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LET THE KIDS PLAY: HOW COLLEGE ATHLETES CAN USE CALIFORNIA'S PROHIBITION ON NONCOMPETE CLAUSES TO CIRCUMVENT THE NCAA'S YEAR-IN-RESIDENCE RULE

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I. INTRODUCTION

A new era had dawned for the University of Southern California (“USC”) football program. The introduction of Kliff Kingsbury as offensive coordinator, and the high-profile high school players he helped recruit to campus, promised to elevate USC’s football program to heights it had not achieved since the mid-2000s.¹ However, when the National Football League’s Arizona Cardinals hired Kingsbury as their head coach on January 8, 2019, that promising new era abruptly ended little more than a month after it started.²

With Kingsbury’s departure, recruits who signed with USC to play in his high-octane offense faced a difficult choice—remain committed to USC and play for an offensive coordinator that did not recruit them or transfer to another school and play for coaches that did. This may seem like an easy decision. Transferring to another school eliminates the risk associated with playing for coaches

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1. See Greg Beacham, *USC Lands Kliff Kingsbury as Helton’s Offensive Coordinator*, AP NEWS (Dec. 5, 2018), <https://www.apnews.com/e1005422766347739655d314d30b35b9> [<https://perma.cc/E2CY-2Q9J>]; see also Dina Colunga, *2019 USC Commits Kedon Slovis and Jude Wolfe Speak on Kliff Kingsbury Hire*, CONQUEST CHRONICLES (Dec. 5, 2018 11:15 AM), <https://www.conquestchronicles.com/recruiting/2018/12/5/18127654/2019-usc-commits-kedon-slovis-and-jude-wolfe-speak-on-kliff-kingsbury-hire> [<https://perma.cc/L8X7-2WRB>].

2. See Josh Weinfuss, *Cardinals Give Kliff Kingsbury Four-Year Deal to Be New Head Coach*, ESPN (Jan. 9, 2019), http://www.espn.com/nfl/story/_/id/25715541/arizona-cardinals-hire-kliff-kingsbury [<https://perma.cc/GXN6-2FH5>].

that you do not know and who may not put you on the field, either because they do not think highly of your skillset or because your skillset does not match the offensive or defensive scheme they employ. Yet, these USC recruits could not make their decision based exclusively on the coaches they expected to roam the USC sidelines that fall. They also needed to consider the National Collegiate Athletic Association's ("NCAA") transfer rules, particularly the so-called year-in-residence rule.³ The year-in-residence rule requires baseball, basketball, football,⁴ and men's ice hockey players that transfer from one Division I school to another to complete one full academic year at their new institution before they can compete in intercollegiate athletics.⁵ The rule essentially serves as a one-year suspension for these athletes. Furthermore, its applicability to only five high-revenue, high-profile sports demonstrates that the rule primarily exists to allow the NCAA to limit the power of its most exploited laborers, even while it allows well-compensated coaches to sell their labor without constraints.

Bru McCoy, a highly-touted high-school football player who committed to USC to play for Kingsbury, faced an unenviable choice—remain at USC despite Kingsbury's absence or transfer to a different school where the year-in-residence rule might make him ineligible to play during the 2019 season.⁶ Ultimately, despite the year-in-residence rule, McCoy transferred to the University of Texas and petitioned the NCAA for a waiver that would grant him immediate eligibility.⁷ Despite transferring to Texas less than a month after formally committing to USC, McCoy's fate rested in the NCAA's hands.⁸ McCoy eventually transferred back to USC in May

3. See *Transfer Terms*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/student-athletes/current/transfer-terms> [<https://perma.cc/KKX2-HUCX>] (last visited Jan. 28, 2020).

4. The year-in-residence rule applies only to Division I football players who compete in the Football Bowl Subdivision ("FBS"). *Id.*

5. See NAT'L COLLEGIATE ATHLETIC ASS'N, DIVISION I MANUAL, 183–85, available at <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/5EV5-8UR9>] (last visited Jan. 28, 2020); *Transfer Terms*, *supra* note 3.

6. See J. Brady McCollough, *USC Freshman Receiver Bru McCoy Enters Transfer Portal*, L.A. TIMES (Jan. 24, 2019, 6:55 PM), <https://www.latimes.com/sports/usc/la-sp-usc-mccoy-transfer-20190124-story.html> [<https://perma.cc/A8Z6-35AG>].

7. See Wescott Eberts, *Bru McCoy Discusses His Time at Texas as Waiver Optimism Grows*, MSN (Mar. 20, 2019), <https://www.msn.com/en-us/sports/ncaafb/bru-mccoy-discusses-his-time-at-texas-as-waiver-optimism-grows/ar-BBV17Pi> [<https://perma.cc/SRV2-KULC>].

8. See Paul Kasabian, *Bru McCoy Reportedly to Begin Classes at Texas After Transferring from USC*, BLEACHER REPORT (Jan. 25, 2019), <https://bleacherreport.com/articles/2817560-bru-mccoy-reportedly-to-begin-classes-at-texas-after-transferring-from-usc> [<https://perma.cc/9AY2-HK2M>].

of 2019, where he once again faced the prospect of missing a year of competition due to the year-in-residence rule.⁹

Optimistic USC fans might have pointed to the NCAA's 2019 decision to grant an eligibility waiver to Justin Fields, a high-profile quarterback who transferred from the University of Georgia to Ohio State University as evidence that the NCAA would grant McCoy's waiver petition.¹⁰ However, while the Fields decision ostensibly demonstrated the NCAA's willingness to relax enforcement of the year-in-residence rule, the NCAA still jealously guards its ability to control how and when football players like McCoy can transfer to other schools.¹¹ Indeed, in June 2019, in response to an increase in waiver requests from players like Fields and McCoy, the NCAA announced updated transfer guidelines that would make it harder for players to receive eligibility waivers.¹² The year prior, the NCAA successfully defended an antitrust challenge to the year-in-residence rule when the Seventh Circuit found that the rule "preserve[s] the amateur character of college athletics," despite reducing the benefits that players might receive if the rule did not exist.¹³

9. See J. Brady McCollough, *Bru McCoy Is Leaving Texas and Intends to Return to USC*, L.A. TIMES (May 31, 2019), <https://www.latimes.com/sports/usc/la-sp-bru-mccoy-usc-texas-transfer-20190531-story.html> [<https://perma.cc/BXR9-5R36>]. In October 2019, USC announced that McCoy would not play at all in the 2019 season, making his waiver requests moot. See Rob Goldberg, *USC's Former 5-Star WR Bru McCoy Out for Season*, BLEACHER REPORT (Oct. 29, 2019), <https://bleacherreport.com/articles/2860427-usc-wr-bru-mccoy-out-for-season> [<https://perma.cc/4CYP-MFRR>].

10. See Emily Caron, *NCAA Grants Ohio State Quarterback Justin Fields Immediate Eligibility*, SPORTS ILLUSTRATED (Feb. 8, 2019), <https://www.si.com/college-football/2019/02/08/justin-fields-immediate-eligibility-ohio-state-transfer-georgia-transfer-ncaa-decision> [<https://perma.cc/T8U5-3CJ5>].

11. See *Deppe v. NCAA*, 893 F.3d 498, 503–04 (7th Cir. 2018) (where the NCAA successfully defended the year-in-residence rule as a "presumptively procompetitive" eligibility rule that should not face federal antitrust scrutiny).

12. See Michelle Brutlag Hosick, *Council Adjusts Transfer Waiver Guidelines, Addresses Other Topics*, NCAA (June 26, 2019, 11:26 AM) <https://www.ncaa.org/about/resources/media-center/news/council-adjusts-transfer-waiver-guidelines-addresses-other-topics> [<https://perma.cc/YJX5-98RT>]; see also Dan Wolken, *NCAA Tightens Transfer Guidelines, Limits Players Gaining Immediate Eligibility*, USA TODAY (June 26, 2019, 9:44 AM), <https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2019/06/26/ncaas-changes-transfer-guidelines-limit-immediate-eligibility/1569260001/> [<https://perma.cc/7YS4-UV6G>].

13. *Deppe*, 893 F.3d at 499, 500. The plaintiff in *Deppe*, an erstwhile punter at Northern Illinois University ("NIU"), challenged the year-in-residence rule as an unlawful restraint of trade under § 1 of the Sherman Act. *Id.* at 499. The NIU coaches had promised the plaintiff, Peter Deppe, a scholarship. *Id.* Unfortunately for Deppe, those coaches left NIU and the new coach offered a scholarship to another punter. *Id.* Coaches at the University of Iowa told Deppe that they wanted to offer him a scholarship, but only if he could play immediately. *Id.* at

Antitrust challenges to the year-in-residence rule have repeatedly failed, but some scholars have argued student-athletes might achieve better outcomes by bringing such suits in a more favorable jurisdiction, like the Ninth Circuit.¹⁴ This paper agrees that student-athletes, like Bru McCoy, should look westward to challenge the year-in-residence rule. However, McCoy and other student-athletes who signed their national letter of intent or scholarship agreement in California should not challenge the year-in-residence rule on antitrust grounds. Instead, they should attack it as a noncompete agreement that violates section 16600 of the California Business Professions Code (“section 16600”).¹⁵

This paper argues that national letters of intent and athletic scholarship agreements create a contractual relationship between a student-athlete and his or her university.¹⁶ When a student-athlete signs that contract, he or she agrees to abide by NCAA bylaws, including the year-in-residence rule.¹⁷ However, the year-in-residence rule violates section 16600’s prohibition on noncompete agreements because it prevents a student-athlete from immediately competing in intercollegiate athletics.¹⁸ This statute and California’s “settled public policy in favor of open competition”¹⁹ give college athletes who sign national letters of intent or scholarship agreements in California a way to successfully circumvent the year-in-residence rule.

This paper proceeds in three parts. Part II outlines the contours of section 16600, which prohibits noncompete agreements.

500. Deppe sued the NCAA hoping to become immediately eligible at Iowa. *Id.* However, the Seventh Circuit held that “the year-in-residence requirement is plainly an eligibility rule” that is “entitled to a procompetitive presumption.” *Id.* at 502. Thus, “Deppe’s Sherman Act challenge to the NCAA’s year-in-residence by-law fail[ed] on the pleadings.” *Id.* at 504.

14. See Cameron Miller, *Go West, Young Man: Why the NCAA’s Transfer Regulations Can Be Defeated in the Ninth Circuit*, ARIZ. ST. U. SPORTS & ENT. L. J.: BLOG (Feb. 17, 2019), <http://asuselj.org/why-the-ncaas-transfer-regulations-can-be-defeated-in-the-ninth-circuit/> [<https://perma.cc/M5LM-VU8U>].

15. CAL. BUS. & PROF. CODE § 16600 (West 2019) (“Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”).

16. See *infra* Part III.

17. See *Shepherd v. Loyola Marymount Univ.*, 125 Cal. Rptr. 2d 829, 834 (Cal. Ct. App. 2002) (noting that NCAA “constitution and bylaws [are] explicitly incorporated by reference into the financial aid agreements executed by” student-athletes); *NCAA Division I Student-Athlete Statement*, NAT’L COLLEGIATE ATHLETIC ASS’N, available at https://ncaaorg.s3.amazonaws.com/compliance/d1/2019-20D1Comp_Form19-1a-StudentAthleteStatement.pdf [<https://perma.cc/U3R3-B72T>] (last visited Jan. 28, 2020); *DIVISION I MANUAL*, *supra* note 5, at 6 (R. 3.1.2.4.).

18. See *infra* Part IV.

19. *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290 (Cal. 2008).

Part III explains why both national letters of intent and athletic scholarship agreements are contracts. Finally, Part IV explains why section 16600 should apply to and ultimately invalidate the year-in-residence rule as a void noncompete agreement.

II. SECTION 16600 PROHIBITS NONCOMPETE AGREEMENTS

Section 16600 of the California Business Professions Code states that, “[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”²⁰ California “courts have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employment mobility.”²¹ Additionally, the state legislature and the California Supreme Court both “generally condemn[] noncompetition agreements” to “ensure[] ‘that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.’”²²

In *Edwards v. Arthur Andersen LLP*,²³ a “landmark” case interpreting section 16600, the California Supreme Court “affirmed that specific statutory exceptions are the only way around section 16600.”²⁴ There the court refused to adopt a “rule of reasonableness” standard when evaluating noncompetition agreements because section 16600’s “plain meaning” prohibits even reasonable limits “on an employee’s ability to practice his or her vocation. . . .”²⁵ The court also explicitly rejected the Ninth Circuit’s interpretation of section 16600, which allowed noncompetition agreements that only narrowly restrained an employee’s ability to engage in his or her vocation.²⁶ The court held that “[s]ection 16600 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect.”²⁷ The court also

20. BUS. & PROF. § 16600. The three subsequent sections of the California Business and Professions Code permit noncompete agreements, “in the sale or dissolution of corporations, partnerships, and limited liability corporations.” See *Edwards*, 189 P.3d at 290–91 (internal citations omitted).

21. *Edwards*, 189 P.3d at 291.

22. *Id.* (quoting *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 577 (1994)).

23. 189 P.3d 285 (Cal. 2008).

24. Jame P. Mascaro, *Non-Competition Agreements in California: The Fine Line Between Good and Bad*, ORANGE COUNTY LAW., Jan. 2016, at 25, available at <http://www.mascarolaw.com/wp-content/uploads/2018/01/Jame-Mascaro-Orange-County-Lawyer.pdf> [<https://perma.cc/DPE2-JL98>].

25. *Edwards*, 189 P.3d at 291–92.

26. See *id.* at 292–93.

27. *Id.* at 293.

alerted future litigants that only the state legislature had the responsibility and power to craft exceptions to section 16600's general prohibition on non-compete agreements.²⁸

III. NATIONAL LETTERS OF INTENT AND ATHLETIC SCHOLARSHIP AGREEMENTS ARE CONTRACTS

A student-athlete can use section 16600 to overturn the NCAA's year-in-residence rule only if an enforceable contract exists between the student-athlete and his or her college or university.²⁹ Two types of agreements between a student-athlete and his or her college or university could provide the contractual relationship necessary to challenge the enforceability of the year-in-residence rule under section 16600—a national letter of intent or a scholarship agreement.

A. National Letters of Intent

When a high school student formally commits to a NCAA Division I or II college or university, he or she signs a national letter of intent.³⁰ A national letter of intent obligates the student-athlete “to attend the institution listed on the [national letter of intent] for one academic year in exchange for that institution awarding athletics financial aid for one academic year.”³¹ The NCAA recognizes these letters as contracts between the student-athlete and the school.³² If a student signs a national letter of intent but leaves the institution listed on the letter before completing one academic year at that institution, then the student-athlete “los[es] . . . one season of competition in all sports” and must spend a year-in-residence at

28. *See id.* (“We reject Andersen’s contention that we should adopt a narrow-restraint exception to section 16600 and leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600.”).

29. *See* CAL. BUS. & PROF. CODE § 16600 (West 2019).

30. *Recruiting*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/student-athletes/future/recruiting> [<https://perma.cc/PU8E-GB2G>] (last visited Jan. 28, 2020).

31. *NLI Binding Agreement FAQs*, NAT’L LETTER INTENT, <http://www.nationalletter.org/frequentlyAskedQuestions/bindingAgreement.html> [<https://perma.cc/XC92-ELYA>] (last visited Jan. 28, 2020).

32. *See Recruiting*, *supra* note 30. Of course, the NCAA does not recognize these contracts as employment contracts because it does not recognize student-athletes as employees. *See* Donald Remy, *NCAA Responds to Union Proposal*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal> [<https://perma.cc/767D-USKX>] (last visited Jan. 28, 2020) (“Student-athletes are not employees, and their participation in college sports is voluntary.”).

his or her new school.³³ Because the NCAA concedes that national letters of intent are contracts, section 16600 applies to national letters of intent signed in California.

B. Athletic Scholarship Agreements

The NCAA describes an athletic scholarship as “an agreement between the school and the student-athlete with expectations on both sides,” namely that the student-athlete will compete for the school in exchange for financial aid during the term of the agreement.³⁴ Because student-athletes and the college or university they attend make “an agreement . . . with expectations on both sides,”³⁵ some scholars have said that “[s]tudent-athletes enter into a direct contractual relationship with their schools.”³⁶ However, the NCAA maintains that, unlike national letters of intent, scholarship agreements do not create a contractual relationship between a student-athlete and his or her school because “the agreement is completely separate from transfer regulations” and “[a] student-athlete may choose to transfer at any time.”³⁷ While the year-in-residence rule undermines the NCAA’s claim that a student-athlete can “transfer at any time,” a student-athlete challenging the year-in-residence rule under section 16660 must prepare to prove that a scholarship agreement is, in fact, a contract under California law.

Section 1549 of the California Civil Code defines a contract as “an agreement to do or not do a certain thing.”³⁸ Section 1550 identifies four essential elements of a contract: “1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and, 4. A sufficient cause or consideration.”³⁹ Scholarship agreements satisfy all four of these elements.

33. *NLI Penalty FAQs*, NAT’L LETTER INTENT, <http://www.nationalletter.org/frequentlyAskedQuestions/nliPenalty.html> [https://perma.cc/9LDN-YV9R] (last visited Jan. 28, 2020).

34. *Frequently Asked Questions About the NCAA*, NAT’L COLLEGIATE ATHLETIC ASS’N, <https://web.archive.org/web/20190404022123/http://www.ncaa.org/about/frequently-asked-questions-about-ncaa> [https://perma.cc/E2HG-DXXU].

35. *Id.*

36. See Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQ. SPORTS L. REV. 287, 291 (2016).

37. See *Frequently Asked Questions About the NCAA*, *supra* note 34 (advertising that a scholarship “agreement does not bind the student-athlete to the institution any more than the current transfer rules—he or she may transfer during the term of the award”).

38. CAL. CIV. CODE § 1549 (West 2019).

39. CIV. § 1550.

1. *Contractual Capacity*

Section 1556 of the California Civil Code provides that “[a]ll persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.”⁴⁰ Notwithstanding section 1556’s exception regarding the contractual capacity of minors, section 6700 of the California Family Code declares that “a minor may make a contract in the same manner as an adult,” subject to specific exceptions that do not apply to student-athletes signing a scholarship agreement.⁴¹ Thus, under typical circumstances, the parties to a scholarship agreement have contractual capacity.⁴² Moreover, student-athletes sign a national letter of intent *before* they sign a scholarship agreement.⁴³ Therefore, the NCAA cannot plausibly argue that student-athletes lack contractual capacity when they sign a scholarship agreement, while also maintaining that they somehow have contractual capacity when they sign their national letter of intent a year prior.

2. *Consent*

Under California law, “[t]he consent of the parties to a contract must be: 1. Free; 2. Mutual; and, 3. Communicated by each to the other.”⁴⁴ Under typical circumstances, both parties consent to a scholarship agreement because neither party signs due to duress, menace, fraud, undue influence, or mistake.⁴⁵ Additionally, both parties sign the agreement and the agreement communicates the consent of each party to the other,⁴⁶ satisfying the second and third elements of contractual consent.⁴⁷ Also, as a practical matter, a student-athlete challenging the year-in-residence rule under section

40. CIV. § 1556. “A minor is an individual who is under 18 years of age.” CAL. FAM. CODE § 6500 (West 2019).

41. FAM. § 6700. The specific exceptions to the contractual capacity of minors pertain to power delegation, real property, personal property, and marriage contracts. FAM. §§ 6700, 6701. Additionally, a minor may “disaffirm” a contract “before majority or within a reasonable time afterwards,” FAM. § 6710, but a student-athlete challenging the year-in-residence rule under section 16600 would not disaffirm the scholarship agreement.

42. This paper presumes that ordinarily neither the exception for persons of unsound mind nor the exception for persons deprived of civil rights apply when a student-athlete signs his or her scholarship agreement.

43. See *Recruiting*, *supra* note 30; *Frequently Asked Questions About the NCAA*, *supra* note 34.

44. CIV. § 1565.

45. See CIV. § 1567.

46. See *Sample Athletic Financial Aid Agreement*, *supra* note 17; *Frequently Asked Questions About the NCAA*, *supra* note 34.

47. See CIV. § 1565.

16600 will undoubtedly concede that he or she consented to the scholarship agreement.

3. *Lawful Object and Consideration*

The requirements that a contract have both a “lawful object” and “sufficient . . . consideration” work together.⁴⁸ An agreement satisfies these elements if the party receiving consideration agrees to do something lawful at the time of contracting and “possible and ascertainable by the time the contract is to be performed.”⁴⁹ Contracts are lawful unless they are “[c]ontrary to an express provision of law,” “the policy of express law,” or “good morals.”⁵⁰ Giving student-athletes athletic-related financial aid in exchange for playing a sport at a particular school is not contrary to an express provision of California law, the policy of an express California law, or good morals. Additionally, student-athletes agree to do something that they can accomplish during the time by which the contract is to be performed because they play college athletics for their institution throughout the duration of the scholarship. Furthermore, because national letters of intent are contracts with similar terms to scholarship agreements, the NCAA likely would not claim that an athletic scholarship agreement is unlawful.⁵¹

Thus, a scholarship agreement satisfies all of the elements of a contract if the promisor—the student-athlete in this case⁵²—receives sufficient consideration for his or her promise to play a sport at a school.⁵³ Section 1605 of the California Civil Code defines “good consideration” as “[a]ny benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled”⁵⁴ A student-athlete receives

48. See Civ. §§ 1550, 1595.

49. Civ. § 1596.

50. Civ. § 1667.

51. See *supra* notes 30–33 and accompanying text.

52. A court should not consider the college or university as the promisor because the college or university obligates itself to the student-athlete only after the student-athlete promises to attend the college or university. Therefore, the college or university is the promisee because the student-athlete makes a promise to the school.

53. See Civ. § 1550. In this context, “sufficient consideration” exclusively refers to legally sufficient consideration, not just or fair consideration. Indeed, it seems clear that student-athletes, particularly those in revenue sports, do not receive fair compensation for their athletic contributions to colleges and universities. See David Berri, *Even When Allegedly Paid Illegally, NCAA Athletes Appear to Be Very Underpaid*, FORBES (Nov. 26, 2017, 3:03 PM), <https://www.forbes.com/sites/davidberri/2017/11/26/even-when-allegedly-paid-illegally-ncaa-athletes-appear-to-be-very-underpaid/#3a348203541a> [<https://perma.cc/X8U5-UYN9>].

54. See Civ. § 1605.

sufficient consideration for his or her promise to play a sport at a school because the terms of a typical scholarship agreement give a student-athlete athletic-related financial aid in exchange for committing to play at a college or university.⁵⁵ Financial aid directly benefits student-athletes by reducing or eliminating the cost of a college education.⁵⁶ Indeed, the NCAA maintains that “[a] college education is the most rewarding benefit of the student-athlete experience.”⁵⁷ Thus, scholarship agreements satisfy the fourth element of a contract because student-athletes receive sufficient consideration for their promise to attend a particular school because they receive a valuable college education for free or at a discounted rate. Because athletic scholarship agreements satisfy all four elements of a contract under California law, a court should hold that an athletic scholarship agreement is a contract.

IV. SECTION 16600 VOIDS THE NCAA’S YEAR-IN-RESIDENCE RULE

Once a student-athlete proves that a national letter of intent or athletic scholarship agreement is a contract, he or she must demonstrate that section 16600 voids the year-in-residence rule as an impermissible noncompete clause. First, student-athlete plaintiffs must show that the contract they signed with their school includes the year-in-residence rule as a contract term.⁵⁸ California courts have held that the NCAA’s “constitution and bylaws [are] explicitly incorporated by reference into the financial aid agreements” that student-athletes sign.⁵⁹ The NCAA Division I manual includes the year-in-residence rule, so a student-athlete plaintiff should have little trouble demonstrating that his or her letter of intent or scholarship agreement includes the year-in-residence rule as a contract term.⁶⁰

The remainder of Part IV explains why section 16600 voids the year-in-residence rule. First, this Part argues that student-athletes engage in a “lawful profession, trade, or business” when they participate in college athletics.⁶¹ Part IV then shows that the year-in-

55. See Epstein & Anderson, *supra* note 36, at 291; *Frequently Asked Questions About the NCAA*, *supra* note 34.

56. See *Scholarships*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/student-athletes/future/scholarships> [<https://perma.cc/9ED7-CAXT>] (last visited Jan. 28, 2020).

57. *Id.*

58. See CAL. BUS. & PROF. CODE § 16600 (West 2019).

59. Shephard v. Loyola Marymount Univ., 125 Cal. Rptr. 2d 829, 834 (Cal. Ct. App. 2002).

60. See DIVISION I MANUAL, *supra* note 5, at 183–85.

61. See *infra* Part IV.A.

residence rule restrains student-athletes from engaging in the business of college athletics.⁶² Finally, this Part concludes by arguing that the California state legislature should not create an exception to section 16600 that protects the year-in-residence rule.⁶³

A. NCAA Student-Athletes Engage in a Lawful Profession, Trade, or Business When They Play College Sports

To circumvent the year-in-residence rule by using section 16600, student-athlete plaintiffs must demonstrate that they “engag[e] in a lawful profession, trade, or business of any kind” when they play their sport.⁶⁴ As a matter of statutory interpretation, courts “must follow [the] plain meaning” of a clear and unambiguous statute.⁶⁵ In *Edwards*, the California Supreme Court held that “[s]ection 16600 is unambiguous” and applied its plain meaning.⁶⁶ This binding precedent requires courts to examine section 16600’s plain meaning to determine if student-athletes engage in a profession, trade, or business when they play a sport.⁶⁷

1. *College Athletics Are a Lawful Business*

Although the California Business and Professions Code does not define profession, trade, or business, student-athlete plaintiffs can credibly argue that they engage in a business by participating in the billion-dollar college sports industry.⁶⁸ Such an argument comports with section 16600’s broad terms that apply to “every contract” that restrains “anyone” from “engaging in a lawful . . .

62. See *infra* Part IV.B.

63. See *infra* Part IV.C.

64. CAL. BUS. & PROF. CODE § 16600 (West 2019).

65. See, e.g., *Torres v. Parkhouse Tire Serv., Inc.*, 30 P.3d 57, 60 (Cal. 2001); see also *Bodell Constr. Co. v. Trs. of Cal. St. Univ.*, 73 Cal. Rptr. 2d 450, 454 (Cal. Ct. App. 1998) (citing *Lungren v. Deukmejian*, 755 P.2d 299, 303–04 (Cal. 1988)) (“If the language of the statute is clear and unambiguous, there is no need for construction.”).

66. See *Edwards v. Arthur Andersen, LLP*, 189 P.3d 285, 291, 293 (Cal. 2008).

67. See, e.g., *id.* at 293; *Torres*, 30 P.3d at 60.

68. See, e.g., S.B. 206, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (as originally introduced) (hereinafter “Proposed Fair Pay to Play Act”), available at <https://legiscan.com/CA/text/SB206/id/1972267/California-2019-SB206-Amended.html> [<https://perma.cc/47Z3-DH4W>] (“California’s postsecondary educational institutions that participate in intercollegiate athletics generate over seven hundred million dollars (700,000,000) per year, which is revenue that would not exist without the efforts of college athletes.”); see also Darren Rovell, *NCAA Tops \$1 Billion in Revenue During 2016-17 School Year*, ESPN (Mar. 7, 2018), http://www.espn.com/college-sports/story/_/id/22678988/ncaa-tops-1-billion-revenue-first [<https://perma.cc/X6BD-PNSX>].

business of *any kind*”⁶⁹ The dictionary defines “any” as “one or more without specification or identification” and “every; all.”⁷⁰ Thus, the plain meaning of section 16600 places no limits or specifications on the type of businesses to which it applies. A student-athlete plaintiff should urge courts to adopt an expansive interpretation of profession, trade, or business that includes college athletics so that the court abides by the statute’s plain meaning and effectuates the intent of the California legislature. With that said, a student-athlete plaintiff must contend with *Townsend v. California*,⁷¹ a 1987 case that describes California colleges and universities as “not in the ‘business’ of” college athletics.⁷² At first glance, the case seemingly undercuts a student-athlete’s argument that the court should interpret business to include college athletics, but, upon closer examination, *Townsend* does not foreclose that argument to student-athletes.

In *Townsend*, the court addressed whether “a student-athlete is an employee of the school he represents” to determine if the plaintiff, a college basketball player injured by an opposing player in an in-game altercation, could recover monetary damages under the California Tort Claims Act.⁷³ To make that determination the court examined “whether a master-servant relationship” existed between a student-athlete and the public college or university for which he played.⁷⁴ The court could not rely exclusively on traditional principles of agency law typically used to distinguish between employees and independent contractors because “the relationship between a school and a student-athlete is a unique one which probably does not fit neatly into” the employee versus independent contractor dichotomy.⁷⁵ Given the unique difficulties presented by defining the relationship between a student-athlete and his or her

69. CAL. BUS. & PROF. CODE § 16600 (West 2019) (emphasis added).

70. *Any*, RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed. 1993).

71. 237 Cal. Rptr. 146 (Cal. Ct. App. 1987).

72. *See id.* at 149 (“Thus, conceptually, the colleges and universities maintaining [football and basketball] programs are not in the ‘business’ of playing football or basketball any more than they are in the ‘business’ of golf, tennis or swimming.”).

73. *See id.* at 146–47.

74. *Id.* at 148 (noting “[a]pplicability of [respondeat superior] in any given case . . . requires an individualized determination of whether a master-servant relationship exists between the tortfeasor and the defendant on which plaintiff seeks to impose vicarious liability”).

75. *Id.*

university, policy considerations factored heavily into the court's analysis.⁷⁶

In its policy analysis, the court deduced that the state legislature excluded student-athletes from its definition of employee in the California Labor Code “to prevent the student-athlete from being considered an employee of an educational institution for any purpose which could result in financial liability on the part of the university.”⁷⁷ The court also reasoned that “conceptually, the colleges and universities maintaining . . . athletic programs are not in the ‘business’ of playing” the sports it offers.⁷⁸ Rather, college sports “are simply part of an integrated multi-sport program which is part of the education process.”⁷⁹ These considerations, and the court's desire to effectuate legislative intent, resulted in the court holding that the student-athlete tortfeasor “was not an employee of the State or the university”⁸⁰

Other California courts have reaffirmed *Townsend's* holding that colleges and universities do not employ student-athletes.⁸¹ Those cases have even cited *Townsend's* observation that “conceptually, the colleges and universities maintaining [football and basketball] programs are not in the ‘business’ of” college athletics.”⁸² However, like *Townsend*, those cases address whether “a student-athlete is an employee of the school he represents,” not whether colleges and universities are “in the ‘business’ of” operating a college athletics program.⁸³ *Townsend's* declaration that colleges and universities with athletic programs “are not in the ‘business’ of” college athletics amounts to nothing more than dicta about the “conceptual” nature of college sports over thirty years ago.⁸⁴ *Townsend's* actual holding does not answer the key question for a student-

76. *See id.* (“It is fair to state, however, that any determination of this issue [of whether a master-servant relationship exists] . . . is affected by policy considerations.”).

77. *Id.* at 149–50.

78. *Id.* at 149.

79. *Id.*

80. *Id.* at 150.

81. *See, e.g., Dawson v. NCAA*, 250 F. Supp. 3d 401, 407 (N.D. Cal. 2017) (applying California law), *aff'd*, 932 F.3d 905 (9th Cir. 2019); *Shephard v. Loyola Marymount Univ.*, 125 Cal. Rptr. 2d 829, 832–36 (Cal. Ct. App. 2002).

82. *See, e.g., Dawson*, 250 F. Supp. at 407–09; *Shephard*, 125 Cal. Rptr. 2d at 834.

83. *Compare Townsend*, 237 Cal. Rptr. at 147 with *Dawson*, 250 F. Supp. 3d at 402–03 (determining whether student athletes are employees under the Fair Labor Standards Act) and *Shephard*, 125 Cal. Rptr. at 830 (“[W]e address the question of whether plaintiff was an employee for purposes of the [Fair Employment and Housing Act].”).

84. *Townsend*, 237 Cal Rptr. at 149.

athlete's challenge to the year-in-residence rule under section 16600—are college athletics a business?⁸⁵

Judge Claudia Wilken's 2014 decision in *O'Bannon v. NCAA*⁸⁶ exemplifies why and how a court should refuse to allow outdated, factually unsupported dicta to control its holding.⁸⁷ In *O'Bannon*, the NCAA attempted to justify its restrictions on student-athlete compensation by citing dicta from the United States Supreme Court's 1984 decision in *NCAA v. Board of Regents of University of Oklahoma*⁸⁸ that said, "[i]n order to preserve the character and quality of the 'product,' [of college football], athletes must not be paid . . ."⁸⁹ Judge Wilken refused to allow that dicta to control her legal analysis for numerous reasons.⁹⁰ First, she noted that *Board of Regents* "addressed limits on television broadcasting, not payments to student-athletes . . ."⁹¹ Second, Judge Wilken observed that "the college sports industry has changed substantially in the thirty years since *Board of Regents* was decided."⁹² Finally, she wrote that "[t]he Supreme Court's suggestion in *Board of Regents* that, in order to preserve the quality of the NCAA's product, student-athletes 'must not be paid,' . . . was not based on any factual findings in the trial record and did not serve to resolve any disputed facts of law."⁹³

Similar issues that led Judge Wilken to eschew reliance on the Supreme Court's dicta in *Board of Regents* should prompt a California court to abstain from using *Townsend's* dicta to decide that California universities are not engaged in a business. First, the California Court of Appeals decided *Townsend* in 1987, just three years after the Supreme Court decided *Board of Regents*.⁹⁴ As Judge Wilken said, "the college sports industry has changed substantially" since the mid-1980s.⁹⁵ Indeed, other courts have also noted that "in so-called revenue sports like Division I men's basketball and FBS [Football Bowl Subdivision] football . . . economic reality and the tradition of amateurism may not point in the same direction" be-

85. See CAL. BUS. & PROF. CODE § 16600 (West 2019).

86. 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part* by 802 F.3d 1049 (9th Cir. 2015).

87. See *id.* at 999–1000.

88. 468 U.S. 85 (1984).

89. *Id.* at 102.

90. See *O'Bannon*, 7 F. Supp. 3d at 999 (describing the NCAA's reliance on *Board of Regents* as "unavailing").

91. *Id.* (citation omitted).

92. *Id.* at 999–1000.

93. *Id.* at 999 (internal citation omitted).

94. Compare note 72 with note 89 (cases decided three years apart).

95. *O'Bannon*, 7 F. Supp. 3d at 1000.

cause “[t]hose sports involve billions of dollars of revenue for colleges and universities.”⁹⁶ The California state legislature highlighted the scale of these changes in the legislative findings section in the original drafts of the recently enacted “Fair Pay to Play Act.”⁹⁷ Section 1 of those first drafts found that, *inter alia*, “the fair market value of the labor of the average FBS football and men’s basketball player was approximately \$137,357 and \$289,829, respectively.”⁹⁸ The proposal also noted that “California’s postsecondary educational institutions that participate in intercollegiate athletics generate over seven hundred million dollars (\$700,000,000) per year, which is revenue that would not exist without the efforts of college athletes.”⁹⁹ Prompted by California’s enactment of the Fair Pay to Play Act and the rush by other states to pass similar legislation,¹⁰⁰ the NCAA ostensibly reversed its longstanding opposition to student-athlete compensation by announcing that it would allow student-athletes “to profit from their name, image, and likenesses ‘in a manner consistent with the collegiate model.’”¹⁰¹

Additionally, the court in *Townsend* offered no factual evidence about the actual nature of college sports to support its assertion, just as the Supreme Court’s dicta in *Board of Regents* lacked factual support.¹⁰² Furthermore, the *Townsend* court’s desire to effectuate legislative intent by deciding that the student-athlete tortfeasor “was not an employee of the State or the university” significantly affected the case’s outcome.¹⁰³ If a court interpreting section 16600 wanted

96. *Berger v. NCAA*, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring).

97. See Proposed Fair Pay to Play Act, *supra* note 68.

98. *Id.*

99. *Id.* The California legislature removed that language in June of 2019 as the bill worked its way toward passage. See *California Senate Bill 206*, LEGISCAN, <https://legiscan.com/CA/text/SB206/id/2055437> [<https://perma.cc/73PN-UXZG>] (last visited Jan. 28, 2020). Upon passage, Section 1 read, “[i]t is the intent of the Legislature to continue to develop policies to ensure appropriate protections are in place to avoid exploitation of student athletes, colleges, and universities.” S.B. 206, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (as enacted).

100. See Craig Meyer, *Pennsylvania Taking Steps Toward Its Own ‘Fair Pay to Play Act’*, PITTSBURGH POST-GAZETTE (Oct. 1, 2019, 4:04 PM), <https://www.post-gazette.com/news/politics-state/2019/10/01/california-fair-pay-to-play-act-gavin-newsom-pennsylvania/stories/201910010178> [<https://perma.cc/HDR9-KCA6>].

101. Dan Murphy, *NCAA Clears Way for Athletes to Profit from Names, Images and Likenesses*, ESPN (Oct. 29, 2019), https://www.espn.com/college-sports/story/_/id/27957981/ncaa-clears-way-athletes-profit-names-images-likenesses [<https://perma.cc/3V4A-NZ76>].

102. Compare *Townsend v. California*, 237 Cal. Rptr. 146, 149 (Cal. Ct. App. 1987) with *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984).

103. See *Townsend*, 237 Cal. Rptr. at 149–50 (reasoning that the California legislature’s amendment of the Labor Code to exclude student-athletes from the defi-

to similarly implement the legislature's intent behind section 16600, then it should not use *Townsend's* dicta to quash a challenge to the year-in-residence rule. Doing so would not only thwart California's "settled public policy in favor of open competition,"¹⁰⁴ but it would also undermine the legislature's clear desire over the last ten years to expand legal protections for student-athletes.¹⁰⁵

O'Bannon and other recent, high-profile challenges to NCAA rules, including the year-in-residence rule, provide additional evidence that college athletics is a business.¹⁰⁶ For instance, in its *O'Bannon* decision, the Ninth Circuit found that the NCAA "regulate[d] 'commercial activity.'"¹⁰⁷ The court noted that:

[T]he modern legal understanding of 'commerce' is broad, 'including almost every activity from which the actor anticipates economic gain' That definition surely encompasses the transaction in which an athletic recruit exchanges his labor and [name, image, and likeness] rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it.¹⁰⁸

The court held that the rules restricting student-athlete compensation "relate to the NCAA's *business activities*: the labor of student-athletes is an integral and essential component of the NCAA's 'product,' and a rule setting the price of that labor goes to the heart of the NCAA's *business*."¹⁰⁹ Though the court ultimately allowed some restrictions on player compensation, it did so because the

tion of employee "evidenced an intent on the part of the Legislature to prevent the student-athlete from being considered an employee of an educational institution for any purpose which could result in financial liability on the part of the university").

104. *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290 (Cal. 2008).

105. See CAL. EDUC. CODE § 67450 (West 2019) (Student Athlete Bill of Rights); S.B. 206, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (as enacted).

106. Federal courts' willingness to view the NCAA and college athletics as a business might prompt a student-athlete to file his section 16600 challenge to the year-in-residence rule in federal court. A federal court would have jurisdiction under 28 U.S.C. § 1332 because the case would involve a California plaintiff and an Indiana defendant. See *Contacting the NCAA*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/who-we-are/contact-us> [<https://perma.cc/MF5V-LF4R>] (last visited Jan. 28, 2020) (showing that the NCAA's national office is in Indiana).

107. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1064–65 (9th Cir. 2015) (describing the NCAA's "claims that its compensation rules are mere 'eligibility rules' that do not regulate any 'commercial activity'" as "not credible").

108. *Id.* at 1065 (internal citation omitted).

109. *Id.* at 1066 (emphasis added).

NCAA persuaded it that limits on student-athlete compensation preserved “the college football market” by promoting amateurism, which made college athletics more appealing to consumers.¹¹⁰

The NCAA’s own briefs in the *O’Bannon* litigation also described college athletics in commercial terms, revealing that the NCAA and its member institutions operate athletic programs as profit-driven businesses. In its post-trial brief following the district court’s *O’Bannon* decision,¹¹¹ the NCAA defended its restrictions on student-athlete compensation by arguing that those rules “create a unique product—amateur college sports—that competes with other forms of entertainment, including professional sports.”¹¹² Thus, even the NCAA described college athletics as an entertainment product in direct competition with other businesses.

Other antitrust cases have similarly exposed the NCAA and its member institutions as involved in commercial activity—namely, the promotion of the student-athlete-created product of college athletics. For instance, in *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation*,¹¹³ Judge Wilken held that recruits “sell their athletic services to the schools that participate in Division I basketball and FBS football in exchange for grants-in-aid and other benefits and compensation permitted by NCAA rules.”¹¹⁴ There the NCAA again defended limits on player compensation as necessary to both maintain consumer demand for the product of college sports and prevent its revenues from decreasing.¹¹⁵ The NCAA’s need to protect the market for the product of college athletics also insulated the year-in-residence rule from an antitrust challenge in *Deppe v. NCAA*.¹¹⁶ There the Seventh Circuit upheld the year-in-residence

110. *See id.* at 1073–74.

111. *See also* NCAA v. O’Bannon, 137 S. Ct. 277 (2016) *denying cert.* (No. 15-1167), 2016 WL 3626736; O’Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015) (No. 14-16601) 2015 WL 8004352.

112. Defendant NCAA’s Post-Trial Brief at 28, O’Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff’d in part, vacated in part by* 802 F.3d 1049 (9th Cir. 2015) (No. 4:09-CV-3329-CW), 2014 WL 3854062.

113. 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

114. *Id.* at 1067. Like the plaintiffs in *O’Bannon*, the plaintiffs in *Alston* challenged the NCAA’s limits on student-athlete compensation under federal antitrust law. *See id.* at 1061–62.

115. *See id.* at 1070 (The NCAA “argue[s] that the challenged compensation limits are procompetitive because ‘amateurism is a key part of demand for college sports’ and ‘consumers value amateurism.’ The corollary is that if consumers did not believe that student-athletes were amateurs, they would watch fewer games and revenues would decrease as a result.” (internal citation omitted)).

116. *See Deppe v. NCAA*, 893 F.3d 498, 503 (7th Cir. 2018).

rule because “the NCAA needs ‘ample latitude’ to preserve *the product of college sports*.”¹¹⁷

These recent antitrust cases show that, when it suits them, the NCAA argues that it and its member institutions actively engage in a market for student-athletes’ “athletic services” so that they can produce “the product of college sports” and generate revenue for itself and its member institutions.¹¹⁸ This is quintessential business activity. California courts should steadfastly reject the NCAA’s attempts to claim otherwise simply because it is legally expedient.

2. *College Athletes Engage in the Lawful Business of College Athletics by Playing College Sports*

Even if a court held that college athletics was a business, the NCAA could argue that student-athletes do not “engage” in the business of college athletics and that section 16600 does not apply because colleges and universities do not employ student-athletes.¹¹⁹ Indeed, most section 16600 cases involve employees,¹²⁰ and state and federal courts in California have reaffirmed that colleges and universities do not employ student-athletes.¹²¹ However, a California court should reject this argument because section 16600 does not apply only when an employee-employer relationship exists.¹²² Rather, the statute applies to “*every contract* by which *anyone* is restrained from engaging in a lawful profession, trade, or business of *any kind*.”¹²³ It does not exclusively regulate contracts that restrain employees, nor does it exclusively regulate contracts that restrain someone from becoming an employee.

To determine what section 16600 means by “engaging in a lawful . . . business of any kind,”¹²⁴ a court should examine the statute’s plain meaning.¹²⁵ The dictionary defines “engage” as “occupy[ing]

117. *Id.* (emphasis added).

118. See notes 106–07 and 109 and accompanying text.

119. See, e.g., Epstein & Anderson, *supra* note 36, at 297 (noting that “courts have been consistent finding that student-athletes are not recognized as employees under any legal standard”).

120. *But see* *Youngevity Int’l, Corp. v. Smith*, 224 F. Supp. 3d 1022, 1032 (S.D. Cal. 2016) (holding that section 16600 applies to both independent contractors and employees).

121. See *Dawson v. NCAA*, 250 F. Supp. 3d 401, 403 (N.D. Cal. 2017), *aff’d*, 932 F.3d 905 (9th Cir. 2019); *Shephard v. Loyola Marymount Univ.*, 125 Cal. Rptr. 2d 829, 832–36 (Cal. Ct. App. 2002).

122. See CAL. BUS. & PROF. CODE § 16600 (West 2019); *Youngevity Int’l, Corp.*, 224 F. Supp. 3d at 1032.

123. BUS. & PROF. § 16600 (emphasis added).

124. *Id.*

125. See *supra* notes 65–67 and accompanying text.

the attention or efforts of (a person or persons).”¹²⁶ Because college sports occupy the attention and efforts of student-athletes, the plain meaning of the statute makes clear that student-athletes engage in the business of college athletics. Both common sense and case law support this understanding. As the Ninth Circuit held in *O’Bannon*, “the labor of student-athletes is an integral and essential component of the NCAA’s ‘product’”¹²⁷ Simply put, without student-athletes, the NCAA’s business does not exist; student-athletes directly create the product that the NCAA sells.¹²⁸ Indeed, the California state legislature initially proposed the Fair Pay to Play Act in part because the state’s colleges and universities “generate over seven hundred million dollars” annually from intercollegiate athletics, “which is revenue that would not exist without the efforts of college athletes.”¹²⁹ Therefore, section 16600’s plain meaning, case law, and recent legislative findings all suggest that a court should hold that student-athletes engage in the business of college athletics.¹³⁰

B. The Year-In-Residence Rule Restrains Student-Athletes from Engaging in College Athletics

To successfully challenge the year-in-residence rule under section 16600, student-athletes must prove that the year-in-residence rule restrains them from engaging in college athletics by forcing

126. *Engage*, RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed. 1993).

127. *O’Bannon v. NCAA*, 802 F.3d 1049, 1066, 1073–74 (9th Cir. 2015); see also Darren Geeter, *March Madness Makes Enough Money to Nearly Fund the Entire NCAA—Here’s How*, CNBC (Mar. 22, 2019, 2:45 PM), <https://www.cnn.com/2019/03/22/ncaa-march-madness-tournament-basketball.html> [<https://perma.cc/8J8U-K7EF>] (“The NCAA’s Division I men’s basketball tournament draws in millions of viewers and rakes in more than \$800 million each year from its television deal alone.”); Brent Schrottenboer, *How College Football Playoff and Bowl Game System Mix Socialism, Capitalism*, USA TODAY (Dec. 14, 2017, 7:42 PM), <https://www.usatoday.com/story/sports/2017/12/14/college-football-bowl-game-revenue-sharing/952646001/> [<https://perma.cc/Z8JD-S65U>] (reporting that NCAA “conferences and schools combined for \$517 million in bowl profit” in 2016).

128. See generally *O’Bannon*, 802 F.3d 1049; Greeter, *supra* note 127; Schrottenboer, *supra* note 127.

129. See Proposed Fair Pay to Play Act, *supra* note 68; see also Cork Gaines & Mike Nudelman, *Why the NCAA May Eventually Be Forced to Pay Some Student Athletes*, *In One Chart*, BUS. INSIDER (Nov. 24, 2017, 4:51 PM), <https://www.businessinsider.com/college-football-player-value-2017-11> [<https://perma.cc/25Q8-HDWZ>] (showing that “the average FBS player is worth \$163,087 a year, with the average football team making \$29.5 million in revenue each year”).

130. See *Edwards v. Arthur Andersen, LLP*, 189 P.3d 285, 293 (Cal. 2008) (“[W]e are of the view that California courts ‘have been clear in their expression that section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat.’” (quoting *Scott v. Snelling & Snelling, Inc.*, 732 F. Supp. 1034, 1042 (N.D. Cal. 1990))).

them to not compete in intercollegiate athletics for one academic year after transferring.¹³¹ Although the year-in-residence rule certainly limits a student-athletes' participation in intercollegiate athletics, the NCAA will likely argue that the rule does not "restrain" student-athletes because they can freely transfer and can still practice with their team during the year-in-residence.¹³² The NCAA might also tout the supposed benefits of the rule by arguing that the year-in-residence allows transfer students "to become comfortable in [their] new environment"¹³³ and prevents schools from trading student-athletes "from year to year like professional athletes."¹³⁴ Finally, the NCAA might contend that preventing a student-athlete from competing in intercollegiate athletics for one year does not restrain him or her from engaging in college athletics because it provides a temporally-limited restriction on only one part of the intercollegiate athletic experience.

However, these arguments should fail because California courts have repeatedly refused to create exceptions to section 16600, even for reasonable, narrow, and time-limited restraints on competition. Although the year-in-residence rule permits transferring student-athletes to participate in some aspects of intercollegiate athletics, the California Supreme Court has considered and explicitly rejected "interpret[ing] the term 'restrain' under section 16600 to mean simply to 'prohibit,' so that only contracts that totally prohibit an employee from engaging in his or her profession, trade, or business are illegal."¹³⁵ Even "reasonably based" and "narrowly tailored" restraints on an individual's ability to engage in "his

131. See CAL. BUS. & PROF. CODE § 16600 (West 2019).

132. NAT'L COLLEGIATE ATHLETIC ASS'N, 2018–19 GUIDE FOR FOUR-YEAR TRANSFERS, at 16 (2018), available at <http://www.ncaapublications.com/product-downloads/TGONLINE42018.pdf> [<https://perma.cc/443U-349U>] (last visited Jan. 28, 2020).

133. *Id.* The NCAA Division I manual does not explain why FBS football, basketball, baseball, and men's hockey players need a year to become comfortable at their new school, while other students do not. However, one scholar astutely noted that the rule makes it so that "schools' most lucrative athletes are heavily disincentivized from taking their talents elsewhere, while 'non-revenue' sport athletes can transfer more freely." See Miller, *supra* note 14.

134. See *Deppe v. NCAA*, 893 F.3d 498, 502–03 (7th Cir. 2018) ("Without [the year-in-residence rule] student-athletes could be 'traded' from year to year like professional athletes."). If the NCAA abolished the year-in-residence rule, student-athletes could transfer and immediately play at their new school. It does not follow, however, that college or universities could directly control when and if a player decided to transfer schools or that they could force a student-athlete to transfer in exchange for the athletic services of another student-athlete.

135. See *Edwards*, 189 P.3d at 291.

or her profession, trade, or business” violate section 16600.¹³⁶ Thus, the supposed benefits of the year-in-residence rule and its narrow prohibition on only one aspect of participation in intercollegiate athletics will not prevent it from running afoul of section 16600. Likewise, the year-in-residence rule’s temporal limitation will not save it because California courts have invalidated noncompete clauses that restrain competition for only one year.¹³⁷ Ultimately, the reluctance of California courts to create exceptions to section 16600 absent legislative guidance makes it unlikely that the NCAA would succeed in arguing that the year-in-residence rule does not restrain student-athletes from engaging in college athletics.

C. An Exception to Section 16600 Does Not (and Should Not) Apply to the NCAA’s Year-In-Residence Rule

Finally, for a student-athlete’s challenge to the year-in-residence rule to succeed, he or she must prove that an exception to section 16600 does not apply.¹³⁸ Sections 16601, 16602, and 16602.5 delineate the only three exceptions to section 16600.¹³⁹ Section 16601 permits “noncompetition agreements in the sale or dissolution of corporations;”¹⁴⁰ section 16602 permits “noncompetition agreements in the sale or dissolution of . . . partnerships;”¹⁴¹ and section 16602.5 permits “noncompetition agreements in the sale or dissolution of . . . limited liability corporations.”¹⁴² None of these exceptions apply to the year-in-residence rule. Additionally, courts have refused to create exceptions to section 16600, instead “leav[ing] it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600.”¹⁴³

136. *See id.*

137. *See id.* at 291–92 (invalidating a noncompete agreement that prevented a former employee from “providing professional services” to any of the organization’s clients for a year after his termination.); *see also* *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 576–80 (Cal. Ct. App. 1994) (invalidating a restrictive covenant under § 16600 because it prevented former employees from working for a business’s competitor “for one year following termination”).

138. *See* CAL. BUS. & PROF. CODE § 16600 (West 2019).

139. BUS. & PROF. §§ 16601, 16602, 16602.5; *Edwards*, 189 P.3d at 290–91.

140. *Edwards*, 189 P.3d at 290.

141. *Id.* at 290–91.

142. *Id.*

143. *Id.* at 293. In *Edwards*, the California Supreme Court shared its view “that section 16600 represents a strong public policy of the state which should not

Given the reluctance of California courts to create exceptions to section 16600 “by judicial fiat,” the NCAA would need to convince the California state legislature to create an exception to section 16600 that would permit the year-in-residence rule.¹⁴⁴ Such an effort seems unlikely to succeed for two reasons. First, the California state legislature has a “settled public policy in favor of open competition,” as evidenced by its creation of only three exceptions to its prohibition on noncompete clauses since 1872.¹⁴⁵ Second, recent legislative developments show that California’s legislators want to expand, not contract, student-athletes’ rights.¹⁴⁶ For instance, in 2019, California enacted legislation that would allow student-athletes to benefit from the sale of their name, image, and likeness.¹⁴⁷ Additionally, in 2011, the state enacted the Student Athletes Bill of Rights, which drastically expanded the rights of California’s student-athletes.¹⁴⁸

Policy considerations also militate against creating a year-in-residence-rule exception to section 16600. Such an exception would perpetuate a dramatically unfair system where coaches can leave for better paying or more prestigious jobs without any negative repercussions while student-athletes must remain at their school or receive what amounts to a one-year suspension.¹⁴⁹ The rule’s

be diluted by judicial fiat.” *Id.* at 293 (quoting *Scott v. Snelling & Snelling, Inc.*, 732 F. Supp. 1034, 1042 (N.D. Cal. 1990)).

144. *Id.* (quoting *Snelling*, 732 F. Supp. at 1042).

145. *Id.* at 290; see also *Howard v. Babcock*, 863 P.2d 150, 154 (Cal. 1993) (“California has a settled policy in favor of open competition.”); *Kelton v. Stravinski*, 41 Cal. Rptr. 3d. 877, 881 (Cal. Ct. App. 2006) (“California has a settled policy in favor of open competition. Accordingly, the general rule is that covenants not to compete are void.” (internal citations omitted)).

146. See, e.g., S.B. 206, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (as enacted).

147. See *id.*

148. CAL. EDUC. CODE §§ 67450–53 (West 2019). Federal legislation to protect the year-in-residence rule seems equally unlikely because the movement to treat student-athletes more equitably has generated bipartisan support. A bill proposed by a Republican this year in the House of Representatives “would allow NCAA student-athletes to profit from the use of their name, likeness and image.” Jenna West, *Congressman to Introduce Bill to Let NCAA Athletes Profit From Use of the Their Name, Likeness*, SPORTS ILLUSTRATED (Mar. 7, 2019), <https://www.si.com/college-basketball/2019/03/07/ncaa-student-athletes-profit-name-use-bill-introduced-mark-walker> [<https://perma.cc/C2Y6-FPJK>]. In the Senate, Connecticut Democrat Chris Murphy plans to release a series of reports “that will consider a range of problems with college athletics.” Chris Murphy, *Madness, Inc.*, at 13 (2019), available at <https://www.murphy.senate.gov/download/madness-inc> [<https://perma.cc/JY2F-6JTJ>] (last visited Jan. 28, 2020).

149. See Angelique S. Chengelis, “It’s Incredibly Simple”: *Let Transfers Play Right Away*, *Advocates Argue*, DETROIT NEWS (Jan. 23, 2019, 7:39 PM), <https://www.detroitnews.com/story/sports/college/2019/01/23/transfers-let-them-play-right-away-advocates-argue/2644360002/> [<https://perma.cc/5RKF-535F>]; Tom Fornelli, *College Football Coaching Changes Carousel: Grades, Breakdowns for New 2018-19 Hires*, CBS

applicability to student-athletes in just five sports further highlights its absurdity.¹⁵⁰ The NCAA's argument that football players need a year-in-residence after transferring, but lacrosse players do not should not persuade any legislator to protect the year-in-residence rule. Moreover, any legislative judgment about the merits of the year-in-residence rule must recognize that the rule inflicts real, substantial harm on student-athletes when it prevents them from receiving scholarships that they otherwise had the athletic talent to earn.¹⁵¹ Finally, the legislature should not provide legal protections for a system that allows the NCAA, colleges and universities, administrators, and coaches to make millions of dollars while student-athletes receive nothing more than a scholarship.¹⁵² Even if the state legislature will not or cannot end the artificial suppression of student-athlete compensation, it need not compound that injustice by perpetuating a system that limits the opportunities for student-athletes to showcase their talents and make the most of the slim chance they have to compete professionally and capitalize economically on their athletic talent.¹⁵³

V. CONCLUSION

Student-athletes have repeatedly challenged the NCAA's year-in-residence rule to no avail.¹⁵⁴ Despite these repeated losses, the law does, in fact, give student-athletes in California an opportunity to circumvent the year-in-residence rule's onerous prohibition on immediate eligibility for transfer students. Student-athletes can challenge the year-in-residence rule as a violation of section 16600 of the California Business and Professions Code, a statute that forbids noncompete agreements. This strategy, like any, does not guarantee the demise of the year-in-residence rule, but for student-athletes like Bru McCoy, such a strategy is a risk worth taking.

SPORTS (Dec. 16, 2018, 8:45 PM), <https://www.cbssports.com/college-football/news/college-football-coaching-changes-carousel-grades-breakdowns-for-new-2018-19-hires/> [<https://perma.cc/TLJ2-JJE7>].

150. See DIVISION I MANUAL, *supra* note 5, at 183–85.

151. See, e.g., *Deppe v. NCAA*, 893 F.3d 498, 499–500 (7th Cir. 2018).

152. See, e.g., Proposed Fair Pay to Play Act, *supra* note 68; Murphy, *supra* note 148; Brian Rosenberg, Opinion, *How the N.C.A.A. Cheats Student Athletes*, N.Y. TIMES (Oct. 3, 2017), <https://www.nytimes.com/2017/10/03/opinion/how-the-ncaa-cheats-student-athletes.html> [<https://perma.cc/W949-JMFR>].

153. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA RECRUITING FACTS (2018), <https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf> [<https://perma.cc/5JGG-VKNH>] (last visited Jan. 28, 2020) (estimating that approximately two percent of college athletes play in a major professional league).

154. See Miller, *supra* note 14.

