

OUT OF “CONTROL”: THE OPERATION GOLD EXCEPTION AND THE NCAA’S SUSCEPTIBILITY TO LAWSUIT UNDER TITLE VI

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I. INTRODUCTION

Thousands of cameras pan down on the starting blocks, focused on the eight best sprinters in the world. The world watches breathlessly on millions of televisions around the globe. It's summertime and each runner is poised and ready to explode off the block, striving for one of three medals but ultimately hoping to bring gold back home to their respective countries.

The starting gun sounds and the runners are off in the 100-meter dash in the 2016 Summer Olympics. This is the race that will determine the fastest man in the world; all eyes are on the two favorites – Liam and Mark. The spotlight shines brighter on these two not just because they posted the two fastest times in the preliminary rounds, but also because they are collegiate teammates at an NCAA Division I university.¹

The runners reach the fifty-meter mark and glance over at each other. They are neck-and-neck at the front of the pack, which surprises neither of them. They have been training together every day for over three years, pushing each other in practice while balancing intense daily workouts with the rigors of collegiate schoolwork.

Seventy-five meters. The crowd roars with anticipation as Liam and Mark pull far enough ahead that it is clear that one will be bringing home the gold and the other will earn silver. They think back to all the time in the weight room and on the track together. The 6:30 AM

¹ NCAA universities are divided into three divisions based on desired levels of competition and financial aid. Division I is the highest level of intercollegiate athletics and contains “the largest programs that provide the most athletically related financial aid for student-athletes.” *About the NCAA – Membership*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaastudent.org/wps/wcm/connect/public/ncaa/about+the+ncaa/membership+new> (last updated Aug. 13, 2012).

sprints, the three-hour practices in the summer heat. Then, they were friends and teammates, working together to help bring an NCAA championship to their university. Now, they are competitors, and each one wants nothing more than to bring home the gold medal for his country.

They cross the finish line side-by-side. It is only once they look up to the scoreboard that they realize Liam has won by one one-hundredth of a second. Mark, though disappointed, can’t help but be happy for his friend as they climb up the podium to receive their medals. The New Zealand national anthem begins to play as Liam sings along with pride. Liam was born and raised in Wellington but decided to run collegiately in the United States on a scholarship, and now he has won the gold medal for Team New Zealand. Mark, standing at his side as he has for the past three years, is wearing the red, white, and blue from Team USA underneath his silver medal.

The two athletes return to their university as heroes and begin preparations for their senior season of collegiate track. Over the next few days, Liam and Mark each receive a call from their country’s Olympic Committee with great news. Along with many other countries, New Zealand and the United States offer cash bonuses to athletes who win medals for their country in the Olympics,² and it is time for

² See Sam Boyer, *Olympic Medals Worth Their Weight in Gold*, STUFF, <http://www.stuff.co.nz/sport/olympics/7442337/Olympic-medals-worth-their-weight-in-gold> (last updated Sept. 8, 2012, 5:00 AM) (describing New Zealand athletes’ medal bonuses as \$60,000 NZD for gold and \$55,000 for silver or bronze); see also Chris Smith, *London Olympics Unpaid Athletes Fight for Rich Medal Bonuses*, FORBES (July 31, 2012, 1:13 PM), <http://www.forbes.com/sites/chris-smith/2012/07/31/london-olympics-unpaid-athletes-fight-for-rich-medal-bonuses/> (listing the United States medal bonuses as \$25,000 for gold, \$15,000 for silver, and \$10,000 for bronze).

Liam and Mark to collect theirs. For his gold medal, Liam is due \$60,000 NZD (or roughly \$49,000 USD)³ as a taxpayer-funded grant from New Zealand. Mark's silver is worth \$15,000 from the United States Olympic Committee.⁴ Understandably, both Liam and Mark are thrilled at this, their first major payday as track and field athletes. As student-athletes, the NCAA has previously forbidden either of them from receiving any income from their track and field pursuits⁵, and their intense training and academic schedules have prevented either from even having a part-time job while in college to earn spending money.⁶

Knowing that NCAA rules can often be confusing and not wanting to jeopardize their ability to compete in their senior season, Liam and Mark go together to their athletic association's compliance department to confirm

that they can accept their bonuses.⁷ After a quick

³ Based on an exchange rate of 1 NZD to 0.818 USD as of Oct. 12, 2012. See *Current and Historical Rate Tables*, XE.COM, <http://www.xe.com/currencytables/?from=NZD&date=2012-10-12>.

⁴ See Boyer, *supra* note 2; see also Smith, *supra* note 2.

⁵ See NCAA DIV. I MANUAL, Bylaw 12.1.2 at 60-61 (2012-13), available at <http://www.ncaapublications.com/productdownloads/D113.pdf> (declaring that a student-athlete loses amateur status and becomes ineligible for intercollegiate competition in a particular sport if the individual "uses his or her athletics skill for pay in any form in that sport").

⁶ According to a 2010 NCAA survey of 1,883 Division I student-athletes in men's sports other than football, basketball, and baseball, they spend on average sixty-eight hours per week on athletic and academic activities during their sport's season. See *Division I Results from the NCAA GOALS Study on the Student-Athlete Experience*, FARA ANNUAL MEETING AND SYMPOSIUM, 1, 20, 23 (2011), available at http://www.ncaastudent.org/wps/wcm/connect/public/ncaa/pdfs/2011/di_goals_fara_2011.

⁷ See Bill Lubinger, *Violation or Legal? Do You Have What it Takes to be an NCAA Compliance Officer? Here's Your Shot*, THE PLAIN DEALER (June

conversation with the compliance officer, they are left in shock.

Despite training together every day, working just as hard and pushing each other to be their very best, only Mark will be allowed to keep his check and continue to compete for his university. Liam, on the other hand, has just been informed that he will have to return his \$60,000 NZD if he wishes to continue participating with his university in NCAA competition. Due to NCAA rules, if he chooses to keep his winnings he will lose his amateur status, likely resulting in the forfeiture of his college scholarship.. Liam was very much looking forward to competing for his university for his final collegiate season and is left with a very difficult choice – one that his friend Mark does not have to make.

The sole reason for this discrepancy? The fact that Mark is from the United States and Liam from New Zealand. The NCAA allows student-athletes⁸ to collect bonuses for winning medals for Team USA from the United States Olympic Committee without forfeiting their eligibility.⁹ This exception only applies for American athletes, so Liam, the proud Kiwi who became a national

9, 2011, 11:59 PM),

http://www.cleveland.com/osu/index.ssf/2011/06/violation_or_legal_do_you_have.html (noting that the NCAA Division I manual is 444 pages thick and even compliance officers, those employed to ensure compliance, often find them confusing and full of idiosyncrasies).

⁸ The NCAA insists on referring to its athletes as “student-athletes”, a term with a very interesting history. Putting “student” before “athlete” helped diminish any possible workers’ compensation responsibilities of employers. See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 83-86 (2006) (explaining the history behind the NCAA’s use of “student-athlete”).

⁹ See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.1.2.

hero thanks to his great achievement, has to tear up his check while watching his friend keep thousands of dollars.

Unfair? Absolutely. Arbitrary? It seems so. But what about discriminatory?

A. NO NEED TO DISCRIMINATE – THE ENORMOUS TASK OF THE NCAA

The NCAA's task has become a large, and in many ways unenviable, one.¹⁰ Founded in 1906 to help protect young people from "the dangerous and exploitive athletics practices at that time,"¹¹ the NCAA initially was made up of just 62 higher-education institutions.¹² It was initially a small institution, acting mostly as a discussion group and rules-making body – it did not even have an executive director or a national headquarters until the early 1950s.¹³

From that small organization, the NCAA has grown tremendously, now overseeing 23 sports and more than 400,000 student-athletes at over 1,000 colleges and universities.¹⁴ With that great growth has also come

¹⁰ See David P. Bruton, *At the Busy Intersection: Title VI and NCAA Eligibility Standards*, 28 J.C. & U.L. 569, 570 (2002) (calling the NCAA's task of "regulat[ing] the relentless competition in higher education for athletes and victory and to rationalize it with other educational goals" the "thankless task of the NCAA").

¹¹ See *About the NCAA - History*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://ncaastudent.org/wps/wcm/connect/public/ncaa/about+the+ncaa/history> (last updated Aug. 13, 2012).

¹² *Id.*

¹³ *Id.*

¹⁴ See *About the NCAA - Who We Are*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaastudent.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are+landing+page> (last visited Oct. 12, 2012).

unprecedented revenues.¹⁵ The NCAA earned \$845.9 million in revenue for 2010-11, mostly from television and marketing rights fees and ticket and merchandise sales from its championships.¹⁶ Sixty percent of this revenue gets distributed directly to Division I conferences, which give most of that money to their member universities to support their athletics programs.¹⁷

Despite all of this revenue coming to the NCAA, conferences, and universities because people want to watch their student-athletes compete at a high level, student-athletes do not get paid outside of receiving a partial or full scholarship,¹⁸ and are forbidden from accepting practically any benefit, monetary or otherwise, relating to their athletic ability.¹⁹

This Note uncovers the unfair, discriminatory nature of one of the NCAA’s exceptions to its general prohibitions of student-athletes receiving money - the Operation Gold Grant.²⁰ Most of the exceptions the NCAA allows are for so-called “actual and necessary expenses”

¹⁵ See *Finances - Revenue*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Jan. 17, 2012), <http://www.ncaastudent.org/wps/wcm/connect/public/NCAA/Finances/Revenue> (breaking down the NCAA's 2010-11 revenue, the most recent year audited numbers are available).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See NCAA DIV. I MANUAL, Bylaw 15.5.6 (detailing scholarship limits for football as eighty-five); *id.* § 15.5.5 (detailing scholarship limits for basketball as thirteen or fifteen); *id.* § 15.5.3.1 (detailing scholarship limits for other sports as being limited to 4.5 to 12.6 per team, which get divided up among all team members).

¹⁹ See NCAA DIV. I MANUAL, Bylaw 12.1.2 (detailing the ways student-athletes may lose their amateur status and become ineligible to compete intercollegiately, along with certain exceptions to the general rule of not receiving any form of pay), *supra* note 5.

²⁰ See *id.* § 12.1.2.1.4.1.2.

incurred by the student-athlete for training and travel in specific circumstances.²¹ What makes the Operation Gold Grant so significant is that Olympic medal bonuses are often worth tens of thousands of dollars, potentially the most money a student-athlete can receive for competing in his sport while in college.²² Compared to the “actual and necessary expenses” limits, which do not allow the student-athlete to actually gain an income and instead simply allow them to get their expenses covered, student-athletes earning money under this exception are allowed to keep whatever bonuses they earn.²³

B. THE OPERATION GOLD GRANT IS DISCRIMINATORY IN
VIOLATION OF TITLE VI

“The NCAA does not discriminate against any person regardless of race, color, national origin, education-impacting disability, gender, religion, creed, sexual orientation or age with respect to its governance policies, educational programs, activities and employment policies.”²⁴

Despite the above statement appearing in its 2012-13 Guide for the College-Bound Student-Athlete, the NCAA does, in fact, discriminate on the basis of national

²¹ See NCAA DIV. I MANUAL (having over fifty bylaws allowing for exceptions for “actual and necessary expenses”).

²² See Chris Smith, *United States Tops Olympic Medal List, but is Third to China and Russia in Bonus Payouts*, FORBES (Aug. 13, 2012, 4:06 PM), <http://www.forbes.com/sites/chris-smith/2012/08/13/united-states-olympic-committee-to-pay-5-million-in-medal-bonuses/> (listing bonus payouts for different countries).

²³ See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.1.2, *supra* note 5, at 62.

²⁴ See 2012-13 Guide for the College-Bound Student-Athlete, NCAA ELIGIBILITY CENTER, at 3 (2012-13), available at http://grfx.cstv.com/photos/schools/afa/genrel/auto_pdf/2012-13/misc_non_event/ncaaguide.pdf.

origin with its Operation Gold Grant. By deliberately drafting the Operation Gold Grant to only allow NCAA Olympic athletes competing for Team USA to accept medal bonus money, the NCAA discriminates against foreign student-athletes. These foreign student-athletes who are talented and driven enough to win Olympic medals are left with the difficult decision of either accepting the medal bonuses they earned or declining potentially tens of thousands of dollars and continuing to compete in the NCAA – a decision American athletes do not have to make.

This Note argues that the Operation Gold Grant is discriminatory in violation of Title VI of the Civil Rights Act of 1964, which the NCAA falls under because of its controlling authority over NCAA-member institutions. Part II of this Note examines the NCAA bylaws and its Operation Gold Grant, including with past Title VI and Title IX challenges to the NCAA. Part III analyzes why the NCAA should now be considered having controlling authority over its member institutions, how Operation Gold is discriminatory, and what relief should be available for potential plaintiffs who bring a claim against the NCAA.

II. BACKGROUND

A. TITLE VI

Title VI of the Civil Rights Act of 1964 states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁵ In calling for its enactment,

²⁵ 42 U.S.C. § 2000d (2014).

President John F. Kennedy stated that “[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination.”²⁶ Title VI follows the Constitutional standard, prohibiting those forms of discrimination that would violate the Equal Protection Clause or the Fifth Amendment.²⁷

The requirements necessary for a plaintiff to bring a lawsuit under Title VI were for many years unclear, especially in relation to a plaintiff’s private right to sue.²⁸ The confusion over what claims private plaintiffs could bring under Title VI was finally resolved by the Supreme Court in the 2001 case *Alexander v. Sandoval*.²⁹ In *Sandoval*, a driver’s license applicant brought a class action under Title VI challenging the Alabama Department of Public Safety’s official policy of administering its driver’s license examination in only the English language.³⁰ The plaintiff argued that this policy violated Title VI because it “had the effect of subjecting non-English speakers to

²⁶ John F. Kennedy, *Special Message to the Congress on Civil Rights and Job Opportunities, June 19, 1963*, THE AMERICAN PRESIDENCY PROJECT available at <http://www.presidency.ucsb.edu/ws/index.php?pid=9283> (last visited Mar. 12, 2014).

²⁷ See *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 284-287 (1978) (describing how though the bill was written to confront the problem of discrimination against African-Americans, evidence shows that its supporters intended that the term 'discrimination' would be made clear by reference to the Constitution).

²⁸ See Andrew M. Habenicht, *Has the Shot Clock Expired? Pryor v. NCAA and the Premature Disposal of A "Deliberate Indifference" Discrimination Claim Under Title VI of the Civil Rights Act of 1964*, 11 GEO. MASON L. REV. 551, 563-564 (2003) (noting that the Supreme Court’s disjointed 1983 Supreme Court decision did not resolve whether a plaintiff had the private right to enforce Title VI through a lawsuit).

²⁹ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

³⁰ *Id.* at 278-279.

discrimination based on their national origin.”³¹ The case reached the Supreme Court on a writ of certiorari to review only whether a private cause of action exists to enforce Title VI.³²

The Court declared three essential aspects of Title VI which must be “taken as given,” two of which are important here.³³ First, private individuals may sue to enforce Title VI, both for injunctive relief and for damages.³⁴ The primary rationale for this declaration was that the Court had previously determined that an implied private cause of action existed to enforce violations of Title IX of the Education Amendments of 1972, and since Title IX was patterned after Title VI, an implied private cause of action must exist under Title VI as well.³⁵ Second, plaintiffs may only sue under Title VI for intentional discrimination, not for a mere disparate impact.³⁶

1. Proving Intentional Discrimination for Title VI Claims.

With this background in mind, we now turn to what the plaintiff must prove for a Title VI claim. As determined by the Supreme Court in *Sandoval*, the plaintiff must show

³¹ *Id.* at 279.

³² *Id.*

³³ *Id.* The third aspect which must be “taken as given” is that regulations promulgated under §602 of Title VI may validly forbid activities that have a disparate impact on racial groups. *Id.* Section 602 authorizes and directs federal departments and agencies “to effectuate the provisions of [§ 601] by issuing rules, regulations, or orders of general applicability.” 42 U.S.C. § 2000d-1. In *Sandoval*, the Department of Justice had issued a regulation “forbidding funding recipients to utilize criteria or administrative methods having the effect of subjecting individuals to discrimination.” *Sandoval*, 532 U.S. at 278. While important in many other contexts, such as challenging government regulations, this third aspect is of no concern to this Note.

³⁴ *Id.* at 279.

³⁵ *Id.* at 279-80.

³⁶ *Id.* at 280.

intentional discrimination.³⁷ An intentional discrimination claim alleges that “similarly situated persons are treated differently because of their race, color, or national origin.”³⁸ Proving intentional discrimination by a facially neutral policy requires that the plaintiff show that the relevant decisionmaker adopted the policy at issue “because of, not merely in spite of, its adverse effects upon an identifiable group.”³⁹ A mere awareness of discriminatory consequences of an otherwise facially neutral policy does not suffice to show intentional discrimination.⁴⁰

The Third Circuit has listed relevant factors a court may consider in deciding whether a discriminatory purpose was the motivating factor in adopting an allegedly discriminatory policy.⁴¹ These considerations include the historical background of the decision and sequence of events leading up to it, departures from normal procedural sequence, the legislative or administrative history, and especially any statements made by members of the decisionmaking body.⁴²

2. Intentional Discrimination Pleading Requirement.

Questions of intent and state of mind are normally not amenable to summary adjudication, and courts have only reluctantly upheld the Rule 12(b)(6) dismissal for a

³⁷ *Id.* at 285-87.

³⁸ See U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, TITLE VI LEGAL MANUAL 43 (Jan. 11, 2001), <http://www.justice.gov/crt/about/cor/coord/vimanual.pdf>.

³⁹ See *Pryor v. Nat'l Collegiate Athletic Ass'n.*, 288 F.3d 548, 562 (3rd Cir. 2002) (citing *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (internal quotations omitted).

⁴⁰ *Id.*

⁴¹ See *id.* at 563 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

⁴² *Id.*

claim alleging discrimination in the adoption of an otherwise facially neutral policy.⁴³ The plaintiff’s complaint need not contain specific facts showing *prima facie* intentional discrimination, but only a “short and plain statement...showing that the pleader is entitled to relief.”⁴⁴

In *Pryor*, the Third Circuit reversed the dismissal of a complaint against the NCAA for intentional discrimination under Title VI.⁴⁵ By alleging that the NCAA purposely adopted an academic qualification policy because it would reduce the number of African-American athletes who would be eligible to compete, knowing via a report that the policy would have these adverse effects on African-Americans, the plaintiffs sufficiently stated facts showing intentional discrimination.⁴⁶ This reluctance to dismiss intentional discrimination claims early allows plaintiffs to reach discovery and attempt to uncover more information to prove that the questioned policy was the product of intentional discrimination.⁴⁷

B. THE NCAA – “THE BEST MONOPOLY IN AMERICA”

The NCAA has been called everything from the

⁴³ See *id.* at 563-64 (listing cases where courts determined plaintiffs to have stated claims for intentional discrimination).

⁴⁴ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (discussing the pleading requirements under Federal Rule of Civil Procedure 8(a)(2) for claims alleging intentional discrimination).

⁴⁵ *Pryor*, 288 F.3d at 565 (holding “the complaint in this case does sufficiently state facts showing intentional, disparate treatment on account of race”).

⁴⁶ *Id.*

⁴⁷ See *Swierkiewicz*, 534 U.S. at 511 (noting that discovery often unearths relevant facts for use in intentional discrimination cases).

“best monopoly in America”⁴⁸ to a “cartel”⁴⁹ for the way it manages to maintain moral high ground while greatly restricting the benefits student-athletes can receive for their participation, all in the name of amateurism.⁵⁰ Only amateur student-athletes are allowed to participate in NCAA collegiate athletics.⁵¹ Once a student-athlete loses his amateur status in a particular sport, he is typically permanently deemed ineligible to compete in the NCAA in that sport.⁵² While the concept of being an amateur might seem relatively straightforward, the NCAA has created its own ever-evolving and ever-complicated definition as it applies to collegiate athletics.⁵³

⁴⁸ See Robert J. Barro, *The Best Little Monopoly in America*, BLOOMBERG BUSINESSWEEK MAGAZINE (Dec. 8, 2002), <http://www.businessweek.com/stories/2002-12-08/the-best-little-monopoly-in-america> (listing the NCAA as the “clear choice for best Monopoly in America” over organizations such as the U.S. Postal Service, OPEC, and Microsoft).

⁴⁹ See ARTHUR A. FLEISHER ET AL., *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR* 5 (1992) (noting economists generally view the NCAA as a cartel for the way it restricts both the number of games played and televised as well as the competition for student athletes).

⁵⁰ See Jason Whitlock, *Greedy NCAA Still Exploiting Athletes*, FOX SPORTS (Mar. 30, 2011, 6:50 PM), <http://msn.foxsports.com/collegebasketball/story/ncaa-amateur-concept-is-a-sham-that-exploits-players-032911> (noting that hypocrisy and immorality of the NCAA for restricting the ability of student-athletes to make money while the NCAA and its member universities receive billions of dollars in revenue).

⁵¹ See NCAA DIV. I MANUAL, Bylaw 12.01.1 (2011-12), available at <http://www.ncaapublications.com/productdownloads/D112.pdf>.

⁵² See *id.*

⁵³ See Kristin R. Muenzen, *Weakening It's [sic] Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 259-263 (2003) (explaining the evolution of the NCAA definition of “amateurism” from 1906 to today).

1. Amateurism.

The NCAA Division I bylaws contain a long list of situations in which student-athletes can lose their amateur status, and thus be deemed ineligible to compete.⁵⁴ Most of these situations involve a student-athlete receiving money based on his athletic skill or participation in athletics.⁵⁵ It is the responsibility of the individual NCAA member universities to ensure that its student-athletes are amateurs who are able to compete in NCAA athletics.⁵⁶ If the NCAA later determines that a student-athlete who competed in a game had lost his amateur status, the NCAA has the ability to punish the student-athlete and the university for that violation.⁵⁷ Punishments often include the forfeiting of games that the non-amateur student-athlete participated in as well as significant fines,⁵⁸ regardless of how innocuous

the violation may seem.⁵⁹ The NCAA has often strictly

⁵⁴ See NCAA DIV. I MANUAL, Bylaw 12.1.2 (2012-13) (listing situations in which a student-athlete can lose amateur status).

⁵⁵ *Id.*

⁵⁶ See NCAA DIV. I MANUAL, Bylaw 12.1.1 (noting that is the responsibility of the institution to certify the eligibility of a student-athlete).

⁵⁷ See NCAA DIV. I MANUAL, Bylaw 19.5.2 (noting the punishments the NCAA Infraction Committee can impose).

⁵⁸ See generally, USC Ordered to Vacate Wins, Gets Bowl Ban, Docked 30 Scholarships, CBSSPORTS.COM (June 10, 2010), <http://www.cbssports.com/collegefootball/story/13506096/usc-ordered-to-vacate-wins-gets-bowl-ban-docked-30-scholarships/cbsnews> (describing the NCAA’s imposed punishment on the University of Southern California).

⁵⁹ See *NCAA Places Georgia Tech on Probation*, ESPN (July 18, 2011, 1:53 PM), http://espn.go.com/college-sports/story/_/id/6769894/ncaa-places-georgia-tech-yellow-jackets-four-years-probation (detailing how the receipt of \$312 worth of clothing by one player from a former teammate made him ineligible and led to Georgia Tech forfeiting three football wins

enforced its definition of amateurism, to the severe detriment of universities and student-athletes, even when doing so might seem unreasonable.⁶⁰

Beyond forfeiting games and fines for the university, the loss of amateurism, even for seemingly innocuous reasons, can have a severe detriment to the life of a student-athlete. Jeremy Bloom, a professional skier and college football star, was forced to give up his college football career with two years remaining after the NCAA declared him ineligible for accepting money from sponsors to help fund his training for the 2006 Winter Olympics.⁶¹ This forced Bloom, who had been named a freshman All-American in 2002 and was known for his ability to return kicks,⁶² to put his promising football career on hiatus for

two years.⁶³ He was later selected in the 2006 NFL draft, but a combination of his two years sitting on the sidelines and untimely injuries led to him never appearing in a single

and a conference championship, as well as paying a \$100,000 fine to the NCAA).

⁶⁰ See Gordon E. Gouveia, *Making a Mountain out of a Mogul*, 6 Vand. J. Ent. L. & Prac. 22 (2003) (arguing that the NCAA's interpretations of its amateurism provisions, when applied, to Jeremy Bloom, was unreasonable).

⁶¹ See *Bloom v. National Collegiate Athletic Ass'n*, 93 P.3d 621 (2004) (upholding the NCAA's determination that Jeremy Bloom had lost his amateur status and could not complete the final two years of his college football career.).

⁶² See *FWAA Announces 2002 Scripps Freshman All-America Team*, FOOTBALL WRITERS ASSOCIATION OF AMERICA (Jan. 3, 2003), <http://www.sportswriters.net/fwaa/news/2002/allamerica030103.html> (listing Bloom as a freshman All-American return specialist).

⁶³ See Steve Dilbeck, *Two-Sport Star is Ready to Bloom*, DAILY NEWS (Feb. 10, 2006), available at <http://www.thefreelibrary.com/TWO-SPORT+STAR+IS+READY+TO+BLOOM.%28Sports%29-a0142025560> (noting Bloom's two years spent away from football and preparations to enter the NFL draft).

NFL game.⁶⁴ Bloom’s once-promising football career was over. While he was still able to finish a successful skiing career, retiring from skiing in 2010 after competing in two Olympics and securing eleven World Cup wins,⁶⁵ Bloom has expressed “disappointment” that he was not able to accomplish his football goals.⁶⁶

The NCAA clearly takes its enforcement of amateurism seriously, even as many outside observers find its countless rules to be unreasonable. But what about when a bylaw crosses the line from “unreasonable” to possibly “discriminatory”?

2. The Olympics and the Operation Gold Grant.

One notable NCAA amateurism bylaw, 12.1.2(a), explains that a student-athlete will lose amateur status if he “uses [his] athletics skill...for pay in any form in that sport.”⁶⁷ Two forms of prohibited compensation included in the NCAA definition of “pay” are expenses, awards, and benefits⁶⁸ and payments based on performance⁶⁹. However, the NCAA has carved out exceptions to these two forms of

⁶⁴ See Jeremy Bloom Player Profile, NFL.COM, <http://www.nfl.com/player/jeremybloom/2506938/profile> (listing Bloom as never appearing in a single game during his brief career).

⁶⁵ See Joanne C. Gerstner, *Moguls Skier Jeremy Bloom Retires*, NEW YORK TIMES (Nov. 11, 2009, 4:53 PM), <http://vancouver2010.blogs.nytimes.com/2009/11/11/moguls-skier-jeremy-bloom-retires/> (describing Bloom’s decision to retire from skiing).

⁶⁶ See *Bloom to Return to U.S. Ski Team Ahead of Vancouver Olympics*, ESPN (Nov. 24, 2008, 7:32 PM), <http://sports.espn.go.com/oly/skiing/news/story?id=3723749> (quoting Bloom as saying “[m]y goals were not accomplished. That was a disappointment to me”).

⁶⁷ See NCAA DIV. I MANUAL, Bylaw 12.1.2(a), *supra* note 5, at 62-63.

⁶⁸ See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4, *supra* note 5, at 63-64.

⁶⁹ See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.5, *supra* note 5, at 64-65.

payment as relating to Olympic athletes.

First, student-athletes competing for any country in the Olympics may receive all *nonmonetary* benefits provided to members of that Olympic team, so long as the student-athlete does not receive any benefits not available to all other members of that team.⁷⁰ Second, student-athletes who are members of Team USA may receive both benefits and payment for performance administered by the U.S. Olympic Committee pursuant to its Operation Gold program (the “Operation Gold Grant”).⁷¹ Operation Gold is a program where the U.S. Olympic Committee pays athletes for performance in international competition; for example, at the 2012 London Summer Olympic Games a gold medal was worth \$25,000.⁷² There is no bylaw allowing for the receipt of similar monetary benefits by student-athletes competing in international competition for any country other than the United States.⁷³

3. *International Student-Athletes in the NCAA.*

Participation in NCAA athletics set an all-time high in the 2011-12 year, with over 450,000 student athletes competing in sports for which the NCAA has championships.⁷⁴ Most of these student-athletes are from

⁷⁰ See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.3.2, *supra* note 5, at 64.

⁷¹ See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.1.2, *supra* note 5, at 62.

See also NCAA DIV. I MANUAL, Bylaw 12.1.2.1.5.1, *supra* note 5, at 62.

⁷² See USA TRACK & FIELD, *Operation Gold*, <http://www.usatf.org/groups/HighPerformance/AthleteSupport/OperationGold.asp>. (last visited Mar. 6, 2014). Awards also include \$15,000 for silver and \$10,000 for bronze.

⁷³ See generally NCAA DIV. I MANUAL, *supra* note 5.

⁷⁴ See NCAA, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 8 (2012), *available at*

the United States, but the number of international athletes has been rising dramatically, up over 1,000% from 2000-2010.⁷⁵ In 2006-2007, for example, over 16,000 international student-athletes competed in the NCAA, and they accounted for 6.2% of all Division I athletes.⁷⁶ International student-athletes have a particularly strong presence in “Olympic sports,” which is the term given to sports that exist both in the NCAA as well as the Olympics.⁷⁷ In the 2006-07 year, 50% of women's tennis players, 38% of men's tennis players, 35% of women's synchronized swimmers, and 22% of women's skiers competing in NCAA Division I sports were international student-athletes.⁷⁸

With so many excellent student-athletes competing in so many Olympic sports, it is unsurprising that many NCAA student-athletes often compete in the Olympics. In the 2012 London Summer Olympics, at least 132 current or enrolled student-athletes competed, winning forty-seven

<http://www.ncaapublications.com/productdownloads/PR2013.pdf> (Oct. 2012) (finding that approximately 453,347 student-athletes competed in 2011-2012).

⁷⁵ See Michelle Brutlag Hosick, *International Prospective Student-Athletes Pose Challenges*, NCAA.ORG (Nov. 19, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/November/International+prospective+student+athletes+pose+challenges> (commenting on the difficulties of applying NCAA amateurism and academic rules to international student-athletes).

⁷⁶ See Steve Wieberg, *Influx of Foreigners Presents New Challenges for NCAA*, USA TODAY (Oct. 1, 2008, 11:36 PM), http://www.usatoday.com/sports/college/2008-10-01-foreign-influx_N.htm (citing a 2008 NCAA study).

⁷⁷ See *generally Sports and Disciplines*, OLYMPIC.ORG, <http://www.olympic.org/sports> (last visited Sept. 25, 2012) (discussing notable NCAA sports that are not Olympic sports include football, baseball, and softball).

⁷⁸ See *id.*

combined medals.⁷⁹ Of these student-athlete Olympians, at least eighty-three were international students.⁸⁰ These international student-athletes trained and competed just as hard as the American student-athletes, but when it came time to collect rewards for their performance, NCAA bylaws prevented them from accepting bonuses that their American counterparts could accept.⁸¹

American NCAA student-athletes who won Olympic medals collected large cash bonuses, pursuant to Team USA's Operation Gold program, in London for winning medals.⁸² Missy Franklin was a high school swimmer who became a star of the Games, winning five

medals for Team USA.⁸³ For her performance, Franklin received over \$200,000 in bonuses from Team USA and USA Swimming, but thanks to the NCAA Bylaws'

⁷⁹ See *Student-Athletes Shine at Olympics*, NCAA.ORG (Aug. 13, 2012), <http://www.ncaa.org/about/resources/media-center/news/student-athletes-shine-olympics> (noting that NCAA student-athletes took home 22 gold, 11 silver, and 14 bronze medals from London).

⁸⁰ See *NCAA Olympic Qualifiers by School*, NCAA.COM (July 30, 2012), <http://www.ncaa.com/news/ncaa/article/2012-07-30/ncaa-olympic-qualifiers-school> (listing by school the 2012 Olympians who participate in NCAA sports).

⁸¹ See NCAA DIV. I MANUAL, BYLAW 12.1.2.1.4.1.2, *supra* note 5, at 64.

⁸² See U.S. MEDALISTS, CHICAGO TRIBUNE, *available at* <http://www.chicagotribune.com/media/acrobat/2012-08/71799588-12204807.pdf> (listing Team USA Olympic medalists and their corresponding bonus from the USOC).

⁸³ See Nicole Auerbach, *Senior Year? 17-year old Franklin to Return to Regular Life*, USA TODAY (Aug. 6, 2012, 12:43 PM), <http://www.usatoday.com/sports/olympics/london/story/2012-08-06/Senior-year-Franklin-17-to-get-back-to-life/56822404/1> (describing Franklin's attempts to lead a regular life after Olympic success while beginning her senior year of high school).

Operation Gold Grant⁸⁴ she still maintains her amateur status, giving her the option to swim in the NCAA in 2013.⁸⁵

Many countries, including Russia, Ukraine, and Ghana among others, have Olympic medal bonus payment systems that are comparable to Team USA’s.⁸⁶ However, international NCAA student-athletes are unable to collect these bonuses without violating their NCAA amateurism and eligibility as a “cash or equivalent award” for participation in competition under NCAA Bylaw 12.1.2.1.4.1.⁸⁷

Derek Drouin, a junior high jumper from Indiana University, won a bronze medal for Team Canada in the 2012 Olympics⁸⁸, which makes him eligible for a \$10,000 bonus through Canada’s Athlete Excellence Fund.⁸⁹ However, accepting this bonus money would put him in

⁸⁴ See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.1.2, *supra* note 5 at 64.

⁸⁵ See Darren Rovell, *Franklin can Remain Amateur Despite Bonus*, ESPN (Aug. 13, 2012, 1:24 PM), http://espn.go.com/blog/playbook/dollars/post/_id/929/franklin-can-remain-amateur-despite-bonus (describing Franklin’s bonus haul).

⁸⁶ See Chris Smith, *London Olympics’ Unpaid Athletes Fight for Rich Medal Bonuses*, FORBES (July 31, 2010, 1:13 PM), <http://www.forbes.com/sites/chris-smith/2012/07/31/london-olympics-unpaid-athletes-fight-for-rich-medal-bonuses/> (describing the bonus systems of various countries).

⁸⁷ See NCAA DIV. I MANUAL, *supra* note 5, at 63; *see also* NCAA DIV. I MANUAL, Bylaw 12.1.2.1.5.1, *supra* note 5, at 64 (listing only Team USA athletes as being allowed to collect the medal bonuses).

⁸⁸ See *IU Junior Shares Olympic Bronze in High Jump*, INSIDE IU (Aug. 15, 2012), <http://inside.iu.edu/headlines/8-15-12-derek-drouin.shtml> (describing Drouin’s accomplishment as well as his plans to compete for IU in the 2012-13 season).

⁸⁹ See *Paying Cash Rewards to Olympic Medalists*, CBC (Aug. 10, 2012), <http://www.cbc.ca/thecurrent/episode/2012/08/10/paying-cash-rewards-to-olympic-medalists/> (describing Canada’s medal bonus system).

violation of NCAA Bylaws and thus make him ineligible. This left Drouin with the unenviable choice of having to choose either the \$10,000 or the opportunity to compete in his senior season at Indiana.⁹⁰

Deon Lendore, a freshman sprinter for Texas A&M University,⁹¹ was left in an even more difficult position than Drouin for his part in Trinidad & Tobago's bronze medal winning 4x400 relay team.⁹² Trinidad & Tobago's eight bronze medalists, including Lenore, were all honored after the conclusion of the Olympics in a ceremony and a cash reward of \$300,000 TTD (over \$46,000 USD) each.⁹³ Lenore, however, was unable to accept this reward since it would have put him in violation of NCAA bylaws and made him ineligible to complete his remaining three years of eligibility at Texas A&M.⁹⁴

C. THE NCAA AND FEDERAL FINANCIAL ASSISTANCE; TITLE VI
AND TITLE IX SUITS

Historically, more discrimination lawsuits have been brought against the NCAA for violations of Title IX

⁹⁰ See *IU Junior Shares Olympic Bronze in High Jump*, *supra* note 88.

⁹¹ See *Deon Lendore Bio*, TEXAS A&M TRACK AND FIELD (last visited Sept. 26, 2012), http://www.aggieathletics.com/ViewArticle.dbml?DB_OEM_ID=27300&ATCLID=205398995.

⁹² See *T&T's Olympic Bronze Medalists Get Their National Awards*, GUARDIAN MEDIA (Sep. 15, 2012), <http://www.guardian.co.tt/sport/2012-09-15/tt%E2%80%99s-olympic-bronze-medallists-get-their-national-awards> (noting Lenore's accomplishment).

⁹³ *Id.* (explaining the ceremony for Trinidad & Tobago Olympians).

⁹⁴ E-mail from Brad Barnes, Assistant Dir. of Athletic Compliance, Texas A&M University, to [FIRST AND LAST NAME], Student, University of Georgia School of Law (Sept. 26, 2012 4:02PM) (on file with author) (stating that Lenore has not accepted any Olympic medal award money and "understands that he may not accept such an award if it is offered").

of the Education Amendments of 1972.⁹⁵ Title IX prohibits discrimination on the basis of sex by any education program or activity receiving federal financial assistance.⁹⁶ Except for the substitution of the word “sex” to replace “race, color, or national origin” in Title VI, the language of Title VI and Title IX is identical.⁹⁷ In fact, Title IX was patterned after Title VI, and “[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been.”⁹⁸ Because of their similar goals and language, courts often look at Title VI cases for guidance in interpreting Title IX controversies, and vice versa.⁹⁹ Therefore, it is important to look at both Title VI as well as Title IX cases against the NCAA in resolving its liability under Title VI.¹⁰⁰

For an entity to be amenable to a suit under Title VI, it must be a recipient of federal funding.¹⁰¹ Individual universities are widely accepted to be covered under Title VI because of the federal funding they receive from the government.¹⁰² Plaintiffs have repeatedly attempted to bring suits against the NCAA under Title VI, often as a result of its connection to and control of its member

⁹⁵ See generally Sue Ann Mota, *Title IX, the NCAA, and Intercollegiate Athletics*, 33 J.C. & U.L. 121 (2006) (explaining the history of the NCAA in relation to Title IX).

⁹⁶ 20 U.S.C. § 1681 (2012).

⁹⁷ See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 (1979).

⁹⁸ *Id.*

⁹⁹ See *Habenicht*, *supra* note 28, at 583.

¹⁰⁰ *Id.* at 599 (noting that since Title VI and Title IX share nearly every legal principle, the plaintiffs in *Pryor* used the two statutes together in stating their claim against the NCAA).

¹⁰¹ See 42 U.S.C. § 2000d (2012).

¹⁰² See generally *Cureton v. Nat’l. Collegiate Athletic Ass’n*, 198 F.3d 107 (3d Cir. 1999).

universities.¹⁰³

1. Smith.

The NCAA has historically been found not to be a recipient of federal funding, and thus not liable for suits under Title VI.¹⁰⁴ In *Nat'l Collegiate Athletic Ass'n v. Smith*¹⁰⁵, the plaintiff was a female collegiate volleyball player who alleged that she was denied the opportunity to continue her playing career on the basis of her sex, in violation of Title IX of the Education Amendments of 1972.¹⁰⁶

Smith argued that the NCAA qualified as a recipient of federal funding because it received dues from its member universities that receive federal funding.¹⁰⁷ The Court rejected this argument, holding that there was no evidence the universities paid their NCAA dues with federal funds earmarked for that purpose, and “[a]n entity that receives dues from recipients of federal funds does not thereby become a recipient itself.”¹⁰⁸ Therefore, the NCAA could not be brought under Title IX on those grounds.¹⁰⁹ The Court declined to address Smith’s two other arguments for bringing the NCAA under Title IX—including that “when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless whether it is itself a recipient”—since those arguments were not brought up at

¹⁰³ See, e.g., *Id.*; *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548 (3rd Cir. 2002); *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999).

¹⁰⁴ See, e.g., *Smith*, 525 U.S. 459 (1999); *Cureton*, 198 F.3d 107 (3rd Cir. 1999).

¹⁰⁵ 525 U.S. 459 (1999).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 460.

¹⁰⁸ *Id.* at 461.

¹⁰⁹ *Id.*

the lower court.¹¹⁰

2. *Cureton and Tarkanian*.

This “controlling authority” argument was seen as promising, however, and was looked at by the Third Circuit just a few months later in *Cureton v. Nat’l Collegiate Athletic Ass’n*.¹¹¹ Here, the plaintiffs alleged that an NCAA Division I rule specifying a minimum-required score on the SAT that prospective student-athletes had to reach to become eligible had an unjustified disparate impact on African-Americans in violation of Title VI.¹¹² The district court, noting that the Court in *Smith* left open the possibility of the NCAA being subject to Title IX coverage on the two theories it declined to address, held that NCAA member universities had ceded control over federally funded programs to the NCAA by allowing it to promulgate rules the members are obliged to obey and enforce, making the NCAA subject to Title VI regardless of whether it was a recipient itself.¹¹³ On appeal, the Third Circuit noted that “the controlling authority argument can be sustained, if at all, only on some basis beyond the NCAA’s mere receipt of dues” from member institutions.¹¹⁴ The court, in analyzing this argument, found the Supreme Court’s decision in *National Collegiate Athletic Ass’n v.*

¹¹⁰ *Id.* The other argument was that that the NCAA should be brought under Title IX because it received federal funds indirectly through the National Youth Sports Program.

¹¹¹ 198 F.3d 107 (3rd Cir. 1999).

¹¹² *Id.* at 111.

¹¹³ *Id.* at 114. The district court also concluded that the NCAA was subject to Title VI as an indirect recipient of federal funds through the National Youth Sports Program. The Third Circuit disagreed with that determination and reversed on that point. *Id.*

¹¹⁴ *Id.* at 116.

*Tarkanian*¹¹⁵, while itself not a Title VI or Title IX case, to be “‘instructive.’”¹¹⁶

In *Tarkanian*, the Court held in a 5-4 decision that even though the NCAA had threatened the University of Nevada, Las Vegas (UNLV) with sanctions including suspending the plaintiff, the university’s men’s basketball coach, for two years, the NCAA had not acted as a state actor.¹¹⁷ The Court reasoned that though the NCAA could threaten UNLV with sanctions if they did not suspend Coach Tarkanian, they did not have the power to fire him themselves.¹¹⁸ It was ultimately up to UNLV what action they wished to take – suspend him and avoid sanctions, retain him and risk possible sanctions (including expulsion from the NCAA), or voluntarily withdraw from the NCAA altogether.¹¹⁹ Therefore the NCAA did not control UNLV’s decision to suspend the coach.¹²⁰

The court in *Cureton* analogized the African-American athletes’ case with *Tarkanian*, saying that similar to how UNLV made the ultimate decision to suspend Coach Tarkanian, “the ultimate decision as to which freshmen an institution will permit to participate in varsity intercollegiate athletics and which applicants will be awarded athletic scholarships belongs to the member schools.”¹²¹ Since NCAA member universities had the

¹¹⁵ 488 U.S. 179 (1988).

¹¹⁶ *Cureton*, 198 F.3d at 117.

¹¹⁷ *Tarkanian*, 488 U.S. 179, 195 (holding that “a State may delegate authority to a private party and thereby make that party a state actor,” but UNLV had not delegated the authority to make employment decisions to the NCAA).

¹¹⁸ *Tarkanian*, 488 U.S. 197.

¹¹⁹ *Id.* (noting “that UNLV’s options were unpalatable does not mean that they were nonexistent.”)

¹²⁰ *Id.*

¹²¹ *Cureton*, 198 F.3d at 117.

option of risking sanctions or withdrawing from the NCAA if they wished to allow non-qualifying student-athletes to compete, the member universities had not ceded controlling authority to the NCAA by giving it the power to enforce its eligibility rules directly against students.¹²² Without the NCAA exercising controlling authority over a recipient of federal funding, the NCAA was not subject to the plaintiffs’ Title VI suit.¹²³

In a dissenting opinion, Judge McKee that the NCAA, in fact, could be found to have controlling authority over its member institutions and could be subject to Title VI.¹²⁴ First, the dissent noted that the NCAA constitution requires member institutions to "effectively cede authority over their intercollegiate athletic programs to the NCAA" by stating that these institutions must operate "in compliance with [the NCAA's] rules and regulations."¹²⁵ Second, the dissent argued that *Tarkanian* actually shows the extent of actual control the NCAA has, rather than the lack of control as argued by the majority.¹²⁶ The actual issue in *Tarkanian* was whether the NCAA had transformed into a state actor, not the control the NCAA had over member institutions. Therefore, the majority looked at *Tarkanian* “through the wrong end of the telescope.”¹²⁷ Also, "[t]he fact that UNLV was coerced into accepting the only viable option among the three choices left it by the NCAA's ultimatum, [firing Coach Tarkanian], in that case demonstrates just how much control the NCAA

¹²² *Id.* at 117-118.

¹²³ *Id.* at 118.

¹²⁴ *Id.* at 118-125.

¹²⁵ *Id.* at 121-122.

¹²⁶ *Id.* at 122-125.

¹²⁷ *Id.* at 124.

has over member institutions' athletic programs."¹²⁸

The Third Circuit remains the only circuit court to address the question of whether the NCAA should be considered a recipient of federal funding for Title VI or Title IX purposes. The Supreme Court has not yet resolved whether a federally funded entity ceding control over one of its programs makes the controlling authority subject to Title VI or Title IX.¹²⁹

3. The Eleventh Circuit Disagrees?

More recently, some courts have become more receptive to an organization such as the NCAA potentially being liable under Title VI as a controlling authority. The Eleventh Circuit, in *Williams v. Bd. of Regents of Univ. Sys. of Georgia*¹³⁰, remarked favorably about the controlling authority argument, noting that "if we allowed funding recipients to cede control over their programs to indirect funding recipients but did not hold indirect funding recipients liable for Title IX violations, we would allow funding recipients to receive federal funds but avoid Title IX liability."¹³¹ In *Williams*, the plaintiff was attempting to bring a suit under Title IX against both the University of Georgia, which both parties agreed received federal funding, and the University of Georgia Athletic Association, to which the plaintiff alleged UGA had ceded controlling authority over its athletic department while providing it with significant funding.¹³²

The Eleventh Circuit determined the plaintiff could

¹²⁸ *Id.*

¹²⁹ *See Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1294 (11th Cir. 2007).

¹³⁰ 477 F.3d 1282 (11th Cir. 2007).

¹³¹ *Id.* at 1294.

¹³² *Id.*

survive a summary judgment motion concerning the Athletic Association’s status as a federal funding recipient.¹³³ The court held that the plaintiff had alleged sufficient facts about the controlling authority to treat the Athletic Association as a federal funding recipient and remanded the case to let the discovery process and the district court make that determination.¹³⁴

In 2010, the United States District Court for the Northern District of Alabama looked at the “controlling authority” argument, this time in the context of an athletic conference.¹³⁵ The plaintiffs were members of Samford University’s softball team and alleged Title IX violations against the Southern Conference for reducing the number of postseason teams in the softball playoffs.¹³⁶ Plaintiffs alleged that the Southern Conference was a federal funding recipient under Title IX because it “govern[ed], regulate[d], operate[d], and control[led] the intercollegiate athletics of its member schools and those schools delegate and assign [to the Southern Conference] the authority to do so.”¹³⁷

The Southern Conference cited the Third Circuit in *Smith* and *Cureton* in defense of its position that it should not be considered a recipient of federal funding.¹³⁸ However, noting that *Williams* post-dated the Third Circuit decisions, the court determined that these allegations, similar to those in *Williams*, were sufficient to allege that the Southern Conference was a recipient of federal funding.¹³⁹

¹³³ *Id.* at 1294.

¹³⁴ *Id.*

¹³⁵ *Barrs v. S. Conference*, 734 F. Supp. 2d 1229 (N.D. Ala. 2010).

¹³⁶ *Id.* at 1235.

¹³⁷ *Id.* (internal quotations omitted).

¹³⁸ *Id.*

¹³⁹ *Id.*

D. THE NCAA'S INCREASING IMPACT ON MEMBER
INSTITUTIONS

Since the arguments in *Smith* and *Cureton* arose, there has been even more control exerted by the NCAA due to the significant impacts it has on universities. One primary impact comes from the revenue college athletics brings. As previously mentioned, the NCAA distributes 60% of over \$850 million in revenue to its member institutions each year.¹⁴⁰ Further, many universities' athletics departments generate significant income through ticket sales, merchandise, donations, and a variety of other income-generating activities.¹⁴¹ In 2010-11, The University of Alabama and Penn State University each earned over \$31 million in net income.¹⁴² In all, thirteen athletics departments earned over \$10 million, and thirty-five athletics departments earned over \$1 million in net income in 2010-11.¹⁴³

Outside of a financial impact, success in big-time college athletics can also positively impact universities as a whole by causing a dramatically increase in undergraduate applications to the school.¹⁴⁴ This phenomenon has been

¹⁴⁰ See *supra* Part I.A.

¹⁴¹ See Alicia Jessop, *Highest Net Income Amongst Athletics Departments*, BUSINESS OF COLLEGE SPORTS (Mar. 21, 2012), <http://businessofcollegesports.com/2012/03/21/highest-net-income-amongst-athletics-departments/> (listing each NCAA member institution that earned a profit in 2010-11, calculated by subtracting their reported expenses from reported revenues).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See Chad McEvoy, *The Impact of Elite Individual Athletic Performance on University Applicants for Admission in NCAA Division I-A Football*, THE SPORTS JOURNAL (2006), available at <http://thesportjournal.org/article/the-impact-of-elite-individual-athletic->

noted for years, dating back to the 30% increase in applicants to Boston College following quarterback Doug Flutie winning the Heisman Trophy in 1984.¹⁴⁵ Other universities seeing similar application jumps have been Northwestern University, who saw a 21% increase in applicants in 1995, one year after winning the Big Ten conference football championship, and Gonzaga University, who saw a 59% increase in the late 1990s following three years of unprecedented basketball success.¹⁴⁶ A recent study additionally found that "an increase of football winning percentage of greater than .250 resulted in an average 6.1% increase in undergraduate applicants."¹⁴⁷

At the same time, the NCAA has the ability to dramatically influence its member institutions in a negative way. On July 23, 2012, after acting without a formal investigation and with unprecedented speed, the NCAA imposed significant sanctions on Penn State for its role in the Jerry Sandusky child sex abuse scandal.¹⁴⁸ Among these sanctions was a \$60 million fine for the university.¹⁴⁹ While Penn State, at least prior to the Sandusky scandal,

performance-on-university-applicants-for-admission-in-ncaa-division-i-a-football/ (using statistics to determine the increase in undergraduate applications after success in NCAA athletics).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Pete Thamel, *Sanctions Decimate the Nittany Lions Now and for Years to Come*, NEW YORK TIMES (July 23, 2012), available at <http://www.nytimes.com/2012/07/24/sports/ncaafootball/penn-state-penalties-include-60-million-fine-and-bowl-ban.html?pagewanted=all> (describing the sanctions imposed on Penn State after a relatively quick investigation by former F.B.I. director Louis J. Freeh, rather than the typically longer NCAA-led investigation).

¹⁴⁹ *Id.*

runs a profitable athletics department, a fine of this caliber will undoubtedly affect many aspects of the university, as the university noted that it might have to use reserve budgets and an "internal bond issue" to cover the cost.¹⁵⁰ While Penn State accepted these penalties when the university was presented them by the NCAA, the consequences of choosing not to accept the penalties were even worse.¹⁵¹ Had the university not accepted the penalties, the NCAA told them that a formal investigation would begin, where the university would have faced fines far greater than \$60 million and a multiyear "death penalty" – forcing the university to shut down the football program completely.¹⁵² Penn State president Rodney Erickson was insistent on avoiding the death penalty due to the "devastating economic impact" no football games would have on both Penn State as well as central Pennsylvania as a whole.¹⁵³ Penn State is just one of many universities whose football programs are very valuable to small towns and regions.¹⁵⁴

¹⁵⁰ See Susan Snyder & Diane Mastrull, *How Will Penn State Sanctions Affect School, Community*, PHILADELPHIA INQUIRER (July 24, 2012), http://articles.philly.com/2012-07-24/business/32805670_1_rodney-erickson-penn-state-ncaa-penalty/2 (quoting a university spokesman).

¹⁵¹ See Don Van Natta Jr., *Penn State Faced 4-year Death Penalty*, ESPN (July 26, 2012), http://espn.go.com/espn/otl/story/_/id/8199905/penn-state-nittany-lions-rodney-erickson-said-school-faced-4-year-death-penalty (describing many NCAA presidents as supporting a four year death penalty for Penn State football).

¹⁵² *Id.* (quoting Penn State president Rodney Erickson as saying the "figures that were thrown around" as a possible fine were "quite large").

¹⁵³ *Id.*

¹⁵⁴ See John Grupp, *State College may pay price for PSU problems*, TRIBLIVE NEWS (July 22, 2012), <http://triblive.com/news/2202207-74/football-state-impact-million-penn-college-economic-per-game-season#axzz2FX4ZRET> (listing the economic impact of football on Auburn, AL, Blacksburg, VA, and Clemson, SC as over \$30 million per season).

III. DISCUSSION

The “controlling authority” argument is the closest the NCAA has come to being found by the courts to be susceptible to suits under Title VI. While the Third Circuit held in *Cureton* that the NCAA did not have controlling authority, this was not a universally held view. Indeed, the district court believed that the member institutions had “vested the NCAA with controlling authority over federally funded athletic programs”.¹⁵⁵ Further, the Third Circuit’s holding was only by a 2-1 margin, with Judge McKee writing a strong dissenting opinion arguing in favor of controlling authority.¹⁵⁶ This Part of the Note will explain why the district court and Judge McKee were right, especially due to recent developments with the NCAA and its power over member institutions.

A. THE NCAA SHOULD BE SUSCEPTIBLE TO TITLE VI DUE TO ITS CONTROLLING AUTHORITY

Due to its significant growth and its authority over these member institutions, the holding in *Cureton* needs to be reversed and the NCAA needs to be found to be susceptible to suit under Title VI on the “controlling authority” theory. As mentioned in Part II.D.2 of this Note, the Third Circuit in *Cureton* remarked that this controlling authority must come from some basis beyond those

¹⁵⁵ *Cureton*, 198 F.3d at 112.

¹⁵⁶ See *infra* Part II.D.2.

member institutions paying dues to the NCAA, since the Supreme Court in *Smith* has previously determined that there is no evidence schools are paying their NCAA dues with earmarked federal funds. Instead of dues, this controlling authority can be seen through the NCAA's power to impose significant punishments on member institutions and those institutions' practical inability to leave the NCAA to avoid sanctions, as well as fairness concerns.

1. Bylaws, Punishments, and Nowhere to go.

The Third Circuit's reliance on *Tarkanian* as the basis for holding that the member institutions had not ceding controlling authority of its athletic programs to the NCAA is misguided. If anything, as noted by Judge McKee in the *Cureton* dissent, *Tarkanian* provides compelling evidence that the NCAA does exercise controlling authority. Despite the *Cureton* majority's strong reliance on it, *Tarkanian*'s subject matter was not related to Title IX, Title VI, or any type of controlling authority, instead Coach Tarkanian was arguing that the NCAA was a "state actor", acting under the color of state law when it investigated and eventually coerced UNLV into punishing him.¹⁵⁷ While UNLV and the NCAA being "adversar[ies]", rather than "partners" during the investigation of Coach Tarkanian, including UNLV's steadfast opposition of the sanctions, was used extensively by the *Tarkanian* majority to prove that the NCAA was not a state actor¹⁵⁸, that adversarial

¹⁵⁷ See *Tarkanian*, 488 U.S. at 199.

¹⁵⁸ *Id.* ("[i]t would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV – sanctions that UNLV and its counsel, including the Attorney General of Nevada, steadfastly opposed during protracted adversary proceedings – is fairly attributable to the State of Nevada").

nature is key in showing how much controlling authority the NCAA has.

To compete in NCAA Division I athletics, member institutions must follow a lengthy set of bylaws, many of which are arbitrarily written and arbitrarily enforced.¹⁵⁹ The NCAA has recently shown, especially with its unprecedented sanctions imposed on Penn State, that it possesses immense power over its member institutions to enforce infractions of these bylaws, and it is willing to use that power even while bypassing its traditional investigation techniques.¹⁶⁰ When conducting an investigation against a university for alleged bylaw violations, “the NCAA is properly viewed as a private actor at odds with the State.”¹⁶¹ The fact that the university feels it must act adversarial reflects on its knowledge that the NCAA can, and very well may, inflict sanctions upon it that have the potential to cripple the athletic association, the university, and in situations as extreme as the Penn State case, the entire community.¹⁶² The NCAA and the university are bound to have competing interests – the NCAA to enforce its bylaws and represent the interests of its entire membership, and the university to protect itself from seriously crippling sanctions.

When a university goes against the directions of the NCAA during an investigation, no matter how innocently, the NCAA has shown that it can and will impose significant penalties for “imped[ing] the enforcement staff

¹⁵⁹ See *supra* Part II.B.

¹⁶⁰ See *supra* part II.D.

¹⁶¹ *Id.* at 196 (analogizing any hypothetical NCAA against university situation with a state-compensated public defender, who is acting in a private capacity when representing a private client in a conflict against the State).

¹⁶² See *supra* note 153 and accompanying text.

investigations.”¹⁶³ When a Georgia Tech player improperly received \$312 worth of clothing, the NCAA imposed a \$100,000 fine and stripped the school of a conference championship.¹⁶⁴ The NCAA justified the large punishment in part because the school's athletic director had disobeyed a minor NCAA order during the investigation.¹⁶⁵ As the NCAA has shown it does not take disobedience lightly, despite having adversary interests and being unhappy to be under investigation by the NCAA, many universities attempt to show good faith and comply with NCAA investigations.¹⁶⁶ These schools often self-impose penalties on themselves, in an effort to show the NCAA that they regret their behavior and to possibly avoid the NCAA coming down on the university with even greater punishments.¹⁶⁷ Even when the NCAA's determination may seem unreasonable to the university, such as the case

¹⁶³ See *supra* note 59 and accompanying text (describing how the NCAA dramatically increased its punishment of Georgia Tech after determining that the Georgia Tech athletic director had gone against NCAA wishes during an investigation by telling a coach that two of his players would be interviewed).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Scott Wolf, *Cooperation Could Help USC Limit NCAA Sanctions*, SAN GABRIEL VALLEY TRIBUNE (Sept. 3, 2012, 10:20:51 PM), http://www.sgvtribune.com/news/ci_21462617/cooperation-could-help-usc-limit-ncaa-sanctions (explaining that after acting defiantly with the NCAA during a 2008-2010 investigation, which resulted in the school being hit "pretty hard", the University of Southern California has fostered a close relationship with the NCAA to show their good intentions and desire to follow the rules, which should reduce future sanctions).

¹⁶⁷ See, e.g., *NCAA Sanctions LSU on Recruiting*, ESPN (July 20, 2011, 9:44 AM), http://espn.go.com/college-football/story/_/id/6784149/ncaa-hits-lsu-one-year-probation-recruiting-restrictions (stating that the NCAA accepted LSU's self-imposed sanctions for bylaw violations, and noting that the NCAA Committee on Infractions chairman said the punishment could have been much worse if LSU had not cooperated).

with Jeremy Bloom,¹⁶⁸ the university is basically powerless and must comply with the NCAA’s determination of eligibility status.¹⁶⁹

If the NCAA did not have any controlling authority over these university’s athletic programs, the university would have no reason to act in an adversarial manner or to attempt to comply for fear of possible greater sanctions. Instead, the university could choose to simply ignore the NCAA’s directions and risk possible expulsion or to voluntarily leave the NCAA altogether. These other alternatives, however, are simply not viable, and the universities are forced to comply with the NCAA.

Other than choosing to accept the NCAA’s penalty, UNLV’s other alternatives of either ignoring the NCAA and risk “heavier sanctions”, or pulling out of the NCAA completely, were referred to by the Court in *Tarkanian* as “unpalatable”, due to UNLV’s desire to remain one of the country’s premiere basketball programs, but not “nonexistent”.¹⁷⁰ Calling the option of leaving the NCAA not “nonexistent”, was an understatement in 1976, when UNLV was making its decision, and is even more of one today.

In the late 1970s, the NCAA was still a relatively small operation, earning \$6.6 million in revenues in 1977-78.¹⁷¹ As mentioned in Part I.A of this Note, the NCAA has grown tremendously since then, with \$845.9 million in revenue in 2010-11, with 60% of that distributed to the member institutions.¹⁷² If it was “unpalatable” to leave the

¹⁶⁸ See *supra* Part II.B.1 (discussing Bloom in greater detail).

¹⁶⁹ See Gouveia *supra* note 60.

¹⁷⁰ *Tarkanian*, 488 U.S. at 198 n.19.

¹⁷¹ See David Meggyesy, *Athletes in Big-Time College Sport*, 37 SOCIETY 3, 24 (noting NCAA’s 8,000% increase in revenue from 1976 to 2000).

¹⁷² See *supra* note 15 and accompanying text.

NCAA in the late 1970s, revenue growth of over 12,000% has now all but made that option nonexistent. Even in just the thirteen years since *Cureton* was decided, NCAA revenues have increased over 200%. Leaving the NCAA would cause the university to lose their share of that NCAA revenue, a significant hit to the university's budget. These dramatic increases in revenue show that the context in which the *Tarkanian* and *Cureton* decisions were made has starkly changed in the direction of making it all but impossible for a university to be able to pass up on that revenue and leave the NCAA. This change in context merits a reconsideration and reversal of *Cureton*'s holding.

Leaving the NCAA would likely also force the university to cancel its intercollegiate athletics programs altogether, since it is not likely any opposing team would be willing to play a non-NCAA affiliated university in a game that does not count. These cancellations would have two primary consequences that make them leaving the NCAA not a feasible alternative for any university to consider. First, the university would stand to lose the millions of dollars of revenue the university generates through merchandise and ticket sales.¹⁷³ Second, as mentioned in Part II.C of this Note, success in big-time college athletics can lead to a significant increase in the number of applicants to a university.¹⁷⁴ As universities continue to face massive budget cuts from States¹⁷⁵, the loss of applicants due to losing its athletics program could

¹⁷³ See *supra* notes 141-143 and accompanying text.

¹⁷⁴ See *supra* note 144 and accompanying text.

¹⁷⁵ See Jens Krogstad, *State Colleges Look at Tuition Freeze to Recoup Funding*, USA TODAY (Nov. 11, 2012, 8:06 PM), <http://www.usatoday.com/story/news/nation/2012/11/11/state-universities-tuition-freeze-budget-cuts/1698379/> (noting several years of steep reductions of state dollars to universities, causing budget-cutting measures).

greatly hinder the university’s budget.

2. Fairness and the Eleventh Circuit.

The Eleventh Circuit’s point in *Williams* that “if we allowed funding recipients to cede control over their programs to indirect funding recipients but did not hold indirect funding recipients liable for Title IX violations, we would allow funding recipients to receive federal funds but avoid Title IX liability”¹⁷⁶ cannot be overstated enough. Allowing the NCAA to continue to narrowly avoid Title VI and Title IX liability does little to promote President Kennedy’s initial goal for Title VI, to prevent public funds from being spent in “any fashion” which encourages discrimination.¹⁷⁷ The words “any fashion” need to be read to include when an entity such as the NCAA exercises such sustained control over government-funded universities. If the current NCAA-member institution relationship, with strict bylaw enforcement, severe punishments, and significant revenue generation, is not enough to show controlling authority, it is difficult to think of that relationship ever logically growing into one that would fall into that category and bring with it Title VI susceptibility, absent something so illogical and extreme as the NCAA joining the university’s board of directors.

The more recent cases of *Williams* and *Barrs* show that some courts seem today to be much more inclined to hear a controlling authority argument concerning the NCAA than the Third Circuit has been. In these cases, the court held that plaintiffs showed enough facts to survive motions to dismiss concerning the controlling authority possessed by an athletic association and an athletic

¹⁷⁶ *Williams*, 477 F.3d at 1294.

¹⁷⁷ See *supra* note 26 and accompanying text.

conference, respectively, over a university's athletics program. Both an athletic association as well as an athletic conference have similarities to the NCAA in how they control a university's athletics programs. All three of these entities have bylaws governing the university and student-athletes, generate revenue, and possess the ability to severely punish the teams and student-athletes.¹⁷⁸ Perhaps notably, both *Williams* and *Barrs* were decided years after *Cureton*, after college athletics revenues continued to skyrocket throughout the late 2000s. The changing attitude from these courts must also be adopted by the Third Circuit to ensure that the NCAA does not indirectly receive any federal funding while avoiding Title VI or Title IX liability. It is simply unfair for the NCAA to control and receive so much from its member institutions, without whom the NCAA would not exist, yet avoid the same standards regarding usage of federal funding that these institutions are held to. To avoid such inequality, *Cureton* must be reversed, and courts need to determine that the NCAA does exercise controlling authority over its member institutions that causes it to be susceptible to suit under Title VI.

B. THE "OPERATION GOLD" GRANT IS DISCRIMINATORY

After determining that the NCAA is susceptible to suit as an indirect recipient of federal funds under Title VI, it is clear that a plaintiff should have the opportunity to prove that the Operation Gold Grant is discriminatory in

¹⁷⁸ See, e.g., Thomas O'Toole, *Big Ten Adds More Penalties to Penn State*, USA TODAY (July 23, 2012, 12:59 PM), <http://content.usatoday.com/communities/campusrivalry/post/2012/07/big-ten-more-penalties-penn-state/1#.UKMrYodYJTI> (explaining the sanctions the Big Ten imposed on Penn State, amounting to a \$13 million fine over four years).

violation of Title VI. Private individuals may sue under Title VI for injunctive relief or damages¹⁷⁹, so anyone being discriminated against by the Operation Gold Grant, such as Liam from Part I of this Note, could bring suit against the NCAA. Discrimination includes when similarly situated persons are treated differently because of their national origin.¹⁸⁰ Thanks to the Operation Gold Grant, two student-athletes such as Mark and Liam from Part I of this Note, identical outside of their national origin, get treated very differently in regards to collecting Olympic medal bonus money that they earned. This discrimination is fairly significant, as since great time commitment required to compete at a high level often prevents student-athletes from getting jobs,¹⁸¹ the \$10,000 and \$46,000 that Drouin and Lenore, respectively, had to decline, would have been an enormous benefit.

The major obstacle for a plaintiff attempting to prove that the Operation Gold Grant is discriminatory is that to sue under Title VI the plaintiff must show intentional discrimination, rather than the more lenient disparate impact standard.¹⁸² To show intentional discrimination, the bylaw must have been adopted “because of, not merely in spite of, its adverse effects upon an identifiable group.”¹⁸³ However, similar to in *Pryor*, where the plaintiffs were able to get past a Rule 12(b)(6) motion by pleading a “short and plain statement...showing that [they were] entitled to relief” despite a lack of specific facts showing *prima facie* intentional discrimination,¹⁸⁴ a

¹⁷⁹ See *supra* note 34 and accompanying text.

¹⁸⁰ See *supra* note 38 and accompanying text.

¹⁸¹ See NCAA RESEARCH, *supra* note 6.

¹⁸² See *supra* Part II.A.1.

¹⁸³ See *supra* note 38 and accompanying text.

¹⁸⁴ See *supra* Part II.A.2.

plaintiff challenging the Operation Gold Grant will be able to plead a short and plain statement and be able to reach discovery in an attempt to uncover more evidence of intentional discrimination. This statement can rely mainly on the wording of the Operation Gold Grant itself.

Other than the Operation Gold Grant, most NCAA bylaws, including those concerning the Olympics, are written in a generic manner, intended to cover all student-athletes as a whole. NCAA bylaw 12.1.2.1.4.3.2 allows Olympic team members to receive all nonmonetary benefits and awards given to other team members of “*that nation’s Olympic team*”.¹⁸⁵ NCAA bylaw 12.1.2.4.14 allows an individual to receive actual and necessary expenses from the USOC, as well as any other national governing body or non-professional organization sponsoring an Olympic Exhibition event.¹⁸⁶ While these exceptions allow student-athletes from any country to accept benefits relating to Olympic participation, only the Operation Gold Grant singles out American student-athletes as the only permissible benefit recipients.¹⁸⁷

The deliberate wording of the exception, differing in form from every other payment exception in its bylaws, must not have been an accident. Surely the NCAA, when it adopted the Operation Gold Grant in April 2001,¹⁸⁸ knew that other countries than the U.S. offered medal bonuses. And even if they did not know, there is no rational reason to single out American student-athletes unless the intent

¹⁸⁵ See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.3.2, *supra* note 5, at 62.

¹⁸⁶ See NCAA DIV. I MANUAL, Bylaw 12.1.2.4.14, *supra* note 5, at 65.

¹⁸⁷ See NCAA DIV. I MANUAL, Bylaw 12.1.2.1.4.1.2, *supra* note 5, at 62.

See also NCAA DIV. I MANUAL, Bylaw 12.1.2.1.5.1, *supra* note 5, at 62 (specifically allowing funds administered by the U.S. Olympic Committee).

¹⁸⁸ *Id.* (stating the bylaw was adopted in April 2001 and effective as of August 2001).

was to provide the American student-athletes with a benefit while simultaneously denying foreign student-athletes the same benefit. In *Pryor*, the plaintiffs were able to overcome the pleading standard for intentional racial discrimination by alleging the NCAA enacted a bylaw to purposely reduce the number of African-Americans who would be eligible to compete. Similarly, the Operation Gold Grant appears to be blatantly intended to treat student-athletes differently solely on account of their national origin, and alleging this should certainly be enough to overcome the pleading standard.

After overcoming this pleading standard, plaintiff will be able to use discovery to unearth more evidence of the true intent behind this bylaw exception. As relevant factors the court takes into account include the historical background of the decision and any statements made by members of the decisionmaking body,¹⁸⁹ the plaintiffs would be wise to review the minutes of the meetings in which the exception was discussed, as well as conduct depositions with members of the NCAA Executive Committee. One likely reason that the NCAA decided to enact this discriminatory bylaw is the longstanding ties between the NCAA and the USOC.

Many American Olympic athletes compete for the U.S. either during or after their time competing for an NCAA university, and some U.S. National Olympic directors calling the NCAA the USOC’s “farm system” or a “sustaining pipeline.”¹⁹⁰ Further, the USOC has recently been working closely with the NCAA to try and keep sports

¹⁸⁹ See *Pryor*, *supra* notes 41-42 and accompanying text.

¹⁹⁰ See Liz Clarke, *Olympic-Style Sports Losing Big at Colleges*, THE NEWS TRIBUNE (July 12, 2012, 12:05 AM), <http://www.thenewstribune.com/2012/07/12/2212099/olympic-style-sports-losing-big.html> (describing how universities eliminating some sports is hurting the USOC).

that are struggling due to budget concerns, such as gymnastics and wrestling, from disappearing from the NCAA.¹⁹¹ If these sports continue to disappear, USOC CEO Scott Blackmun noted that it would “have a huge impact on [Team USA's] Olympic performance.”¹⁹² Seeing American student-athletes accept bonuses thanks to the Operation Gold Grant that they have to turn down could cause foreign student-athletes to pass up attending an NCAA university altogether, opening up more scholarships for American athletes to sustain the NCAA-USOC pipeline. Every time a foreign student-athlete accepts a scholarship to an NCAA university, that is one less spot that could go to an American athlete who, with proper NCAA and USOC coaching, could potentially be a Team USA Olympic athlete one day.

Of course, no executive from the NCAA or USOC is likely to openly admit that this partnership, or any other reason, caused the NCAA to intentionally discriminate against foreign student-athletes, which is why getting to the discovery process is so important. The meeting minutes for when the bylaw was enacted will be the most telling, as these minutes will show both the sequence of events leading up to its enacting as well as statements made by decisionmakers at the time – two of the more important factors in showing a discriminatory intent.¹⁹³

C. REMEDY

¹⁹¹ See David Barron, *U.S. Olympic Committee to Tighten Ties with NCAA*, HOUSTON CHRONICLE (July 17, 2011), <http://www.chron.com/sports/article/U-S-Olympic-Committee-to-tighten-ties-with-NCAA-2078180.php> (explaining the growing NCAA-USOC partnership).

¹⁹² *Id.*

¹⁹³ See Pryor, *supra* notes 41-42 and accompanying text.

**OUT OF “CONTROL”: The Operation Gold
Exception and the NCAA’s Susceptibility to
Lawsuit Under Title VI**

The simple way for the NCAA to remedy this situation is preempt any potential litigation and to amend the Operation Gold Grant to be more in line with the rest of its bylaws, allowing *any* Olympic student-athlete to accept funds administered through a country’s Olympic medal bonus program. This amending would put all similarly-situated NCAA student-athletes in the same position, regardless of national origin. Considering that the NCAA itself claims that it does not discriminate,¹⁹⁴ it should have no problems with amending the bylaw.

If the NCAA does not take this step on its own, it opens itself up to a lawsuit under Title VI, where the plaintiff would be able to receive both injunctive relief and damages. As the number of foreign student-athletes competing in the NCAA continues to increase, the NCAA’s potential liability continues to grow.¹⁹⁵ The injunction would likely see the court enjoin the NCAA from continuing to enforce this discriminatory bylaw provision, and damages could potentially force the NCAA to pay compensatory damages to foreign student-athletes for both bonuses they previously had to decline as well as potentially for any nonpecuniary injuries.¹⁹⁶

IV. CONCLUSION

The Operation Gold Grant, which specifically allows NCAA student-athletes who are members of Team USA to collect Olympic medal bonus money, but not

¹⁹⁴ See 2012-13 Guide for the College-Bound Student-Athlete, *supra* note 24.

¹⁹⁵ See Hosick, *supra* note 75.

¹⁹⁶ See U.S. Department of Justice, *supra* note 38, at 103 (listing compensatory damages for Title VI violations as including those for pecuniary and nonpecuniary injuries)

foreign student-athletes, is very likely intentionally discriminatory under Title VI. The courts should find the NCAA to be susceptible to Title VI suits so that the true background of the bylaw can be uncovered through the discovery process. While the Third Circuit has held that the NCAA does not have controlling authority over its member institutions athletic programs, and thus not a federal funding recipient susceptible to a Title VI suit, that holding is contrary to the current nature of the NCAA. The Third Circuit was incorrect on basing the NCAA's lack of controlling authority on *Tarkanian*, as *Tarkanian* actually showed how much power the NCAA has to force a university to do something it does not want to do. Further, the NCAA and college athletics are completely different entity than it was at the time of the *Tarkanian* and *Cureton* decisions, with skyrocketing revenues and increasing NCAA oversight making it so that leaving the NCAA is simply no longer an option. Through its revenue it provides to universities and its ability to enforce great sanctions, the NCAA does exercise controlling authority over its member institutions and should be susceptible to a Title VI suit.

After showing controlling authority, the NCAA is clearly in violation of Title VI due to the Operation Gold Grant's apparent intentional discriminatory treatment of foreign student-athletes. It is difficult to think of any purpose for the specific wording of the Operation Gold Grant other than to purposely treat American and foreign student-athletes differently. The NCAA loves to flex its muscles and impose serious sanctions on its member institutions for rule breaking,¹⁹⁷ and has shown a tremendous ability to avoid liability in lawsuits brought

¹⁹⁷ See generally Part II.C.

against it.¹⁹⁸ In this case, however, the NCAA has gone against what President Kennedy called “simple justice” – the equal treatment of all citizens by institutions receiving federal funding¹⁹⁹ – and needs to be punished accordingly.

¹⁹⁸ See Gouveia, *supra* note 60.

¹⁹⁹ See President John F. Kennedy’s address to Congress, *supra* note 26 and accompanying text.