fellow warriors "were, and still are, surprised at the continued resistance, backlash and walls that have been put up around this idea of equality."²⁹⁷

Champion Women, a group advocating for women and girls in sports, used a recent EADA report to conclude that 90% of higher-education institutions discriminate against women in the context of intercollegiate sports.²⁹⁸ The analysis found that women receive approximately \$1 billion less in athletic scholarships than they are entitled to, contributing to the disproportionate share of student loan debt held by women.²⁹⁹ During the 2018–2019 academic year, NCAA schools provided women over 60,000 fewer opportunities than they provided men; this data indicates sex-based discrimination across the board in college athletics.³⁰⁰ Champion Women is working to make college athletes aware of the level to which schools fail to comply with their Title IX athletics requirements, and aimed to initiate 100 cases in 2021.³⁰¹ Both men and women have used the

²⁹² Iowa's News Now Newsroom, *University of Iowa Reaches Settlement Terms with Female Athletes in Title IX Suit*, IOWA'S NEWS NOW (Sept. 23, 2021), <https://cbs2iowa.com/> [<https://perma.cc/WF47-DJTK?type=image>].

²⁹³ *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996).

²⁹⁴ *Id.*

²⁹⁵ Amy Cohen, *Class Action Hall of Fame, Class of 2022: Title IX Champions for Equality in Women's Sports*, IMPACT FUND (Feb. 24, 2022), <https://www.impactfund.org/> [<https://perma.cc/BH86-G5PT>].

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ Baker, *supra* note 282.

²⁹⁹ *Id.*

³⁰⁰ Champion Women Communications, *Discrimination Against Women in College Sports is Getting Worse*, CHAMPION WOMEN: TITLE IX 50 BY 50 (June 23, 2020), <https://titleixschools.com/> [<https://perma.cc/Y2KT-VHA9>]; Baker, *supra* note 282.

³⁰¹ Baker, *supra* note 282.

courts to advocate for their rights to equal opportunity in athletics.³⁰² With this increased awareness and the resulting actions of women student-athletes to vindicate their rights in court, colleges and universities will likely spend a great deal of time and money litigating and settling these Title IX claims if they fail to provide equitable athletic opportunities for women.

For courts to count competitive cheer and dance opportunities alongside others when determining equitable opportunities for women and men athletes, the NCAA needs to officially recognize the activities as Emerging Sports. Both women and men participate on some of these teams, although they are primarily comprised of women. Recognizing existing activities as sports does not violate the spirit of Title IX and would provide more women athletes the chance to participate in their chosen activities while receiving important benefits and protections.³⁰³

V. WHAT IT LOOKS LIKE IN PRACTICE

With many athletics directors already cutting programs, an increasing number of colleges and universities may be subject to denial of federal funding. While, given the history of collegiate cheer and dance, it is unlikely that these sports would be given precedent over already-protected teams, the NCAA can provide another route for schools to satisfy these requirements by recognizing college cheer and dance in their current states as “Emerging Sports.” This will give these athletes more access to the courts to enforce their rights under Title IX, protecting them from the pervasive issues faced by the sports today. This section discusses teams that have already successfully initiated Title IX investigations at their schools and the resulting relief. It also details the NCAA’s endorsement of STUNT as an Emerging Sport for Women and argues for endorsing cheer and dance in their current forms.

A. BENEFITS FLOWING FROM TITLE IX PROTECTION

Granting cheer and dance teams Title IX protection would result in benefits across the board, from financial benefits for the team

³⁰² See Pruitt, *supra* note 76 (detailing Clemson University’s men’s track and field and cross-country teams winning a historic settlement for their Title IX discrimination claim).

³⁰³ See Erin E. Buzuvis, *The Feminist Case for the NCAA’s Recognition of Competitive Cheer as an Emerging Sport for Women*, 52 B.C. L. REV. 439 (2011), <https://lawdigitalcommons.bc.edu/> [<https://perma.cc/QJ95-KPCV>].

members and coaches, to competition opportunities, and to moving away from the gender binary in sports. Title IX's intention to move women off the sidelines was just that, and collegiate cheer and dance teams became easy targets for derision.³⁰⁴ Many still do not see cheer and dance as sports that empower women.³⁰⁵

Recognizing cheer and dance as sports would help close the regulatory gap programs face when they are not recognized by the NCAA.³⁰⁶ The NCAA sets guidelines for the hours student-athletes can practice and train, requires guaranteed off-days, and requires reporting all "catastrophic" injuries occurring in the programs it recognizes.³⁰⁷ A former Georgia Tech cheerleading team head coach, Daniel Nester, has stated that the transition to becoming an NCAA sport would be easy, due to the coaching and training staff many collegiate cheer teams already have.³⁰⁸ He maintains that it would increase the number of participants and empower women.³⁰⁹

The lack of classification as "student-athletes" faced by collegiate cheer and dance teams results in cheerleaders and dancers wearing more hats than other student-athletes, taking on more responsibilities than many of their peers.³¹⁰ Regardless of efforts to re-classify the activities, as USA Cheer has done with its development of STUNT, "schools still want cheerleaders waving pom-poms at football games."³¹¹ Cheerleaders and dancers on these teams play the roles of both student ambassadors and high-level competitors, and many enjoy it and want to maintain this balance.³¹² Competition opportunities will also improve if collegiate cheer and dance receive Title IX protection as sports. Most teams train year-round to compete only once a year, as both UCA/UDA and NCA/NDA are divisions of Varsity, a private athletic-wear company.³¹³

The lower salaries and scholarships, while not technically based on gender, race, or sexual orientation, disparately affect the women and LGBTQ+ people who often hold head coaching positions,

³⁰⁴ Jennifer Gerson, *The Complicated History of Cheerleading, Title IX and What It Means to be a Sport*, THE 19TH (June 16, 2022, 7:47 AM), <https://19thnews.org/> [<https://perma.cc/GB7Y-A2ED>].

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

causing a significant wage gap.³¹⁴ Dancers and cheerleaders are paid low wages across the industries, and the lack of scholarship and salary resources made available to these athletes and coaching staff are no different.³¹⁵ Many cheerleaders and dancers develop their passions for the sports at young ages, sacrificing years and their mental and physical health to pursue sports that do not help them get into or afford college.³¹⁶

Collegiate cheerleaders and dancers have dedicated their lives—and full years without breaks—to training for national competitions, but their universities do not recognize them the same as other athletes because they lack NCAA status.³¹⁷ More people would be incentivized to allow their children to pursue these sports, and more athletes would continue pursuing them, if they had the opportunity to be viewed as “real athletes” by people still holding outdated perceptions due to the lack of varsity status granted to these athletes.³¹⁸

B. RECENT TITLE IX INVESTIGATIONS

The University of Southern California’s (USC) investigation into Lori Nelson, coach of its official dance team the USC Song Girls, demonstrates the benefits that not only can, but should flow from an extension of Title IX protections to collegiate cheer and dance teams. USC’s Title IX office investigated Nelson’s behavior, finding that the coach had violated university policies on harassment, creating a “hostile and unhealthy” environment for the dancers.³¹⁹ Nelson resigned the day she was notified about the Title IX investigation, and the school was unable to impose any additional consequences or sanctions.³²⁰ As coach, Nelson had publicly rebuked girls for their appearances, weight, eating habits, and sex lives, causing them to suffer from body image issues and eating disorders.³²¹ Additionally, the investigators concluded that Nelson made “intrusive and harassment [sic] statements” and engaged in gender-based body-shaming statements regarding the

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ Ryan Kartje, *Title IX Probe Finds USC Song Girls Coach Lori Nelson Body Shamed, Harassed Dancers*, L.A. TIMES (Sept. 24, 2021, 4:14 PM), <https://www.latimes.com/> [<https://perma.cc/2ZJW-6ULW>].

³²⁰ *Id.*

³²¹ *Id.*

dancers' morals, sexual activity, and bodies.³²² Nelson's curated dance team culture had gone unchecked since the 1990s, subjecting generations of young women to her inappropriate and offensive behavior.³²³ In fact, the dancers' contracts required that they "must stay within five pounds of their audition weight" and stated that Nelson had to approve any changes to their physical appearance.³²⁴

The USC Song Girls did not go without any accommodations besides Nelson's resignation, however.³²⁵ Team members who had been cut because of Nelson's comments were given the chance to rejoin the team and were provided with the \$1,500 stipends team members receive, regardless of their decisions.³²⁶ Additionally, USC provided the team's coaches, staff, judges, and volunteers with training and education regarding prohibited conduct and discrimination.³²⁷ The dancers also now have opportunities to anonymously provide information regarding their experiences on the team.³²⁸ Some of the Song Girls who brought about this investigation detailed the ways their experiences had been invalidated over the years, which they claim contributes to toxic issues in dance team environments at the school.³²⁹ The Title IX investigation, a unique occurrence among college dance teams, has helped remedy a situation by providing healing and validation to women suffering from mental health issues that stem from the lack of protections they had previously received. The USC Song Girls are not alone in these experiences, as body image and harmful diet culture issues are extremely prevalent in the dance industry.³³⁰ Applying Title IX protections to collegiate cheer and dance teams would ensure that these student-athletes have clear and available opportunities to report inappropriate and discriminatory treatment.

C. STUNT TEAMS

The NCAA recently recognized STUNT as an Emerging sport for Women, but removing the crowd-leading aspect should not be necessary for collegiate cheer and dance teams to qualify for Title IX protection. STUNT is a new sport for women that is derived from

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ Ashley Mowrey, *Body Image and Toxic Diet Culture in Dance – Part I*, APOLLA, <https://www.apollaperformance.com/> [<https://perma.cc/7PE3-YDZE>].

cheerleading, as “two teams execute skills-based routines in various categories – partner stunts, jumps & tumbling, pyramids & tosses, and team routines.”³³¹

Resentment may flow from removing the crowd-leading and sideline performances from cheer and dance, and cheer and dance would only be stronger by retaining this aspect of their teams. Many cheerleaders and dancers love the school spirit-building aspects of their teams and feel that these help them to grow as performers—indeed, these aspects are often present in their competition routines. Crowd-leading is not incompatible with Title IX unless it is viewed as only supporting other athletics programs, and it is so much more than that. While STUNT’s Emerging Sport designation is a good first step, it takes away from the history and value of cheer and dance.

VI. POTENTIAL DRAWBACKS OF RECOGNIZING CHEER & DANCE AS EMERGING SPORTS THAT RECEIVE TITLE IX PROTECTIONS

Opponents of the push for the NCAA to recognize cheerleading as a varsity sport argue that doing so would be inconsistent with Title IX’s intention, which is for schools to create new athletic opportunities instead of labeling existing activities as sports to satisfy substantial proportionality.³³² This argument applies with equal force to dance teams. As mentioned earlier, even USA Cheer has stated that cheer is better positioned as a student activity. Title IX’s rigidity and focus on competition-based sports may require cheer and dance to give up their crowd-leading and gameday capacities, as STUNT has done. Some schools already circumvent this by offering separate spirit clubs and cheerleading teams.³³³ This results in distancing cheer and dance teams from their origins, which are based in cultivating school spirit. USA Cheer even states that Title IX recognition is not required to ensure safety for Traditional Cheerleading, which is primarily based on school spirit.³³⁴ However, this statement disregards the safety of collegiate

³³¹ *What is STUNT?*, STUNT THE SPORT <https://stunththesport.org/> [<https://perma.cc/U89N-49WE>].

³³² Lee Green, *Impact of Competitive Cheer Laws, Regulations on Title IX Compliance*, NAT’L FED’N OF STATE HIGH SCHOOL ASS’NS (Apr. 16, 2019), <https://www.nfhs.org/> [<https://perma.cc/VCM9-5NTM>].

³³³ *USA Cheer’s Position Paper on Cheer Safety & Title IX*, USA CHEER, <https://usacheer.org/> [<https://perma.cc/4YZQ-LYP6>].

³³⁴ *Id.*

cheerleaders who compete at UCA and NCA Nationals, as they often also perform on the sidelines on gamedays.

This may also lead to excluding men from participation on collegiate cheer and dance teams, as co-ed teams cannot apply to receive the Emerging Sport designation. While this would not remove any spots for men to participate in college athletics and does not technically violate the spirit of Title IX, men should not have to be excluded from these teams just so the teams can receive Title IX protections.

The NCAA recently granted STUNT Emerging Sport status. STUNT is extremely similar to cheer but removes the crowd-leading aspect. This does not change the fact that many collegiate cheer teams are not currently STUNT teams, although they share many of the same practices. There is a dissonance here: women were not originally allowed on college cheer and dance teams; women were then relegated to the sidelines, as they were denied equitable participation opportunities. Title IX was meant to change this.³³⁵ Yet these athletes, who grew to love the sports and the school-spirit aspects of them while organizing their own competitions and improving the sports, would now be forced to give up an aspect of their sports that is so essential to their history, to ensure safe and equitable practices and competitions. Proponents of granting collegiate cheer and dance Title IX protections emphasize the highly competitive and intense nature of the sports, which have evolved to a level similar to that of recognized varsity sports.³³⁶ As a result, young girls are choosing to dedicate themselves to cheer and dance in lieu of participating in other recognized sports that would allow them to receive Title IX benefits and protections in the future.³³⁷ If they had chosen these other sports, they would likely have been counted as participants that help satisfy colleges' and universities' Title IX obligations.³³⁸ Recognizing cheer and dance as sports will benefit not only the athletes who love their activities, but also the colleges and universities offering these often low-cost sports.³³⁹

CONCLUSION

It would appear that, understandably, opponents do not wish to grapple with the complex process to receive Title IX protections,

³³⁵ Gerson, *supra* note 304.

³³⁶ Green, *supra* note 332.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ Gerson, *supra* note 304.

which seem to imply that they must sacrifice the sports' origins in order to qualify as varsity sports. At times, it seems that process of becoming a sport is catered towards the conversion of men's traditional sports to a format for women. While collegiate cheer and dance teams originated from all-male pep squads, a large part of their histories and evolutions were led by the women who took over these squads and their progenies. Yet there is something new about the cheer and dance teams of the 21st Century, is there not? The UCA/UDA and the NCA/NDA were new organizations when Title IX first applied to athletics departments. The level of skill these athletes have cultivated in the 21st Century is nearly unrecognizable from the cheer and dance teams that existed when Title IX was implemented. Does honoring their history render them less deserving of protection and status as varsity sports?

The original forms of college cheer and dance teams do not qualify as sports for purposes of Title IX, as they were primarily focused on supporting other sports (though one could argue this focus was on promoting school spirit at the institutions' more highly attended events). However, the activities have evolved in ways that lead many who are active in the communities to wonder why this status, and the protections that flow from it, have not yet been granted. The collegiate cheer and dance worlds have taken the *Biediger* court's advice and implemented improved rules and organization. The teams that compete have rigorous practice and training schedules, and often spend more seasons practicing and performing than Title IX protected sports, due to the lack of regulation. These athletes have spent decades proving that they are more than the stereotypes that plague their sports, while still honoring their origins. NCAA recognition as sports would provide not only the athletes, but their coaches and universities, with insurmountable necessary protection and benefits. Cheer and dance have undergone total transformations in recent decades, resembling traditional sports more than ever before. Generations of cheerleaders and dancers have put in the work to organize, create cohesive rules and practices, and are ready and qualified for the rest of the world to finally view them as sports.

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**“FAKE NEWS”: A SYSTEMATIC REVIEW OF THE “ACTUAL
MALICE” STANDARD IN LIGHT OF THE DIGITAL AGE**

JOSIE JASMIN*

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INTRODUCTION

Now, more than ever before, society and democracy in general require rectification of the “fake news” phenomenon, as it has rendered citizens incapable of distinguishing between truth and falsity. Moreover, “fake news” in the news media has become increasingly more prevalent as society has progressed, with its perilous effects posing a severe threat to public welfare and democratic self-government.

Despite the apparent exigency of accurate news stories, the First Amendment protections for false speech are significant and have historically formed somewhat of an impregnable barrier around news media sources, shrouding them from the adverse consequences of deceptive and misleading claims. As society has advanced, these extensive protections have gradually come to function less like a shield and more like a sword, thus enabling “fake news” to flourish. This Article maintains that the First Amendment doctrine must evolve by way of reconsidering the “actual malice” standard adopted by the U.S. Supreme Court in *New York Times Co. v. Sullivan*, not to subvert the freedom of speech, but to ensure that the values of public debate and democratic self-government persist in the current media environment.

Part I of this Article defines “fake news” and identifies the nuances of the issue as well as its detrimental effect on democracy. Part II describes the application of the First Amendment protections to news media sources and the history of the First Amendment in this context. Part III addresses the potential implications of the “actual malice” standard as applied to current defamation lawsuits surrounding “fake news.” Finally, Part IV proposes a need for the Supreme Court to redress the “actual malice” standard as a means of limiting the promulgation of “fake news.”

I. “FAKE NEWS”: MISINFORMATION AND DISINFORMATION IN THE NEWS MEDIA

“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,”¹ but would it protect a man falsely shouting fraud during a landmark presidential election and causing mass discontent? Over 100 years ago in *Schenck v. United States*, Justice Oliver Wendell Holmes proclaimed that there is a category of speech analogous to shouting fire in a theater that is unprotected, thus championing the notion that free speech was not—and could never be—absolute.²

Despite the fact that there are certainly limitations regarding the extent to which speech can truly be considered free, First Amendment free speech protections are robust and not easily overcome, as the right to openly voice one’s opinions is the cornerstone of democracy, a basic human right, and a mark of a civilized and tolerant society.³ It is therefore essential that Americans have the opportunity to hear and contest a diverse range of perspectives and have access to various facts, interpretations, and constraining views.⁴ In this way, members of democracy are not merely passive recipients of information, but instead are active and

¹ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (citing *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 439 (1911)).

² Evelyn Douk & Genevieve Lakier, *Rereading Schenck v. United States*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV.: REREADING THE FIRST AMEND. (Jul. 7, 2022), [https://knightcolumbia.org/\[https://perma.cc/6LX6-AV79\]](https://knightcolumbia.org/[https://perma.cc/6LX6-AV79]); see Michael Gonchar, *Why Is Freedom of Speech an Important Right? When, if Ever, Can It Be Limited?*, N.Y. TIMES (Sept. 12, 2018), [https://www.nytimes.com/\[https://perma.cc/M4GN-7KUX\]](https://www.nytimes.com/[https://perma.cc/M4GN-7KUX]) (stating that *Schenck* declared that individuals are not entitled to free speech that presents ‘a clear and present danger’ to society).

³ NIGEL WARBURTON, *FREE SPEECH: A VERY SHORT INTRODUCTION* 1–3 (2009).

⁴ *Id.*

informed participants in political and social discourse concerning the nation.⁵

However, due to the nation's staunch commitment to free speech, the significant strength of these aforementioned First Amendment protections maintains the capacity to undermine the democratic value they endeavor to protect: the free exchange of ideas in public debate.⁶ Because free speech resides at the core of the First Amendment, and false "statement is inevitable in free debate," the United States Supreme Court has maintained that false statements "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" ⁷ However, these vast free speech protections have, in turn, subjected Americans to the pernicious threat of "fake news," which distorts the truth and is detrimental to discourse regarding politics, news, and science.⁸ When faced with innumerable interpretations of events that, in theory, should only have one outcome, Americans lack the means to form accurate opinions and make sound judgments.⁹ As a result, individuals are rendered incapable of formulating their own ideas and are thus unable to effectively participate in public debate, which is the cornerstone of a self-governing republic.¹⁰

A. "FAKE NEWS" IS NOTHING NEW

Although "fake news" seems to be somewhat of a novel issue, seemingly commencing with the 2016 presidential campaign, the printing and dissemination of spurious news has endured for centuries and is by no means unique to modern society.¹¹

⁵ *Id.*

⁶ See Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623 (2019).

⁷ *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964).

⁸ Emily Bazelon, *The First Amendment in the Age of Disinformation*, N.Y. TIMES (Oct. 13, 2020), <https://www.nytimes.com/> [<https://perma.cc/8LJT-9H2P>].

⁹ Michael K. Park, *Separating Fact from Fiction: The First Amendment Case for Addressing "Fake News" on Social Media*, 46 HASTINGS CONST. L.Q. 1, 3 (2018).

¹⁰ See *id.*

¹¹ See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPECTIVES 211, 212 (2017) (stating that "[f]ollowing the 2016 election, a specific concern has been the effect of false stories— 'fake news,' as it has been dubbed—circulated on social media."); Park, *supra* note 9, at 2; *The Real Story of 'Fake News,'*

1. 19TH CENTURY “FAKE NEWS”

In the 1890s, the term “yellow journalism” was coined, and, much like “fake news,” referred to the practice of presenting “sensationalistic or biased stories” as objective truth.¹² Both William Randolph Hearst, publisher of the *New York Journal*, and Joseph Pulitzer, publisher of the *New York World*, pioneered this style of journalism, employing deceptive and unverified information as truth in a brazen attempt to amass readership.¹³ Namely, shortly after the American battleship U.S.S. Maine exploded off a Cuban harbor in 1898, Hearst’s *New York Journal* announced that a Spanish mine was unequivocally responsible for the devastation, though the explosion’s actual source was and still remains inconclusive.¹⁴ This incredulous news story, along with ample others proffered by Hearst and Pulitzer, heightened public calls for United States entry into conflict with Spain and thus engendered the Spanish-American War of 1898.¹⁵ As a consequence of “yellow journalism,” news sources faced major backlash for lack of journalistic integrity, inducing citizens to demand objective and reliable news sources.¹⁶ Out of this demand arose *The New York Times*, which, at the time, became renowned for its impartial reporting.¹⁷

MERRIAM-WEBSTER, <https://www.merriam-webster.com/> [<https://perma.cc/DYW6-BF7T>] (noting that the term “fake news” was used as early as 1890 but appears to have begun seeing general use at the end of the 19th century).

¹² Cleveland Ferguson III, *Yellow Journalism*, FIRST AMEND. ENCYC., <https://www.mtsu.edu/> [<https://perma.cc/8MQZ-5EGF>]; *A Brief History of Fake News*, CTR. FOR INFO. TECH. & SOC’Y, <https://cits.ucsb.edu/> [<https://perma.cc/7H9F-JTM3>].

¹³ Ferguson, *supra* note 12.

¹⁴ Park, *supra* note 9, at 6.

¹⁵ See *id.* at 3; Ferguson, *supra* note 12; Lesley Kennedy, *Did Yellow Journalism Fuel the Outbreak of the Spanish-American War?: Sensationalist Headlines Played Off Tensions Between Spain and the United States in a Time when Raucous Media Found a Voice*, HISTORY (Aug. 21, 2019), <https://www.history.com/> [<https://perma.cc/PQ7Y-LX39>] (stating that Hearst and Pulitzer’s likely did not cause the Spanish-American war, but may have “heightened public calls for U.S. entry into the conflict”).

¹⁶ Alexandra Samuel, *To Fix Fake News, Look to Yellow Journalism*, JSTOR DAILY (Nov. 29, 2016), <https://daily.jstor.org/> [<https://perma.cc/FX5W-R46W>].

¹⁷ See *id.*; *A Brief History of Fake News*, *supra* note 12.

2. 21ST CENTURY “FAKE NEWS”

Synonymous to the news circulated amid the “yellow journalism” era of the 1890s, modern “fake news” functions to deceive the public by means of wholly manufactured news stories and publications.¹⁸ However, the “fake news” phenomenon of the 21st Century presents an unprecedented danger, as media distribution centers are no longer centralized or concentrated as they were in the past.¹⁹ Instead, technological advancements have spawned innumerable news media sources and digital platforms which consistently proffer varying accounts and outcomes of the same story.²⁰ This development presents a grave danger to democracy, as citizens’ social and political opinions are largely influenced by the media they digest.²¹

B. UNDERSTANDING “FAKE NEWS”

1. WHAT IS AUTHENTIC NEWS?

Although virtually all forms of journalism are socially constructed and largely narrative in nature, with journalists often exercising subjective judgment regarding the omission or inclusion of various facts and details,²² contrary to that of “fake news,” authentic news stories endeavor to provide citizens with “independent, reliable, accurate, and comprehensive information.”²³ This objective is embodied by the four principles of ethical journalism espoused by the *Society for Professional Journalists Code of Ethics*, which encourage journalists to seek truth and report it, minimize harm, act independently, and be accountable as well as transparent.²⁴ Accordingly, authentic news media sources are those which strive to accurately inform rather than mislead and confound

¹⁸ Samuel, *supra* note 16; *A Brief History of Fake News*, *supra* note 12.

¹⁹ See Park, *supra* note 9, at 3.

²⁰ *Id.*; see Allcott & Gentzkow, *supra* note 11, at 213; Darrell M. West, *How to Combat Fake News and Disinformation*, BROOKINGS INST. (Dec. 18, 2017), <https://www.brookings.edu/> [<https://perma.cc/F3FD-JC5M>].

²¹ See Park, *supra* note 9, at 6; see also Tao Huang, *Freedom of Speech as a Right to Know*, 89 U. CIN. L. REV. 106 (2020).

²² See CHERILYN IRETON & JULIE POSETTI, JOURNALISM, ‘FAKE NEWS’ AND DISINFORMATION: HANDBOOK FOR JOURNALISM EDUCATION AND TRAINING 23 (2018); Edson C. Tandoc et al., *Defining “Fake News”*: A Typology of Scholarly Definitions, 6 DIGIT. JOURNALISM 137, 140 (2018).

²³ BILL KOVACH & TIM ROSENSTIEL, THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT 11 (Three Rivers Press, 1st rev. ed., 2007).

²⁴ *SPJ Code of Ethics*, SOC’Y OF PRO. JOURNALISTS (Sept. 6, 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp> [<https://perma.cc/7DTZ-SBYY>].

their audience.²⁵ It is, therefore, essential that journalists present information in a manner that is factual, objective, and unhindered by personal motive, as it is this practice that actualizes the primary purpose of journalism, “to provide citizens with the information they need to be free and self-governing.”²⁶

2. WHAT IS “FAKE NEWS”?

There is no universally agreed upon definition of “fake news,” and the term’s application is often limited to that of social media platforms or obscure and disreputable internet news sites;²⁷ however, for the purposes of this Article, “fake news” is defined as “false information knowingly circulated with specific strategic intent—either political or commercial.”²⁸ This definition is applicable to both social media and internet platforms as well as to traditional news publishers, including, but not limited to, Fox News, CNN, ABC, *BuzzFeed*, CBS, CNN, MSNBC, NBC, *The New York Times*, and *The Washington Post*. Accordingly, the term “fake news” is applicable to publications and broadcasts circulated by any news media source which intentionally and knowingly reports false information.²⁹

3. FALSE INFORMATION: MISINFORMATION AND DISINFORMATION

Generally, false information is comprised of two different subsets: misinformation and disinformation.³⁰ Despite the

²⁵ See *id.*

²⁶ *Id.*; KOVACH & ROSENSTIEL, *supra* note 23, at 17.

²⁷ See David Klein & Joshua Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 5, 5 (2017) (stating that traditional news publications fall squarely outside their definition of “fake news”).

²⁸ RISJ Admin, *How Can We Combat Fake News? – The Role of Platforms, Media Literacy, and Journalism*, REUTERS (Mar. 24, 2017), <https://reutersinstitute.politics.ox.ac.uk/> [<https://perma.cc/494M-YFTF>] (defining fake news narrowly as “false information knowingly circulated with specific strategic intent—either political or commercial”). This Article adopts Reuters’ definition; see also *Fake News*, DICTIONARY.COM, <https://www.dictionary.com/> [<https://perma.cc/TX8U-2QTV>] (defining “fake news” as “false news stories, often of a sensational nature, created to be widely shared or distributed for the purpose of generating revenue, or promoting or discrediting a public figure, political movement, company, etc.”).

²⁹ Klein & Wueller, *supra* note 27, at 6.

³⁰ “Misinformation” vs. “Disinformation”: *Get Informed on the Difference*, DICTIONARY.COM (Aug. 15, 2022), <https://www.dictionary.com/> [<https://perma.cc/UT3K-SQ5A>].

idiosyncrasy of these terms, there is a societal tendency to conflate misinformation with disinformation.³¹ Whereas misinformation refers to false or misleading information that is “created or disseminated without manipulative or malicious intent,” disinformation is explicitly disseminated with the intent to mislead others.³² Though both terms function to describe inaccurate or incorrect information, it is the honest intent of the publisher or broadcaster when promulgating false information that differentiates misinformation from disinformation.³³ Therefore, only false news publications and broadcasts premised on disinformation satisfy the criteria for “fake news,” as misinformation lacks the requisite scienter.³⁴

C. THE EFFECT OF “FAKE NEWS” ON DEMOCRACY

Access to accurate information is essential to a functioning democracy, as the ability to participate in democratic self-government necessitates a well-informed citizenry equipped with the means necessary to effectively engage in unconstrained public debate.³⁵ Absent this access, citizens are rendered uninformed and incapable of formulating sound opinions.³⁶ Moreover, when immersed in a poor informational environment dominated by falsity and uncertainty, citizens lack the capacity to make a fully rational choice when casting their vote, further undermining democracy’s participatory nature.³⁷ Thus, the anti-deliberative ramifications of “fake news” pose a major risk to the perpetuation of participatory democracy.³⁸

1. PUBLIC LACK OF TRUST AND THE INABILITY TO DISTINGUISH BETWEEN TRUTH AND FALSITY

The pervasive journalistic practice of convoluting opinion and objective fact has engendered an uninformed and confused populace

³¹ *Id.*; Valerie Strauss, *Word of the Year: Misinformation. Here’s Why.*, WASH. POST (Dec. 10, 2018, 12:20 PM), <https://www.washingtonpost.com/> [<https://perma.cc/3AEU-9SAW>].

³² *See id.*; *see also* IRETON & POSETTI, *supra* note 22, at 6.

³³ *See* Strauss, *supra* note 31.

³⁴ *See* Klein & Wueller, *supra* note 27, at 6 (“Fake news publishers do not reasonably believe that the stated facts are true.”).

³⁵ Huang, *supra* note 21, at 112-13.

³⁶ *See* Spencer McKay & Chris Tenove, *Disinformation as a Threat to Deliberative Democracy*, 74 POL. RSCH. Q. 703, 703 (2020).

³⁷ Huang, *supra* note 21, at 137.

³⁸ McKay & Tenove, *supra* note 36, at 703.

incapable of distinguishing between truth and falsity.³⁹ Regardless of partisan affiliation, an individual’s cognizance of “fake news,” or their efforts to evade it, Americans experience considerable difficulty distinguishing between authentic journalism and disinformation.⁴⁰ Even those who are aware of the “fake news” phenomenon and have a self-professed aptness for detecting “fake news” frequently fall victim to journalistic deceit.⁴¹ In fact, the more confidence an individual has in their ability to detect “fake news,” the more likely they are to believe in and unwittingly circulate untrue stories.⁴² This correlation becomes especially problematic when considering the national population, as the majority of Americans tend to vastly overestimate their ability to identify “fake news,” resulting in a significant part of the population heedlessly circulating and believing false and misleading narratives.⁴³

Furthermore, as a result of underestimating their susceptibility to “fake news,” few citizens indicate having personally seen or shared it.⁴⁴ However, many citizens believe that their societal counterparts remain highly influenced by deceptive and false narratives.⁴⁵ According to a Pew Research Center poll from 2016, although 88% of surveyed Americans claimed that “fake news”

³⁹ Peter Vanderwicken, *Why the News Is Not the Truth*, HARV. BUS. REV., May–Jun. 1995, <https://hbr.org/1995/05/why-the-news-is-not-the-truth> [<https://perma.cc/4ET9-ZUZP>].

⁴⁰ Ryan Prior, *Most Americans Think They Can Spot Fake News. They Can’t, Study Finds*, CNN (May 31, 2021, 8:03 PM), <https://www.cnn.com/> [<https://perma.cc/X85T-D595>]; see also Gene M. Grossman & Elhanan Helpman, *Electoral Competition with Fake News*, EUR. J. POL. ECON. 1, 1–2 (Sept. 2022); Brett Edkins, *Americans Believe They Can Detect Fake News. Studies Show They Can’t*, FORBES (Dec. 20, 2016), <https://www.forbes.com/> [<https://perma.cc/256F-347C>].

⁴¹ Benjamin A. Lyons et al., *Overconfidence in News Judgments is Associated with False News Susceptibility*, 118 PROC. NAT’L ACAD. SCI. 1, 1 (May 28, 2021) (finding that as many as three in four Americans overestimate their ability to identify fake headlines).

⁴² *Id.* at 7.

⁴³ See *id.* at 1, 10 (stating that “[a]lthough Americans believe the confusion caused by false news is extensive, relatively few indicate having seen or shared it.”); see also Scripps National, *Study Finds 3 in 4 Americans Overestimate Their Ability to Identify Fake News*, DENVER7 (Jun. 1, 2021), <https://www.denver7.com/> [<https://perma.cc/G3KT-XXTE>].

⁴⁴ Lyons et al., *supra* note 41, at 1.

⁴⁵ Merten Reglitz, *Fake News and Democracy*, 22 J. ETHICS SOC. POL’Y 162, 163 (2022); see also ‘Fake News’ Poses Corrosive Existential Threat to Democracy – Study, UNIV. OF BIRMINGHAM (Jul. 27, 2022), <https://www.birmingham.ac.uk/> [<https://perma.cc/43AR-VPFC>].

causes confusion among the citizenry, 39% of respondents indicated that they were “very confident” in their ability to identify fake news and 45% were “somewhat confident.”⁴⁶ Therefore, 84% of respondents expressed concern about “fake news” not because of their own susceptibility to disinformation, but because of its perceived effect on others.⁴⁷

This lack of faith and confusion caused by “fake news” poses a deadly threat to the well-being of American citizens and democracy in general, as a vigorous democratic society hinges on the existence of a well-informed electorate and collective public decision-making.⁴⁸ Absent epistemic trust among voters and faith in one another’s electoral choices, citizens may lose confidence in laws, social institutions, or electoral outcomes produced by public-decision making, which maintains the capacity to destabilize the entire democratic process.⁴⁹

2. *THE INABILITY TO MAKE SOUND ELECTORAL CHOICES*

Access to accurate information regarding political candidates, the country’s economic performance, and the general state of the nation is essential for an informed electorate capable of making sound choices.⁵⁰ When voters are exposed to “fake news” and consequently lack the means to accurately educate themselves about pressing social issues, they are more inclined to make uninformed choices at the polls.⁵¹ In turn, the likelihood of electing incompetent or disreputable candidates in contravention to democracy is significantly increased.⁵²

II. APPLICATION OF FIRST AMENDMENT PROTECTIONS TO NEWS MEDIA SOURCES

America, as envisioned by its founders, was a nation in which citizens were free to overtly denounce their government and speak candidly without fear of being censored or persecuted. This firmly entrenched sentiment was enshrined by the First Amendment of the

⁴⁶ Michael Barthel, *Many Americans Believe Fake News is Sowing Confusion*, PEW RSCH. CTR. (Dec. 15, 2016), <https://www.pewresearch.org/> [<https://perma.cc/3WV3-B5RD>].

⁴⁷ *Id.*

⁴⁸ James R. Hollyer et al., *Fake News is Bad News for Democracy*, WASH. POST (Apr. 5, 2019, 6:00 AM), <https://www.washingtonpost.com/> [<https://perma.cc/N7XT-DVCP>]; Reglitz, *supra* note 45, at 170.

⁴⁹ UNIV. OF BIRMINGHAM, *supra* note 45.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

United States Constitution, which mandates that, “[c]ongress shall make no law... abridging the freedom of speech, or of the press, or of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁵³ The founders’ commitment to the facilitation of robust debate derives from the notion that freedom of thought and expression are essential to liberty.⁵⁴ For this reason, current First Amendment jurisprudence poses a nearly insurmountable obstacle to regulating deception posed by “fake news.”⁵⁵ This is especially true regarding defamation law, as the doctrine surrounding libel and slander steadfastly promotes free speech under the First Amendment, even when such speech proves to be untrue or harmful.⁵⁶

A. DEFAMATION CLAIMS AND THE FIRST AMENDMENT FREEDOM OF SPEECH

Although the First Amendment imbues journalists with a virtually unfettered right to report on issues of public concern, individuals simultaneously possess a right not to be subjected to defamatory statements.⁵⁷ These competing rights often conflict, thus resulting in vehement litigation that can result in multi-million dollar jury verdicts and settlements.⁵⁸ Consequently, defamation, specifically that of libel, is the most frequently invoked legal claim against “fake news” publishers and remains the leading form of legal recourse against such publishers.⁵⁹ However, defamation law is not a one-size-fits-all solution to the “fake news” phenomenon, as claims are limited to false statements of fact regarding an

⁵³ U.S. CONST. amend. I.

⁵⁴ CATHERINE J. ROSS, A RIGHT TO LIE?: PRESIDENTS, OTHER LIARS, AND THE FIRST AMENDMENT 12 (2022).

⁵⁵ *Id.*

⁵⁶ See JP Perry, *Defamation and the First Amendment: Protecting Free Speech While Promoting Accountability Under Trump*, 21 CUNY L. REV. 259, 265 (2018) (contending that defamation is in doctrinal tension with First Amendment speech and press freedoms).

⁵⁷ David L. Hudson Jr., *Libel and Slander*, FIRST AMEND. ENCYC., <https://www.mtsu.edu/> [<https://perma.cc/MEK3-UNVT>].

⁵⁸ See *id.*; see also Elizabeth Williamson, *Judge Upholds \$49 Million Verdict Against Alex Jones, Despite Cap*, N.Y. TIMES (Nov. 22, 2022), <https://www.nytimes.com/> [<https://perma.cc/2AFR-8CD6>] (ordering Infowars host Alex Jones to pay entire \$49 million verdict awarded by jury due to his defamatory statements).

⁵⁹ See Klein & Wueller, *supra* note 27, at 6.

individual, and therefore do not encompass disinformation pertaining to mere topics or events.⁶⁰

1. *WHAT IS DEFAMATION?*

Though the right to speak openly and without the fear of reprisal is fundamental and heavily protected by the First Amendment, it does not protect harmful or untrue statements about another amounting to defamation.⁶¹ Generally, the common law tort of defamation is defined as the public communication of a false statement that tends to injure the reputation or character of another.⁶² This encompasses both libel (written defamatory statements) as well as slander (oral defamatory statements).⁶³ However, each is typically treated as a separate tort and are therefore separate causes of action.⁶⁴ In order to prevail on a defamation claim, a plaintiff must provide convincing evidence of a defamatory statement's falsity, as "truth" serves as an absolute defense against defamation.⁶⁵

2. *PUBLIC FIGURES AND OFFICIALS*

Although most defamation suits regarding "fake news" seemingly relate to public figures or officials, public figures, public officials, and private individuals maintain the right to bring a claim.⁶⁶ However, the level of intent required to bring a claim for libel varies and is contingent upon the plaintiff's level of prominence.⁶⁷

"Public figures," as defined by *Gertz v. Robert Welch, Inc.*, are those who "have assumed roles of special prominence in the affairs of society."⁶⁸ "Public figures" generally fall into one of two

⁶⁰ See generally ROSS, *supra* note 54, at 12.

⁶¹ Hudson, *supra* note 57.

⁶² ROSS, *supra* note 54, at 12; Bonnie Docherty, *Defamation Law: Positive Jurisprudence*, 13 HARV. L. REV. 263, 246 (2000); see also RESTATEMENT (SECOND) OF TORTS §§ 558-59 (AM. L. INST. 1977) (stating that the elements for a cause of action in defamation require: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.").

⁶³ Docherty, *supra* note 62, at 264.

⁶⁴ Perry, *supra* note 56, at 264.

⁶⁵ See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 262 (1964); see also *Time Inc. v. Hill*, 385 U.S. 374, 411 (1967).

⁶⁶ See Docherty, *supra* note 62, at 270.

⁶⁷ *Id.*

⁶⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

categories: (1) all-purpose public figures who have “pervasive fame or notoriety,” such as celebrities, or (2) limited-purpose public figures, who achieve their status by “thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”⁶⁹ Additionally, the *Gertz* Court identified a third type of public figure: the “involuntary public figure,” who is inadvertently thrown into the public spotlight, becoming a public figure “through no purposeful action of his own.”⁷⁰ However, the *Gertz* Court noted that “instances of truly involuntary public figures must be exceedingly rare,” thus applying exclusively to individuals forced into public debate without voluntarily assuming the public figure status.⁷¹

Pursuant to *Rosenblatt v. Baer*, the “public official” designation, though not comprehensive, “applies... to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”⁷² This includes those who work in elected positions as well as those who work for elected officers.⁷³

3. PRIVATE INDIVIDUALS

Conversely, the *Rosenblatt* Court classified a “private individual” as one who has not sought out the public spotlight or “assumed an influential role in ordering society.”⁷⁴ Contrary to that of public figures or officials who are furnished with widespread access to channels of effective communication, “private individuals” remain unequipped with a means to garner public attention, thus rendering them incapable of refuting false statements as effectively as prominent individuals can.⁷⁵ This vulnerability has resulted in the Supreme Court granting significantly stronger

⁶⁹ *Id.*; Klein & Wueller, *supra* note 27, at 6; Melissa Sarsten Polito, *Actual Malice in the Age of #fakenews*, NAT’L L. REV. (Oct. 26, 2022), <https://www.natlawreview.com/> [<https://perma.cc/LZX7-74QF>].

⁷⁰ *Gertz*, 418 U.S. at 345; Derigan Silver & Loryn Rumsey, *Going Viral: Limited-Purpose Public Figures, Involuntary Public Figures, and Viral Media Content*, 27 COMM’N L. & POL’Y 49, 55–56 (2022).

⁷¹ *Gertz*, 418 U.S. at 345; Katherine D. Gotelaere, *Defamation or Discourse?: Rethinking the Public Figure Doctrine on the Internet*, 2 CASE W. RES. J. L. TECH. & INTERNET 1, 5 (2011).

⁷² *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

⁷³ Gary Bugh, *Public Figures and Officials*, FIRST AMEND. ENCYC., <https://www.mtsu.edu/> [<https://perma.cc/FLB9-PWAU>].

⁷⁴ *Gertz*, 418 U.S. at 345 (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring)).

⁷⁵ *See id.* at 344.

protections to private individuals, requiring only a showing of “negligence”—that someone carelessly published a mistake, and leaving the States to establish their own individual standards of liability, “so long as they do not impose liability without fault.”⁷⁶ Public officials and public figures, however, are ostensibly in a superior position to rebut or minimize false claims, prompting the Supreme Court to articulate a far more stringent standard, requiring a showing of “actual malice” to prevail on a libel claim.⁷⁷

B. THE “ACTUAL MALICE” STANDARD

In an attempt to strike a balance between the public right of free speech and the private right to protect a public figure’s reputation, the Supreme Court devised the “actual malice” standard in *New York Times Co. v. Sullivan*, which sets an incredibly high bar for liability.⁷⁸ However, as society has progressed, this standard has become antiquated and unworkable and functions as a shield against liability and impetus for “fake news.”

1. ARTICULATING THE “ACTUAL MALICE” STANDARD

In essence, the *Sullivan* “actual malice” standard inhibits a public figure from recovering damages for a defamatory falsehood, unless they can prove that the statement was made with “actual malice” meaning, “knowledge that it was false or with reckless disregard of whether it was false or not.”⁷⁹ The plurality in *United States v. Alvarez* reaffirmed this notion, stating that “falsity alone may not suffice to bring the speech outside the First Amendment” and that “the statement must be a knowing or reckless falsehood.”⁸⁰ However, according to Justice Clarence Thomas, the standard “has evolved from a high bar to recovery into an effective immunity from liability.”⁸¹ This presents a significant problem for public figures who are the subject of purported defamatory “fake news.”⁸²

⁷⁶ *Id.* at 347; Klein & Wueller, *supra* note 27, at 7; *see also* Lauren Lee, *Clarified: How Does Defamation Law Protect Against Damaging Misinformation?*, KSBW ACTION NEWS (Dec. 15, 2022, 12:56 PM), <https://www.ksbw.com/> [<https://perma.cc/7JKX-XGUP>].

⁷⁷ *See Gertz*, 418 U.S. at 334.

⁷⁸ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *see also* Bugh, *supra* note 73.

⁷⁹ *Sullivan*, 376 U.S. at 279–80.

⁸⁰ *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (plurality opinion).

⁸¹ *Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting) (mem.).

⁸² *See* Jane Haskins, *Fake News: What Laws Are Designed to Protect*, LEGALZOOM (May 2, 2022), <https://www.legalzoom.com/> [<https://perma.cc/N4FL-FUMT>].

Because a public figure’s only means of prevailing on a lawsuit of this nature is by showing that the news outlet or journalist acted with “actual malice,” the standard fortifies the news media, thus enabling them to make injurious and false statements without fear of consequence.⁸³

2. *DEFAMATION’S LIMIT ON THE FREEDOM OF SPEECH AND THE FREEDOM OF PRESS*

Though erroneous statements of fact by news media sources regarding prominent individuals are manifestly undeserving of Constitutional protection, they remain an inevitable product of free debate among a fallible society and therefore warrant some First Amendment protection to encourage uninhibited public discourse and foster the marketplace of ideas.⁸⁴ These protections provide true social value, which further encourages free speech while simultaneously deterring self-censorship by the news media.⁸⁵ It is for these reasons that society should be weary of hindering the news media’s rights to critique or denounce public officials. Furthermore, because public figures have voluntarily cast themselves in the public eye, they tacitly subject themselves to widespread societal scrutiny via the news media, thus inviting a myriad of conflicting and subjective viewpoints, all of which coalesce to generate robust public debate.⁸⁶ This free exchange of ideas consequently promotes a democratic system of governance in which varying notions are ruthlessly evaluated, enabling only the most compelling policies and theories to endure.⁸⁷ Likewise, the criticism of public officials, and the government in general, remains the pinnacle of constitutionally protected free discussion and is therefore indispensable to democracy.⁸⁸ Accordingly, it is paramount that publishers and broadcasters enjoy extensive freedom in reporting to further stimulate fruitful public discourse.

However, this autonomy to freely critique public figures becomes problematic when it amounts to the unbridled “breathing space,” which the “actual malice” standard accords “freedoms of expression,” as the need to avoid self-censorship by the news media

⁸³ *See id.*

⁸⁴ *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–41 (1974).

⁸⁵ *See id.* (“The First Amendment requires that we protect some falsehood in order to protect speech that matters.”).

⁸⁶ *Id.*

⁸⁷ *See* Manzi, *supra* note 6.

⁸⁸ *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

is not the only societal value at issue.⁸⁹ An individual's right to the protection of his own good name lies at the heart of defamation law and is therefore equally as deserving of protection as the First Amendment freedoms of speech and press; however, the "actual malice" standard has significantly undermined this right, allowing for the proliferation of "fake news" surrounding public officials while rendering them without recourse.⁹⁰

III. CURRENT DEFAMATION CASES REGARDING "FAKE NEWS"

As society has progressed, technological advances have given new meaning to the term "public figure," enabling more individuals to acquire the title by simply posting a notable video or image on one of the numerous media sites or platforms now available.⁹¹ In turn, this has resulted in the "actual malice" standard applying to an extent that was likely unanticipated by the Supreme Court when drafting *Sullivan* (1964) and its progeny.⁹² Furthermore, a series of recent defamation cases regarding disinformation has given more significance to the "fake news" phenomenon, signaling a nationwide trend in the utilization of defamation lawsuits to repel the news media's unwarranted falsity and deceit.⁹³ The culmination of more individuals classifying themselves as public figures, "fake news" surging, and the rising number of defamation suits being filed (increasing 30% between 2018 and 2020) all necessitate revamping *Sullivan*'s "actual malice" standard.⁹⁴

A. 'COVINGTON KID' NICHOLAS SANDMANN

Although the majority of Nicholas Sandmann's lawsuits were either settled or dismissed,⁹⁵ this case highlighted the unmitigated power of media in the digital age, which induced many to speculate

⁸⁹ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964).

⁹⁰ See Hudson, *supra* note 57.

⁹¹ Polito, *supra* note 69.

⁹² *Id.*

⁹³ See *Are Defamation Lawsuits Being Used to Rein in Disinformation Spread by News Outlets?*, FIRST AMEND. WATCH (Feb. 16, 2021), <https://firstamendmentwatch.org/> [<https://perma.cc/BDD4-5BN3>].

⁹⁴ See *id.*

⁹⁵ Mia Jankowicz, 'Covington Kid' Nicholas Sandmann Loses Lawsuits Against Media Outlets Including NYT, ABC, and Rolling Stone, BUS. INSIDER (Jul. 28, 2022, 7:24 AM), <https://www.businessinsider.com/> [<https://perma.cc/WK9E-WKYX>].

about his status as plaintiff and the legal implications of “going viral” for the purpose of defamation law.⁹⁶

1. *FACTUAL BACKGROUND*

On January 18, 2019, ordinary 16-year-old student Nicholas Sandmann donned his red “Make America Great Again” hat and made the seemingly inconsequential decision to attend the anti-abortion March for Life rally with his fellow Covington Catholic High School classmates.⁹⁷ After attending the March for Life, Sandmann, his similarly adorned peers, and their teacher chaperones gathered at the steps of the Lincoln Memorial, which was the designated waiting spot for their return buses.⁹⁸ At the same time and location, a second rally for Native Americans and other Indigenous people was also wrapping up.⁹⁹ While the Covington students waited for their bus, Nathan Phillips, a participant of the second rally and a Native American elder and activist, brazenly inserted himself in the Covington student’s group and began to beat his ceremonial drum.¹⁰⁰ Consequently, Sandmann found himself face-to-face with Phillips.¹⁰¹

Videos taken by various bystanders of this interaction were then uploaded to social media platforms, including Instagram, Twitter, and YouTube, which each garnered millions of views.¹⁰² However, the video clip that ultimately went “viral” failed to depict the full extent of the interaction, thus portraying Sandmann as a confrontational teenage racist smirking in the face of a Native American elder.¹⁰³ Conversely, the unedited video largely

⁹⁶ Lyrissa Lidsky, *Sandmann: Bringing the Dream*, PRAWFSBLAWG (Aug. 2, 2020), <https://prawfsblawg.blogs.com/> [<https://perma.cc/24Z3-3FPS>]; Silver & Rumsey, *supra* note 70, at 3.

⁹⁷ Steve Gorman, *Student in Trump Hat Denies Mocking Native American Activist in Videotaped Encounter*, REUTERS (Jan. 20, 2019, 8:28 PM), <https://www.reuters.com/> [<https://perma.cc/4MTC-X848>].

⁹⁸ *Id.*

⁹⁹ Sarah Mervosh & Emily S. Rueb, *Fuller Picture Emerges of Viral Video of Native American Man and Catholic Student*, N.Y. TIMES (Jan. 20, 2019), <https://www.nytimes.com/> [<https://perma.cc/8WPL-BHM3>].

¹⁰⁰ *Id.*; Matt London, ‘Covington Kid’ Nick Sandmann Says He’s Lived Under ‘Constant Threat’ for Over a Year, FOX NEWS (Apr. 13, 2020, 12:02 PM), <https://www.foxnews.com/> [<https://perma.cc/3SRS-2GFP>].

¹⁰¹ Mervosh & Rueb, *supra* note 99.

¹⁰² Silver & Rumsey, *supra* note 70, at 1–2; *see also* London, *supra* note 100.

¹⁰³ London, *supra* note 100; Silver & Rumsey, *supra* note 70, at 2.

contradicted much of the discourse surrounding the video clip and its resulting narrative.¹⁰⁴

Despite this fact, due to the rapidity at which news spreads and the news media's increasing tendency to disregard the principles of journalistic ethics,¹⁰⁵ several media outlets took the video clip at face value, opting to republish and draw conclusions from the clip without endeavoring to confirm its veracity,¹⁰⁶ a rush to judgment that many attributed to bias and possibly even malice.¹⁰⁷ Regardless of intent, this unwarranted decision proved to have life altering repercussions.¹⁰⁸ Overnight, the mainstream media thrust Sandmann into the forefront of the "Covington Catholic controversy," falsely portraying him and his classmates as "privileged racist white kids harassing a peaceful Native protester."¹⁰⁹ As a result, Sandmann experienced nationwide vitriolic condemnation, with a mob of individuals taking to social media to insult, demean, and even threaten to kill him and his family.¹¹⁰

Based on the media's coverage of the incident and decision to "ignore basic journalistic standards,"¹¹¹ Sandmann's family filed defamation lawsuits against *The Washington Post*, *CNN*, *ABC News*, *NBC News*, *CBS News*, *The New York Times*, and multiple other news outlets, later settling with *The Washington Post*, *CNN*,

¹⁰⁴ Silver & Rumsey, *supra* note 70, at 2–3.

¹⁰⁵ See *SPJ Code of Ethics*, *supra* note 24 (encouraging journalists to seek truth and report it).

¹⁰⁶ Silver & Rumsey, *supra* note 70, at 2; Lidsky, *supra* note 96.

¹⁰⁷ Lidsky, *supra* note 96; Silver & Rumsey, *supra* note 70, at 2.

¹⁰⁸ London, *supra* note 100; see also Ebony Bowden & Steven Nelson, *Covington Teen Nick Sandmann Speaks Out on Being 'Defamed by the Media' During RNC Speech*, N.Y. POST (Aug. 25, 2020, 9:49 PM), <https://nypost.com/> [<https://perma.cc/5LY2-GHB9>] (Nicholas Sandmann claimed that his "life changed forever" after videos surfaced of his confrontation with Mr. Phillips).

¹⁰⁹ Zach Beauchamp, *The Real Politics Behind the Covington Catholic Controversy, Explained*, VOX (Jan. 23, 2019, 10:30 AM), <https://www.vox.com/> [<https://perma.cc/EY6V-RA8Y>].

¹¹⁰ Karma Allen, *Teen Accused of Taunting Native American Protesters in Viral Video Says He's Receiving Death Threats*, ABC NEWS (Jan. 20, 2019, 8:16 PM), <https://abcnews.go.com/> [<https://perma.cc/9TB9-QW4G>]; see also London, *supra* note 100.

¹¹¹ Stephen Loiaconi, *Attorneys Say More Lawsuits Coming as Covington Student Accuses Post of Defamation*, FOX 29 (Feb. 20, 2019, 3:35 PM), <https://foxsanantonio.com/> [<https://perma.cc/L699-6KY7>] (Sandmann's complaint alleged that "The Post ignored basic journalist standards because it wanted to advance its well-known and easily documented, biased agenda...").

and *NBC News*.¹¹² These settlements, in conjunction with the highly publicized and contentious nature of the encounter, drew national attention to the “fake news” phenomenon, thus transforming Sandmann and his classmates into what former President Trump deemed, “symbols of Fake News and how evil it can be.”¹¹³

2. IMPLICATIONS OF THE LAWSUITS

Because many of our defamation precedents date back to the 1960s and 1970s, before the Internet gained prominence, the United States Supreme Court has yet to address this issue and the ease at which private individuals can gain prominence from a simple post.¹¹⁴ Despite this fact, in *Gertz v. Robert Welch*, the court indicated that there were limited circumstances where a plaintiff could be classified as an “involuntary public figure,” becoming a public figure “through no purposeful action of his own.”¹¹⁵

This “involuntary public figure” classification presents a significant threat to 21st Century defamation lawsuits, as the subject of any viral video may be involuntarily thrust into the public spotlight, and thus adjudged an “involuntary public figure.”¹¹⁶ In turn, the unwitting subject would have to prove the defendant acted with “actual malice,” deliberately lying about the plaintiff or seriously doubting the truth of their statement but opting to vocalize it anyway.¹¹⁷ A “private individual,” however, would simply have

¹¹² Silver & Rumsey, *supra* note 70, at 3; Mia Jankowicz, ‘Covington Kid’ Nicholas Sandmann Loses Lawsuits Against Media Outlets Including NYT, ABC, and Rolling Stone, BUS. INSIDER (Jul. 28, 2022, 7:24 AM), <https://www.businessinsider.com/> [https://perma.cc/E7TM-GVGS]; Edmund Lee, *Washington Post Settles Lawsuit with Student in Viral Protest Video*, N.Y. TIMES (Jul. 24, 2020), <https://www.nytimes.com/> [https://perma.cc/HK9N-MDZK]; see also Charles Creitz, *Nicholas Sandmann Reaches Settlement with NBC in Covington Catholic High School Controversy*, FOX NEWS (Dec. 17, 2021, 6:32 PM), <https://www.foxnews.com/> [https://perma.cc/EL4E-23ZT].

¹¹³ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 22, 2019, 5:32AM), <https://twitter.com/> [https://perma.cc/GME4-ZG86]; Lidsky, *supra* note 96.

¹¹⁴ Silver & Rumsey, *supra* note 70, at 3, 28.

¹¹⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); Gotelaere, *supra* note 71, at 23.

¹¹⁶ Gotelaere, *supra* note 71, at 23.

¹¹⁷ *Id.*; Enrique Armijo, *Alex Jones Loses Sandy Hook Case, but Important Defamation Issues Remain Unresolved*, FIRST AMEND. ENCYC. (Nov. 17, 2021), <https://www.mtsu.edu/first-amendment/post/2398/alex-jones-loses-sandy-hook-case-but-important-defamation-issues-remain-unresolved> [https://perma.cc/U7H6-GR5L].

to show that the defamatory statement was false or that a reasonable speaker would have known it was false.¹¹⁸ Accordingly, the need to prove “actual malice” as an “involuntary public figure” would severely hinder the plaintiff’s likelihood of prevailing in a defamation lawsuit akin to that of Sandmann’s¹¹⁹—a result the *Gertz* Court could not possibly have anticipated when drafting the opinion in 1974.

B. ALEX JONES: SANDY HOOK DISINFORMATION CAMPAIGN

Although the Supreme Court in *Gertz* speculated that “instances of truly involuntary public figures” would be “exceedingly rare,” the Internet, social media, and proliferation of news media sources have coalesced to largely subvert this assertion.¹²⁰ Likewise, the “limited-purpose public figure” designation has taken on an entirely new connotation.¹²¹ Though never resolved, this issue was alluded to by right-wing American radio host and conspirator Alex Jones amid the slew of multimillion-dollar defamation lawsuits filed against him because of his ruthless Sandy Hook disinformation campaign.¹²²

1. *FACTUAL BACKGROUND*

Following the fatal 2012 Sandy Hook Elementary School shooting, which devastated Americans across the country and invariably altered the livelihoods of the victims and their families, conspiracy theorist Alex Jones initiated a long-winded and sadistic attack on the Sandy Hook victims and their families.¹²³ Just hours after the shooting, Jones took to his *Infowars* web show, deeming the travesty a “false flag” and “secretive plot planned by the government as a pretext for taking away Americans’ guns.”¹²⁴ Jones further erroneously alleged that the 20 students and six school staff members who lost their lives as a result of the shooting were never actually murdered and that the grieving families were merely “crisis

¹¹⁸ *Id.*

¹¹⁹ See Lidsky, *supra* note 96.

¹²⁰ *Gertz*, 418 U.S. at 345; Armijo, *supra* note 117.

¹²¹ *Sandy Hook Families v Alex Jones: Defamation Case Explained*, BBC NEWS (Aug. 31, 2018), <https://www.bbc.com/> [<https://perma.cc/Q9S5-7ZNA>].

¹²² Armijo, *supra* note 117; Daniel Victor, *What to Know About the Alex Jones Defamation Case*, N.Y. TIMES (Aug. 5, 2022), <https://www.nytimes.com/> [<https://perma.cc/U2KE-XA3C>].

¹²³ See Victor, *supra* note 122; see also Marianna Spring, *Alex Jones: 'Moment of Reckoning' for Infowars Conspiracist*, BBC NEWS (Oct. 13, 2022), <https://www.bbc.com/> [<https://perma.cc/W9HW-SNH4>].

¹²⁴ Victor, *supra* note 122.

actors.”¹²⁵ As a result of the callous and distorted statements relentlessly proffered by Jones, many of his acolytes set about harassing, stalking, and sending death threats to family members of the victims, persisting for nearly a decade.¹²⁶ Consequently, multiple family members of the victims, as well as an F.B.I. agent who became a target of the conspiracy, filed suit against Jones for his misleading and defamatory statements.¹²⁷

In 2018, Neil Heslin and Scarlett Lewis, the parents of slain 6-year-old Jesse Lewis, commenced suit against Alex Jones in Texas, alleging defamation.¹²⁸ Although all defamation lawsuits necessarily involve the First Amendment, lawyers on both sides noted that Jones’ case remained critical to the concept of free speech given the current media landscape.¹²⁹ At the trial’s outset, Jones initially portrayed the lawsuit as an “assault on the First Amendment,” and sought dismissal based on the assertion that the conspiracy theories amounted to opinion, not fact, and were therefore protected by the First Amendment.¹³⁰ He further emphasized this sentiment by showing up to the Texas courthouse with the words “Save the 1st” scrawled on tape covering his mouth.¹³¹

¹²⁵ *Id.*; Max Chafkin, *Being Thrown Off Social Media Was Supposed to End Alex Jones’s Career. It Made Him Even Richer*, BLOOMBERG (Aug. 5, 2022, 3:00 AM), [https://www.bloomberg.com/\[https://perma.cc/M6LF-RGLX\]](https://www.bloomberg.com/[https://perma.cc/M6LF-RGLX]).

¹²⁶ Jack Queen, *Jury Awards \$45.2 Million in Punitive Damages in Alex Jones Sandy Hook Trial*, REUTERS (Aug. 6, 2022, 2:50 PM), [https://www.reuters.com/\[https://perma.cc/9FPN-RP7U\]](https://www.reuters.com/[https://perma.cc/9FPN-RP7U]); see also Victor, *supra* note 122; Jack Queen & Jacqueline Thomson, *Alex Jones Must Pay Sandy Hook Families Nearly \$1 Billion For Hoax Claims, Jury Says*, REUTERS (Oct. 12, 2022, 5:50 PM), [https://www.reuters.com/\[https://perma.cc/6XDW-8NAG\]](https://www.reuters.com/[https://perma.cc/6XDW-8NAG]).

¹²⁷ Joanna Slater, *Connecticut Jury Orders Alex Jones to Pay Nearly \$1 Billion to Sandy Hook Families*, TEX. TRIB. (Oct. 12, 2022), [https://www.texastribune.org/\[https://perma.cc/VY79-M4HL\]](https://www.texastribune.org/[https://perma.cc/VY79-M4HL]).

¹²⁸ Queen, *supra* note 126; see also Michael Tarm, *EXPLAINER: Is Alex Jones’ Trial About Free Speech Rights?*, AP NEWS (Aug. 3, 2022), [https://apnews.com/\[https://perma.cc/FTA3-4MLU\]](https://apnews.com/[https://perma.cc/FTA3-4MLU]).

¹²⁹ Tarm, *supra* note 128.

¹³⁰ See Linda Qui, *Here’s How Alex Jones Gave Up His Chance to Defend Himself on Free Speech Grounds*, N.Y. TIMES (Sept. 13, 2022), [https://www.nytimes.com/\[https://perma.cc/V9HB-X3CY\]](https://www.nytimes.com/[https://perma.cc/V9HB-X3CY]).

¹³¹ *Id.*; see also Dave Collins, *Second Trial Set to Begin for Alex Jones in Sandy Hook Hoax Case*, PBS (Sept. 12, 2022), [https://www.pbs.org/\[https://perma.cc/BED4-QRXB\]](https://www.pbs.org/[https://perma.cc/BED4-QRXB]).

Despite these claims, Jones lost the opportunity to mount a First Amendment defense when he and his lawyers consistently failed to comply with court orders and discovery requests.¹³² As a result of his noncompliance, Judge Maya Guerra Gamble entered a default judgment in the plaintiffs' favor, effectively eliminating the First Amendment issue and leaving only the question of compensatory and punitive damages to the jurors.¹³³ Nevertheless, the plaintiffs' lawyer continued to emphasize the consequential nature of the case, informing the jurors prior to deliberation that they had "the ability to send a message for everyone in this country and perhaps this world to hear... [s]top Alex Jones... [s]top the monetization of misinformation and lies."¹³⁴

The jurors evidently took that declaration to heart when subsequently awarding the plaintiffs a considerable \$4.1 million in compensatory damages and \$45.2 million in punitive damages, thus signaling widespread discontent with Jones' abhorrent conduct and his decision to propagate false and misleading information as unadulterated fact.¹³⁵ This sentiment was further emphasized in a succeeding Connecticut defamation trial, where Judge Barbara Bellis awarded eight other victims and an F.B.I. agent implicated in Jones' claims \$965 million in compensatory damages and \$473 million in punitive damages, bringing the total damages to nearly \$1.5 billion.¹³⁶ Two additional plaintiffs, Veronique De La Rosa and Leonard Pozner, who lost their 6-year-old son to the shooting, brought suit in Texas court, where Jones and his company, Free Speech Systems, were found liable. However, this third defamation trial, which will determine how much Jones owes the parents, has been delayed due to both Jones and his company filing for bankruptcy.¹³⁷

¹³² Qui, *supra* note 130.

¹³³ *Id.*

¹³⁴ Elizabeth Williamson, et al., *Jury Orders Alex Jones to Pay \$45.2 Million in Sandy Hook Case*, N.Y. TIMES, (Aug. 5, 2022), <https://www.nytimes.com/> [<https://perma.cc/2ZUT-7QP3>]

¹³⁵ See Queen, *supra* note 126; see also Michael R. Sisak, *Alex Jones' \$49.3M Verdict and the Future of Misinformation*, FIRST AMEND. ENCYC. (Aug. 8, 2022), <https://firstamendment.mtsu.edu/> [<https://perma.cc/FM5L-SLAW>].

¹³⁶ Elizabeth Williamson, *With New Ruling, Sandy Hook Families Win Over \$1.4 Billion From Alex Jones*, N.Y. TIMES (Nov. 10, 2022), <https://www.nytimes.com/> [<https://perma.cc/6N2B-G7LL>].

¹³⁷ Dietrich Knauth, *Sandy Hook Plaintiffs Seek Third Trial Against Bankrupt Alex Jones*, REUTERS (Feb. 14, 2023, 3:21 PM), <https://www.reuters.com/> [<https://perma.cc/5RRY-J9A5>].

2. IMPLICATIONS OF THE LAWSUITS

Although these significant damages certainly have a chilling effect on the type of harmful and false statements espoused by Jones—and on the promulgation of “fake news” in general—the plaintiffs ultimately prevailed on a technicality, default judgment, before the trial even began.¹³⁸ This outcome, although ostensibly warranted, resulted in the failure to address the ultimate issue of whether Jones’ speech qualified as unprotected defamation.¹³⁹ If not for the default judgment, it is probable that the jury could have found that Jones’ claims were permissible under the First Amendment.¹⁴⁰ However, this result would likely hinge on whether the plaintiffs were designated as public or private figures, thus begging the question: does speaking publicly about the killing of a child turn the child’s parents into public figures?¹⁴¹

At the outset of trial, Jones initially alleged that because the plaintiffs spoke publicly on the issue of gun violence, they consequently became “limited-purpose public figures” and were thus required to prove actual malice.¹⁴² Specifically, by advocating for stricter gun laws on TV and before Congress,¹⁴³ Jones argued that these plaintiffs entered the national debate over guns and therefore became public figures.¹⁴⁴ Although no one would willingly volunteer to be thrust into the public light in the manner that the victims’ parents were, the current media environment has made it possible for sufferers of notable tragedies to become public figures by simply vocalizing their discontent with a causal

¹³⁸ See Sisak, *supra* note 135.

¹³⁹ See *id.*; see also Tarm, *supra* note 128.

¹⁴⁰ First Amendment Lawyer Barry Covert stated that, “defamation is always a challenge to prove” and that he “wouldn’t discount the possibility Jones could have prevailed.” See Tarm, *supra* note 128.

¹⁴¹ See Elizabeth Williamson, *In Alex Jones Lawsuit, Lawyers Spar Over an Online Broadcast on Sandy Hook*, N.Y. TIMES (Aug. 1, 2018), <https://www.nytimes.com/> [<https://perma.cc/G22S-B4AZ>] (questioning whether “speaking publicly about the killing of a child turn the child’s parents into public figures, making it more difficult to win their case.”).

¹⁴² See *Sandy Hook Families v Alex Jones: Defamation Case Explained*, *supra* note 121; see also Armijo, *supra* note 117.

¹⁴³ Several parents of the Sandy Hook victims offered pleas for firearm controls at task force hearing in Hartford. See Mary E. O’Leary, *Victims’ Parents, Gun Advocates Testify at Task Force Hearing in Hartford (Photos)*, NEW HAVEN REG. (Jan. 28, 2013), <https://www.nhregister.com/> [<https://perma.cc/JA2J-KBLP>].

¹⁴⁴ Tarm, *supra* note 128.

mechanism of the tragedy.¹⁴⁵ Therefore, it is entirely possible that the plaintiffs would have become either “limited-purpose” or “involuntary” public figures, a designation that would make it increasingly more difficult to prevail on a defamation claim.¹⁴⁶ As public figures, the plaintiffs would have had to prove “actual malice”—that Jones knew that the statements were untrue and broadcast them anyway, or that he demonstrated reckless disregard as to their accuracy.¹⁴⁷

In turn, the well-deserved punitive and compensatory damages might have never been awarded to the plaintiffs. A result that would not surprise First Amendment lawyer Barry Covert, who professed that he “wouldn’t discount the possibility that Jones could have prevailed” absent a determination of default judgment and that “[t]rying to speculate what a jury would find is always a fool’s errand.”¹⁴⁸ This outcome, though entirely probable due to the difficulty of proving “actual malice,” runs contrary to the primary function of free speech under the First Amendment, “to promote the free exchange of ideas.”¹⁴⁹ By designating individuals like those of the victims’ families “public figures” and thus requiring a showing of “actual malice,” individuals would be hesitant to respond to disastrous or tragic events they endured.¹⁵⁰ Consequently, this would “encourage individuals to take the tragedies that happen to them and swallow them silently,” and therefore severely stifle public debate.¹⁵¹

C. FOX-DOMINION VOTING SYSTEMS LAWSUIT

Although defamation lawsuits typically involve harm to an individual, they often refer to matters of public concern, with some false statements maintaining the capacity to, according to Fox News host Tucker Carlson, “amount to the single greatest crime in American history,” and result in “millions of votes stolen in a day. Democracy destroyed. The end of our centuries-old system of

¹⁴⁵ See Armijo, *supra* note 117.

¹⁴⁶ See Brianna Sacks, *Alex Jones Is Trying to Get Out of Court by Arguing That What He Says Is Not Real*, BUZZFEED NEWS (Aug. 3, 2018), <https://www.buzzfeednews.com/> [<https://perma.cc/TRP5-CK78>]; Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

¹⁴⁷ See Williamson, *supra* note 141.

¹⁴⁸ Tarm, *supra* note 128.

¹⁴⁹ See Perry, *supra* note 56, at 265 (stating defamation law is at odds with “the primary function of free speech under the First Amendment, which is to promote the free exchange of ideas”).

¹⁵⁰ See Armijo, *supra* note 117.

¹⁵¹ *Id.*

government.”¹⁵² This occurrence is exemplified by Dominion Voting Systems’ lawsuit against Fox News, a lawsuit that *The New York Times* alleges could be one of the most consequential First Amendment libel cases brought against an American media company in more than a generation.¹⁵³

1. *FACTUAL BACKGROUND*

In March 2021, Dominion Voting Systems filed a \$1.6 billion defamation lawsuit against Fox News, alleging that Fox destroyed its reputation by airing falsehoods that it knew were untrue regarding the use of Dominion voting machines to rig the 2020 U.S. Presidential Election.¹⁵⁴ Reportedly, after Joe Biden was declared the winner of the 2020 election, Fox’s ratings began to plummet significantly due to its failure to bolster former President Trump’s claims that the election was rigged and that he was the rightful winner.¹⁵⁵ As a result of Fox’s reduced ratings and lack of viewership, Dominion claimed that Fox executives opted to push false narratives in an attempt to regain their audience and avoid alienating viewers.¹⁵⁶ Consequently, Fox’s purportedly false claims thrust the once-obscure voting technology company into the

¹⁵² Jeremy W. Peters, *Tucker Carlson Dared Question a Trump Lawyer. The Backlash Was Quick*, N.Y. TIMES (Nov. 23, 2020), <https://www.nytimes.com/> [<https://perma.cc/JQT8-ZGXX>].

¹⁵³ Jeremy W. Peters, *Defamation Suit About Election Falsehoods Puts Fox on Its Heels*, N.Y. TIMES (Aug. 13, 2022), <https://www.nytimes.com/> [<https://perma.cc/QL5M-MEJN>]; First Amendment attorney Lee Levine claimed that Dominion had the strongest defamation claim he’s seen in more than 40 years of being involved in the topic. David Bauder, *Fox Libel Defense at Odds with Top GOP Presidential Foes*, AP NEWS (Mar. 6, 2023), <https://apnews.com/> [<https://perma.cc/3Q27-GB54>].

¹⁵⁴ Helen Coster & Jack Queen, *Fox Knew Vote Rigging Claims Were False, Dominion Says, as Network Defends Coverage*, REUTERS (Feb. 17, 2023, 9:23 PM), <https://www.reuters.com/> [<https://perma.cc/CM2W-5AYU>]; Jan Wolfe, *Trial Date Set in Defamation Suit Against Fox News Over U.S. Election Claims*, REUTERS (Apr. 13, 2022), <https://www.reuters.com/> [<https://perma.cc/LB97-ASCQ>].

¹⁵⁵ After Joe Biden was elected, Fox fell from first to third in the news network ratings. Many Fox viewers flocked to Newsmax whose viewership increased from 58,000 the week before the 2020 election to 568,000 the week after. David Bauder, *Dominion Voting Case Exposes Post-Election Fear at Fox News*, AP NEWS (Feb. 23, 2023), <https://apnews.com/> [<https://perma.cc/D8RR-V846>].

¹⁵⁶ *Id.*

national spotlight, thus resulting in irreversible harm to its reputation and inducing Dominion's defamation lawsuit.¹⁵⁷

Echoing Alex Jones's claims, Fox's legal team cited the broad protections the First Amendment allows, arguing that statements about Dominion were protected opinion and, therefore, the type of speech that any media organization would cover as indisputably newsworthy.¹⁵⁸ Furthermore, Fox stated that the core of the case remained "about freedom of the press and freedom of speech, which are fundamental rights afforded by the Constitution and protected by *New York Times Co. v. Sullivan*."¹⁵⁹ However, according to a court filing by Dominion, "the words of multiple Fox employees provide overwhelming direct evidence of actual malice," and that "[p]rivately, Fox hosts and executives knew that Donald Trump lost the election and that he needed to concede. But Fox viewers heard a different story—repeatedly."¹⁶⁰ The filing further provided numerous examples showing that Fox employees knew that the claims were false, referring to the election fraud claims and their guests promoting them as "ludicrous," "totally off the rails," "F'ing lunatics," and "complete bs," but nonetheless reported on them as though they were fact.¹⁶¹

2. IMPLICATIONS OF THE CASE

Dominion's evidence, although ample, may still not be compelling enough to prove that Fox's false claims amounted to defamation. In his "Order on Public Figure Status," Delaware Judge Eric M. Davis addressed the "limited-purpose public figure" standard set out in *Gertz*, stating that "the standard would seem to make any person or entity that is reported on by the media a limited-purpose public figure," and questioned how anyone would not meet

¹⁵⁷ See Coster & Queen, *supra* note 154.

¹⁵⁸ See Wolfe, *supra* note 154.

¹⁵⁹ Bauder, *supra* note 155.

¹⁶⁰ Dominion's Brief in Support of its Motion for Summary Judgment on Liability of Fox News Network, LLC and Fox Corporation at 8, 44, US Dominion, Inc. v. Fox News Network, LLC, No. N21C- 11-082-EMD CCCLD (Del. Super. Ct. Feb. 16, 2023).

¹⁶¹ *Id.* at 8–9; Fox News host Laura Ingraham referred to Sidney Powell as a "nut" regarding her election fraud theories in text to fellow host, Tucker Carlson. Bauder, *supra* note 153; Tucker Carlson called the election fraud charges "ludicrous" and "off the rails." Sean Hannity texted about "F'ing lunatics." A senior network vice-president called one of the stories "MIND BLOWINGLY NUTS." Charles Kaiser, *How Dominion Voting Systems Filing Proves Fox News Was 'Deliberately Lying'*, THE GUARDIAN (Feb. 20, 2023, 2:00 PM), <https://www.theguardian.com/us> [https://perma.cc/Y5B3-CT57].

the standard once the “ever-expanding media world” addresses an event and the allegedly defamed person or entity responds.¹⁶² He later designated Dominion a public figure, reasoning that Dominion was likely a public figure for the limited purpose of the incident.¹⁶³

Therefore, because Fox’s allegations thrust the once-obscure Dominion Voting Systems into the national spotlight, it became a public figure by no volition of its own and must now prove that Fox acted with “actual malice” by publishing false and defamatory statements with knowledge of or reckless disregard for their falsity.¹⁶⁴ Despite its employees acknowledging the outrageousness of the election fraud claims, Fox News has relied on the *Sullivan* standard, stating that “the core of this case remains about freedom of the press and freedom of speech, which are fundamental rights afforded by the Constitution and protected by *New York Times Co. v. Sullivan*.”¹⁶⁵ Fox is, therefore, confident that they will prevail.¹⁶⁶ Fox’s confidence, despite Dominion’s compelling evidence, emphasizes the need for the Supreme Court to revisit the “actual malice” standard set forth in *New York Times Co. v. Sullivan* and reexamine its implications in light of the ever-expanding media world.

IV. THE EXIGENCY OF REWORKING THE “ACTUAL MALICE” STANDARD

Laws conceptualized and implemented for a rudimentary era are incapable of resolving the problems currently facing the nation’s media ecology.¹⁶⁷ Because much of libel law was established during the 1960s and 1970s, a time when news media distribution centers

¹⁶² Order on Public Figure Status at *2, *U.S. Dominion, Inc. v. Fox News Network, LLC*, C.A. N21C-03-257 EMD (Del. Super. Ct. Jan. 27, 2023).

¹⁶³ *Id.* at *2.

¹⁶⁴ See Gabriel Malor, *Dominion v. Fox News: A Good Case, But Not a Slam Dunk*, THE DISPATCH (Mar. 15, 2023), [https://thedispatch.com/\[https://perma.cc/MQ7Z-MWTD\]](https://thedispatch.com/[https://perma.cc/MQ7Z-MWTD]).

¹⁶⁵ Steve Benen, *Newly Exposed Internal Messages Create a Nightmare for Fox News*, MSNBC (Feb. 17, 2023, 11:51 AM), [https://www.msnbc.com/\[https://perma.cc/HE4Z-3FVS\]](https://www.msnbc.com/[https://perma.cc/HE4Z-3FVS]).

¹⁶⁶ Jonathan Peters, *Dominion’s Lawsuit Is No Slam Dunk—But Neither Is Fox News’ Defense*, VANITY FAIR (Sept. 22, 2022), [https://www.vanityfair.com/\[https://perma.cc/9W2N-6H3W\]](https://www.vanityfair.com/[https://perma.cc/9W2N-6H3W]).

¹⁶⁷ Zaynep Tufekci, *We Should Try to Prevent Another Alex Jones*, N.Y. TIMES (Oct. 16, 2022), [https://www.nytimes.com/\[https://perma.cc/7VX9-TVHW\]](https://www.nytimes.com/[https://perma.cc/7VX9-TVHW]).

were centralized and finite, the precedents set by the Supreme Court in *Sullivan* and its progeny are incongruous with the digital age.¹⁶⁸

Although the standards espoused in these cases may have served as a sufficient means of protection for the traditional press, they have become wholly inadequate in a world where innumerable unconstrained news sources are equipped with the ability to reach a global audience at the touch of a button.¹⁶⁹ “Our libel model is one that envisions establishment media and a bunch of people gossiping”—it does not envision digital media.¹⁷⁰ As a result, the “actual malice” standard must be reevaluated in light of technological advances and the evolution of society.

A. REEVALUATING THE “ACTUAL MALICE” STANDARD

Due to the considerable strength of the “actual malice” standard, which renders defamation cases brought by “public figures” against the press virtually impossible to win, Supreme Court Justices have begun to voice considerable discontent with the standard.¹⁷¹ Although it is unlikely that the Court will overturn 50 years of settled precedent, both Justice Thomas and Justice Gorsuch have indicated that the *Sullivan* standard warrants another look.¹⁷²

1. THE UNITED STATES SUPREME COURT’S DISCONTENT WITH THE “ACTUAL MALICE” STANDARD

In 2019 Supreme Court Justice Thomas issued a concurrence in *McKee v. Cosby*, a defamation case questioning the rationale of *New York Times Co. v. Sullivan* and calling for the High Court to revisit the decision.¹⁷³ In his concurrence, Justice Thomas declared that the *Sullivan* decision had no basis in the Constitution, as it was “policy-driven decisions masquerading as constitutional law” and that the Court failed to apply the First Amendment as understood by the founders, instead choosing to fashion its own rules by balancing ‘the

¹⁶⁸ See Park, *supra* note 9, at 3; Silver & Rumsey, *supra* note 70, at 3.

¹⁶⁹ Alexandra M. Gutierrez, *The Case for a Federal Defamation Regime*, 131 YALE L.J.F. 19, 21 (2021).

¹⁷⁰ Emma Grey Ellis, *Win or Lose, the Alex Jones Lawsuit Will Help Redefine Free Speech*, WIRED (Aug. 6, 2018, 7:00 AM), <https://www.wired.com/> [https://perma.cc/3YL8-G2UJ].

¹⁷¹ See Polito, *supra* note 69; see also The Editorial Board, *Reconsidering Times v. Sullivan*, WALL ST. J. (Mar. 22, 2021, 7:03 PM) <https://www.wsj.com/> [https://perma.cc/576K-LW48].

¹⁷² See Polito, *supra* note 69.

¹⁷³ Adam Liptak, *Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/> [https://perma.cc/RPT5-DV63].

competing values at stake in defamation suits.’¹⁷⁴ This policy-driven approach, he stated, should not continue to be reflexively applied.¹⁷⁵ Instead, he asserted that the Court should reexamine whether the First and Fourteenth Amendments “require public figures to satisfy an actual-malice standard in state-law defamation suits...” and if they do not, then neither should the Supreme Court.¹⁷⁶

The Supreme Court, he noted, “did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified,” indicating that “[t]he states are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm.”¹⁷⁷ Justice Thomas concluded that, as a result, the Court should reconsider its jurisprudence in defamation law.¹⁷⁸

Two years later, in *Berisha v. Lawson*, another defamation lawsuit, Justice Thomas and Justice Neil Gorsuch reiterated the need to reconsider *New York Times Co. v. Sullivan*.¹⁷⁹ In their dissents, both Justices emphasized the way the “actual malice” standard interacts with the modern news landscape and its application to public figures, with Justice Thomas asserting that “the proliferation of falsehoods is, and always has been, a serious matter.”¹⁸⁰

In his dissent, Justice Gorsuch suggested that the “actual malice” standard might have been more workable in the 1960s when there were fewer, more reliable sources of news, dominated by outlets “employing legions of investigative reporters, editors and fact-checkers.”¹⁸¹ “What started in 1964 with a decision to tolerate the occasional falsehood to ensure robust reporting by a comparative handful of print and broadcast outlets,” he wrote, “has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable.”¹⁸²

¹⁷⁴ *Id.*; *McKee v. Cosby*, U.S., 139 S. Ct. 675, 676 (2019) (Thomas, C., concurring) (mem.) (citing *Gertz*, 418 U.S. at 334, 348).

¹⁷⁵ *McKee*, 139 S. Ct. at 676.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 682.

¹⁷⁸ *Id.*

¹⁷⁹ Adam Liptak, *Two Justices Say Supreme Court Should Reconsider Landmark Libel Decision*, N.Y. TIMES (Jul. 2, 2021), <https://www.nytimes.com/> [<https://perma.cc/2LND-8NCF>].

¹⁸⁰ *See id.*

¹⁸¹ *Id.*; *Berisha v. Lawson*, U.S., 141 S. Ct. 2424, 2427 (2021) (Gorsuch, N., dissenting).

¹⁸² *Lawson*, 141 S. Ct. at 2428.

CONCLUSION

The 21st Century speech environment has entirely altered the premise upon which the First Amendment was built: that “information is scarce and listeners’ attention abundant.”¹⁸³ Prior to the internet’s increased prevalence, “fake news” was a much less likely occurrence.¹⁸⁴ Because there were fewer channels of information that could reach citizens, the mainstream sources were in direct competition with one another and thus forced to present accurate information to their audiences so as to bolster their reputation.¹⁸⁵ However, the current digitized information environment characterized by innumerable news sources has resulted in a dispersed audience and lack of competition, thus eradicating the incentive to report accurately.¹⁸⁶ Therefore, with “fake news” burgeoning in the current media environment, the “actual malice” standard must be reevaluated to ensure that news outlets remain accountable and that individuals possess access to unambiguous facts so that participatory democracy may persist.

¹⁸³ Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1634 (2021).

¹⁸⁴ Reglitz, *supra* note 45, at 173.

¹⁸⁵ *Id.*

¹⁸⁶ *See id.*

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**THE TEN-CENT INFRASTRUCTURE OF A BILLION-DOLLAR
INDUSTRY**

KURT RUSSELL JR.*

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ABSTRACT

This Article dives into the rapidly growing market and form of sport, Esports, and the need for more regulation within the industry. With Esports competitions becoming mainstream, the dabbling within unregulated markets, coupled with a foundationally weak player contract governance, may cripple the legitimacy of Esports when compared to traditional sports. Unlike conventional sports and their well-regulated systems and leagues, which ensure contractual fairness and stability, there have been predatory contractual agreements between Esports players and their gaming organizations. This Article will also examine Esports' expansion into the rapidly growing, though unregulated, industries of NFTs and sports gambling. NFTs offer the Esports industry a way to continue increasing revenues and building camaraderie between the fans and Esports organizations by producing various digital collectibles. For the past five years, the emergence of NFTs has grabbed the attention of many industries, notably the sports industry. Traditional sports leagues like the NBA became involved in NFTs in 2020 and the NFL in 2021. Presently, NFTs are not subject to regulation, resulting in little guidance and protection to those involved. Pair this with Esports' involvement in the newly legalized sports gambling market, post-Professional and Amateur Sports Protection Act. However, gambling within Esports, and sports in general, has occurred illegally for many years. With the rapid increase in state-implemented legislation to legalize sports gambling, only a few states have taken the initiative to consider regulations for Esports. Without proper regulation and governance within the Esports industry, the involvement and expansion into other unregulated sectors may be a recipe for disaster. However, with appropriate regulations and management of Esports nationally and internationally, Esports can legitimize themselves as complementary to traditional sports.

I. WHAT IS ESPORTS, AND WHERE DID IT COME FROM?

A. ESPORTS EXPLAINED

Esports are video games that are played in a highly organized competitive environment.¹ Most commonly, these video games can range from famous, team-oriented multiplayer online battle arenas (MOBAs) to single-player first-person shooters, survival battle royales, and virtual reconstructions of traditional physical sports.² The term “Esports” is short for electronic sports. In passing, competitive gaming may seem built around large-scale, team-based games such as Fortnite, Counter-Strike, or Overwatch.³ These tournaments are typically held in large arenas and live-streamed or broadcasted on Twitch, YouTube, or ESPN, but this is not a holistic view of the industry.⁴ Esports have emerged as an alternative to many other spectator sports, particularly among younger viewers.⁵ “Audiences watch the games live, pre-and post-game interviews with the players, view how-to guides made by the players discussing key strategic decisions (such as which abilities to level up first, which items to buy, etc.), and, increasingly, watch unofficial casual matches involving their favorite players.”⁶ In many ways, the Esports industry is similar to the traditional sports from which it derives its name: an industry built around competition, fan loyalty, and spectatorship. In 2019, 380 million people worldwide watched Esports, with most viewers from North America, China, and South Korea.⁷ Esports began to gain even more momentum in early 2020, with traditional sports leagues coming to a halt due to the COVID-19 pandemic.⁸ The Esports industry was able to function with

¹ AJ Willingham, *What is eSports? A Look at an Explosive Billion-Dollar Industry*, CNN (Aug. 27, 2018, 2:18 PM), <https://www.cnn.com/https://perma.cc/53B2-8HMQ>.

² Andrew Heinzman, *What Are Esports, and Why Do People Watch Them?*, HOW-TO GEEK (Aug. 2, 2022, 1:07 PM), <https://www.howtogeek.com/https://perma.cc/BR4F-D256>.

³ *Id.*

⁴ *Id.*

⁵ Katherine E. Hollist, *Time to Be Grown-Ups About Video Gaming: The Rising Esports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 825 (2015).

⁶ *Id.* at 826.

⁷ *Id.*

⁸ Anser Haider, *CES 2021: Esports Growth ‘Turbocharged’ in 2020 Due to COVID-19 Pandemic*, S&P GLOBAL (Jan. 14, 2021), <https://www.spglobal.com/https://perma.cc/54F4-S58L>.

minimal interruptions during this time by moving to a fully remote broadcast with players streaming from their homes.⁹

B. HISTORY OF ESPORTS

Many may believe Esports has been a recent development over the past decade, but that is untrue. Although the technological progress of the 1990s made video games suitable for the masses, the first video game competitions took place decades prior.¹⁰ However, the circle of people competing in the early games was limited to universities and similar institutions, as they had the technical facilities necessary for this activity.¹¹ The first Esports event occurred over 50 years ago, back in 1972, with students from Stanford University competing in a video game titled “Spacewar.”¹² In it, two players played against each other with one spaceship each.¹³ The spaceships started with a limited supply of fuel and ammunition. They then had to fight against a planet’s gravitational field.¹⁴ “Spacewar” was considered the world’s first digital computer game, solidifying its position as one of the ten most essential computer games of all time by the New York Times in 2007.¹⁵ The Artificial Intelligence Laboratory at Stanford hosted the “Intergalactic Spacewar Olympics,” where 24 players met to compete in “Spacewar.”¹⁶ The sought-after prize in that event was a yearlong subscription to Rolling Stones magazine.¹⁷

Though the “Intergalactic Spacewar Olympics” were significant in the history of computer games, they do not qualify as the first video game competition as we know them today.¹⁸ “Magnavox Odyssey,” introduced in 1972, was the first game console that could be connected to a TV.¹⁹ However, this console was very awkward, as the playing field had to be glued to the TV as a template to play.²⁰ Even so, this console made digital gaming suitable for the masses.²¹ In addition, arcades started becoming

⁹ *Id.*

¹⁰ Florian Larch, *eSports History: How It All Began*, ISPO (Feb. 8, 2023), <https://www.ispo.com/> [<https://perma.cc/3VN2-TMKR>].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

more common, making it possible for the general public to play games, like the famous “Pong” game, on machines.²² However, the competitive nature only became possible with the inclusion of endless high-score lists.²³ One of the first to feature this score list was “Sea Wolf” in 1976.²⁴ By 1979, “Asteroids” and “Starfire” arcade machines appeared, enabling gamers to input personal name codes to immortalize themselves into the high-score list.²⁵ At the turn of the decade, Atari laid the foundation for the world’s first major Esports tournament.²⁶ In 1980, there was a championship of 10,000 participants playing Space Invaders.²⁷ This tournament experienced vast media attention. Although virtual interaction had not yet been introduced, this competition built the foundation of what we see now as the monetization of video game tournaments. In 1983, Iowa arcade operator Walter Day—now considered one of the pioneers of the Esports industry—founded the U.S. National Video Team, the world’s first professional gaming team.²⁸ Additionally, he organized the North American Video Game Challenge.²⁹ This was the first video game masters tournament in the United States.³⁰

The rise of the internet in the late 1980s and into the 1990s allowed more gamers to connect through the web, making competitive online gaming possible.³¹ In 1988, “Netrek” was released, the first multiplayer computer game.³² Netrek allowed up to 16 players to play against each other over the Internet.³³ Players could take on the role of the Federation, the Klingon, the Romulans, or the Orions with the ultimate objective of conquering a galaxy consisting of 40 planets.³⁴ The internet connectivity at this time led to the popularity of personal computer (PC) games, which eventually prompted companies to sponsor world championships.³⁵ Recognizing the demand for competition, Nintendo organized the

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

“Nintendo World Championships” in 1990, a triple-header tournament of Super Mario Bros, Rad Racer, and Tetris.³⁶ Blockbuster subsequently organized a world championship of their own in 1994. The tournament included games like Sonic the Hedgehog 3 and Virtua Racing on the Super Nintendo and Sega Mega Drive.³⁷

By the late 90s, these tournaments began to take off. It became clear that the future of competitive gaming would be found on PCs, consoles, and the network.³⁸ This led to the emergence of the Cyberathlete Professional League (CPL).³⁹ The CPL began holding their own tournaments, and increased prize monies to thousands of dollars during this period.⁴⁰

C. THE CURRENT ESPORTS INDUSTRY

At the turn of the millennium, major international tournaments, such as the World Cyber Games (WCG), Electronic Sports World Cup (ESWC), Cyberathlete Professional League (CPL), and Championship Gaming Series (CGS), were founded and began making headway.⁴¹ Currently, North America is the second largest Esports market in audience and revenue categories.⁴² Nearly 70% of Americans—almost 222 million—identify as gamers.⁴³ In 2021, the Esports industry generated approximately \$243 million in revenue in the United States and \$360 million in China.⁴⁴ That same year, the global Esports market size was valued at 1.22B USD, with the market expected to reach 5.48B USD by 2029.⁴⁵ The increase in live streaming, engagement activity, growing viewership, and league tournament infrastructure are expected to propel the industry’s trajectory continuously. For contextual purposes, the 2021 Super Bowl was watched by 96.4 million viewers, and the 2021 League of Legends World Championship Final was watched

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Zorine Te, *In Esports, the U.S. Still Lags the Rest of the World. Why?*, GLOB. SPORT MATTERS (Aug. 18, 2021), [https://globalsportmatters.com/\[https://perma.cc/X4RS-DTJZ\]](https://globalsportmatters.com/[https://perma.cc/X4RS-DTJZ]).

⁴³ *Id.*

⁴⁴ Jack Dunn, *The Rise of Esports*, FED. RSRV. BANK OF ST. LOUIS (Aug. 24, 2022), [https://www.stlouisfed.org/\[https://perma.cc/8S2G-LFCG\]](https://www.stlouisfed.org/[https://perma.cc/8S2G-LFCG]).

⁴⁵ *With 21.0% CAGR, Global eSports Market Size Worth USD 5.48 Billion in 2029*, FORTUNE BUS. INSIGHTS (Sep. 15, 2022, 8:16 AM) [https://www.globenewswire.com/\[https://perma.cc/5MGZ-X266\]](https://www.globenewswire.com/[https://perma.cc/5MGZ-X266]).

by 73.86 million viewers.⁴⁶ The League of Legends Championship Series has also solidified itself as the third most popular sport in the United States amongst 18- to 34-year-olds, only behind the National Football League (NFL) and the National Basketball Association (NBA).⁴⁷

Esports teams and players typically generate income by competing for prize money.⁴⁸ The highest-paying game to play professionally is Defense of the Ancients 2 (Dota 2), a multiplayer online battle arena game developed by Valve.⁴⁹ In 2021, it set the record for the largest overall prize pool with over \$34 million.⁵⁰ Although prize money is substantial within the industry, many Esports teams and players rely on sponsors and other forms of revenue for their income.⁵¹ For example, both Adidas and Spotify announced partnerships with Esports teams.⁵² In 2020, Spotify became the official audio streaming partner for the League of Legends game.⁵³ Typical terms of Esports sponsorship deals in this space include product exclusivity, logo placement on uniforms, streams, social media, websites, and other elements.⁵⁴ Although sponsorships are the most effective form of financing and revenue for Esports teams, they rely on periodic sponsor contract renewals, which can leave teams in financial peril if contract negotiations fail.⁵⁵ Merchandise sales, while less profitable than sponsorships, provide more income security.⁵⁶

In terms of individual professional Esports, players generate income through various forms.⁵⁷ The oldest and simplest form is prize money.⁵⁸ When players place highly enough in a tournament, they receive a portion of the tournament's prize pool—similar to traditional sports such as golf and tennis.⁵⁹ When an Esports team

⁴⁶ Dunn, *supra* note 44.

⁴⁷ *How Do Professional Gamers Make Money?*, TEKNOS, <https://www.teknosassociates.com/> [<https://perma.cc/29U5-3JSR>].

⁴⁸ Dunn, *supra* note 44.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Michael Hassall, *How Do Esports Teams Make Money?*, ESPORTS (Nov. 22, 2022), <https://esports.gg/> [<https://perma.cc/NE3B-WGTS>].

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Dunn, *supra* note 44.

⁵⁸ TEKNOS, *supra* note 47.

⁵⁹ *Id.*

wins or places highly enough in a tournament, the prize is split between the team members.⁶⁰ Prize pools have been around since the beginning of video game competitions; however, over time, professional players began to pursue the increased security of salaried contracts with teams.⁶¹ Professional teams can improve the quality of life for Esports players when teams operate with good intentions. For example, the Overwatch League mandated that the professional teams provide their players with a minimum \$50,000 salary, health benefits, and access to a retirement plan.⁶² However, not all leagues and teams treat their players like this, which causes players to pursue income through sponsorships, Twitch, and YouTube.⁶³

As Esports players and streamers started attracting sizable fanbases, beverage brands such as Red Bull, Monster Energy, and Mountain Dew, and computer companies such as Intel and AMD, began sponsoring high-profile players.⁶⁴ These sponsorships provide players with a high-paying source of income.⁶⁵ For example, Tyler Blevins, known as 'Ninja,' earned \$17 million from donations and sponsorships in connection with his streams in 2019.⁶⁶ Streaming is likely the most popular way for gamers to make a living.⁶⁷ Individual team players often begin streaming when their season is over or outside team-mandated practices and events.⁶⁸ The most popular streaming platform, Twitch, controls approximately 72% of the market.⁶⁹ YouTube Gaming has approximately 20%.⁷⁰ Twitch has three subscription tiers, with the Tier 1 subscription (\$4.99 a month) being the cheapest and most popular for Esports players to utilize.⁷¹ Players with 2,000 Tier 1 subscribers can take home roughly \$5,000 a month with a revenue share agreement of a 50/50 split. However, the most popular streamers can usually negotiate a more favorable 70/30 split, increasing their take-home income.⁷² Players also monetize their content by utilizing

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Dunn, *supra* note 44.

⁶⁷ TEKNOS, *supra* note 47.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

YouTube.⁷³ Analogous to Twitch, YouTube has a paid subscription called a “channel membership.” However, there is only one tier, which costs \$4.99 a month, leaving earning potential completely up to the number of subscribers and sponsorship agreements players obtain.

Ultimately, the Esports industry’s growth has provided a variety of diverse revenue streams for both professional teams and players, thus resulting in an incredibly lucrative activity.⁷⁴ However, this past success is by no means determinative of the future of Esports.

II. THE “WILD WEST” OF ESPORTS

In the almost 70-plus years of history, the popularity of Esports has increased drastically. As a result, opportunities to participate and profit have steadily increased. But, as with many other rapidly growing industries, there are issues and areas of concern as the industry advances. The combination of predatory player contracts, the implementation of NFTs, and the emergence of sports gambling has led to an uncertain future for the industry. Without a regulation framework like that of traditional sports leagues, Esports progressively appear to be the “wild west” of sports and may not stand to be legitimate or complimentary to conventional sports.

A. PLAYER CONTRACTS

1. *CONTRACTS IN TRADITIONAL SPORTS*

Unlike the traditional sports leagues in the United States, Esports lacks tight regulation, which has led to a variety of questionable practices, specifically regarding contracts with players.⁷⁵ In the other major leagues, such as the National Hockey League (NHL), Major League Baseball (MLB), National Football League (NFL), and the National Basketball Association (NBA), there are independent player associations that serve as unions to collectively negotiate for players’ rights.⁷⁶ However, this was not always the case, and players in these major national leagues were, like the players of Esports, victims of tyrannical bosses, harsh

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Noah Smith, *Inside ‘Contract Hell’: Esports Players Say Predatory Contracts Run ‘Rampant’*, WASH. POST (Mar. 4, 2022, 4:01 PM), <https://www.washingtonpost.com/> [<https://perma.cc/8LJW-5E2W>].

⁷⁶ *Id.*

expectations, and unbalanced wages.⁷⁷ Out of these unfair working conditions, labor unions were created throughout leagues, allowing professional athletes to enjoy many perks that they continue to enjoy today.

Before the formation of the National Hockey League Players Association (NHLPA) in 1967, most players were paid approximately \$10,000 to \$15,000 per year with no pension or healthcare plans.⁷⁸ Furthermore, in the MLB, before the first collective bargaining agreement (CBA) was negotiated in 1965, players had a minimum salary of \$6,000. Additionally, they had no freedom of movement due to the reserve clause, which allowed team owners to retain players' services against their will.⁷⁹ Finally, the Major League Baseball Players Association (MLBPA) was established as an official union.⁸⁰ Negotiations by this union and the league have led to free agency mobility and a 2021 increase of the average MLB salary to \$4.17 million.⁸¹ The National Football League Players Association (NFLPA) similarly successfully forced the league to address player grievances and establish an official minimum salary and a pension plan in 1956.⁸² Lastly, before the National Basketball Players Association (NBPA), the average player's salary was \$8,000 in the NBA, and there was no minimum wage.⁸³ However, as a result of the CBA between the NBA and NBPA, the average salary was \$8.32 million in 2020, with a \$4 million median.⁸⁴ Ultimately, the players' associations within the leagues have led to more player-friendly environments and contributed to the major leagues' continued successes.

2. *CONTRACTS IN ESPORTS*

Because Esports players do not have independent associations like those of the major leagues, little is done to deter predatory contracting practices with players.⁸⁵ Many current contract offers to Esports players are low paying and come with a ticking clock of just a few hours to either sign or have the offer rescinded, a threatening

⁷⁷ Michael Macklon, *How Labor Unions Changed Pro Sports*, INVESTOPEDIA (Jan. 11, 2023), <https://www.investopedia.com/https://perma.cc/XKZ2-PJG7>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Smith, *supra* note 75.

tactic that pressures players into less than reasonable contracts.⁸⁶ In addition, players have been subjected to default template contracts used across many leagues and teams within the industry that allows players to be traded, even to teams based in foreign countries, without the player's consent.⁸⁷ Furthermore, these contracts illustrate that players can be terminated at any time, including during the season, and allow for a player's pay to be substantially lowered if they are benched.⁸⁸ Finally, these contracts entitle teams to match any contract offer that may be made to players after the expiration of their current contract, obligating the player to re-sign with the organization and effectively freezing player mobility.⁸⁹ Accordingly, Esports players currently suffer grievances similar to those addressed and remedied by the player associations within the major leagues.

Although the operation of Esports differs from traditional sports, an association similar to player associations in major league sports would be beneficial in standardizing the treatment of Esports players. Some Esports leagues have started to form player associations, such as the global Counter-Strike union and League of Legends Player Association.⁹⁰ However, not all leagues have associations to provide a stable framework, leaving most players in less than practical situations.⁹¹

B. NFTs

1. *WHAT ARE NFTs?*

Non-fungible tokens (NFTs) are digital assets that represent some interest in internet collectibles such as art, music, games, videos, and more.⁹² "Tokens" have long been used to represent a right or interest in another asset.⁹³ For example, an automobile certificate of title or a typical deed represents an interest in that

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Pat Evans, *How Players Associations Could Help Improve Esports' Infrastructure*, FRONT OFF. SPORTS (Mar. 8, 2019), <https://frontofficesports.com/> [<https://perma.cc/9F92-K4LQ>].

⁹¹ *Id.*

⁹² *Impact of NFTs in Sports Industry and How Are NFTs Being Used in Sports?*, COINGAPE (Jan. 2, 2023), <https://coingape.com/> [<https://perma.cc/2APS-8FLE>].

⁹³ *Non-Fungible Tokens (NFT)*, ETHEREUM, <https://ethereum.org/> [<https://perma.cc/MA5P-PJR6>].

asset.⁹⁴ The simplest explanation is that an NFT is equivalent to either a certificate of title or a deed.⁹⁵ Similar to cryptocurrencies, NFTs are created through blockchain technology.⁹⁶ “A blockchain is a publicly accessible database where transaction records (‘blocks’) are securely linked using cryptography to create a ‘chain’ of references.”⁹⁷ A blockchain acts like a secure, publicly distributed ledger.”⁹⁸ Most NFTs reside on the Ethereum blockchain.⁹⁹ Specifically, Ethereum cryptocurrency’s blockchain allows for “smart contracts.” Smart contracts are not legal contracts; they are the functions and codes that enable the creation and transfer of blockchain-based assets.¹⁰⁰ However, unlike cryptocurrencies, NFTs are not fungible, meaning they cannot be replaced or interchanged for one another due to their unique properties.¹⁰¹ The value of NFTs is determined by market demand.¹⁰² Analogous to physical types of art, NFTs can be bought and sold.¹⁰³ Although an NFT can be owned and transferred, the NFT itself is not the underlying digital asset—it is the token representing ownership of the underlying asset.¹⁰⁴

2. HISTORY OF NFTS

Although NFTs are still a relatively new development, the possible applications of the technology are seemingly limitless.¹⁰⁵ Many people believe that NFTs started with recognizable organizations such as Bored Ape Yacht Club or CryptoPunks; however, NFTs were created by digital artists Jennifer and Kevin McCoy.¹⁰⁶ Together, the two created Quantum, a generative piece of art that later turned into an NFT in 2014.¹⁰⁷ In the early 2010s, blockchain technology was a very new and niche field. For reference, /at this time, Bitcoin was only valued at \$630. Currently,

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Jex Exmundo, *Quantum: The Story Behind the First NFT and Its Controversial Sale*, NFT Now (Nov. 24, 2022), <https://nftnow.com> [<https://perma.cc/9J4W-GJ5A>].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

one Bitcoin is now worth \$24,000.¹⁰⁸ Additionally, Ethereum had just launched, and coin creators regularly overpromised and underdelivered, thus causing unrest within sector.¹⁰⁹ However, even with the current climate of blockchain technology, the McCoys started exploring the technology further with the help of Anil Dash, a tech entrepreneur.¹¹⁰ Blockchain technology provided them with a way to buy and sell digital art while maintaining the ability to identify and track the creator and ownership history.¹¹¹ Subsequently, the McCoys registered ‘Quantum’ on the blockchain.¹¹² This effectively set the foundation for the multi-billion-dollar NFT sector that we see today.

3. *NFTs IN TRADITIONAL SPORTS*

Traditional sports leagues like the NBA, NFL, and MLB have explored and implemented NFTs to sell collectible, authenticated, limited-edition digital content.¹¹³ Collectible NFTs—typically licensed by leagues, teams, or individual athletes—are essentially trading cards for the digital world.¹¹⁴ Since trading cards have been popular for decades, multiple organizations are already collaborating with NFT companies to create digital trading cards. The most prominent example of this currently is NBA Top Shot.¹¹⁵ This NFT marketplace allows fans to buy, sell, and trade basketball highlight clips.¹¹⁶ NBA Top Shot launched in 2020, running on Dapper Lab’s Flow blockchain.¹¹⁷ The Flow blockchain also supports transactions on other sports NFT marketplaces, such as NFL All Day and UFC Strike.¹¹⁸ Within NBA Top Shot, ‘Moments’ are video highlight clips sold as NFTs.¹¹⁹ Much like their conventional sports trading card counterparts, the value of these ‘Moments’ increase based on the rarity.¹²⁰

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *NFTs: The Future of Digital Assets in Sports*, PWC, <https://www.pwc.com/> [<https://perma.cc/HV8L-25MS>].

¹¹⁴ *Id.*

¹¹⁵ Robyn Conti, *Guide to NBA Top Shot*, FORBES ADVISOR (Jan. 30, 2023), <https://www.forbes.com/> [<https://perma.cc/3N9Q-HX2P>].

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

Collectible NFTs in the form of these next-generation trading cards are not the only implementation of this new technology.¹²¹ Many teams have been considering how they could transform their tickets into digital tokens, specifically for season ticket holders.¹²² If tickets are to become digital tokens, teams could provide access to special content around the stadium, like VIP areas of the venue, discounts at concession stands, and special edition collectible NFTs for the games they attend.¹²³

4. *NFTs IN ESPORTS*

Data shows that NFTs and Esports may already be connected. Whereas 25% of the U.S. population either used to own or currently owns either an NFT or cryptocurrency, among Esports viewers, that number rises to 36%.¹²⁴ Another 27% of Esports viewers are interested in NFTs and crypto but have yet to make their first purchase.¹²⁵ The capabilities for NFT utilization within the Esports industry are similar to that of traditional sports, but the virtual nature of Esports can take it even further.¹²⁶ When looking at the convergence of NFTs and Esports, some practical applications are the substantiation of in-game assets, in-game purchases, gaming achievements, highlights, competitions, and trophies.¹²⁷ As currently constructed, in-game purchases only live within the gaming world of the purchaser, and there is no way to trade or transfer such purchased assets with other players.¹²⁸ NFTs would allow ownership of in-game purchases to become transferable and tradable, ultimately preserving and extending the items' usability and value.¹²⁹

¹²¹ PWC, *supra* note 113.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ James Brightman, *Esports Teams Looking to NFTs to Generate Much Needed Revenue Streams*, LINKEDIN (Sep. 12, 2022), <https://www.linkedin.com/> [https://perma.cc/KBY9-45K5].

¹²⁵ *Id.*

¹²⁶ Nagi An, *How NFTs are Changing Esports*, NFT NEWS (May 24, 2022), <https://nftnewstoday.com/> [https://perma.cc/Y8BV-JCGL].

¹²⁷ David Thompson, *Exploring the Popularity of NFTs and Its Impact on Esports and Gaming*, TECH TIMES (Nov. 2, 2021), <https://www.techtimes.com/> [https://perma.cc/X52P-A36H].

¹²⁸ *Id.*

¹²⁹ *Id.*

Furthermore, NFTs may unlock access to VIP spaces, clubs, and channels hosted by fans' favorite Esports teams and players.¹³⁰ Similar to traditional leagues, Esports can use NFTs to build a greater sense of camaraderie for ongoing fandom, membership, viewership, rewards, and access.¹³¹ NFTs offer a predictable revenue stream to stabilize the finances of Esports organizations, teams, and players.¹³² Possible NFTs uses tabled within the Esports industry have been tokenized merchandise where NFT holders receive access to new and exclusive drops, game clips of memorable and iconic moments captured in the form of an NFT, and in-game asset NFTs.¹³³ More exploration and implementation of NFTs within Esports will continue, with organizations, teams, and players trying to maximize profits. However, the industry must move with caution.

5. ISSUES WITH NFTS

Although NFTs present limitless applicable opportunities, the lack of regulation presents legal uncertainty and complications. NFTs are not currently specifically regulated in the United States.¹³⁴ Whether and how regulation comes about depends on how an NFT is classified.¹³⁵ Classification turns on the specific rights and attributes associated with an NFT.¹³⁶ Presently, there are three main ways to classify NFTs: commodities, securities, and intellectual property.¹³⁷

The definition of a commodity by the Commodity Futures Trading Commission (CFTC) includes all goods and articles, services, rights, and interests that are subject to a contract for future

¹³⁰ Sebastian Quinn, *Esports and the Metaverse: The Case for NFTs in the Gaming World*, BEINCRYPTO (Mar. 15, 2022), [https://beincrypto.com/\[https://perma.cc/AQ66-NZXJ\]](https://beincrypto.com/[https://perma.cc/AQ66-NZXJ]).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Sunny J. Kumar, *The NFT Collection: A Brave NFT World – A Regulatory Review of NFTs (Part 2)*, NAT'L L. REV. (Jun. 30, 2022), [https://www.natlawreview.com/\[https://perma.cc/45R6-EXBL\]](https://www.natlawreview.com/[https://perma.cc/45R6-EXBL]).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Darya Yatchenko, *How Are NFTs Regulated: Legal Issues, Taxation Aspects and More*, PIXEL PLEX (Apr. 13, 2022), [https://pixelplex.io/\[https://perma.cc/T7BM-RY9D\]](https://pixelplex.io/[https://perma.cc/T7BM-RY9D]).

delivery or provision.¹³⁸ CFTC's definition of commodities include cryptocurrencies, such as Bitcoin, renewable energy credits, and other intangible assets.¹³⁹ Because NFTs share similar qualities with cryptocurrencies, like both being based on blockchain technology with the potential to be bought and sold, it is reasonable to also view NFTs as commodities.¹⁴⁰ The CFTC was created to regulate commodity futures and options markets, with a mission to protect market participants from fraud and abuse and the systemic risk associated with derivatives subject to the Commodities Exchange Act (CEA).¹⁴¹ If NFTs are considered a commodity, the CEA could apply through its general prohibitions on deceptive and manipulative trading.¹⁴² This would create greater protections in NFT transactions and a legal standard going forward, but this has not yet been decided.

Another possible classification of NFTs is as a security.¹⁴³ However, the Supreme Court's *Howey* test poses a barrier. In *SEC v. W.J. Howey Co.*, the Supreme Court created a framework to determine when an investment vehicle will be considered an "investment contract" under federal securities law.¹⁴⁴ Under *Howey*, an investment contract exists where there is: (1) an investment of money, (2) a common enterprise, and (3) a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.¹⁴⁵ Recently, the District Court of New York concluded that an NFT offered by Dapper Labs that featured video highlights from NBA games was an investment contract under *Howey*; however, the Court stated that their conclusion was narrow and that "not all NFTs offered or sold by any company will constitute a security, therefore each scheme must be assessed on a case-by-case basis."¹⁴⁶ Although the Court, in this case, found the NFTs to qualify under the protection of the *Howey* investment contract, there is a high bar to provide evidence for the second and

¹³⁸ Shannon Cogbill, *NFTs as Commodities: Proposed Senate Bill Signals Regulatory Guidelines*, JD SUPRA (Jun. 14, 2022), <https://www.jdsupra.com/> [<https://perma.cc/7LQ8-GJRR>].

¹³⁹ Yatchenko, *supra* note 137.

¹⁴⁰ *Id.*

¹⁴¹ Cogbill, *supra* note 138.

¹⁴² *Id.*

¹⁴³ Yatchenko, *supra* note 137.

¹⁴⁴ The *Howey* Test, 10 BUS. & COM. LITIG. FED. CTS. § 111:5 (5th ed. Supp. 2022).

¹⁴⁵ *Id.*

¹⁴⁶ *Friel v. Dapper Labs, Inc.*, No. 21-CIV-5837, 2023 WL 2162747, at *22 (S.D.N.Y. Feb. 22, 2023).

third prong of the test.¹⁴⁷ The second “common enterprise” prong typically requires (i) investors to put money toward the same enterprise (“horizontal” commonality) or (ii) a link between the success of an investment and the success of the party being invested in (“vertical” commonality).¹⁴⁸ Additionally, the third prong of “reasonable expectations of profits” typically requires an objective inquiry into the character of the instrument or transaction.¹⁴⁹ Because of this bar and the fact that each NFT scheme will be evaluated on a case-by-case basis, some NFTs will likely fail to meet the requirements.¹⁵⁰ By holding NFTs to such a high bar under securities law, the adverse effects may be the discontinuation of sports leagues exploring the possibilities.

Furthermore, NFTs can be classified as intellectual property, specifically implicating copyright.¹⁵¹ If a purchaser buys an NFT for their enjoyment, copyright issues pose little threat.¹⁵² However, if a purchaser intends to use the NFT in further commercial actions, copyright is implicated.¹⁵³ Copyright can be transferred by purchasing NFTs, but it is not required.¹⁵⁴ At the creation of an NFT, the copyright attaches to the creator, analogous to any other copyright.¹⁵⁵ If the copyright is not included in the sale, any royalties the buyer may earn from the NFT, even after the sale, will belong to the copyright owner, not the owner of the NFT.¹⁵⁶ Additionally, not retaining the copyright in an NFT purchase may restrict the owner’s usage of the NFT, adversely impacting future purchases.¹⁵⁷

Although there is extreme promise regarding the merging of Esports and NFTs, the lack of clear NFT classification is

¹⁴⁷ William K. Pao, *Howey Should Think About NFTs and Securities Laws*, O’MELVENY (Sep. 29, 2022), [https://www.omm.com/\[https://perma.cc/ER4Y-DVYV\]](https://www.omm.com/[https://perma.cc/ER4Y-DVYV]).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Micah Kindred, *NFTs and Intellectual Property Rights: What We Know and What Is Coming*, U. CINCINNATI L. REV., [https://uclawreview.org/2023/01/18/nfts-and-intellectual-property-rights/\[https://perma.cc/522U-NEPF\]](https://uclawreview.org/2023/01/18/nfts-and-intellectual-property-rights/[https://perma.cc/522U-NEPF]).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Gregory J. Chinlund, *What are the Copyright Implications of NFTs?*, REUTERS (Oct. 29, 2021), [https://www.reuters.com/\[https://perma.cc/FNG3-B75P\]](https://www.reuters.com/[https://perma.cc/FNG3-B75P]).

concerning. Based on the construction of NFTs within the sports industry so far, it is likely that they implicate the intellectual property classification the most. Composing regulation to standardize the transferring of copyright with Esports NFTs may be essential to the successful convergence of the two sectors.

C. SPORTS GAMBLING

1. *HISTORY OF SPORTS GAMBLING*

Since the beginning, individuals have invariably gambled on games. The earliest records of sports wagering go back more than 2,000 years.¹⁵⁸ Greeks loved sports, which lead them to start the Olympics, followed closely by the first recording of sports wagering.¹⁵⁹ From the Greeks, sports wagering spread to the Romans, who began wagering on their gladiator games.¹⁶⁰ As time progressed, gambling became popular in England because of horse races, a favorite of the elite class.¹⁶¹ Over time, sports wagering made its way across the ocean, and the United States emerged as one of the largest markets. Over the past 100 years in the United States, gambling in sports has been rather eventful.¹⁶² With the rise of professional baseball in 1876, traditional sports betting came to the forefront.¹⁶³

In 1921, Major League Baseball (MLB) Commissioner Kenesaw Mountain Landis permanently banned eight Chicago White Sox players who were accused of throwing the 1919 World Series in connection with sports gambling.¹⁶⁴ The scheme to fix the game may have materialized between White Sox first baseman, C. Arnold “Chick” Gandil, and a gambler, Joseph “Sport” Sullivan.¹⁶⁵ During this time, gamblers preyed upon underpaid professional athletes for insider tips in exchange for sums of money.¹⁶⁶ It was reported that Gandil and a few co-conspirators agreed to throw the World Series for \$100,000.¹⁶⁷ In October 1920, the eight White Sox

¹⁵⁸ Kristiyan Kyulyunkov, *A Brief Look at the History of Sports Betting*, NOSTRABET, <https://nostrabet.com> [<https://perma.cc/J9NR-PZH3>].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Evan Andrews, *What was the 1919 ‘Black Sox’ Baseball Scandal?*, HISTORY (Aug. 12, 2021), <https://www.history.com> [<https://perma.cc/RP9L-8T2T>].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

players were indicted on nine counts of conspiracy.¹⁶⁸ On August 2, 1921, the players were found not guilty on all counts.¹⁶⁹ Despite this verdict, only a day after the acquittal, Commissioner Landis banned all eight players permanently from the MLB, stating that “regardless of the verdict of juries[,] no player who throws a ballgame, no player that undertakes or promises to throw a ballgame, no player that sits in conference with a bunch of crooked players and gamblers where the ways and means of throwing a game are discussed and does not promptly tell his club about it, will ever play professional baseball.”¹⁷⁰ The Commissioner’s blanket ban helped cleanse baseball’s damaged image and has remained consistent.¹⁷¹

Though sports betting was prevalent in this era, it remained illegal; due to a lack of sports betting laws and enforcement, it was still commonplace.¹⁷² In 1931, Nevada became the first and only state to legalize gambling, including sports betting.¹⁷³ Nevada casinos were the only locations where legal sports bets could be placed in the United States for many decades.¹⁷⁴ However, due to the Mob’s considerable participation in sports betting, Congress took regulatory action.¹⁷⁵ Looking to further discourage the spread of sports gambling outside of Nevada casinos, in the 1950s the federal government imposed a ten percent tax on profits brought in through sports gambling.¹⁷⁶ However, when this ten percent tax was lowered in the 1970s after a change in administration, more states moved to legalize sports betting. These state activities prompted Congress’s endeavor to stop the proliferation of sports betting across America by outlawing sports gambling.¹⁷⁷

D. PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

President George H.W. Bush signed the Professional and Amateur Sports Protection Act (PASPA) in 1992, which federally banned sports betting. However, Nevada and a few other states were

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *History of Sports Betting in the USA*, LEGAL SPORTS BETTING (Feb. 10, 2023), <https://www.legalsportsbetting.com> [<https://perma.cc/8P27-6D4Q>].

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

exempt from the ban due to “grandfather” provisions.¹⁷⁸ PASPA was a reaction to the increasing concern about the morality of sports betting and its effect on the integrity of sports.¹⁷⁹ PASPA’s morality concerns derived from the 1989 Dowd Report, which described Pete Rose’s gambling activity as an MLB player and manager.¹⁸⁰ Pete Rose’s gambling scandal was met with widespread public disapproval and brought overwhelming negative publicity for sports betting.¹⁸¹ In 1991, the Senate Judiciary Subcommittee on Patents, Copyrights, and Trademarks held public hearings to investigate, and ultimately found sports betting to be “a national problem.”¹⁸² A year after the hearings began, the U.S. Senate voted on PASPA, which passed by an overwhelming margin of 88-5.¹⁸³ This federal legislation was supported by the representatives of major sports leagues and the NCAA.¹⁸⁴

Although PASPA’s passage made sports betting illegal in almost every U.S. state, it did not prevent sports betting from taking place. Illegal sports betting thrived in the 26 years PASPA remained “good law.” During this time, criminals primarily controlled the sports betting market, as many sports fans used online sportsbooks hosted offshore. PASPA endured many legal challenges over its 26-year existence, but New Jersey’s challenge was the final and most impactful blow. Although PASPA did not make sports gambling itself a federal crime, it did authorize the Attorney General and other professional and amateur sports organizations to bring civil actions to enjoin violations.¹⁸⁵ Notably, “grandfather” provisions within PASPA section 3704(a), subsections (1) and (2) allowed existing forms of sports gambling to continue in four states.¹⁸⁶ Another provision in section 3704(a)(3) would have permitted New Jersey to conduct sports gambling in Atlantic City within one year of PASPA’s enactment.¹⁸⁷ Due to the public appetite for sports gambling, in 2012, New Jersey voters approved an amendment to the State Constitution authorizing the legislature to legalize sports

¹⁷⁸ See Richard Janvrin, *PASPA Supreme Court Decision: Everything You Need to Know*, WORLD SPORTS NETWORK, [https://www.wsnn.com/\[https://perma.cc/E2UB-YPU6\]](https://www.wsnn.com/[https://perma.cc/E2UB-YPU6]).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 461 (2018).

¹⁸⁶ *Id.* at 462.

¹⁸⁷ *Id.*

gambling in Atlantic City.¹⁸⁸ Shortly after that, the legislature enacted a law continuing the process started by New Jersey voters rather than using the methods provided within PASPA.¹⁸⁹ The NCAA and other major professional leagues immediately brought an action in federal court arguing that the New Jersey law violated PASPA.¹⁹⁰ New Jersey countered that PASPA violated the Tenth Amendment's "anticommandeering" principle by preventing the State from modifying its laws prohibiting sports gambling.¹⁹¹ The District Court and the Third Circuit did not find that PASPA violated the anticommandeering principle.¹⁹²

In 2014, the New Jersey legislature reconstructed and enacted a similar law.¹⁹³ This time, instead of affirmatively authorizing sports gambling, the new law repealed state law provisions that prohibited such actions in Atlantic City.¹⁹⁴ The new law prohibited gambling on sporting events involving a New Jersey college team or a collegiate event in the state.¹⁹⁵ The NCAA and professional leagues again brought an action against this legislation and prevailed in the District Court and Third Circuit.¹⁹⁶ However, the Supreme Court overruled the lower courts, stating:

The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA 'regulate[s] state governments' regulation' of their citizens. The Constitution gives Congress no such power.¹⁹⁷

Effectively, this decision allowed states to establish their own sports gambling laws.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 462–63.

¹⁹² *Id.* at 463.

¹⁹³ *Id.* at 464.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 486.

1. *POST-PASPA REPEAL*

The Supreme Court struck down PASPA in May of 2018.¹⁹⁸ Nearly every State legislature has introduced a sports betting bill at some point since then.¹⁹⁹ As of 2023, 35 states and the District of Columbia allow sports gambling via mobile apps or in-person sportsbooks.²⁰⁰ An in-person sportsbook is a brick-and-mortar-style venue in a casino where bettors can place bets and watch sporting events.²⁰¹ Although in-person sportsbooks remain successful, the growth of online sports betting via mobile apps has dominated sports betting in recent years. Since the repeal of PASPA, the MLB, NBA, NFL, NHL, and PGA Tour have entered partnerships with significant sportsbook operators.²⁰² As the leagues have come to accept sports betting, the industry has exploded over the last few years.²⁰³ In 2021, the American Gaming Association (AGA) reported that \$57.2 billion was wagered, breaking the previous industry record of \$43.65 billion in 2019.²⁰⁴

2. *SPORTS GAMBLING IN ESPORTS*

With the advances in technology and Esports, online play has introduced a new arena where players maintain the ability to interact with one another within the game.²⁰⁵ Some general bets placed on Esports events include bets on the first map, first kill, match winner, tournament winner, odd/even bets, and over/under bets, all of which share similarities with traditional sports betting.²⁰⁶ However, skin gambling has become extremely popular over many years in

¹⁹⁸ Matthew Waters, *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP. (Mar. 10, 2023), [https://www.legalsportsreport.com/\[https://perma.cc/6YXC-TVRS\]](https://www.legalsportsreport.com/[https://perma.cc/6YXC-TVRS]).

¹⁹⁹ *Id.*

²⁰⁰ Janvrin, *supra* note 178.

²⁰¹ Sam LaFrance, *What is a Sportsbook?*, ABC 6 (Aug. 1, 2022), [https://www.abc6.com/\[https://perma.cc/7XWL-QJKJ\]](https://www.abc6.com/[https://perma.cc/7XWL-QJKJ]).

²⁰² Dan Holmes, *A Snapshot of Sports Betting in America on Fourth Anniversary of PASPA Repeal*, GAMING TODAY (May 13, 2022), <https://www.gamingtoday.com/news/sports-betting-fourth-anniversary-paspa-repeal/>.

²⁰³ *Id.*

²⁰⁴ Joe Hernandez, *Sports Betting Ads are Everywhere. Some Worry Gamblers Will Pay a Steep Price*, NPR (Jun. 18, 2022), [https://www.npr.org/\[https://perma.cc/RQ4P-BHRK\]](https://www.npr.org/[https://perma.cc/RQ4P-BHRK]).

²⁰⁵ Andy Robinson, *Skin Gambling – A Guide for Professionals, Parents and Carers*, SWGFL (May 30, 2022), [https://swgfl.org/\[https://perma.cc/XX84-D56Y\]](https://swgfl.org/[https://perma.cc/XX84-D56Y]).

²⁰⁶ *Esports Betting: How It Works & Risks Involved*, INTENTA DIGIT., [https://intenta.digital\[https://perma.cc/XD7A-C7EF\]](https://intenta.digital[https://perma.cc/XD7A-C7EF]).

Esports.²⁰⁷ Skin gambling is a way for online players to bet, usually involving in-game currencies called “skins.” However, it has also extended to real-world monetization.²⁰⁸ Typically, skins are in-game cosmetic items that may enhance and customize a player’s avatar, weapons, or equipment; however, they do not tend to affect game-play performance.²⁰⁹ Skin gambling may not directly illustrate a potential issue, but it is illegal unless the site that manages the transactions holds a betting license, and most do not.²¹⁰ The lack of regulation and verification results in rigged odds making it not uncommon for fans, and sometimes minors, to lose substantial amounts of real money when buying skins to gamble.

Although some states have yet to legalize traditional sports betting, those that have legalized it have begun providing various regulated Esports betting options.²¹¹ Thirteen states have legalized Esports betting over the last few years.²¹² The sports gambling laws in these states define “sporting events” to include “Esports,” “electronic sports,” and “competitive video game events.” However, this is not the case in every state, and a few states have imposed further age-specific and gambling regulations in connection with Esports. For example, the Colorado Limited Gaming Control Commission regulates which Esports competitions individuals can bet upon and the types of wagers they may place.²¹³ Like traditional sports gambling, Esports gambling is not federally regulated, thus causing uncertainty in the space. Nevertheless, Esports and sportsbooks are interested in leveraging game data to offer Esports fans a more robust gambling experience.²¹⁴ Furthermore, virtual technologies allow for the potential of blockchain-based technologies and platforms in Esports betting markets.²¹⁵ Ultimately, future development within Esports betting could enable fans and bettors to gamble and win cryptocurrency or digital assets such as NFTs.²¹⁶ But, the current operation of Esports

²⁰⁷ Nancy Phillips, *Skins Betting in Esports*, SPORTS GEEK (Sep. 8, 2022), <https://www.thesportsgeek.com> [<https://perma.cc/99GB-NKL5>].

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Samuel Cohen, *What the Future Holds for Esports Gambling*, JD SUPRA (Mar. 31, 2022), <https://www.jdsupra.com/> [<https://perma.cc/XMT5-K7P4>].

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

gambling is not stable nor legal in most cases. Although the industry will only be able to act within the limits of specific states' laws, regulation within the industry pursuant to those laws would nonetheless be beneficial.

III. AN ESPORTS REVOLUTION THROUGH REGULATION

Within Esports, organizational bodies have attempted to assume the role of the industry's regulator; however, none have been officially recognized as a central authority. This is the cause of the industry's current "wild west" governance structure.²¹⁷ Although Esports has been able to manage itself and operate to this point, its structure looks completely different from traditional sports. Therefore, Esports must adopt rules and regulations for the future industry operations on the national and international level, especially with its continued market growth and involvement in the loosely regulated NFT and sports gambling industries. Unlike traditional sports, Esports games are owned by developers and publishers; therefore, they decide how to structure and play games and tournaments.²¹⁸ Additionally, they control the relationships between professional players and teams that compete in their game.²¹⁹ For example, Riot Games owns League of Legends and maintains sole authority to dictate game rules, tournament structure, and player contracts.²²⁰ With the vast array of Esports games developers and publishers, this leads to a highly fragmented industry lacking a regulatory framework.²²¹ Conversely, for legitimacy, a framework must be implemented on both the national and international level.

A. NATIONAL REGULATIONS

Nationally, the United States has had conversations regarding possible regulations for Esports, yet it has taken no significant legislative action.²²² For Esports to continue to be successful in the United States, the federal government should look to other countries that have been proactive in regulating the industry. For example,

²¹⁷ Charis Georgiades, *The Regulatory Landscape of Esports*, MONEY SMART ATHLETE (Jun. 30, 2021), [https://moneysmartathlete.com/\[https://perma.cc/CWB5-5DPN\]](https://moneysmartathlete.com/[https://perma.cc/CWB5-5DPN]).

²¹⁸ Christopher E. Reggie, *United States: Timeout! States Struggle to Provide an Effective Framework for Esports Regulation*, MONDAQ (Mar. 18, 2022), [https://www.mondaq.com/\[https://perma.cc/2ERW-DKPV\]](https://www.mondaq.com/[https://perma.cc/2ERW-DKPV]).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Georgiades, *supra* note 217.

South Korea does so through a comprehensive regulatory system, the Korean Electronic Sports Association (KESPA), established in 2000.²²³ KESPA licenses and regulates professional players.²²⁴ In addition to KESPA, France has established a national organization for Esports called the French Esports Association.²²⁵ This French organization has issued two legislations; one for the regulation of organized video game competitions and the other for the status of salaried professional players.²²⁶ For example, the French Esport Association requires the duration of contracts between the players and teams to be one to five years and prohibits children under the age of 12 from participating in competitions where there are prize pools.²²⁷ In addition to South Korea and France, other countries like Italy, Spain, and Germany have adopted regulatory measures for their national Esports industry.²²⁸ With the establishment of a federal regulating body, a player's association should also be formed to enable collective bargaining agreements. Additionally, by creating an association like that of South Korea and France, standardized operations and regulations within industries such as NFT and Esports gambling can afford Esports stability going forward.

B. INTERNATIONAL REGULATIONS

Regarding international regulations, a global regulatory body would publish relevant guidelines, directives, and rules for the industry as necessary.²²⁹ In traditional sports, these organizations take the form of International Federations (IFs).²³⁰ Typically, these IFs exist to oversee confederations and national federations while ensuring uniformity and consistency in that specific sport.²³¹ For example, the International Federation of Association Football (FIFA) sets the rules of the game, licenses and regulates the referees who administer the game's laws, and regulates other operations of the sport.²³² Some well-known organizations have tried to regulate

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Faithfulness Okom, *How Athletes are Bound by the Rule of Governing Bodies and International Federations*, LINKEDIN (Mar. 7, 2022), <https://www.linkedin.com/> [<https://perma.cc/6PVX-TJNT>].

²³¹ *Id.*

²³² *Id.*

the Esports industry over the past couple of years.²³³ The Esports Integrity Coalition (ESIC), established in 2015, has attempted to regulate against match-fixing, cheating, and doping and has integrated regulations into games such as CS: GO, Dota 2, League of Legends, and Starcraft.²³⁴ The World Esports Association (WESA), founded in 2016, was established to be an all-encompassing regulatory network for esports, and currently 13 Esports organizations are part of WESA. Furthermore, the International Esports Federation (IeSF) launched in 2008 to legitimize Esports with global standardization and regulation.²³⁵

CONCLUSION

As currently constructed, the Esports industry suffers from a lack of regulation, leading to a fragmented sector. Due to its rapidly growing market and entanglement with other loosely regulated industries, Esports is likely to be perceived as an illegitimate sports entity when compared to the traditional leagues. The rapid growth and fandom illustrate the massive potential of this industry, but it currently suffers from a detrimental lack of cohesiveness. Therefore, the industry should utilize national and international federations to ensure stability in contractual agreements with players and its convergence with NFTs and sports gambling. Although Esports has seen incredible growth over the past few years, without regulation that can bring uniformity between the video game developers, publishers, tournaments, teams, and players, Esports is likely to begin regressing due to the issues discussed throughout this Article.

²³³ *Who is Regulating Esports?*, ESPORTS (Jun. 21, 2021), <https://www.esports.net/> [<https://perma.cc/ZSH9-LL37>].

²³⁴ *Id.*

²³⁵ *Id.*

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COPYRIGHT CONSIDERATIONS FOR TIKTOK CONTENT CREATION

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INTRODUCTION

“So there’s a brand that is using a video of mine to advertise that did not pay me,” TikTok user “Alex Peter (Lolo)” (@loloverruled)—a public defender whose real name is Alex Clavering¹—says in a video uploaded to his TikTok account. Clavering’s video shows a clip of the referenced advertisement before he goes on to say, “uh that was me getting my bar exam

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¹ McCord Pagan, *Suffolk County Public Defender Talks Work, TikTok Fame*, LAW360 PULSE (Feb. 24, 2022, 2:54 PM), <https://www.law360.com/> [https://perma.cc/ME3T-K4RC]; Hannah Paperno, *TikToker Loloverruled on Using the App to Educate the Masses About Criminal Justice*, TEEN VOGUE (June 4, 2024), <https://www.teenvogue.com/> [https://perma.cc/YW93-AZFX].

results not figuring out that I could get car insurance so I did not get paid for that and um like that's my video that I made um yeah so yeah I would like \$15,000 um now or I'm going or I'm going [sic] to sue you okay?"²

Although Mr. Clavering may be a lawyer, his threatened lawsuit may not present a clear-cut case of infringement. On a platform that rose to prominence through its ability to allow users to engage with other users' content, Clavering's situation presents a legitimate question: is that use legal, or does his threat of litigation have any teeth to it?

TikTok rose to prominence by leveraging virality in the midst of a viral pandemic,³ and has since become a firmly-entrenched and hugely significant cultural fixture. Indeed, TikTok was the second most downloaded app globally in 2023 with 654 million downloads, behind only Meta's Instagram.⁴ The app has drawn the ire of US lawmakers,⁵ has become an outlet through which people consume news,⁶ has served as a platform for some of the world's largest companies to advertise their brands,⁷ has enabled content creators and influencers to become brands unto themselves,⁸ and has proven to be a fertile ground for copyright litigation.

The U.S. Constitution provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁹ This Article

² Alex Peter (Lolo) (@loloverruled), TIKTOK (Jan. 24, 2022), <https://www.tiktok.com/> [<https://perma.cc/Y53P-AFTV>].

³ Taylor Lorenz, *This Is Why You Heard About TikTok So Much in 2020*, N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/> [<https://perma.cc/SHG6-F7DC>].

⁴ David Curry, *Most Popular Apps (2024)*, BUS. OF APPS (Jan. 30, 2024), <https://www.businessofapps.com/> [<https://perma.cc/5Y4D-M6Q8>].

⁵ Sapna Maheshwari & David McCabe, *Congress Passed a Bill That Could Ban TikTok. Now Comes the Hard Part*, N.Y. TIMES (Apr. 23, 2024), <https://www.nytimes.com/2024/04/23/technology/bytedance-tiktok-ban-bill.html>.

⁶ See, e.g., The Washington Post (@washingtonpost), TIKTOK, <https://www.tiktok.com/> [<https://perma.cc/5LZC-W2EP>].

⁷ See, e.g., Disney (@disney), TIKTOK, <https://www.tiktok.com/> [<https://perma.cc/AD9T-N675>]; see, e.g., Microsoft (@microsoft), TIKTOK, <https://www.tiktok.com/> [<https://perma.cc/6C8H-6DEW>].

⁸ See Steffi Cao, Matt Craig & Alexandra S. Levine, *The Social Media Stars Turning Followers into Fortunes*, FORBES, <https://www.forbes.com/> [<https://perma.cc/A6WZ-TTXH>].

⁹ U.S. CONST. art. I, § 8, cl. 8.

eschews an in-depth review of the history of copyright law¹⁰ in favor of focusing on some aspects of copyright that are most relevant to TikTok content creation. It then explores some of the practical legal issues affecting TikTok content creation in the context of the currently existing framework of copyright law. While some issues discussed may be unique to the platform and similar video-sharing apps, many of the underlying legal theories apply across a broad range of User Generated Content (UGC)¹¹-based platforms.

Specifically, this Article focuses on two important aspects of copyright law—namely, licensing and fair use—that individual users should consider when seeking to create TikTok content in a way that avoids liability for copyright infringement, or conversely, in protecting one’s own copyright on the platform. Part I provides an overview of the statutory and contractual provisions that govern users’ relationships to copyright in the platform’s context before turning to a case study illustrating the complexity of TikTok’s licensing scheme. Part II then analyzes the Fair Use doctrine in the context of two cases with seemingly similar facts that have nonetheless had different legal results. This analysis focuses on the behavior of the platform’s users; as such, any analysis of TikTok’s liability as a platform is beyond the scope of this analysis.

I. NAVIGATING LIABILITY IN LICENSING

As of May 2024, TikTok boasts over one billion monthly active users.¹² TikTok actively encourages its users to monetize their accounts by partnering with brands through its creator marketplace.¹³ In addition to this more traditional influencer pay model, the app has also allowed creators to monetize their content through its Creator Fund,¹⁴ leading to even greater incentives for its creators to go viral.

¹⁰ *But see A Brief History of Copyright in the United States*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/> [<https://perma.cc/VQS8-RXDS>].

¹¹ *User Generated Content*, GOOGLE, <https://support.google.com/> [<https://perma.cc/2NU3-5BMX>].

¹² Brandon Doyle, *TikTok Statistics – Updated May 2024*, WALLAROO MEDIA (May 7, 2024), <https://wallaroomedia.com/> [<https://perma.cc/ZY2D-6VNM>].

¹³ *Creator Marketplace*, TIKTOK, <https://creatormarketplace.tiktok.com/> [<https://perma.cc/6NDK-G92R>].

¹⁴ *TikTok Creator Fund: Your Questions Answered*, TIKTOK (Mar. 25, 2021), <https://newsroom.tiktok.com/> [<https://perma.cc/7SRS-WDQT>].

The Copyright Act provides that “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹⁵ Accordingly, TikTok videos qualify for copyright protection as long as they are “*original* works.” TikTokers often use sound and video recordings created by someone other than themselves, which creates a complex interplay of intellectual property that, while perhaps not entirely unique to the platform, is nonetheless unrivaled in the degree to which users utilize others’ copyrightable materials in the creation of their own content.

Under federal copyright law, copyright ownership grants the holder of the copyright the exclusive rights to do and authorize any of the following: reproduce the work; prepare derivative works based upon the copyrighted work; distribute copies by sale or other transfer or ownership; perform the work publicly; and display the work publicly.¹⁶

Thus, an important consideration for TikTok content creators is what ownership rights they may or may not have in their content under US copyright law. An equally, if not more important, consideration for individual TikTokers is what rights they retain or cede in posting their content on the platform and what they are, and are not, authorized to do by TikTok’s Terms of Service. TikTok’s Terms of Service states:

You or the owner of your User Content still own the copyright in User Content sent to us, but by submitting User Content via the Services, you hereby grant us an unconditional irrevocable, non-exclusive, royalty-free, fully transferable, perpetual worldwide licence [sic] to use, modify, adapt, reproduce, make derivative works of, publish and/or transmit, and/or distribute and to authorize other users of the Services and other third-parties to view, access, use, download, modify, adapt, reproduce, make derivative works of, publish and/or transmit your User Content in any format and on any platform, either now known or hereinafter invented.¹⁷

¹⁵ 17 U.S.C. § 102.

¹⁶ 17 U.S.C. § 106.

¹⁷ *Terms of Service*, TIKTOK (Nov. 2023), [https://www.tiktok.com/\[https://perma.cc/3XAG-7WGD\]](https://www.tiktok.com/[https://perma.cc/3XAG-7WGD]).

These clauses are essential to TikTok's ethos and to innumerable viral videos. TikTok's Terms of Service grant TikTok an unconditional, irrevocable license to a user's content. This is vital because of what TikTok's Terms of Service say TikTok can then do with that content, namely, permit other users of the platform to make use of that content:

Users of the Services may also extract all or any portion of User Content created by another user to produce additional User Content, including collaborative User Content with other users, that combine and intersperse User Content generated by more than one user. Users of the Services may also overlay music, graphics, stickers, Virtual Items (as defined and further explained Virtual Items Policy) and other elements provided by TikTok ("TikTok Elements") onto this User Content and transmit this User Content through the Services. The information and materials in the User Content, including User Content that includes TikTok Elements, have not been verified or approved by us.¹⁸

TikTok takes a license for itself in the copyright of content uploaded by users and then permits other users to utilize that copyright. In doing so, TikTok becomes both the licensee and licensor. This contractual scheme is essential to allow TikTok to operate in the way it does within the context of statutory copyright law framework by rendering use—which would otherwise constitute infringement—permissible through licensing.

One of the most notable aspects of TikTok is the platform's "Stitch" and "Duet" creator tools. "Stitch . . . allows you to combine another video on TikTok with one you're creating. If you allow another person to Stitch with your video, they can use a part of your video as a part of their own video."¹⁹ TikTok allows users to adjust their settings to control who can Stitch with their videos and whether the function is turned on or off for each video.²⁰ Similarly, "Duet allows you to post your video side-by-side with a video from another creator on TikTok. A Duet contains two videos in a split

¹⁸ *Id.* (internal hyperlinks omitted).

¹⁹ *Stitch*, TIKTOK, <https://support.tiktok.com/> [<https://perma.cc/ZYE2-C5BJ>].

²⁰ *Id.*

screen that play at the same time.”²¹ The Stitch and Duet functions are permissible when a creator’s wholly original content is being Stitched or Dueted because, as the original copyright holder, the creator has the ability to grant a license to TikTok. In turn, TikTok then extends that license (via its Terms of Service) to other users by allowing them to use the original user’s copyrighted content in their own content.

However, legal issues can arise when the initial user does not own the underlying copyright for an aspect of the content they upload. An exemplary illustration of such issues is the use of sound on TikTok. Much like how TikTok’s functionality allows users to Stitch or Duet another’s video, the platform also enables users to create and utilize original sounds.²² The Terms of Service make such use permissible when wholly original sounds are utilized (i.e. the initial user creates the sound—and thus holds the copyright to the sound—and uploads it to the TikTok sound library, making it available to others to use within the bounds of what is permitted by the Terms of Service). The copyright to the original sound is owned by the original user; unauthorized use of that sound would constitute infringement, but such use is made permissible by TikTok’s Terms of Service. Therefore, problems may arise when users do not own the underlying copyright to the sound being used.

A. UNDERSTANDING A COMPLEX LICENSING SCHEME

It is important to note that TikTok offers two different sound libraries, one for commercial purposes and one for non-commercial purposes.²³ Recognizing that “sourcing and licensing music for branded content can be a pain point for brands,” in May 2020, TikTok launched its Commercial Audio Library (CAL).²⁴ According to TikTok, “[a]ll songs in the CAL are pre-cleared for commercial use, so businesses don’t have to go through the lengthy process of obtaining licenses on their own.”²⁵ On the same page, however, TikTok offers this warning to users:

²¹ *Duets*, TIKTOK, <https://support.tiktok.com/> [<https://perma.cc/7PTX-VRXF>].

²² Tal Imagor, *How to Make a Sound on TikTok*, MAKE USE OF (Feb. 11, 2023), <https://www.makeuseof.com/> [<https://perma.cc/7MZR-L4E7>].

²³ Isaiah Poritz, *TikTok Music Lawsuits Fire Warning Shots to Brands, Influencers*, BLOOMBERG L. (Dec. 6, 2022, 3:10 AM), <https://news.bloomberglaw.com/> [<https://perma.cc/6NTP-SUV7>].

²⁴ *Explore Royalty-Free Music in Our New Audio Library*, TIKTOK, <https://www.tiktok.com/> [<https://perma.cc/2XCG-REDK>].

²⁵ *Id.*

*If you use our General Music Library through a personal account to promote your business, you are at risk of copyright infringement. Songs in our General Music Library are not pre-cleared for commercial content — defined as any content posted by a brand — and are not available for use by any brand or business.*²⁶

Thus, TikTok places the onus on users to ascertain for themselves on a case-by-case basis whether their video has a commercial purpose. If it does—even marginally or arguably—then that TikToker (whether they be an individual, influencer, or a brand) should, as a best practice, only utilize those sounds available to them through the Commercial Audio Library. Otherwise, they run the risk of incurring liability for copyright infringement.

Notably, “TikTok does allow music reproduction for user-generated content. However, as soon as influencers receive financial compensation for a brand’s promotion, the content fits the definition of ‘commercial use’ and is no longer covered by the platform’s licenses.”²⁷ This is because the nature of TikTok’s licenses vary depending upon whether the licensed work is being used for a commercial or non-commercial purpose, with the latter falling under a license that doesn’t necessarily cover the same material as the former and “doesn’t contain the most sought-after songs owned by the record labels.”²⁸ This distinction between commercial and non-commercial use is significant for any user who may monetize their TikTok account, either through the Creator Fund or through a brand partnership, because such use may constitute a commercial use potentially exceeding the bounds of TikTok’s licensing scheme, exposing the user to liability for copyright infringement.

“[A] plaintiff who claims copyright infringement must show: (1) ownership of a valid copyright; and (2) that the defendant violated the copyright owner’s exclusive rights under the Copyright Act.”²⁹ The nuances of TikTok’s complex licensing scheme played

²⁶ *Id.*

²⁷ Paul Resnikoff, *TikTok Licensing Is Trickier Than We Thought — Court Grants Partial Victory to Universal Music Group in Its TikTok Copyright Infringement Lawsuit Against Bang Energy Drink*, DIGIT. MUSIC NEWS (July 15, 2022), <https://www.digitalmusicnews.com/https://perma.cc/6UCF-LEZU>.

²⁸ Poritz, *supra* note 23.

²⁹ *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17 U.S.C. § 501(a); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1073 (9th Cir. 2000)).

out when one company failed to recognize that use of copyrighted material fell outside the permissible use of TikTok's licensing scheme and was thus infringement. In *UMG Recordings, Inc. v. Vital Pharmaceuticals, Inc.*, UMG Recordings sued Vital Pharmaceuticals—which at the time owned the Bang Energy drink brand—for violating its copyrights and for contributing to such infringement.³⁰

UMG sought to hold Vital Pharmaceuticals liable for posting videos that infringed on their copyrights to Bang's TikTok accounts and for urging "Bang Influencers to post additional Infringing Videos on their personal TikTok accounts."³¹ UMG claimed that, when it asked for evidence of a license authorizing the defendants to use their copyrighted musical works, the defendants were unable to provide a license and instead responded through counsel that "[o]ur understanding is that TikTok provides use of these songs, and others, with a license to all of its members."³² However, TikTok's Terms of Service state: "NO RIGHTS ARE LICENSED WITH RESPECT TO SOUND RECORDINGS AND THE MUSICAL WORKS EMBODIED THEREIN THAT ARE MADE AVAILABLE FROM OR THROUGH THE SERVICE."³³

UMG not only sued Vital Pharmaceuticals for direct infringement by claiming that it "infringed the Record Company Plaintiffs' copyrights in the Recordings, including by reproducing, distributing, adapting, and digitally publicly performing the Recordings without authorization, in violation of the Copyright Act, 17 U.S.C. §§ 106 and 501,"³⁴ but also sued the company on a theory of contributory/vicarious copyright infringement by alleging that "Bang intentionally induced or materially contributed to the Influencer Videos."³⁵ A federal judge granted partial summary judgement in favor of UMG on the direct infringement claim, but ruled that UMG was not entitled to summary judgement on its

³⁰ Christopher Yasiejko, *UMG Sues Bang Energy for Copyright Infringement on TikTok*, BLOOMBERG L. (Apr. 29, 2021, 10:30 AM), <https://www.bloomberglaw.com/> [<https://perma.cc/PWQ2-NLMN>].

³¹ Complaint and Demand for Jury Trial at ¶¶ 37–38, *UMG Recordings, Inc. v. Vital Pharmaceuticals, Inc.*, No. 0:21-cv-60914, 2021 WL 9473658 (S.D. Fla. Apr. 28, 2021) [hereinafter *UMG Complaint*].

³² *Id.* ¶ 44.

³³ *Terms of Service*, *supra* note 17.

³⁴ *UMG Complaint*, *supra* note 31, ¶ 50.

³⁵ *Id.* ¶ 65.

claims of contributory copyright infringement and vicarious copyright infringement.³⁶

Compounding Vital Pharmaceuticals' legal troubles, Sony Music Entertainment also sued the company for copyright infringement in August 2021,³⁷ and record labels affiliated with Warner Music Group Corporation filed suit against Vital Pharmaceuticals in September 2022.³⁸ While there may remain an outstanding question of whether brands might be held liable for the posts of their influencers on a theory of contributory or vicarious infringement, the resounding takeaway from Vital Pharmaceuticals' case is that brands must exercise the utmost caution when using copyrighted content on TikTok to ensure that such use is permissible within the frameworks of both the Copyright Act and TikTok's Terms of Service.³⁹

And, while an *ex-post* analysis of Vital Pharmaceuticals' direct copyright infringement might seem to offer a simple solution—that brands should avoid using unlicensed copyrighted material entirely—the reality of the situation is more complex and seems to contradict TikTok's own Terms of Service, which state that no rights are licensed with respect to sound recordings. Take, for example, a November 2020 news release in which “TikTok announces agreement with Sony Music Entertainment.”⁴⁰ Though the headline seemed to offer a promising collaboration between TikTok and Sony, as *The Verge* contemporaneously reported: “Neither company would tell *The Verge* any real details about what

³⁶ Order on Plaintiffs' Motions for Summary Judgement Pages 19–20; see also Blake Brittain, *Bang Energy Violated UMG Music Copyrights in TikTok Ads, Judge Says*, REUTERS (July 12, 2022, 12:00 PM), <https://www.reuters.com/> [<https://perma.cc/GSJ3-L8JG>].

³⁷ Resnikoff, *supra* note 27; see also Chris Cooke, *Now Sony Music Sues Energy Drink Brand Bang Over Unlicensed Music in Social Media Videos*, COMPLETE MUSIC UPDATE (Aug. 5, 2021), <https://completemusicupdate.com/> [<https://perma.cc/RR6E-JSAH>].

³⁸ Isaiah Poritz, *Bang Energy Sued Again for Unlicensed Song Use on TikTok Account*, BLOOMBERG L. (Sept. 16, 2022, 10:00 AM), <https://news.bloomberglaw.com/> [<https://perma.cc/5XPV-NRWY>].

³⁹ Chris Cooke, *Court Says Bang's Own TikTok Videos Infringed Universal's Rights, But Not Its Influencer Content*, COMPLETE MUSIC UPDATE (July 13, 2022), <https://completemusicupdate.com/> [<https://perma.cc/YT8P-9C9E>].

⁴⁰ *TikTok Announces Agreement with Sony Music Entertainment*, TIKTOK (Nov. 2, 2020), <https://newsroom.tiktok.com/> [<https://perma.cc/MR36-YB9Y>].

this means for TikTok users.”⁴¹ Both UMG⁴² and Warner Music Group⁴³ also have license agreements with TikTok. Considering that the existence of these licensing agreements is seemingly very public but the specific terms of them are not, Vital Pharmaceuticals’ argument—that they believed their use of copyrighted sounds owned by the three major entities was permissible due to TikTok’s licensing—may have been at least somewhat justified.

So, how did an entity as sophisticated as Vital Pharmaceuticals fail to correctly understand whether it could legally use the labels’ copyrighted music in its TikTok videos? The answer may simply be that the company’s use of the copyrighted content predated the licensing agreements between TikTok and the labels. However, given that the Sony licensing agreement was announced in November 2020, this seems unlikely. The more plausible explanation is that Vital Pharmaceuticals used the wrong sound library because they were either unaware of the distinctions between the libraries or were willing to risk that the distinctions between the two libraries were unlikely to cause significant legal consequences.

Regardless of where Vital Pharmaceuticals went wrong, its liability for direct infringement underscores the need for creators and brands to be hyper-aware of whether the music they are using has been pre-cleared for use through a licensing agreement, which is a lesson that applies across UGC platforms.

II. NAVIGATING LIABILITY UNDER FAIR USE

If navigating TikTok’s licensing scheme is not a complicated enough endeavor for both brand and individual creators hoping to

⁴¹ Jacob Kastrenakes, *TikTok and Sony Music Reach a Long-Awaited Licensing Deal / It Doesn’t Seem to Change Much, But At Least Music Isn’t Disappearing*, THE VERGE (Nov. 2, 2020, 1:18 PM), <https://www.theverge.com/> [https://perma.cc/WV9Q-VE2V].

⁴² Following the expiration of their previous licensing agreement in January 2024, TikTok and UMG reached a new licensing agreement in May 2024 after the parties initially failed to reach an agreement, resulting in UMG removing its content from the platform for a period of time. Dawn Chmielewski & David Shepardson, *Universal Music Group Artists to Return to TikTok After New Licensing Pact*, REUTERS (May 2, 2024, 12:27 PM), <https://www.reuters.com/business/media-telecom/universal-music-group-reaches-new-licensing-agreement-with-tiktok-2024-05-02/> [https://perma.cc/8XYV-QKJH].

⁴³ Ellise Shafer & Chris Willman, *Warner Music Group and TikTok Ink Expanded Licensing Agreement, as App Looks to Grow Its Upstart Streaming Service*, VARIETY (July 18, 2023), <https://variety.com/2023/digital/news/warner-music-group-tiktok-licensing-agreement-1235672985/> [https://perma.cc/4UQ8-FSGT].

avoid infringement, non-infringing content creation is further complicated when one considers the Fair Use doctrine. Codified in Section 107 of the Copyright Act, the fair use of a copyrighted work is statutorily *not* an infringement of copyright.⁴⁴ When the copyrighted work is used for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, the factors to be considered in determining whether the use is a fair use shall include: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work, and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁵

Other factors may also be considered in determining whether a work falls within the Fair Use doctrine, depending upon the circumstances.⁴⁶ Indeed, the Supreme Court has recognized that “[t]hese factors are not necessarily the exclusive determinants of the fair use inquiry and do not mechanistically resolve fair use issues; no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”⁴⁷ While the four factors listed in section 107 are nonexclusive,⁴⁸ this analysis is limited to only those four factors illustratively enumerated in the statute.

As Justice Storey recognized in *Folsom*, “copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.”⁴⁹ Or, in modern day language, one might say: copyright is messy and fair use can be hard to determine. The complexity of Fair Use analysis is made abundantly clear when applied in the context of TikTok, as seen when two seemingly analogous situations—two musicals born on TikTok—had very different legal outcomes.

⁴⁴ 17 U.S.C. § 107.

⁴⁵ *Id.*

⁴⁶ *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/> [<https://perma.cc/493E-WHKN>] (last updated Nov. 2023).

⁴⁷ *Harper & Row, Publishers v. Nation Enter.*, 471 U.S. 539, 588 (1985) (internal quotations and citations omitted).

⁴⁸ *See id.* at 549 (“the statute notes four nonexclusive factors to be considered”).

⁴⁹ *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

A. RATATOUILLE: THE TIKTOK MUSICAL

In August 2020, with Broadway shut down by the pandemic, TikToker “Em Jaccs” (@e_jaccs),⁵⁰ whose real name is Emily Jacobsen,⁵¹ posted a video⁵² to their account singing about Remy the Rat, a character from Disney’s film *Ratatouille*.⁵³ She sings, “Remy, the ratatouille, the rat of all my dreams. I praise you, my ratatouille. May the world remember your name.”⁵⁴ In true TikTok fashion, the video went viral, and other TikTokers began to build upon Jacobsen’s original video.⁵⁵ TikToker “danieljmertzlufft”

(@danieljmuertzlufft),⁵⁶ whose real name is Daniel Mertzlufft,⁵⁷ posted a video to their account in which they set Jacobsen’s words to original arrangement and orchestration.⁵⁸ More



Figure 1: Playbill of *Ratatouille: The TikTok Musical*, with poster key art by Jess Siswick.

⁵⁰ Em Jaccs (@e_jaccs), TIKTOK, [https://www.tiktok.com/\[https://perma.cc/FB5M-NUVF\]](https://www.tiktok.com/[https://perma.cc/FB5M-NUVF]).

⁵¹ Eliana Dockterman, *How the Ratatouille Musical Went from TikTok Sensation to All-Star Broadway Production*, TIME (Dec. 31, 2020), [https://time.com/\[https://perma.cc/Z2SQ-JYLM\]](https://time.com/[https://perma.cc/Z2SQ-JYLM]).

⁵² Em Jaccs (@e_jaccs), TIKTOK, [https://www.tiktok.com/\[https://perma.cc/M5LD-TDW2\]](https://www.tiktok.com/[https://perma.cc/M5LD-TDW2]).

⁵³ *Ratatouille*, PIXAR, [https://www.pixar.com/\[https://perma.cc/6UUF-7D8X\]](https://www.pixar.com/[https://perma.cc/6UUF-7D8X]).

⁵⁴ Jaccs, *supra* note 52.

⁵⁵ Rebecca Alter, *Broadway Is Closed, But Ratatouille the Musical Is Cooking on TikTok*, VULTURE (Nov. 19, 2020), [https://www.vulture.com/\[https://perma.cc/Z7QF-YLB4\]](https://www.vulture.com/[https://perma.cc/Z7QF-YLB4]).

⁵⁶ danieljmertzlufft (@danieljmertzlufft), TIKTOK, [https://www.tiktok.com/\[https://perma.cc/L8NW-LPE8\]](https://www.tiktok.com/[https://perma.cc/L8NW-LPE8]).

⁵⁷ Alter, *supra* note 55.

⁵⁸ danieljmertzlufft, *supra* note 56; *see also* Alter, *supra* note 55 (comments from Mertzlufft to Vulture about their creative process).

and more creators added videos of their own, including new musical numbers, choreography, designs for the set, puppets, and playbill, until a full-fledged musical had sprung into being.⁵⁹

And, while the viral sensation might have ended up being nothing more than the latest in a string of memes and extended jokes on the platform, something rather remarkable happened instead. *Ratatouille: The TikTok Musical* debuted on January 1, 2021,⁶⁰ as a live-streamed event on the platform⁶¹ (and available for streaming thereafter until January 4⁶²) with a star-studded cast including Tituss Burgess, Adam Lambert, Wayne Brady, and Tony Award winners André De Shields and Priscilla Lopez.⁶³ Tickets sold for \$5 each, with the proceeds going to support The Actors Fund.⁶⁴ The event would go on to be considered the most successful fundraiser in the organization's history, with an audience of over 350,000 people tuning in over the course of the show's virtual run and raising \$2 million for The Actors Fund.⁶⁵

Perhaps the most remarkable thing about *Ratatouille: The TikTok Musical* is that Disney allowed it to happen at all. Disney has had a tremendous influence on US copyright law⁶⁶ and is incredibly protective of its intellectual property.⁶⁷ However, rather than shutting down the production or suing the creators for copyright infringement, Disney instead provided its implicit approval by issuing a statement: “[a]lthough we do not have development plans for the title, we love when our fans engage with

⁵⁹ Alter, *supra* note 55.

⁶⁰ Mark Kennedy, *Tituss Burgess, Adam Lambert Star in ‘Ratatouille’ Musical*, ASSOCIATED PRESS (Dec. 28, 2020), [https://apnews.com/\[https://perma.cc/QJ9T-7UBZ\]](https://apnews.com/[https://perma.cc/QJ9T-7UBZ]).

⁶¹ Lauren M. Johnson, *‘Ratatouille: The TikTok Musical’ Has Raised Over \$1 Million for Struggling Actors*, CNN (Jan. 3, 2021, 3:04 PM), [https://www.cnn.com/\[https://perma.cc/4MZB-ZAKL\]](https://www.cnn.com/[https://perma.cc/4MZB-ZAKL]).

⁶² Sandra Gonzalez, *‘Ratatouille: The TikTok Musical’ Aims to Cook Up First-Of-Its Kind Fun*, CNN (Jan. 3, 2021, 2:22 PM), [https://www.cnn.com/\[https://perma.cc/JC2M-Z4JM\]](https://www.cnn.com/[https://perma.cc/JC2M-Z4JM]).

⁶³ *Id.*

⁶⁴ Johnson, *supra* note 61.

⁶⁵ Dan Meyer, *Ratatouille: The TikTok Musical Raises \$2 Million for The Actors Fund*, PLAYBILL (Jan. 11, 2021), [https://playbill.com/\[https://perma.cc/48GX-MC32\]](https://playbill.com/[https://perma.cc/48GX-MC32]).

⁶⁶ Intellectual Property Group, *Disney’s Influence on United States Copyright Law*, IPLAWBLOG (Feb. 17, 2016), [https://www.theiplawblog.com/\[https://perma.cc/6W96-MTDE\]](https://www.theiplawblog.com/[https://perma.cc/6W96-MTDE]).

⁶⁷ Shradha Jain, *Popular Copyright Infringement Cases Highlighting How Disney is Protective of its Intellectual Property Rights*, IPLEADERS (July 10, 2021), [https://blog.ipleaders.in/\[https://perma.cc/L48T-STZW\]](https://blog.ipleaders.in/[https://perma.cc/L48T-STZW]).

Disney stories . . . [w]e applaud and thank all of the online theater makers for helping to benefit the Actors Fund in this unprecedented time of need.”⁶⁸

While it remains to be seen whether the *Ratatousical* is “the future of musical theater”⁶⁹ or will simply be looked back upon as a feel-good story⁷⁰ from the pandemic, its mere, unlitigated occurrence may prove to have significant legal ramifications as a precedent for content creators in the future.

B. THE UNOFFICIAL BRIDGERTON MUSICAL

Despite the success and support experienced by the *Ratatousical*, it seems that not all unauthorized uses of another’s copyrighted material will result in a Disney-style happy ending. Instead, the creators of another TikTok musical learned that unauthorized uses of another’s copyrighted material may result in the probably-more-expected outcome of a copyright infringement lawsuit. This not-such-a-Cinderella-story began when TikTok creator Abigail Barlow⁷¹ asked in a video posted to her account, “[o]kay but what if Bridgerton was a musical?”⁷² *Bridgerton* is a massively popular Netflix series.⁷³ Barlow soon teamed up with Emily Bear and the duo began crafting a full-scale musical inspired by the series, posting videos of their progress on TikTok.⁷⁴ In contrast to the large number of creators who came together to create the *Ratatousical*, what would come to be called *The Unofficial Bridgerton Musical* was the creative product of just two creators,

⁶⁸ Ashley Lee, *Commentary: Why TikTok’s ‘Ratatouille’ Experiment is the Future of Musical Theater*, L.A. TIMES (Jan. 2, 2021, 8:02 AM), <https://www.latimes.com/> [<https://perma.cc/MKG7-5TWT>].

⁶⁹ *Id.*

⁷⁰ *Ratatouille Musical: TikTok Phenomenon Raises \$1m for Actors’ Charity*, BBC (Jan. 4, 2021), <https://www.bbc.com/> [<https://perma.cc/E9NS-MHZC>]; see also Peter Marks, *Judy and Mickey Would Have Loved the TikTok ‘Ratatouille’ – 2021’s Answer to ‘Let’s Put on a Show!’*, WASH. POST (Jan. 2, 2021, 2:01 PM), <https://www.washingtonpost.com/> [<https://perma.cc/RP8N-AWMH>]; see also Jesse Green, *‘Ratatouille’ Review: What’s Small and Hairy With Big Dreams?*, N.Y. TIMES (Jan. 3, 2021), <https://www.nytimes.com/> [<https://perma.cc/KR8N-NMH4>].

⁷¹ Abigail Barlow (@abigailbarlowwww), TIKTOK, <https://www.tiktok.com/> [<https://perma.cc/J956-VTTK>].

⁷² Abigail Barlow (@abigailbarlowwww), TIKTOK, (Jan. 10, 2021), <https://www.tiktok.com/> [<https://perma.cc/2H9U-ZEJV>].

⁷³ *Bridgerton* (Netflix 2020).

⁷⁴ Jeff Lunden, *Now Playing On TikTok: ‘Bridgerton’ The Musical*, NPR (Feb. 13, 2021, 5:08 PM), <https://www.npr.org/> [<https://perma.cc/KH64-6Z6K>].

Barlow and Bear, working together.⁷⁵ Another notable difference is that the *Bridgerton* musical took on a decidedly more substantial life beyond TikTok. *The Unofficial Bridgerton Musical* was released in September 2021 as a 15-song album performed by Barlow and Bear.⁷⁶ The album would go on to win a 2022 Grammy for the best musical theater album, beating out Andrew Lloyd Webber's *Cinderella*, the cast recording of *Girl from the North Country*, *Les Misérables: The Staged Concert*, and Stephen Schwartz's *Snapshots*.⁷⁷ The National Symphony Orchestra presented the world premiere of *The Unofficial Bridgerton Musical Live in Concert* at The Kennedy Center on July 26, 2022.⁷⁸



Figure 2: Promotional material from The Kennedy Center's website.

⁷⁵ Shannon Gaffney, *The 'Unofficial Bridgerton Musical': A Chat with Barlow and Bear*, ONSTAGE BLOG (Sept. 6, 2021), <https://www.onstageblog.com/> [https://perma.cc/7M48-GSGE].

⁷⁶ Deanna Schwartz, *The Netflix v. 'Unofficial Bridgerton Musical' Lawsuit, Explained*, NPR (Aug. 4, 2022, 12:42 PM), <https://www.npr.org/>.

⁷⁷ 2022 GRAMMYs Awards Show: Complete Winners & Nominations List, GRAMMY AWARDS (Nov. 23, 2021, 3:54 PM), <https://www.grammy.com/> [https://perma.cc/VUG5-5ULP]; see also Jazz Tangcay, 'Unofficial Bridgerton Musical' Becomes First Grammy-Winning Album to Originate on TikTok, VARIETY (Apr. 3, 2022, 1:38 PM), <https://variety.com/> [https://perma.cc/5V4N-KAJB].

⁷⁸ *Barlow and Bear's The Unofficial Bridgerton Musical Album Live in Concert*, KENNEDY CTR. (July 26, 2022, 8:00 PM), <https://www.kennedy-center.org/> [https://perma.cc/KDT8-ANW3].

When asked how they obtained the rights to create a derivative work based on the Netflix property, the pair⁷⁹ reportedly laughed, with Barlow stating: “We asked! . . . Ask and you shall receive. Netflix was very, very supportive.”⁸⁰ Netflix, however, disputes this, claiming that “Barlow and Bear misrepresented that they had permission to use the *Bridgerton* trademark, despite vigorous objections from the streaming giant.”⁸¹ Perhaps not surprisingly, Netflix accordingly filed suit, alleging copyright and trademark infringement.⁸²

Netflix asserted in its complaint that “Netflix owns the exclusive right to create *Bridgerton* songs, musicals, or any other derivative works based on *Bridgerton*. Barlow & Bear cannot take that right . . . for themselves, without permission. Yet that is exactly what they have done.”⁸³

So, how did *The Unofficial Bridgerton Musical* go from a project finding its creators featured in *The New York Times*⁸⁴ and streaming on Spotify⁸⁵ to being haled into a District Court in Washington, D.C.?⁸⁶ Abridging the history offered by Netflix in its complaint provides the following account:

[I]n early 2021, Netflix did not stop what Barlow & Bear represented as their personal TikTok fan tribute to *Bridgerton*. Numerous individuals involved in the creation of *Bridgerton* . . . applauded Barlow & Bear . . . [Barlow & Bear] went viral. . . . In March 2021, Barlow & Bear’s counsel asked expressly for

⁷⁹ The creators now brand themselves as Barlow & Bear. Barlow & Bear, *Musical Theatre’s Newest Songwriting Duo is Taking the World by Storm.*, BARLOW & BEAR, <https://www.barlowandbear.com/> [https://perma.cc/F9LQ-BLHK].

⁸⁰ Gaffney, *supra* note 75.

⁸¹ Britain Eakin, *Netflix Ends IP Fight Over ‘Unofficial Bridgerton Musical,’* LAW360 (Sept. 26, 2022, 1:36 PM), <https://www.law360.com/> [https://perma.cc/YX4F-VM8B].

⁸² Jay-Anne B. Casuga, *Netflix Sues ‘Unofficial Bridgerton Musical’ Over IP Violations*, BLOOMBERG L. (July 29, 2022, 3:48 PM), <https://www.bloomberglaw.com/> [https://perma.cc/Q9KD-NPEF].

⁸³ Complaint at 1, Netflix Worldwide Ent., LLC v. Barlow, No. 1:22-cv-02247 (D.D.C. July 29, 2022).

⁸⁴ Julia Jacobs, *TikTok to the Grammys: How a ‘Bridgerton’ Musical Beat Broadway*, N.Y. TIMES (Apr. 4, 2022), <https://www.nytimes.com/> [https://perma.cc/5KKE-LAJ9].

⁸⁵ Barlow & Bear, *The Unofficial Bridgerton Musical*, SPOTIFY, <https://open.spotify.com/> [https://perma.cc/EY4Y-MVBE].

⁸⁶ Schwartz, *supra* note 76.

Netflix's blessing of a recorded album and a *single* specific U.K. charity promotion . . . Netflix responded in June that it was "not approving or authorizing" the album's release or any charity performances, but . . . stated that it was "not standing in the way." Barlow & Bear did not ask for, and Netflix never granted, ongoing authorization or any license. . . . In August, after learning that Barlow & Bear were due to release an album to Spotify the following month, Netflix sought to advise them of a clear line: Netflix representatives stressed to Barlow & Bear's representatives that Netflix would not authorize and did not want them to engage in any live performances . . . or any other derivative works that might compete with Netflix's own planned live events . . . In November 2021, Barlow & Bear's representative informed Netflix that their canceled U.K. charity performance had been rescheduled for later that month . . . Given Netflix's clear statement . . . that this would be the last such event, Barlow & Bear's assurances that it would be, and their express statement that they planned to focus on other projects . . . Netflix did not seek to halt the rescheduled charity event in the U.K. . . . In March 2022, following Barlow & Bear's Grammy nomination, Netflix reached out—again—to reiterate the lines. . . . Barlow & Bear's representative reiterated that Netflix should not worry because Barlow & Bear did not want to be known only for their work derivative of *Bridgerton*, so they would be focusing on other activities in the future. . . . Barlow & Bear kept coming back to Netflix with updates on the U.K. charity event and went out of their way to make clear that they did not have any other performances planned. Netflix relied on these representations in deciding not to pursue any additional enforcement activity. . . . On June 7, 2022, Barlow & Bear's representative informed Netflix for the first time that they would be performing "The Unofficial Bridgerton Musical" at the Kennedy Center on July 26. . . . in June and July 2022, Netflix informed counsel for Barlow & Bear that the July 26 performance and

any subsequent live performances were not authorized and that such exploitation would constitute willful copyright and trademark infringement unless they negotiated a license—which Netflix was willing to do. . . . Barlow & Bear refused.⁸⁷

From there, the complaint goes on to offer details about the Kennedy Center performance, including that tickets to the sold-out performance (in a 1,100-seat venue) were sold for \$29-\$149 per ticket and featured performances by Tony Award winner Kelli O'Hara and Tony Award nominees Ephraim Sykes and Denée Benton.⁸⁸

The dispute reached a resolution relatively soon after the suit was filed, with the parties settling and Netflix voluntarily dismissing the suit in September 2022.⁸⁹ And while the last act of this drama played out behind the scenes rather than on the public stage of a court room, such an ending leaves open the question of whether Barlow & Bear's musical would be found to constitute a fair use.

C. A FAIR USE COMPARATIVE ANALYSIS: THE RATATOUSICAL AND THE UNOFFICIAL BRIDGERTON MUSICALS

That question begs others. What of the *Ratatousical*? Would it be considered a fair use? Is that why, at least in part, Disney declined to litigate the matter? And, if so, what differences exist between these two TikTok musicals, such that one avoided litigation while the other was subjected to court intervention? When the two musicals are considered side by side under a fair use analysis, it is clear that one key factual difference has a dispositive effect on why the *Ratatousical* falls much more squarely into the realm of fair use than *The Unofficial Bridgerton Musical*. Only one of the musicals extended beyond the confines of a primarily charitable purpose.

This analysis quickly dispenses with the second and third Fair Use factors, including the nature of the copyrighted work and the amount and substantiality of the portion used.⁹⁰ This is because the facts of both cases are so analogous that analysis of the works under factors two and three results in essentially the same conclusion as to those factors. The second factor “calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to

⁸⁷ Complaint at 13–16, Netflix Worldwide Entertainment LLC v. Abigail Barlow (Case No. 1:22-cv-02247) (D.D.C., 2022).

⁸⁸ *Id.* at 17.

⁸⁹ Eakin, *supra* note 81.

⁹⁰ 17 U.S.C. § 107.

establish when the former works are copied.”⁹¹ In both cases, the base works are “closer to the core of intended copyright protection” because both base works are original, creative works.⁹² As such, this factor in both cases favors the original creator and supports a finding that the use was not fair.⁹³

Likewise, the third factor favors the original creators by supporting a finding that the use was not fair.

The “Ratatousical” . . . appropriated a substantial portion of the protected elements of “Ratatouille” without prior permission. Characters, plot, design, and dialogue from the original “Ratatouille” are all used in the “Ratatousical.” But since the musical is not providing commentary nor serving a parody purpose, and only relying on an industry standard of licensed copying, the court would weigh this factor in favor of Disney in the case of an unlicensed “Ratatousical.”⁹⁴

Similarly, as Netflix’s complaint asserted, *The Unofficial Bridgerton Musical* “featured over a dozen songs that copied verbatim dialogue, character traits and expression, and other elements from *Bridgerton* the series.”⁹⁵ Netflix’s complaint backed up this assertion by describing a number of “representative examples of infringement”⁹⁶ in which Barlow & Bear copied from their work.⁹⁷

So, what was the difference between these two cases such that Netflix opted to pursue litigation regarding *The Unofficial Bridgerton Musical* while the “notoriously litigious”⁹⁸ Disney

⁹¹ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

⁹² *Id.*; see also Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc., 150 F.3d 132, 143 (2d Cir. 1998) (“the scope of fair use is somewhat narrower with respect to fictional works . . . than to factual works”).

⁹³ See Twin Peaks Prod. v. Publ’g Int’l, Ltd., 996 F.2d 1366, 1376 (2d Cir. 1993) (“the second factor, if it favors anything, must favor a creative and fictional work, no matter how successful”).

⁹⁴ Paige V. Gagliardi, *TikTok the Musical: Copyright Issues Raised by the “Ratatouille” Musical*, 17 WASH. J.L. TECH. & ARTS 147, 166 (2022).

⁹⁵ Complaint, *supra* note 83, at 2.

⁹⁶ *Id.* at 11.

⁹⁷ *Id.* at 9–13.

⁹⁸ David Devich, Blog, *Why Can’t Disney Apply the “Hakuna Matata” Mantra to Copyright Infringement?*, FORDHAM INTELL. PROP., MEDIA & ENT. L. J., <http://www.fordhamiplj.org/> [<https://perma.cc/XUF4-ZPYV/>].

decided to let the *Ratatousical* slide? The answer probably hinged on one primary consideration.

Money.

The first Fair Use factor is the purpose and character of the use.⁹⁹ This factor considers “whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is transformative”¹⁰⁰ because “[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”¹⁰¹ The inverse—the less transformative the new work, the greater will be the significance of other factors, like commercialism—is relevant in analyzing both cases because the musicals are only minimally transformative, if at all. Unlike in *Campbell*, in which the Court found that the allegedly infringing work had a “critical element” because it criticized the original source material,¹⁰² no such critical element exists in either the *Ratatousical* or *The Unofficial Bridgerton Musical*. Both works are little, if at all, more than re-framings of the underlying source material in the different medium of musical theatre.

Notably, while both musicals were created after *Campbell*, they preceded the Supreme Court’s decision in *Andy Warhol Foundation for the Visual Arts v. Goldsmith*. Despite that fact, *Warhol*’s holding likely would not have changed the outcome for either musical.

In *Warhol*, the Court found that AWF’s unauthorized licensing was not a fair use because it shared substantially the same purpose as Goldsmith’s work, and AWF’s use of Goldsmith’s work was of a commercial nature.¹⁰³ Perhaps most significantly, the Court clarified that “*Campbell* cannot be read to mean that §107(1) weighs in favor of any use that adds some new expression, meaning, or message.”¹⁰⁴ The Court acknowledged that 2 Live Crew’s version of the Roy Orbison song that was the subject of *Campbell* “easily conveyed a new meaning or message But new meaning or message was not sufficient Instead, meaning or message was simply relevant to whether the new use served a purpose distinct from the original, or instead superseded its objects. That was, and is, the ‘central’ question under the first factor.”¹⁰⁵ What was dispositive in *Campbell* was not that 2 Live Crew made

⁹⁹ 17 U.S.C. § 107.

¹⁰⁰ *Campbell*, 510 U.S. at 571 (internal quotation marks omitted).

¹⁰¹ *Id.*

¹⁰² *Id.* at 582.

¹⁰³ *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 550 (2023).

¹⁰⁴ *Id.* at 541.

¹⁰⁵ *Id.* at 542.

transformative use of the original by adding new expression through altered lyrics and musical elements; rather, it was that those new elements transformed the *purpose* of 2 Live Crew's work into parody.¹⁰⁶

What *Warhol* suggests, then, is that the primary question to be determined under the first factor is the purpose for which the transformed expression is used, rather than whether the purpose of the use is to transform the expression.¹⁰⁷ Thus, it well may be that the "transformative use" doctrine has itself been transformed into what is effectively the "transformative purpose" doctrine.¹⁰⁸ It is not necessarily sufficient that doing something "new" to a work will result in success under factor one; instead, prevailing on factor one may now require doing something new *with* the secondary work. "Whether the purpose and character of a use weighs in favor of fair use is, instead, an objective inquiry into what use was made, *i.e.*, what the user does *with* the original work."¹⁰⁹

The Court held:

In sum, the first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use. If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.¹¹⁰

In so holding, the Court elided the first and fourth factors more than it previously had, in that an assessment of a work's purpose(s)¹¹¹ weighed against the commercial nature of the use is

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ This notion is further supported by the Supreme Court's decision in *Google v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021).

¹⁰⁹ *Warhol*, 598 U.S. at 545 (emphasis added).

¹¹⁰ *Id.* at 532–33.

¹¹¹ It seems an open question at this time whether a work might be found to have multiple purposes and, if a work can have multiple purposes, what the effect would be if a secondary work shares one or more purposes with the underlying work but also has at least one distinct purpose. See *Philpot v. Indep. J. Rev.*, 92 F.4th 252, 260 (4th Cir. 2024) (finding that the defendant used plaintiff's photograph for exactly the same reason that the

necessarily and inextricably intertwined with an analysis of the fourth Fair Use factor, potential market harm. The degree of that elision remains to be seen; in Justice Kagan's dissenting view, "the majority transplants factor 4 into factor 1,"¹¹² while Justice Gorsuch's concurrence argues "[t]here is no double counting here."¹¹³

In all likelihood, the elision probably falls somewhere between the two views. A non-commercial use (which would support a finding of fair use under factor one) could nonetheless have a harmful effect on the market for the original. After all, the secondary user may offer a non-commercial use of the original free of charge, encouraging users to abandon the original because there is now a free alternative. In such a case, the use would likely support a finding of fair use under the first factor (because it is a non-commercial use) but not the fourth (because there is market harm). By contrast, a second commercial use may nonetheless be so vastly different from the original commercial use that the two can coexist without market harm to the original. Obviously, though, the Court's increased focus on the use's commercial nature under factor one will likely cause future courts to consider more of the same facts under factor one as they already do under factor four, leading to some increase in the degree of elision between the first and fourth factors.

In analyzing both musicals under the fourth factor, it is critical to consider that "[t]he market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop."¹¹⁴ This was significant in *Campbell*, if not outright dispositive, as the allegedly infringing work was a parody.¹¹⁵ No such parodic protection applies to either of the musicals considered here. Thus, they fall more into the realm of *Warhol*, in that their purposes are *arguably* much closer to the original work's purpose. These cases perfectly illustrate the degree to which a work's purpose *may be argued*, either by arguing differences in the fundamental nature of the uses (i.e., "to provide a televisual experience" versus "to provide an auditory experience") or by arguing the breadth of the definition of the use (i.e., whether their purposes are all defined as broadly as "to entertain" or as

plaintiff had—to depict Ted Nugent—but not considering whether the defendant's use had an additional purpose, such as criticism or commentary).

¹¹² *Warhol*, 598 U.S. at 578 (J. Kagan, dissenting).

¹¹³ *Id.* at 555 (J. Gorsuch, concurring).

¹¹⁴ *Campbell*, 510 U.S. at 592.

¹¹⁵ *Id.* ("There is no protectible derivative market for criticism.").

narrowly as “to entertain through a television” versus “to entertain through a phone screen”).

Because adding “new expression” (such as by musicalizing a pre-existing work) no longer carries the same degree of support it once did for finding transformative use, it is likely the purpose of both musicals would be found to be highly similar or identical to the source material, thus foregrounding an inquiry into the works’ commercial natures. As such, an issue considered by the Court in *Campbell* is raised anew here: does a *presumption* of market harm attach to derivative works with a commercial purpose?¹¹⁶ The *Campbell* Court squarely rejected this presumption by holding that the lower court erred when it applied *Sony* to find that a presumption existed and gave that inapplicable presumption a “virtually dispositive weight to the commercial nature of the parody.”¹¹⁷ The Court reasoned that “[i]f, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107.”¹¹⁸ Thus, “[n]o presumption or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes.”¹¹⁹

In a case like *Campbell*, in which the derivative work is a parody, the derivative work is clearly “something beyond mere duplication,” and the derivative work’s transformativity in its parodic nature makes market substitution “less certain.”¹²⁰ But what about a case like the *Ratatousical* or *The Unofficial Bridgerton Musical*, in which the derivative work is arguably of a type that the creators of the original work “would in general develop or license others to develop”?¹²¹ In these cases and others like them, the interplay between factors one and four presents a difficult question: at what point on the spectrum of transformativity *does* a presumption of market harm attach, if it does at all?

This question is made particularly complex due to the emergence of a novel approach to content creation, which, while not entirely unique to TikTok, is nonetheless prevalent on the platform. This trend is exemplified by the two TikTok musicals, where the conventional end-product derivative work that is typically the

¹¹⁶ *Id.* at 590–91.

¹¹⁷ *Campbell*, 510 U.S. at 584.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 591 (internal quotation marks omitted).

¹²⁰ *Id.*

¹²¹ *Id.* at 592.

subject of copyright litigation is not given the traditional incubatory period in which to develop outside of the public eye. Instead, in both cases, part of the appeal of the musical was that the audience was able to watch—and, in the case of the *Ratatousical*, contribute to—its creation. This mode of creation may make it more difficult for copyright holders to police their work moving forward, because it allows the creators of derivative works to benefit from the blurriness between a non-commercial and commercial purpose by shifting the works' purpose mid-way through its creation.

Contrast this with a case like *Warhol*, where there were multiple points of different uses, but those points were static and easily distinguishable from one another: (1) Warhol's initial silkscreen print authorized by Goldsmith's licensing agreement with Vanity Fair; (2) Vanity Fair's subsequent publication of the authorized Warhol silkscreen image; (3) Warhol's creation of additional works in the "Prince Series" beyond the authorized scope of the Vanity Fair license; and (4) AWF's subsequent licensing of another silkscreen from the Prince Series to Condé Nast (with the last use being the challenged use at issue in *Warhol*). The Court explicitly stated that their analysis was limited only to the challenged use, and "expresse[ed] no opinion as to the creation, display, or sale of any of the original Prince Series works."¹²² Justice Gorsuch did concede at the end of his concurrence, however, that "while [the Court's] interpretation of the first fair-use factor does not favor the Foundation in this case, it may in others. If, for example, the Foundation had sought to display Mr. Warhol's image of Prince in a nonprofit museum or a for-profit book commenting on 20th-century art, the purpose and character of that use might well point to fair use."¹²³ The key difference between the various uses of Goldsmith's work and the TikTok musicals' uses of the source work is that each use of Goldsmith's work was distinct, whereas the musical's use was ongoing and transformed over time.

This new mode of creation, which allows for an ongoing use that changes over time—and that use's dynamic nature—may make it difficult to identify the points of use when a fair use tips over into an infringing use. This mode of ongoing creation essentially makes contemplating copyright litigation in such matters akin to aiming at a moving target. It forces the potential plaintiff to constantly monitor an ongoing and possibly changing use to determine whether the use has shifted from a fair use to an infringing one, justifying a lawsuit.

¹²² *Warhol*, 598 U.S. at 534.

¹²³ *Id.* at 557–58 (J. Gorsuch, concurring).

The potential legal issues posed by this mode of creation are exemplified in the most key factual difference between the *Ratatousical* and *The Unofficial Bridgerton Musical* and in the implications of that difference on the Fair Use analysis as applied to both cases. Essentially, the dispositive difference is this: while both TikTok musicals were born in what was likely the realm of fair use, only one of them, *The Unofficial Bridgerton Musical*, eventually extended beyond the realm of fair use because, at a certain point in its life, its purpose shifted from an arguably non-commercial use to an unmistakably commercial one.

What began as a fan's seemingly innocent song based on a Netflix show eventually grew into something much larger, presenting significant potential for market harm to the original work. While the *Ratatousical*, at an indeterminate point of success constituting a heightened level of legitimacy, doubled down on the non-commercial nature of its origins to take on a highly lucrative but nonetheless charitable purpose, *The Unofficial Bridgerton Musical* reached that tipping point and came down on the opposite side, instead pursuing a blatantly commercial purpose.

In future similar cases, attorneys should closely scrutinize the number of creators of a work—such as in the case of the *Ratatousical*'s more crowd-sourced origin—but should not give this fact undue weight. A work's number of creators will not prevent it from having an unfair commercial purpose or from constituting infringement. However, in the case of the *Ratatousical* and perhaps others moving forward, it remains a consideration that should be assessed by analyzing the degree of coordination between the collaborators to determine whether, and if so, at what point in the creation, the creators were making the derivative work with an intentionally commercial purpose in mind. Such a consideration may offer valuable evidentiary support for plaintiffs seeking to prevail on the first and fourth Fair Use factors. Furthermore, it is easy to imagine that such an assessment may be necessary to successfully overcome a defense of laches or equitable estoppel made by alleged infringers.¹²⁴

Thus, as illustrated by the difference in how these two cases unfolded, it is essential for both content creators seeking to avoid liability and copyright holders seeking to protect their work to carefully consider the purpose of a work and, if that purpose is a commercial one, to determine whether the work is likely to result in actionable market harm to the underlying work. If so, content creators would do well to seek a license as soon as their work takes

¹²⁴ Devich, *supra* note 98.

on a commercial purpose (or simply err on the side of caution by creating wholly original content), and copyright holders should seek to set clear boundaries regarding commercial use as soon as a potentially infringing derivative work comes to their attention.

CONCLUSION

Returning to Alex Peter (Lolo)’s threat regarding the “unauthorized” use of his video, the foregoing analysis, while it does not seek to draw a conclusion on the strength of Mr. Clavering’s claim, is intended to offer a helpful framework in which such claims might be assessed. As illustrated above, essential questions that must be answered in any copyright dispute arising out of content posted on TikTok are (1) whether a use that would otherwise constitute infringement under the Copyright Act is rendered permissible through TikTok’s Terms of Service and the complex licensing scheme it employs, and (2) whether a use notwithstanding permissibility conferred through those Terms of Service and licensing is nonetheless not copyright infringement because the use is protected under the Fair Use doctrine.

Regardless of what the future holds for content creation on TikTok, the reality of the current moment is that TikTok has become, for better or worse, a staggeringly important platform that informs how a global audience consumes and creates content. As such, it is vitally important that any attorney practicing intellectual property law has at least a basic understanding of how the platform works and the possible legal issues that may arise related to copyrighted material on TikTok.

