

**COVID-19 Protocols for NCAA Football and the NFL:
Does Collective Bargaining Produce Safer Conditions for Players?**

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SUMMARY

My study surveyed all NCAA football programs in Power 5 conferences during the 2020 season to compare their COVID-19 safety protocols to those in the NFL-NFLPA labor agreement. College protocols lacked input from a player’s union. In contrast, the NFL and their players collectively bargained a 72-page agreement for COVID-19 protocols. Policies from 19 college football programs fell far short of NFL-NFLPA standards, scoring 10-30 points out of the 45 safety points in the NFL labor agreement. College policies were strongest for symptom checking and cardiac evaluations. However, most college policies failed to identify players with individual risk factors and provide them extra medical monitoring; and no college policy reported using location-tracking technology for contact tracing. The NFLPA also had a whistleblower hotline to report noncompliance with the labor agreement, but college policies had nothing like this. I conclude that collective bargaining provided NFL football players superior safeguards compared to those for college players. Like unionized construction firms, which have better safety records than nonunion firms, the NFL is safer than the NCAA for football players because of collectively bargained practices. This study adds support for treating college players as employees, rather than amateurs, because employment is necessary to form a union.

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I. INTRODUCTION

A. Research Question and Overview of Methods and Findings

Do college football players have the same safety protections for the COVID-19 virus as union-represented NFL players,¹ even though they cannot form a labor union?² The pandemic produced a natural experiment to determine if a players union produces more comprehensive testing and mitigation procedures than college football, where conferences and schools unilaterally implemented COVID-19 protocols.³ The virus posed similar risks to both player groups. Therefore, protocols for infection testing, quarantining, return to competition, and contact tracing should have been similar for professional and college players.

To answer my research question, I sent Freedom of Information Act (FOIA)/Open Records Act (ORA) requests to all 53 public universities and colleges in Power 5 conferences, and the same request to 12 legal departments of the private schools.⁴ My research strategy aimed to elicit answers, not rejections, under these laws. Thus, I simplified and limited my request.⁵

The NCAA has been criticized since the 1970s for transmuted a de facto employment relationship into a self-enriching amateur athlete model.⁶ My research broadens the pay-for-play

¹ These protections appear in NFL-NFLPA COVID-19 PROTOCOLS FOR 2020 SEASON (September 5, 2020), published at <https://www.playsmartplaysafe.com/wp-content/uploads/2020/09/nfl-nflpa-covid-19-protocols-for-2020-season-9.5.20-final.pdf>. (hereafter, Addendum) (copy on file with author).

² See *Northwestern University and College Athletes Players Ass'n*, 362 N.L.R.B. 1350 (N.L.R.B.), rejecting an effort by football players to form a union under the National Labor Relations Act. The Board declined to assert jurisdiction, noting that while approximately 125 schools comprise the NCAA's upper tier of FBS football competition, the NLRA applied to only 17 private schools. Allowing only a small fraction of players at these private schools to form a union would destabilize labor relations and league-based competition in college football. *Id.* at 1354.

³ See Alan Blinder et al., *College Sports Has Reported at Least 6,629 Virus Cases. There Are Many More*, N.Y. TIMES (Dec. 11, 2020), at <https://www.nytimes.com/2020/12/11/sports/coronavirus-college-sports-football.html>. (“Testing standards vary from one conference to the next.”).

⁴ See *infra* tbl. 1 for the list of private and public schools.

⁵ See Part III.B for my FOIA inquiry.

⁶ An early article expressing skepticism about the student athlete model is Stephen Horn, *Intercollegiate Athletics: Waning Professionalism and Rising Professionalism*, 5 J. COLL. & U. L. 97, 98 (1977), noting:

theme of this perennial critique by suggesting that employment for college football players would allow them to form a union and bargain over safety policies related to COVID-19 infections, and long-term health effects arising from this virus.

To measure differences between pro and college football procedures, I broke down the NFL's 72-page COVID-19 agreement into six categories— (1) symptom screening,⁷ (2) COVID-19 testing,⁸ (3) exposure and positive test policies,⁹ (4) quarantining,¹⁰ (5) return to athletic activity,¹¹ and (6) contact tracing.¹² These elements broke into 45 points. I created a scorecard for each Power 5 school that replied with usable information. I scored one point for each school policy that matched an NFL policy.

My scoring system revealed gaps between pro and college football. The NFL and Power 5 COVID-19 policies and practices were roughly similar for (1) symptom identification and

Too often the jockeying for power within the NCAA has reflected the economic positions between institutions rather than concerns about what should be the basic purpose of the organization: the protection of student-athletes from unscrupulous actions by those who would exploit them for their own purposes.

More recently, research has focused on the strong comparison of NCAA amateurism to professional employment. See Comment, Richard Smith, *The Perfect Play: Why the Fair Labor Standards Act Applies to Division I Men's basketball and Football Players*, 67 CATH. U. L. REV. 549 (2018); Sam C. Ehrlich, *The FLSA and the NCAA's Potential Terrible, Horrible, No Good, Very Bad Day*, 39 LOY. L.A. ENT. L. REV. 77 (2018); Marc Edelman, *From Student-Athletes to Employee-Athletes: Why a "Pay for Play" Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable*, 58 B.C. L. REV. 1137 (2017); Richard Karcher, *Big-Time College Athletes' Status as Employees*, 33 ABA J. LAB. & EMP. L. 31 (2017); Jay D. Lonick, *Bargaining With the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135 (2015); Michelle A. Winters, Comment, *In Sickness and in Health: How California's Student-Athlete Bill of Rights Protects Against The Uncertain Future Of Injured Players*, 24 MARQ. SPORTS L. REV. 295 (2013); Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543 (2010); Daniel Lazaroff, *The NCAA In Its Second Century: Defender of Amateurism or Antitrust Recidivist*, 86 OR. L. REV. 329 (2007); and Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH L. REV. 71, 97-108 (2006).

⁷ See *infra* note 122.

⁸ See *infra* note 126.

⁹ See *infra* note 127.

¹⁰ See *infra* note 128.

¹¹ See *infra* note 131.

¹² See *infra* note 133.

screening,¹³ although the NFL had more stringent standards; (2) isolation protocols for players who tested positive,¹⁴ though the NFL also isolated high-risk players who were not infected; (3) cardiac screening,¹⁵ though the NFL specified a more thorough process; and (4) policies for returning to practice and games,¹⁶ with the main similarity being a minimum ten-day period of isolation period after a player registered a positive test.

However, my study revealed significant differences between NFL and NCAA COVID-19 policies and practices, including (1) criteria for high risk NFL players, which included individualized risk categories for NFL but not college players,¹⁷ (2) the NFL's more protective protocols for high-risk players, with suggested isolation and medical monitoring, essentially treating them like infected players,¹⁸ (3) the frequency of COVID-19 testing, with some NCAA schools testing as little as three times per week, compared to daily testing in the NFL,¹⁹ and (4) contact tracing in the NFL, enabled by wearable tracking equipment that measured player-to-player contact on the field and during travel, compared to no policy for wearable technology contact tracing in college football.²⁰

B. *Organization of This Article*

In Part II, I explain how NCAA football players are unable to form a union and engage in collective bargaining.²¹ Part II.A shows that college players cannot bargain collectively with

¹³ See *infra* Finding 4, Bullet Point 2.

¹⁴ See *infra* Finding 5, Bullet Point 4.

¹⁵ See *infra* Finding 6, Bullet Point 2.

¹⁶ See *infra* Finding 7, Bullet Points 3 & 4.

¹⁷ See *infra* Finding 3, Bullet Point 3.

¹⁸ See *infra* Finding 5, Bullet Point 4.

¹⁹ See *infra* Finding 4, Bullet Point 2.

²⁰ See *infra* Finding 8, Bullet Points 2 & 3.

²¹ See *infra* notes 45-90.

their schools because they are not employees, a legal predicate under applicable labor laws.²²

Part II.B explores how NFL players engage in bargaining over their pay and terms and conditions of employment.²³ In contrast, as Part II.C shows, the NCAA limits player input to a Student Athlete Advisory Committee (hereafter, SAAC), a captive group that compares to “company unions” in the 1930s which employers created to forestall union representation.²⁴

Part III describes my research design and methods.²⁵ Part III.A applies the concept of a natural experiment in sports economics to the concurrent development of COVID-19 policies in union- and nonunion-football settings in 2020.²⁶ This framework undergirds my research design, which compares pro football safety policies that were collectively bargained and similar policies imposed by schools on college players.²⁷

Part IV presents my empirical findings.²⁸ In IV.A.1, I report the sample characteristics in Finding 1.²⁹ Part IV.A.2 reports Findings 2-9 for COVID-19 testing policies.³⁰ The main elements of these findings relate to the checklist of symptoms (Finding 2),³¹ individualized risk assessment (Finding 3),³² daily screening for symptoms and COVID-19 testing (Finding 4),³³ quarantine testing and medical monitoring (Finding 5),³⁴ cardiac testing (Finding 6),³⁵ criteria for

²² *See infra* notes 51-63.

²³ *See infra* notes 64-82.

²⁴ *See infra* notes 83-90.

²⁵ *See infra* notes 91-119.

²⁶ *See infra* notes 91-110.

²⁷ *See infra* notes 111-119.

²⁸ *See infra* notes 120-139.

²⁹ *See infra* note 121.

³⁰ *See infra* notes 122-133.

³¹ *See infra* tbl 2.

³² *See infra* tbl 3.

³³ *See infra* tbl 4.

³⁴ *See infra* tbl 5.

³⁵ *See infra* tbl 6.

return-to-activity (Finding 7),³⁶ and contact tracing policies and technology (Finding 8).³⁷ In Finding 9,³⁸ I pick out chronological milestones in this testing and treatment sequence—essentially four key points in structuring prevention, treatment, and mitigation. This provides an overall sense of the effectiveness of college protocols as compared to the NFL-NFLPA procedures. Part IV.A.3 compares scheduling disruptions due to COVID-19 for college and NFL teams.³⁹ Following this timeline, Finding 10 charts the weekly frequency of game postponements and cancellations in college versus pro football.⁴⁰

Part IV.B enumerates significant caveats and limitations in this study.⁴¹

Part V offers conclusions.⁴² My findings support studies that show the (a) superiority of worker safety in unionized versus nonunion work settings,⁴³ (b) prevalence of company unions long after the 1930s,⁴⁴ and (c) employment model as a better way to classify Power 5 football players than as amateurs.⁴⁵

II. NCAA AND NFL PLAYERS: THE EMPLOYMENT BARRIER TO UNIONIZATION

³⁶ *See infra* tbl 7.

³⁷ *See infra* tbl 8.

³⁸ *See infra* tbl 9.

³⁹ *See infra* notes 134-135.

⁴⁰ *See infra* tbl 10.

⁴¹ *See infra* notes 137-140.

⁴² *See infra* notes 141-189.

⁴³ *See infra* notes 142-160.

⁴⁴ *See infra* notes 161-170.

⁴⁵ *See infra* notes 171-189.

College football players are not employees.⁴⁶ Thus, they cannot form a union because collective bargaining laws such as the National Labor Relations Act (NLRA),⁴⁷ Railway Labor Act,⁴⁸ and state collective bargaining laws,⁴⁹ apply only to employees. Because the NCAA classifies college players as amateurs, they fall outside the definition of an employee.⁵⁰

⁴⁶ The amateur student-athlete model was upheld recently in two appellate cases that rejected NCAA player claims that they are employees under the Fair Labor Standards Act. *See Dawson v. National Collegiate Athletic Association*, 932 F.3d 905 (9th Cir. 2019); and *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285 (7th Cir. 2016). *But see Livers v. National Collegiate Athletic Association*, 2018 WL 3609839 (E.D.Pa. 2018) (denying the NCAA's motion to dismiss).

⁴⁷ National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935), codified as amended at 29 U.S.C. §§ 151-69 (2020). Section 152(3) defines employee as "any employee, ... unless this subchapter explicitly states otherwise." The same section then excludes "any individual employed by ... any other person who is not an employer as herein defined." *Id.* The definition of an employer excludes "any State or political subdivision thereof..." Section 153(2). Thus, players at state universities would need collective bargaining laws in their states to bargain with their schools over pay and conditions of employment.

An example of a state law that provides for public sector collective bargaining is Conn. Gen. State. Ann., *infra* note 63. I propose a federal form of NCAA-specific collective bargaining to address this fractured approach to private- and public-sector collective bargaining. *See infra* notes 48 & 185.

⁴⁸ Railway Labor Act of 1926, c. 347, § 1, 44 Stat. 577, codified as amended at 45 U.S.C. § 151, Fifth (2020), defining an employee as "every person in the service of a carrier ... who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect." The Railway Labor Act (RLA) is relevant to my discussion of legislating a federal collective bargaining law that would apply only to NCAA players. *See infra* note 185, and related discussion. The RLA and its jurisdiction over carriers in rail and air transport is analogous to college athletics insofar as the law regulates transport industries that are especially important to the nation's economy.

⁴⁹ *E.g.*, the Illinois Educational Labor Relations Act (IELRA), 115 Ill. Comp. Stat. Ann. 5/1-5/21. The IELRA defines an "employee" broadly to include "any individual, excluding supervisors, managerial, confidential, short term employees, student, and part-time academic employees of community colleges employed full or part time by an educational employer." 115 Ill. Comp. Stat. Ann. 5/2(b) (including exceptions for managerial and confidential employees).

⁵⁰ NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-21 NCAA DIVISION I MANUAL, at art. 1.2.(a) & (c), stating:

The purposes of this Association are:

- (a) To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence, and athletics participation as a recreational pursuit; ... (and)
- (c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and *amateurism* (emphasis added)....

Art. 2.13 states:

2.13 The Principle Governing Financial Aid.

A student-athlete may receive athletically related financial aid administered by the institution without violating the principle of *amateurism*, provided the amount does not exceed the cost of education authorized by the Association; however, such aid as defined by the Association shall not exceed the cost of attendance as published by each institution. Any other financial assistance, except that received from one upon whom the student-athlete is naturally or legally dependent, shall be prohibited unless specifically authorized by the Association (emphasis added).

Moreover, because the NLRA excludes all public sector employment relationships, 53 of the 65 (81%) of Power 5 football programs cannot engage in legally sanctioned collective bargaining—a legal barrier that would moot the possibility of collective bargaining for college football players unless special legislation was enacted for them.⁵¹

A. College Players Cannot Form a Labor Union Because They Are Not Employees

The NCAA defines college sports as an activity pursued by “the student body” that cannot be part of “professional sports.”⁵² This idyllic status has roots in the nineteenth century cultivation of athletic competition to foster Christian character.⁵³ The NCAA combines intercollegiate athletics with college-degree programs by strictly designating athletes as amateurs.⁵⁴ Over time, the NCAA has lost touch with its culture of amateurism—for example, by

⁵¹ Only a smattering of states provide public-sector collective bargaining. If, for example, football players at Illinois formed a union under the IELRA (*see supra* note 49), this would leave conference schools without a public sector collective bargaining law at a competitive disadvantage. Wisconsin repealed its collective bargaining law for virtually all public sector employees, and its action was upheld in *State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436, 441 (2011).

⁵² *See* the purpose of the NCAA, in Rule 1.3.1 of NAT’L COLLEGIATE ATHLETIC ASS’N, 2020-21 NCAA DIVISION I MANUAL, *supra* note 50:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.

⁵³ Karen L. Hartman, *THE RHETORICAL MYTH OF THE ATHLETE AS A MORAL HERO: THE IMPLICATIONS OF STEROIDS IN SPORT AND THE THREATENED MYTH*, Ph.D. Diss., Louisiana State University (2008), at 61, available here https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=3014&context=gradschool_dissertations, stating:

In the mid-1800s to the early 1900s, sport became increasingly popular in America. As technology and manufacturing developed, more and more Americans turned toward sport as a way to fill their newfound leisure time. During this time, there were several national organizations and important figures that served to frame sport as a moral endeavor. Specifically, the Young Men’s Christian Association (YMCA), the Muscular Christianity Movement, Bernarr Macfadden and the *Physical Culture* magazine, Theodore Roosevelt, and the creation of the National Collegiate Athletics Association worked together to create an enduring myth of the athlete as a moral hero. People were exposed to this message if they went to church, listened to a Presidential speech, or read a magazine; these five factors infiltrated sport and morality into numerous aspects of society. Modern sport, therefore, was incubated by practitioners of the social gospel during Protestant Christianity’s time of optimistic missionary revival.

⁵⁴ *See Justice v. Nat’l Collegiate Athletic Ass’n*, 577 F. Supp. 356, 361 (D. Ariz. 1983) (quoting NCAA regulations from that time).

continuing to declare that college sports is an “avocation.”⁵⁵ It believes that its educational mission transcends commercialism.⁵⁶ A student crosses the amateur boundary by signing a contract to play a professional sport.⁵⁷

Beginning in the 1950s, football-related deaths and injuries prompted college football players to litigate their status as employees.⁵⁸ Some appellate courts in worker’s compensation cases viewed NCAA athletes as employees.⁵⁹ However, this trend gave way to court rulings denying college athletes’ claims for worker’s compensation benefits.⁶⁰ In some instances, state legislation resolved this ambiguity by excluding college athletes from this insurance system.⁶¹

More recently, NCAA athletes have sued under the Fair Labor Standards Act, seeking a ruling that they are employees. So far, their efforts have failed. Two federal appeals courts have

⁵⁵ See *Bloom v. Nat’l Collegiate Athletic Ass’n*, 93 P.3d 621 (Colo. 2004), stating: “*Student participation in intercollegiate athletics is an avocation*, and student-athletes should be protected from exploitation by professional and commercial enterprises (emphasis added),” quoting NCAA regulations from that time and remaining in effect in NCAA DIVISION I MANUAL, *supra* note 50, at art. 2.9.

⁵⁶ See *Banks v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 850, 852 (N.D. Ind. 1990) (NCAA organizes amateur intercollegiate athletics “as an integral part of the educational program and . . . retain[s] a clear line of demarcation between intercollegiate athletics and professional sports.”).

⁵⁷ *Shelton v. Nat’l Collegiate Athletic Ass’n*, 539 F.2d 1197, 1198 (9th Cir. 1976).

⁵⁸ *University of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953), ruling that a student-athlete who hurt his back during the team’s football practice qualified as an employee who was eligible for worker’s compensation benefits. The court said that the claimant’s injury arose in the course of employment insofar as players “engage in football games under penalty of losing the job and meals,” and therefore, “playing football was an incident of his employment by the University, well-known to it and a requirement which it imposed on claimant.” *Id.* at 424.

⁵⁹ *Van Horn v. Indus. Accident Comm’n*, 33 Cal. Rptr. 169, 170–74 (Ct. App. 1963) (widow and minor children of a college football team member, who was killed in a plane crash while returning from a game, were entitled to death benefits under the California Workmen’s Compensation Act because athletic scholarship was “consideration . . . paid for services”).

⁶⁰ See *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170, 1174-75 (Ind. 1983); and *State Comp. Ins. Fund v. Indus. Comm.*, 314 P.2d 288 (Colo. 1957) (a college student who had received an athletic scholarship for his tuition plus a part-time job, and who was fatally injured while playing in a college football game, was not entitled to a beneficiary death benefit under the Colorado Workmen’s Compensation Act).

⁶¹ California excludes college players from worker’s compensation. See Cal. Lab. Code. § 3352(a)(11), excluding a “student participating as an athlete in amateur sporting events sponsored by a . . . public or private nonprofit college, university, or school, who does not receive remuneration for the participation, other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid. . .”).

ruled that the amateur student-athlete model precludes a court from ruling that NCAA athletes are employees under the Fair Labor Standards Act.⁶²

The distinction between amateur and employee is crucial because the right to form a union and engage in collective bargaining is limited to persons who are in an employment relationship. Thus, for players at state universities and colleges, it is significant that state laws providing public-sector collective bargaining rights are predicated on an employment relationship.⁶³ More generally, the amateur status of college athletes led to the futile outcome for football players at Northwestern University who tried to form a union under the NLRA. The National Labor Relations Board ended their organizing efforts by declining to assert jurisdiction over college football as a whole.⁶⁴

B. *Collective Bargaining in Professional Sports*

During the Great Depression, Congress enacted a bill called the National Industrial Recovery Act (hereafter, N.R.A. or NIRA).⁶⁵ The aim of the law was to foster collective bargaining between employers and labor unions.⁶⁶ However, the N.R.A. was a weak law: It allowed collective bargaining without specifying conditions to require employers to negotiate

⁶² Dawson, *infra* note 46; and Berger, *supra* note 46.

⁶³ *E.g.*, Conn. Gen. State. Ann. § 31-104.

⁶⁴ Northwestern University, *supra* note 2. and College Athletes Players Association (CAPA), 362 NLRB 1350 (2015).

⁶⁵ National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), invalidated by *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935).

⁶⁶ *See* Edwin E. Witte, *The Background of the Labor Provisions of the N.I.R.A.*, 1 U. CHI. L. REV. 572 (1934), at 573:

[E]ssential provisions of this section— the affirmative recognition of the right of workingmen to bargain collectively through representatives of their own choice and the prohibition of interference by employers with the exercise of this right— are but restatements of principles previously recognized in several acts of Congress and, earliest of all, by the National War Labor Board during the World War, when that board was the supreme authority upon industrial relations in a large part of American industry.

terms and conditions of employment with a labor organization.⁶⁷ Employers did not accept the idea that employees should have an independent voice in their workplace, and instead, formed company unions.⁶⁸ These employee groups were often illusory exercises in worker representation: Companies wrote their bylaws and set their agendas.⁶⁹

Sen. Robert Wagner addressed the failure of the N.R.A. to provide more legal protection to collective bargaining by introducing the bill that became the National Labor Relations Act

⁶⁷ See Laura J. Cooper, *Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act*, 94 MARQ. L. REV. 837, 840 (2011):

Administration of the NIRA by the National Recovery Administration (NRA) soon revealed the weaknesses of the articulated labor protections in Section 7(a). Section 7(a) provided no enforcement powers or procedures for selection of employee representatives. There was no specific list of prohibited employer actions or requirement for employers to bargain with organizations that represented their employees. Ambiguities in the Act could be interpreted to sanction employer-controlled company unions, allow proportional rather than exclusive representation, and permit individual rather than collective bargaining.

⁶⁸ U.S. DEPT. OF LABOR, CHARACTERISTICS OF COMPANY UNIONS 2-3 (Bull. 634, 1937). The Department of Labor's exhaustive study of 14,725 workplaces summarized this employer interaction with employees:

[T]he employer personally, or through his foreman or personnel director, negotiates with his employees individually. The employer may occasionally call a meeting of his employees to make an announcement or for purposes of general discussion. A temporary workers' committee may sometimes be appointed to act upon a particular matter. Essentially, however, relations between the employer and the employee remain on an individual basis, and there is no permanent or formal organization of workers with duly constituted representatives to carry on negotiations.

Id. at 2.

⁶⁹ General Motors' Pontiac plan illustrates employer control of this participatory process:

This provides for voluntary membership of all employees of the manufacturing department; that is, voluntary for all employees 21 years or more, with at least 90 days of service and at least first papers. These employees choose their representatives from among the members of their own division with at least 1 year's service. They meet alone, but the factory manager must be notified of all meetings. Management is present only when requested. The meeting place is established by the works council subject to the approval of the plant manager. The company pays the representatives their regular earned rate, prints the ballots for elections, and elections are held on company time. In addition, the company will furnish a stenographer for any meeting on request.

The plan emphasizes that membership is voluntary, but it provides that only members of the employees association have the right to make a complaint to the works council with reference to wages, hours of labor, working conditions, or other appropriate subjects. Only members have a right to take out insurance and to participate in the company savings and investment plans.

. . . In other words, they offer an inducement to the workers to come into their company union, and say that he cannot be a beneficiary under these plans otherwise. . . . In cases of disagreement, appeal is possible all the way up to the general management of the company, who, it is said, "will take up the subject for consideration."

1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 128 (1985).

(hereafter, NLRA).⁷⁰ The goal of this Depression-era law, also called the Wagner Act, was to give employees a voice in determining their wages and working conditions.⁷¹ This was to be achieved by providing employees equality of bargaining power with employers.⁷² Thus, the NLRA provided employees basic collective bargaining rights— forming a union, bargaining with an employer, and engaging in concerted activities.⁷³

The law spurred growth in union membership, which peaked in 1954 at 34.7% of the non-agricultural workforce.⁷⁴ However, professional athletes did not engage in collective bargaining with leagues until the 1960s.⁷⁵ In football, the players union was involved in protracted antitrust lawsuits that challenged the NFL’s anticompetitive labor market rules.⁷⁶ The players association also bargained over other issues, including a player’s right to file a grievance

⁷⁰ See National Labor Relations Act, Hearings on S. 2926 Before the Comm. on Education and Labor, 73d Cong., 2d Sess. 40 (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 110 (statement of Sen. Robert Wagner) (“Yesterday we had a hearing in the automobile industry and it came out very clearly that the company union was formed by sending to each worker a constitution and bylaws telling him, ‘This is now your organization.’ As the result of that an election was held, and the workers testified that they voted because they knew very well if they did not vote their jobs were gone.”).

⁷¹ See Sen. Robert Wagner vision when he introduced the bill that eventually became the NLRA: The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call. Thus the right to bargain collectively, guaranteed to labor by section 7(a) of the Recovery Act, is a veritable charter of freedom of contract; without it there would be slavery by contract.

Id. at 20.

⁷² *Id.*

⁷³ Section 7 of the Act provides: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities” 29 U.S.C. § 157 (2019).

⁷⁴ See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR BULL. NO. 2070, HANDBOOK OF LABOR STATISTICS 412 tbl. 165, col. 7 (1980) (“Union Membership as a Proportion of the Labor Force, 1930-78, Membership Exclusive of Canada as a Percentage of Employees in Nonagricultural Establishments”).

⁷⁵ Baseball was the first sport to enter into collective bargaining. See Major League Baseball Players, *Marvin Miller: Founding Executive Director, 1966-1982*, at <https://www.mlbplayers.com/marvin-miller> (“In 1968, Miller led a committee of players that negotiated the first collective bargaining agreement in the history of professional sports.”).

⁷⁶ *Mackey v. NFL*, 543 F.2d 606, 620-21 (8th Cir. 1976). The opinion noted that football players entered into a labor agreement that ran from July 15, 1968, to February 1, 1970. *Id.* at 610.

related to their injuries.⁷⁷ When a Minnesota Vikings offensive lineman, Korey Stringer, died from heat-related medical conditions in training camp in 2001,⁷⁸ the NFL and NFLPA labor agreement had several provisions concerning player safety.⁷⁹ Another lawsuit, filed by retired players in 2011, alleged that the CBA did not address the NFL's duty to warn players about the long-term effects of concussions.⁸⁰ Players eventually settled for a brain-injury fund valued at \$1 billion.⁸¹ When the NFL and players association negotiated a new collective bargaining agreement in 2020, their contract included many provisions for player safety and medical care.⁸² A short time later, they bargained an addendum for COVID-19 protocols.⁸³

C. NCAA Student-Athlete Advisory Committees: A Company Union For College Players

The NCAA provides college players representation that resembles company unions in the 1930s. The NCAA adopted this controlled form of participation by establishing Student Athlete Advisory Committees (SAACs) in 1989.⁸⁴ Like company unions, the parents organization

⁷⁷ National Football League Management Council v. Superior Court, 188 Cal.Rptr. 337 (1983). After the Oakland Raiders terminated Leander Jones' contract to play football in 1979, he filed an "injury grievance" against his former team under terms of the CBA. *Id.* at 338.

⁷⁸ Stringer v. National Football League, 474 F.Supp.2d 894 (S.D. Oh. 2007), at 898.

⁷⁹ *Id.* at 905-06, discussing a player's a right to medical treatment, and describing a Joint Committee on Player Safety and Welfare "to discuss player safety and welfare aspects related to equipment, playing surfaces, stadiums, rules, and player-coach relationships" (referencing Art. XIII, § 1(a)) of the CBA).

⁸⁰ In re National Football League Players Concussion Injury Litigation, 821 F.3d 410 (3d Cir. 2016), at 421-22.

⁸¹ *Id.* at 440.

⁸² NFLPA Collective Bargaining Agreement 2020, available <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf>. Article 39 contains more than twenty sections, including Physicians, Trainers, the NFLPA's Medical Director, Emergency Action Plan, Accountability and Care Committee, Player's Right to a Second Medical Opinion, Player's Right to a Surgeon of His Choice, Preseason Physical, Substance Abuse and Performance-Enhancing Substances, Visiting Team Locker Rooms, Field Surface Safety & Performance Committee, Joint Engineering and Equipment Safety Committee, Sleep Studies, Club-Wide Biospecimen Collection, Head, Neck and Spine Committee's Concussion Diagnosis and Management Protocol, Game Concussion Protocol Enforcement, Player Scientific and Medical Research Protocol, Behavioral Health Program, Prescription Medication and Pain Management Program, and Remedies.

⁸³ The main provisions of this lengthy agreement are discussed *infra*, in Part III.B.

⁸⁴ NCAA, *NCAA Student-Athlete Advisory Committee*, at unnumbered p. 3, available in <http://www.ncaapublications.com/productdownloads/SAAC02.pdf>

created them with limited functions. SAACs were “formed primarily to review and offer student-athlete input on NCAA activities and proposed legislation that affected student-athlete welfare.”⁸⁵ SAACs have no actual power or defined authority: Instead, they “(g)enerate a student-athlete voice within the NCAA structure,” “(s)olicit student-athlete response to proposed NCAA legislation,” “(r)ecommend potential NCAA legislation,” “(r)evue, react and comment to the governance structure on legislation, activities and subjects of interest,” “(a)ctively participate in the administrative process of athletics programs and the NCAA,” and “(p)romote a positive student-athlete image.”⁸⁶ Minutes of the quarterly meetings of the Division I SAAC reveal the group’s absence in developing COVID-19 safety policies.⁸⁷

The bylaws of a campus-level SAAC confirms that these groups function like company unions. Northwestern University— the school involved in the most serious effort by football

⁸⁵ *Id.*

⁸⁶ NCAA, *NCAA Student-Athlete Advisory Committees (SAACs)*, available in <http://www.ncaa.org/student-athletes/ncaa-student-athlete-advisory-committees-saacs#:~:text=Each%20committee%20is%20made%20up.%2Dathletes%20lives%20on%20campus>.

⁸⁷ NCAA, Report of the NCAA Division I Student-Athlete Advisory Committee (April 22, 2020), https://ncaaorg.s3.amazonaws.com/committees/d1/saac/Apr2020D1SAAC_Report.pdf, listed no action items on the agenda and only informational points including an update from the NCAA research staff on the NCAA Student-Athlete COVID-19 Well-Being Survey. By mid-summer, as football programs began workouts, some schools required players to sign COVID-related waivers. *E.g.*, Ross Dellenger, *Coronavirus Liability Waivers Raise Questions As College Athletes Return to Campus*, SPORTS ILLUSTRATED (June 17, 2020), at <https://www.si.com/college/2020/06/17/college-athletes-coronavirus-waivers-ohio-state-smu> (reporting that returning athletes, “without legal representation, are agreeing to waive their legal rights”). However, when SAAC met on July 17, 2020 in a videoconference, and developed priorities for the 2020-2021 year, they barely discussed COVID-19. In Point 8, during the discussion part of the meeting for conference reports, COVID-19 was mentioned only once, and it was framed with other items, including social justice and mental health concerns for student-athletes. NCAA, *Report of the NCAA Division I Student-Athlete Advisory Committee* (July 17, 2020), https://ncaaorg.s3.amazonaws.com/committees/d1/saac/July2020D1SAAC_Report.pdf. SAAC held a meeting in mid-August and “provided feedback related to the 2020 fall playing season and agreed that student-athletes need clear guidance before the Division can adopt a comprehensive playing season model for the remainder of the fall.” NCAA, *Report of the NCAA Division I Student-Athlete Advisory Committee* (Aug. 18, 2020), at https://ncaaorg.s3.amazonaws.com/committees/d1/saac/Aug2020D1SAAC_Report.pdf. Nothing in the minutes specifically referenced COVID-19. In October, SAAC discussed COVID-19 in the limited context of reviewing a draft policy, “Competition Waivers and Extensions of Eligibility for Winter and Spring Sport Student-Athletes.” NCAA, *Report of the NCAA Division I Student-Athlete Advisory Committee* (October 22, 2020), at https://ncaaorg.s3.amazonaws.com/committees/d1/saac/Oct2020D1SAAC_Report.pdf. This dealt with player eligibility, not safety related to COVID-19.

players to form a union under the NLRA⁸⁸— has a SAAC.⁸⁹ However, the campus SAAC does not post its bylaws on a public access website. Stanford University also has a SAAC; and like Northwestern, its football team plays in a Power 5 Conference. Unlike Northwestern, Stanford’s SAAC publishes its bylaws.⁹⁰ The group’s modest advisory functions fall short of bargaining over wages, hours of practice, and other conditions of their athletic participation.⁹¹

III. RESEARCH DESIGN AND METHODS

A. Research Design: A Natural Experiment

When COVID-19 escalated in March 2020, the impact on professional and NCAA sports was abrupt and severe, with shutdowns occurring on March 11-12.⁹² Football was the best positioned of team sports to adjust to the pandemic because the first wave of lockdowns occurred

⁸⁸ Northwestern University, *supra* note 2.

⁸⁹ Northwestern University, *Student-Athlete Advisory Committee (SAAC)*, available in https://nusports.com/sports/2015/3/18/GEN_2014010134.aspx#:~:text=The%20mission%20of%20the%20Student,Big%20Ten%20and%20the%20NCAA, (visited most recently on Jan. 16, 2021).

⁹⁰ Stanford University, *Stanford SAA*, available at https://docs.google.com/document/d/1YG8_gQ6QnuvXfMctyfTLYoT_GT0jBaL6yx89X2XJTNY/edit?ts=5bede5cc#heading=h.w9jwwqv8m2c0 (visited most recently on Jan. 16, 2021).

⁹¹ *Id.* at Art. II (Mission):

- Goals and Commitments of SAAC are to help student-athletes:
- Achieve elite-level athletic performance
- Achieve academic excellence
- Participate in community service
- Foster lasting relationships with alumni and faculty
- Develop leadership skills

⁹² Scott Cacciola & Sopan Deb, *N.B.A. Suspends Season After Player Tests Positive for Coronavirus*, N.Y. TIMES (March 11, 2020) (N.B.A. abruptly cancelled games and suspended the season due to the first player testing positive for COVID-19); Greta Anderson, *Coronavirus Looms Over March Madness*, INSIDE HIGHERED (March 5, 2020) (two colleges canceled basketball games due to COVID-19 outbreak on West Coast, putting March Madness tournament at risk); *NHL to Pause Season Due to Coronavirus*, NHL.COM (March 11, 2020) (hockey season paused until further notice); Jabari Young, *MLB Will Delay Opening Day by at Least Two Weeks, Spring Training Canceled Due to Coronavirus*, CNBC (March 12, 2020).

near the start of their off-seasons.⁹³ The NFL and NCAA had approximately five months to decide whether to play a 2020 season, and what safety protocols to use.

My research design utilizes a natural experiment. A sports economics study, “A Natural Experiment to Determine the Crowd Effect Upon Home Court Advantage,”⁹⁴ offers a model for this design. The researchers tested for the independent effect of a supportive crowd on a team’s performance. From 1999-2014, the Los Angeles Clippers and Los Angeles Lakers shared the same home facility, the Staples Center.⁹⁵ They also played four games against each other at this arena, alternating as home and away teams.⁹⁶ As a home team, each team filled the arena with its fans. This provided a natural experiment, allowing researchers to measure for the independent effect of a sympathetic home crowd on team performance. The Clippers won 13 of 30 games (43.3%) against the Lakers when designated the home team, compared to winning 7 of 29 games (24.1%) as the visitors.⁹⁷ The home crowd correlated with winning more games.⁹⁸

Professional and college football are sufficiently similar to offer a natural experiment to determine whether collective bargaining has an independent effect on player health protocols. Their games are on the same length and type of field; eleven players are on offense, and eleven players are on defense; a line of scrimmage is used to start most plays, bringing many players

⁹³ Ken Belson, *N.F.L. Players Vote Yes on New 10-Year Labor Deal*, N.Y. TIMES (March 15, 2020), reporting that the NFLPA approved a new, 10-year collective bargaining agreement by a slim majority. While other pro and college sports postponed or cancelled games, the NFL experienced a more muted impact: “Given the limitations on travel because of the risk of spreading coronavirus, teams will have to evaluate players by telephone or video conference. This includes college players that teams want to speak with before the draft, which is currently set to begin on April 23.” *Id.*

⁹⁴ Christopher J. Boudreaux et al., *A Natural Experiment to Determine the Crowd Effect Upon Home Court Advantage*, 18 J. OF SPORTS ECON. 737 (2017).

⁹⁵ *Id.* at 740.

⁹⁶ *Id.* reporting that the teams played each other four times per season—except for the 2011 season, which had a lockout— with each team serving as the home team in two games.

⁹⁷ *Id.*

⁹⁸ *Id.* at 746.

within six feet of each other; offensive and defensive positions are the same; and games are played in four fifteen-minute quarters that yield an hour of competition. The close similarity is borne out by the fact that the NFL’s labor market is drawn almost entirely from the NCAA.⁹⁹ More than 80 percent of rookie players who were drafted by an NFL team in 2020 made an NFL roster, underscoring the close similarity of playing conditions in college and pro football.¹⁰⁰

The racial compositions of NFL and NCAA Power 5 rosters are also similar.¹⁰¹ In 2019, Division I football had 3,671 Black players (46.1% of the total for all teams), 1,355 “Other” race players (17.0%), and 2,935 (36.9%) White players.¹⁰² In 2016, an analysis of pro football rosters concluded that the “NFL as a whole is about 68% black, although that number could be a couple percent higher from the unknowns. Black and Pacific Islander are hugely overrepresented compared to the American population, while all other races are heavily underrepresented.”¹⁰³ These statistics— apart from indicating similar compositions by race— also suggest that NCAA and NFL players should have especially stringent safety conditions because Blacks and other non-Whites are more at risk for COVID-19 infections¹⁰⁴ and death.¹⁰⁵

⁹⁹ See Scott Kacsmar, *Where Does NFL Talent Come From?*, BLEACHER REP’T (May 13, 2013). Analyzing rosters from the 2012 season, including practice squads, from Pro-Football-Reference for all teams, a total of 1,947 players attended 256 different colleges. The study reports that only “seven players did not go to a college in the United States.”

¹⁰⁰ Rick Gosselin, *Could the 2020 NFL Draft Be One of the Greatest?*, SPORTS ILLUSTRATED (Sept. 20, 2020) (“Of the 255 players selected last April, a record 209 of them made opening-day rosters. That’s a success rate of 81.9 percent, another record for drafts.”)

¹⁰¹ See NCAA, *Diversity Research: NCAA Race and Gender Demographics Database*, available in <http://www.ncaa.org/about/resources/research/diversity-research>.

¹⁰² *Id.*

¹⁰³ See Michael Gertz, *NFL Census 2016*, PROFOOTBALLLOGIC (April 19, 2017), at <http://www.profootballlogic.com/articles/nfl-census-2016/>

¹⁰⁴ See Shirley Sze, et al., *Ethnicity and Clinical Outcomes in COVID-19: A Systematic Review and Meta-Analysis*, ECLINICAL MED. (THE LANCET) (Dec. 1, 2020), at <https://www.thelancet.com/journals/eclinm/home> (Analysis of 18,728,893 patients from 50 studies showed that Blacks and Asians had a higher risk of COVID-19 infection compared to Whites).

¹⁰⁵ See Michael Doumas, et al., *COVID19 and Increased Mortality in African Americans: Socioeconomic Differences or Does the Renin Angiotensin System Also Contribute?*, J. OF HUMAN HYPERTENSION (July 15, 2020)

In sum, many important variables were essentially constant across the NFL and NCAA Power 5 football platforms for the pandemic season of 2020. One significant difference, however, was the process for implementing safety protocols related to practices and games. On September 5, 2020, the NFL and NFLPA agreed to a 72-page addendum that addressed COVID-19 protocols.¹⁰⁶ In contrast, the NCAA had no players union; its SAAC played no role in co-determining COVID-19 safety policies;¹⁰⁷ and even the Power 5 conferences had chaotic and disjointed responses in resuming the 2020 season.¹⁰⁸ These disparate conditions for the NFL and Power 5 football set a natural experiment to compare whether collective bargaining produced worse, the same, or better safety protocols compared to a nonunion process.

This was not an ideal natural experiment because factors other than collective bargaining probably led to differences in COVID-19 protocols. The NFL’s protocols reportedly cost teams \$40 million.¹⁰⁹ Cost data for NCAA football COVID-19 safety protocols were not reported but were probably less due to athletic budgets that strained to support non-revenue sports.¹¹⁰

(“African-Americans suffer from a 2.4 and 2.2 times higher mortality rate when compared to Whites and Asians or Latinos, respectively”), at <https://www.nature.com/articles/s41371-020-0380-y>.

¹⁰⁶ NFL-NFLPA COVID-19 PROTOCOLS, FOR 2020 SEASON, *supra* note 1.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Gregg Bell & Lauren Kirschman, *The Seahawks Are Perfect Against COVID, But the Huskies Got Crushed — What Happened?*, THE NEWS TRIB. (Dec. 19, 2020). The Seattle Seahawks spent about \$40 million on daily, PCR “gold standard” COVID-19 testing, at \$30 per test, while the nearby University of Washington spent about \$21 to \$23 per test for antigen testing.

¹¹⁰ *Id.* Because NCAA football rosters are larger than those for NFL teams, the University of Washington routinely administered several dozen more COVID-19 tests than the Seattle Seahawks, driving up these costs. The Seahawks also had more financial backing to administer its COVID-19 program, with annual TV revenue of about \$260 million. *Id.* In contrast, the Washington athletic program—presumably, like other Power 5 schools—faced a large hole in its budget from COVID-19 and had to administer its protocols in the face of budget cuts. *Id.* This report did not mention, however, if the University of Washington paid for some or all COVID-19 testing out of a general campus budget—a possibility, if the general student population was being tested with some regularity. *Also see* Craig Garthwaite & Matthew J. Notowidigdo, *The COVID-19 Pandemic Is Revealing the Regressive Business Model of College Sports*, BROOKINGS BROWN CENTER CHALKBOARD (Oct. 16, 2020), reporting that non-revenue sports were being eliminated to budget strains caused by the COVID-19 pandemic.

Also, NCAA players were students on college campuses. Athletic programs could not control their social interactions as much as NFL teams could restrict players. By comparison, once NFL football players left practice- and game-related activities, they were often subject to strongly normative guidelines to reduce social interactions.¹¹¹ Also, unlike the NFL, NCAA football protocols were part of comprehensive policies for other sports. In sum, these outside factors affected the natural experiment for assessing an effect for collective bargaining. However, no outside factor appeared to match the singular difference in the processes that the NFL and Power 5 schools used to implement COVID-19 safety procedures.

B. Research Methods: Comparing NFL and Collegiate COVID-19 Protocols

On September 5, 2020, the NFL and NFLPA agreed to comprehensive COVID-19 protocols. The addendum was posted online. I began by reading the addendum and breaking out provisions for player safety.¹¹² These fell into six categories and subdivided in 45 points. Based on these points, I created a scorecard to compare to college protocols.

The start of the college football season was more irregular. Among Power 5 conferences, the Big Ten initially announced that it would significantly delay the start of its 2020 football season.¹¹³ Other conferences went forward with scheduling games for the regular season. Facing

¹¹¹ Some provisions related to non-players, such as travel and media groups. NFL-NFLPA COVID-19 PROTOCOLS FOR 2020 SEASON, *supra* note 1, at 7 (Tier 2M (pool media) and Tier 3 (facility workers who do not have close contact with players and coaches)).

¹¹² *Infra* notes 126-128 & 131-133.

¹¹³ Bruce Schoenfeld, *Was the College Football Season Worth It?*, N.Y. TIMES (Dec. 30, 2020).

pressure from President Donald Trump¹¹⁴ and coaches¹¹⁵ to put on a football season during the fall, the Big Ten modified its original decision.¹¹⁶

By the end of September, with a football season in place for Power 5 conferences, I began to identify FOIA and similar open records laws for the 53 public schools in these conferences. I expected that the public schools would respond, in whole or in large part, to my request because public records laws apply to state-supported schools. My survey confirmed this assumption: Numerous initial responses to my inquiries referenced a school's obligations under a public records law.¹¹⁷ These laws generally allow public access to a school's records, with exceptions.¹¹⁸ I tempered my hope for cooperation from schools when an investigative report

¹¹⁴ Allan Smith & Peter Alexander, *Trump Takes Victory Lap Over Return of Big Ten Football. College President Says It Has Nothing To Do With Him*, NBCNEWS.COM, (Sept. 16, 2020), reporting on late-August tweet by President Trump: “No, I want Big Ten, and all other football, back – NOW.” In a follow-up, Trump tweeted, “Disgraceful that Big Ten is not playing football. Let them PLAY!”

¹¹⁵ E.g., Orion Sang, *Michigan Football Coach Jim Harbaugh Attends Protest, Says ‘Free the Big Ten,’* DETROIT FREE PRESS (Sept. 5, 2020); and Gabe Lacques, *20 for 2020: Sports Figures Who Defined Courageous and Kind, Selfish and Stubborn*, USA TODAY (Dec. 28, 2020) (while the Big Ten was deliberating whether to play football in 2020, Nebraska Head Coach Scott Frost suggested that his program would play a non-Big Ten schedule if games were cancelled).

¹¹⁶ Schoenfeld, *supra* note 113.

¹¹⁷ E.g., email response to my Public Records Act request from Melissa Tindell, Director of Communications, University of Tennessee (Oct. 16, 2020), stating that “only citizens of Tennessee may inspect and receive copies of public records under the Tennessee Public Records Act. Tenn. Code Ann. § 10-7-503(a)(2)(A). It appears this law would impact your request for information.” Also see email response to my Open Records Act request from Bob Taylor, Open Records Manager, University of Georgia (Oct. 22, 2020), stating: “Professor LeRoy— This is to acknowledge receipt of your October 16, 2020, request for documents under the Georgia Open Records Act, and is in accordance with the three-day period of response pursuant to O.C.G.A. § 50-18-71(b)(2).”

¹¹⁸ E.g., Freedom of Information Act, 5 Ill. Comp. Stat. 140/1-11 (2020). The statute's purpose states: Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.

The law also provides exceptions, stating that it “is not intended to be used to violate individual privacy, nor for the purpose of furthering a commercial enterprise, or to disrupt the duly-undertaken work of any public body independent of the fulfillment of any of the fore-mentioned rights of the people to access . . . information.”

found that college athletic departments concealed information about COVID-19 infections from their communities.¹¹⁹

Often, I was required to register online with these public universities to request information. I devised a simple request for COVID-19 policies related to football players. I avoided questions that would likely be rejected—for example, data on testing results, or player information. I also avoided requests that could be rejected on grounds of being burdensome or costly. I sent requests to all 53 public schools, and to legal departments of the 12 private schools,¹²⁰ between October 15 and October 30, 2020. My request was the same for every school:

This request is for my research study, “COVID-19 Protocols for NCAA Football and the NFL.” My survey includes all NCAA Power 5 conference institutions, including those that are not subject to a FOIA or public information disclosure law.

I respectfully request policies and procedures at your university relating to (1) questionnaires, or similar inquiries, for football student athletes for COVID-19 symptoms and exposure to the virus; (2) criteria to identify high-risk football student athletes, and specialized procedures for them; (3) screening and testing procedures for football student athletes; (4) screening and testing procedures for football student athletes who test positive or are symptomatic for COVID-19; (5) criteria to return football student athletes who test positive or are symptomatic for COVID-19 to regular athletic activities; and (6) contact tracing policies and procedures for football student athletes who test positive or are symptomatic for COVID-19.

My request is only for football policies and procedures. If this information is grouped with other sports, I would accept that more general information. I prefer an email

¹¹⁹ See Blinder *supra* note 3 (“At least 6,629 people who play and work in athletic departments that compete in college football’s premier leagues have contracted the virus,” and noting that the “actual tally of cases during the pandemic is assuredly far larger than what is shown by The Times’s count, the most comprehensive public measure of the virus in college sports.”).

¹²⁰ Arranged by conferences in 2020, schools included: ACC (Clemson, Florida State, Georgia Tech, Louisville, North Carolina State, North Carolina, Pittsburgh, Virginia, Virginia Tech); Big Ten (Illinois, Indiana, Iowa, Maryland, Michigan, Michigan State, Minnesota, Nebraska, Ohio State, Penn State, Purdue, Rutgers, and Wisconsin); Big Twelve (Iowa State, Kansas, Kansas State, Oklahoma, Oklahoma State, Texas, Texas Tech, and West Virginia); PAC-12 (Arizona, Arizona State, Cal (California-Berkeley), Colorado, Oregon, Oregon State, UCLA, Washington, and Washington State); and SEC (Alabama, Arkansas, Auburn, Florida, Georgia, Kentucky, LSU, Mississippi, Mississippi State, Missouri, South Carolina, Tennessee, and Texas A&M).

response with a PDF attachment over physical copies of pages sent by mail. My email address is mhl@illinois.edu.

I am not seeking data or information relating to football student athletes. My research will also report institutions that do not participate in this survey. If you wish to discuss my request, please email me. Thank you for your time and cooperation.

I tracked responses and non-responses to my requests. Among the responses, they sub-divided into fully or mostly complete information; partial information; and too little information to be usable. Other schools informed me that their state's FOIA laws exempted requests from non-residents. Penn State noted that the university is entirely exempt from all FOIA requests. Some schools delayed their response, often several times. Other schools—especially private schools (except Baylor)—never replied to me.

When a response was sufficient to be considered comprehensive, I tallied points that matched items on the NFL-NFLPA scorecard. I assigned one point to each matching item. While some points were probably more important than others in limiting the spread or medical effects of COVID-19, I had no scientific basis for assigning different weights to these points.

IV. EMPIRICAL FINDINGS

I present the empirical results in three parts. Part IV.A.1 pertains to school responses and non-responses. In Part IV.A.2, I provide a statistical breakdown of the usable responses. My scoring compared 45 specific elements in the NFL-NFLPA agreement with the policy materials that each school provided me. My results show that schools scored between 10 and 30 points. In Part IV.A.3, I compare the number of Power 5 and NFL games that were postponed or canceled due to COVID-19.

In Part IV.B, I interpret my results. To begin with, my data have several limitations. I therefore caution against making critical judgments of schools with lower scores. I also note that

as the 2020 football season continued, the NFL and NFLPA revised their policies. Near the end of the 2020 football season, some Power 5 schools made changes, too, such as adopting the use of KINEXON tracking technology,¹²¹ a protocol that was absent from the policies in my survey.

A. Survey Responses

1. Sample and Response Rate

Table 1 summarizes responses and non-responses from 65 Power 5 schools.

Table 1			
Responses to FOIA and Open Records Requests by Power 5 Schools			
No Response/Delayed Response (39 Schools)	Responses (26 Schools)		
(Numbers in parentheses reflect games postponed or cancelled)			
No Response	22	Unusable: One Page, Little Information	3
<u>Private</u> Boston College (1), Duke (2), Miami (4), Northwestern (1), TCU (0), Stanford (1), Syracuse (0), USC (2), Wake Forest (6), Vanderbilt (4) (21 disrupted games)	(10)	Michigan State (2), Nebraska (1), Rutgers (0) (3 disrupted games)	
<u>Public</u> Auburn (1), Florida (2), Kansas State (0), Mississippi (0), Wisconsin (3), North Carolina State (1), Oklahoma (2), Oklahoma State (1), Oregon State (0), Purdue (3), South Carolina (0), Texas Tech (0), Washington State (3) (16 disrupted games)	(12)	Unusable: Good Faith Response with Too Little Specific Information	4
		Baylor (Private) (1), Iowa State (0), Maryland (4), Texas A&M (3) (8 disrupted games)	
Response Received: School Is Exempt from Disclosure Law	8	Usable: Substantial or Complete Response	19
Alabama (2), Arkansas (2), LSU (3), Penn State (0), Pitt (1), Tennessee (2), Virginia (4), Virginia Tech (2) (16 disrupted games)		Arizona State [PAC-12] (3), Cal-Berkeley [PAC-12] (4), Clemson [ACC] (1), Colorado [PAC 12] (2), Florida State [ACC] (4), Illinois [Big Ten] (0), Indiana [Big Ten] (2), Iowa [Big Ten] (1), Kansas [Big 12] (2), Kentucky [SEC] (0), Michigan [Big Ten] (3), Mississippi State (\$159 Fee) [SEC] (2), Missouri [SEC] (5), North Carolina [ACC] (0), Oregon [PAC 12] (1), Texas [Big 12] (2), Utah [PAC 12] (3), Washington [PAC 12] (4), West Virginia [Big 12] (2) (41 disrupted games)	
Response: Acknowledgment and Indefinite Delay	9		
Arizona (2), Georgia (3), Georgia Tech (3), Louisville (3), Minnesota (2) Ohio State (2), UCLA (1) (16 disrupted games)			

¹²¹ E.g., Dawgman, *PAC-12 to Utilize KINEXON SafeZone for Rapid, Reliable Tracing*, PAC-12 SPORTS (Nov. 30, 2020) (PAC-12 Conference announced on Nov. 30, 2020 that it would use KINEXON SafeZone technology to mitigate the spread of COVID-19 in its football and men’s and women’s basketball programs).

Finding 1: The response rate for the survey was about 30%, a typical figure for organizational responses to survey research.¹²²

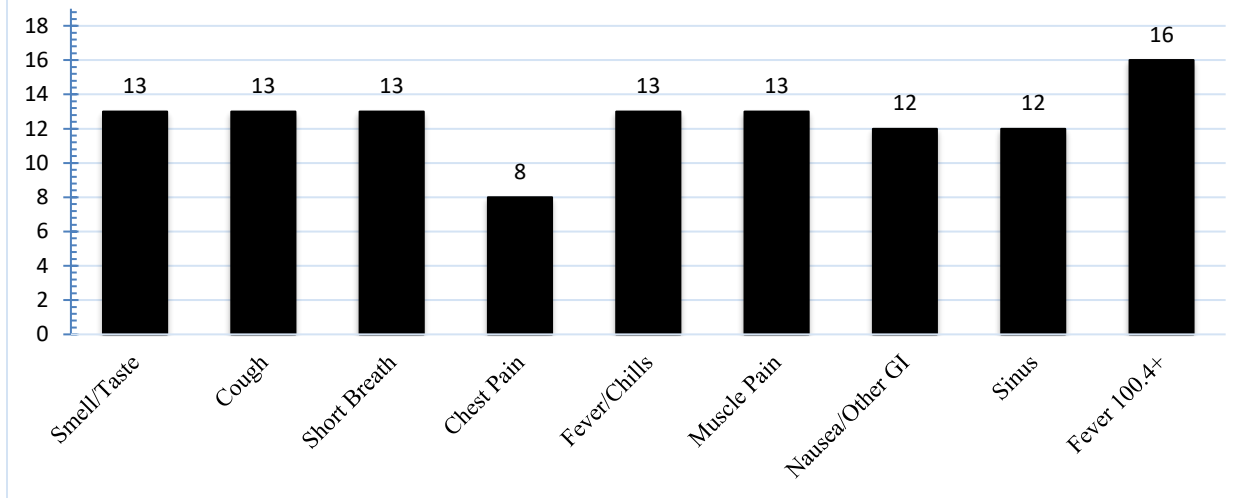
- The response rate, counting only usable replies to the survey request, was 29.2% (19 of 65).
- Among the 11 private schools, 90.9% did not respond to this survey. Baylor, the lone exception, provided a good faith response that was too incomplete to score.
- The NFL and NFLPA, also private entities that are exempt from FOIA and Open Records laws, published its complete labor agreement addendum for COVID-19 protocols.
- Eight public schools (12.3%) stated that they were exempt from providing information to me as an Illinois resident.
- Nine schools (13.8%) asked for one or more extensions in October 2020, and as of December 31, 2020, had not provided information.
- Three schools provided such limited information that their response could not be considered a good faith reply. Two schools sent a cursory list of COVID-19 symptoms; the other school sent a blank form for a player to complete with a space for first and last name, and a space for whether the player tested positive. These schools were Michigan State, Nebraska, and Rutgers.
- The 19 usable responses came from public schools (100%).
- The sampling of usable responses across Power 5 Conferences was fairly even: ACC (3 responses); Big Ten (4 responses); Big 12 (3 responses); PAC-12 (6 responses); and SEC, (3 responses).

2. Scoring Power 5 School Responses on an NFL-NFLPA COVID-19 Scorecard

In this section, I present data for various elements of school responses on the NFL-NFLPA scorecard.

¹²² See Yehuda Baruch & Brooks C. Holtom, *Survey Response Rate Levels and Trends in Organizational Research*, 61 HUMAN RELATIONS 1139 (2008). Analysis of 1,607 studies published from 2000-2005 in 17 refereed academic journals, and including more than 100,000 organizations as respondents, found that the average response rate for studies that used organizational data was 35.7 percent. *Id.* at 1139. Also see Brad R. Fulton, *Organizations and Survey Research: Implementing Response Enhancing Strategies and Conducting Nonresponse Analyses*, 47 SOC. METHODS & RESEARCH 240 (2018) (for organizational studies that use key informants as responders, the mean response rate for published studies is 34%).

Table 2
Symptom Checklist for College Players
(Total Responses = 19)

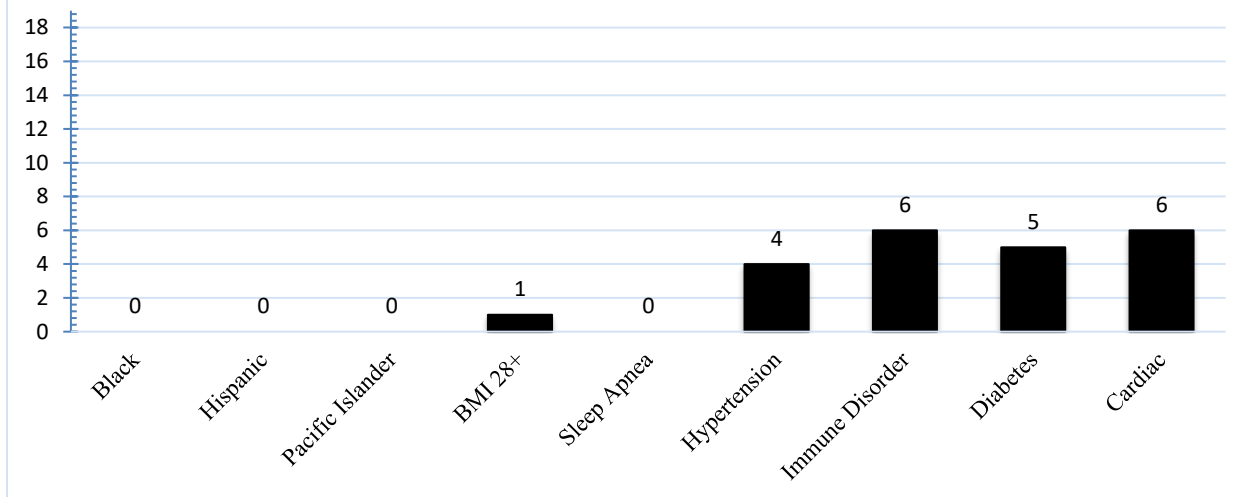


Finding 2: Less than half of the Power 5 schools matched the NFL-NFLPA’s policies to screen for nine COVID-19 symptoms, meaning that NFL players were screened more thoroughly than college players.

- The NFL-NFLPA symptom list included:
 - “1. Loss or diminution of smell or taste 2. Cough. 3. Shortness of breath. 4. Chest Pain. 5. Feeling feverish, chills. 6. Muscle pain (not exercise related). 7. Nausea, vomiting, diarrhea. 8. Sinus or cold-like symptoms (headache, congestion, runny nose, sore throat). 9. Fever (temperature > 100.4 degrees).”¹²³
- Only 7 of 19 schools (36.8%) had a policy for checking player symptoms that completely matched the NFL-NFLPA agreement: Cal-Berkeley [PAC-12], Colorado [PAC 12], Illinois [Big Ten], Iowa [Big Ten], Michigan [Big Ten], North Carolina [ACC], and Oregon [PAC 12].
- Schools in three conferences reported screening policies for player symptoms that matched the NFL-NFLPA: PAC-12 (3 schools), Big Ten (3 schools), and ACC (1 school). No schools in the Big 12 and SEC reported a policy of symptom checking that matched the NFL-NFLPA.

¹²³ Addendum, *supra* note 1, at 25.

Table 3
Policy for Identifying Individual Risk Factors
Total Responses = 19



Finding 3: Only about one-third of Power 5 schools had a policy for identifying at least one specific medical risk factor for individuals; and no school matched the NFL-NFLPA’s guidance for “high risk” players to curtail most social interactions.

- The NFL-NFLPA agreement designated “high risk” individuals as having any one of the following traits: “African American, Hispanic or Pacific Islander; BMI \geq 28; Sleep apnea; Hypertension; Altered immunity; Diabetes mellitus; Cardiac disease.”¹²⁴
- The NFL-NFLPA agreement treated “High Risk” players the same as players with COVID-19 symptoms by requiring:
 - “i. Home pulse oximeter, if confirmed COVID-19 positive.
 - ii. If fever or flu-like symptoms are present and COVID-19 is not confirmed initially, testing for other viral syndromes such as influenza and RSV should be considered (i.e., respiratory multiplex viral PCR).
 - iii. If initial PCR testing is negative, repeat testing for COVID-19 must be considered pursuant to the Screening and Testing Protocol.
 - iv. Confirmation of another virus does not rule out co-infection with COVID-19, and re-testing for COVID-19 should be considered if symptoms persist beyond one week.
 - v. Labs and ECG are not recommended in patients being managed as an outpatient during the acute phase of a COVID-19 illness as conducting these tests place others at risk when the patient should be in isolation; however, players will require some cardiovascular evaluation before a return to exercise.”¹²⁵

¹²⁴ *Id.* at 1.

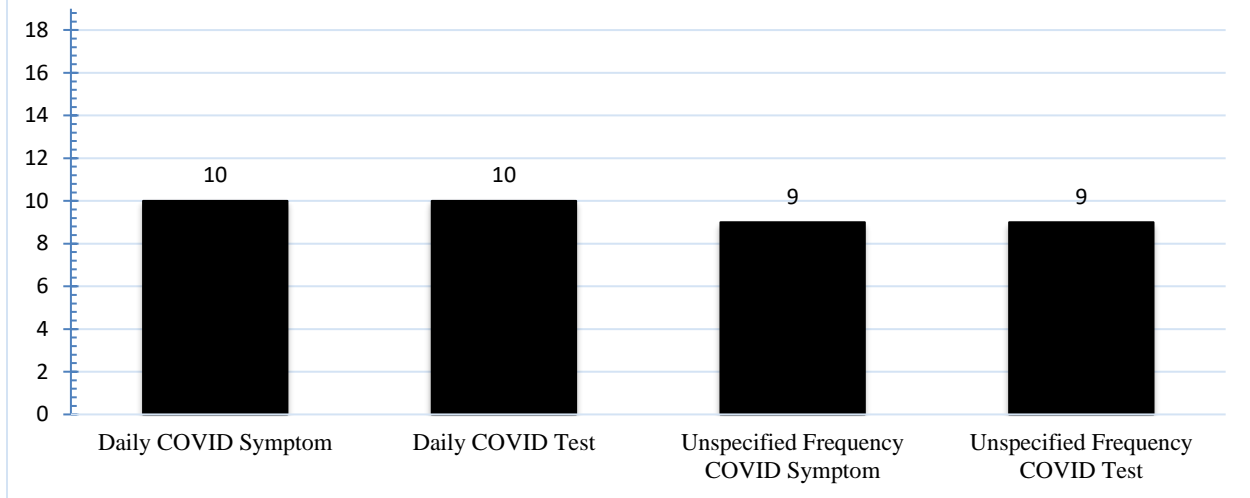
¹²⁵ *Id.* at 26-27.

- The NFL-NFLPA had a broad policy of restrictions on player time at practice facilities and social interactions, apart from the baseline safety protocols for all players.¹²⁶
- No Power 5 school had a “high risk” policy like the policy in the NFL-NFLPA agreement that specifically designated a player’s race.
- Only 6 out of 19 schools (31.6%) had a “high risk” policy specifically for individuals with an immune or cardiac condition; only 5 schools (26.3%) had a policy for diabetes; only 4 schools (21.1%) had a policy for hypertension; and only one school (5.3%) had a policy for obesity.
- Even for the few schools that identified individual risk factors associated with COVID-19 infection, none had comprehensive social limitations and enhanced testing like the NFL-NFLPA agreement’s “High Risk” player protection policies.

¹²⁶ *Id.* at 60-61, stating in Part V:

Protocols for High-Risk Individuals. COVID-19 can cause symptoms ranging from mild to severe. According to the CDC, some individuals may be more likely to suffer severe illness as a result of COVID-19 than others due to the presence of certain characteristics or medical conditions.¹⁰ It is the responsibility of each Head Team Physician to identify any player that may be a High Risk Individual, and he or she must review each player’s individual medical history in light of the current CDC guidance regarding individuals with increased risk of severe illness from COVID-19. Clubs should educate their High Risk players and players in close contact or residing with High Risk Individuals on steps they can take to help further protect themselves, such as: **staying home to the extent possible, and limiting time at Club facilities to only “essential” time; avoiding close contact with others, especially crowds, communal spaces, and anyone who is sick; closely monitoring and managing physical and mental health at all times, and notifying the Team Physician of any change in health status; speaking to a Team Physician about whether all vaccinations are up to date, including the flu vaccine; continuing to take medications as recommended by the High Risk Individual’s treating physician, and maintaining at least a two-week supply of any necessary prescription and nonprescription medications at all times; and reviewing the CDC’s Guidance for extra precautions for reducing risk for High Risk Individuals**, as set forth in the NFL-NFLPA Education Protocol. Each Club is responsible for identifying and implementing additional measures to reduce High Risk Individuals’ risk of exposure to COVID-19 while in the club facilities (emphasis added).

Table 4
Frequency of COVID-19 Symptom Screening and Testing for Players
Total Responses = 19

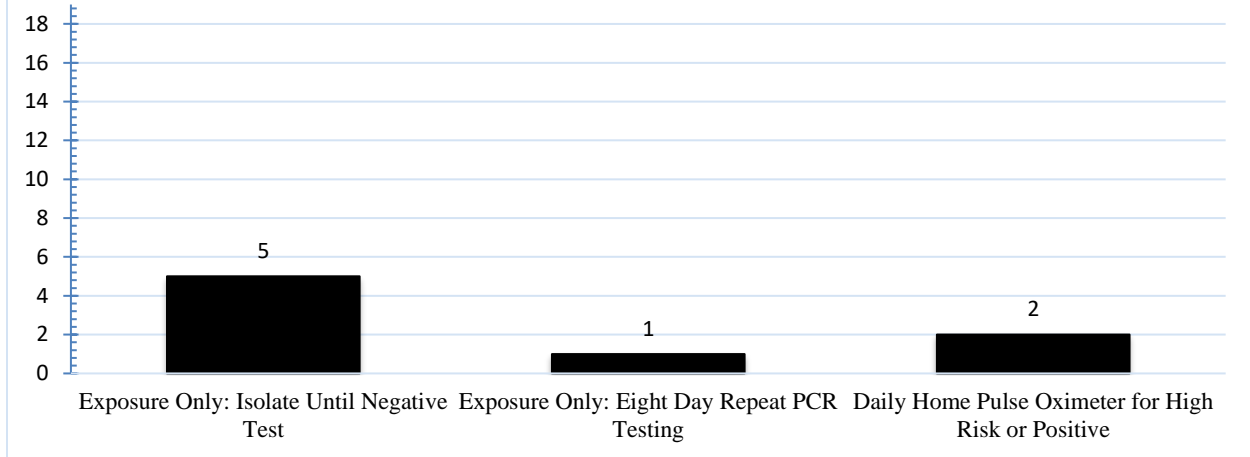


Finding 4: While the NFL-NFLPA’s COVID-19 protocols required daily symptom and COVID-19 testing of all players, only about half of Power 5 schools explicitly stated the same testing policies for symptoms and infections.

- The NFL-NFLPA agreement had a rigorous policy of daily screening and testing, providing: “Screening: *All players*, Club employees and contractors who have access to the Restricted Areas must undergo *daily screening and testing* prior to entering the facility pursuant to the Screening and Testing Protocol (emphasis added).”¹²⁷
- All Power 5 school had policies for periodic symptom screening and COVID-19 testing; however, only 10 out of 19 schools (52.6%) had explicit policies to screen and test players at least six days per week.

¹²⁷ *Id.* at 9.

Table 5
Player Exposure to Symptomatic Contacts
and Quarantine for Confirmed COVID-19 Infections
Total Responses = 19



Finding 5: Power 5 schools had fewer policies for player exposure to COVID-19, and quarantine due to a COVID-19 positive test, compared to the NFL-NFLPA’s addendum.

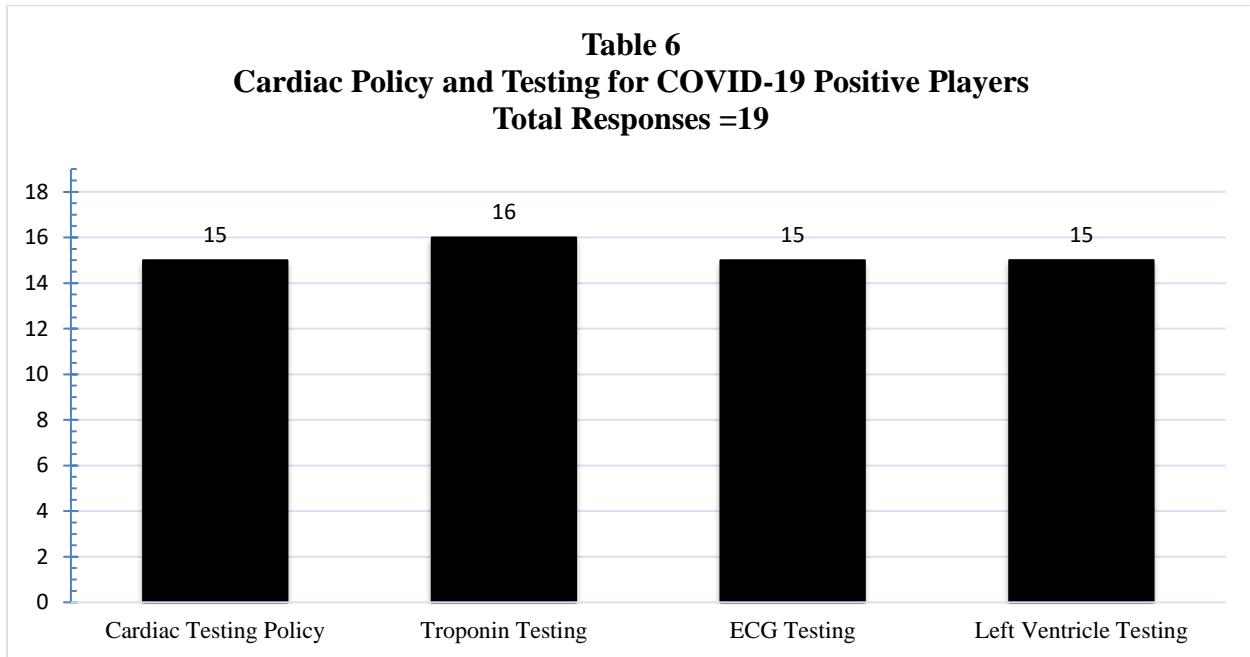
- The NFL-NFLPA agreement had a rigorous policy for isolating and testing players who were exposed to people with COVID-19: “If virus test is negative and Close Contact remains asymptomatic: Close Contact may return to Club Facility subject to the following: Increased symptom monitoring; Daily PCR Virus Testing: Days 1-8; Regular testing schedule thereafter of daily screening and testing.”¹²⁸
- The NFL-NFLPA agreement had a rigorous policy for quarantining and testing a player who tested positive for COVID-19: “If virus test is positive ... and individual is symptomatic: No return unless and until: At least 10 days have passed since first COVID symptoms appeared; and at least 24 hours have passed since last fever without the use of fever-reducing medications; and other symptoms (e.g., cough, shortness of breath) have improved; and return approved by the Club physician, after consultation with ICS and notification of NFL Chief Medical Officer.”¹²⁹
- The NFL-NFLPA Agreement also provided: “The following additional testing for NFL Players who are High Risk (as defined below) or have COVID-19 symptoms are required: i. Home pulse oximeter, if confirmed COVID-19 positive. ii. If fever or flu-like symptoms are present and COVID-19 is not confirmed initially, testing for other viral syndromes such as influenza and RSV should be considered (i.e., respiratory multiplex viral PCR).”¹³⁰

¹²⁸ *Id.* at 34 (box, left-hand side).

¹²⁹ *Id.* (box, middle and right-hand side).

¹³⁰ *Id.* at 26.

- All Power 5 school had weaker policies, compared to the NFL-NFLPA agreement, for players exposed to people who tested positive for, or were exposed to people with, COVID-19:
 - For exposure only cases, only five schools (26.3%) had policies requiring isolation until the player had a negative test; and only one school (5.3%) had a policy for PCR testing for eight consecutive days.
 - For COVID-19 positive players, only two schools (10.5%) had policies for at-home monitoring of a player’s oxygen levels.



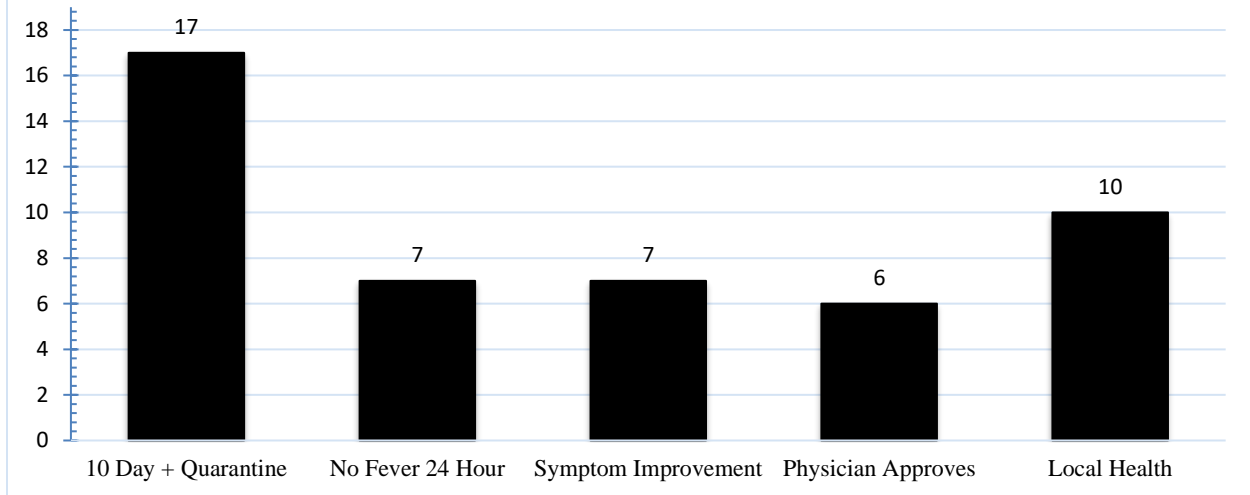
Finding 6: Most Power 5 schools had similar cardiac testing protocols to those in the NFL-NFLPA’s COVID-19 agreement.

- The NFL-NFLPA agreement had a rigorous policy for isolating and testing players who were exposed to COVID-19 or related symptoms: “Any player who (i) tests positive for COVID-19 (by PCR or antibody test), (ii) is presumed COVID-19 positive, or (iii) has any cardiopulmonary symptoms (e.g., shortness of breath, chest pain, tachycardia), is required to undergo the following testing prior to returning to participation: 1. High-sensitivity troponin testing (or troponin I or T if high sensitivity troponin); 2. Standard 12-lead electrocardiogram (ECG); and 3. Two-dimensional resting echocardiogram to assess left ventricular function.”¹³¹
- Most Power 5 schools had cardiac testing requirements for COVID-19 positive players.
 - For the three or four schools that did not score on any of these dimensions, they gave discretion to a team physician to conduct cardiac testing. Physicians may have used discretion in many or all cases to test players for cardiac problems.

¹³¹ *Id.* at 33.

- Fifteen schools (78.9%) had a policy of requiring cardiac testing for COVID-19 players, ECG testing, and left-ventricle function testing. Sixteen schools (84.2%) required a troponin blood test screen for cardiac problems.

Table 7
Returning COVID-19 Positive Players to Regular Activity
Total Responses =19

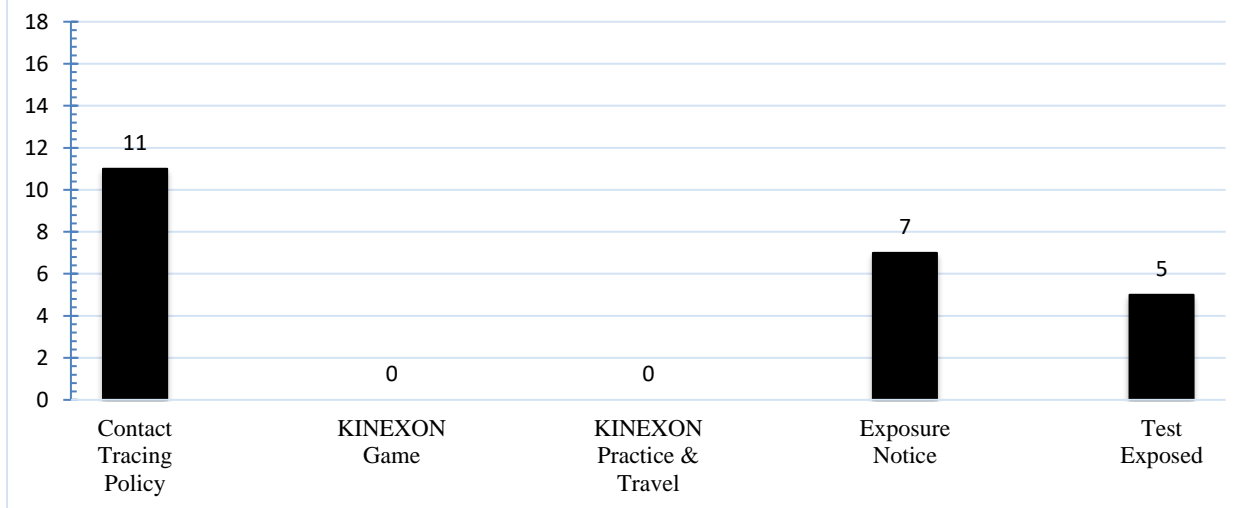


Finding 7: Nearly all Power 5 schools had the same 10-day minimum quarantining requirement for players who tested positive for COVID-19, but only one-third of the schools also matched the specific medical-improvement criteria in the NFL-NFLPA’s COVID-19 agreement.

- The NFL-NFLPA agreement required a player who tested positive for COVID-19 and who had symptoms to isolate and meet all five of the following conditions to resume regular activity: “Individual Tests Positive for COVID-19 and is Symptomatic. Isolate as soon as possible. No return unless and until: 1. At least 10 days have passed since first COVID symptoms appeared; and 2. At least 24 hours have passed since last fever without the use of fever reducing medications; and 3. Other symptoms (e.g., cough, shortness of breath) have improved; and 4. Return approved by the Club physician, after consultation with ICS and notification of NFL Chief Medical Officer; and 5. Local regulations and requirements are satisfied.”¹³²
- Seventeen Power 5 schools (89.5%) matched the NFL-NFLPA Agreement policy that required COVID-19 positive players with symptoms to quarantine for ten days.
- Only seven schools required a player in quarantine to be fever free without medication for 24 hours and symptom improvement (36.8%); and only six schools (31.6%) required a physician to release a player from quarantine.

¹³² *Id.* at 38.

Table 8
COVID-19 Contact Tracing Procedures
Total Responses = 19



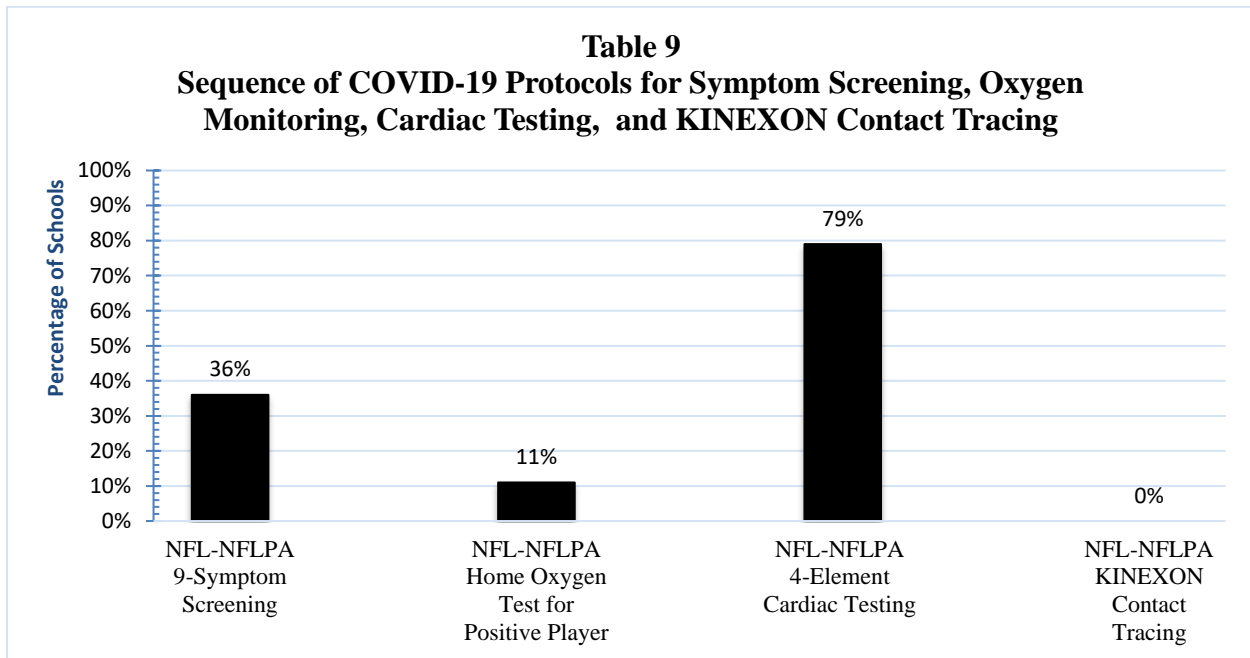
Finding 8: Power 5 schools completely lacked KINEXON tracking technology for contact tracing, and only about one-fourth of the schools reported contact tracing policies to test people who were exposed to a player who tested positive to COVID-19.¹³³

- The NFL-NFLPA agreement required a player who tested positive for COVID-19 or who had symptoms to isolate and meet all five of the following conditions to resume regular activity: “Conduct a contact tracing investigation to identify all other Club employees, contractors and/or *players* (emphasis added), including at other Clubs, who had Close Contact with the infected individual; 1. Contact tracing to determine Close Contact exposures in-game will be conducted using Kinexon tracking devices. 2. Tier 1, Tier 2, Tier 2M and Tier 3 Individuals will also be required to wear Kinexon Proximity Recording tracking devices at all times while engaged in team activities (including in the Club facility, during practices, and during team travel). Such devices will only be used to determine Close Contact exposures during team activities. The data and information collected from the Proximity Recording tracking devices shall not be shared with or used by the Club or any third party for any purpose other than evaluating Close Contact exposures and evaluating efficacy and compliance with the NFL-NFLPA COVID-19 Protocols. ii. Notify those individuals of their potential exposure and probable need for quarantine or isolation pending the results of testing; iii. Arrange for those individuals to be tested; and Notify the proper health authorities as required by the applicable local regulation/law.”¹³⁴
- About half of the Power 5 schools (57.9%) stated a specific contact tracing policy.

¹³³ Bell & Kirschman, *supra* note 109, reporting: “Unlike the Seahawks, the Huskies go back to their dorms or shared houses and apartments, in close quarters with fellow students who’ve done who knows what with whom that day, week and month. College students don’t wear contact tracers.”

¹³⁴ Addendum, *supra* note 1, at 38.

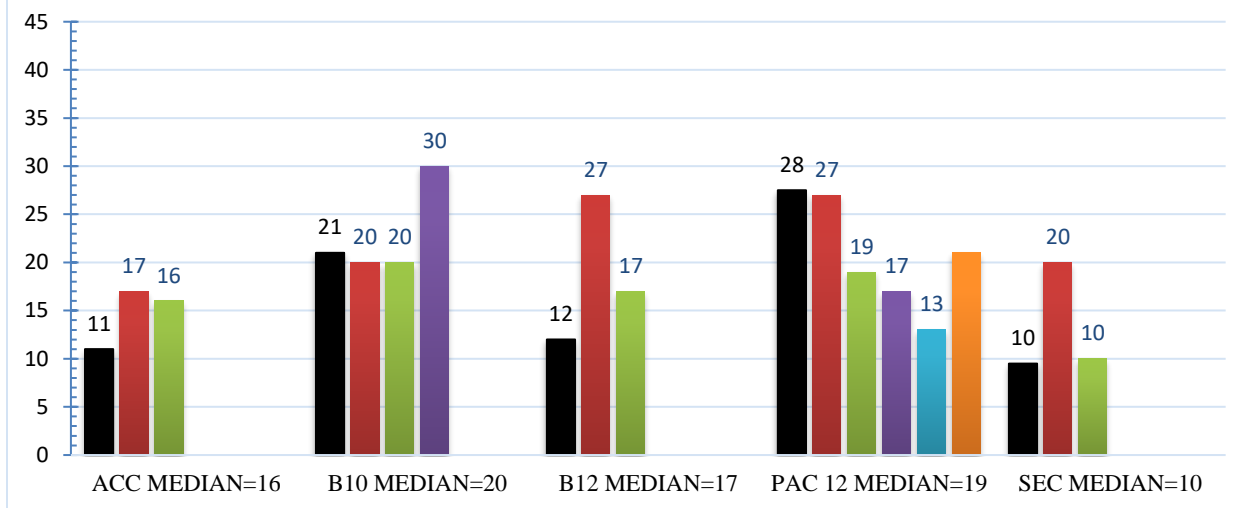
- Less than half of the Power 5 schools reported a contact tracing policy that required notification of players exposed to another player who tested positive for COVID-19 (36.9%), and required testing of the exposed player (26.3%).



Finding 9: A sequence for COVID-19 policies, starting with symptom screening, and including home-based oxygen monitoring, cardiac testing, and contact tracing shows that schools significantly trailed NFL protocols at key milestones for disease mitigation and treatment:

- **At the front-end of a school’s policy, only 36% of schools regularly screened for nine COVID-19 symptoms listed in the NFL-NFLPA agreement.**
- **Only 11% of schools had home oxygen testing and monitoring of COVID-19 positive players as provided in the NFL-NFLPA agreement.**
- **Most schools (79%) had the same or similar cardiac testing protocols as the NFL-NFLPA agreement for COVID-19 positive players.**
- **No schools reported use of KINEXON location tracking technology for use in contact tracing as provided in the NFL-NFLPA agreement.**

Table 10
Scorecard of College COVID-19 Protocols That Matched
NFL-NFLPA Addendum (Schools Grouped By Conference)



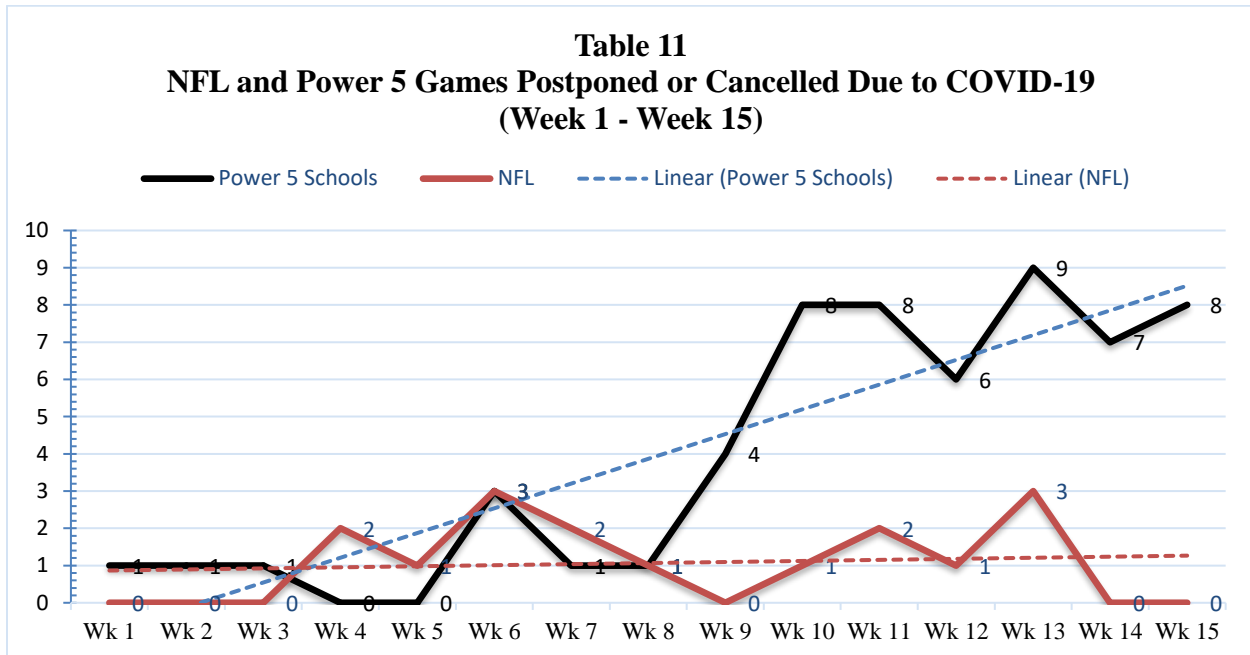
Finding 10: Median scores for teams varied substantially by conferences, with the Big Ten and PAC-12 registering the highest COVID-19 policy scores (median scores, respectively, 20 points and 19 points) and the SEC registering the lowest (median score 10 points).

- **The variances in scores across conferences were consistent with the SEC’s relatively rushed approach to play football, and the Big Ten’s and PAC-12’s delayed start.**
- **The variances of team scores within all five conferences suggested that some schools adopted more rigorous COVID-19 safety policies, or other schools did not conform to conference standards.**
- **Four schools stood out for COVID-19 policies that approximated standards in the NFL: Illinois (30 points), Colorado (27.5 points), Cal (27 points), and Texas (27 points).**

In sum, a consistent pattern emerged in Finding 2 through Finding 10, showing that Power 5 schools had less comprehensive, and less rigorous, COVID-19 testing, mitigation, treatment, return to activity, and contact tracing policies compared to the NFL. Viewed as a whole, the data suggest that collectively bargained player safety policies in the NFL were better compared to those that schools and conferences unilaterally implemented. Thus, the natural experiment produced by the sudden and severe outbreak of the COVID-19 pandemic provides evidence that college players could have benefitted from being treated as employees who could form a union to negotiate safer protocols and policies.

3. Comparing Scheduling Disruptions Due to COVID-19 Among Power 5 and NFL Teams

The data presented in Table 11 derive from news reports that tabulated game postponements and cancellations in college football and the NFL. The news reporting for college football games included all teams, included those not in a Power 5 Conference. For Table 11, I used only games where both teams were Power 5 schools.



Finding 11: Power 5 football games were postponed or canceled twice as often NFL games.

- **At least 61 games involving only Power 5 teams as home and visiting teams were postponed or cancelled due to COVID-19 concerns during the 2020 football season.¹³⁵ With 122 teams affected by game disruptions, the 65 Power 5 schools experienced roughly two game disruptions apiece during the season.**

¹³⁵ David Cobb, et al., *College Football Sees 139 Games Canceled or Postponed During 2020 Regular Season Due to COVID-19 Issues*, CBSSPORTS.COM (Oct. 16, 2020, updated through Dec. 19, 2020), at <https://www.cbssports.com/college-football/news/college-football-sees-139-games-canceled-or-postponed-during-2020-regular-season-due-to-covid-19-issues/>, listing college football game that were affected during the 2020 regular season. I reduced the list to games involving only Power 5 schools as home and visiting teams, and found that 63 games were canceled or postponed: NC State at Virginia Tech (Sept. 11); Virginia at Virginia Tech (Sept. 19); Oklahoma State at Baylor (Oct. 17); Vanderbilt at Missouri (Oct. 17); LSU at Florida (Oct. 17); Missouri at Florida (Oct. 24); Wisconsin at Nebraska (Oct. 31); Purdue at Wisconsin (Nov. 7); Louisville at Virginia (Nov. 7); Washington at California (Nov. 7); Arizona at Utah (Nov. 7); Auburn at Mississippi State (Nov. 14); Texas A&M at Tennessee (Nov. 14); Alabama at LSU (Nov. 14); Georgia at Missouri (Nov. 14); Ohio State at Maryland (Nov. 14); Pitt at Georgia Tech (Nov. 14); Cal at Arizona State (Nov. 14); Utah at UCLA (Nov. 14); Arizona State at Colorado (Nov. 21); Ole Miss at Texas A&M (Nov. 21); Georgia Tech at Miami (Nov. 21); Wake Forest at Duke (Nov. 21); Texas at Kansas (Nov. 21); Michigan State at Maryland (Nov. 21); Washington State at Stanford (Nov. 21);

- **At least 16 NFL games were postponed or cancelled due to COVID-19 concerns during the 2020 football season. With 32 teams affected by game disruptions, NFL teams experienced roughly one game disruption apiece during the season.**¹³⁶

In sum, Table 11 provides evidence about the overall effectiveness of COVID-19 protocols in NFL and Power 5 football. College teams experienced about twice as many game disruptions as the NFL teams. This finding is consistent with data in Finding 2 through Finding 10 that report shortcomings in the nonunion college football protocols compared to the collectively bargained protocols in the NFL.

B. Interpreting Data with Caveats and Limitations

This study's methodology and findings have several limitations. For clarity, I enumerate them in a format that is similar to the data findings.

1. Schools responded to my survey request with varying degrees of openness and cooperation, as well as reluctance. To repeat part of Finding 1, three schools provided enough

Clemson at Florida State (Nov. 21); Louisville at Boston College (Nov. 27); Washington at Washington State (Nov. 27); Miami at Wake Forest (Nov. 28); Arkansas at Missouri (Nov. 28); Tennessee at Vanderbilt (Nov. 28); Minnesota at Wisconsin (Nov. 28); Utah at Arizona State (Nov. 28); Oklahoma at West Virginia (Nov. 28); Colorado at USC (Nov. 28); Virginia at Florida State (Nov. 28); Wake Forest at Louisville (Dec. 5); Alabama at Arkansas (Dec. 5); Northwestern at Minnesota (Dec. 5); Maryland at Michigan (Dec. 5); Ole Miss at LSU (Dec. 5); Missouri at Mississippi State (Dec. 5); Miami at Wake Forest (Dec. 5); Florida State at Duke (Dec. 5); Vanderbilt at Georgia (Dec. 5); Ole Miss at Texas A&M (Dec. 12); Michigan at Ohio State (Dec. 12); Purdue at Indiana (Dec. 12); Washington at Oregon (Dec. 12); Oklahoma at West Virginia (Dec. 12); Cal at Washington State (Dec. 12); Texas at Kansas (Dec. 12); Washington at USC (Dec. 18); Purdue at Indiana (Dec. 18); Vanderbilt at Georgia (Dec. 19); Georgia Tech at Miami (Dec. 19); Arizona at Cal (Dec. 19); Michigan State at Maryland (Dec. 19); Michigan at Iowa (Dec. 19); Florida State at Wake Forest (Dec. 19).

¹³⁶ Nick Selbe, *Which NFL Games Have Been Rescheduled Due to COVID-19?*, SPORTS ILLUSTRATED (Oct. 8, 2020, updated Nov. 30, 2020), <https://www.si.com/nfl/2020/10/09/every-game-rescheduled-due-to-covid19-this-season>. Games that were postponed one day or more through December 7, 2020 include: Week 4 (Pittsburgh Steelers at Tennessee Titans; and New England Patriots at Kansas City Chiefs); Week 5 (Buffalo Bills at Tennessee Titans); Week 6 (Kansas City Chiefs at Buffalo Bills; Denver Broncos at New England Patriots; and New York Jets at Miami Dolphins); Week 7 (Pittsburgh Steelers at Baltimore Ravens; Jacksonville Jaguars at Los Angeles Chargers); Week 8 (Los Angeles Chargers at Denver Broncos); Week 10 (Los Angeles Chargers at Miami Dolphins); Week 11 (Denver Broncos at Miami Dolphins; New York Jets at Los Angeles Chargers); Week 12 (Baltimore Ravens at Pittsburgh Steelers); Week 13 (Cowboys at Ravens; Washington at Steelers; and Bills at 49ers).

information to close my FOIA request without rejecting it, but offered almost no information about COVID-19 safety protocols.

However, other schools used my inquiry to publicize their protocols. Two schools that replied to my standard FOIA request openly copied people in the university president's office who appeared to be senior staff members. These replies suggested that the presidents of these schools viewed COVID-19 testing protocols in football as an important matter. These replies may have signified that these schools had robust accountability from their athletic departments to campus leaders.

2. Schools may have updated their policies after responding to my request in mid-October, just as the NFL and NFLPA updated their protocols in October 2020.¹³⁷ My findings compared pro and college football COVID-19 policies at or near the start of their seasons. Policy revisions after my requests in mid-October were not part of my findings.

3. Survey responses provided data about *policies* but not practices. More rigorous practices may have been implemented apart from the policies. It is also possible, however, that a school's practices fell short of their prescribed procedures. Again, this study compared only COVID-19 football written policies.

4. The Power 5 conferences took varying approaches in their COVID-19 protocols. Unlike the 32 NFL teams that were governed by uniform protocols and enforced by a powerful league, these 65 schools operated under different rules, perhaps accentuated by regional politics. The Big Ten alone illustrated this dynamic. University presidents initially voted 11-3 not to

¹³⁷ NFL-NFLPA COVID-19 PROTOCOLS FOR 2020 SEASON (October 16, 2020), at <https://static.www.nfl.com/image/upload/v1604923568/league/qj8bnhpzrmjevze2pmc9.pdf> (copy on file with author).

proceed with a football season.¹³⁸ The fact that any conference promulgated health and safety standards did not ensure that member schools adopted these policies. In short, while my study purports to compare NFL and NCAA COVID-19 protocols, my study actually compares college football policies at 19 schools spread over five conferences to one professional league operating under a unified set of rules.

5. My coding of data likely had some degree of inconsistency due to the varying formats that schools used to communicate their COVID-19 policies. The PDF files I received ranged from heavily bulleted information presented succinctly in a short document to a master plan laid out in a densely worded, lengthy document with minute details. Some schools sent policies piecemeal in several files that sometimes created confusion. Adding data coding challenges, policies used basic terms in slightly different ways that could result in meaningful differences in administering a player safety program. For example, some policies specified a temperature for a fever that would be taken at an athletic facility; others used a player's self-report of fever; other asked a player if he felt feverish. I coded these policies the same, even though they could have meant different things.

6. My sample is small. Nonetheless, small samples are occasionally published,¹³⁹ including a cardiological study of a small sample of Ohio State players who tested positive for COVID-19.¹⁴⁰ On the other hand, non-responses are more of a concern: They could reflect bias

¹³⁸ Schoenfeld, *supra* note 113.

¹³⁹ For other research with small samples, see Pamela C. Regan, et al., *Relationship Outcomes in Indian-American Love-Based and Arranged Marriages*, 110 PSYCH. REP'TS 915 (2012) (comparing relationship outcomes in love-based and arranged marriages in U.S. sample of 58 Indian participants); Konstantina Vasileiou, et. al, 18 BMC MED. RES. METHODOLOGY 148 (2018) (justifying small sample size in interview-based studies); and Kathleen E. Etz1 & Judith A. Arroyo, *Small Sample Research: Considerations Beyond Statistical Power*, 16 SOCIETY FOR PREVENTION RES. 1033 (2015) (small sample research can be important where serious health concerns arise in vulnerable and underrepresented populations).

¹⁴⁰ Rajpal, *infra* note 149.

in how my sample was drawn, omitting schools with weaker safety protocols. In light of this possibility, I included information in Table 1 such as conference affiliation and number of games in which a school had a postponement or cancellation. I also compared game-disruption numbers to see if they significantly correlated to non-responding schools. For example, the 22 private and public schools that did not respond to my survey experienced 38 disrupted games (1.72 disrupted games per school), while the 19 schools that provided a usable response had 41 disrupted games (2.16 disrupted games per school). These differences were not statistically significant.

V. CONCLUSION: COLLECTIVE BARGAINING BENEFITS FOOTBALL PLAYERS

The COVID-19 pandemic provided a natural experiment to compare whether collectively bargained and unilaterally implemented safety protocols for football players would be the same. One would expect roughly equal safety measures because NFL and Power 5 football games are so similar. Both were tied to large but disrupted revenue streams.¹⁴¹ One would assume that managerial concern for player safety would be the same. However, my study showed real differences between pro and college football. Collectively bargained COVID-19 protocols for NFL players were superior to the unilaterally imposed COVID-19 protocols for college football. This is the main conclusion of my study. As I now explain, my study adds to research streams for worker safety in unionized workplaces, company unionism, and employment for NCAA players.

A. *Safety Practices in Unionized Workplaces Are Superior to Nonunion Workplaces.*¹⁴²

¹⁴¹ See Bell & Kirschman, *supra* note 109.

¹⁴² Unions play an important role in workplace safety. Barbara Hilyer, et. al, *A Union-Initiated Safety Training Program Leads to Improved Workplace Safety*, 24 LABOR STUDIES JOURNAL 53 (2000); Jill Kriesky & Edwin Brown, *The Union Role in Labor-Management Cooperation: A Case Study at the Boise Cascade Company's Jackson Mill*, 18 LAB. STUDIES J. 17 (1993); and Margrit K. Hugentobler, et. al, *How Unions Can Improve the Outcomes of Joint Health and Safety Training Programs*, 15 LAB. STUD. J. 16 (1990). Many labor agreements grant employees a right to refuse unsafe work, and some contacts. See George R. Gray et al., *Collective Bargaining Agreements: Safety and Health Provisions*, 121 MONTHLY LABOR REVIEW 13 (1998). More recently, see Robert R. Sinclair et. al, *Labor Unions and Safety Climate: Perceived Union Safety Values and Retail Employee Safety*

A 5% increase in occupational fatalities occurs for every 1% decline in union representation of employees in the workforce.¹⁴³ Workplaces with unions are more likely to offer intensive safety training.¹⁴⁴ Unions also improve enforcement of safety laws.¹⁴⁵ Union employers, compared to nonunion counterparts, use emerging technologies such as drones, wearable devices, lasers, and robotics.¹⁴⁶ Union employers are also more likely to have site-specific safety plans.¹⁴⁷

My study is relevant to these broader areas of workplace safety. The NFL, comprised of 32 employers engaged in league-wide collective bargaining, is the union employer in this natural experiment. Sixty-five Power 5 schools are the nonunion, de facto employers. The higher

Outcomes, 42 ACCIDENT ANALYSIS & PREVENTION 1477 (2010), at 1486 (“the link between union safety values and safety motivation could reflect a social exchange process in which employees who feel supported by their union reciprocate with greater safety motivation or it could reflect a self-regulatory processes employees use to manage safety”).

¹⁴³ Michael Zoorob, *Does ‘Right to Work’ Imperil the Right to Health? The Effect of Labour Unions on Workplace Fatalities*, 75 OCC. & ENV. MED. 736 (2018) (estimating the effect of unionization on occupational mortality per 100 000 workers from 1992–2016.).

¹⁴⁴ Xuanwen Wang, et al., *Union Effect on Safety Management and Safety Culture in the Construction Industry*, CPWR QUARTERLY DATA REP’T (2018), at 20, available in <https://www.cpwr.com/wp-content/uploads/2018/05/Quarter1-QDR-2018.pdf>.

(U)nion firms reported better performance of safety management and safety culture than non-union firms.... Union firms also adopted most of the organization safety practices, safety policies, and safety culture indicators included in this report. Moreover, union firms were more likely and frequently to offer and require general safety and health training, and OSHA 10-hour and 30-hour training to their employees. The results confirm that labor-management cooperation is a win-win solution for improving safety management and safety culture at workplaces (citation omitted) which benefits not only construction workers, but also construction contractors.

¹⁴⁵ See David Weil, *Building Safety: The Role of Construction Unions in the Enforcement of OSHA*, 13 J. LAB. RES. 121 (1992), at 130, finding that unionized construction workplaces provide more safety to employees. Unionized workplaces find more OSHA violations than nonunion counterparts; reduce hazard abatement periods set by OSHA; and add potency to calls for OSHA inspections. Unions also increase an employer’s price of being cited for OSHA violations because more of these problems are flagged for inspectors.

¹⁴⁶ Safety+Health, *Survey: Construction Firms with Union Workers More Likely to Engage in Safety Best Practices, Training* (Sept. 19, 2018). This survey of 334 union-only firms, 109 firms with union and non-union employees, and 135 firms with only nonunion employees, found that “78.9 percent of union firms perform job hazard or safety analyses before construction starts, compared with 55.6 percent of nonunion firms,” and “66.8 percent of union firms conduct ‘prompt/thorough’ near-miss and incident investigations, compared with 49.6 percent of nonunion firms.”

¹⁴⁷ *Id.* (“86.9 percent of union firms have a site-specific safety and health plan, compared with 68.9 percent of nonunion firms.”).

proportion of disrupted college football games implies that the lack of collectively bargained COVID-19 protocols at Power 5 schools hurt college football as an entertainment enterprise.¹⁴⁸ A study of Ohio State athletes with COVID-19 infections, finding that almost 46% had a physical predictor of future heart disease,¹⁴⁹ suggests that nonunion playing conditions exposed college football players to long-term health risks. According to the Myocarditis Foundation, this heart condition is related to 22% of sudden cardiac deaths in athletes 35 years of age and younger.¹⁵⁰ By comparison, pro football players had collectively bargained protocols for special protections and enhanced isolation for individual risk factors such as race, diabetes, hypertension, and obesity.¹⁵¹

My conclusions relate to collective bargaining in professional sports. The NLRA creates a duty to bargain wages, hours, and terms and conditions of employment.¹⁵² This legal obligation

¹⁴⁸ See tbl. 10.

¹⁴⁹ Saurabh Rajpal, et. al, *Cardiovascular Magnetic Resonance Findings in Competitive Athletes Recovering From COVID-19 Infection*, JAMA CARDIOLOGY (Sept. 11, 2020). CMR imaging in 26 college athletes who tested positive for COVID-19 (15 males, mean age 19.5 years) in football, soccer, lacrosse, basketball, and track showed that 26.9% reported mild symptoms, while others were asymptomatic; none showed heart-beat wave changes on electrocardiogram; and none had elevated serum levels of troponin I. However, after cardiac MRIs were performed on these subjects, four players (15%, all males) had imaging consistent with myocarditis. Two players also exhibited mild heart condition symptoms (shortness of breath). Twelve players (46%) had LGE, a medical acronym for late gadolinium enhancement. An earlier study in a general population found that LGE observed by cardiac magnetic resonance testing “is a predictor of adverse cardiovascular outcomes in patients with nonischemic cardiomyopathy (NICM).” Sujith Kuruvilla, et al., *Late Gadolinium Enhancement on Cardiac Magnetic Resonance Predicts Adverse Cardiovascular Outcomes in Nonischemic Cardiomyopathy: A Systematic Review and Meta-Analysis*, 7 CIRCULATION: CARDIOVASCULAR IMAGING 250 (Dec. 20, 2013). The study found that patients with LGE had higher annualized mortality (4.7% for LGE-positive subjects versus 1.7% for LGE-negative subjects).

¹⁵⁰ Josh Peter, *‘It Saved My Kid’s Life:’ Why Aren’t All College Athletes with COVID-19 Getting MRI Exams?*, USA Today (Dec. 30, 2020).

¹⁵¹ See Rajpal, *supra* note 140.

¹⁵² The NLRA provides only a general statement of an employer’s and union’s mutual obligation to bargain:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment or the negotiation of an agreement, or any question arising thereunder; and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

NLRA, *supra* note 69, at 29 U.S.C. § 158 (d).

The Supreme Court has defined this duty with more specificity. *E.g.*, NLRB v. Katz, 369 U.S. 736 (1962),

includes bargaining over workplace safety conditions.¹⁵³ More closely related to COVID-19 safety protocols, the National Labor Relations Board ruled that employers must bargain a drug-testing policy with a union.¹⁵⁴ These labor law developments paved the way for major leagues and player unions to bargain over testing athletes for illicit and performance enhancing drugs—largely an interest of management.¹⁵⁵

However, collective bargaining allowed player unions to bring their health and safety issues to negotiations with the leagues. Just before the pandemic reached severe levels of transmission in the U.S. in 2020, the NFL and NFLPA entered into a labor agreement that

at 747, concluding: “Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.”

¹⁵³ Safety and health issues are included as part of an employer’s duty to bargain with a union. E.g., *NLRB v. Am. Nat’l Can Co.*, 924 F.2d 518 (4th Cir. 1991), where unions sought access to a manufacturing plant to take heat measurements for processing heat relief grievance and monitor compliance with health protection. The court said that a “Union’s right to information that is relevant to the Union’s performance of its responsibilities is statutory and not contractual, especially when it concerns health and safety conditions.” *Id.* at 522.

¹⁵⁴ *Johnson-Bateman Co.*, 295 N.L.R.B. 180 (1989), and *Kysor Ind. Corp.*, 307 N.L.R.B. 598 (1992). *Compare* *Star Tribune Div.*, 295 N.L.R.B. 543 (1989) (drug testing for job applicants is not a mandatory subject of bargaining). The employer in *Johnson-Bateman Co.* argued that it had a managerial right to impose drug testing without mandatory bargaining—a view that is similar to how colleges formulated and implemented COVID-19 testing policies without interacting with the NCAA’s Student Athlete Advisory Committee. *See* SAAC, *supra* note 87. The NLRB rejected the employer’s position in *Johnson-Bateman Co.* that it had a unilateral right to dictate drug testing, even if the employer’s purpose was to promote a safe workplace. *Id.* at 182, concluding that the “newly imposed requirement of drug/alcohol testing for employees who require medical treatment for work injuries is a mandatory subject of bargaining.” The NLRB added that “we find the drug/alcohol testing requirement to be both germane to the working environment, and outside the scope of managerial decisions lying at the core of entrepreneurial control.” In a related vein, physical testing of employees is part of an employer’s duty to bargain. *LeRoy Machine Co.*, 147 NLRB 1431, 1432, 1438-1439 (1964) (physical examinations). *Also see* *Lockheed Shipbuilding Co.*, 273 N.L.R.B. 171 (1984) WL 37024 (1984), decision supplemented, 278 N.L.R.B. 18, (1986).

¹⁵⁵ Glenn M. Wong & Richard J. Ensor, *Major League Baseball and Drugs: Fight the Problem or the Player?*, 11 NOVA L. REV. 779 (1987), at 795-804, reviewing the origins of drug testing in professional baseball in the 1980s. Stephen F. Brock & Kevin M. McKenna, *Drug Testing in Sports*, 92 DICK. L. REV. 505 (188) (reviewing drug testing in professional sports in the 1980s), at 518-519 (“In contrast to the situation in professional football and basketball, major league baseball (MLB) has in effect no agreement expressly governing drug testing of its players.”). *See* Joint Drug Agreement, effective in 2006, banning performance-enhancing substances, providing random drug testing both during the season and the offseason, and imposing significant penalties at Major League Baseball, Major League Baseball’s Joint Drug Prevention and Treatment Program 5, 8, &17 (2006), available at <http://mlb.mlb.com/pa/pdf/jda.pdf>. *Also see* Adam M. Finkel, et. al, *The NFL as a Workplace: The Prospect of Applying Occupational Health and Safety Law to Protect NFL Workers*, 60 ARIZ. L. REV. 291 (2018), at 347: “Since 1968, the NFL and NFLPA have negotiated ten CBAs. The most recent CBA (executed in 2011) is 301 pages long and governs nearly every aspect of the NFL. Thus, generally speaking, the parties have resolved most issues concerning player health and safety via the collective bargaining process....”

covered a wide range of health and safety to benefit players safety.¹⁵⁶ A short time later, they negotiated the addendum for COVID-19 protocols. Similar to construction unions that rigorously enforce safety standards,¹⁵⁷ the NFLPA set up a whistleblower hotline to report breaches of these safety policies and practices.¹⁵⁸ Also like unions in the construction industry, the NFLPA and NFL adopted state of the art technology—in this instance, KINEXON contact tracking devices.¹⁵⁹ I found no evidence for this technology adoption in survey responses, though later in the fall at least one conference adopted KINEXON.¹⁶⁰

B. “*Company Unionism*” Continues Long After Enactment of the NLRA

SAAC’s nearly complete silence on COVID-19 policies signified its captive role as a voice for NCAA players.¹⁶¹ SAAC’s cooptation mirrored company unions in the years preceding the NLRA.¹⁶² These organizations proliferated during the Great Depression.¹⁶³ Employers implemented them in response to growing calls for legislation to allow collective bargaining for workers. The N.R.A. encouraged employers voluntarily to bargain with unions.¹⁶⁴ It was a sop to

¹⁵⁶ NFL, *2020 NFL-NFLPA CBA: Need to Know*, at <https://operations.nfl.com/inside-football-ops/players-legends/2020-nfl-nflpa-cba-need-to-know/>. A summary of improvements to key benefit include “improved health and safety: guaranteed funding for research on training methods, equipment, field surfaces, and medical care; the formation of a new committee to design safety standards for equipment; the extension of training camp acclimation periods; further strengthened credentialing standards for team medical and training staffs; enhanced enforcement of the concussion protocol; and additional joint research funding.”

¹⁵⁷ Weil, *supra* note 145.

¹⁵⁸ Alex Prewitt, *The NFLPA Has Set Up a Whistleblower Hotline to Report Health and Safety Violations*, SI FOOTBALL (Aug. 5, 2020).

¹⁵⁹ *Supra*, Finding 8.

¹⁶⁰ Dawgman, *supra* note 120

¹⁶¹ Student Athlete Advisory Committee, *supra* note 87.

¹⁶² Stanford SAAC, *supra* note 90.

¹⁶³ BUREAU OF LABOR STATISTICS, *supra* note 74.

¹⁶⁴ Congress passed the National Industrial Recovery Act in 1933 “[t]o encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works.” National Industrial Recovery Act, ch. 90, 48 Stat. 195, 195 (1933) (Act held unconstitutional in *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935)). In its brief time as a transitional labor law that was eventually replaced by the National Labor Relations Act, NIRA (also called the N.R.A.) spurred workers to join unions and also prompted employers to blunt this development by forming “company unions”:

workers, similar to current Name, Image, and Likeness (NIL) laws prohibit NCAA schools from penalizing college athletes from marketing themselves for money.¹⁶⁵ Like the N.R.A., NIL laws obliquely address a more fundamental concern of workers. NIRA shielded workers from “yellow dog” contracts which employers being required them to sign as a condition of employment.¹⁶⁶ Similarly, NCAA strict limits on financial assistance for players,¹⁶⁷ and related penalties for violations,¹⁶⁸ are like the take-it-or-leave-it terms in yellow dog contracts— agreements that employers forced workers to sign to prohibit their joining a union.¹⁶⁹ NIL legislation provides

Concurrent with this growth in trade-unionism was an even greater increase in company unions. Of all the company unions in existence in 1935, nearly two-thirds were established during the N. R. A. In a number of plants both company unions and trade-unions were established, with overlapping of membership and jurisdiction.

CHARACTERISTICS OF COMPANY UNIONS 2-3 (Bull. 634, 1937), *supra* note 68, at 28.

¹⁶⁵ California offers an analogous development to company unions as a half-measure for NCAA players. In 2019, the state enacted a “pay to play” law that allows NCAA athletes to market their name, image, and likeness (NIL) for monetary compensation without incurring a penalty from a California public university or college. Senate Bill No. 206, ch. 383 (approved by Governor, Sept. 30, 2019). Section 2 adds to Section 67456 of the Education Code, stating:

67456. (a) (1) A postsecondary educational institution shall not uphold any rule, requirement, standard, or other limitation that prevents a student of that institution participating in intercollegiate athletics from earning compensation as a result of the use of the student’s name, image, or likeness. Earning compensation from the use of a student’s name, image, or likeness shall not affect the student’s scholarship eligibility.

By early 2020, dozens of states considered similar legislation. Alan Blinder, *After California Law, Statehouses Push to Expand Rights of College Athletes*, N.Y. TIMES (Jan. 13, 2020). More recently, the NCAA has announced plans to allow players to accept NIL compensation. See Billy Witz, *NCAA Outlines Plans for Players to Make Endorsement Deals*, N.Y. TIMES (April 30, 2020).

¹⁶⁶ See Comment, *Impact of the Courts upon the NRA Program: Judicial Administration of NIRA*, 44 YALE L.J. 90, 106 (1934) (“A supplemental right to that of collective bargaining has also been acquired by labor through the medium of Section 7(a). This is the negative, but nevertheless, important, right of freedom from ‘yellow dog’ contracts.”).

¹⁶⁷ NAT’L COLLEGIATE ATHLETIC ASS’N, 2020-21 NCAA DIVISION I MANUAL, *supra* note 50, art. 12.01.4: “Permissible Grant-in-Aid. A grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skill, provided it does not exceed the financial aid limitations set by the Association’s membership.” *Also see id.* art. 15.1: “Maximum Limit on Financial Aid— Individual. [A] A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance as defined in Bylaw.”

¹⁶⁸ *Id.* art. 12.1.2: “Amateur Status. An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: ... (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation....”

¹⁶⁹ A “yellow dog” contract was its prohibition against the employee from joining a union. Courts uniformly struck down laws that barred these employment contracts. See *Federal Protection of Collective Bargaining under the Railway Labor Act of 1926*, 40 YALE L. J. 92 (1930), at 93. For a more comprehensive treatment of these contracts, see Cornelius Cochrane, *Why Organized Labor Is Fighting Yellow Dog Contracts*, 15

college players a work-around for earning money related to their NCAA activities, but fails to address the root problem of the NCAA's self-serving amateurism model. The NFL players association would not likely be a strong voice during a pandemic if the N.R.A. had not been replaced by the NLRA, with its legal process for unions to bargain with employers.¹⁷⁰

C. Employment for NCAA Players Is More Appropriate Than Their Outmoded Amateur Status

This study shifts the perspective for treating NCAA players as employees. Pay-for-play remains important given that NCAA conferences and athletic programs reap a financial bonanza,¹⁷¹ and considering the large disparity in wealth generated by Black players and transferred as rents to White coaches.¹⁷² However, player safety and welfare is an important justification for legalizing employment of NCAA players.

Using data, this study shows specific areas where Power 5 schools did not manage player health and welfare with the same rigor as the NFL and players union. College football had proportionally more disrupted games than the NFL.¹⁷³ Making this disparity more remarkable, college teams in the Big 12 and SEC announced that games would be played provided that

AM. LAB. LEG. REV. 227 (1925).

¹⁷⁰ Sen. Robert Wagner described the significance of a law that would enable employees to bargain over wages and conditions of employment when he remarked: "While the bill explicitly states the right of employees to organize, their unification will prove of little value if it is to be used solely for Saturday night dances and Sunday afternoon picnics." S. 1958, 74th Cong. 1373, 1419 (1935), reprinted in LEGISLATIVE HIST., *supra* note 69, at 137.

¹⁷¹ See NCAA, Financial Database Homepage Data Summary (Nov. 2019), available in <file:///C:/Users/arbit/Documents/NCAA%20FINANCIALS%202009-2018.pdf> (copy on file with author). In 2018, "FBS DI Autonomy Schools" generated \$7.98 billion, with 34.1% coming from media rights, yielding approximately \$2.69 billion). *Also see* Schoenfeld, *supra* note 113 (in 2017, Big Ten signed a \$2.64 billion, six-year deal with Fox Sports, ESPN, and CBS).

¹⁷² Craig Garthwaite et al., *Who Profits from Amateurism? Rent Sharing in Modern College Sports*, National Bureau of Economic Research (Working Paper 27734, Aug. 2020), available in <http://www.nber.org/papers/w27734>. This recent economics study concluded that "(t)he athletes generating the rents are more likely to be black and come from lower-income neighborhoods, and the rents are shared with a set of athletes and coaches that are more likely to be white." *Id.* at 34.

¹⁷³ *Supra* tbl 11.

teams could field a roster with 53 active players— in other words, a team would be required to play even if 32 players on its roster of 85 scholarship players was unable to play.¹⁷⁴

These findings raise worrisome questions about the long-term impact of playing a season of college football during the pandemic of 2020. It bears repeating that an Ohio State medical study showed that 46% of COVID-19 positive players had cardiac imaging associated with much higher mortality rates over time.¹⁷⁵ Who will bear the cost if they suffer significant heart problems or die because of heart-related conditions as middle-aged adults? The players will almost certainly bear those costs without any financial assistance from their schools. In contrast, the NFL and NFLPA have negotiated retiree health and welfare benefits.¹⁷⁶ As employees, NFL players are also eligible to claim for worker’s compensation treatment arising out of an injury they incurred in the course of their employment.¹⁷⁷ College football players have nothing like this.¹⁷⁸ Worker’s compensation laws require a claimant to show that an injury was incurred in the course of employment, thus excluding injuries incurred by amateur athletes.¹⁷⁹

¹⁷⁴ David Cobb, *SEC Announces Minimum Roster Requirements for Its 2020 College Football Season*, COVID-19 Protocols, CBS SPORTS (Sept. 18, 2020).

¹⁷⁵ Rajpal, *supra* note 149.

¹⁷⁶ NFLPA Collective Bargaining Agreement 2020, *supra* note 82, including Art. 53, Retirement Plan; Art. 60, NFL Player Disability and Neurocognitive Benefit Plan; Art. 61, Long Term Care Insurance Plan; Art. 62, Gene Upshaw NFL Health Reimbursement Account; Art. 63, Former Player Life Improvement Plan (Section 2-Joint Replacement; Section 5 Spine Treatment Plan).

¹⁷⁷ A former player for the Chicago Bears petitioned under the Illinois Worker’s Compensation Act for “open medical rights” related to progression of an injury incurred during games he played for the team. *Rashied Davis v. Chicago Bears*, 2018 WL 6626117 (Ill. Indus. Com’n). After his career ended, the player was entitled to open medical rights under Section 8(a) of the Act “for any reasonable and related medical expenses relating specifically to neck or cervical spine, subject to review per provisions of the Act.” *Id.* at *2. The Commission also ordered the team to authorize and pay for recommended spinal disc surgery and related medical expenses prospectively.

¹⁷⁸ Michael H. LeRoy, *Harassment, Abuse, and Mistreatment in College Sports: Protecting Players through Employment Laws*, 41 BERKELEY J. OF LAB. & EMP. L. __ (2021), at __ (“NCAA athletes would be eligible for medical treatment, long-term care, partial income replacement, and compensation for physical or psychological impairment under state worker’s compensation laws.”).

¹⁷⁹ Rensing, *supra* note 60, at 1175, where the Indiana supreme court concluded: “Rensing did not receive ‘pay’ for playing football at the University within the meaning of the Workmen’s Compensation Act; therefore, an essential element of the employer-employee relationship was missing in addition to the lack of intent.”

In short, college football players were young adults during the 2020 season who played without any legal representation, and without a student advisory committee that advocated for their safety. These players might pay football related medical costs out of their pockets in the 2030s and beyond for playing during a pandemic in 2020. At this early point for observing COVID-19 effects, several college athletes have died,¹⁸⁰ and a star basketball player suffered a heart attack during a game.¹⁸¹ High school athletes who played in 2020 are also showing signs of heart damage.¹⁸² The better players of this group may play in college— again, without the benefit of an employment relationship, access to worker’s compensation, the ability to form a labor union, and a COVID-19 plan that was inferior to the plan that the NFL and NFLPA bargained.

The best model for allowing these players to form a union is the Railway Labor Act, an early labor law that spans public-sector and private-sector employment and relates to specific industries in rail and air transportation.¹⁸³ This law was passed by Congress because of the singular importance of uninterrupted interstate travel and the need to minimize labor disputes

¹⁸⁰ Lisa Kerns, et al., *Add Covid-Related Myocarditis, Mechanical Ventilation, and Death to This Year’s Football Risks*, STAT. (Nov. 26, 2020) (Jamain Stephens Jr., a defensive lineman for California University of Pennsylvania, died from a blood clot in his heart after contracting COVID-19); and *A Ruthlessly Exploitative College Football Season Finally Draws to a Close*, THE GUARDIAN (Jan. 11, 2021) (Appalachian State University student and basketball player, Chad Dorrill, died from COVID-19).

¹⁸¹ Editorial Board, *Consider Health Risks for College Athletes*, THE GAINESVILLE SUN (Dec. 16, 2020). Keyontae Johnson, a 21 year-old basketball player for the University of Florida, collapsed in a December 2020 game with Florida State and was airlifted to a hospital. He was diagnosed with myocarditis, a heart condition associated with COVID-19 can lead to myocarditis.

¹⁸² Kerns, *supra* note 182 (Mississippi high school football player was hospitalized in critical condition with COVID-19).

¹⁸³ Railway Labor Act of 1926, *supra* note 48.

and disruptions.¹⁸⁴ An industry-specific labor law for major revenue NCAA sports patterned after the RLA could cover public- and private-sector institutions.¹⁸⁵

While my research compares NFL and Power 5 COVID-19 protocols, it sharpens the focus on how college football bends its rules to favor its elites,¹⁸⁶ and amplifies an ideology of ignoring basic health and safety practices.¹⁸⁷ My study documents policy discrepancies for schools within the same conference, a finding that implies that teams did not play by the same COVID-19 rules for football. Schools were free to adopt more rigorous policies; but some discrepancies within a conference could mean that some schools were unable to scale-up COVID-19 protocols, or worse, cut safety corners.

Reinforcing these unsettling possibilities, no policy required schools to report and share information about COVID-19 practices and testing trends with their conference or the NCAA. Nor did a policy reference a requirement to use an outside entity— a conference or the NCAA—

¹⁸⁴ A succinct summary of this law appears in *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239 (1950), at 242:

The first declared purpose of the Railway Labor Act is ‘To avoid any interruption to commerce or to the operation of any carrier engaged therein’ (citation omitted). . . . This purpose extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements. (Citation omitted.) . . . The plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes. Carriers are therefore required to negotiate with bargaining representatives of the employees. (Citation omitted.) The Act also sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail.

¹⁸⁵ Congress appears to have constitutional authority to regulate the NCAA as the Sherman Act applies college athletics. *See in re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub. nom.*, *Alston v. NCAA*, 2020 WL 7366279 (Dec. 16, 2020) (NCAA violated federal antitrust law by limiting compensation student athletes could receive in exchange for their athletic services).

¹⁸⁶ Amy Daughters, *How the Big Ten Changed Its Mind Three Times, and Altered the Outcome of the 2020-21 CFB Season*, *FBSCHEDULES* (Jan. 12, 2021) (describing several flop-flops by the Big Ten in scheduling football games in 2020 and reversing its own rules to allow Ohio State to play for the conference championship).

¹⁸⁷ Kent Babb, *A College Football Coach’s Season at War with the Coronavirus — and His Own School*, *WASH. POST* (Jan. 19, 2021) (Tony Franklin, offensive coordinator for Middle Tennessee State, left school after fighting with the head coach and administration over the necessity of wearing masks to prevent spread of COVID-19).

to monitor schools for COVID-19 policy compliance. Considering the history of cheating in NCAA athletics,¹⁸⁸ this, too, was unsettling.

These unresolved questions underscore a more general benefit of unionization in sports. Players on teams throughout a league are able to have an independent voice to bargain—and then, to enforce— uniform conditions of competition. Ironically, this function of a professional sports union dovetails with the foundational purpose of the NCAA—to foster rules in athletic competitions under conditions of rigid uniformity. Yet, the NCAA’s insistence on maintaining an obsolete ideal of amateurism poorly serves player health while Power 5 money-making teams exploit player safety for the glory of winning.¹⁸⁹ The 2020 football season served as a natural experiment that shed new light on how college football players were shortchanged by laws that prohibit them from forming a labor union.

¹⁸⁸ *The Most Notable College Sports Cheating Scandals*, RANKER.COM (June 23, 2020), at <https://www.ranker.com/list/college-sports-cheating-scandals/swiperight>. The list’s top scandals includes: (1) Louisville’s use of sex workers to entice players to play for a championship team in 2013 (the NCAA took away the title in 2018); (2) Colorado football’s use of sexual escorts to recruit players under Coach Gary Barnett; (3) UNC basketball’s 18-year practice of enrolling players in no-work classes, with little faculty supervision; (4) Oklahoma football’s offers of cars and money to players; (5) University of Miami’s defrauding of federal Pell Grant program to funnel \$220,000 to players; (6) Alabama’s \$200,000 bribe of a high school player as a recruiting inducement; (7) SMU’s payments to football players, resulting in suspension of football for two years at the school; (8) Southwestern Louisiana’s fraudulent grading scheme for football, resulting in a two-year ban of the sport; (9) Kentucky basketball’s point shaving scheme in 1951; and (10) Florida State exam cheating scandal.

¹⁸⁹ See Billy Witz, *With Injury, Justin Fields Is Taking a Big Risk for Ohio State*, N.Y. TIMES (Jan. 19, 2021), discussing a Penn State physician who was removed from the football team after clashing with Head Coach James Franklin over withholding medical information to injured players.