

Traditional Sports and Esports: The Path to Collective Bargaining

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ABSTRACT: Esports is a rising industry that has seen rapid growth in recent years. With an explosion in investment and revenue, competitive leagues have begun to form for most popular esports with lucrative winnings. However, not all players win big, and the existing systems in place for players are often inadequate to protect them from unfair labor practices. This Note examines the current competitive esports landscape and compares it to traditional sports leagues to show that esports players' unions are an attractive option for players to eliminate harsh working conditions and gain a seat at the bargaining table. Examples from the history of traditional players associations show that although there are legal and market constraints on the formation of esports players' unions, eventually, collective bargaining will be a reality in the industry. This Note first highlights relevant labor law issues and antitrust realities of traditional sports. This Note then explores what current esports players endure and how the industry impacts efforts at forming a union. Next, this Note considers the shape and form an esports players' union might take. Finally, this Note argues that a players' union modeled after traditional sports players associations is the best means for players to better their condition, despite antitrust suits and governance structures being available as interim solutions as well.

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I. INTRODUCTION

The sports industry has a new competitor: Esports, which includes a diverse and ever-changing landscape of competitive video games, has become a fast-growing alternative to traditional sports. In 2017, the world championship for League of Legends, one of the most popular esports, had 106 million viewers.¹ That number trailed behind the 2017 Super Bowl's 111 million viewers by only five million.² Compare those viewership numbers with tallies from 2018: League of Legends boasted an impressive peak of 200

1. Christopher Ingraham, *The Massive Popularity of Esports, in Charts*, WASH. POST: WONKBLOG (Aug. 27, 2018, 2:59 PM), <https://www.washingtonpost.com/business/2018/08/27/massive-popularity-esports-charts/?noredirect=on> [https://perma.cc/8R8U-KU3E].

2. Tom Huddleston Jr., *Here's How Many People Watched the Super Bowl*, FORTUNE (Feb. 6, 2017), <http://fortune.com/2017/02/06/super-bowl-111-million-viewers>. The amount of 2017 Super Bowl viewers reflects a decrease from recent years and that the peak viewership for a Super Bowl was in 2015, when the New England Patriots faced the Seattle Seahawks, drawing 114.4 million spectators. *Id.*

million viewers during its world championship,³ but the Super Bowl's viewership declined to only 103.4 million.⁴ While esports competitions are not novel, they have recently grabbed multiple headlines for a variety of reasons besides rising spectator numbers, including lucrative sponsorship deals,⁵ heavy investments from celebrities,⁶ and even an active shooter at a local tournament.⁷ While there is no way to gauge the esports industry's longevity, market experts project that revenue will climb, along with popularity and viewership.⁸

Many readers may be asking a simple question: What are esports? "Oversimplified, esports is competitive video game play. . . . [that] involves head-to-head, real-time competition."⁹ While the rules and intricacies of each video game differ, this basic definition underlies the industry. Traditionally, esports competitions were limited to tournaments.¹⁰ The increasing

3. Xing Li, *Peak Viewership for Worlds 2018 Nearly Doubles from Last Year*, DOT ESPORTS (Dec. 6, 2018, 3:56 PM), <https://dotesports.com/league-of-legends/news/peak-viewership-for-worlds-2018-nearly-doubles-from-last-year> [<https://perma.cc/B93B-AMJM>]. This figure should "be taken with a strong dose of salt," however, as some experts question the accuracy of Chinese viewing numbers. *Id.* According to one source, "the World Championship Finals had roughly [a] 75% increase in viewership [between 2017 and 2018], from 56.7 million to 99.6 million unique viewers." Alan Bernal, *League of Legends: 'By the Numbers' Report Show Huge Spike in Viewership for 2018 World Championship*, DEXERTO (Dec. 12, 2018, 6:13 PM), <https://www.dexerto.com/league-of-legends/league-of-legends-by-the-numbers-report-show-huge-spike-in-viewership-for-2018-world-championship-251639> [<https://perma.cc/B2T4-32ME>]. While the exact viewership numbers may be elusive, there is no doubt that spectatorship is trending upwards.

4. Joe Otterson, *TV Ratings: Super Bowl LII Slips 7% from 2017 to 103.4 Million Viewers*, VARIETY (Feb. 5, 2018, 7:06 AM), <https://variety.com/2018/tv/news/super-bowl-lii-ratings-1202687239> [<https://perma.cc/JVS2-7X2S>].

5. On September 19, 2018, Mastercard became a global sponsor for League of Legends (and its parent company, Riot Games) and the bargain is similar to those Mastercard has with "the Grammy Awards and golf's British Open." Lester Wong, *eSports: Mastercard Comes on Board as Global Sponsor for League of Legends in Multi-Year Deal*, STRAITS TIMES (Sept. 19, 2018, 3:29 PM), <https://www.straitstimes.com/sport/esports-mastercard-comes-on-board-as-global-sponsor-for-league-of-legends-in-multi-year-deal> [<https://perma.cc/85HQ-5TTS>].

6. See Max Miceli, *Michael Jordan Invests in Team Liquid Parent aXiomatic, Joins \$26M Funding Round*, ESPORTS OBSERVER (Oct. 25, 2018), <https://esportsobserver.com/michael-jordan-invests-team-liquid-parent-axiomatic-joins-26m-funding-round> [<https://perma.cc/T5ZP-LWXT>] (discussing recent investments in esports by celebrities).

7. Noah Smith, *'It Was Only a Matter of Time': Security of Esports Events Scrutinized After Jacksonville Shooting*, WASH. POST (Aug. 29, 2018, 4:24 PM), <https://www.washingtonpost.com/news/sports/wp/2018/08/29/it-was-only-a-matter-of-time-security-of-esports-events-scrutinized-after-jacksonville-shooting> [<https://perma.cc/WG7F-EBSP>] (reporting on a shooting in a Jacksonville mall during an esports event). Furthermore, while some competitions are at larger venues and have the security usually expected at those venues, small-scale events often have security lapses. *Id.* One competitor was shot in the thumb as a result of the lax security in Jacksonville. *Id.*

8. Ingraham, *supra* note 1.

9. Aaron D. Lovaas, *Esports: A Whole Different Ball Game*, 26 NEV. LAW., Aug. 2018, at 26, 26 (2018).

10. Andrew Webster, *Why Competitive Gaming Is Starting to Look a Lot Like Professional Sports*, VERGE (July 27, 2018, 10:00 AM), <https://www.theverge.com/2018/7/27/17616532/overwatch>

popularity of esports has led to a new phenomenon: the development of leagues that resemble traditional sports organizations, like Major League Baseball and the National Football League.¹¹

The increasing viability of the esports industry has led to an interesting array of legal questions. Issues of intellectual property,¹² sports betting,¹³ and player doping have all generated scholarship.¹⁴ One area that has not been fully explored, however, is the potential for unionizing esports competitors.¹⁵ Specifically, this Note compares traditional sports unions to the current esports landscape. By examining traditional sports and the development of their player unions, this Note provides context and support to conclude that esports unions are legally possible and are already coming down the pipeline in a way that mirrors traditional player unions.

Part II introduces the relevant background information for this Note. Specifically, Section II.A of this Note addresses labor law's collective bargaining rules under the National Labor Relations Act ("NLRA"). Section II.B describes the traditional sports industry, including the unique application of the Sherman Antitrust Act to the league competition model. Next, Section II.C introduces player unions for traditional sports players, looking at their genesis in the top three leagues as well as the current negotiated terms of the members' collective bargaining agreements. Lastly, Section II.D discusses the rising phenomenon of esports and two of the most popular esports leagues, League of Legends and the Overwatch League.

Part III exposes the existing problems that justify an esports players' union and provides analysis of whether such a union is legally available.

league-of-legends-nba-nfl-esports [https://perma.cc/8gDN-LKCG] ("Most big competitive gaming events . . . are tournaments where teams are either invited or have to qualify to participate.").

11. Ingraham, *supra* note 1.

12. See James Gatto & Mark Patrick, *Overview of Select Legal Issues with eSports*, 6 ARIZ. ST. U. SPORTS & ENT. L.J. 427, 442-45 (2017) (discussing myriad intellectual property issues surrounding esports). See generally Tori Allen, *What's in a Game: Collective Management Organizations and Video Game Copyright*, 8 U. NEV. L.V. GAMING L.J. 209 (2018) (discussing how collective management organizations might be applied to licensing for video games).

13. Gatto & Patrick, *supra* note 12, at 429-42; see also Matthew R. Tsai, Note, *Fantasy (e)Sports: The Future Prospect of Fantasy Sports Betting Amongst Organized Multiplayer Video Game Competitions*, 6 U. NEV. L.V. GAMING L.J. 393, 396-418 (2016) (discussing how traditional sports betting laws and structure affect esports).

14. See generally Colby Stivers, Comment, *The First Competitive Video Gaming Anti-Doping Policy and Its Deficiencies Under European Union Law*, 18 SAN DIEGO INT'L L.J. 263 (2017) (discussing anti-doping policy in esports).

15. See generally Timothy Heggem, "It's Complicated": *Analyzing the Potential for Esports Players' Unions*, 6 ARIZ. ST. U. SPORTS & ENT. L.J. 447 (2017) (identifying many reasons why a union for professional esports players could be denied status); Hunter Amadeus Bayliss, Note, *Not Just a Game: The Employment Status and Collective Bargaining Rights of Professional ESports Players*, 22 WASH. & LEE J.C.R. & SOC. JUST. 359 (2016) (providing an analysis of what counts as an employee under California law and federal law to determine if League of Legends professional players can qualify for unionization).

Section III.A shows that esports player conditions create an extremely demanding work environment, similar to those of traditional sports. Further, Section III.B discusses the bargaining power disparity between players, teams, and game developers that creates strained employer–employee relationships. Given these conditions and the huge amount of control game developers have over the viability of professional competition, Part III ultimately shows that players need additional protections through a collective bargaining agreement. Section III.C analyzes the obstacles facing esports players’ union efforts, including players’ employee status, the bargaining unit issue, various contractual constraints, and unique market conditions that may dissuade players from pursuing union status.

In Part IV, this Note recommends following the path of traditional sports leagues to develop players’ unions. While other alternatives do exist, none are as effective at representing players’ interests to the same extent or provide the same level of bargaining power as a traditional league-modeled players’ union. Esports players can follow the examples of traditional professional sports players’ unions to improve conditions for all esports league competitors.

II. BACKGROUND

Before delving into the esports players’ unions issue, some basic background on unions, traditional sports, and esports is necessary, and this Part examines each in turn. First, Section II.A briefly examines the purpose of collective bargaining and the NLRA’s various provisions that govern labor law’s protections and requirements. This includes a discussion of how unions are formed under the NLRA and what kinds of benefits inure to union members. Next, Section II.B explores the traditional sports industry, focusing on the structure of the league model and how that model interacts with antitrust law, which makes professional leagues possible. Section II.C looks at how unions developed in three of the biggest sports leagues, highlighting player conditions and market constraints that led to the need for collective bargaining. Also included is a brief description of the current bargaining agreements between ownership and players. Lastly, Section II.D explains the rise of the esports industry and its similarities to traditional sports. Special focus is given to two of esports’ biggest competitors, League of Legends and Overwatch, which both follow the same league model as traditional professional league sports.

A. COLLECTIVE BARGAINING & DEVELOPMENT OF UNIONS UNDER THE
NATIONAL LABOR RELATIONS ACT

Labor law has a long and detailed story,¹⁶ which can be summarized as a struggle between capitalist employers trying to maximize profits and the efforts of workers to gain rights against exploitation. Modern labor law was born as a byproduct of the Industrial Revolution, which created greater competition between employers and ultimately led to worse conditions for employees.¹⁷ Workers struggled to improve their treatment under oppressive employment regimes, often resulting in a great deal of conflict¹⁸ and substantial disruptions in commerce.¹⁹ After a long battle for recognition,²⁰ labor law found its ultimate champion in the NLRA, a product of the New Deal, which is still standing today.²¹ So, what does the NLRA do?

At the most basic level, “[t]he NLRA establishe[s] employee rights to organize, join unions, and engage in collective bargaining.”²² The NLRA puts forward “the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . when they have occurred by encouraging the practice and procedure of collective bargaining.”²³ In effect, the NLRA regulates both employers and organized labor groups in an attempt to streamline conflicts by protecting employee and employer rights, minimizing harms and maximizing commerce.²⁴ The NLRA has been supplemented by amendments, as well as other statutory schemes,

16. For an excellent, concise history of labor law, see WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW* 9–75 (5th ed. 2013). See also generally REGINALD PARKER, *A GUIDE TO LABOR LAW: BASIC FACTS, QUESTIONS AND ANSWERS, PERTINENT STATUTES* (1961) (discussing the development of labor law in mid-twentieth century America).

17. See GOULD, *supra* note 16, at 9.

18. For a quick listing of deadly conflicts, see Miss Cellania, *6 Deadly Labor Disputes*, MENTAL FLOSS (Sept. 6, 2015), <http://mentalfloss.com/article/68180/6-deadly-labor-disputes> [<https://perma.cc/WBS9-N3AW>].

19. See Melanie Hicken, *The Most Expensive Strikes in History*, BUS. INSIDER (Feb. 29, 2012, 11:58 AM), <https://www.businessinsider.com/the-most-expensive-strikes-in-history-2012-2> [<https://perma.cc/23NP-DSSG>] (discussing seven strikes that ground commerce to a halt).

20. In its infancy, organized labor was treated as a criminal conspiracy in the United States. See GOULD, *supra* note 16, at 9 (citing *Commonwealth v. Pullis* (*The Philadelphia Cordwainer's Case*), Mayor's Court of Philadelphia (1806), as reported in 3 *A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY: LABOR CONSPIRACY CASES, 1806–1842*, at 59 (John R. Commons & Eugene A. Gilmore eds., 1910)). Some years into the future, organized labor continued to gain traction but was then targeted under the Sherman Antitrust Act. See *id.* at 14 (citing *Loewe v. Lawlor*, 208 U.S. 274 (1908)). Congress thereafter shifted policy on unions, attempting to legitimize organized labor by passing the Clayton Act, but was ultimately thwarted by the Supreme Court in *Duplex Printing Press Co. v. Deering*. See *id.* at 17 (citing *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921)). The implications of the Sherman Antitrust Act are explored further in Section II.B.

21. *Id.* at 35–38; see National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2012).

22. BRUCE S. FELDBACKER & MICHAEL J. HAYES, *LABOR GUIDE TO LABOR LAW* 3 (5th ed. 2014).

23. 29 U.S.C. § 151.

24. See *id.* §§ 151–169.

to achieve this purpose.²⁵ The National Labor Relations Board (“NLRB”) is the agency which enforces and adjudicates its provisions.²⁶ The NLRA thus provides the necessary statutory framework for legal collective bargaining, but to qualify for its protections, laborers and employers must operate within prescribed boundaries.

One of these threshold questions is whether workers fit the definition of “employees” under the NLRA.²⁷ Under Section 152(3) of the NLRA, “[t]he term ‘employee’ shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family . . . or any individual having the status of an independent contractor.”²⁸ To determine whether a laborer is an employee, the Supreme Court has held that the common law definition of employee must be used.²⁹ Therefore, “[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished.”³⁰ However, as a matter of agency expertise, the Court has noted that “the [NLRB]’s construction of that term is entitled to considerable deference.”³¹ As a result, the NLRA has expanded “employee” to be “more than the technical and traditional common law definition[.]”³² Ultimately, the NLRB must

25. See, e.g., FELDBACKER & HAYES, *supra* note 22, at 3–5 (describing the Taft–Hartley Amendment, the Landrum–Griffin Act, and the Health Care Amendments); Jonathan Fox Harris, Note, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA’s Future*, 13 N.Y.C. L. REV. 107, 107–09 (2009) (discussing how the Fair Labor Standards Act, passed in 1938, contributed to efforts to stabilize labor efforts by setting minimum salaries for industry).

26. See 29 U.S.C. § 153; see also *id.* § 156 (giving the NLRB “authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this subchapter”).

27. See *id.* § 157; see also *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89 (1995) (“[NLRA] rights belong only to those workers who qualify as ‘employees’ as that term is defined in the Act.”).

28. 29 U.S.C. § 152(3).

29. *Town & Country Elec., Inc.*, 516 U.S. at 92–95.

30. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) (“Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. . . . No one of these factors is determinative.” (footnotes omitted) (citation omitted)).

31. See *Town & Country Elec., Inc.*, 516 U.S. at 94 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 881, 891 (1984)) (stating that the lack of clear definition of “employee” within the NLRA necessitates deference to the NLRB in construing that term, so long as that construction is reasonable and “consistent with the common law”).

32. See *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947) (“[T]he Board, in performing its delegated function of defining and applying these terms, must bring to its task an appreciation

determine that a laborer falls within that modified definition for NLRA protections to inure to worker conditions.

While not all workers qualify for protections under the NLRA, workers determined to be employees enjoy substantial benefits. Section 7 of the NLRA states that

[e]mployees 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 for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [S]ection 158(a)(3) of this title.³³

The NLRA leveled the playing field between employees and employers by giving employees the right to create and join (or not join) labor organizations, which can then bargain on their behalf or take part in concerted activities (such as demonstrations or strikes).³⁴ Though employees gain many rights by collective bargaining, the NLRA's true strength lies within Section 8, which regulates unfair labor practices by both employers and employees.

For employers under Section 8, these unfair labor practices include: interfering with Section 7 rights, controlling or supporting a labor organization, discriminating against labor organization members in hiring or firing, and failure to bargain with representatives.³⁵ According to the NLRB, this means “[f]or example, employers may not respond to a union organizing drive by threatening, interrogating, or spying on pro-union employees, or by promising benefits if they forget about the union.”³⁶ For employees and unions, unfair labor practices include: interfering with Section 7 rights, causing discrimination against non-union members, and failure to bargain with the employer.³⁷ Any Section 8 violation can result in remedies to the

of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute.”).

33. 29 U.S.C. § 157.

34. See GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 518 (4th ed. 2010).

35. 29 U.S.C. § 158(a).

36. *Interfering with Employee Rights (Section 7 & 8(a)(1))*, NLRB, <https://www.nlr.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1> [<https://perma.cc/PQC3-S8U8>].

37. 29 U.S.C. § 158(b).

injured party.³⁸ The NLRB is tasked with enforcing penalties and preventing Section 8 violations.³⁹

Another important function of the NLRB is deciding whether a group of employees makes up an appropriate bargaining unit. “[I]n order to assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof”⁴⁰ This determination consists of a balancing of many factors,⁴¹ but the main condition sought is “a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group.”⁴² Similar to employee status determinations, the NLRB determination of an appropriate bargaining unit “is accorded broad discretion” by the courts.⁴³ The community of interest standard “serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit.”⁴⁴

38. “If an employer is found to have breached any Section 8(a) articles, there are six possible remedies: (1) back pay; (2) reinstatement; (3) bargaining order; (4) rerun election; (5) cease and desist order; (6) injunctive relief.” WONG, *supra* note 34, at 519. “If a labor organization is found to have breached any of the articles in Section 8, there are five possible remedies: (1) injunctive relief; (2) bargaining order; (3) cease and desist order; (4) damages; (5) disestablishment of the union or withdrawal of recognition.” *Id.*

39. See 29 U.S.C. § 160(a) (establishing the powers of the NLRB “to prevent any person from engaging in any unfair labor practice . . . affecting commerce”).

40. *Id.* § 159(b).

41. PCC Structurals, Inc., 365 N.L.R.B. No. 160, 2017 WL 6507219, at *5–6 (2017) (stating that the determination “requires the Board to assess ‘whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised’” (quoting United Operations, Inc., 338 N.L.R.B. 123, 123 (2002))).

42. *Id.* at *6.

43. Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 171 (1971).

44. *Id.* at 172–73.

There are several ways for employees to form a union,⁴⁵ but once formed and certified, the union and the employer must negotiate.⁴⁶ The topics that must be negotiated are “wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder.”⁴⁷ If the employers and employees disagree on these “mandatory” elements of an agreement, “[o]ne side may threaten a strike or lock-out potentially causing significant financial harm to force the other party to agree.”⁴⁸ Once the parties reach a final agreement, union members ratify that agreement to create a binding collective bargaining agreement (“CBA”).⁴⁹ Although there is plenty more to learn about labor law, these basics are enough to move on to a quick study of the sports industry, including a foray into how antitrust and labor law interact in that unique market.

B. THE SPORTS INDUSTRY AS A CASE STUDY

In 2010, the United States sports industry was valued at over \$213 billion⁵⁰ and a major part of that value comes from professional sport leagues.⁵¹ While the sports industry can be divided into six activity groups, this Note focuses primarily on professional sport leagues.⁵² The professional sport

45. To bargain on behalf of workers, the labor union needs to be recognized by the employer and receive certification. WONG, *supra* note 34, at 524. Typically, one of the hardest steps in unionizing is the initial process of finding employees with a common set of interests for collective bargaining. See Heggem, *supra* note 15, at 450. In order to be certified, there needs to be an NLRB election, voluntary recognition by the employer, or board-ordered recognition without election. WONG, *supra* note 34, at 524. An NLRB election can occur if 30 percent of workers have declared an intent to unionize, leading to an election requiring more than half of workers voting to unionize for success. *Id.* Alternatively, the potential union may have enough support from workers that the employer decides to forego this technical process, and the employer can voluntarily recognize the union. *Id.* For the biggest traditional sports leagues, employer recognition was the means followed to reach certification. See *id.* at 525. If the NLRB believes that the union has enough support, it can also order recognition without an election. *Id.* at 524.

46. 29 U.S.C. § 158(d) (2012).

47. *Id.* These required bargaining items include “[r]ate and method of pay . . . [w]ork rules, discipline, drug testing . . . [s]afety . . . [g]rievance and arbitration procedures . . . [h]ealth insurance, pensions, and layoff compensation.” WONG, *supra* note 34, at 527 exhibit 11.1.

48. WONG, *supra* note 34, at 527. In contrast, “[p]ermissive subjects are topics that may be bargained at the table if both sides are willing to do so, but if one side does not want to discuss a permissive topic, it is not required to do so.” *Id.*

49. *Id.* at 528.

50. *Id.* at 3.

51. See T.J. Mathewson, *TV Is Biggest Driver in Global Sport League Revenue*, GLOBALSPORT MATTERS (Mar. 7, 2019), <https://globalsportmatters.com/business/2019/03/07/tv-is-biggest-driver-in-global-sport-league-revenue> [<https://perma.cc/SK4X-4X4D>].

52. WONG, *supra* note 34, at 2. Those six groups consist of (1) professional sport leagues, (2) intercollegiate athletics, (3) the Olympics, (4) interscholastic athletics, (5) public/private associations for professional and recreational sports, and (6) facilities, agency firms and media. *Id.* at 2–3. It may be of interest that esports has also begun spreading into intercollegiate athletics. See Sean Morrison, *List of Varsity Esports Programs Spans North America*, ESPN (Mar. 15, 2018),

leagues can be broken down into two distinct subgroups: the “Big Four,” comprised of the National Basketball Association (“NBA”), the National Football League (“NFL”), the National Hockey League (“NHL”), and Major League Baseball (“MLB”), and the single-entity leagues, which includes Major League Soccer (“MLS”) and the Women’s National Basketball Association (“WNBA”).⁵³ The organizational differences between the Big Four and the single-entity leagues are important, but their competitive structure is the same.

The structure of each of these professional leagues follows a general franchising model, which allows for regional market monopolies.⁵⁴ Each league is made up of a set number of teams, dictated by the league’s rules, so that new competitors are disallowed from joining except under specific conditions.⁵⁵ Most of these teams are owned by private entities, “including sole proprietorships, partnerships, and corporations.”⁵⁶ While there are rules put in place by the league to maintain fair competition, the “teams may compete against one another as rival companies, just as they would in any other business.”⁵⁷ A large proportion of income for professional sports teams comes from broadcasting contracts and sponsorship deals, but they also benefit from regular attendance by fans and from selling merchandise.⁵⁸ In contrast to the Big Four, single-entity leagues allow for operator-investors instead of team owners, which allows for a single entity to control more than one team (and often, all the teams; hence, the namesake).⁵⁹ Additionally, instead of having teams sign players directly, the league itself has a direct contract with players, who are then assigned to a team.⁶⁰

One important legal aspect of these professional leagues is their existence in spite of the Sherman Antitrust Act. Originally passed in 1890, the Sherman Antitrust Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among

http://www.espn.com/esports/story/_/id/21152905/college-esports-list-varsity-esports-programs-north-america [<https://perma.cc/C428-4VMA>]. Additionally, there have been efforts to include esports in Olympic competition. See David Bloom, *What Olympic Recognition Could Mean for Esports, and Vice Versa*, FORBES (Oct. 18, 2018, 3:23 PM), <https://www.forbes.com/sites/dbloom/2018/10/18/esports-olympics-recognition-ioc-esl-advertising-sponsors> [<https://perma.cc/2ZEU-Z2MG>].

53. WONG, *supra* note 34, at 2.

54. See *id.* at 456. It should be noted that some leagues do allow for more than one franchise within a region. A clear example of this comes from the NBA: The Los Angeles Lakers and the Los Angeles Clippers clearly share regional market space.

55. See *id.* at 466.

56. *Id.* at 4.

57. *Id.*

58. See *id.* at 6–13. As the reader is probably aware, teams offer tickets at a variety of price points, with the most desirable and sought-after seats or experiences going for premium rates. *Id.* at 10. Season tickets, for example, are often a lucrative marketing scheme for teams. *Id.*

59. *Id.* at 15.

60. *Id.*

the several States, or with foreign nations, is declared to be illegal.”⁶¹ According to Justice Stevens, “[t]he basic premise underlying the Sherman Act is the assumption that free competition among business entities will produce the best price levels.”⁶² While many league rules and activities constitute a constraint on commerce, they do not generally fall victim to the Sherman Antitrust Act because of their unique need for cooperation.⁶³ “When ‘restraints on competition are essential if the product is to be available at all,’ *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.”⁶⁴ As a result of that analysis, professional leagues are often allowed to enter into agreements that would normally run afoul of the Sherman Antitrust Act.

To a keen observer, it should be apparent that labor and antitrust principles are at odds with one another. While Congress attempted to statutorily rectify these competing principles, the Supreme Court ultimately invented the nonstatutory labor exemption to protect collective bargaining agreements from antitrust attacks.⁶⁵ That protection extends “to parties within the bargaining relationship and to matters of fundamental employee

61. 15 U.S.C. § 1 (2012).

62. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 252 (1996) (Stevens, J., dissenting).

63. As stated by Justice Stevens:

Football teams that need to cooperate are not trapped by antitrust law. . . . The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions.

Am. Needle, Inc. v. NFL, 560 U.S. 183, 202 (2010) (citation omitted). “As Judge Bork has noted: ‘[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.’” *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984) (alteration in original) (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX* 278 (1978)); *see also* *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (“Joint ventures and other cooperative arrangements are also not usually unlawful . . . where the agreement . . . is necessary to market the product at all.”).

64. *Am. Needle, Inc.*, 560 U.S. at 203 (quoting *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 101). The *per se* rule and the Rule of Reason have been described as “two complementary categories of antitrust analysis.” *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978). “*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.” *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 103–04.

Under [the rule of reason], the plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition. If the plaintiff meets this burden, the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct. If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner.

Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998) (citations omitted).

65. Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1046–59 (1994).

interest.”⁶⁶ In *Mackey v. National Football League*, a court applied the nonstatutory labor exemption to professional sports for the first time.⁶⁷ In *Brown v. Pro Football, Inc.*, the Supreme Court further extended the exemption’s applicability by holding that it applied even after collective bargaining agreements expire.⁶⁸ These developments allow for the professional leagues to exist as they do today. Now, this Note examines the culmination of these legal principles: the players associations.

C. PLAYERS ASSOCIATIONS

A players association denotes the general term for unions in the realm of sports. All the professional leagues have players associations to represent members’ interests. “Beyond their primary responsibility of negotiating and administering the league collective bargaining agreement, players associations also work with players who have filed for grievance arbitration, as per the collective bargaining agreement, with the league.”⁶⁹ When collective bargaining agreements fail, players have resorted to strikes, which have led to significant game cancellations.⁷⁰ These cancellations have included an entire season of professional football and a World Series in professional baseball.⁷¹

Prior to players associations and the collective bargaining agreements they create, “the member clubs enjoy[ed] a monopsony control, a buyers’ monopoly, over their employees.”⁷² Players were subject to blacklisting, nonnegotiable contract terms, and poor working conditions.⁷³ Despite these factors, several legal writers of the time believed that professional sport unions were “neither feasible nor practical.”⁷⁴ Those conclusions stemmed from several views. One was the fact that professional sports was “an industry of ‘stars,’” where individualism reigned in contract negotiations.⁷⁵ Another factor was the belief “that many athletes are not solely motivated by the profit motive,” such “that the athletes themselves do not feel a need for a union.”⁷⁶ Additionally, some believe that players had brief careers that were too “migratory and seasonal” for labor union formation.⁷⁷ The following brief history of the development of players associations in baseball, basketball, and

66. *Id.* at 1052.

67. *Mackey v. NFL*, 543 F.2d 606, 611–12 (8th Cir. 1976).

68. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 244–50 (1996).

69. WONG, *supra* note 34, at 585.

70. See Ryan T. Dryer, Comment, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 270–71, 281–82.

71. *Id.*

72. Erwin G. Krasnow & Herman M. Levy, *Unionization and Professional Sports*, 51 GEO. L.J. 749, 754 (1963).

73. *Id.* at 750–59 (discussing the many issues that players faced).

74. *Id.* at 759.

75. *Id.* at 759–60.

76. *Id.* at 760.

77. *Id.* at 761.

football highlights the challenges that players encountered along the path to unionizing.

1. Major League Baseball and Major League Baseball Players Association

The first professional sports players' union started in baseball. It began as an attempt to improve players' working conditions and to combat the disparity between player and owner bargaining power.⁷⁸ Although there were many reasons for players to pursue collective bargaining, one of the most egregious reasons players sought collective bargaining was because they were subject to a reserve system.⁷⁹ "The reserve system was first a secret 'gentleman's agreement' among owners that provided a list of five players on each team to be protected and reserved for the owner of each team."⁸⁰ The reserve clause allowed owners to set players' salaries at the time of contract renewal and, if a player refused to comply, he could be forced to retire by the owner.⁸¹ The owners' control over players prevented high player salaries by restricting player movement to new teams as well.⁸² Additionally, "owners had no qualms about openly blacklisting any player who protested the terms of his contract or tried to negotiate better terms with another club."⁸³

Players, unhappy with these monopolistic activities, began organizing to strengthen their position. The first players' union formed as the Brotherhood of Professional Baseball Players in 1887.⁸⁴ Unfortunately, the union was short-lived and ultimately failed.⁸⁵ In 1946, players of the Pittsburgh Pirates formed the American Baseball Guild, a single team-based union that ultimately folded that same year.⁸⁶ However, "after decades of life under the thumb of the owners, and with frustration boiling over as salaries stagnated and working conditions deteriorated,"⁸⁷ the Major League Baseball Players Association

78. For a detailed history of MLB unionization efforts, see generally KRISTER SWANSON, *BASEBALL'S POWER SHIFT: HOW THE PLAYERS UNION, THE FANS, AND THE MEDIA CHANGED AMERICAN SPORTS CULTURE* (2016).

79. Dryer, *supra* note 70, at 268.

80. *Id.*

81. *Id.*

82. SWANSON, *supra* note 78, at 8. "The clause placed each player in a one-bidder system when it came time to negotiate his salary for the upcoming season. The only factor that prevented a club from paying a player more than mere subsistence wages was the desire to keep the player relatively happy." *Id.*

83. *Id.* at xi–xii.

84. WONG, *supra* note 34, at 534.

85. The Brotherhood of Professional Baseball Players lasted until 1891 but was reestablished briefly from 1900 to 1902. *Id.*

86. *Id.*

87. Zachary Moser, *The History of the MLBPA, Part One: The Rise of Sports' Strongest Union, SB NATION: BEYOND THE BOX SCORE* (Feb. 16, 2017, 1:00 PM), <https://www.beyondtheboxscore.com/2017/2/16/14151448/mlbpa-history-rise-curt-flood-bowie-kuhn-marvin-miller> [<https://perma.cc/D93E-CCHW>].

(“MLBPA”) formed in 1953.⁸⁸ At first, the MLBPA struggled to achieve any meaningful gains for players and failed as a union, in large part due to the failings of its representative, Robert Cannon. Cannon, representative from 1959–1965, was more concerned with pleasing owners than with representing players.⁸⁹ At that time, the MLBPA was funded by MLB itself, preventing it from being recognized as a union under the NLRA.⁹⁰ While the MLB subsidized the MLBPA, the MLBPA had only managed “to negotiate a meager pension plan.”⁹¹ To strengthen their position, players looked for a new representative and found Marvin Miller, who described baseball players as “the most exploited group of workers I had ever seen—more exploited than the grape pickers of Cesar Chavez.”⁹² In an effort to undercut players’ efforts, owners removed the subsidy provided to the MLBPA. Miller, however, capitalized on this development to file for union certification.⁹³ After hiring Marvin Miller to represent the players from 1966 until 1982, the MLBPA took off and quickly gained formal certification under the NLRA.⁹⁴

Today, the MLBPA and MLB’s CBA is seen as one of the strongest in the United States but the original CBA was quite modest.⁹⁵ It only set a minimum salary for players of \$10,000 and established a procedure for resolving disputes by having the Commissioner arbitrate.⁹⁶ In 1970, renegotiations led to a \$5,000 minimum salary increase and a new optional procedure for dispute resolution which operated outside of the Commissioner’s purview.⁹⁷

88. WONG, *supra* note 34, at 534.

89. Al Neal, *Thanks, MLBPA and Marvin Miller: 50 Years Since First Pro Sports Union Contract*, PEOPLE’S WORLD (June 13, 2018, 3:14 PM), <https://www.peoplesworld.org/article/thanks-mlbpa-and-marvin-miller-50-years-since-first-pro-sports-union-contract> [https://perma.cc/4S3F-SSQP]; see also SWANSON, *supra* note 78, at 99–110 (describing how Robert Cannon was more concerned with pleasing the owners as opposed to looking out for the best interest of the players).

90. Moser, *supra* note 87 (“The new MLBPA head’s first move was to maneuver around the owners’ revocation of their previous subsidization of the association. Subsidization by management was illegal, and the owners sought to pull the rug out from under the union by stopping payment before a new financial structure could be implemented, effectively leaving Miller without a contract and forcing the players to negotiate headlessly [sic]. Miller, however, saw it as an opportunity to bring MLB and the union under the applicable federal labor laws, most notably the Wagner Act and Taft-Hartley Act, whereas organized baseball had previously flouted such legal mandates.”). Under Section 8 of the NLRA, an employer cannot support its labor organization. 29 U.S.C. § 158(a)(2) (2012).

91. Moser, *supra* note 87.

92. *Id.*

93. *Id.*

94. See *id.*

95. *Id.* A copy of the current MLBPA collective bargaining agreement is available at *Collective Bargaining Agreement*, MLB PLAYERS, <https://www.mlbplayers.com/cba> [https://perma.cc/ER87-R85S].

96. Dryer, *supra* note 70, at 269.

97. *Id.*

The most recent CBA sets a minimum salary of \$535,000 for 2017, with increases set for each subsequent year.⁹⁸ Also included is a salary arbitration process,⁹⁹ expense allowance provisions,¹⁰⁰ termination pay provisions,¹⁰¹ disciplinary protections,¹⁰² safety and health provisions,¹⁰³ a revenue sharing plan,¹⁰⁴ and many other agreed-upon provisions. A uniform player contract is attached,¹⁰⁵ player expectations are established,¹⁰⁶ and management rights are set forward.¹⁰⁷

2. National Basketball Association and National Basketball Players Association

In the NBA, the National Basketball Players Association (“NBPA”) was formed in 1954, but did not reach formal status as a recognized union until 1964, after several prominent players threatened to strike and boycott the 1964 All-Star game.¹⁰⁸ Initially, unionization efforts were led by Boston Celtics star player Bob Cousy, the first president of the NBPA (president from 1954–1958).¹⁰⁹ Prior to the union’s existence, “[t]here was no pension plan, no per diem, no minimum wage, no health benefits and the average player salary was \$8,000.”¹¹⁰ Initially, the NBA would not even agree to meetings with the NBPA, but slowly came to terms with the fact that its players would be unionizing.¹¹¹ In 1964, the CBA gave players “an eight dollar per diem and a pension plan.”¹¹² The NBPA has renegotiated the CBA several times with the NBA to gain additional player protections.¹¹³ In 1976, the Robertson Settlement Agreement resulted in an altered draft and a new right of first refusal for players, but most importantly, it removed reserve and option

98. MLB PLAYERS ASS’N, 2017–2021 BASIC AGREEMENT 11–12 (2016), available at https://www.dol.gov/OLMS/regs/compliance/cba/2019/private/30MajorClubs_K9831_060122.pdf [<https://perma.cc/ZK62-TP3L>].

99. *Id.* at 18–23.

100. *Id.* at 24–34.

101. *Id.* at 36–38.

102. *Id.* at 51–55.

103. *Id.* at 55–65.

104. *Id.* at 130–49.

105. *Id.* at 337–54.

106. *Id.* at 152–53.

107. *Id.* at 105.

108. WONG, *supra* note 34, at 533.

109. Dryer, *supra* note 70, at 274.

110. *About & History*, NAT’L BASKETBALL PLAYERS ASS’N, <https://nbpa.com/about> [<https://perma.cc/7RGS-UWSA>].

111. *Id.*

112. Dryer, *supra* note 70, at 275.

113. See WONG, *supra* note 34, at 533. A copy of the NBPA’s collective bargaining agreement is available at *Collective Bargaining Agreement (CBA)*, NAT’L BASKETBALL PLAYERS ASS’N, <https://nbpa.com/cba> [<https://perma.cc/6E54-2JB9>].

clauses which prevented player mobility.¹¹⁴ In addition, players have used antitrust lawsuits to push for stronger bargaining positions.¹¹⁵

The current CBA between the NBA and NBPA provides many protections to both players and owners. The minimum player salary in the current CBA is \$815,615.¹¹⁶ There are compensation protections,¹¹⁷ extensive player pension and post-career income benefits,¹¹⁸ and player conduct expectations.¹¹⁹ Unlike the MLB CBA, there is a maximum player salary and a salary cap that helps owners.¹²⁰ These caps signify a stronger owner bargaining position.¹²¹ Additionally, players are prevented from striking, lock-outs, or concerting contract breaches.¹²²

3. National Football League and National Football League Players Association

For the NFL, the National Football League Players Association (“NFLPA”) was created in 1956, but only gained prominence and efficacy after 1967.¹²³ At the time of the NFLPA’s formation, “players had virtually no bargaining power, and although several proposals, such as a minimum salary requirement, were made to the owners, those proposals were likely not even considered.”¹²⁴ In 1963, “[t]he average football player’s career extend[ed] from four to five years.”¹²⁵ Players went on strike in 1968.¹²⁶ The players threatened another strike in 1970, which led to an agreement that “solidified the NFLPA as an established entity and formidable bargaining force” and “provid[ed] for a minimum wage and an improved pension and insurance plan.”¹²⁷ Despite reaching an agreement, the “NFL players fought for increased benefits and increased player mobility in the courts and on the

114. Dryer, *supra* note 70, at 275.

115. *Id.*

116. See NAT’L BASKETBALL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT 32–35, ex. C (2017), available at <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [<https://perma.cc/5LVC-MSHQ>] [hereinafter NBA CBA].

117. See *id.* at 22–32 (enumerating compensation protections for lack of skill, death, injury or illness, and mental disability).

118. See *id.* at 67–82, 92–99.

119. See *id.* at 116–24.

120. See *id.* at 35–43, 159–66. “[T]he NBA was the first professional sports league to establish a salary cap.” Dryer, *supra* note 70, at 276.

121. However, the salary cap required owners to share league revenue with the players. See *id.* at 275. Thus, the salary cap came at a huge price for owners as the sharing of league revenue was a significant release of funds.

122. NBA CBA, *supra* note 116, at 390.

123. WONG, *supra* note 34, at 531.

124. Dryer, *supra* note 70, at 281.

125. Krasnow & Levy, *supra* note 72, at 753 n.12.

126. WONG, *supra* note 34, at 531.

127. Dryer, *supra* note 70, at 281.

picket line.”¹²⁸ Several strikes occurred over the following decade, and several antitrust cases provided greater bargaining power for players.¹²⁹

Like the CBA for the MLB and the NBA, the NFL CBA aims to protect both players and owners. The 2018 minimum salary for players during the regular season is between \$480,000 and \$1,015,000.¹³⁰ There are “No Strike/Lockout” and “No Suit” provisions to prevent players and owners from work stoppages during the CBA’s effect.¹³¹ However, there are uniform contracts attached which must be used, as well as player conditions that must be met to qualify for portions of salary payment.¹³² Draft procedure and rookie compensation are covered,¹³³ as well as free agency conditions.¹³⁴ There is a guaranteed amount of revenue sharing for players and owners, as well as a salary cap.¹³⁵ The CBA also has arbitration requirements for disputes within certain Articles of the CBA.¹³⁶ Additionally, there are provisions on minicamps, preseason training, and practices for set working conditions.¹³⁷

D. THE ESPORTS INDUSTRY

Even though the esports industry is quite distinct from the traditional sports industry, esports share many similarities with traditional sports and may be considered an offshoot branch of the larger entertainment industry. While online gaming has been available for quite some time, the 1997 “Red Annihilation tournament . . . is widely considered by gamers as the first

128. WONG, *supra* note 34, at 531.

129. *Id.* See generally *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (holding that nonstatutory labor exemption extends beyond impasse); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (holding that the player draft ran afoul of Sherman Antitrust Act); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (holding that while nonstatutory labor exemption applies, the NFL’s “Rozelle Rule” still violated the Sherman Antitrust Act).

130. NFL & NFL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT AS AMENDED THRU JANUARY 2015, at 150 (2011), available at <https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/2011%20CBA%20Updated%20with%20Side%20Letters%20thru%201-5-15.pdf> [<https://perma.cc/X379-K4TJ>].

131. *Id.* at 7 (“[N]either the NFLPA nor any of its members will engage in any strike, work stoppage, or other concerted action interfering with the operations of the NFL or any Club for the duration of this Agreement, and no Clubs, either individually or in concert with other Clubs, will engage in any lockout for the duration of this Agreement. . . . The NFLPA agrees that neither it nor any of its members, nor agents acting on its behalf, nor any member of its bargaining unit, will sue, or support financially or administratively, or voluntarily provide testimony or affidavit in, any suit against the NFL or any Club with respect to any claim relating to any conduct permitted by this Agreement, or any term of this Agreement . . .”).

132. See *id.* at 9–15.

133. See *id.* at 17–35.

134. See *id.* at 37–45.

135. See *id.* at 63–91.

136. See *id.* at 116–19.

137. See *id.* at 141–48.

iteration of esports.”¹³⁸ Although a relative newcomer to mainstream attention, the esports industry has had rising revenue for several years now, reaching a projected value of \$900 million in 2018.¹³⁹ While new, it is clear that esports now makes up a promising component of the entertainment industry that competes directly with the traditional sports industry for viewership.

For several reasons, the esports industry is unique compared to the traditional sports industry. First, there are different games involved,¹⁴⁰ separate platforms for the games to be played upon,¹⁴¹ and many different leagues.¹⁴² Second, team organizations involved in esports tend to field competitors in multiple esports,¹⁴³ meaning they employ professional players with unique skillsets especially suited to distinct competitions. Third, game

138. Al Neal, *The Esports Union Revolution Is Coming*, GRANDSTAND CENT. (Aug. 4, 2018), <https://grandstandcentral.com/2018/sports/esports/esports-union-is-coming> [<https://perma.cc/U23U-8V3T>]. By 2016, roughly 162 million viewers regularly tuned into esports and another 131 million nonregular viewers watch competitions. *Id.* (indicating slight increase in viewers that watched the 2016 Super Bowl); cf. Otterson, *supra* note 4 (indicating 103.4 million viewers watched the 2018 Super Bowl).

139. Trefis Team & Great Speculations, *How Much Can the eSports Market Grow in 2018?*, FORBES (July 11, 2018, 1:36 PM), <https://www.forbes.com/sites/greatspeculations/2018/07/11/how-big-can-esports-grow-in-2018> [<https://perma.cc/RGM5-63TC>].

140. See *Top Games Awarding Prize Money*, ESPORTS EARNINGS, <https://www.esports-earnings.com/games> [<https://perma.cc/N8HM-C4Z8>] (showing a non-exhaustive list of esports games that players compete in). As of January of 2020, the top esports games of 2020 ranked by prize pool have been: (1) Dota 2, (2) Counter-Strike: Global Offensive, (3) Fortnite, (4) League of Legends, and (5) Starcraft II. *Id.*

141. See Jeff Dunn, *Here Are the Most Popular Platforms for Video Game Developers*, BUS. INSIDER (Mar. 15, 2017, 4:35 PM), <https://www.businessinsider.com/most-popular-game-platforms-developers-chart-2017-3> [<https://perma.cc/P7BL-DBNM>] (noting the three traditional major platforms are PC/Mac, Sony’s PlayStation, and Microsoft’s Xbox). It should also be noted that each platform supports games that the other platforms do not, termed “exclusives.” *Exclusives*, GEMATSU, <https://www.gematsu.com/exclusives> [<https://perma.cc/SL93-TRNJ>]. While many games are available on multiple platforms, each platform has its own hardware and software for running those games, leading to platform-exclusive control features. Chris Kemp, *Platform Exclusivity Is Bad for Gamers, Developers and Everybody*, NAG (Dec. 7, 2015), <https://www.nag.co.za/2015/12/07/platform-exclusivity-is-bad-for-gamers-developers-and-everybody> [<https://perma.cc/BDM4-FMMY>]. As a result, it is possible for a game to have simultaneous leagues on different platforms. Additionally, some game developers have begun pushing towards cross-platform play: By enabling the different platforms to interface with one another, a player on one platform can compete against another player on a different platform. Steven Petite, *All Cross-Platform Games (PS4, Xbox One, Nintendo Switch, and PC)*, DIGITAL TRENDS (Feb. 17, 2020, 8:16 AM), <https://www.digitaltrends.com/gaming/all-cross-platform-games> [<https://perma.cc/SP67-RJ7R>].

142. For a non-exhaustive listing of esports leagues that have been formed, see *Browse Leagues*, ESPORTS EARNINGS, <https://www.esportsearnings.com/leagues> [<https://perma.cc/96ET-5MX7>].

143. See Mai-Hanh Nguyen, *See How Much the Top eSports Teams, Athletes, and Their Organizations Make*, BUS. INSIDER (Jan. 11, 2018, 8:21 AM), <https://www.businessinsider.com/top-esports-teams-players-salaries-2018-1> [<https://perma.cc/P6US-VGAG>]. See generally *About Us*, TEAM LIQUID, <https://www.teamliquidpro.com/about> [<https://perma.cc/MF9S-73XL>] (detailing the wide range of Team Liquid’s interests).

developers hold nearly limitless power over teams and players,¹⁴⁴ and fourth, there are no collective bargaining agreements between players and their teams or their leagues.¹⁴⁵ Another significant difference between esports and traditional professional league sports is the global market.

In a much greater degree than the NBA, NFL, and MLB, esports is an international phenomenon. Esports has a wide global audience and proud international competitive scene, with many top players competing against one another while in different countries. This has led to the creation of international tournaments more akin to the Grand Slam tournaments of tennis or the Olympics, as compared to the NFL's Super Bowl or the NBA Finals, which are both more narrowly tailored to a United States audience.¹⁴⁶ While the United States does enjoy a thriving esports industry of its own, it by no means completely dominates the market. According to one source, players from the United States collectively earned the highest overall prize winnings compared to any other nation, but also had the most competitors, clocking in with \$129.8 million of prize winnings split amongst 14,970 players in 2019.¹⁴⁷ Due to this international aspect, there is a significant disconnect between what law applies in the United States and elsewhere. Because of that jurisdictional hurdle, this Note focuses on recent efforts by various esports to develop leagues more similar to traditional sports instead of looking at international tournaments.¹⁴⁸

The push in the United States to expand esports toward a franchise model is a recent development. "Traditionally, teams participating in esports were self-organized. Teams would find the necessary players to participate and join leagues and tournaments by paying an entry fee."¹⁴⁹ However, with the increase of revenue streams, including "sponsorships, merchandise, branded skins, and advertising opportunities on streaming platforms," esports has developed its own ownership groups.¹⁵⁰ Some traditional sports organizations have been quick to invest in esports, such as the Philadelphia 76ers'

144. See Mitch Reames, *Player Representation and the Future Structure of Esports Leagues*, SPORTTECHIE (June 12, 2018), <https://www.sporttechie.com/player-representation-and-the-future-structure-of-esports-leagues> [https://perma.cc/F3L4-JUVS] ("The primary agenda will always be what makes the developers money," Hall continued. "The games' economics are driven by who is buying their game and how many people are playing. Sports economics are driven by who is watching, not who is playing . . . Imagine if the whole point of the NFL was to sell footballs.") (alteration in original) (quoting Jace Hall, Chairman of Twin Galaxies)).

145. Neal, *supra* note 138.

146. See *About the League*, OVERWATCH LEAGUE, <https://overwatchleague.com/en-us/about> (detailing the global nature of the sport).

147. *Highest Earning by Country*, ESPORTS EARNINGS, <https://www.esportsearnings.com/countries> [https://perma.cc/8NZZ-CST2].

148. Steve Van Sloun, *Esports Franchise Economics*, LOUPVENTURES (Mar. 9, 2018), <https://loupventures.com/esports-franchise-economics> [https://perma.cc/QWL5-JBSH].

149. *Id.*

150. *Id.*

ownership organization, which bought two esports franchises in 2016.¹⁵¹ Recently, collegiate athletics have entered the field, as many programs have begun developing, featuring extensive recruiting and scholarship opportunities.¹⁵²

However, for several reasons, the way organizers have structured esports leagues has led to a system where players are almost entirely barred from organizing. To illustrate, this Note examines two of the top esports leagues, the North American League of Legends Championship Series (“NA LCS”) and the Overwatch League (“OWL”), although there are dozens more which operate differently.¹⁵³

1. League of Legends

One of the top esports, League of Legends,¹⁵⁴ has a league organized by the League of Legends Championship Series (“LCS”).¹⁵⁵ LCS develops its own rule system, which places requirements on players, teams, coaches, and other league participants.¹⁵⁶ Given the global nature of League of Legends’ esports competitions, there are currently 13 professional leagues which operate in different regions.¹⁵⁷ All 13 professional leagues are represented at the League of Legends World Championship, known colloquially as “Worlds,” and teams are selected based on their performance record within their region. Most relevant to this Note is the North American League of Legends Championship Series (“NA LCS”), where teams organized within the United States compete.

151. Andrew Webster, *The Philadelphia 76ers Just Acquired an E-Sports Team*, VERGE (Sept. 26, 2016, 10:24 AM), <https://www.theverge.com/2016/9/26/13057934/nba-philadelphia-76ers-buy-esports-team-dignitas> [<https://perma.cc/4ZXC-NXS5>]; see also Webster, *supra* note 10 (detailing the many esports groups that have been acquired by various sports franchise owners).

152. Lovaas, *supra* note 9, at 27.

153. For most popular video games, some form of a league has formed, even if the games do not invoke the traditional imagery of competitive sports. One recent newcomer that has gathered a lot of media attention is “Farming Simulator,” developed by GIANTS Software, which has announced a new league for players to compete for a grand prize of \$100,000. Samwell Fawcett, *Understanding the Success of Farming Simulator in Esports*, ESPORTS.NET (Jan. 31, 2019), <https://www.esports.net/understanding-success-farming-simulator-esports> [<https://perma.cc/9SY2-SS2B>]. “The contests will be multiplayer team-based affairs, that feature two teams of three players that have to be the best in the field by carrying out tasks such as harvesting and stacking bales of hay.” *Id.*

154. For an explanation of what League of Legends as a game entails, see generally *Welcome to the Rift: Learn the Basics*, LEAGUE OF LEGENDS, <https://na.leagueoflegends.com/en-us/how-to-play> [<https://perma.cc/HE5X-FPN3>]. League of Legends is developed and maintained by Riot Games. *Our Story*, RIOT GAMES, <https://www.riotgames.com/en/who-we-are/values> [<https://perma.cc/7SWW-BWX7>].

155. Bayliss, *supra* note 15, at 364. “The exact relationship between Riot Games and the LCS is not precisely clear.” *Id.*

156. *2019 World Championship Rules*, LEAGUE OF LEGENDS, <https://nexus.leagueoflegends.com/en-us/2019/09/2019-world-championship-rules> [<https://perma.cc/84WK-AANZ>]. The full rules are also accessible from this site. *Id.*

157. *Worlds 2019 Primer*, LEAGUE OF LEGENDS, <https://nexus.leagueoflegends.com/en-us/2019/09/worlds-2019-primer>.

The NA LCS is made up of ten teams and features 18 matches per team every year.¹⁵⁸ Matches occur throughout two three-month “splits,” where each “split” has a “Regular Season” that culminates in “Playoffs and Finals.”¹⁵⁹ Teams that win first place in the NA LCS “splits” qualify for the international League of Legends events.¹⁶⁰ The NA LCS, as well as each of the other regions, has rules put in place specifically for its regional operation.¹⁶¹ LCS requires that “[a]ll Players on the Full Team Roster must have a written contract with the Team they are playing for (a ‘Player Services Agreement’).”¹⁶² Prior to 2018, the NA LCS had teams compete for spots within the league, but it has recently updated to a franchising model.¹⁶³

2. Overwatch League

Another one of the top esports, Overwatch,¹⁶⁴ which is developed by Blizzard Entertainment, Inc., is available on multiple platforms and has its own global league, OWL.¹⁶⁵ For the 2018 season, OWL featured “permanent franchises representing major cities across the globe. The Atlantic and Pacific Divisions, comprising six teams each, . . . [compete] for the Overwatch League championship, as well as for the USD \$3.5 million in performance bonuses.”¹⁶⁶ In 2019, OWL expanded to 20 cities total and offered players “up

158. LEAGUE OF LEGENDS CHAMPIONSHIP SERIES, 2019 OFFICIAL RULES: LCS AND LACS 2 (2019), available at https://nexus.leagueoflegends.com/wp-content/uploads/2019/01/2019-LCS-Rule-Set-v19.3_uh6067gozd58db005po8.pdf [<https://perma.cc/94SE-WDBE>] [hereinafter 2019 OFFICIAL RULES: LCS AND LACS].

159. *Id.*

160. *Id.*

161. Compare *id.* at 1–48 (setting forth rules applicable only to teams and players participating in the League Championship Series, a North American venture), with LEAGUE OF LEGENDS EUROPEAN CHAMPIONSHIP, 2020 SEASON OFFICIAL RULES 3 (2020), available at <https://s3-eu-west-1.amazonaws.com/cdn.eu.lolesports.com/LEC+Rulebook+2020.pdf> [<https://perma.cc/ZPE9-UZ79>] (providing rules applying to teams and players participating in the League of Legends European Championship, the European-centric equivalent).

162. 2019 OFFICIAL RULES: LCS AND LACS, *supra* note 158, at 7.

163. Todd Spangler, *Ten Franchise Teams for ‘League of Legends’ North American eSports League Unveiled*, VARIETY (Nov. 20, 2017, 2:00 PM), <https://variety.com/2017/digital/news/league-of-legends-north-america-league-teams-esports-1202619230> [<https://perma.cc/CCV7-NUBF>].

164. For an explanation of what Overwatch as a game entails, see generally *About: Welcome to Overwatch*, OVERWATCH, <https://playoverwatch.com/en-us/game/overview> [<https://perma.cc/ES45-TCPE>].

165. See *What Is the Overwatch League?*, OVERWATCH LEAGUE, <https://overwatchleague.com/en-us/about> (describing the format and teams of the Overwatch League).

166. *Overwatch League Viewing at AFKgg*, DO IT! SAN JOSE, <https://www.doitsanjose.com/event/overwatch-league-viewing-at-afkgg-31> [<https://perma.cc/B6MU-CDZL>]. The permanent teams consist of Boston Uprising, Dallas Fuel, Florida Mayhem, Houston Outlaws, London Spitfire, Los Angeles Gladiators, Los Angeles Valiant, New York Excelsior, Philadelphia Fusion, San Francisco Shock, Seoul Dynasty, and Shanghai Dragons. *Overwatch League 2020 Teams and Rosters*, ESPN (Oct. 23, 2019), https://www.espn.com/esports/story/_/page/overwatchrosters-season3/overwatch-league-2020-teams-rosters-%7C-esports-%7C-espn [<https://perma.cc/5YQA-HWUE>].

to \$5 million in total prize pool money.”¹⁶⁷ The teams joining OWL paid a steep price “between \$30 and \$60 million for the rights to join the league.”¹⁶⁸ While the full rules for the OWL have not been released, an early version was leaked online.¹⁶⁹ The leaked copy, while not acknowledged by OWL officials as being official or accurate, contains severe restrictions on individual players’ streaming rights, drug restrictions (including “alcohol or marijuana”), and a section devoted to “the rights to turn the players’ entire lives into a reality show, if they so choose.”¹⁷⁰

III. RISING PROBLEMS IN ESPORTS & ANALYSIS OF THE CURRENT LEGAL FRAMEWORK TO ADDRESS THOSE PROBLEMS

In the context of labor law, traditional sports, and esports, this Note now examines the problems professional esports players face and analyzes the potential for union certification. Section III.A shows the general player sentiment in favor of unionization and greater bargaining power it brings. Section III.A then discusses the player conditions which drive this desire, as well as the power structure that currently exists that leaves players without a voice. Section III.B focuses on the legal and economic barriers to an esports players’ union. Section III.B includes discussion of employment status, the appropriate bargaining unit, certain contractual issues, and finally market conditions that adversely affect the prospect of an esports players’ union.

A. RISING PROBLEMS IN ESPORTS

With the new level of exposure and ever-climbing revenues, professional esports players and others have asserted concern with the lack of protections afforded by the current structure. There is a “significant lack of transparency in the world of e[s]ports [which] makes it difficult for players to determine what constitutes fair compensation.”¹⁷¹ In 2016, disgruntled esports professional players from multiple teams published a joint letter detailing their displeasure with their employers and league organizers.¹⁷² In an effort to

167. Noah Higgins-Dunn, *Six-figure Salaries, Million-dollar Prizes, Health Benefits and Housing Included—Inside the Overwatch League*, CNBC (Sept. 29, 2019, 8:30 AM), <https://www.cnbc.com/2019/09/29/what-its-like-to-be-a-professional-gamer-in-the-overwatch-league.html> [https://perma.cc/E7MV-UB34].

168. Kevin Webb, *Eight Teams Paid More than \$30 Million Each to Join the Overwatch League—Here’s Everything You Need to Know Before the New Season Starts*, BUS. INSIDER (Dec. 29, 2018, 8:00 AM), <https://www.businessinsider.com/overwatch-league-season-2-2018-9> [https://perma.cc/BR4M-YCG2].

169. Maddy Myers, *Overwatch League’s Code of Conduct Got Leaked [UPDATE]*, KOTAKU (Mar. 23, 2018, 8:00 PM), <https://compete.kotaku.com/overwatch-leagues-code-of-conduct-got-leak-ed-1824038224> [https://perma.cc/JA6S-VY8U].

170. *Id.*

171. Nguyen, *supra* note 143.

172. Scott “SirScoots” Smith, *An Open Letter to the Professional Esports Association, Its Member Teams, and the Counter-Strike Community*, MEDIUM (Dec. 21, 2016), <https://medium.com/@sirs>

gather greater bargaining power, there have been calls for player unions.¹⁷³ Several attempts at forming collective bargaining groups have already occurred. Within OWL, there have been efforts “to form a model like the other major North American sports unions.”¹⁷⁴ Another effort includes players from two separate leagues for the same game.¹⁷⁵ In 2017, Riot Games founded its own player organization for League of Legends, but it has not been recognized as an official union and is still largely controlled by the company.¹⁷⁶ To some, it may not be readily apparent that esports players need a union: After all, the players are just playing video games, right?

1. Player Conditions

As it turns out, esports players share many similarities with traditional sports players when it comes to working conditions. While esports do not invoke the traditional image of an athletic competition, many of “[t]hese games require strategic movement and intense hand-eye coordination.”¹⁷⁷ Additionally, to reach the peak level of performance and competitiveness that a league demands, some professional gamers endure a “relentless practice schedule of 10 to 12 hours per day, six days a week.”¹⁷⁸ One top esports player, Faker, stated, “I practise a minimum of 12 hours a day. Sometimes 15 hours a day when it’s close to a match.”¹⁷⁹ As a result of such a heavy commitment, esports players face similar health issues to those faced by traditional sports athletes. “Carpal tunnel syndrome, a wrist injury, has ended many a gaming career.”¹⁸⁰ Those issues include mental and physical issues.¹⁸¹ “[G]amers face

cootscs/an-open-letter-to-the-professional-esports-association-its-member-teams-and-the-counter-strike-db2fb8b55f75 [https://perma.cc/EJ22-WRBY]. The players stated, “[H]ere we are, in a situation where we do not feel we are being treated fairly or offered the level of transparency we should be able to expect.” *Id.*

173. Jordan Ashley, *TSM Myth Calls for Unionization After Fortnite Backlash*, ESPORTS.NET (Jan. 29, 2019), <https://www.esports.net/tsm-myth-unionization-fortnite-backlash> [https://perma.cc/NgY6-CUDF].

174. Liz Mullen, *Two Groups Vie to Establish Esports Players Associations*, L.A. BIZ (Mar. 13, 2018, 8:44 AM), <https://www.bizjournals.com/losangeles/news/2018/03/13/two-groups-vie-to-establish-esports-players.html> [https://perma.cc/FCK2-VGYR?type=image].

175. *Id.* Both leagues compete in the popular “Counter-Strike” esports. *Id.*

176. *Id.*

177. Bayliss, *supra* note 15, at 363.

178. Samwell Fawcett, *Why Do Some Esports Stars Burn Out so Young?*, ESPORTS.NET (Dec. 24, 2018), <https://www.esports.net/esports-stars-burn-out-young> [https://perma.cc/CM4R-4E9R].

179. Simon Hattenstone, *The Rise of eSports: Are Addiction and Corruption the Price of Its Success?*, GUARDIAN (June 16, 2017, 7:24 AM), <https://www.theguardian.com/sport/2017/jun/16/top-addiction-young-people-gaming-esports> [https://perma.cc/EE76-JAG4].

180. Paula Coccozza, *You Have to Keep Fit to Stay in Gaming*, GUARDIAN (Oct. 16, 2018, 12:27 PM), <https://www.theguardian.com/sport/shortcuts/2018/oct/16/keep-fit-to-stay-in-gaming-esports> [https://perma.cc/T5JG-PUHH].

181. Fawcett, *supra* note 178. “From repetitive strain injuries such as carpal tunnel syndrome affecting a gamer’s ability to play, to the wide range of mental health issues that hamper an

a huge amount of pressure . . . they face a constant barrage of withering scrutiny on Twitter and Reddit. . . . [M]ental health issues such as panic attacks and acute anxiety have become equally, if not more problematic, than the physical issues”¹⁸² Because of these pressures and the strains of a professional esports career, many players retire young, with the average retirement age set around 25.¹⁸³

Similar to traditional sports, an esports career and its early retirement age can lead to other problems. “Esports players sometimes leave education early to fully immerse themselves in the competitive scene, which can be a problem when they cannot find a suitable position within the industry after their competitive careers draw to a close.”¹⁸⁴ Retired players only have a limited number of employment opportunities within the esports industry where their prior experience is marketable, such as becoming coaches, advisors, analysts, or commentators.¹⁸⁵ Due to this early retirement age and the lack of continuing opportunities, players can be left without the ability to sustain themselves in the future, especially if they incur medical or counseling costs that exceed their competitive salaries.

These player conditions are endured by many video game players in the pursuit of greater competition, but there are also several benefits, like hefty paychecks for top players. The best esports athletes earn in the millions, and lucrative bonuses and sponsorships can add to their base salary.¹⁸⁶ For non-star esports players, however, the salary is much less lucrative, coming in at “an average salary of around \$60,000.”¹⁸⁷ At the highest levels of competition, esports organizations maintain facilities for training players. Once signed to a team, esports organizations “often pay for amenities such as housing, water and electricity, coaches and trainers, and the team’s food and gaming peripherals.”¹⁸⁸ Living in these training facilities, players “practice constantly” and experience “genuine fear for their livelihood because they didn’t have a good game.”¹⁸⁹ Due to these conditions, it would be tough to characterize esports players as any less deserving of protections than traditional athletes.

individual’s approach to the game, it seems that there are more than a few reasons as to why ‘burnout’ has become such a feared aspect of professional esports gaming.” *Id.*

182. *Id.*

183. Shotaro Tani, *Life After Esports: What Happens When Pro Gamers Hang Up the Joystick?*, NIKKEI ASIAN REV. (Mar. 14, 2018, 1:45 PM), <https://asia.nikkei.com/Business/Business-trends/Life-after-esports-What-happens-when-pro-gamers-hang-up-the-joystick> [<https://perma.cc/P8J2-PJX4>].

184. *Id.*

185. *See id.*

186. Hattenstone, *supra* note 179.

187. Arijeta Lajka, *Esports Players Burn Out Young as the Grind Takes Mental, Physical Toll*, CBS NEWS (Dec. 21, 2018, 12:14 AM), <https://www.cbsnews.com/news/esports-burnout-in-video-gaming-cbsn-originals> [<https://perma.cc/5G24-GDL7>].

188. Nguyen, *supra* note 143.

189. Lajka, *supra* note 187.

For some esports players, a possible career in esports can become addictive and may even turn deadly. One psychiatrist recounted stories of “addicts . . . who wear nappies so they don’t have to leave their game to go to the toilet; the gamers so obsessed that they stop eating and sleeping altogether.”¹⁹⁰ The stories get worse. One player that was treated for an esports addiction “killed himself two months after completion of the treatment. . . . ‘The fact that he thought he had lost all his social relationships led to his suicide.’”¹⁹¹ While an extreme, this example certainly illustrates the pitfalls of pursuing a competitive esports career.

2. Power Disparity

Beyond playing and living conditions, another key factor to consider for esports players is the power disparity in the current market. Players are effectively at the mercy of their employers. “From the lack of security in fighting for a place on a team, to the punishing esports tournament schedules, it has been felt that there is very little in the way of protection for young gamers.”¹⁹² The power that game developers possess over players is immense. “Game developers . . . own the games, and completely control the leagues. Players hold almost no power, and player strikes are unheard of.”¹⁹³ Because they own all the intellectual property and software rights to the programs the athletes use to compete, game developers can collapse an entire professional league market without much consequence. This is not an illusory fear for players: Blizzard Entertainment cancelled the professional esports league for one of its products, *Heroes of the Storm*, ending hundreds of careers.¹⁹⁴ As a result, “[t]he entire competitive element of the game die[d] . . . for some people . . . because they aspired to be professional players.”¹⁹⁵ One esports team responded to the closure by highlighting that “[t]his is a full ecosystem with hundreds of young adults relying on its existence. To just pull the plug on it overnight is entirely irresponsible.”¹⁹⁶ The reality is that for game developers, the focus is on profitability, not player rights or equal distribution of revenue.¹⁹⁷

190. Hattenstone, *supra* note 179.

191. *Id.*

192. Fawcett, *supra* note 178.

193. Reames, *supra* note 144.

194. Brent Terean, *Blizzard Ends the Heroes of the Storm Global Championship*, DAILY ESPORTS (Dec. 13, 2018), <https://www.dailyesports.gg/blizzard-ends-heroes-of-the-storm-global-championship> [<https://perma.cc/GD8M-X2UF>].

195. *Id.*

196. Fern Rojas, *Thank You, Heroes of the Storm*, TEAM LIQUID (Feb. 9, 2019), <https://www.teamliquidpro.com/news/2019/02/09/thank-you-heroes-of-the-storm> [<https://perma.cc/NB75-W4Z9>] (reproducing Victor “Nazgul” Goossens’ letter).

197. “The primary agenda will always be what makes the developers money.” Reames, *supra* note 144.

Besides the threat of leagues collapsing, game developers can also change the rules of the competitions. One esports company, Epic Games, publisher of the popular *Fortnite* title, released a new patch (which alters the software at the code level, meaning players are completely unable to ignore the changes) on the same day as a \$500,000 tournament.¹⁹⁸ This was, unsurprisingly, met with a great deal of criticism by competitive players, who quickly had to adjust playing styles.¹⁹⁹ This happened despite “Epic . . . committing to doing various things to help their community function” because it had complete discretion to “do[] the opposite.”²⁰⁰ This is a concrete example of a phenomenon which could occur in any game and any esports league.

Also, while the relative bargaining position of an individual player pales in comparison to the power held by a game developer, players are also forced into an inferior bargaining position with their team organizations.²⁰¹ As a result, there are two entities which might seek to depress wages and rights of players: the developers and the team organizers. Although professional esports players are normally employed directly by their team,²⁰² some leagues place direct constraints on those player-team relationships and ultimately exercise a great deal of control over players.²⁰³ The esports industry model itself is a barrier to players’ unions. Every year, new games are created and published by developers which might displace a formerly popular esports event.²⁰⁴ “[E]sports titles are constantly falling in and out of favor Initiating, supporting, and maintaining an esports for a short-lived title may disincentivize players, owners, and representatives from pursuing unionization.”²⁰⁵ While that may not ultimately be a concern for established esports leagues,²⁰⁶ it does suggest that new leagues may take advantage of players in the short term and that players “will be willing to accept the punishing demands faced by the esports teams, as there is very little in the way

198. Ashley, *supra* note 173.

199. *Id.*

200. *Id.*

201. See Bayliss, *supra* note 15, at 365–67, 371–75.

202. *Id.* at 366.

203. *Id.* at 372, 375–83 (detailing the “Minimum Player Compensation” that is required for participation in LCS and the significant level of control that can be exerted by Riot through bans).

204. Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535, 1539 (2013).

205. Jonathan Kogel, *State of the Esports Player Union: Drawbacks and Legal Challenges*, ESPORTS OBSERVER (May 8, 2018), <https://esportsobserver.com/state-of-the-esports-union> [<https://perma.cc/UA6P-EQBB>].

206. Burk, *supra* note 204 (“New games, whether electronic or physical, may be quickly adopted by consumers for personal play; however, professional play in competitive games of any sort requires some time for the game to become stabilized, for a fan base to develop, and for the business and vocational infrastructure to accumulate. New physical sports sometimes enter the Olympic or professional canon, but not with great frequency, and not immediately with popularity. Some of the same dynamics are apparent in the [esports] arena.”).

of a guarantee that they will get another chance to earn money from video gaming.”²⁰⁷

The players themselves pose some difficulties for collective bargaining because they have to come together collectively in order to gain power. One issue is that players are relatively short-lasting within the esports scene.²⁰⁸ Most players end their competitive careers some time before they hit the age of 30.²⁰⁹ On that basis, sacrificing playing time to strike or collectively organize could deprive players of income, popularity, and competitive opportunities, which are naturally limited in number. Further, some above average or star esports players might also push against unionizing efforts, on the basis that they are compensated better than their less skilled competitors. While these issues were just as present within traditional sports leagues and were ultimately overcome, it could be that the continually changing market will disincentivize players from sacrificing valuable playing time.²¹⁰ Despite that disincentive, however, many players have spoken out about the need for heightened player protections.²¹¹ “Players are very aware that they are not the most qualified to be dealing with legal issues such as contracts”²¹² Rather, leagues and teams are in a much better bargaining position than players, which leads to lower league costs, but at the price of more sacrifices for players. In sum, given player conditions and the power disparity between the leagues and the players, a players’ union would help to even out the balance.

B. ANALYSIS OF THE CURRENT LEGAL FRAMEWORK TO RESOLVE PROBLEMS

As addressed in Part II, there are certain requirements that must be met before union certification is granted.²¹³ This Section analyzes the employee status and bargaining unit requirements, as well as other contractual restraints on organization that would need to be dealt with to form a union. The Section concludes with a look at some market constraints that a players’ union would face.

207. Fawcett, *supra* note 178.

208. *See id.*

209. *How Can Esports Stars Lengthen Their Gaming Careers?*, ESPORTS.NET, <https://www.esports.net/how-esports-stars-lengthen-gaming-careers> [<https://perma.cc/2LGT-3QHT>].

210. *See* Krasnow & Levy, *supra* note 72, at 759–61 (“Professional sports represent an industry of ‘stars,’ of employees whose jobs depend entirely on their individual abilities . . . [and] tend to be very individualistic . . . [which] results in athletes’ displeasure with standardized contracts. . . . [However,] many athletes are not solely motivated by the profit motive . . . [and] the brief duration of an athlete’s career . . . emphasizes both the need for less burdensome conditions which affect the length of an athlete’s active playing life, and the need for pension and retirement plans.” (footnotes omitted)).

211. Mike Stubbsy, *Does eSports Need a Players’ Union?*, RED BULL (Dec. 3, 2015), <https://www.redbull.com/us-en/does-esports-need-a-players%E2%80%99union>.

212. *Id.*

213. *See supra* Section II.A.

1. Employee Status

One of the biggest legal challenges facing players' unions for esports is the independent contractor bar.²¹⁴ As previously discussed, the NLRB states that the term "employee" within the scope of the act "shall not include . . . any individual having the status of an independent contractor."²¹⁵ Currently, "it is unclear whether [esports] professional players are employees or independent actors."²¹⁶ In both the OWL and the NA LCS, players are required, as a condition of participation in the league, to have contracts with their teams.²¹⁷ However, these contracts are kept confidential and are not available to the public.²¹⁸

Within the Overwatch League's Official Rules, Terms and Conditions document, there is a section specifically devoted to employment status.²¹⁹ It states:

Each Team Member acknowledges and agrees that by adopting and enforcing these League Rules, the League Office is not creating an employment relationship with Team Members. Each Team Member is employed solely by his or her Team. Nothing in this Agreement may be construed or reasonably relied upon as evidence that the League Office is an employer, joint-employer, and/or co-employer of any Team Member. Furthermore, nothing in these League Rules may be relied upon as evidence that a Team Member has a contract of employment for any particular period of time.²²⁰

Additionally, the rules contain a provision conditioning eligibility for competition, stating "each [p]layer must be retained as an employee of his or

214. See Heggem, *supra* note 15, at 455 (noting the basics of "The Independent Contractor Wrinkle"); Bayliss, *supra* note 15, at 383–91 (examining whether professional League of Legends players are employees and thus, whether certain federal protections apply).

215. 29 U.S.C. § 152(3) (2012).

216. Bayliss, *supra* note 15, at 361.

217. 2019 OFFICIAL RULES: LCS AND LACS, *supra* note 158, at 7; OVERWATCH LEAGUE, OFFICIAL RULES, TERMS AND CONDITIONS 5.15(b) (2018), available at <https://www.documentcloud.org/documents/4420166-OWL-Rulebook.html> [<https://perma.cc/UZ7V-524E>] [hereinafter OWL OFFICIAL RULES].

218. A routine search for the information reveals that it is unavailable. See, e.g., Blake Wiles, *Contract Conflicts Creating Players Associations in eSports*, SCI. & TECH. BRIEF (Nov. 12, 2018), <https://sciencetechbrief.com/2018/11/12/contract-conflicts-creating-players-associations-in-esports> [<https://perma.cc/629H-A8EP>]; *Team Participation Agreements: Esports Law Matters*, GORDON L. (Dec. 10, 2018), <https://gordonlawltd.com/team-participation-agreements-lol-esports-law> [<https://perma.cc/MZ9U-4AZ9>].

219. OWL OFFICIAL RULES, *supra* note 217, at 1.3. The OWL Official Rules, Terms, and Conditions were not publicly published, but were leaked online in 2018 by Richard Lewis. See Myers, *supra* note 169.

220. OWL OFFICIAL RULES, *supra* note 217, at 1.3.

her respective Team using the then-current form player professional services agreement as specified by the League Office.”²²¹

Within the NA LCS, there is a similar rule provision devoted to employment status.²²² It states:

Members of the Full Team Roster may not be employees of Riot Games Inc. (“RGI”), North America League of Legends Championship Series LLC (“NALCS LLC”), the League of Legends [Esports] Federation LLC or any of their respective affiliates at the start of or at any point during the LCS Competitive Season.²²³

While not as direct as the provision given within the Overwatch League Rules, the goal is apparently the same: Players competing within the League are not to be considered employees of the League.²²⁴ If these provisions were upheld in court, professional esports players would be completely barred from unionizing in the traditional league structure. There were additional contract elements required by the NA LCS in 2018:

All players on the Full Team Roster must have a written contract with the Team they are playing for (a “Player Services Agreement”) The Service Agreements must represent the entirety of obligations between the player/Head Coach and the Team. Any obligation outside of the Service Agreements which has not been submitted to the League will not be recognized by the League.²²⁵

There was also a restriction on veteran players in the lower league competition, the North American League of Legends Academy Championship Series (“LACS”), which prevents players who “started over 50% of eligible regular season games . . . [for] the last three splits,” which necessarily prevents seasoned players from dropping down into an easier tier.²²⁶

221. *Id.* at 5.15(b).

222. 2019 OFFICIAL RULES: LCS AND LACS, *supra* note 158, at 5.

223. *Id.* (emphasis omitted) (“‘Affiliate’ is defined as any person or other entity which own[s] or controls, is under the ownership or control of, or is under common ownership or control with, an owner. ‘Control’ shall mean the power, through any means, to determine the policies or management of an entity, whether through the power to elect, appoint or approve, directly or indirectly, the directors, officers, managers or trustees of such entity or otherwise.” (emphasis omitted)).

224. See David Graham, *Player Contracts and Unions in the LCS*, DPG L. (Mar. 27, 2019), <https://www.dpgatlaw.com/2019/03/27/player-contracts-and-unions-in-the-lcs> [<https://perma.cc/E7J6-ANVM>] (“LCS players are independent contractors . . . [and] Season 3 LCS rules take pains to point out that players are not and should not be considered Riot employees.”).

225. N. AM. LEAGUE OF LEGENDS CHAMPIONSHIP SERIES & N. AM. LEAGUE OF LEGENDS ACAD. LEAGUE, 2018 OFFICIAL RULES: NA LCS AND NA LACS 8 (2018) [hereinafter 2018 OFFICIAL RULES: NA LCS AND NA LACS] (emphasis omitted). This language was pared down in the 2019 rules. See 2019 OFFICIAL RULES: LCS AND LACS, *supra* note 158, at 7.

226. 2018 OFFICIAL RULES: NA LCS AND NA LACS, *supra* note 225, at 10. This was removed in the 2019 rules. See 2019 OFFICIAL RULES: LCS AND LACS, *supra* note 158, at 50.

If players are under contract with their leagues and those contracts state the players are not employees, the leagues can argue that the NLRA, and therefore collective bargaining protection, is not applicable.²²⁷ The NLRB “has the duty of determining in the first instance who is an employee . . . and . . . the Board’s determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law.”²²⁸ While there are many factors involved in determining employment status, “[t]he key question . . . is the alleged employer’s . . . control over the manner and means by which the work is performed.”²²⁹ After balancing relevant factors, one scholar has argued that “the scales tip toward classifying pro players as employees” because players are subject to “significant control” by the leagues.²³⁰

Looking at traditional sports players associations, the employee requirement of the NLRA was no bar to the certification of traditional player unions.²³¹ Prior to union certification, scholars recognized that “[a]thletes in team sports would probably have no difficulties in meeting the Board’s interpretation of the term ‘employee.’”²³² The MLBPA itself gained union recognition from the MLB in the first collective bargaining agreement by pressuring owners through negotiations and fervent public opinion pieces, without any need for the NLRB to determine employee status.²³³ “[T]he players associations that were formed in football, hockey, and basketball grew out of the players’ desire to break through the joint opposition of the owners and the commissioners who were opposed to player participation in the formulation of league standards and conditions.”²³⁴ All of the professional leagues had similar employee and employer relationships to those within the esports industry. “[A] combination of oppressive conditions, unreasonable refusals by the owners to negotiate with the players, leadership by recognized figures in the sport, threat of coercion, good timing, and favorable public

227. See Bayliss, *supra* note 15, at 361–62 (stating that employment status affects the legal rights of players, especially in the realm of collective bargaining). The leagues can also attempt to argue that the NLRA is inapplicable on the basis of jurisdiction, but “[m]ost professional sports have been recognized to have a substantial effect on interstate commerce,” and there is little reason why esports would be an exception. *Id.* at 383–85.

228. NLRB v. E.C. Atkins & Co., 331 U.S. 398, 403 (1947).

229. Bayliss, *supra* note 15, at 386. “Determining employee status is . . . a fact-bound determination applying the common law principles of agency” and “a reviewer must determine both the technical and traditional concepts of employee and employer, as well as the economic realities of the situation.” *Id.* at 385–86.

230. *Id.* at 391. While the Bayliss Note focuses on League of Legends, the analysis is equally applicable to other esports leagues, such as OWL.

231. See Krasnow & Levy, *supra* note 72, at 781. “[T]he Board has held free lance [sic] artists, screen writers, and announcers, all of whom do considerable individual contracting of their services, to be employees . . .” *Id.*

232. *Id.*

233. SWANSON, *supra* note 78, at 121–27.

234. Krasnow & Levy, *supra* note 72, at 764.

reaction resulted in the successful formation of these associations.”²³⁵ Esports could likewise face such a perfect storm of conditions.

2. Bargaining Unit

The next barrier to the certification of esports players’ unions is the bargaining unit determination by the NLRB. That provision “implies that the initiative in selecting an appropriate unit resides with the employees,” but ultimately the NLRB resolves any dispute if the unit is appropriate.²³⁶ “The most important factor used in determining an appropriate unit is the existence of a community of interest among the employees.”²³⁷ As a result, bargaining units can be formed at multiple levels: It would be possible to have an esports players’ union at the team level,²³⁸ team-organization level,²³⁹ league level, or even at the industry-wide level.²⁴⁰ League level organization is analogous to the players associations present in traditional sports and would probably qualify as a bargaining unit, but the other possibilities have unique characteristics that make this determination more difficult.

At the team level, it may be difficult for players to unionize. Within the esports industry, owner organizations often have several teams that compete in different games and different leagues.²⁴¹ The NLRB has recognized that players could theoretically organize within those organizations, in either employer-wide or game-specific units, to collectively bargain with ownership at a single-team level.²⁴² However, the NLRB has also stated that certifying a single-team bargaining unit might upset stability in a league market, so there is some doubt whether they would approve such a unit.²⁴³ Additionally, a game-specific bargaining unit might not be the most effective given the

235. *Id.* at 765.

236. *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991).

237. FELDBACKER & HAYES, *supra* note 22, at 38.

238. For example, one single team from a league, akin to if the Chicago Bulls had their own individual union apart from all other NBA teams.

239. For example, one esports team organization that fields multiple individual teams, such as Team SoloMid (“TSM”) which has a League of Legends team, Fortnite team, and many other competitive gamer units. See *Our Teams*, TSM, <https://tsm.gg> [<https://perma.cc/DC82-WKMG>].

240. See Heggem, *supra* note 15, at 454 (describing “The Bargaining Unit Wrinkle”).

241. *Id.* (“They each have a *League of Legends* team, a *Counter-Strike: Global Offensive* team, an *Overwatch* team, etc.”). By way of comparison, imagine if one organization (hypothetically named Los Angeles Sports) owned the Los Angeles Dodgers (a baseball team), the Los Angeles Rams (a football team), and the Los Angeles Lakers (a basketball team), which all participate in different leagues.

242. *Nw. Univ.*, 362 N.L.R.B. 1350, 1354 (2015) (“[S]uch an arrangement is seemingly unprecedented; all previous Board cases concerning professional sports involve leaguewide bargaining units.”).

243. *Id.*; see also *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684 (1951) (“Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.”).

relative bargaining strength gained.²⁴⁴ Also, having a game-specific union for all teams within an organization might pose a prohibitive cost issue.²⁴⁵ Alternatively, if players attempt to form a unit made up of all teams within an organization, their bargaining strength would increase and the overall cost might decrease, but the “community of interest” principle may be harder to meet given that player conditions across games might differ.²⁴⁶ The most ambitious bargaining unit that could be formed is industry-wide. That would mean that all esports players participating in any league or under any team owner could be a party to the union.²⁴⁷ However, the “community of interest” principle would again be a barrier and, given that working conditions across all teams is likely different, convincing the NLRB of efficient collective bargaining might be incredibly difficult.²⁴⁸

3. Contractual Constraints

While not a direct bar under the NLRA, the league rules of the OWL and the NA LCS both contain language that could substantially constrain any early efforts at union organization. The NLRA does, however, specifically protect against such constraints when employees try to collectively bargain.

Within the OWL, there are provisions which might impact any attempt at unionizing, located within the “Cheating and Game Integrity” section. It states that “[c]ollusion, match fixing or any other action to intentionally alter, or attempt to alter, the results of any game, match or tournament” is considered cheating and “will not be tolerated.”²⁴⁹ There are also restrictions on actions which “could reasonably be expected to be, detrimental to the image or reputation of, or result in public criticism of or reflect badly on” league affiliates.²⁵⁰ A players’ strike or other organizational efforts could qualify as violations of these provisions.

There is also a dispute resolution section within the league rules. Within that section, all disputes are subject to arbitration. The rules state “[a]ll Rules

244. See Heggem, *supra* note 15, at 455 (“[I]f the players’ unions get too small—for instance, Team SoloMid’s five *League of Legends* players form a union—they may not have the [sic] enough power to do any good.”).

245. See *id.* at 454–55 (stating that if unions developed for each game, “existing esports organizations would need to enter into multiple CBAs—an expensive, perhaps even cost-prohibitive, proposition”).

246. Recall that the test for a community of interest has many factors and the determination is fact dependent. See *supra* notes 40–44 and accompanying text. If all players within an organization, regardless of which team they played on, shared common characteristics such as the same supervisors, work schedules, amenities, and obligations, the likelihood of a positive determination by the NLRB would increase.

247. Heggem, *supra* note 15, at 454 (“[C]ould all players form a single union that spans multiple esports titles? Such a union would be large (and probably powerful) . . .”).

248. *Id.*

249. OWL OFFICIAL RULES, *supra* note 217, at 6.2.

250. *Id.* at 6.3(b).

Disputes and Arbitration Disputes will be governed by and construed under the laws of the United States of America and the law of the State of New York, without regard to choice of law principles.”²⁵¹

The NA LCS also has conditions on collusion. In the 2018 rules, one clause defines collusion to include “any agreement among two (2) or more players to not damage, impede or otherwise play to a reasonable standard of competition in a game. . . . [Including d]eliberately losing a game for compensation, or for any other reason, or attempting to induce another player to do so.”²⁵² The rules also prohibit “[a]ny other further act, failure to act, or behavior which, in the sole judgment of League officials, violates these Rules and/or the standards of integrity established by LCS for competitive game play.”²⁵³ Therefore, any players’ strikes in an attempt to bargain collectively could be punished by league officials at their discretion.

The NA LCS 2018 rules also contains a provision limiting the speech of players, which states, “Team Members may not give, make, issue, authorize or endorse any statement or action having, or designed to have, an effect prejudicial or detrimental to the best interest of LCS, Riot Games or its affiliates, or League of Legends, as determined in the sole and absolute discretion of LCS.”²⁵⁴ Efforts to organize and spread awareness of bad labor practices could effectively be punished under this provision.

Player trades and signings are also subject to league approval.²⁵⁵ As a result, the league could effectively block players from the league if they spread information counter to the league’s interests. Another provision states that:

League officials at all times may act with the necessary authority to preserve the best interests of the LCS. This power is not constrained by the lack of any specific language in this document. League officials may use any form of punitive actions at their disposal against any entity whose conduct is not within the confines of the best interests of the LCS.²⁵⁶

Clearly, these punishments can be used to prevent collective bargaining by the players.

The NLRA has specific protections to prevent these contractual provisions from being used against collective bargaining efforts.²⁵⁷ As discussed in Section II.A, the NLRA details what constitutes an unfair labor practice.²⁵⁸ Those unfair practices include “to interfere with, restrain, or

251. *Id.* at 9.4(a).

252. 2018 OFFICIAL RULES: NA LCS AND NA LACS, *supra* note 225, at 44.

253. *Id.* at 45.

254. *Id.* at 46.

255. *Id.* at 12–15.

256. *Id.* at 50.

257. *See* 29 U.S.C. §§ 157–58 (2012).

258. *See id.* § 158; *see also supra* Section II.A.

coerce employees in the exercise of the rights guaranteed in [S]ection [7].”²⁵⁹ Under Section 8(a)(1), employers cannot “[t]hreaten employees with adverse consequences, such as closing the workplace, loss of benefits, or more onerous working conditions, if they support a union, engage in union activity, or select a union to represent them.”²⁶⁰ Therefore, if a league enforced the above provisions against organizing and freedom of speech in order to restrict players’ ability to organize a collective bargaining group, players could seek NLRB enforcement. Players would need to file a charge with the NLRB, which would lead to an investigation by NLRB agents and, if enough supporting evidence is found and if the parties do not reach a settlement, the NLRB itself files a complaint that results in a hearing before an administrative judge.²⁶¹

Additionally, an employer cannot “dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”²⁶² As discussed above, one game developer has created a players association.²⁶³ Under the NLRA provision quoted above, that group cannot qualify for union certification because it is funded by the employer, Riot Games.²⁶⁴ Riot has indicated that the players association was formed to “give players a voice in any league decisions, as well as provide the players with the supportive services of outside consultants such as agents, lawyers and financial advisers.”²⁶⁵ A similar situation existed in the early days of baseball when the organization was able to receive union certification only after sufficiently distancing itself from the employer, as discussed in Section II.C.1.²⁶⁶ The example of the early MLBPA, which lacked any real strength to influence league decision-making, merely maintained the status quo. While Riot has indicated that the players association is intended to become a certified union in the future, there are no guarantees that will actually happen.²⁶⁷ With the right guidance, however, this early effort at a players association could blossom into a certified union by following in the MLBPA’s footsteps.

259. 29 U.S.C. § 158(a)(1). For a description of Section 7 rights, see *supra* Section II.A.

260. *Interfering with Employee Rights (Section 7 & 8(a)(1))*, *supra* note 36.

261. *Investigate Charges*, NLRB, <https://www.nlr.gov/about-nlr/about-nlr/what-we-do/investigate-charges> [<https://perma.cc/YE4F-BTSZ>].

262. 29 U.S.C. § 158(a)(2).

263. See *supra* notes 174–76 and accompanying text.

264. See Austen Goslin, *Riot Will Fund New NA LCS Players’ Association*, RIFT HERALD (June 1, 2017, 9:06 AM), <https://www.rifthermal.com/2017/6/1/15721676/na-lcs-players-association-lol-esports-union> [<https://perma.cc/GQ5N-HP77>] (“The Players’ Association . . . will be funded, at least in the beginning, by Riot itself.”).

265. *Id.*

266. See *supra* Section II.C.1.

267. See Goslin, *supra* note 264 (encouraging “the possibility of the Players’ Association becoming a fully independent Players’ Union in the future”).

4. Market Constraints

In addition to legal constraints on professional esports players' unions, there are also market factors which may limit esports players' collective bargaining efforts. This Section considers alternative employment options, possible current preemptive efforts to curb unions, and the idea that one union might lead to further preemptive efforts.

For esports players, participation in a league may decrease salary potential. Successful esports players often have an alternative revenue source available in "livestreaming," which allows spectators to watch them compete in real time through online platforms.²⁶⁸ For some players, the potential revenue from livestreaming is many times greater than what is offered through participation in a league.²⁶⁹ While not all professional esports players are guaranteed massive sums through livestreaming, participation in a league can remove that potential almost entirely. Both the OWL and the NA LCS have conditioned eligibility for competition on streaming exclusivity in the past, although it is unclear if such restrictions exist now.²⁷⁰ Because esports league participation may remove this revenue source, some qualified players may simply abandon the league instead of organizing within it. In collective bargaining elections, research supports the argument that "[t]he greater the alternative employment opportunities . . . the less likely are workers to vote for union representation."²⁷¹ Therefore, the ability to proverbially jump ship may be a more attractive offer to potential union leaders than sacrificing earnings for the betterment of other players' position.

268. Katherine E. Hollist, Note, *Time to Be Grown-Ups About Video Gaming: The Rising eSports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 829–30 (2015). One huge site in the livestreaming market is Twitch.tv. *Id.* Twitch has become the premier livestreaming site and boasts an impressive total of 2.2 million daily broadcasters and 15 million daily viewers on average. Mansoor Iqbal, *Twitch Revenue and Usage Statistics* (2019), BUS. APPS (Feb. 27, 2019), <https://www.businessofapps.com/data/twitch-statistics> [<https://perma.cc/9NNV-WDSJ>].

269. See Hollist, *supra* note 268, at 830 (detailing how one professional esports player retired to exclusively livestream to the tune of an \$800,000 yearly salary).

270. In the OWL, the leaked rules place direct constraints on livestreaming: "A Player may endorse products and services so long as the Player and the endorsement (i) do not mention, reference or include any video game content of Overwatch . . ." OVERWATCH LEAGUE, PLAYER STREAMING POLICY § 3.B (2018), available at <https://www.documentcloud.org/documents/4420166-OWL-Rulebook.html> [<https://perma.cc/Z6E7-HMCV>]. Players livestreaming rights are curtailed further when "stream[ing] any video game content" where "more than two Players are playing a game." *Id.* § 3.C. For additional restrictions, see *id.* §§ 5–6.

In the LCS, player contracts that leaked in 2013 revealed the existence "of a 'restricted games' clause, which prohibited players from streaming online while playing specific other games" from other developers that directly competed with Riot Games. Bayliss, *supra* note 15, at 365. That restriction was removed from the LCS rules and is not located within the 2018 NA LCS rules, but it is possible the clause may still be included in player-team contracts, which are kept secret. *Id.* at 365–66. See generally 2018 OFFICIAL RULES: NA LCS AND NA LACS, *supra* note 225 (lacking a "restricted games" clause for player streaming).

271. William N. Cooke, *Determinants of the Outcomes of Union Certification Elections*, 36 INDUS. & LAB. REL. REV. 402, 405 (1983).

Another market constraint on unionizing is that game developers and teams have begun responding to player concerns. “[R]ising wages are assumed to increase the utility associated with remaining nonunion, and thereby [assumed] to increase the likelihood that workers will vote against representation by a union.”²⁷² Following this premise, it can be assumed that any benefits provided to players would also ostensibly decrease the chances of organizing. The OWL established a standard player contract that requires a minimum yearly salary of \$50,000, as well as “employer-sponsored housing, health insurance and a retirement savings plan.”²⁷³ This was done largely to combat stability issues for players and “provide a good example of how esports could look after its competitors in the future.”²⁷⁴ One esports organization, Immortals, provides a sports psychology consultant for players.²⁷⁵ These efforts may be genuine attempts to remove player anxiety, but the overall effect may be player complacency. Players could receive better benefits through collective bargaining, but organizations will attempt to find the bare minimum of compensation that preempts union formation.

It is also possible that the formation of a single players’ union within esports would fundamentally alter the landscape. If one esports players’ union arose, it might alter the behavior of future esports league creators in an attempt to avoid a similar fate. One theory within collective bargaining is “that as an industry becomes more highly organized, workers in non-union firms in that industry determine that there is less utility associated with union representation, because . . . such workers benefit from increasing union threat effects that drive up nonunion wages.”²⁷⁶ Therefore, if a strong players’ union develops for one game or league, other owners or league organizers might attempt to prevent the formation of a union in their sector by raising wages or providing other benefits, without any need for collective bargaining efforts by their own players.

IV. RECOMMENDATIONS

Following in line with traditional sports leagues, the formation of a players association is an attractive solution for addressing the growing concerns of player conditions and the vast power disparity between players and their leagues. Like traditional sports player unions, esports players could

272. *Id.*

273. Jacob Wolf, *Overwatch League Announces Standard Player Contract Terms*, ESPN (July 26, 2017), http://www.espn.com/esports/story/_/id/20163254/overwatch-league-owl-announces-details-player-contracts-team-buy-in [https://perma.cc/JS57-5A4A]. The contracts also contain provisions for performance bonuses. *Id.*

274. Fawcett, *supra* note 178.

275. *How Can Esports Stars Lengthen Their Gaming Careers?*, *supra* note 209.

276. Cooke, *supra* note 271, at 407–08.

use a union to negotiate limited practice hours,²⁷⁷ guaranteed retirement funds,²⁷⁸ and better health conditions.²⁷⁹ Given the vast amounts of revenue in esports, it would also be possible for esports players to negotiate a raised minimum salary, making the average salaries more comparable to traditional sports. By leveling the playing field between game developers and esports players, both groups could work together to create a marketable product that does not have to severely impair players' future livelihoods by allowing negotiation on any important issue. The presence of a union might also attract star livestreaming players that had turned away from the competitive scene due to the increased benefits. Also, having guaranteed player protections might influence talented potential players to focus on joining the industry because of the reduced opportunity cost in pursuing a competitive career.

Esports players would not be the only ones to benefit from a players association. "[T]he formation of esports players associations and unions may be in the best interests of both players and owners. Collective bargaining may bring player cost certainty for owners, while insuring [sic] that someone is looking after the players' best interests."²⁸⁰ As discussed above, the collective bargaining agreement between the NBA and NBPA contains several provisions that limit player salary.²⁸¹ Also, leagues could negotiate for protective clauses, such as hazardous activity limits²⁸² and no-strike policies.²⁸³ Another facet of reaching a collective bargaining agreement: The nonstatutory labor exemption would benefit esports organizations because it would provide protection against antitrust actions under certain circumstances.²⁸⁴ From the example of the NFL, it is clear that this exemption is quite powerful.²⁸⁵

There are some potential negatives that may accompany unionization, but they do not outweigh the positives. Any union presence would have an

277. See NBA CBA, *supra* note 116, at 333–39; NFL & NFL PLAYERS ASS'N, *supra* note 130, at 145–48; see also MLB PLAYERS ASS'N, *supra* note 98, at 6 (“There shall be one off-day with no workouts scheduled . . .”); *id.* at 272 (letter regarding mini-camps).

278. See MLB PLAYERS ASS'N, *supra* note 98, at 129–30; NBA CBA, *supra* note 116, at 67–81; NFL & NFL PLAYERS ASS'N, *supra* note 130, at 225–27.

279. See MLB PLAYERS ASS'N, *supra* note 98, at 55–65; NBA CBA, *supra* note 116, at 344–59; NFL & NFL PLAYERS ASS'N, *supra* note 130, at 175–78.

280. Mullen, *supra* note 174.

281. See *supra* Section II.C.2.

282. See J.J. Pristanski, Note, *No Risky Business: A Proposal to Modify the Hazardous Activities Clause in Professional Sports*, 14 DEPAUL J. SPORTS L. 67, 69–70 (2018) (proposing a modification to the hazardous activities clause, which is currently used in some form in the CBAs of each of the Big Four leagues).

283. See NBA CBA, *supra* note 116, at 390–91 (laying out the limits on player strikes, lockouts, and other concerted behavior).

284. See *supra* Part II.

285. See *supra* Section II.C.3.

effect on esports leagues: The share of revenue to owners and game developers would likely decrease as the players' share increased. Also, a union developing in one league might start a domino effect in other leagues: Once players see how attractive a CBA can be in action, players on the fence would be more likely to take the plunge. However, given the severe player conditions and the lack of transparency offered by game developers, these are necessary sacrifices to correct a career path that currently results in massive burnout and extreme mental and physical stresses.

The traditional league model of a players' union is likely the only feasible option. Players would have a great deal of power by being able to collectively strike within the league, possibly during championship events to severely undercut developers' and team owners' bottom line, similar to the cancellation of the MLB World Series.²⁸⁶ Players would also not have to make as many concessions as a larger league would necessitate, letting localized issues be addressed appropriately. For these reasons, the best path forward for unionization would likely be to stick to the traditional league level players' union, and the NLRB has approved of such a bargaining unit in many instances, removing most of the danger that union certification would not be recognized.

While the relative bargaining power of players would likely increase with the amount of participation, an industry-wide union could potentially be quite powerful but ultimately fail to address specific team or player complaints. Also, if an industry-wide players' union became certified, it would put major strains upon the industry. As all esports players would qualify for the union, any new leagues would face a heightened barrier to enter and compete. Players could immediately demand enforcement of any CBA that is reached and cause costs to skyrocket before a new league could find its footing, requiring an enormous amount of capital investment. This argument also cuts the opposite direction, however: Heightened barriers to enter and compete would prevent the industry from gaining new competitors and bolster the prominence of pre-existing league structures, helping current esports organizations by creating a near monopoly through excessive start-up costs.

Additionally, a small team-specific union also could have quite a few issues. Such a small union would have substantially less power in bargaining with owners, as well as very limited bargaining power over an entire league, but would probably be a better advocate for fixing localized issues the players have. Also, such a union might raise costs for a team organization exponentially compared to their competitors, forcing them out of actual competitiveness.

Until a union does form, players still need protections now. One possibility for impatient players would be to bring antitrust actions against the leagues. This avenue was often utilized by traditional athletes in professional

286. See *supra* Section II.C.

league sports prior to, and even during, collective bargaining. However, this is not a one-size-fits-all solution. As discussed in Part II, leagues receive some insulation from the Sherman Antitrust Act due to the need for cooperation to create a market. Therefore, any antitrust suit against an esports league would need to find an angle of attack that would be supported by either the *per se* rule or the Rule of Reason.²⁸⁷ As a result, an antitrust action could not accomplish nearly as much as collective bargaining in improving player conditions or the power disparity, but it might alleviate some of the most egregious behaviors. Additionally, even if an esports players' union does form, antitrust suits are still an option for gaining leverage in court.²⁸⁸

Another option for uneasy players would be to seek outside governance and direction through legislative, administrative, or nongovernmental avenues. A few countries have taken this approach, including South Korea, France, and the United Kingdom.²⁸⁹ In South Korea, "the Korea [Esports] Association ('KeSPA') was established as a nongovernmental organization after approval and support from South Korea's Ministry of Culture and Tourism, and it has long been involved in regulating national gaming and esports."²⁹⁰ The organization "can officiate and organize tournaments, manage esports venues . . . , enforce professionalism and ethical standards," and more.²⁹¹ In the United Kingdom, a similar venture was created, but ultimately folded due to lack of funds.²⁹² Afterwards, a new group, the British Esports Association, was founded through government action to oversee competitive gaming.²⁹³ The United States could follow suit, using either direct legislation or administrative agencies to regulate esports.²⁹⁴ This strategy would certainly benefit players, but it is uncertain if these efforts would be solely in the players' interest like a union would provide, as many other stakeholders might seek protections in the legislation or governing organization.

These alternatives to collective bargaining are somewhat effective, but the formation of a players' union is ultimately the best path forward for players. The unique situation of a players' union is that it allows for game developers, team owners, and players to determine, with minimal outside interference, what balance is needed within their own industry. For players to combat poor conditions that they themselves endure and solve the existing power disparities to gain an equal seat at the table, collective bargaining is the

287. See *supra* Part II; see also *supra* note 64 and accompanying text.

288. See *supra* Section II.C.

289. Laura L. Chao, Note, "You Must Construct Additional Pylons": Building a Better Framework for Esports Governance, 86 *FORDHAM L. REV.* 737, 757-60 (2017).

290. *Id.* at 758.

291. *Id.* (footnotes omitted).

292. *Id.* at 759-60.

293. *Id.* at 760.

294. For a conversation on the potential for such governance, see *id.* at 760-65.

best solution. The traditional league model allows for a union that has an equal balancing of bargaining power and responsiveness to player issues. Therefore, this Note's recommendation is to establish an esports players association at the league level to provide a balance between bargaining power and localized attention with little risk of NLRB rejection. To gain initial bargaining power, this Note also suggests seeking out potential antitrust suits against leagues to encourage all parties to come to the table.

V. CONCLUSION

One industry insider "believe[s] formation of a players association, or more accurately multiple players associations across different publishers, leagues and games, is inevitable."²⁹⁵ Players' unions in the esports industry seem destined to form, without any substantial legal obstructions. There are certain market constraints that may be hard to overcome, but if players want to sufficiently protect their interests, a union is the best path forward. The development of players associations in the MLB, the NBA, and the NFL all provide evidence that an esports players' union would be highly beneficial and that current barriers have been overcome before. Player conditions and the power disparity between the players and the league are often oppressive within current esports leagues, and any new leagues that start out may have even worse conditions until they become fully established. It is possible that a players' union could form for teams, leagues, or industry-wide, each with its own benefits and limitations, but the best option is likely to follow the precedent set by other players associations in pursuing league-wide bargaining units. There are some alternatives to unionization, including antitrust suits and the establishment of governance oversight, but a union will be most responsive to player interests. The successful models of the players associations of the MLB, the NBA, and the NFL are available to guide any attempts of unionizing and collective bargaining by esports players.

295. Mullen, *supra* note 174.