BALANCING ESPORTS: PROTECTING THE NEXT GENERATION’S SUPERSTARS

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I. Introduction

In mid-March of 2020, when millions of people were confined to their homes at the peak of the COVID-19 pandemic, professional sports leagues shut down, television shows stopped production, and people had few options to entertain themselves.1 Despite these challenges, video game popularity has continued to grow and is projected to grow exponentially in the coming years.2 As video games

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1 See Joseph Zucker, Timeline of Coronavirus’ Impact on Sports, BLEACHER REP. (Oct. 9, 2020), archived at https://perma.cc/7UNY-LMLZ (outlining the timeline of various sports leagues suspending or canceling parts of their seasons). See Sarah Whitten, Your favorite TV shows may still be on the air now, but new episodes could be delayed as coronavirus shuts down production, CNBC (Mar. 13, 2020), archived at https://perma.cc/VFF9-L9JM (warning traditional cable programs and streaming services have been halted or altered due to government restrictions and lack of content). See Craig Wigginton, COVID-19: Impact on media and entertainment companies, DELoitte (Apr. 3, 2020), archived at https://perma.cc/DTM2-CXK4 (describing the skyrocketing demand for streamed, live, and Esports content during the height of the COVID-19 pandemic).

2 See Don Reisinger, Coronavirus is Conditioning New Entertainment Habits That May Not Change Post Pandemic, FORBES (June 23, 2020), archived at https://perma.cc/K2YP-K3F6 (suggesting 38% of consumers have tried out a new digital media subscription or activity, like playing videogames, and how two-thirds plan to continue at the conclusion of the pandemic). Video games are especially appealing because they offer a safe way to socialize and make the small world of quarantine feel big. Id. See also Noah Smith, The giants of the video game industry
grow in popularity worldwide, so has interest in professional video game competition, otherwise known as Esports. Esports are organized video game competitions where athletes and teams contend with one another in different games, such as League of Legends, Counter Strike: Global Offensive, Dota 2, and Fortnite. Esports teams compete in various tournaments across hundreds of games for massive prize pools, the largest of which was Dota 2 The Invitational’s $34 million prize pool. The rising popularity of video games and Esports has attracted billions of dollars of investments and sponsorship deals.
Global Esports revenue across all games in 2021 is estimated to exceed $1.1 billion and viewership across all Esports competition will grow to 474 million people in 2021. The rapid increase in revenue and explosion of Esports popularity has left labor relations between “E-athletes,” teams, and league organizers lagging behind.

This Note will examine how an Esports athlete union covering all leagues and athletes would help protect athletes’ health, rights, working conditions, and maximize their opportunities to succeed in Esports as a whole. To investigate this end, this Note will explore: unionization in the United States, the plummeting union membership in America and its juxtaposition with the rise of Esports, the development of player’s associations in major sports in the United States, the brief history of Esports development, and the recent attempts of unionization in Esports. Finally, this Note will discuss why an Esports athlete union covering all athletes and leagues provides the greatest protection and opportunity for Esports athletes and is preferable to a game-by-game or league-by-league approach.

(outlining several disclosed investments made into Esports in the month of March alone, including a $10 million gaming center for VERITAS Entertainment). See also Tim Maloney, How Do Esports Teams Make Money?, ROUNDHILL INVEST. (Feb. 12, 2020), archived at https://perma.cc/KWL6-G2BY (showing how Esports organizations profit off all of these viewers and sponsors and why they are an attractive investment for entrepreneurs). See also Dean Takahashi, Newzoo: Global esports will top $1 billion in 2020, with China as the top market, VENTUREBEAT (Feb. 25, 2020), archived at https://perma.cc/E7W9-GWU6 (analyzing a new market report suggesting there will be a rapid increase in viewership of Esports in 2020 and beyond). See also Newzoo Global Esports Market Report 2020 | Light Version, NEWZOO (Feb. 25, 2020), archived at https://perma.cc/2UKM-FGHY (predicting the growth revenue and viewership-wise of Esports in 2020 and beyond).

See Takahashi, supra note 6 (analyzing a new market report suggesting there will be a rapid increase in viewership of Esports in 2020 and beyond); Newzoo’s Global Esports & Live Streaming Market Report 2021 | Free Version, NEWZOO (Mar. 9, 2021), archived at https://perma.cc/GY7J-YCE8 (predicting the growth revenue and viewership of Esports in 2021 and beyond). See also Ed Dixon, Study: Global esports revenue to hit almost US $1.1bn in 2021, SPORTSPRO (Mar. 9, 2021), archived at https://perma.cc/5L6D-K87V (outlining the expected growth of the Esports market in 2021). “The global Esports audience will grow to 474 million in 2021, with revenues from competitive gaming set to be just shy of US $1.1 billion by the end of this year . . . .” Id.

See Jonathan L. Israel, It’s Not Just a Game – Addressing Employment Law Issues in Esports, FOLEY & LARDNER LLP (June 3, 2019), archived at https://perma.cc/W5TB-LDEM (highlighting some of the employment law issues arising around the Esports industry, specifically within the team-athlete relationship by using the Tfue-FaZe Clan California case).
II. History

A. The National Labor Relations Act and Collective Bargaining

During the 19th century in the United States, unions struggled to form due to discrimination from employers; some courts went so far to classify them as illegal “criminal conspiracies” against the employer.9 Despite years of demand for unions and worker protection by oppressed workers in the United States, it was not until the passage of the National Labor Relations Act (“NLRA”), and the Norris-La Guardia Act that workers were granted meaningful labor protections.10 The NLRA gives workers the right to form, join, or assist unions, choose representatives to bargain collectively with their employer about terms and conditions of employment, and attempt to improve the

9 See Hannah Esquenazi, Who Can “Seize the Day?: Analyzing Who is an “Employee” For Purposes of Unionization and Collective Bargaining Through the Lens of the “Newsie” Strike of 1899, 59 B.C. L. Rev. 2551, 2563 (2018) (outlining some of the early struggles union proponents faced before the passage of the NLRA in 1935). See also Todd A. Cherry, Declining Jurisdiction: Why Unionization Should Not Be the Ultimate Goal for Collegiate Athletes, 16 U. Ill. L. Rev. 1937, 1945 (2016) (explaining how at first, federal courts did not support unions and often issued injunctions to stop them). “[T]here were a few instances when injunctions proved ineffective and United States presidents ordered federal troops to stamp out these strikes.” Id. See Lochner v. New York, 198 U.S. 45, 45 (1905) (holding a New York statute limiting the number of hours bakers can work in a week was unconstitutional). “[T]he freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.” Id. at 64. See also Collective Bargaining, AFL-CIO (Jan. 31, 2021), archived at https://perma.cc/RJN5-6MD6 (explaining what a collective bargaining agreement is and what it can solve).

10 See National Labor Relations Act, 29 U.S.C.S. § 151 (1935) (attempting to resolve strikes and other forms of economically disruptive activity due to employers denying the rights of employees to organize). The inequality of bargaining power between employees who are not able to organize themselves and employers substantially affects the flow of commerce. Id. The flow of commerce is disrupted because if employers depress wages and purchasing power of wage earners, it prevents stabilization of competitive wage rates and working conditions within and between industries. Id. See also Norris-La Guardia Act, 29 U.S.C.S. § 103 (1932) (banning “yellow dog” contracts requiring workers to agree to not join a union as a condition of their employment or hiring). See also LISA GUERIN & SACHI BARRIERO, THE ESSENTIAL GUIDE TO FEDERAL EMPLOYMENT LAWS 268 (6th ed. 2019) (explaining the NLRA gave strong support for worker’s rights to organize and bargain collectively with their employer). The law outlawed certain employer efforts to prevent union organization or bust up existing unions. Id.
workplace through concerted activity. Additionally, the NLRA prohibits employers and unions from engaging in unfair labor practices. Examples of unfair labor practices include but are not

11 See NLRA, 29 U.S.C. § 157 (1935) (asserting employees’ rights to organize and collectively bargain with employers, or to refrain from any such activities). See Concerted Activity, NLRB (Nov. 6, 2020), archived at https://perma.cc/PZ56-T5P7 (describing examples of what concerted activities are and restrictions on employers for discriminating against workers for participating in such concerted activities).

[One] has the right to act with co-workers to address work-related issues in many ways. Examples include: talking with one or more co-workers about [one’s] wages and benefits or other working conditions, circulating a petition asking for better hours, participating in a concerted refusal to work in unsafe conditions, openly talking about your pay and benefits, and joining with co-workers to talk directly to [one’s] employer, to a government agency, or to the media about problems in [one’s] workplace. [One’s] employer cannot discharge, discipline, or threaten [one] for, or coercively question [one] about, this “protected concerted” activity.

Id. See also Republic Aviation Corp. v. NLRB, 324 U.S. 793, 795 (1945) (holding an employer is not allowed to fire an employee for conducting union activity outside work time and the work area or advertising the union using buttons or insignias during work hours). “The board determined that the promulgation of the ‘no solicitation’ rule violated . . . the National Labor Relations Act as it interfered with, restrained and coerced employees in their rights . . . and discriminated against the discharged employee.” Id. at 795. See also NLRB v. Washington Aluminum, 370 U.S. 9, 17 (1962) (affirming that the NLRA allows workers to engage in concerted activities to better working conditions in the workplace without being discriminated against by their employer). “[C]oncerted activities by employees for the purpose of trying to protect themselves from working conditions . . . are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated.” Id.

12 See NLRA, 29 U.S.C. § 158 (1935) (outlining the different unfair actions and practices employers and labor organizations are prohibited from engaging in). Employers cannot “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” Id. Additionally, employers cannot “dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” Id. Moreover, employers cannot discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Id. Finally, Employers cannot “discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act” or “refuse to bargain collectively with representatives of their employees, subject to the provisions of section 9(a).” Id. See also NLRB v. Steelworkers, 357 U.S. 357, 364 (1958) (holding that an employer forcing his employees to listen to anti-union demonstrations during work hours, while simultaneously blocking attempts for
limited to discouraging workers from forming a union, misinforming workers about labor rights, and discriminating against a worker for exercising their labor rights.13

In order for workers to form a union, there are several requirements under the NLRA that must be satisfied.14 First, the employer must be covered by the NLRA, which applies to all private employers whose operations affect interstate commerce, but the National Labor Relations Board (“NLRB”), who enforce the NLRA, usually only intervene in disputes that are not resolved or settled following a formal complaint.15 Additionally, if a union wants to represent a group of workers, the union must garner the support of a majority of workers in a bargaining unit.16 Once there is simple majority support for the unions to solicit employees, was an unfair labor practice and interfered with employees’ rights under section 7 of the NLRA).

13 See NLRA, 29 U.S.C. § 158 (1935) (outlining the actions taken by employers that would constitute as unfair labor practices).

14 See NLRA, 29 U.S.C. § 152 (1935) (defining the requirements to be covered under the NLRA and qualify for union creation). See also 4 Steps to Form a Union, AFL-CIO (Jan. 28, 2021), archived at https://perma.cc/9JN2-6U5B (describing the general steps that one must follow in order to form a union in their workplace).

15 See GUERIN & BARRIERO, supra note 10, at 270 (explaining what qualifies as interstate commerce and the jurisdictional limits of the NLRA). See also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 1 (1937) (holding the determination of employers being covered by the NLRA according to the commerce clause and “affecting commerce” is constitutional). “[The Court] think[s] it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority.” Id. at 30. “It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds.” Id. at 31. See also NLRA, 29 U.S.C. § 152(3) (1935) (describing what types of workers qualify as employees and those workers whom do not qualify as employees under the NLRA). See also Frequently Asked Questions – NLRB, NAT’L LAB. RELS. BD. (Oct. 16, 2020), archived at https://perma.cc/8KCE-8UVL (reaffirming that government employees, agricultural workers, independent contractors, and supervisors, with some exceptions, are not covered by the NLRA). An employee must be covered by the NLRA, which generally covers all employees of covered employers, except agricultural workers, domestic service workers, anyone employed by a parent or a spouse, and independent contractors. Id.

16 See GUERIN & BARRIERO, supra note 10, at 274 (describing the process of how unions garner support for a union formation). See also MICHAEL W. HAWKINS & STEPHEN J. KUEBBING, DEFINING THE BARGAINING UNIT: MANAGERIAL AND SUPERVISORY EXCLUSIONS IN HEALTHCARE AND HIGHER EDUCATION UNDER THE NATIONAL LABOR RELATIONS ACT 2 (2002), archived at https://perma.cc/C29U-S2JS (describing the intricacies of what is and is not considered a bargaining unit and what occurs when there is disagreement over who makes up the bargaining unit). “When the parties to a representation disagree on the composition of the unit, the
union, indicated by workers signing authorization cards, the union will typically be recognized voluntarily by the employer; but if there isn’t a majority, workers can petition the NLRB to hold an election to form a union if 30% or more of the authorization cards are signed. Once the union is recognized, it can collectively bargain on behalf of the workers with the employer about wages, hours, and other conditions of employment until they agree on a labor contract.

B. The Rise and Fall of Unions and Its Coincidence with Esports

Following the passage of the NLRA, union membership in the United States skyrocketed, due to the efforts of two major labor unions, the American Federation of Labor (“AFL”), and Congress of Industrial Organizations (“CIO”). Union membership peaked at about 15 million workers in 1945, with 35% of wage and salary workers being members of unions. The power of unions would not last much longer.
however, due to the passage of the Taft-Hartley Act, which diminished the power unions had to expand into new sectors and increased corporate executives’ powers to discourage unions from forming. The blow to unions’ tactics and tools coupled with external economic and political effects caused irreparable harm to the growth of unions in the United States from which union membership rates would never recover. In fact, from the 1960s through the 2010s, union membership in America has been steadily decreasing, with Union membership hitting a new all-time low in 2019.

See also [source](https://www.perma.cc/99KF-EFPZ) (describing the growth of unions from the passage of the NLRA to its peak membership density in 1945). “By 1945, the percentage of wage and salary worker in unions (‘union density’) was at 35.4%, the highest point it ever reached, because corporations could not employ their usual instruments of intimidation and repression.” Id.

See also [source](https://www.perma.cc/NPV4-5ALL) (explaining the ways in which the Taft-Hartley Act restricted the powers of unions in the United States). “For example, it outlawed discrimination against nonunion members by union hiring halls and closed shops (a closed shop was a business or establishment that hired only union members).” Id. “Other provisions prohibited: the use of pickets, sympathy strikes or boycotts . . . to bargain with an unrecognized union; the use of secondary boycotts . . . and the use of jurisdictional strikes and boycotts.” Id. “The act also forbade unions to contribute to political campaigns.” Id. The act attempts to “define and proscribe practices on the part of labor and management, which affect commerce and protect the rights of the public in connection with labor disputes affecting commerce.” Id. See Domhoff, supra note 20 (detailing how the Taft-Hartley Act limited the ability for unions to grow and obtain a higher union density in the United States). “[T]he Taft-Hartley Act put its greatest emphasis on adding new rights for corporate executives in relation to labor, which in effect gave management more latitude to pressure workers.” Id. “In practice, this meant employers could refuse to bargain and more readily propagandize workers through pamphlets, flyers, and speeches’ workers had to attend. Id. “The act also added a list of unfair labor practices that hampered union organizing by outlawing tactics that were used in the 1930s to win union recognition, such as mass picketing, and secondary boycotts.” Id.

See also [source](https://www.perma.cc/99KF-EFPZ) (detailing the decline of labor unions from its peak labor density in 1953 to 2015). “In 1953, 35.7% of private sector workers belonged to unions. By 2015, that number was 6.7%.” Id. at 969. “Some of the seeds of the current decline were the fault of unions themselves . . . [and] economic factors also have led to a decline in union membership.” Id. See also [source](https://www.perma.cc/99KF-EFPZ) (detailing the decline of labor unions from its peak labor density in 1953 to 2015). “In 1953, 35.7% of private sector workers belonged to unions. By 2015, that number was 6.7%.” Id. at 969. “Some of the seeds of the current decline were the fault of unions themselves . . . [and] economic factors also have led to a decline in union membership.” Id.
C. A Brief History of Esports

The decrease in union membership from the 1960s to the present is juxtaposed by massive technological innovations, which include the advent of video games. The first computer-based video game, Spacewar!, is also known for being the first game used in an Esports competition at Stanford University in 1972. However, the first large Esports competition was 1980’s Space Invaders Championship in which 10,000 athletes competed against one another. The next major development in Esports was in 1982 when Walter Day created “Twin Galaxies’ Official Video Game & Pinball Book of World Records” to maintain world record scores for various video games and ensure that there was no cheating in obtaining these records.

24 See Riad Chikhani, The History of Gaming: An Evolving Community, TECHCRUNCH (Oct. 31, 2015), archived at https://perma.cc/9YVG-VALD (recounting the general history of video game development and rise of popularity since the first video game was created in the 1960s). See Ryan P. Smith, How the First Popular Video Game Kicked Off Generations of Virtual Adventure, SMITHSONIAN MAG. (Dec. 13, 2018), archived at https://perma.cc/5WWQ-TY62 (detailing how the first computer-based video game, Spacewar!, was created in 1962 and its impact on the future of video games). “Spacewar! proved that video games made with heart could be addicting entertainment, and gave rise to the arcade culture of the decades to follow.” Id.

25 See The History of Esports, AM. ESPORTS (Oct. 18, 2020), archived at https://perma.cc/7TP2-4XYM (recounting the first sign of Esports in history). “By most accounts, the first official video game competition on record happened at Stanford University on October 19, 1972. The event invited athletes to compete in a game called Spacewar, a space combat game that was first developed in 1962.” Id. 26 See id. (showing that the Space Invaders Championship attracted 10,000 athletes and helped bring video games into the public eye). See also Florian Larch, The History of The Origin of eSports, ISPO (Jan. 11, 2019), archived at https://perma.cc/Y9XN-B8P3 (discussing how “Atari laid the corner stone for the world’s first major eSports tournament” with the 1980s Space Invader Tournament). “William Salvador Heineman was crowned winner . . . he was the first winner of a national video game competition.” Id.

27 See A brief history of esports and video games, BRITISH ESPORTS ASSN (Oct. 18, 2020), archived at https://perma.cc/ML2L-L4PT (highlighting that Twin Galaxies was formed in 1981 to record world record scores in games like Donkey Kong and Space Invaders). See Larch, supra note 26 (revealing that while also recording world records, Twin Galaxies was the first referee service for video games).
also responsible for founding the U.S. National Video Game Team, the first Esports team.\(^{28}\)

Though arcades and home gaming systems had created a small competitive scene and brought competitive video games into general American culture, it wouldn’t be until the technological advances of the 1990s and the internet that video games and Esports would be revolutionized.\(^{29}\) Esports became popular in some countries, particularly South Korea; they created the Korean esports Association (“KeSPA”), to negotiate broadcasting deals for Esports tournaments, organize tournaments, and nurture developing Esports leagues.\(^{30}\) In the early 2000s, personal computer (“PC”) gaming cafés popped up around the world that allowed athletes to access high powered PCs which may have been too expensive for the average consumer to afford.\(^{31}\) This greatly increased the number of athletes who had access to the means of participating in Esports and competitive video gaming.\(^{32}\) With the growing popularity of Twitch.tv, a broadcasting website, and the increasing accessibility to online video games in the forms of consoles and PCs throughout the 2010s, Esports have exploded and grown into a billion dollar industry, entertaining...

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\(^{28}\) See id. (stating that in 1983, the world’s first professional gaming team—U.S. National Video Team—was founded).

\(^{29}\) See The History of Esports, supra note 25 (describing how the new home consoles brought the accessibility of games to a new level, and how its tournaments paved the way for larger future Esports events). “[T]he Super NES (SNES) was released in 1991 . . . sparking an ‘arms race’ that would lead to video games getting exponentially better in a short period of time.” Id. See also Larch, supra note 26 (discussing how “[i]n the 1990s it became clear that the future of competitive gaming would be found in PCs” and over the internet). “In the mid-1990s, the first big LAN parties were held at which gamers could compete with each other.” Id. “With the progress of networking and the possibility of private internet connections, the previous regional restrictions also fell.” Id.

\(^{30}\) See id. (using KeSPA to show how strongly the topic was professionalized, especially in places like Korea and Germany). See also John Yoon, Esports in Korea — A Complete Breakdown of the Korean Gaming Culture, SEOULZ (Aug. 11, 2020), archived at https://perma.cc/TFR3-2697 (discussing how competitive Esports in Korea works and how KeSPA was created by the Korean government to regulate and organize the Esports industry there).

\(^{31}\) See Shreeya Saldanha, PC Bangs and the Gaming Culture in South Korea, SNACKFEVER (Feb. 7, 2020), archived at https://perma.cc/6YV6-YHD2 (explaining how PC bangs or internet cafes in South Korea give many Koreans access to highly powerful PCs and helped foster the competitive gaming culture in South Korea).

\(^{32}\) See The History of Esports, supra note 25 (suggesting that internet cafes popping up around the world gave average people access to high end machines and internet connections which fostered a culture of competitive gaming as well as widening the outreach of games).
millions of fans across the world. Tournaments across various games can attract millions of viewers, much like traditional sports, and events like the 2019 League of Legends World Championship that peaked in viewership (excluding Chinese viewership) at 3.9 million concurrent viewers and drawing in over 100 million unique viewers. Esports

33 See John T. Holden et al., A Short Treatise on Esports and the Law: How Am. Regulates Its Next Nat’l Pastime, 2020 U. ILL. L. REV. 509, 519 (2020) (discussing how Esports are already beginning to overtake traditional sports markets thanks to free streaming of competitions on websites like YouTube and Twitch). See also Steve Van Sloun, Esports Franchise Economics, LOUPVENTURES (Mar. 9, 2018), archived at https://perma.cc/5ZZA-8SS6 (explaining how Esports organizations make their money and attract investors). “The vast majority of revenue (roughly 70-80%) for Esports organizations comes from sponsorships and advertising. The remaining revenue is split evenly between ticket sales, merchandising, and media rights.” Id. See also Ryan Forquer, The growth and role of streaming in Esports, LIGHTSTREAM (Mar. 7, 2019), archived at https://perma.cc/N34Q-CPBQ (arguing that streaming platforms are responsible for the growth of the Esports industry). The rise of Esports is inarguably tied to livestreaming. Id.

Around 2010, esports experienced an inflection point as access to consumer level broadcast technology and platforms such as Ustream and Justin.tv (later Twitch) allowed events of all sizes to expand beyond regional confines. The excitement of those experiences drew a wider audience and soon concurrent viewership of broadcasts became the measuring stick for success. Id.

34 See Pearce Bates, LoL World Championship the most-watched esports event of 2019, SPORTSPRO (Jan. 6, 2020), archived at https://perma.cc/GP96-CXZ8 (describing the viewership hours of the major Esports tournaments in 2019, as well as the highest peak viewership numbers of these tournaments in 2019). See also Adam Fitch, The most watched esports events of 2019, ESPORTS INSIDER (Jan. 13, 2020), archived at https://perma.cc/9DMH-NXZ8 (presenting various statistics on viewership of Esports events throughout 2020, such as hours watched, peak viewership, and average viewers). See also Jamie Hore, Esports viewership metrics could be stunting the industry’s growth, THE LOADOUT (Oct. 3, 2019), archived at https://perma.cc/XU5L-KWBN (suggesting that the inclusion of Chinese viewership numbers when calculating peak viewers for an Esports event or tournament is misleading). “The esports audience is massive, but it’s extremely hard to get precise numbers from China due to the nature of the platforms they use to watch events and tournaments.” Id. “As a result, the figures are often difficult to verify.” Id. See also Annie Pei, This esports giant draws in more viewers than the Super Bowl, and it’s expected to get even bigger, CNBC (Apr. 14, 2019), archived at https://perma.cc/Q6FM-S8BA (showing how viewership for some Esports events can rival that of the Super Bowl, one of the most watched sports events in the United States).
popularity exploded in the 2010s while the union membership rate was a fraction of what it had been in the past.\textsuperscript{35}

\textbf{D. Player’s Associations in Major Professional Sports Leagues}

Traditional sports and Esports have many connections with one another; many Esports leagues include traditional sports video games such as Madden, NBA 2K, FIFA, NHL, and owners of many sports franchises also own Esports organizations.\textsuperscript{36} Major professional sports athletes today are some of the highest paid professionals in the United States; however, before professional athletes were making millions, they were being oppressed by their employers much like many of the oppressed workers in the first half of the 20\textsuperscript{th} century.\textsuperscript{37} Major League Baseball (“MLB”), became the first sports organization to unionize its athletes in 1968 after hiring a United Steelworkers of America economist to negotiate a collective bargaining agreement (“CBA”), which increased the minimum salary to $10,000 and established the player’s association as an official union.\textsuperscript{38} The National Basketball League (“NBA”), and National Hockey League (“NHL”), had similar

\textsuperscript{35} See The Incredible Growth of eSports [+ eSports Statistics], INFLUENCER MKTG. Hub (Oct. 17, 2020), archived at https://perma.cc/PQ3T-EQVU (highlighting how Esports viewership hours have increased by 1.1 billion watch hours since 2012, with 6.6 billion watch hours in 2018). See Union Members Summary, U.S. BUREAU OF LAB. STATS. (Jan. 22, 2020), archived at https://perma.cc/28Z8-5NK (describing how the union membership rate in 2019 was only 10.3\%, down by .2\% from 2018).

\textsuperscript{36} See Mark Hall, Professional Sport Franchises Turn to Esports For The Next Billion-Dollar Market Opportunity, FORBES (Nov. 7, 2018) [hereinafter Sport Franchises], archived at https://perma.cc/V9BH-LE8C (discussing how leagues like the NBA have taken interest in investing in Esports and fostering Esports scenes around their video games). See also Jamie Wilde, Traditional Sports Leagues are Waging a Battle Royale for Esports, MORNING BREW (Jan. 31, 2020), archived at https://perma.cc/3KKX-YPVR (noting the similarities of Esports and traditional sports leagues and how traditional sports have started to invest into Esports teams and leagues).

\textsuperscript{37} See Michael Macklon, The Rise Of Labor Unions In Pro Sports, INVESTOPEDIA (June 25, 2019), archived at https://perma.cc/426Z-6U4G (describing the unfair conditions that professional athletes in some of the major sports leagues had to endure before unionizing). “Given today’s glitzy, millionaire athletes, it’s often forgotten that the pioneers of America’s favorites sports leagues . . . were victims of tyrannical bosses, harsh expectations and unbalanced wages. Non-unionized athletes were treated as pieces of property that had no rights to pensions, healthcare benefits or even lunch money for road games.” Id.

\textsuperscript{38} See History, MLB PLAYERS (Oct. 18, 2020), archived at https://perma.cc/NGP5-GECM (recounting how the MLBPA was formed, what its goals were, and the prior failed attempts at unionization in professional baseball).
struggles and would eventually have their respective unions recognized by franchise owners shortly after the MLB.\textsuperscript{39} The National Football League ("NFL"), is a unique case, in that the union often decertifies, which is a legal strategy by the athletes to bring their legal issues to court rather than arbitration required by a traditional labor union.\textsuperscript{40}

Professional athletes’ unions are similar to traditional unions under the NLRA, but there are some distinct differences that set sports player’s association apart.\textsuperscript{41} Professional sports unions take a different approach than traditional labor unions and view a CBA as a framework for the minimum standards for things like salary, bonuses, percentages

\textsuperscript{39} See Macklon, \textit{supra} note 37 (describing, briefly, the unionization process for both the NHLPA and NBAPA). See also \textit{About & History}, NBPA (Oct. 18, 2020), \textit{archived at} https://perma.cc/8UA4-SGZW (outlining the history behind the formation, mission, and victories of the NBAPA since 1965). See also \textit{Association}, NHLPA (Oct. 18, 2020), \textit{archived at} https://perma.cc/XH3C-ZS92 (stating that the NHL was founded in 1967 to advance the rights of NHL athletes and keep pace with the evolving world of sports).

\textsuperscript{40} See 2000s: A Landmark CBA, NFLPA (Oct. 18, 2020), \textit{archived at} https://perma.cc/4Z38-ZNE3 (showing some of the landmark achievements in the 2000s for the NFLPA as well as showing how the NFLPA decertified on multiple occasions to deal with athlete punishments in court rather than arbitration). See also \textit{What is the process to decertify a union?}, SHRM (Oct. 18, 2020), \textit{archived at} https://perma.cc/24GQ-K4K7 (explaining the process to decertify the union, that as long as 30% of the bargaining-unit employees sign the petition, the union can be decertified and “replaced” with a new one). See also NFL Mgmt. Council v. NFL Players Ass’n, 820 F.3d 527, 531 (2d Cir. 2016) (noting how the NFLPA sought judicial review of arbitration by the NFL’s commissioner after quarterback Tom Brady was suspended for four games). A famous example of this is the “Deflate-gate” scandal, where the New England Patriots quarterback, Tom Brady, was suspended for allegedly deflating footballs to gain a competitive advantage. \textit{Id}.

\textsuperscript{41} See Amy Livingston & Heidi Wagner, \textit{Professional Sports Players Unions & The Broader Labor Movement}, PORTSIDE (Nov. 27, 2018), \textit{archived at} https://perma.cc/CCW7-MU67 (showing the clear differences in professional sport and traditional labor unions).

Most U.S. labor unions follow a traditional union strategy called job control unionism. These unions seek to obtain collective bargaining agreements (contracts) with specific language about job duties, seniority rights, and pay . . . All of the major unions for professional athletes in the U.S. use the employee empowerment model. In every professional sports league, a collective bargaining agreement outlines the basic framework of the employment relationship (including minimum salaries), but workers negotiate their salaries and bonuses as individuals.
of league revenue, benefits and working conditions. Additionally, and perhaps most unique to professional sports unions, is that athletes are free to negotiate their contracts with team owners, allowing for some athletes to get much higher salaries than their peers. When a CBA cannot be agreed to in any professional sport, owners—rather than the athletes—will exercise a lockout which prevents athletes from competing and being paid. This pressures the player’s associations to settle contract agreements with the owners and team management.

42 See id. (highlighting how professional sports unions use the employee empowerment unionism strategy to outline basic frameworks of the employment relationship but leave bargaining bonuses and salaries up to the athletes). See also Gabe Feldman, Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law, OXFORD HANDBOOKS ONLINE (Sept. 2017), archived at https://perma.cc/33K4-YLHK (describing the various terms that collective bargaining agreements in sports decide). Collective bargaining agreements in professional sports govern a wide range of terms and conditions of employment, including the player entry draft, free agency restrictions, minimum and maximum salaries, salary caps and luxury taxes, revenue sharing, roster sizes, player discipline, drug testing, practice times, season length, travel expenses, health benefits, and myriad other issues impacting the players and owners.

Id.

43 See Livingston & Wagner, supra note 41 (describing the employee empowerment model that allows professional athletes to negotiate salaries with their employers separate from their fellow workers due to skill discrepancies). This model can allow for “higher performing” workers to negotiate much larger salaries than coworkers. Id. See also Darryl Hale, Step Up to the Scale: Wages and Unions in the Sports Industry, 5 MARQ. SPORTS L. REV. 123, 125 (1994) (explaining the bifurcated process of athlete negotiation in professional sports associations).


The lockout is an employer action that is designed to stop unions from economically harming a business when there are union contract negotiation disputes, and the current contract expires as a result. A lockout is a temporary, employer-initiated work stoppage in which employees are prohibited from returning to work when a contract expires and there’s no replacement contract.

Id.

45 See Livingston & Wagner, supra note 41 (positing that professional sports athletes’ unions have brought attention to the employers most powerful weapon against unions—the lockout).

A lockout is an inverted strike: rather than workers deciding to withhold their labor (a strike), a lockout occurs when management suspends all of the workers represented by a union without pay as a negotiation tactic, “locking out” workers from their workplaces.
The value of professional sports unions can also be exemplified outside of CBAs.\textsuperscript{46} For example, the NFL players association has defended its athletes from excessive control by owners in various off-the-field issues ranging from things like domestic abuse to unfounded suspicions of performance enhancing drug use.\textsuperscript{47} The NFL players association also managed to earn a $1 billion settlement with NFL owners for its athletes due to head and neck injuries scientifically proven to occur when playing football.\textsuperscript{48}

III. Premise

A. Recent Unionization Attempts in Esports

Currently, there are no officially recognized Esport athlete unions; however, there have been several attempts to create player’s associations in different games and leagues.\textsuperscript{49} The first “attempt” at creating an Esports union was in the game League of Legends, where Riot Game’s created the North American League Championship Series...
Player’s Association (“NA LCS Player’s Association”) in 2017.\(^{50}\) This is a unique situation because rather than the athletes, the developers of League of Legends and organizers of the “League Championship Series,” Riot Games, were the creators of the player’s association.\(^{51}\) So far, the player’s association has managed to create a grace period for athletes cut from teams to find new teams before roster locks at the beginning of the season, and more lenient streaming rules for athletes.\(^{52}\) There were concerns about the association violating the NLRA due to Riot Games, the employer, directly funding the employee player’s association and Riot’s refusal to suspend the spring season after athletes voted to cancel the season due to COVID-19.\(^{53}\)

\(^{50}\) See David Hoppe, The Present State and Uncertain Future of Esports Athletes’ Unionization in the US, GAMMA L. (Nov. 25, 2019), archived at https://perma.cc/Z2MG-6QUW (stating that in 2017, Riot Games franchised its North American League for League of Legend and created an official player’s association which they said would have full autonomy).

\(^{51}\) See Kieran Darcy, Riot’s players’ association lays groundwork for unionization, ESPN (June 12, 2017), archived at https://perma.cc/9V67-6DJX (discussing how it is unusual and unprecedented that a developer and employer has started and funded a player’s association for its athletes). “It is important as we begin to move forward in a different alignment with the owners that the players have a voice at the table and are able to have someone in those discussions whose sole responsibility is to answer to the players and look out for their interests.” \(\text{Id.}\)

\(^{52}\) See also Roshan Patel, Esports, Player Positions, and the Benefits of Unionization, 18 DUKE L. & TECH. REV. 232, 235 (2020) (noting that the NALCS player’s association is not a true union because it does not give its members legal protection).

\(^{53}\) See Victoria Rose, LoL Pro Player’s association Does Fifth Notable Thing Ever In 18 Months, FANBYTE (Dec. 19, 2019), archived at https://perma.cc/8H5N-KLQA (discussing some of the positive impacts the League of Legends player’s association has had in its history).

The most prominent one took place in January of last year, when several players were released from rosters with no time to find new organizations . . . . As a result, a grace period of 72 hours for athlete sign-ons was added on for any players dropped within 48 hours of the deadline. The other rule change was regarding streaming rights . . . . on the “tournament realm” . . . . allow[ing] players to combine high-level scrimmaging or solo-queue practice.

\(\text{Id.}\)

\(^{53}\) See Minnie Che, Is Riot Games in Violation of the NLRA for Funding its Own Union?, ONLABOR (May 1, 2019), archived at https://perma.cc/64MH-CD4G (answering the question whether or not professional league athletes are Riot employees and if they are, then is Riot violating the NLRA by funding their player’s association). See also Tyler Esguerra, Majority of LCS Players Association reportedly voted to cancel 2020 Spring Split, DOT ESPORTS (Mar. 23, 2020), archived at https://perma.cc/BZJ5-2YNM (reporting that just under two-thirds of athletes voted to cancel the spring split due to COVID-19, but were forced to finish the split regardless).
However, recently, Riot announced that it would stop funding the NA LCS Player’s association and a new president of the association was elected, Darshan “Zion Spartan” Upadhyahya, to hopefully accomplish more meaningful goals.\(^{54}\) Not all Esports organizations take advantage of their athletes and some owners are even supportive of an Esports union, believing that a union could create a secure and profitable future.\(^{55}\)

Another attempt at an Esports player’s association happened in Counter-Strike: Global Offensive, when the Counter-Strike Professional Player’s association (“CSPPA”), was created in 2018.\(^{56}\) The CSPPA attempted to protect athletes from team owners who were attempting to stop athletes from competing in the ESL Pro League (“ESL”), and instead compete in a newly formed Professional Esports Association (“PEA”).\(^{57}\) The CSPPA invites any Counter-Strike athlete with a pro contract or seeking one to join the player’s association and offers collective representation in dialogues with industry stakeholders.\(^{58}\) The CSPPA explicitly states however that it is not a labor union and the membership cards that the athletes signed were not

\(^{54}\) See LCS Players Association President Darshan addresses recent news around Riot pulling funding, upcoming elections, the release of their Executive Director and more, REDDIT (Nov. 2, 2020), archived at https://perma.cc/XBV4-9JFS (sharing Darshan’s “Zionspartan” explanation of what went wrong with the NALCS Player’s association and his plans for the future of the player’s association).

\(^{55}\) See Paresh Dave, In e-sports, it's the bosses who are rallying for a union, L.A. TIMES (May 26, 2017), archived at https://perma.cc/6FSB-SXJN (suggesting that Esports teams and bosses are open to negotiate with a union for stable employment relationship and standards for their athletes; however, they need the athletes to make the move as unions cannot be started from the management side).

\(^{56}\) See Krell, supra note 49 (revealing the “[CSPPA] is a democratically run entity made up of more than 180 Counter-Strike players . . . .”).

\(^{57}\) See id. (explaining the reason the CSPPA was originally formed).

Smith helped players form the CSPPA to protect themselves from groups of team owners’ attempts to control which leagues the players can and can’t participate in. The most notable example of this occurred in 2016 when the Professional Esports Association (PEA), a group of North American team owners, tried to force players into participating in their own league while withdrawing from the ESL Pro League (EPL).

\(^{58}\) See Jacob Wolf, Counter-Strike pros form the Counter-Strike Professional Players Association, ESPN (June 29, 2018), archived at https://perma.cc/KLF2-AU5Z (stating that any elite CS:GO athlete seeking a contract or with an existing one is eligible to join the player’s association).
authorization cards. The CSPPA is also an international organization which makes it even more difficult for it to unionize. Finally, a Fortnite Professional Player’s association was recently created by some of the biggest Fortnite stars, but it’s only goal is to open a dialogue with the developer about competitive Fortnite. Though there have been attempts and discussions by pro Esports athletes in other games to organize, the NALCS player’s association and CSSPA are currently the only examples of labor organization in Esports.

B. Esports Athlete Contract Exploitations and Disputes

The reason there have been efforts to unionize in Esports is because athletes devote substantial amounts of time and energy into practicing despite the fact that at any moment, athlete’s careers, or spots on the team, could be taken away from them. A major reason for the

59 See Hoppe, supra note 50 (discussing how the CSPPA is not an official labor union under the NLRA). “[T]he organization emphasizes that the ‘membership letters’ players sign are not union authorization cards, which would be needed to organize as a labor union under the National Labor Relations Act . . . .” Id.

60 See id. (arguing that international organization is a hurdle for the CSPPA to overcome for unionizing in the United States).

61 See Benjamin Griffin, Fortnite pro athletes form an association to maintain a “productive dialogue” with Epic, PCGAMESN (Jan. 23, 2020), archived at https://perma.cc/4HLE-FUD9 (reporting that some of the biggest stars in Fortnite’s competitive Esports from around the world have formed a collective to try to create an open line with Epic Games).

62 See Krell, supra note 49 (outlining the lack of presence of unions in competitive Esports). See also Mallory Locklear, Two major eSports players associations are in the works, ENGADGET (Mar. 15, 2018), archived at https://perma.cc/5K2U-6ZDS (suggesting that a player’s association for Overwatch was in the works in 2018, but ultimately never was created). See also Jamie Hore, Seagull wants an Overwatch players association amid mass free agency, THE LOADOUT (Oct. 28, 2020) [hereinafter Seagull], archived at https://perma.cc/ZEQ5-J53S (revealing that former Overwatch pro athlete, Seagull, wants to form an Overwatch player’s association after many athletes were dropped from their teams at the end of the competitive season).

63 See Alex Tsiaoussidis, Cloud9 drops marquee Fortnite stars Vivid and Chap in shock move, DEXERTO (Jan. 3, 2021), archived at https://perma.cc/37JY-L2JP (reporting that Cloud9 unexpectedly dropped two popular competitive Fortnite athletes after failing to meet “a range of metrics” and causing Vivid to retire rather than try to find a new team). See also Esports Roster Changes, ESPORTSGUIDE (Nov. 11, 2020), archived at https://perma.cc/ANM6-VDJU (documenting the many roster changes that occur across the various Esports leagues and games). See also Emily Rand, Multiple Call of Duty League teams to release players, ESPN (Sept. 8, 2020), archived at https://perma.cc/S4IF-XWS2 (noting the major roster changes that occurred at the end of the most recent Call of Duty League season). “This has been
uncertainty of these roster spots is a symptom of a larger problem: the rampant contract exploitation that is present in the Esports industry.\textsuperscript{64} Esports contracts usually require athletes to take part in various team events—whether they be for social media, sponsors, competition, or training—and they can also regulate social media behavior and third party sponsorship deals.\textsuperscript{65} Due to the nature of Esports, athletes are comprised of many young people who don’t have the legal education to identify a bad contract, or do not even look for a lawyer to read their

\begin{quote}
 a particularly volatile Call of Duty League offseason due to the announcement that the upcoming Treyarch game of Black Ops: Cold War will have 4v4 gameplay instead of the 5v5 gameplay of Modern Warfare, necessitating at least one roster cut from every team in the league.” \textit{Id.}
\end{quote}

\textsuperscript{64} See Seth Zulinski, \textit{Contract Killers: Why the exploitation in eSports has to stop}, GAMESKINNY (Mar. 31, 2016), \textit{archived at} https://perma.cc/A2BV-BKUR (exploring why Esports has a long way to go for athletes to be treated fairly in a rapidly growing industry). “No system is really in place for most eSports to allow players counsel or recourse.” \textit{Id.} “The lack of any central organization for players of any age to turn to increases the odds of things like professional players being surprised at core pieces of signed contracts (such as ‘buyouts,’ or early termination fees).” \textit{Id.} “At any given moment [one] could get bit by a contract [they] didn’t understand, or get shafted by the organization joined with little to no recourse.” \textit{Id.} See also Katalin Horváth, \textit{Are Gamers Being Exploited?}, CMS (Aug. 2019), \textit{archived at} https://perma.cc/6CEW-P94V (investigating the athlete exploitation that is rife in the Esports industry). “Revenue is flowing from diverse sources—streaming and social platforms, tournament winnings, sponsorship and media appearances—sometimes amounting to millions of dollars per gamer often leading to disputes between teams and their rising star members.” \textit{Id.} “But with Esports regulation still in its infancy in most countries—and not regulated at all in some—these contracts offer the only route for the parties to regulate their legal relationship, define their rights and obligations.” \textit{Id.}

\textsuperscript{65} See \textit{id.} (explaining the details of what is included in the typical Esports athlete contract).

Gamer contracts usually include provisions on marketing and merchandise, exclusivity, the gamer’s services, competitions, training, absence, and termination of contract. Additional agreements and policies, which may supplement the gamer contract, usually focus on social media behavior, sponsorship, and the ethical aspects of team member cooperation . . . These services generally require the gamer to take part in tournaments and training sessions, make marketing and social media appearances, and be available for streaming on a regular basis and as reasonably instructed by the team.

\textit{Id.}
contract because athletes are excited to get the opportunity to compete at the highest level.\footnote{See Aabicus Lee, The dangers of esports contracts: Don’t sign before you read this, DAILY ESPORTS (Apr. 21, 2019), archived at https://perma.cc/8UD9-WKAX (evaluating the fairness of three Esports contracts). See also Jacob Wolf, Three lawyers weigh in on the Esports Federation of India player contract, ESPN (June 8, 2018), archived at https://perma.cc/39PC-2748 (investigating the unusual and unfair terms of a contract all participants in the 2018 Asian Games were forced to sign). See also Adam Fitch, Player contract illustrates unfair and unethical conditions, ESPORTS INSIDER (Dec. 17, 2019), archived at https://perma.cc/R43F-Z4J8 (documenting an unfair athlete contract between a North American organization and an anonymous athlete). See also Dylan Walker, Esports is the Wild West: The sad truth about gaming orgs, YAHOO (Mar. 9, 2016), archived at https://perma.cc/GKH7-9ZUH (discussing the shady business practices that some Esports organizations can participate in). “It’s very hard for players to assess their own value.” Id. Most players don’t have the legal education to spot a bad contract; more likely, they’re so thrilled to be offered money to play video games in the first place that they’ll sign anything put in front of them based on the merit of the character and reputation of the brand proposing the deal.}

Without an agent to negotiate their contract, many Esports athletes are signing flagrantly unfavorable contracts without understanding the conditions they are binding themselves to.\footnote{See Walker, supra note 66 (noting some of the unfair terms common in many Esports contracts). “The fact is there is an ocean of legal inconsistencies in the ‘contracts’ holding together the professional gaming community. Most of them are shaky enough that either party could withdraw at any time. Some have illegitimate competitor buyout and non-compete clauses.” Id. See also Fitch, supra note 66 (showing examples of some of the unfair terms that unwitting Esports athletes may sign contracts agreeing to). “Perhaps more alarmingly, an exclusivity clause in the contract prevents the athlete from working elsewhere—despite being an independent contractor, not an employee—and they only receive income that’s earned from solo livestreams.” Id.} The most prominent example of an unfair Esports contract—and the first major employment-related litigation in Esports—is the recently settled case of FaZe Clan, Inc. v. Tenney, where Fortnite star Turner “TFue” Tenney sued his former Team, FaZe, for its unfair contract that entitled FaZe to 80% of earnings from third parties and prevented TFue from
signing sponsorship deals. Another example of unfair contract negotiation, occurred when Team Solo Mid’s (“TSM”), president, Leena Xu, was overheard on a livestream discussing how TSM was having difficulty getting rid of one of its athletes, Joshua “Dardoch” Hartnett, which severely impacted his bargaining power in upcoming free agency. Finally, Call of Duty League (“CDL”) star, Seth “Scump” Abner, alleged that the CDL forced him to sign a contract without having a lawyer review it before he could compete in a tournament and was fined for doing a sponsored stream on his personal Twitch channel.

C. Life of an Esports Athlete: Dream Job or Nightmare?


TFue filed two suits against FaZe Clan, alleging the company was exploiting him with an "oppressive, onerous and one-sided contract" that violated state law and the Talent Agency Act. He claimed his contract with FaZe allowed the organization to collect up to 80% of the revenue he earned from third parties and prevented him from signing lucrative sponsorship deals. At the time, TFue’s lawyer Bryan Freedman said it was the first significant case to ask questions about the relationship between gamers and their supposed management, the contracts and the potentially illegal actions by those calling themselves representatives.

69 See Craig Robinson, Dardoch Leaves TSM, Joins Dignitas, HOTHSPAWN (May 26, 2020), archived at https://perma.cc/7DPJ-TKGH (recounting the events that lead to Dardoch leaving TSM and joining Dignitas). “Doublelift’s stream picked up a conversation that TSM President of Esports, Leena Xu, was having that confirmed Dardoch would be leaving TSM. The speech detailed how TSM intended to bench Dardoch and that nobody wanted him.” Id.

70 See Olivia R., OpTic’s Scump accuses CDL of forced contracts, unfair terms, WIN (Nov. 15, 2020), archived at https://perma.cc/9EQA-VHR6 (compiling allegations against the CDL made by OpTic Scump). “According to Scump, the CDL forced multiple players to sign contracts on the spot, preventing them from consulting their managers. No details were given on the terms of the contract or what they were related to.” Id. “I haven’t spoken of this publicly really, but I was fined for playing Raid Shadow Legends during a sponsored stream. It was during the off season as well which makes it worse.” Id.
Superficially, the life of an Esports athlete—playing video games competitively for a living—would appear to be a dream job for many young people. However, being a professional Esports athlete requires dedication and hours of practice on par with a traditional professional athlete that goes far beyond casually playing games. Esports athletes can spend nearly twelve to fourteen hours a day dedicated to improving their craft, whether that be practicing alone, competing in scrimmages with other teams, or reviewing film of past games as a team. Outside of practicing in-game, many Esports teams now hire nutritionists, physical therapists, and workout coaches to

71 See Emily Guskin, Teenagers are fueling a competitive gaming tidal wave, THE WASH. POST (Mar. 9, 2018), archived at https://perma.cc/5BKA-5XGR (investigating the boom of interest in video games and competitive gaming among young people in the United States). “Almost three-quarters of Americans ages 14-to-21 either played or watched multiplayer online games or competitions in the previous year.” Id. See also Blake Robbins, The New Dream Job ... and why these kids aren’t crazy, MEDIUM (Mar. 22, 2017), archived at https://perma.cc/ASB3-ZYV8 (showing why the dream of playing video games for a living is not as far-fetched as it used to be).

72 See Adam James, THE UNTOLD TRUTH OF ESPORTS, GRUNGE (Mar. 27, 2018), archived at https://perma.cc/V4LD-RP53 (warning about the challenges of becoming an Esports athlete). “Playing for a living might sound like it’s all fun and games, but it’s not particularly fun. To even have a shot at competing for millions in prize money, professional gamers must train for hours on top of hours . . . not unlike professional athletes in regular sports.” Id. See also Ann Cao, The harsh truth of an e-sports ‘dream job’: amid the fun and games, it’s a rough road to the top, S. CHINA MORNING POST (July 14, 2019), archived at https://perma.cc/NK2W-PCR2 (documenting the challenges that Esports athletes in China endure to reach the top of their respective games).

73 See Phil Hornshaw, eSports Ain’t Easy: Inside the Everyday Grind of Pro Gaming, COMPLEX (Aug. 3, 2016), archived at https://perma.cc/86M8-MESR (exploring the daily life of an Esports athlete and its harsh realities). “There’s a reason why eAthletes are so competitive—their job is easy to lose. As fun as the perks might sound . . . the eSports life is a grind, not some glamorous dream job.” Id. See also Graham Ashton, What is the Optimum Training Time for Esports Players?, THE ESPORTS OBSERVER (Dec. 28, 2017), archived at https://perma.cc/VV6J-U3SF (accumulating testimony from various Esports athletes about what they think the optimal training time per day is). See also Harrison Jacobs, Here’s the insane training schedule of a 20-something professional gamer, BUS. INSIDER (May 11, 2015), archived at https://perma.cc/K4D8-5W7D (investigating the intense practice schedule of League of Legends athletes on Team Liquid). “[C]hae ‘Piglet’ Gwan-jin and Kim ‘Fenix’ Jae-hun, are notorious for pushing physical boundaries for how much a person can practice. They often sleep only four hours a night and practice between 12 and 14 hours per day.” Id.
“level up” their real life fitness and prevent health issues that can result from a sedentary lifestyle which cause many athletes to retire early. ⁷⁴

On top of these long hours of practice mandated by teams, many athletes put in additional hours playing and practicing in order to remain at the top of their game, or to fulfill time quotas set by their team to stream themselves playing to their fans. ⁷⁵ If all of this was not enough, many Esports athletes live in team houses or training facilities where they live, sleep, and work. ⁷⁶ In some cases athletes have to

⁷⁴ See Esports players are training like traditional athletes to enhance performance, THE INDEP. (Apr. 15, 2019), archived at https://perma.cc/52UG-ZPZ2 (showing the novel approach that Origen takes in making sure its athletes live a healthier lifestyle). “[Origen] has assembled a performance team – a physical trainer, a sports psychologist, a massage therapist, a medical doctor and a nutritionist – and constructed a lifestyle plan for the athletes.” Id. See also Jake Middleton, THE IMPORTANCE OF EXERCISE TRAINING FOR ESPORTS ATHLETES, PREDATOR (Nov. 7, 2020), archived at https://perma.cc/NX25-2NK5 (emphasizing the importance of physical exercise and its correlation with success in Esports). See also Franz Christian Irorita, Retirement in esports: Why do esports players retire so early?, CLUTCHPOINTS (Nov. 10, 2020), archived at https://perma.cc/5TRG-UZL4 (examining some of the reasons behind why the average Esports athlete decides to retire so young).

⁷⁵ See Ben Westcott & Nanlin Fang, They train 14 hours a day, 7 days a week, chasing million-dollar paydays. Meet China’s new breed of esports athletes, KSL NEWS RADIO (Dec. 31, 2019), archived at https://perma.cc/5HUS-3MU8 (investigating the incredibly busy schedule of aspiring Esports professionals in China). See also Matt Hanson, What it takes to become a professional esports player, TECHRADAR (Oct. 3, 2019), archived at https://perma.cc/CP94-HNZH (interviewing a professional Overwatch athlete, Eli Gallagher, about his practice schedule). “Even those times playing Overwatch in his spare time are useful.” Id. “Gallagher has been playing Overwatch, an extremely popular online game, since its launch, and currently plays around 10 hours a day.” Id. See also Adam Fitch, Player contract illustrates unfair and unethical conditions, ESPORTS INSIDER (Dec. 17, 2019), archived at https://perma.cc/A86K-DYMV (revealing the unfair conditions of a mobile Esports athlete’s contract). “The contract states that should the player in question be transitioned to a substitute player, or if they’re not required to play in a LAN tournament for any given month, then they’re required to stream 120 hours per month while receiving $0 salary for their efforts.” Id.

⁷⁶ See Vic Hood, Life inside a pro-esports team house with Ftnatic: streaming, training and burritos, TECHRADAR (Sept. 21, 2018), archived at https://perma.cc/FU8U-HMVR (showing what life is like inside of the Ftnatic FIFA Esports team house in London). See also Laura Byrne, The changing face of gaming houses and esports training facilities, ENUK (Jan. 16, 2019), archived at https://perma.cc/3QFR-JFLS (showing the evolving nature of the team house in Esports). “Gaming houses are nothing new, but they’re becoming more prevalent in the UK scene and orgs around the globe are thinking more about their format and how to maximize their effectiveness.” Id. See also Danielle Hayes, Gaming House
constantly travel all around the world to attend various tournaments. These long hours of practice, constant travel, and intense lifestyle lead to what many Esports athletes refer to as “burnout,” which occurs when an athlete loses the motivation to play games competitively and is often a major reason cited for athletes retiring early. Despite all of these harsh conditions, athletes will endure them with the dreams of

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What Is It Really Like?, WEPC (Aug. 14, 2020), archived at https://perma.cc/MBR5-L2WP (investigating the history of Esports houses and what it is truly like to live in one). “[T]he phenomenon of gaming houses has now become commonplace among the world’s elite sports teams. With everyone living under one roof, it is much easier to fill their days with extra game practice, build team relationships, and make sure nobody is stepping out of line.” Id. “Worried that they are actually counterproductive to the team’s success, some brands have instead begun to create team practice spaces in separate locations . . . .” Id. Cf. Company Towns in the U.S. 1880s to 1935, VCU LIBRS. (Mar. 12, 2018), archived at https://perma.cc/S3GU-QY82 (recounting how many industries in the United States used to house their workers in company towns where they would live, work, and sleep).

See Colin Campbell, LIFE IS TOUGH ON THE COUNTER-STRIKE PRO CIRCUIT, Polygon (Apr. 12, 2016), archived at https://perma.cc/M7GJ-W6HM (detailing the grueling travel and tournament schedule CS:GO pros have to endure). See also Tyler Erzberger, Long flights, mirror metas and an uncertain 2020 for Overwatch League, ESPN (Jan. 9, 2020), archived at https://perma.cc/99E2-UDEN (speculating that long travel miles are playing a part in the collapse of the Overwatch League). “Boston Uprising will be traveling 71,640 miles this season. By comparison, the Los Angeles Lakers will be traveling 40,000 miles for their 2019-2020 season.” Id.

See Arijeta Lajka, Esports players burn out young as the grind takes mental, physical toll, CBS News (Dec. 21, 2018), archived at https://perma.cc/55DU-EQUUS (explaining the prevalent burnout in the Esports scene). “The peak of a professional esports competitor is so short-lived that players often toss their controller and call it quits by the time they’re in their mid 20s.” Id. “Professional gamers, barely past their teens, burn out even faster than athletes. Top competitors are playing 12 to 14 hours a day, at least six days a week, according [to] Richard Lewis, a journalist who covers esports.” Id. See also Michael Jeong, What to do about the increasing problem of burnout in Esports, Esports.Net (Aug. 31, 2020), archived at https://perma.cc/YYH7-L65F (documenting how burnout is a major issue in Esports and some possible remedies to fix it). “Burnout is a prevalent issue in the Esports industry.” Id. “Burnout is a syndrome conceptualized as resulting from chronic workplace stress that has not been successfully managed. It is characterized by three dimensions: feelings of energy or exhaustion, increased mental distance from one’s job, or feelings of negativism or cynicism related to one’s job, and reduced professional efficacy.” Id. See also Mike Stubbs, How Rogue ‘CS:GO’ Imploding Led Hiko to ‘Valorant’ and 100 Thieves, Forbes (Aug. 13, 2020), archived at https://perma.cc/M7EE-FLB6 (detailing how former CS:GO pro Hiko overcame his burnout after his team disbanding and became one of the top players in Valorant’s Esports league).
becoming international Esports superstars that can be paid millions of dollars a year and earn large sums from streaming on popular sites like Twitch or YouTube.\textsuperscript{79}

\textbf{D. Employee or Contractor?}

Another issue is whether or not Esports athletes are considered independent contractors or employees when they sign their contracts.\textsuperscript{80} The reason this is significant is because according to the NLRA, independent contractors are not able to form or join unions and the employer—or teams—are not required to collectively bargain with independent contractors.\textsuperscript{81} If Esports athletes are unable to classify

\textsuperscript{79} See \textit{Who are the Most Popular Esports Players in 2020?}, READYESPORTS (Feb. 27, 2021), archived at https://perma.cc/88EF-YSDS (revealing some of the most popular Esports athletes in the world by what game they compete in).

\textsuperscript{80} See John T. Holden & Thomas A. Baker III, \textit{The Econtractor? Defining the Esports Employment Relationship}, 56 AM. BUS. L. J. 391, 413 (2019) (explaining the complex relationship between independent contractors and employees in Esports). “Misclassification of workers as independent contractors, rather than employees, has become more commonplace since the 1970s, since various sources, including investors and lenders, have pushed companies to cut excess spending on noncore employees.” \textit{Id.} “Competitor employment status is important for the professionalization of esports because, at present, meaningful concerns persist regarding both competitor compensation and, perhaps more importantly, their health and safety.” \textit{Id.} at 414. See also Keahn Morris & John Bolesta, \textit{Which Are They? Independent Contractor Or Employees? Navigating The Conflicts Between State And Federal Law}, SHEPPARDMULLEN (July 2, 2019), archived at https://perma.cc/Z6NR-CUXB (providing an overview of the conflicting state and federal laws of how workers are classified as either employees or independent contractors).

\textsuperscript{81} See NLRA, 29 U.S.C. § 152(3) (1935) (outlining the types of workers that are prohibited from forming unions under the NLRA). See also Holden & Baker III, supra note 80, at 418 (breaking down the significance of Esports athletes being categorized either as independent contractors or employees). “[I]f competitors are deemed to be independent contractors, not only are leagues and teams free from compliance with the statutory obligations associated with employees, but the competitors will also be unable to organize under the National Labor Relations Act.” \textit{Id.} See also Katherine Hollist, \textit{Time to be Grown-ups About Video Gaming: The Rising Esports Industry and the Need for Regulation}, 57 ARIZ. L. REV. 823, 838 (2015) (explaining the challenges to unionization that Esports athletes face related to the classification of their employment status).

Under the National Labor Relations Act (“NLRA”), only employees have a legal right to unionize. It is also an “unfair labor practice” under the NLRA to refuse to engage in collective bargaining only with employees. Therefore, even if a large
themselves as employees, then they risk violating the Sherman Act and antitrust law when trying to collectively bargain as independent contractors.\textsuperscript{82} Many contracts signed by Esports athletes classify them as “independent contractors;” however, this is not dispositive, and there are a few tests that may be utilized in order to truly determine whether or not a worker is an employee.\textsuperscript{83}

The two most important tests to determine employment status in relation to employment and the NLRA are the common law agency number of professional players were to go on strike and form a collective bargaining group with a representative, Riot and league teams would be under no obligation to negotiate with them. \textit{Id.} See also Jonathan Kogel, \textit{State of Esports Player Union: Drawbacks and Legal Challenges}, \textsc{The Esports Observer} (May 8, 2018), archived at https://perma.cc/C653-7S3N (applying the employee or independent contractor analysis specifically to Esports). “Right off the bat, there is a subtle difficulty in esports player unionization: players’ classification as ‘employees.’” \textit{Id.} “Another legal formation requirement that may pose difficulty is actually garnering sufficient support from the player base to form a union.” \textit{Id.} “Beyond legal challenges, there are some practical drawbacks to the formation of esports unions as well.” \textit{Id.}

\textsuperscript{82} See 15 U.S.C.S. § 1 (1890) (outlawing certain activities that restrain trade or commerce within the United States). “Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby to be declared illegal.” \textit{Id.} See also Morris & Bolesta, supra note 80 (showing some of the liability facing independent contractors under antitrust law if they attempt to collectively bargain with their employer).

If the workers qualify as employees for NLRA purposes, then that conduct is protected by the law and probably immune to the constraints of federal and state antitrust laws. However, if they are deemed independent contractors, then their collective action may constitute a conspiracy to restrain trade in violation of the Sherman Antitrust Act.

\textit{Id.}

\textsuperscript{83} See Yifan Wu, \textit{Booming e-sports industry faces contract challenges}, MEDILL REPS. CHI. (Mar. 14, 2017), archived at https://perma.cc/5RMQ-D5AE (documenting how many Esports are classified as independent contractors by the teams they sign with). “There are players-as-independent-contractors contracts, and then there are employee contracts. Most contracts are [the] former.” \textit{Id.} See also Holden & Baker III, \textit{supra} note 80, at 417–18 (suggesting that it is common for Esports teams to sign Esports athletes as independent contractors).

In addition to issues surrounding many competitors’ capacity to contract, a common practice for organizations is to classify their competitors as independent contractors rather than employees. This classification, while suspect, is partially enabled by the competitors’ lack of legal sophistication and general unwillingness to challenge the status quo, perhaps out of fear of being blacklisted. \textit{Id.}
test and the California independent contractor test (‘ABC Test’).\textsuperscript{84} When applying the NLRA, courts usually prefer to apply the common law agency test, which examines the extent to which an employer is able to control the actions of a worker.\textsuperscript{85} California’s test is important, because many of the game developers, Esports events, and teams are located there.\textsuperscript{86} The ABC test, used by 33 states—most recently

\textsuperscript{84} See Charles J. Muhl, \textit{What is an employee? The answer depends on the Federal law}, MONTHLY L. REV. (Jan. 2002), archived at https://perma.cc/W3HQ-Z7LL (explaining the various different federal tests for determining the status of a worker as an employee or an independent contractor).

The courts have developed three tests to be used in determining a worker’s status: the common-law test, the economic realities test, and a hybrid test that incorporates various elements of both of those tests. Because the tests have been applied to different Federal statutes, the characterization of a worker as an employee or an independent contractor can vary, depending on which statute is being applied. As a result, the same person can be classified as an employee under one test and the relevant Federal laws to which that test is applied, but as an independent contractor under another test and its relevant Federal laws.

\textit{Id.}

\textsuperscript{85} See Muhl, supra note 84 (explaining what the common law agency test is and the factors that are considered in it).

The common-law test was developed on the basis of the traditional legal concept of agency, which, in an employment context, consists of a relationship wherein one person (the employee) acts for or represents another (the employer) by the employer’s authority. The common-law test involves the evaluation of 10 factors to determine whether a worker is an employee, with no one factor dispositive, but with the determination centering on who has the right to control the work process.

\textit{Id.} See also Roadway Package System, Inc., 326 N.L.R.B. 842, 850 (1998) (holding that the common law agency test is the one that is applicable under the NLRA). “To summarize, in determining the distinction between an employee and an independent contractor under Section 2(3) of the Act, we shall apply the common-law agency test and consider all the incidents of the individual’s relationship to the employing entity.” \textit{Id.} See also Stamford Taxi, Inc., 332 N.L.R.B. 1372, 1373 (2000) (furthering the examination criteria used when determining a worker’s status under the NLRA). The common-law agency test is the standard to determine the distinction between employee and independent contractor status. \textit{Id.} The Court recognizes the common-law agency test, but ultimately assesses the amount or degree of control exercised by an employing entity over an individual. \textit{Id.} The Court does not believe factors which do not include the concept of “control” are insignificant when compared to those that do. \textit{Id.}

\textsuperscript{86} See Lauren Petrullo, \textit{All Pro Esports Teams In The US}, AM. ESPORTS (Nov. 14, 2020), archived at https://perma.cc/X8L9-6XEX (listing all major active Esports
including California—requires the employer asserting a worker is an independent contractor to satisfy a three prong ABC test, which once satisfied would prove the worker is in fact an independent contractor. In the case of People v. Uber Techs, California placed a preliminary injunction on Uber and Lyft from misclassifying drivers as independent contractors, because under the ABC test, the court believed the drivers were employees. Using this same reasoning, it is possible that California courts would also rule that Esports athletes are being misclassified as independent contractors, despite proposition 22—which proposed to classify Uber and Lyft drivers as independent contractors—recently passing and rendering People v. Uber Techs moot through statutory means.

teams in the United States, many of which are located in or have headquarters in California).

87 See The Wrapbook Team, Employee or Contractor? The Complete List of Worker Classification Tests By State, WRAPBOOK (Oct. 25, 2019), archived at https://perma.cc/VB3S-ASL6 (showing the types of worker classification tests that each state employs and explaining the different types of worker classification tests). See also Dynamex Operations W. v. Super. Ct., 416 P.3d 1, 3 (Cal. 2018) (holding that the hiring entity asserting independent contractor status must satisfy the three-pronged ABC test). To determine whether a worker is properly considered the type of independent contractor to whom the wage order does not apply, the Court employs the ABC test. Id. According to the ABC test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes 3 separate prongs—A, B and C—are present. Id. The first prong, A, requires that the “worker is free from the control and direction of the hiring entity in connection with the performance of the work.” Id. The second prong, B, requires that the “worker performs work outside the usual course of the hiring entity’s business.” Id. The third prong, C, requires that the “worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed” for the hiring entity. Id. See also Michael Arin, Esports & Employment After Dynamex, ESPORTS BAR ASS’N (Nov. 14, 2020), archived at https://perma.cc/R6ES-NMLM (explaining the California test’s importance and relation to sports).

88 See People v. Uber Techs., Inc., 270 Cal. Rptr. 3d 290, 315 (Cal. App. 1st Dist. 2020) (concluding that Uber and Lyft are restrained from classifying its drivers as independent contractors pending further litigation). Under the ABC test, defendants’ drivers are presumptively employees, and defendants bear the burden to show otherwise. Id. In order to determine whether defendants can meet their burden, the Court need only decide that defendants cannot satisfy one of the three prongs of the ABC test. Id. Here, this Court need only address the “B” prong in order to find that the people have shown, at the very least, a reasonable probability of prevailing on their claim. Id.

89 See C.A. Keeps Preliminary Injunction Against Uber, Lyft in Place, METRO. NEWS-ENTER. (Oct. 26, 2020), archived at https://perma.cc/B3WX-YXQU (explaining the outcome of the case and implications if proposition 22 was to pass).
IV. Analysis

A. Are Esports Athletes Employees Under the Common Law or ABC Tests?

According to the ABC and common law agency tests, it seems many athletes competing in major Esports leagues or tournaments could be included in an esports union. However, many amateur athletes—where the Esports organization has significantly less control over the athletes—could be left out. Under the common law agency test, Esports athletes would need to demonstrate the extent to which Esports teams control athletes’ actions as workers. Factors that might suggest an Esports athlete is an employee include but are not limited to: living in a team house; having set practice, travel, and streaming schedules; living in a team house; having a coach or manager; or wearing a work uniform—which could include team jerseys. Additionally, the athlete would likely need to compete in a

“The opinion will have no effect, however, if voters approve Proposition 22, on the Nov. 3 ballot. It provides that ‘an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver’s relationship with a network company’ under specified circumstances.” Id.

90 See Dynamex, 416 P.3d at 1 (outlining California’s three prong ABC employment test to determine whether or not a worker is an employee or independent contractor). See also Stamford Taxi, Inc., 332 N.L.R.B. at 1373 (describing the conditions under the common law agency test for a worker to be classified as an employee or independent contractor). See also Holden & Baker III, supra note 80, at 418 (expressing how if Esports athletes are considered independent contractors, they are unable to collectively bargain under the NLRA). See Uber Techs., Inc., 270 Cal. Rptr. 3d at 312 (concluding that Uber and Lyft drivers may be considered employees under the ABC test, which indicates a possibility for Esports athletes to pass under the test as well). See also Muhl, supra note 84 (outlining the necessary elements that must be satisfied for a worker to be found an employee under the common law agency test).

91 See Stamford Taxi, Inc., 332 N.L.R.B. at 1373 (holding that the degree of control the employer has over the worker is the ultimate deciding factor when determining a workers employment status).

92 See Muhl, supra note 84 (explaining the ten factors that the common law test tries to balance and the author’s opinion on which of those factors hold the most importance). See also Stamford Taxi, Inc., 332 N.L.R.B at 1373 (suggesting that the control aspect of the employer over an individual is what ultimately determines the outcome of the test but does not make the other factors insignificant).

93 See Hollist, supra note 81, at 844 (suggesting that under the common law agency test, it is likely League of Legends athletes would qualify as employees because they
league or Esport that generates money for the organization through sponsorships or tournament prizes.\textsuperscript{94}

Although some Esports athletes may not satisfy the common law agency test, many Esports leagues, teams, and game developers are based in California, so the ABC independent contractor test may apply instead of the common law test.\textsuperscript{95} Under the ABC test, the burden would be on Esports teams to prove that all three prongs, A, B, and C are present in order to establish that an athlete is an independent contractor.\textsuperscript{96} This is a much more difficult standard for Esports teams to overcome because they have to establish that all three prongs are present, not just one or two.\textsuperscript{97} If the ABC test is applicable for a majority of Esports athletes, then it is likely a much larger variety of Esports athletes could be classified as employees and be qualified to collectively bargain under the NLRA.\textsuperscript{98}

Prong A of the test requires the employer show that the worker is free from control and direction of the hirer when it comes to the performance of work.\textsuperscript{99} Many Esports organizations hire coaches, live in team houses and live under the supervision of a team manager, use equipment provided for by sponsors, and have set practice and game schedules).

\textsuperscript{94} See Van Sloun, \textit{supra} note 33 (breaking down how Esports organizations make money and the different revenue streams they have). “The vast majority of revenue (roughly 70-80%) for esports organizations comes from sponsorships and advertising. The remaining revenue is split evenly between ticket sales, merchandising, and media rights.” \textit{Id.} “With more users flocking to online streaming platforms, and the audience becoming more valuable to advertisers, media rights contracts are becoming more valuable, and advertisers are paying more money to esports leagues, teams, and athletes.” \textit{Id.}

\textsuperscript{95} See Petrullo, \textit{supra} note 86 (listing the major North American Esports organizations, many of which are based in California).

\textsuperscript{96} See Dynamex Operations W. v. Super. Ct., 416 P.3d 1, 35 (Cal. 2018) (establishing a three prong ABC test with the burden on the employer to prove why a worker is an independent contractor satisfying all three prongs of the test).

\textsuperscript{97} See Arin, \textit{supra} note 87 (showing how the ABC test is a much higher standard to hold employers to because they might not exert any control on a worker and have the worker be considered an employee).

\textsuperscript{98} See People v. Uber Techs., Inc., 270 Cal. Rptr. 3d 290, 305 (Cal. App. 1st Dist. 2020) (expressing the dangers of misclassifying workers as independent contractors and the burden it places on workers and the taxpayers). \textit{See also} Morris & Bolesta, \textit{supra} note 80 (explaining how collective bargaining as an independent contractor is a violation of antitrust law). “If [workers] are deemed independent contractors, then their collective action may constitute a conspiracy to restrain trade in violation of the Sherman Antitrust Act.” \textit{Id.}

\textsuperscript{99} See Dynamex, 416 P.3d at 35 (requiring the employer prove prong A of the ABC test). The worker is free from the control and direction of the hiring entity in
nutritionists, and personal trainers to ensure that that athletes perform according to expectations and will often fire athletes if they do not fulfill those expectations.\textsuperscript{100} If an Esports athlete is subject to a fitness routine, practice schedules, traveling, living in a team house, or under the control of a coach or team manager, then it would be extremely difficult for Esports organizations to satisfy prong A.\textsuperscript{101} Under prong B, Esports organizations must prove the athlete performs work outside the usual course of the Esports organizations’ business.\textsuperscript{102} Esports organizations rely on athletes to either draw in sponsorships, viewership, fans, or win tournaments with large prize pools, all of which are integral to successful organized competitive play and Esports organizations.\textsuperscript{103} Considering how much Esports organizations rely on athletes for this income, it is unlikely that a court would find that prong B is properly satisfied.\textsuperscript{104}

\textsuperscript{100} See Esports players are training like traditional athletes to enhance performance, supra note 74 (documenting how one Esports organization hires a variety of staff, such as personal trainers, nutritionists, and psychologists to ensure its athletes are competing at the top of their game). See also Tsiaoussidis, supra note 63 (revealing that two popular Cloud9 Fortnite athletes were dropped for not meeting “a range of metrics”).

\textsuperscript{101} See Arin, supra note 87 (suggesting that constant supervision over an athlete, living in a team house, and practice schedules would make it difficult for an Esports organization to show the court athletes have sufficient freedom to be considered independent contractors).

\textsuperscript{102} See Dynamex, 416 P.3d at 35 (requiring the employer prove prong B of the ABC test). “[A] worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes . . . that the worker performs work that is outside the usual course of the hiring entity’s business.” Id.

\textsuperscript{103} See Arin, supra note 87 (arguing without athletes, there would be no sponsors, viewers, lucrative sponsorship deals, or revenue for Esports teams). Without players, there would be no viewership, no sponsorship, no fan engagement, and no revenue. Players in an organization’s team provide services central—not incidental—to the business or organized competitive play. A single player competing under an organization’s banner provides services central to the business of organized competitive play and sale of sponsorships.

\textsuperscript{104} See Maloney, supra note 6 (listing the different revenue streams for Esports organizations including tournament winnings, broadcasting deals, merchandise, sponsorships, and advertising). See also Van Sloun, supra note 33 (breaking down the different revenue streams of Esports organizations). “The vast majority of revenue (roughly 70-80%) for esports organizations comes from sponsorships and
Prong C may only be satisfied for some Esports athletes, but it is important to remember that Esports organizations would need to prove all three prongs of the ABC test, not just C.\textsuperscript{105} To satisfy prong C, Esports organizations would need to prove that athletes are customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.\textsuperscript{106} This prong may be easier for Esports organizations to prove because many professional athletes stream on websites like YouTube or Twitch to generate extra income and whether or not this prong is satisfied will likely depend on if athletes signed a separate contract with YouTube or Twitch for a streaming contract, or if the court regards independent streaming different from competitive play.\textsuperscript{107}

\textsuperscript{105} See \textit{Dynamex}, 416 P.3d at 35 (stating that all three criteria of the three-prong test must be met in order for an employer to classify a worker correctly as an independent contractor).

\textsuperscript{106} See \textit{id.} (outlining the criteria needed for employers to satisfy prong C on the ABC test). “[A] worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes . . . the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.” \textit{Id.} See also \textit{Arin, supra} note 87 (going into more detail on how courts would likely apply prong C).

The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself. The primary evidence of an independently established trade would be an actual contract to perform similar services to another entity at the same time as the hiring organization. Other evidence includes an employee-maintained home office, independent licensure, independent business cards, solicitation of outside work, independent liability insurance, and advertisements.

\textit{Id.}

\textsuperscript{107} See \textit{id.} (theorizing Esports athletes who stream or are not organized into leagues could prove a hurdle under the ABC test for athletes to overcome).

Part C is deceptive given the independent streamer market and ability for some athletes to enter tournaments independently. Streamers, more so than professional athletes, incorporate in personal limited liability vehicles, advertise to potential sponsors, and provide exclusive content to paid subscribers. However, athletes, generally, do not play for multiple teams. Furthermore, it is unclear if the court would consider on-the-side streaming as the same trade as professional tournament play. As the exclusivity
B. Challenges of Creating an Esports Union

Apart from challenges presented by determining whether or not Esports athletes are independent contractors or employees, there are further challenges to creating an Esports union. One of the major issues is that Esports is dominated by young athletes who often retire young and are inexperienced when it comes to understanding their rights as workers. For an Esports union to form and flourish among the various Esports athletes, leagues, and games, the concerted effort of respected veterans of their respective games must encourage a discussion about worker rights, conditions, and unionization. These veterans are not alone however, and could reach out to a union organizer at an organization such as the AFL-CIO to help strategize and organize Esports athletes together. It is clear from the multiple attempts made by athletes across different sports and leagues to create player’s associations that athletes are recognizing the benefits of unionization. The AFL-CIO should be interested in helping because it could create a new union in an exploding industry, dominated by

of the contract increases, so too do the chances of a court determining the athlete to be an employee under Part C.

Id. See Kogel, supra note 81 (explaining some of the legal challenges facing Esports athletes in forming their own union).

See Irorita, supra note 74 (citing some of the reasons why Esports athlete retire young such as decreased reaction times, health concerns, and hand and eye injuries). See also Tagle, supra note 66, at 82 (suggesting some of the reasons why young Esports athletes are not sufficiently aware of their legal rights, do not care about their contracts, or are too afraid to speak up about a bad contract).

See GUERIN & BARRIERO, supra note 10, at 274 (explaining the process of how support for a union is gathered and what happens when a sufficient amount of support has been obtained to form a union).

See also 4 Steps to Form a Union, supra note 14 (suggesting that when trying or thinking about forming a union in the workplace, one should consult with a union organizer to develop a strategy and discuss the next steps).

See LCS Players Association President Darshan addresses recent news around Riot pulling funding, upcoming elections, the release of their Executive Director and more, supra note 54 (detailing how the League of Legends player’s association plans on expanding its operations and making improvements within the association). See also Griffin, supra note 61 (detailing how some professional Fortnite Esports athletes created a player’s association). See also Krell, supra note 49 (discussing how CS:GO athletes are attempting to form a player’s association for themselves). See also Seagull, supra note 62 (showing how a former Overwatch pro and popular streamer wants to form a player’s association for the professional Overwatch League).
younger people and potentially help unions find a new place in the technology industry.\textsuperscript{113}

An additional roadblock towards forming an Esports Union is getting 30\% of professional Esports athletes to write an authorization card to trigger an election process by the NLRB or 50\% + 1, a simple majority, to avoid the need for an election.\textsuperscript{114} Spots on teams and in Esports organizations are extremely coveted and athletes that sign these authorization cards to form a union may worry that they will be replaced by young, eager talent.\textsuperscript{115} To curtail this, Esports athletes would need to be informed about their rights when forming a union and how their employer cannot fire them or punish them for supporting or trying to form a union.\textsuperscript{116} However, an Esports union may be in Esports organizations and athletes common interest as the union could provide a platform for negotiation terms of employment and stability in the industry that could perhaps, one day, rival the extremely profitable traditional sports leagues.\textsuperscript{117}

\textsuperscript{113} See Average age in esports vs. major sports, supra note 66 (emphasizing the young average age of Esports athletes). See also Wright, supra note 23, at 969 (describing the drastic decline in union membership since its peak in the 1950s and some of the various factors that may have contributed to labor union’s decline).

\textsuperscript{114} See What is a Union Authorization Card?, supra note 17 (explaining how a majority or 30\% of the bargaining unit need to sign authorization cards to start the union formation process). See also GUERIN \\ & BARRIERO, supra note 10, at 274 (explaining how the union election process occurs). In order to represent workers in negotiations with an employer, a union must have the support of a majority of workers in an appropriate bargaining unit. \textit{Id.} Unions generally demonstrate support by asking workers to sign authorization cards. \textit{Id.}

\textsuperscript{115} See Esports Roster Changes, supra note 63 (detailing many of the roster changes that have occurred across the major Esports leagues in 2020). See also Rand, supra note 63 (noting how many of the Call of Duty league rosters were changed and multiple athletes dropped at the end of the season).

\textsuperscript{116} See Concerted Activity, supra note 11 (preventing employers from discharging, disciplining, or threatening workers who want to unionize or discuss unionization). See also Republic Aviation Corp. v. NLRB, 324 U.S. 793, 795 (1945) (holding that workers cannot be discriminated against by their employer for engaging in union activity). The Board was of the view that wearing union steward buttons by employees did not carry any implication of recognition of that union by the employer where, as here, there was no competing labor organization in the plant. \textit{Id.} The discharges of the stewards, however, were found not to be motivated by opposition to the particular union, or as the Court deduced, to unionism. \textit{Id.}

\textsuperscript{117} See Dave, supra note 55 (revealing the opinions of a few Esports organization bosses that think an Esports union would actually help the industry grow and increase profits).

If professional video game players banded together, they would be locked into regulations and dispute resolution processes that would bring stability to this burgeoning but mercurial corner of sports,
Another issue among Esports athletes creating a union would be securing the funding and capital needed to start up a union, hire employees, and create a campaign. It is unclear how an Esports union would be able to secure funding, whether it be from one of the other traditional sports league player’s associations, a private business, or out of pocket from the athletes. One possible solution to this problem could come from traditional sports unions such as the NFLPA or NBAPA, because both leagues are invested in Esports teams and there are Esports athletes and leagues revolving around traditional sports video games. Additionally, traditional sports leagues investing in an Esports union could help them develop a good relationship with the union and gain access to the many young Esports fans that traditional sports typically fail to reach.

managers say. Sponsors and business partners prefer to invest in a business with long-term labor peace than a loose gaggle that could quickly fall apart.

See id. (noting that another barrier to an Esports union is the issue of funding it). “Forming a successful union often takes false starts, the right leader and strong funding.” Id. “Whether the leadership and cash to kick-start unions in e-sports would come from athletes or from outsiders is to be seen. E-sports businesses have offered to fund a union, but the conflict-of-interest concerns have stymied such proposals.” Id.

See id. (suggesting some possible opportunities for Esports players to obtain funding for creating an Esports union).

See Sport Franchises, supra note 36 (documenting how the different professional sports leagues have taken steps to create and grow Esports around their sports and in some cases even purchased Esports organizations). “2018 marked the inaugural year of the NBA’s gaming league, known as the NBA 2K League. This league is composed of 17 competitive gaming teams that are essentially owned and operated by the same organizations that pay your favorite dunker or three-point shooter.” Id. “The NBA isn’t the only league making moves like this. In August, the National Football League (NFL) announced a partnership with gaming company Electronic Arts and TV network ESPN to host a competitive league for their famed Madden game series.” Id.

See Wilde, supra note 36 (describing how traditional sports franchise owners are trying to get into Esports in order to gain access to the young audience).

In 2016, the NBA’s Philadelphia 76ers became the first North American professional sports team to own an esports team by buying two, Dignitas and Apex. Since then, numerous franchises and individual athletes have either acquired or formed esports teams of their own. Traditional leagues are also becoming more deliberate about leveraging the popular virtual versions of themselves.
Despite these challenges, unionization in Esports is possible and organizations like the AFL-CIO have succeeded in the past to unionize massive industries, so maybe it is time for unions to make a comeback and make headway in the tech industry and Esports in particular. In the near future of Esports, it is not likely a movement for unionization, but as more controversies occur and Esports players speak out against unfair practices by their employers, the calls for some sort of unionization will begin to get louder. Social media on sites like Twitter and interaction across games between Esports athletes on streaming platforms such as Twitch and YouTube will hopefully be the launch pad for discussions on Esports athletes working together to protect themselves and help their passions grow safely. Already, decentralized groups of athletes are investigating ways to increase their bargaining power and protection within Esports, but it is going to take a lot more effort from athletes to care about their rights and push for change. This push towards unionization could be helped by Esports veterans who either still compete or have retired

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122 See Freeman, supra note 19 (detailing the explosion of union membership in America during the 1940s and using a hypothetical of the major employers in America today unionizing for comparison).

If you want to think in contemporary terms, it’s as if suddenly someone succeeded in unionizing Walmart, Amazon, FedEx, McDonald’s, Burger King, IBM, and Home Depot. And with this gigantic increase in union membership from 3 million to 15 million in 1945 – so that right after World War II you see the peak of U.S. union membership with about 35 percent of workers belonging to unions.

Id.

123 See Settimi, supra note 68 (discussing how TFue was suing his former Esports organization, FaZe Clan, for taking advantage of TFue in his contract). See also Olivia R., supra note 70 (showing how Call of Duty Esports athlete Scump spoke out against the Esports league for its unfair contract terms).

124 See Forquer, supra note 33 (suggesting that streaming platforms were instrumental in the growth and popularity of Esports).

125 See Hoppe, supra note 50 (discussing the creation of the official Legends Players Association in 2017). See also LCS Player’s Association President Darshan addresses recent news around Riot pulling funding, upcoming elections, the release of their Executive Director and more, supra note 54 (revealing the League of Legends Player’s Associations plans to expand their influence and have players take the player’s association seriously). See also Wolf, supra note 58 (outlining the attempts by some CS:GO pros to create a player’s association to help negotiate with tournament organizers and team owners). See also Griffin, supra note 61 (showing how some of Fortnite’s biggest stars are trying to form a player’s association to create an open dialogue with the developer about design decisions that affect competitive play).
and still have a respected voice in their respective gaming communities.\footnote{See Hore, supra note 62 (showing former Overwatch Pro Seagull is calling for an Overwatch player’s association to negotiate better terms for the players competing in the Overwatch League).}

C. Why a Union is Better for Esports Athletes than Player’s Associations

What would Esports athletes gain from going through the trouble of forming a union for all athletes and why is it preferable over the several Esports player’s associations that exist?\footnote{See Kogel, supra note 81 (explaining some of the problems that arise from trying to apply the traditional sports player’s association model to Esports). “Unlike a national football league or a national baseball league, there are tons of esports titles and leagues, from League to Legends, to Starcraft II, to . . . competitive Tetris.” Id. Different esports titles have idiosyncratic tendencies that distinguish themselves both in-game, and in the contract terms that would be involved in collective bargaining. Thus, for one, it may be counterproductive and wasteful to establish incongruous and decentralized esports unions for the many, many titles are involved in the esports industry.}

A union could solve many of the current issues within Esports when it comes to working conditions, contract negotiation and exploitation, athlete salaries, and benefits.\footnote{See Patel, supra note 51, at 241 (explaining what some of the benefits of unionization would be if Esports athletes were able to unionize).} The Esports union could utilize employee empowerment unionism and use the CBA as a framework that sets minimum standards for working conditions, establish dispute resolution networks, and allow athletes to negotiate their own contracts if they want, which would help entice superstar athletes to join the union.\footnote{See Livingston & Wagner, supra note 41 (explaining the concept of employee empowerment unionism and how it is a new concept employed by sports unions).}

As far as working conditions, a CBA could limit the amount of travel athletes have to endure in a year, set minimum standard for

\footnote{Unions pursuing the employee empowerment unionism strategy see the contract as a basic framework that sets some minimum thresholds and establishes a procedure for resolving disputes. Workers are free to negotiate their own salaries. This model can allow for “higher performing” workers to negotiate much larger salaries than their coworkers.}

\footnote{Id. See also Patel, supra note 51, at 243 (describing the ability to contract around the collective bargaining agreement which is very common in sports unions).}
living arrangements in team houses, institute a mandatory nutrition and fitness routine to maintain physical fitness and health, and set the amount of mandatory practice time or competitions allowed in a week among other things.\textsuperscript{130} By creating minimum standards for working conditions, burnout might be reduced among athletes and some of the health issues common in esports could be avoided, which would be beneficial for the longevity of Esports athletes careers.\textsuperscript{131} The benefit of using employee empowerment unionism is that it can account for the funding disparities between esports organizations and teams.\textsuperscript{132} For example, more affluent teams might hire a professional chef and trainer, but teams with little funding could just make sure their players have access to a local gym and healthy eating options.\textsuperscript{133}

One advantage of an Esports-wide union rather than a league-by-league player’s association is the union could standardize minimum working conditions and salaries across all of Esports.\textsuperscript{134} Because there

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\textsuperscript{130} See Collective Bargaining, supra note 9 (outlining the terms and conditions that may be negotiated in a collective bargaining agreement). “Collective bargaining is the process in which working people, through their unions, negotiate contracts with their employers to determine their terms of employment, including pay, benefits, hours, leave, job health and safety policies, ways to balance work and family, and more.” Id.

\textsuperscript{131} See Jeong, supra note 78 (documenting some of the factors that lead Esport athletes to burnout and retire young). “Burn-out is a syndrome conceptualized as resulting from chronic workplace stress that has not been successfully managed. It is characterized by three dimensions: feelings of energy depletion or exhaustion; increased mental distance from one’s job, or feelings of negativism or cynicism related to one’s job; and, reduced professional efficacy.” Id. See also Irorita, supra note 74 (describing some of the health issues that can arise from Esports athletes not having a proper diet or exercise routine). “Esports athletes train for hours as a part of their job, and many players tend to neglect their physical needs.” Id. “But perhaps the most fatal injuries—at least for Esports careers—are wrist injuries.” Id. “Players who do not watch their diet and don’t exercise regularly may end up with a variety of health problems.” Id.

\textsuperscript{132} See Van Sloun, supra note 33 (breaking down the methods Esports teams use to make money and how some are more successful than others).

\textsuperscript{133} See Irorita, supra note 74 (stressing the importance of Esports athletes exercising regularly and eating healthy to avoid serious health issues).

\textsuperscript{134} See Dave, supra note 55 (suggesting that an Esports union could foster growth and stability in the Esports industry).

If professional video game players banded together, they would be locked into regulations and dispute resolution processes that would bring stability to this burgeoning but mercurial corner of sports, managers say. Sponsors and business partners prefer to invest in a business with long-term labor peace than a loose gaggle that could quickly fall apart.

\textit{Id.}
would be elected representatives for each league or game in the union, athletes can ensure they are receiving at least the same benefits and contract terms as other teammates. Standardization could also help end the rampant contract exploitation in Esports because the CBA would prevent teams from including unfair, or unagreed upon provisions into athletes’ contracts. Another advantage of having all players in one union rather than several decentralized ones is that players would have significantly more leverage when negotiating with their employers or league organizers. If athletes are unhappy with work conditions, certain changes made to the game, or any other issue, they could use the power of the union to file a grievance and negotiate to resolve the issue. Having increased bargaining power when dealing with extremely powerful Esports organizations and game developers would be a huge benefit to athletes, who currently can only

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135 See Patel, supra note 51, at 242 (outlining why standardization and minimum benefits would be a benefit for Esports athletes, especially the less famous and powerful ones).

For example, if the union collectively bargains with the employer and establishes a certain minimum wage for employees, the employer cannot then agree to pay less than the established wage to a new hire. The bargaining agreement cannot be contracted around on an individual basis, and the union represents all employees.

Id. at 242. “Teams would not be able to offer players pay or benefits beneath a certain floor if the union established one. Without a union, lower-skilled or less-famous players would lack the bargaining power to establish better pay or working conditions.” Id.

136 See Settimi, supra note 68 (noting some of the outlying unfair contract terms that Fortnite pro Turner “Tfue” Tenney was forced to sign).

Tfue filed two suits against FaZe Clan in California, alleging the company was exploiting him with an “oppressive, onerous and one-sided” contract that violated state law and the Talent Agency Act. He claimed his contract with FaZe allowed the organization to collect up to 80% of the revenue he earned from third parties and prevented him from signing lucrative sponsorship deals.

Id.

137 See Patel, supra note 51, at 244 (suggesting that an Esports union would give players more bargaining power when negotiating collective bargaining agreements with employers).

138 See id. (discussing how a collective bargaining agreement in Esports could allow for athletes to negotiate terms of employment to their liking and even contract around the NLRA to accommodate superstar Esports athletes).
rely on other players in the league who have little to no bargaining power.\textsuperscript{139}

Finally, the largest advantage of an Esports union for all athletes is they can freely transfer from league to league or game to game without worrying about unfavorable working conditions, wages, or contracts.\textsuperscript{140} This is extremely important because in video games athletes’ skills and knowledge is transferable across games and the popularity and competitive scenes of games and leagues can come and go.\textsuperscript{141} An athlete being able to switch games easily could prevent some of the burnout that comes with playing a game for too long, like former Counter Strike pro Hiko, who reinvigorated his career by moving to a new first person shooter, Valorant.\textsuperscript{142} Esports organizations also benefit from a system where Esports athletes can easily transfer to new games because they can give new leagues or teams more attention and expose their star athletes to a new and possibly larger audience that may not play or watch another game.\textsuperscript{143} The ability for athletes to easily transfer leagues and still maintain their representation, standardization of contracts, and conditions, as well as having a large backing of peers to bargain with employers and possibly much more

\textsuperscript{139} See Advocate for Social and Economic Justice, supra note 18 (discussing how a union can be used to protect its workers from exploitation and corporations by unifying the workers under one voice).
\textsuperscript{140} See Patel, supra note 51, at 242 (suggesting that standardized minimum benefits could benefit all kinds of players, especially those who are less famous or popular).
\textsuperscript{141} See also Livingston & Wagner, supra note 41 (explaining how employee empowerment unionism sets a minimum threshold of expectations for employers to meet).
\textsuperscript{142} See Stubbs, supra note 78 (showing how Hiko, an extremely successful CS:GO player, switched to playing Valorant professionally and has experienced a lot of competitive success).

Valorant was a chance to start again. [Hiko] knew he would have the skills required to be one of the best in the world, and with a brand new scene [Hiko] wouldn’t have to deal with the politics and lack of commitment he found in the latter days of his CS:GO run. He was demoralized after a failed attempt to build another top team and wanted a new direction.

\textit{Id.}

\textsuperscript{142} See Lajka, supra note 78 (discussing the prevalence of burnout and how it can cause many players to retire young or cause their level of play to diminish significantly). See also Jeong, supra note 78 (furthering the notion that burnout is a major issue in Esports and some possible ways to fix the negative attitude that athletes develop over time).

\textsuperscript{143} See Who are the Most Popular Esports Players in 2020?, supra note 79 (discussing some of the most popular Esports around the world and the massive fanbases and followings they have).
powerful developers would likely be an invaluable asset to foster the growth of Esports in general and protection of Esports athletes in this burgeoning new industry.¹⁴⁴

V. Conclusion

A centralized Esports union that covers athletes across all games affords athletes significant protection and bargaining power while also fostering the growth and competitive integrity of Esports as a whole. There are significant obstacles to overcome before an Esports union will form, such as funding, the ability to classify athletes as employees, and coordinating amongst a large number of athletes over a variety of the games. These obstacles can be overcome, but it will require Esports veterans and superstars who are not afraid to open up an honest dialogue with employers, team owners, and game developers to represent the thousands of professional athletes that may benefit from being included into an Esports union. As athletes continue to speak out against their mistreatment and demand change from Esports organizations and game developers, it is only a matter of time until Esports athletes recognize the power and protection they will be afforded by banding together. One day, it is almost certain that Esports will be as popular as, if not more popular than, traditional sports and it is necessary that we protect these future superstars with an Esports union to ensure that the industry and athletes continue to grow in a safe and healthy manner.

¹⁴⁴ See Dave, supra note 55 (showing how some Esports managers believe that standardization and stability of a union could be beneficial for both teams and Esports players). “To secure the prospect of a profitable future, owners say they are willing to work with a union and dole out more compensation and protections to workers. ‘Standards need to be created, and a lot have been created for video game publishers and teams,’ said Mike Rufail.” Id.