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**ONE-AND-DONE IS NO FUN: THE NBA DRAFT  
ELIGIBILITY RULE'S CONUNDRUM AND A PROPOSED  
SOLUTION**

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*“Like LeBron or Sebastian, high school graduates straight to the league, I ain’t waitin’ for my knee to blow, Yesterday I was needin’ this dough, get it, I was kneadin’ this dough.”<sup>1</sup>*

**I. INTRODUCTION**

**A. THE TIPPING POINT**

On September 26, 2017, four National Collegiate Athletic Association (“NCAA”) Division I men’s basketball coaches, an Adidas executive and five others were arrested on fraud and corruption charges.<sup>2</sup> The scandal also implicated Rick Pitino, coach of the University of Louisville’s basketball team, and one of NCAA Division I’s winningest men’s basketball coaches.<sup>3</sup> The

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<sup>1</sup> JAY-Z, DEAD PRESIDENTS III (Def Jam Records) (Hip-Hop artist, Jay-Z, using a double entendre, juxtaposes two very different situations that great high school basketball players used to face: go to college and risk the chance of injury or enter the league with an uncertain future but make millions of dollars).

<sup>2</sup> Press Release, U.S. Dep’t of Justice, U.S. Attorney Announces the Arrest of 10 Individuals, Including Four Division I Coaches, for College Basketball Fraud and Corruption Schemes (Sept. 26, 2017), <https://www.justice.gov/usao-sdny/pr/us-attorney-announces-arrest-10-individuals-including-four-division-i-coaches-college>.

<sup>3</sup> *Id.*

United States Attorney's Office for the Southern District of New York and the Federal Bureau of Investigation ("FBI") found many instances of bribery and criminal activity intended to facilitate where a college basketball player went to school, who they hired if they made it to the NBA, and what types of shoe brands the athlete would endorse.<sup>4</sup> One specific scheme found that a University of Louisville basketball employee along with an Adidas executive paid a high school basketball prospect's family \$100,000 in return for his commitment to enroll at and play for Louisville, whose athletic program is sponsored by Adidas.<sup>5</sup> He further agreed to sign with Adidas if he entered the NBA.<sup>6</sup> Ultimately, the "legendary" Rick Pitino was fired by the University of Louisville amid the FBI investigation.<sup>7</sup> However, this was just the beginning of the storm.

The FBI's investigation has led to the discovery of an underground college basketball recruiting operation implicating at least twenty Division I college basketball programs.<sup>8</sup> On February 23, 2018, it was reported that some of the documents recovered were balance sheets from ASM Sports.<sup>9</sup> One particular balance

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Tracy Connor, *Louisville Fires Rick Pitino Amid NCAA Bribery Probe*, NBC NEWS (Oct. 16, 2017, 2:44 PM), <https://www.nbcnews.com/news/us-news/louisville-fires-rick-pitino-amid-ncaa-bribery-probe-n811021>.

<sup>8</sup> Pat Forde & Pete Thamel, *Exclusive: Federal Documents Detail Sweeping Potential NCAA Violations Involving High-Profile Players, Schools*, YAHOO! SPORTS (Feb. 23, 2018, 3:33 AM), <https://sports.yahoo.com/exclusive-federal-documents-detail-sweeping-potential-ncaa-violations-involving-high-profile-players-schools-103338484.html> (schools implicated include Duke, North Carolina, Michigan State, and Kentucky).

<sup>9</sup> ASM Sports is a sports agency headed by Andy Miller who is considered one of the premier NBA agents. *See* Pat Forde & Pete Thamel, *Meet Andy Miller, the Controversial Agent Tied to College Hoops Scandal*, YAHOO! SPORTS (Nov. 21, 2017, 11:56 AM), <https://sports.yahoo.com/meet-andy-miller-controversial-agent-tied-college-hoops-scandal-185645771.html>. The agency represents prominent NBA athletes such as Kyle Lowry and Kristaps Porzingis. A few months after the indictment, Miller relinquished his agent certification. *Id.*; *see also* Paolo Uggetti, *FAQ: Prominent Agent Andy Miller Relinquishes Certification*, THE RINGER (Dec. 6, 2017, 5:20

sheet has the heading, “Loans to Players.”<sup>10</sup> The document showed that some men’s high school and college basketball athletes received tens of thousands of dollars from ASM Sports.<sup>11</sup> The storm grew even darker when, the very next day, it was reported that the FBI, through a wiretap, intercepted Sean Miller, head coach of University of Arizona’s men’s college basketball program, allegedly discussing a payment of \$100,000 to DeAndre Ayton.<sup>12</sup>

Although this might appear “shocking,”<sup>13</sup> NCAA Division I men’s college basketball has historically been known for its violations of NCAA rules.<sup>14</sup> The NCAA pushes aside the

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PM), <https://www.theringer.com/nba/2017/12/6/16743348/nba-andy-miller-asm-sports-relinquish-certification>.

<sup>10</sup> Forde, *supra* note 8.

<sup>11</sup> *Id.*

<sup>12</sup> Deandre Ayton was one of the top recruits this year and is considered to be one of the top picks in the upcoming 2018 NBA Draft. See Mark Schlabach, *FBI Wiretaps Show Sean Miller Discussed \$100K Payment to Lock Recruit*, ESPN (Feb. 24, 2018), [http://www.espn.com/mens-college-basketball/story/\\_/id/22559284/sean-miller-arizona-christian-dawkins-discussed-payment-ensure-deandre-ayton-signing-according-fbi-investigation](http://www.espn.com/mens-college-basketball/story/_/id/22559284/sean-miller-arizona-christian-dawkins-discussed-payment-ensure-deandre-ayton-signing-according-fbi-investigation). It is reported that if Miller is fired for cause, he will receive more than \$10 million equaling about 85% of his contract. *Id.*; see also Darren Heitner, *Drafting Error Could Cost University of Arizona Millions if Sean Miller Is Fired*, FORBES (Feb. 24, 2018, 12:03 PM), <https://www.forbes.com/sites/darrenheitner/2018/02/24/drafting-error-that-could-cost-university-of-arizona-millions-if-sean-miller-is-fired/#62e8ab86522d>.

<sup>13</sup> Following reports of the ASM balance sheets and Miller’s alleged payment, NCAA President Mark Emmert had this to say: “Did we or anybody else have suspicions that these things are going on, well of course. Everybody did. No one was shocked that these things occurred.” See @CBSSportsCBB, TWITTER (Feb. 24, 2018, 10:43 AM), <https://twitter.com/cbssportscbb/status/967470077061693440?s=12>.

<sup>14</sup> See, e.g., Shannon Ryan, *NCAA Penalizes Memphis in Derrick Rose Test Case*, CHICAGO TRIBUNE (Aug. 21, 2009), [http://articles.chicagotribune.com/2009-08-21/sports/0908210085\\_1\\_penalizes-memphis-coach-john-calipari-infractions-report](http://articles.chicagotribune.com/2009-08-21/sports/0908210085_1_penalizes-memphis-coach-john-calipari-infractions-report); see also Joe Smith, “*Fab Five*” Legacy Tainted, THE MICHIGAN DAILY (Mar. 25, 2002), <https://www.michigandaily.com/content/fab-five-legacy-tainted>; see also Adam Spolane, *Remembering Kelvin Sampson’s Scandal-Ridden Past*, CBS HOUSTON (Apr. 3, 2014),

efforts of men's college basketball student-athletes to benefit financially off of their own success. At the same time, the NCAA is willfully blind when sports apparel companies, boosters, and agents pay these student-athletes for their success on the hardwood. The NCAA is known for its hardline stance on not compromising a "student-athlete's eligibility."<sup>15</sup> Yet, underneath it all, lies a criminal enterprise that exploits high school men's basketball athletes who are left with very few choices.

The NCAA implements a stringent policy against any student-athlete receiving any type of monetary benefits.<sup>16</sup> Recently, some men's basketball college athletes have come out and said how unfair the NCAA system is to them. Shabazz Napier, a former first-team All-American and two-time NCAA champion, claimed that there had been nights where he went to bed without food.<sup>17</sup> Ben Simmons, the #1 pick in the 2016 NBA Draft and a former "One-and-Done" athlete, was also highly critical of the NCAA in a recent interview.<sup>18</sup> Simmons described "the business of college sports" as a "dirty business" and "sneaky."<sup>19</sup> Simmons recalled that when he first arrived at Louisiana State University ("LSU"), his number, but not his name, was draped across billboards all over Louisiana proclaiming that a superstar was on the horizon.<sup>20</sup> Yet Simmons never received a dime from the profits of the billboard advertisements.<sup>21</sup> Finally, and most importantly,

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<http://houston.cbslocal.com/2014/04/03/remembering-kelvin-sampsons-scandal-filled-past/>.

<sup>15</sup> *NCAA President: Not a Good Idea*, ESPN (Sept. 17, 2013), [http://www.espn.com/college-sports/story/\\_/id/9682086/ncaa-budget-paying-college-athletes](http://www.espn.com/college-sports/story/_/id/9682086/ncaa-budget-paying-college-athletes).

<sup>16</sup> *Amateurism*, NCAA, <http://www.ncaa.org/student-athletes/future/amateurism> (last visited Nov. 17, 2018).

<sup>17</sup> Sara Ganim, *UCONN Guard on Unions: I Go to Bed 'Starving'*, CNN (Apr. 8, 2014, 1:26 PM), <http://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html>.

<sup>18</sup> *Kneading Dough: Ben Simmons*, UNINTERRUPTED (Nov. 9, 2017), <https://www.uninterrupted.com/watch/CiQZqsrP/kneading-dough-ben-simmons>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

Simmons said that one year in the NBA has already taught him more than he had ever learned during his one year at LSU.<sup>22</sup>

#### B. THE DILEMMA OF THE ELITE MEN'S BASKETBALL STUDENT-ATHLETE

High school basketball athletes are not eligible to enter the National Basketball Association's ("NBA") annual draft immediately after graduating high school unlike in Major League Baseball ("MLB")<sup>23</sup> and the National Hockey League ("NHL").<sup>24</sup> Yet, not so long ago, the NBA did allow high school athletes to directly enter the league. This allowed Moses Malone, Kevin Garnett, Kobe Bryant, and LeBron James to grow from talented, young teenagers to some of the greatest players in NBA history.<sup>25</sup> Moreover, it allowed these players to monetize their abilities as athletes.<sup>26</sup>

The NCAA and its member schools monetize the athlete's abilities by, for example, denying the athlete the right of publicity through advertisements and jersey sales as was seen with Simmons.<sup>27</sup> All it takes is one elite, high school men's basketball player committing to a NCAA school for the school to generate revenue and ticket sales.<sup>28</sup> But, the men's basketball student-

<sup>22</sup> *Id.*

<sup>23</sup> *Official Rules*, MLB,

<http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Nov. 17, 2018).

<sup>24</sup> National Hockey League & National Hockey League Players Association Collective Bargaining Agreement, art. VIII, § 8.4(a) (Feb. 15, 2013),

[http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL\\_NHLPA\\_2013\\_CB\\_A.pdf](http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CB_A.pdf).

<sup>25</sup> BILL SIMMONS, *THE BOOK OF BASKETBALL: THE NBA ACCORDING TO THE SPORTS GUY* 491, 501, 569 (2009). Simmons ranks the top ninety-six players in NBA history and ranks Garnett at 22, James at 20, Malone at 13 and Bryant at 8. *Id.* However, the book was written prior to Bryant winning one more championship and James winning three championships. *Id.*

<sup>26</sup> *See, e.g.*, Kurt Badenhausen, *Kobe Bryant Will Retire with Record \$680 Million in Career Earnings*, FORBES (Nov. 30, 2015, 11:18 AM), <https://www.forbes.com/sites/kurtbadenhausen/2015/11/30/kobe-bryant-will-retire-with-record-680-million-in-career-earnings/#7e6f3501217c>.

<sup>27</sup> *Id.*

<sup>28</sup> Aaron Reiss, *Mizzou Men's Basketball Announces Season-Ticket Sales Record*, THE KANSAS CITY STAR (Nov. 7, 2017, 12:00

athletes are no fools. They see the NCAA and its member schools getting rich, while they are left with empty pockets. The NCAA's member schools and the school's boosters, sponsors, and unaffiliated agents take advantage of the young basketball athlete's dilemma by providing him with money and other gifts. Although against NCAA rules, some college men's basketball athletes feel the only choice they have is to accept money to support themselves and their families.<sup>29</sup> Ultimately, athletes in financial constraints are left with two options: receive money, in violation of NCAA rules, and potentially lose their NCAA eligibility, or watch as people make money off their athletic abilities. This article seeks to articulate a theory by which high school athletes can challenge the NBA's Draft Eligibility Rule in court. It also offers an alternative to the current eligibility rule in place.

### C. THE "ONE-AND-DONE" RULE AND POSSIBLE LEGAL CHALLENGES

The NBA's draft eligibility rule was revised in the 2005 NBA Collective Bargaining Agreement (CBA).<sup>30</sup> The new rule changed the longstanding rule that high school men's basketball athletes, after graduation, could be eligible for the NBA Draft.<sup>31</sup> The current rule, known as the "One-and-Done Rule"<sup>32</sup> requires that:

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PM), <http://www.kansascity.com/sports/college/sec/university-of-missouri/article183216206.html>.

<sup>29</sup> Sheryl Nance-Nash, *NCAA Rules Trap Many College Athletes in Poverty*, AOL (Sept. 13, 2011, 4:00 PM), <https://www.aol.com/2011/09/13/ncaa-rules-trap-many-college-athletes-in-poverty/>.

<sup>30</sup> Howard Beck, *N.B.A. Draft Will Close Book on High School Stars*, NY TIMES (June 28, 2005), <http://www.nytimes.com/2005/06/28/sports/basketball/nba-draft-will-close-book-on-high-school-stars.html> ("[T]he National Basketball Players Association agreed to the league's request to put the 19-year-old limit in the new labor agreement.").

<sup>31</sup> *Id.*

<sup>32</sup> Known as the One-and-Done Rule because the top college basketball athletes attend college for one college basketball season, and then immediately declare for the NBA Draft at the conclusion of the collegiate season. Myron Medcalf, *Roots of One-and-Done Rule Run Deep*, ESPN (Jun. 26, 2012) <http://www.espn.com/mens-college->

The player (A) is or will be at least nineteen (19) years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player . . . , at least one (1) NBA Season has elapsed since the player's graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school).<sup>33</sup>

There are two avenues to challenge the One-and-Done Rule. The first is through a restraint of trade argument. Under this argument, high school men's basketball athletes argue that their right to monetize their athletic abilities is being infringed upon by excluding them from entering the NBA immediately after high school.<sup>34</sup> The restraint of trade argument arises when an athlete argues that the NBA is in violation of the Sherman Antitrust Act § 1, which says a contract is illegal if it is made in collusion with others to restrain trade.<sup>35</sup> The problem with the anti-trust argument is that sports leagues, including the NBA, are exempt from anti-trust lawsuits through a non-statutory labor exemption<sup>36</sup> if the players union and the league collectively bargain for the terms of a rule.<sup>37</sup> For an athlete to succeed on an anti-trust argument, the athlete must first show that the draft eligibility rule in place does not fall within the non-statutory labor exemption.<sup>38</sup>

Proving that the non-statutory labor exemption does not apply is the most crucial step for a high school men's basketball

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basketball/story/\_/id/8097411/roots-nba-draft-one-done-rule-run-deep-men-college-basketball (“[T]he one-and-done generation—players who leave after one season of college basketball.”).

<sup>33</sup> NBA COLLECTIVE BARGAINING AGREEMENT, art. X, § 1(b)(i) (2017).

<sup>34</sup> See Michael McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 216–18 (2004).

<sup>35</sup> Sherman Antitrust Act, 15 U.S.C. § 1 (2004).

<sup>36</sup> See *Connell Constr. Co. v. Plumbers and Steamfitters Loc. Union No. 100*, 421 U.S. 616, 622 (1975) (the non-statutory labor exemption was judicially created to promote the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions).

<sup>37</sup> *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 390 (S.D.N.Y. 2004).

<sup>38</sup> *Id.*

athlete who wants to challenge the NBA's One-and-Done Rule. There are two cases that highlight the non-statutory exemption in sports leagues. In *Mackey v. National Football League*, the U.S. Court of Appeals for the Eighth Circuit resolved when the non-statutory labor exemption would apply through a three-factor test.<sup>39</sup> Under the *Mackey* test, courts must determine if: (1) "the restraint on trade primarily affects only the parties to the collective bargaining relationship;" (2) the restriction "concerns a mandatory subject of collective bargaining," which include wages, hours, and working conditions; and (3) the restriction is "the product of bona fide arm's-length bargaining."<sup>40</sup> In 1996, twenty years later, the U.S. Supreme Court decided *Brown v. Pro Football, Inc.*<sup>41</sup> In its decision, the Supreme Court did not apply the *Mackey* test, but instead chose to look at other Supreme Court decisions in their totality.<sup>42</sup> The Supreme Court did not make a distinction between what is and what is not covered by the exemption, leaving it to a case-by-case analysis of the facts.<sup>43</sup> Nonetheless, in 2004, the Southern District of New York applied the *Mackey* factors to hold that the non-statutory labor exemption did not apply in *Clarett DC*.<sup>44</sup> However, in the same year, the NFL appealed, and the U.S. Court of Appeals for the Second Circuit overturned the District Court's decision, refusing to apply the *Mackey* factors.<sup>45</sup> The decision by the Second Circuit was brought to the NBA's attention, and the NBA soon after amended the NBA Draft Eligibility Rule to its current state.

This Note will argue that the non-statutory labor exemption should not apply to the NBA's One-and-Done Rule, which exists within the NBA's CBA. Part II addresses the history of Draft Eligibility Rules in the NBA and compares it with those of the National Football League ("NFL"), and references the cases that changed the draft eligibility rules. Part III compares the

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<sup>39</sup> *Mackey v. Nat'l Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

<sup>40</sup> *Id.*

<sup>41</sup> *Brown v. Pro Football*, 518 U.S. 231 (1996).

<sup>42</sup> *Id.* at 237–38.

<sup>43</sup> *Id.* at 250.

<sup>44</sup> *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 411 n.87 (S.D.N.Y. 2004).

<sup>45</sup> *Clarett v. Nat'l Football League*, 369 F.3d 124, 134 (2d Cir. 2004).



District Court decision and the Second Circuit decision in *Clarett*. Part IV explains why the Second Circuit's arguments for not applying the non-statutory labor exemption should not apply to the NBA Draft. Finally, Part V will look at a reform plan that the NBA could institute in place of the One-and-Done Rule.

## II. HISTORY OF DRAFT ELIGIBILITY RULES IN THE NBA AND NFL

An examination of the NBA and NFL Draft's eligibility rules is needed to understand how and why the One-and-Done Rule exists. The NFL's rule was challenged by Maurice Clarett in an effort to gain early entry into the NFL Draft.<sup>46</sup> Ultimately, the *Clarett* decisions led to the NBA instituting the One-and-Done Rule.<sup>47</sup>

### A. NBA DRAFT ELIGIBILITY RULE HISTORY

In 1961, the NBA mandated that men's basketball athletes could not be eligible for the NBA Draft until four years after an athlete's high school class graduated.<sup>48</sup> The NBA stated that it was protecting the interests of the athletes.<sup>49</sup> Perhaps, unknowingly, it also built the NCAA's college basketball brand. Accordingly, the NBA has always made sure the interests of the NCAA were met. In 1970, Spencer Haywood played professional basketball in the American Basketball Association ("ABA") after spending two years in college.<sup>50</sup> After one year and a MVP award in the ABA, Haywood canceled his contract.<sup>51</sup> He subsequently signed with a NBA team, the Seattle Supersonics, in 1971.<sup>52</sup> Haywood was only three years removed from high school, so the NBA threatened to void the contract and impose sanctions on the Supersonics.<sup>53</sup> In response, Haywood filed suit claiming the NBA's rule was a

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<sup>46</sup> *Clarett*, 306 F. Supp. 2d at 382.

<sup>47</sup> Warren K. Zola, *Transitioning to the NBA: Advocating on Behalf of Student-Athletes for NBA & NCAA Rule Changes*, 3 HARV. SPORTS & ENT. L.J. 159, 171 (2012).

<sup>48</sup> *Id.* at 167–68.

<sup>49</sup> *Id.*

<sup>50</sup> Doug Merlino, *Spencer Haywood, the NBA Draft, and the Legal Battle That Shaped the League*, BLEACHER REPORT (May 6, 2011), <http://bleacherreport.com/articles/691783-spencer-haywood-the-nba-draft-and-the-legal-battle-that-shaped-the-league>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

group boycott under anti-trust law.<sup>54</sup> Haywood's case reached the Supreme Court and the Court ruled in Haywood's favor. In *Haywood*, the Supreme Court agreed with the District Court ruling that Haywood would suffer an irreparable injury if he was unable to play for the Supersonics, and a great injustice would be done to him.<sup>55</sup> The Court reasoned Haywood's basketball career would suffer because he would not play against high-level competition.<sup>56</sup> Haywood's status as a superstar would fade causing him to lose pride and self-esteem.<sup>57</sup> Importantly, a major reason the court ruled this way is because the age requirement was never collectively bargained.<sup>58</sup> The *Haywood* decision became the precedent that anchored high school athletes' ascent into the NBA.

In 1976, the NBA changed the rule to one allowing any high school men's basketball athlete to enter the draft as long as the athlete sent a letter to the Commissioner stating the player's intent to forfeit his NCAA eligibility.<sup>59</sup> Until 1995, only three high school basketball athletes made use of this rule change.<sup>60</sup> In 1995, Kevin Garnett became the first high school men's basketball athlete drafted in twenty years.<sup>61</sup> From 1995 until the "One-and-Done" rule was implemented in 2005, thirty-nine high school men's basketball athletes were drafted.<sup>62</sup> During that timeframe, the NBA saw more high school basketball athletes declare for the draft after every season. David Stern, former Commissioner of the NBA, advocated for an age limit of twenty for the NBA Draft because of the sudden uptick in athletes skipping college.<sup>63</sup> Around this time, Maurice Claret brought an anti-trust suit against the National Football League ("NFL") challenging the requirement that a football athlete be three years removed from

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<sup>54</sup> *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205 (1971).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Zola, *supra* note 47, at 168.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 168–69.

<sup>61</sup> *Id.* at 169.

<sup>62</sup> *Id.* at 170.

<sup>63</sup> *Id.*

high school in order to be draft eligible.<sup>64</sup> In that case, the U.S. Court of Appeals for the Second Circuit ruled for the NFL. The court reasoned that the NFL did not violate anti-trust laws because it had collectively bargained draft eligibility requirements with the NFL Players Association (“NFLPA”), and thus was labor exempt from anti-trust suits.<sup>65</sup> In 2005, the NBA, with the approval of the National Basketball Players Association (“NBPA”), agreed to structure a draft eligibility rule into the league’s CBA that required athletes to be nineteen years old and a year removed from their high school graduation.<sup>67</sup> This rule came to be known as the One-and-Done Rule. The NBA is protected from future legal challenges through the non-statutory labor exemption and by also collectively bargaining the draft eligibility requirements. Up to this point, the One-and-Done Rule has not yet been challenged. However, the NBA and NFL’s draft eligibility rules and process have striking similarities which makes an examination of the *Clarett* decisions imperative for those who want to challenge the rule.

#### B. NFL DRAFT ELIGIBILITY HISTORY

The NFL had its inaugural season in 1920. In 1925, it implemented its first draft eligibility rule.<sup>68</sup> The rule precluded a player from entering the NFL unless four NFL seasons had passed since the athlete’s high school graduation.<sup>69</sup> At the time, the NFL did not have a CBA, and the rule stood on its own.<sup>70</sup> In 1990, the NFL reduced the restriction from four NFL seasons to three.<sup>71</sup> In 1993, the NFL and the NFLPA negotiated a CBA that the NFL contended included the eligibility rule that was in the NFL’s Constitution and Bylaws.<sup>72</sup> The 1993 CBA allowed for college athletes to get special permission from the Commissioner to be

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<sup>64</sup> *Clarett v. Nat’l Football League*, 369 F.3d 124, 125 (2d Cir. 2004).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 142–43.

<sup>67</sup> NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 33.

<sup>68</sup> *Clarett v. Nat’l Football League*, 306 F. Supp. 2d 379, 385 (S.D.N.Y. 2004).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

eligible for the NFL Draft.<sup>73</sup> Special permission would be granted if at least three NFL seasons had elapsed since the athlete's high school graduation.<sup>74</sup> Permission was routinely granted so long as the athlete fell within the scope of the rule.<sup>75</sup> The rule was amended in 2003, stating that three full college seasons must pass since an athlete's high school graduation before he can be eligible for the NFL Draft.<sup>76</sup> This rule set the stage for Maurice Clarett's cause of action.

Maurice Clarett graduated high school in 2001.<sup>77</sup> He then went on to attend Ohio State University ("OSU") on a college football scholarship.<sup>78</sup> During his first season at OSU, he led OSU to a National Championship and was considered the best running back in college football.<sup>79</sup> What seemed like the start of a bright future ended up being the highlight of his career. The following season, OSU suspended Clarett for the entire season because of several off-field incidents including receiving several thousands of dollars in violation of NCAA rules.<sup>80</sup> With his NCAA eligibility in limbo, Clarett sought to be eligible for the 2004 NFL Draft, two and a half years after he graduated from high school.<sup>81</sup> The NFL, sticking to its eligibility rule, denied Clarett entry into the NFL Draft.<sup>82</sup> In response, Clarett sued the NFL under Section 1 of the Sherman Antitrust Act.<sup>83</sup> Clarett argued that the NFL Draft Eligibility Rule ("The Rule") is an "illegal restraint of trade because the teams have agreed to exclude a broad class of players from the NFL labor market, thereby constituting a 'group boycott.'" <sup>84</sup> The NFL argued that the non-statutory labor exemption immunized the league from anti-trust lawsuits.<sup>85</sup> Ultimately, the Clarett litigation was the last challenge to a

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<sup>73</sup> *Id.* at 385–86.

<sup>74</sup> *Id.* at 386.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 387.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 387–88.

<sup>80</sup> *Id.* at 388.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 390.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 389.

professional sports league's draft eligibility rule, proving its importance.

### III. THE CLARETT DECISIONS

Judge Shira A. Scheindlin's District Court decision and Judge Sonia Sotomayor's Second Circuit Court of Appeals opinion come to different conclusions in their determination of whether the non-statutory labor exemption was applicable to the NFL in *Clarett*. Although not binding in the Second Circuit, Judge Scheindlin applied the three-factor *Mackey* test, finding it persuasive, and determined that the non-statutory labor exemption was not applicable to the NFL.<sup>86</sup> Therefore, she held that Clarett was eligible for the NFL Draft because the NFL Draft's Eligibility Rule violated anti-trust law.<sup>87</sup> However, Justice Sotomayor did not apply the *Mackey* factors because *Mackey* was decided in the Eighth Circuit, and thus was not binding on the Second Circuit.<sup>88</sup> Instead, Justice Sotomayor looked at *Brown v. Pro Football* and other precedent within the circuit to determine that the non-statutory labor exemption does immunize the NFL, disregarding the possible persuasive value of *Mackey*.<sup>89</sup>

#### A. JUDGE SCHEINDLIN'S DISTRICT COURT DECISION

Judge Scheindlin conceded that the Second Circuit did not have an applicable test for the non-statutory labor exemption.<sup>90</sup> However, she acknowledged that the Sixth, Eighth and Ninth Circuits applied the *Mackey* three-factor test:

First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily *affects only the parties to the collective bargaining relationship*. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted *concerns a mandatory subject of collective bargaining*. Finally,

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<sup>86</sup> *Id.* at 391–93.

<sup>87</sup> *Id.* at 410–11.

<sup>88</sup> *Id.*

<sup>89</sup> *Brown v. Pro Football*, 518 U.S. 231, 231 (1996); *see also* *Caldwell v. Am. Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995); *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995); *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987).

<sup>90</sup> *Clarett v. Nat'l Football League*, 306 F. Supp. 2d at 391.

the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the *product of bona fide arm's-length bargaining*.<sup>91</sup>

Judge Scheindlin interpreted the scope of the non-statutory labor exemption as limiting the exemption to compulsory subjects of collective bargaining that “covers only conduct that arises from the collective bargaining process,”<sup>92</sup> following the Supreme Court’s decision in *Brown v. Pro Football, Inc.*, which held that the exemption applied to the wage restriction because it was an “integral part of the bargaining process.”<sup>93</sup> Judge Scheindlin also believed the exemption could only apply to “actions that affect employees within the bargaining unit or those who seek to become employees and who will be bound by those actions.”<sup>94</sup> Thus, Judge Scheindlin determined that wages, hours, and working conditions could only apply to employees.<sup>95</sup>

Judge Scheindlin held that The Rule did not address a mandatory subject of collective bargaining.<sup>96</sup> The mandatory subjects of collective bargaining affected only people who are employed or are eligible to be employed; yet The Rule made a “class of potential players unemployable.”<sup>97</sup> The NFL relied on three Second Circuit precedent cases to support its argument that the rules governing the NFL Draft were exempt from anti-trust litigation.<sup>98</sup> Judge Scheindlin distinguished the precedent cases from the instant case by commenting that all three precedent cases concerned either wages or working conditions, which are mandatory subjects of collective bargaining.<sup>99</sup> Judge Scheindlin found that none of the precedent cases involved job eligibility.<sup>100</sup> The precedent cases the NFL relied on were successful in arguing that the exemption applied because the provisions governed terms

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 393.

<sup>93</sup> *Brown*, 518 U.S. at 239.

<sup>94</sup> *Clarett*, 306 F. Supp. 2d at 393.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 393–95.

<sup>99</sup> *Id.* at 393.

<sup>100</sup> *Id.* at 395.

“by which those who are drafted are employed.”<sup>101</sup> Judge Scheindlin reasoned The Rule prevented athletes from entering the labor market entirely and affected wages only because the athlete subjected to the rule earned no wages.<sup>102</sup>

Judge Scheindlin also held that the exemption did not apply to individuals that were “excluded from the bargaining unit.”<sup>103</sup> The Rule affected players who were “complete strangers to the bargaining relationship.”<sup>104</sup> Relying on *Mackey*, Judge Scheindlin reasoned that the exemption could not apply to provisions that only affect individuals outside of the bargaining unit.<sup>105</sup> However, it is settled law that the non-statutory labor exemption applied to current and prospective employees.<sup>106</sup> Applying this standard, Judge Scheindlin concluded that an athlete, once drafted, could not object to a mandatory subject of collective bargaining on the basis that the athlete was not a party to the CBA.<sup>107</sup> However, Judge Scheindlin made an important distinction for Clarett. The Rule barred Clarett from being drafted because the NFLPA and NFL agreed to the provision.<sup>108</sup> Yet, Clarett’s eligibility for the NFL Draft was not the NFLPA’s to trade away.<sup>109</sup> Judge Scheindlin held that “those who are categorically denied employment, even temporarily, cannot be bound by the terms of employment they cannot obtain.”<sup>110</sup> Finally, Judge Scheindlin held that the non-statutory labor exemption did not apply because the NFL Draft Eligibility Rule did not arise from arm’s length negotiations.<sup>111</sup> Judge Scheindlin determined that because The Rule had originated prior to the first NFL CBA and because it was only briefly mentioned in the 1993 CBA, The Rule was never the subject of collective bargaining between the NFL and NFLPA.<sup>112</sup> After determining that the non-statutory labor exemption did not apply to the NFL, Judge Scheindlin held The

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 395–96.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 395.

<sup>110</sup> *Id.* at 396.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

Rule violated anti-trust law and Clarett was eligible for the 2004 NFL Draft.<sup>113</sup>

B. JUSTICE SOTOMAYOR'S SECOND CIRCUIT COURT OF APPEALS DECISION

Justice Sotomayor declined to apply the *Mackey* factors because she refused to distinguish between employers using agreements to “disadvantage their competitors in the product or business market,” and “restraint upon a unionized labor market characterized by a collective bargaining relationship with a multi-employer bargaining unit.”<sup>114</sup> Instead, Justice Sotomayor chose to rely on the Second Circuit precedent.<sup>115</sup> Justice Sotomayor held that to permit anti-trust suits against sports leagues that engaged in concerted action which imposed a restraint on the labor market would undermine the policies of labor law.<sup>116</sup>

Disagreeing with Judge Scheindlin, Justice Sotomayor found that the NFL Draft Eligibility Rule was a mandatory bargaining subject.<sup>117</sup> Justice Sotomayor reasoned that The Rule acted as an initial condition of employment and had tangible effects on the working conditions and wages of NFL players currently in the league.<sup>118</sup> The NFL Draft, team salary caps, and free agency all impacted how a player's salary in the NFL is set.<sup>119</sup> Therefore, Justice Sotomayor said The Rule “cannot be viewed in isolation” because eliminating The Rule could alter certain assumptions between the NFL and NFLPA that underlie the CBA.<sup>120</sup> Justice Sotomayor also found that The Rule positively affected the “job security of veteran players”<sup>121</sup> and reduced the risk of veteran players being replaced by a potential draftee.<sup>122</sup> Justice Sotomayor, therefore, held that the NFL Draft Eligibility

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<sup>113</sup> *Id.* at 410–11.

<sup>114</sup> *Clarett v. Nat'l Football League*, 369 F.3d 124, 134 (2d Cir. 2004).

<sup>115</sup> *Id.* at 134–35.

<sup>116</sup> *Id.* (“[C]ongressional policy favoring collective bargaining, the bargaining parties’ freedom of contract, and the widespread use of multi-employer bargaining units.”).

<sup>117</sup> *Id.* at 139.

<sup>118</sup> *Id.* at 140.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*



Rule was a mandatory collective bargaining subject, and not merely permissive.<sup>123</sup>

Clarett argued that The Rule was an impermissible bargaining subject because it affects players who are not parties to the union.<sup>124</sup> Justice Sotomayor disagreed, stating that just because The Rule is a hardship on a prospective, rather than an actual, employee did not make The Rule impermissible.<sup>125</sup> Justice Sotomayor reasoned that how a prospective player became eligible for the NFL Draft is for the NFLPA and NFL to determine.<sup>126</sup> Although Clarett believed he was qualified to play in the NFL and viewed the Rule as arbitrary, Justice Sotomayor disagreed.<sup>127</sup> Justice Sotomayor stated the NFL and NFLPA, in their collective bargaining capacity, could consider a person ineligible for the NFL Draft for any reason so long as it did not violate the law.<sup>128</sup> Justice Sotomayor reasoned that federal labor policy allows NFL teams to act in concert as a multi-employer bargaining unit in making the rules for player employment.<sup>129</sup> “Such concerted action is encouraged as a matter of labor policy and tolerated as a matter of antitrust law, despite the fact that it plainly involves horizontal competitors for labor acting in concert to set and to implement terms of employment.”<sup>130</sup> Finally, Justice Sotomayor held that the CBA itself is clear enough evidence that the NFLPA and NFL agreed on how to handle The Rule.<sup>131</sup> Justice Sotomayor reasoned that terms outside the CBA could not be a reason for not applying the non-statutory labor exemption.<sup>132</sup> After reviewing those factors, the Second Circuit reversed Judge Scheindlin’s judgment. Thus, Maurice Clarett’s hopes of entering the NFL Draft that year quickly evaporated.<sup>133</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 141.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 142.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 143. See generally Associated Press, *Timeline: The Rise and Fall of Maurice Clarett*, ESPN (Sept. 18, 2006), <http://www.espn.com/nfl/news/story?id=2545204> (explaining that the NFL Draft had already passed, but Clarett would have been eligible for

#### IV. ANALYSIS OF THE NON-STATUTORY LABOR EXEMPTION AND ITS APPLICATION TO THE NBA

For a high school men's basketball athlete to challenge the NBA's One-and-Done Rule, the high school athlete will have to prove that the non-statutory labor exemption does not apply to the One-and-Done Rule.<sup>134</sup> The non-statutory labor exemption was designed to reconcile the difference between labor and anti-trust policies.<sup>135</sup> The crucial distinction courts make is whether the anti-trust claim will undermine any of the major labor policies "favoring collective bargaining, the bargaining parties' freedom of contract, and the widespread use of multi-employer bargaining units."<sup>136</sup>

As previously mentioned, the One-and-Done Rule has not been challenged in court. However, the similarities between the NFL and NBA's draft eligibility rules and process make it likely that any high school men's basketball athlete that challenges the rule will have to educate themselves on the *Clarett* decisions. The NBA would likely use *Clarett COA* in its defense because of Justice Sotomayor's favorable decision for the NFL. Although Justice Sotomayor did not apply the *Mackey* factors test, she still considered whether the NFL's Draft Eligibility Rule was a mandatory subject of bargaining, whether it dealt with people outside the bargaining unit, and whether it was formed during arms-length negotiations.<sup>137</sup> Therefore, it is likely that a high school athlete will have to defeat one of the three *Mackey* factors for the athlete to succeed in arguing that the labor exemption does not apply. There is one critical distinction between the NBA's One-and-Done Rule and the NFL Draft's Eligibility Rule that *Clarett* challenged: the NBA and NBPA have collectively bargained a player's eligibility for the NBA Draft.<sup>138</sup> Thus, the NBA and NBPA included the provision during arms-length negotiations. However, the high school men's basketball athlete has several arguments he can make to prove that the NBA's One-

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the Supplemental NFL Draft if the Second Circuit affirmed the District Court's decision).

<sup>134</sup> *Clarett v. Nat'l Football League*, 369 F.3d 124, 125 (2d Cir. 2004).

<sup>135</sup> *Id.* at 141.

<sup>136</sup> *Id.* at 135.

<sup>137</sup> *Id.* at 133–134, 139–43.

<sup>138</sup> *Id.* at 135.

and-Done Rule does not apply because the One-and-Done Rule is not a mandatory bargaining subject and only concerns athletes outside the bargaining unit.

A. THE ONE-AND-DONE RULE IS NOT A MANDATORY SUBJECT OF BARGAINING

The One-and-Done Rule does not deal with a mandatory subject of bargaining. Mandatory subjects of bargaining are wages, hours, and working conditions.<sup>139</sup> The bargaining subject must vitally affect the terms and conditions of the employee's employment, must be closely related to legitimate union objectives that concern the mandatory subjects of bargaining and must not include conditions that indirectly affect the employees.<sup>140</sup> In addition, Justice Sotomayor reasoned, in *Clarett COA*, that many veteran players would be displaced or lose out on lucrative contracts if the NFL Draft's Eligibility Rule allowed ineligible athletes to enter the Draft.<sup>141</sup> The Court concluded that changing the NFL Draft's Eligibility Rule would vitally affect the conditions of the veteran player's employment.<sup>142</sup>

The NBA would likely use the same argument to conclude that the NBA's One-and-Done Rule is a mandatory subject of bargaining. The NBPA would argue that its veteran players have the right to keep playing and obtain new contracts without interference from high school athletes. First, the high school men's basketball athlete should argue that if he is not drafted, someone else will take his spot on the roster and likely end up taking the veteran player's roster spot or pay anyway. Further, in the NBA, rookies can only be paid a certain maximum salary, so if a team did not draft the high school men's basketball athlete, they could end up signing a Free Agent for more than what they

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<sup>139</sup> *Brown v. Pro Football*, 518 U.S. 231, 240–241 (1996).

<sup>140</sup> *Allied Chem. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179–180 (1971) (holding that retiree benefits do not vitally affect terms and conditions of employment of current employees); *Berman Enter. Inc. v. Local 333*, 644 F.2d 930, 935 (2d Cir. 1981) (holding that challenged clauses in the collective bargaining agreement were legitimate union objectives and were thus considered mandatory subjects of bargaining).

<sup>141</sup> *Clarett v. Nat'l Football League*, 369 F.3d 124, 139–40 (2d Cir. 2004).

<sup>142</sup> *Id.*

would have paid the high school athlete.<sup>143</sup> In turn, the veteran player on the roster still ends up being cut or paid less. The veteran player's conditions of employment are altered every offseason, and having the current rule in place only indirectly affects the veteran player. The One-and-Done Rule does not vitally affect the terms and conditions of the veteran player's employment even though, in *Clarett COA*, Justice Sotomayor ruled that employers could have any number of pre-employment qualifications.<sup>144</sup> If high school men's basketball athletes could enter the NBA Draft, the only people that would be directly affected are the basketball athletes who would have been selected if the high school athletes were ineligible for the draft. Yet, these basketball athletes are not employees who get the preference of the exemption.<sup>145</sup> They cannot compete at the same level as the high school men's basketball athletes wanting to enter the NBA directly. Thus, the One-and-Done Rule only affects individuals who want to enter the NBA, not those already in the NBA.

Second, the NBPA would likely also argue that the NBA's One-and-Done Rule is in place because of its close relation to legitimate union objectives.<sup>146</sup> The NBA would argue that the One-and-Done Rule is in place to shield teams from taking a major risk on an undeveloped player.<sup>147</sup> The One-and-Done Rule also protects the league from the adverse consequences that might occur as a result of a high school men's basketball athlete underperforming or not meeting the team's expectations. In turn, it insulates a team's front-office for not doing its due diligence on a high school athlete that did not meet expectations. The One-and-Done Rule also immunizes the league from a possible decline in revenue and viewership due to too many high school men's basketball athletes declaring for the draft and diluting the league's talent base. On its face, the league has many arguments to achieve their "legitimate union objectives."<sup>148</sup> However, the objectives that the NBA will contend are merely pretextual.

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<sup>143</sup> See NBA Collective Bargaining Agreement Exhibit B-1 (2017).

<sup>144</sup> *Clarett*, 369 F.3d at 141 (2d Cir. 2004).

<sup>145</sup> *Id.*

<sup>146</sup> *Berman Enter. Inc. v. Local 333*, 644 F.2d 930, 936 (2d Cir. 1981).

<sup>147</sup> McCann, *supra* note 34, at 163.

<sup>148</sup> *Berman Enter. Inc.*, 644 F.2d at 936.

The high school men's basketball athlete could argue that the collateral consequence of the One-and-Done Rule is to protect the NCAA's college basketball interest. College basketball is a major contributor to the NCAA's revenue each year.<sup>149</sup> The loss of elite athletes bypassing college to go directly to the league hurts the NCAA's college basketball brand. In turn, viewership declines, and there is a resulting loss of revenue in NCAA college basketball because the best athletes are in the NBA.<sup>150</sup> College basketball has been wrought with numerous scandals over the years, and it has been to the detriment of the student-athletes.<sup>151</sup> As we have recently seen with the Louisville scandal, some schools will do anything they can to get an elite player to come to their school, even if it means breaking the law.<sup>152</sup> Public policy favors the NBA's right to collectively bargain the terms of the NBA Draft provided it meets legitimate union objectives—but what about protecting the high school men's basketball athletes from the greed of agents and NCAA schools?<sup>153</sup> The NBA in past years has chosen to seek the interests of the NCAA over its future athletes. Perhaps it is time for the NBA to reassess what is truly important to its brand and how the public views the league. If anything, the FBI's recent arrests should serve as a wakeup call to the NBA and NCAA. The NCAA should re-think how it looks after its basketball student-athletes' interests, and the NBA should look how it can reform the One-and-Done Rule.

Finally, the One-and-Done Rule is not a mandatory subject of collective bargaining because it does not concern an employer-employee relationship.<sup>154</sup> The NBA would likely argue,

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<sup>149</sup> *NCAA Revenue Returned to Division I Conferences and Member Institutions from 2010/11 to 2016/17*, STATISTA, <https://www.statista.com/statistics/219586/revenue-returned-to-its-members-by-the-ncaa/> (last visited Oct. 31, 2018).

<sup>150</sup> *See Berman Enter. Inc.*, 644 F.2d at 936.

<sup>151</sup> *See generally supra* note 14.

<sup>152</sup> *See* U.S. Dep't of Justice, *supra* note 2.

<sup>153</sup> Stan Van Gundy, head coach of the Detroit Pistons, said that the "NCAA is one of the worst organizations—maybe the worst organization—in sports . . . [and] [t]hey certainly don't care about the athlete." *Stan Van Gundy Rips NCAA, NBA's One-and-Done Rule*, ESPN (Feb. 25, 2018), [http://www.espn.com/nba/story/\\_/id/22579359/stan-van-gundy-shreds-ncaa-one-done-rule](http://www.espn.com/nba/story/_/id/22579359/stan-van-gundy-shreds-ncaa-one-done-rule).

<sup>154</sup> *Nat'l Labor Relations Bd. v. U.S. Postal Serv.*, 18 F.3d 1089, 1097 (3d Cir. 1994).

as the Second Circuit did, that the high school men's basketball athlete is a prospective employee, and a prospective employee's eligibility is for the NBA and the NBPA to determine. Justice Sotomayor supported this argument because she believes that, through collective bargaining, an employer and a union can set the terms of eligibility in any way provided the terms do not violate the law.<sup>155</sup> Justice Sotomayor's ruling in *Clarett COA* harms the chances of this argument succeeding in the Second Circuit.

The National Labor Relations Board ("NLRB") applied *Allied Chemical*, a case decided by the Supreme Court, in *Star Tribune*<sup>156</sup> with regard to hiring employees. The NLRB concluded that applicants are not considered employees because there is not an economic relationship that exists between an employer and an applicant.<sup>157</sup> The NLRB went on to say that any thought of an economic relationship existing between the two is mere speculation.<sup>158</sup> The NLRB's interpretation of a Supreme Court decision supports the argument that applicants are not employees. Yet, a high school men's basketball athlete is not even an applicant. Under the One-and-Done Rule, the high school athlete is not an applicant because the athlete is prohibited from even entering the application process. The high school athlete is not allowed to file paperwork to enter the draft, nor is he allowed to attend any pre-draft workouts held by teams. Thus, even if the mandatory bargaining subjects were embodied in the rule, the rule should not stand because the high school men's basketball athlete is not an employee or an applicant. Rather, the high school athlete is barred from applying entirely.

#### B. THE ONE-AND-DONE RULE AFFECTS PEOPLE OUTSIDE THE BARGAINING UNIT

In the alternative, the NBA's One-and-Done Rule is not labor exempt from an anti-trust suit because it affects those outside the bargaining unit.<sup>159</sup> The mandatory bargaining subject

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<sup>155</sup> *Clarett v. Nat'l Football League*, 369 F.3d 124, 141 (2d Cir. 2004).

<sup>156</sup> *Star Tribune v. Newspaper Guild of the Twin Cities*, 295 N.L.R.B. 543 (1989).

<sup>157</sup> *Id.* at 546.

<sup>158</sup> *Id.*

<sup>159</sup> *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 395 n.100 (S.D.N.Y. 2004).

must affect prospective or current employees but cannot pertain to applicants or other third parties.<sup>160</sup> Judge Scheindlin, in *Clarett DC*, made a strong argument when she stated that the NFL Draft's Eligibility Rule only affected players who were "strangers to the bargaining relationship."<sup>161</sup> Although the non-statutory labor exemption applies to prospective employees, the NBA's One-and-Done Rule should not apply to high school men's basketball athletes because they have been denied employment, and therefore "cannot be bound by the terms of employment they cannot obtain."<sup>162</sup> As was previously stated, the high school athletes are not even applicants in the NBA Draft process, so they should not be considered prospective employees. The Second Circuit, in *Clarett*, relied on the precedent cases in its circuit: *Wood*, *Williams*, and *Caldwell*. In *Wood*, Wood was drafted into the NBA and wanted to change how he was paid under the salary cap.<sup>163</sup> In *Williams*, Williams challenged the unilaterally-imposed terms of the expired CBA after the NBA and NBPA reached an impasse.<sup>164</sup> In *Caldwell*, Caldwell claimed he was wrongfully terminated after he represented the player's union against the ABA.<sup>165</sup>

There is a major distinction to be drawn between the athletes in the preceding cases and the high school men's basketball athlete. In each case, the player had been drafted or was already on a team at the time he sued. Judge Scheindlin, in *Clarett DC*, applied the *Mackey* factor test because she made the distinction that the three precedent cases in the Second Circuit did not encompass job eligibility.<sup>166</sup> In addition, the provisions that Wood, Williams, and Caldwell wanted to challenge "govern the terms by which those who are drafted are employed."<sup>167</sup> The NBA's One-and-Done Rule does not allow high school men's basketball athletes to enter the labor market entirely. Also, unlike the three preceding cases, the high school athlete does not want to change conditions of which the NBA subjects him to. The high

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 396.

<sup>163</sup> *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 958 (2d Cir. 1987).

<sup>164</sup> *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684, 691 (2d Cir. 1995).

<sup>165</sup> *Caldwell v. Am. Basketball Ass'n, Inc.*, 66 F.3d 523, 526-27 (2d Cir. 1995).

<sup>166</sup> *Clarett*, 306 F. Supp. 2d at 395.

<sup>167</sup> *Id.*

school athlete merely wants the opportunity to participate in the NBA Draft and be subject to the conditions that the NBA imposes on him. The high school men's basketball athlete is unlike the three claimants in the preceding cases because they sought to alter the labor policies embodied in the exemption. The high school athlete, on the other hand, just wants to be subjected to the policies.

In conclusion, the high school athlete has an uphill climb if he wants to challenge the NBA's One-and-Done Rule. There are, however, significant legal arguments that can help his cause. It is imperative for the athlete to argue that the non-statutory labor exemption has a narrow interpretation. In addition, forum shopping will play a major role in how the case is decided. Labor-friendly jurisdictions such as the Ninth Circuit are more likely to be sympathetic to the high school athlete's cause.<sup>168</sup> If the high school men's basketball athlete succeeds, the NBA could still create a rule that protects its own interests, and the interests of the NCAA while not diminishing a high school athletes' interest.

#### V. THE PROPOSAL: KD'S RULE<sup>169</sup>

A possible solution is Kevin Durant's Rule ("KD's Rule").<sup>170</sup> KD's Rule allows high school men's basketball athletes to make the jump to the NBA. However, it restricts an athlete that chooses to enroll in college from entering the NBA Draft until he completes at least 72 college credits *or* reaches the age of twenty-one, whichever comes first.<sup>171</sup> The rule is modeled after the MLB's draft eligibility requirements. The MLB allows high school baseball players to enter the draft if they have not entered college.<sup>172</sup> However, if the college baseball player does enroll in college, the college baseball player must wait three years after

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<sup>168</sup> See generally, *Dent v. Nat'l Football League*, 902 F.3d 1109 (9th Cir. 2018).

<sup>169</sup> See *infra* Appendix 1 for proposed rule.

<sup>170</sup> Named after NBA superstar Kevin Durant who was the first notable player affected by the one-and-done rule. See Aaron Dodson, *All The NBA Draft's One-And-Done Lottery Picks: A Scorecard*, THE UNDEFEATED (June 22, 2017), <https://theundefeated.com/features/all-the-nba-drafts-one-and-done-lottery-picks-a-scorecard/>.

<sup>171</sup> CBA, NBPA, (July 1, 2017) <https://nbpa.com/cba/>.

<sup>172</sup> *Official Rules*, MLB, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Oct. 27, 2018).



enrolling or turn twenty-one, whichever comes first before becoming eligible for the MLB Draft.<sup>173</sup> KD's Rule allows athletes and the NBA to benefit in respect to the interests that each want to protect.

A. NBA'S INTERESTS UNDER KD'S RULE:

Justice Sotomayor's decision in *Clarett COA* and the One-and-Done Rule support the NBA's stance not to allow high school athletes to enter the draft. However, the Commissioner of the NBA, Adam Silver, has been open to change and reform since his appointment as Commissioner in 2014.<sup>174</sup> This past October, Commissioner Silver said that it is "clear a change will come" to the One-and-Done Rule.<sup>175</sup> Silver has also stated his intention to study the One-and-Done Rule "outside of the bright lights of collective bargaining."<sup>176</sup> Commissioner Silver and NBPA Executive Director Michele Roberts have met with the Commission on College Basketball for what was described as an informational meeting.<sup>177</sup> Most recently, Adam Silver said that he wants to expand the NBA's relationship with elite high school men's basketball athletes.<sup>178</sup> Silver intends to do this by revamping the G-League, the NBA's official minor league, and by

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<sup>173</sup> *Id.*

<sup>174</sup> *Adam Silver Replaces David Stern*, ESPN (Feb. 1, 2014), [https://www.espn.com/nba/story/\\_/id/10387067/adam-silver-replaces-david-stern-nba-commissioner](https://www.espn.com/nba/story/_/id/10387067/adam-silver-replaces-david-stern-nba-commissioner).

<sup>175</sup> Marcel Mutoni, *Adam Silver Expects 'One-and-Done' Rule to Change*, SLAM ONLINE (Oct. 17, 2017), <http://www.slamonline.com/nba/adam-silver-expects-one-done-rule-change/#6GHz40xIvTkx1TTz.97>.

<sup>176</sup> Ohm Youngmisuk, *Adam Silver: Age Issue 'Needs to Be Studied' Outside CBA Negotiations*, ESPN (Feb. 20, 2017), [http://www.espn.com/nba/story/\\_/id/18715853/nba-commissioner-adam-silver-says-age-issue-worth-looking-deeper-cba](http://www.espn.com/nba/story/_/id/18715853/nba-commissioner-adam-silver-says-age-issue-worth-looking-deeper-cba).

<sup>177</sup> Matt Bonesteel, *NBA Commissioner Adam Silver Reportedly Meets with NCAA Group Over One-and-Done Rule*, WASH. POST (Nov. 17, 2017), [https://www.washingtonpost.com/news/early-lead/wp/2017/11/17/nba-commissioner-adam-silver-reportedly-meets-with-ncaa-group-over-one-and-done-rule/?utm\\_term=.5b90c62ed117](https://www.washingtonpost.com/news/early-lead/wp/2017/11/17/nba-commissioner-adam-silver-reportedly-meets-with-ncaa-group-over-one-and-done-rule/?utm_term=.5b90c62ed117).

<sup>178</sup> Khadrice Rollins, *Report: Adam Silver Wants to Improve NBA's Relationship with Elite High School Players*, SPORTS ILLUSTRATED (Mar. 5, 2018), <https://www.si.com/nba/2018/03/05/adam-silver-elite-high-school-player-one-and-done-change-g-league>.

having more interactions with these athletes during the summer.<sup>179</sup> Silver cited the FBI investigation as a reason for his fast action.<sup>180</sup> Even more telling, Darius Bazley, the #8 recruit in the 2018 high school men's basketball recruiting class, is forgoing his college eligibility and going straight to the G-League.<sup>181</sup> In doing so, Bazley becomes the first high school player to go straight to the G-League.<sup>182</sup>

The NBA and NCAA will need to make changes to the rule soon or watch as others exploit the loopholes within the rule. Lavar Ball, outspoken father of NBA rookie Lonzo Ball, recently said he would be starting a basketball league called the Junior Basketball Association (“JBA”).<sup>183</sup> The premise of the league is to give nationally ranked high school basketball athletes the choice of skipping college and playing in the JBA while earning a salary, something that is not possible under NCAA rules.<sup>184</sup> Though only in the early stages, the JBA could serve as competition to the NCAA. This might be the spark the NBA needs to change the One-and-Done Rule because the alternative could cost the NBA and the NCAA revenue.<sup>185</sup>

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Sam Fortier, *As High School Star Skips College for NBA's G League, Others Remain Skeptical*, WASH. POST (Apr. 9, 2018), [https://www.washingtonpost.com/sports/highschools/as-high-school-star-skips-college-for-nbas-g-league-others-remain-skeptical/2018/04/09/c55389ec-3bfa-11e8-a7d1-e4efec6389f0\\_story.html?utm\\_term=.70f70a5f3790](https://www.washingtonpost.com/sports/highschools/as-high-school-star-skips-college-for-nbas-g-league-others-remain-skeptical/2018/04/09/c55389ec-3bfa-11e8-a7d1-e4efec6389f0_story.html?utm_term=.70f70a5f3790).

<sup>182</sup> *Id.*

<sup>183</sup> Darren Rovell, *LaVar Ball Plans to Start League for High School Graduates*, ESPN (Dec. 21, 2017), [http://www.espn.com/mens-college-basketball/story/\\_/id/21827823/lavar-ball-wants-start-league-high-school-graduates](http://www.espn.com/mens-college-basketball/story/_/id/21827823/lavar-ball-wants-start-league-high-school-graduates).

<sup>184</sup> *Id.*

<sup>185</sup> NCAA schools are impacted because high school athletes considering college could go to the JBA instead. *See* Will Hobson, *Fund and Games*, WASH. POST (Mar. 18, 2014), <https://www.washingtonpost.com/graphics/sports/ncaa-money/>. College basketball generates the bulk of its revenue from the yearly NCAA tournament. *Id.* Schools earn money for making the tournament and earn even more money the farther they advance in the tournament. *Id.* Schools could lose out on this revenue if top-tier high school athletes opt for the JBA as opposed to going to college, thereby hurting the school's chances of making the tournament. *Id.* The NBA loses

See Appendix 2 for the data and exhibits regarding the last seven NBA Drafts.<sup>186</sup> This data and these exhibits show that more athletes are taking advantage of the One-and-Done Rule.<sup>187</sup> Based on the data, one could assume that many, if not all, of the One-and-Done athletes drafted in the top four of the NBA Draft would declare for the draft after high school if KD's Rule was implemented.<sup>188</sup> If KD's Rule was implemented from 2011-2017, in each season, around three One-and-Done top four picks would have declared for the draft immediately after high school.<sup>189</sup> From

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because the NCAA is considered its "farm system." *Id.* If the NCAA is not luring the top-tier high school athletes to come play for its schools, then the NBA might start asking why they are playing for the JBA instead of the NBA. *Id.*

<sup>186</sup> NBA Draft Years: 2011–2017. *See infra* Appendix 2.

<sup>187</sup> The number of One-and-Done athletes drafted in the lottery had a positive trend from 2011-2017. *See infra* Appendix 2, Exhibit A.

<sup>188</sup> From 2011-2017, 75% of the top four picks in the NBA Draft were One-and-Done athletes. 21 One-and-Done athletes were selected during that time. *See infra* Appendix 2, Exhibit D. Only 1 of those 21 athletes were not considered lottery picks prior to the start of the collegiate season. *See Adam Fromal, 2011 NBA Mock Draft: Projecting All 1st and 2nd Round Picks*, BLEACHER REPORT (June 20, 2011), <https://bleacherreport.com/articles/740747-2011-nba-mock-draft-projecting-all-1st-and-2nd-round-picks#slide6>; Andy Bailey, *2012 NBA Mock Draft: An Early Look at Next Year's Stacked Draft Class*, BLEACHER REPORT (July 20, 2011), <https://bleacherreport.com/articles/769089-2012-nba-mock-draft-an-early-look-at-next-years-stacked-draft-class#slide0>; Bryant West, *2013 NBA Mock Draft: Very Early First Round Predictions*, BLEACHER REPORT (Aug. 12, 2012), <http://bleacherreport.com/articles/1293846-2013-nba-mock-draft-very-early-first-round-predictions>; Jonathan Wasserman, *2014 NBA Mock Draft: Pre-Training Camp Edition*, BLEACHER REPORT (Sept. 11, 2013), <http://bleacherreport.com/articles/1769826-2014-nba-mock-draft-pre-training-camp-edition>; Jonathan Wasserman, *2015 NBA Mock Draft: Very Early Look at All 30 Projected First-Round Picks*, BLEACHER REPORT (Nov. 13, 2014), <http://bleacherreport.com/articles/2265955-2015-nba-mock-draft-very-early-look-at-all-30-projected-first-round-picks>; Jonathan Wasserman, *2016 NBA Mock Draft: September Projections for All 30 1st Round Picks*, BLEACHER REPORT (Sept. 2, 2015), <http://bleacherreport.com/articles/2558179-2016-nba-mock-draft-september-projections-for-all-30-1st-round-picks>.

<sup>189</sup>Based on the assumption that One-and-Done athletes selected in the top four would have declared for the NBA Draft under

2011-2017 the non-international One-and-Done athletes selected outside of the top four, but still in the lottery,<sup>190</sup> represented only 31% of the sample.<sup>191</sup> The sample of lottery picks outside the top four yields about three One-and-Done athletes per NBA Draft and yields about four when international athletes are included.<sup>192</sup> One could argue that the uptick in One-and-Done athletes would become worse if the same athletes were forgoing college altogether under KD's Rule. The One-and-Done Rule was put in place to stop the "influx" of high school basketball athletes entering the NBA Draft. However, many lottery picks outside the top four might not have been looked at with great hype if not for a stellar collegiate season or a strong NCAA tournament run, thus lowering the probability of those athletes declaring for the draft immediately after high school.<sup>193</sup> The NBA instituted the One-

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KD's Rule. *See infra* Appendix 2, Exhibit D, at NBA Draft Years: 2011-2017.

<sup>190</sup> NBA Draft picks: 5-13. *2011-2017 NBA Draft*, BASKETBALL REFERENCE, [https://www.basketball-reference.com/draft/NBA\\_2011.html](https://www.basketball-reference.com/draft/NBA_2011.html) (last visited Dec. 9, 2018).

<sup>191</sup> *See infra* Appendix 2, Exhibit A at NBA Draft Year: 2011.

<sup>192</sup> *See infra* Appendix 2, Exhibit D.

<sup>193</sup> 75% of One-and-Done athletes selected in the 2011-2016 NBA Drafts outside of the Top 4, but in the lottery, either had their draft position fall or were not on any draft board prior to the start of their first and only collegiate season. *See* Adam Fromal, *2011 NBA Mock Draft: Projecting All 1st and 2nd Round Picks*, BLEACHER REPORT (June 20, 2011), <http://bleacherreport.com/articles/740747-2011-nba-mock-draft-projecting-all-1st-and-2nd-round-picks>; Andy Bailey, *2012 NBA Mock Draft: An Early Look at Next Year's Stacked Draft Class*, BLEACHER REPORT (July 20, 2011), <http://bleacherreport.com/articles/769089-2012-nba-mock-draft-an-early-look-at-next-years-stacked-draft-class>; Bryant West, *2013 NBA Mock Draft: Very Early First Round Predictions*, BLEACHER REPORT (Aug. 12, 2012), <http://bleacherreport.com/articles/1293846-2013-nba-mock-draft-very-early-first-round-predictions>; Jonathan Wasserman, *2014 NBA Mock Draft: Pre-Training Camp Edition*, BLEACHER REPORT (Sept. 11, 2013), <http://bleacherreport.com/articles/1769826-2014-nba-mock-draft-pre-training-camp-edition>; Jonathan Wasserman, *2015 NBA Mock Draft: Very Early Look at All 30 Projected First-Round Picks*, BLEACHER REPORT (Nov. 13, 2014), <http://bleacherreport.com/articles/2265955-2015-nba-mock-draft-very-early-look-at-all-30-projected-first-round-picks>; Jonathan Wasserman, *2016 NBA Mock Draft: September Projections for All 30 1st Round*

and-Done Rule to protect the game from getting diluted with too many high school basketball athletes who could take years to develop.<sup>194</sup> Yet from 1998-2004, the seven years preceding the implementation of the One-and-Done Rule, only 6.39% of the athletes drafted were high school athletes.<sup>195</sup> If so few athletes were drafted immediately after high school, what was the purpose of the One-and-Done Rule in the first place?

Before starting college, some high school men's basketball athletes probably did not consider leaving college after one season. Under KD's Rule, only a handful of athletes would enter the league directly from high school. The NBA would continue to produce quality basketball because many of the One-and-Done top picks have been "NBA ready" since high school. Under KD's Rule, the NBA would continue to protect the interests of college basketball in the NCAA by having all college basketball athletes enrolled in college for two to three years, depending on when the athlete completes seventy-two credits or turns twenty-one. The NCAA would lose some star power to the NBA, but it would gain a stronger brand as a result of athletes staying in college longer. Fans would associate star college athletes with their respective schools, building the NCAA's brand. After all, the NCAA's college basketball brand is what rakes in hundreds of millions of dollars, not the one-and-done college athletes.<sup>196</sup>

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*Picks*, BLEACHER REPORT (Sept. 2, 2015), <http://bleacherreport.com/articles/2558179-2016-nba-mock-draft-september-projections-for-all-30-1st-round-picks>; see also Reid Forgrave, *These 10 Players Got Off to a Fast Start and Have Sent Their NBA Draft Stock Soaring*, CBS SPORTS (Dec. 20, 2017), <https://www.cbssports.com/college-basketball/news/these-10-players-got-off-to-a-fast-start-and-have-sent-their-nba-draft-stock-soaring/>.

<sup>194</sup> Myron Medcalf, *Roots of One-and-Done Rule Run Deep*, ESPN (June 26, 2012), [http://www.espn.com/mens-college-basketball/story/\\_/id/8097411/roots-nba-draft-one-done-rule-run-deep-men-college-basketball](http://www.espn.com/mens-college-basketball/story/_/id/8097411/roots-nba-draft-one-done-rule-run-deep-men-college-basketball).

<sup>195</sup> See *infra* Appendix 2, Exhibit E.

<sup>196</sup> This is not to say that the athletes do not impact the brand at all. The athletes, the on-court success, and the NCAA tournament are part of the NCAA's brand. However, long after the athlete leaves the school, the school still reaps the benefit of the athlete or the team's "one shining moment." See Jen Floyd Engel, *NCAA Tournament a sham until these kids get paid*, SPORTING NEWS (Mar. 29, 2016), <http://www.sportingnews.com/ncaa-basketball/news/ncaa-tournament-final-four-college-basketball-scholarships-paid-players-athletes->

Additionally, by allowing high school basketball athletes to enter the NBA Draft, college basketball would achieve more parity. For example, Kentucky, a recruiting powerhouse for One-and-Done athletes, would not have an excess of scholarships available due to athletes leaving after one year. In turn, it would allow for schools across the country to recruit the athletes that Kentucky may have wanted, but cannot have. Although some individual schools would lose revenue, NCAA basketball, as an institution, would benefit. More parity among teams would bring more competition. The competition amongst teams would engage more fans because more teams would have the opportunity to compete at a competitive level. Parity in college basketball would ultimately result in a domino effect where the NCAA's revenue increases, and the public opinion of the NCAA improves.

KD's Rule has a "limitations clause" allowing the NBA to review the rule three years after its implementation.<sup>197</sup> After three years, the NBA can decide to limit a high school athlete's entry into the draft. This happens if the NBA and NBPA believe too many athletes are making the jump to the NBA, and the NBA deems the influx of those athletes has a negative impact on the game. Under the clause, the athletes allowed to enter the draft would presumably be the ones projected to be top picks in the NBA Draft. It is up to the discretion of the NBA and NBPA to work out a solution under the limitations clause. Under KD's Rule, the NBA could be seen as a progressive league that puts its players first.

#### B. ATHLETES' INTERESTS UNDER KD'S RULE:

The NBPA has standing to push for the adoption of KD's Rule.<sup>198</sup> The *Haywood* decision supports the argument that high school athletes face irreparable harm if they are not allowed to declare for the draft when they want.<sup>199</sup> Further, arguments have

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college-football/h73e8613hnh1e891ju5zjsf; see also McCann, *supra* note 34, at 190–92 (“[E]xperts conclude that the lack of star power in college basketball has made it difficult for CBS to market March Madness.” Alumni donations and student applications increase at some universities who make it far in the NCAA tournament).

<sup>197</sup> See *infra* note 213.

<sup>198</sup> See *supra* note 169.

<sup>199</sup> *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205 (1971).

been presented above which can help in a challenge against the One-and-Done Rule by asserting that the non-statutory labor exemption is not applicable to the rule. Attending college for one year makes an athlete lose out on millions of dollars, doing a great injustice to the athlete.<sup>200</sup> Under KD's Rule, high school athletes have the power to decide if they want to declare for the draft. The NBA has previously worried about NBA agents taking advantage of high school athletes and their families by giving them bad advice.<sup>201</sup> To combat this, KD's Rule implements a NBA Draft Advisory Board, comprised of neutral NBA scouts, who would gather information about the high school athlete's prospects.<sup>202</sup> The NBA would hire the scouts that form the advisory board, to ensure that there is a strong and trusted system in place. After doing its due diligence, the NBA Draft Advisory Board would inform the athletes if they would be a top four pick, lottery pick, late first round pick, or second round pick. As a result, the athletes would make informed decisions regarding their draft status and would likely only declare for the draft if they were a first round pick. Under KD's Rule, disadvantaged high school athletes would be able to provide for their families. In the current rookie scale, the last pick in the first round makes close to a million dollars the first year he plays in the NBA.<sup>203</sup> If the money is managed right, the rookie contract can last a lifetime.

The second prong of KD's Rule does not allow athletes attending college to enter the NBA Draft until seventy-two college credits are completed *or* until the athlete turn twenty-one.<sup>204</sup>

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<sup>200</sup> Professor Michael McCann explains that athletes who skip college have a higher earning potential than those who attend college. *See* McCann, *supra* note 34, at 157–59. High school athletes are in a better negotiating position because they will likely be in their “prime” years at the time NBA teams are able to offer the athlete a max contract. *Id.*

<sup>201</sup> *See id.* at 170.

<sup>202</sup> Modeled after the NFL's Draft Advisory Board. “Since 2010, 85% of athletes who got a first or second round evaluation from the advisory board and declared for the NFL Draft have been selected in the first two rounds.” *College Advisory Committee*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/the-players/development-pipeline/college-advisory-committee/> (last visited Nov. 19, 2018).

<sup>203</sup> *2016–2017 NBA Rookie Scale*, REALGM, [http://basketball.realgm.com/nba/info/rookie\\_scale](http://basketball.realgm.com/nba/info/rookie_scale) (last visited Nov. 19, 2018).

<sup>204</sup> *See infra* note 214.

College basketball athletes are considered student-athletes, and the NCAA has always stood by its principle that athletes are “students first.”<sup>205</sup> Under the current One-and-Done Rule, many One-and-Done athletes play the college basketball season, and then leave the school before the semester ends to prepare for the upcoming draft. Seventy-two credits equal 60% of the one-hundred and twenty credits required to graduate by most colleges.<sup>206</sup> The credit limit can be reached in two to three years based on the amount of credits taken per semester. The credit requirement incentivizes athletes that are potential prospects in the draft. The requirement motivates these athletes to take more classes and finish the credit requirement within two years to become NBA Draft eligible. Furthermore, athletes that complete the credit requirement have a great opportunity to come back to school after their playing career is over and receive a degree. The decision to attend college should be made because athletes want to grow academically, not because they are forced to. KD’s Rule allows for the interests of high school athletes to be recognized and upheld.

Under KD’s Rule, there would be a benefit to entering college as opposed to declaring for the NBA Draft after high school. A clause under KD’s Rule would have the NCAA and NBA jointly contribute to a Going-Back-To-College Fund (“College Fund”). This clause would benefit any athlete who chose to go to college, but after turning twenty-one years old or achieving seventy-two credits, entered the NBA Draft before earning their college degree. This clause would especially benefit the athletes whose basketball careers did not pan out professionally. For example, a college athlete that left after achieving seventy-two credits that got drafted by an NBA team but is later cut, and subsequently plays overseas, would benefit from the program. The athlete would not be making an NBA salary, but he has the prospect of going back to school to further his professional career at an affordable rate. All the college athletes entering the NBA Draft would be more than halfway done

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<sup>205</sup> *Frequently Asked Questions About the NCAA*, NCAA, <http://www.ncaa.org/about/frequently-asked-questions-about-ncaa> (last visited Nov. 19, 2018).

<sup>206</sup> *What Exactly is a College Credit? (and How Many do I Need to Graduate?)*, COLLEGE DEGREE COMPLETE, <https://collegedegreecomplete.com/what-exactly-is-a-college-credit-and-how-many-do-i-need-to-graduate/> (last visited Nov. 19, 2018).



with their credits as a result of KD's Rule. The NCAA benefits due to the added brand exposure by possibly bringing back a college athlete after having a tremendous career in the NBA. The NCAA also benefits from the athletes spending longer time in college, and the NCAA getting the athlete's name and accolades associated with the association. In turn, the NCAA could put a percentage of the profits toward the College Fund through merchandise sales bearing any name, image, and likeness rights of its former athletes. Moreover, the NCAA and NBA agreeing to contribute toward a College Fund would be a mutually beneficial relationship between the associations and the athletes. This proposal will finally give the athletes a share of the profit, which they generated from their work in the classroom and their play on the court.

## VI. CONCLUSION

Over the years, the NCAA,<sup>207</sup> schools,<sup>208</sup> boosters,<sup>209</sup> and agents<sup>210</sup> have exploited student-athletes by not allowing the athletes to receive any profits from their accomplishments on the court.<sup>211</sup> This note does not explore this issue further because in the proposed regime high school men's basketball athletes can avoid NCAA exploitation by going pro after high school. These athletes have a right to monetize their athletic abilities immediately upon graduation from high school. The One-and-Done Rule circumvents this right and jeopardizes the athlete's chance of ever playing professionally and monetizing his athletic

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<sup>207</sup> Kneading Dough: Ben Simmons, *supra* note 18; *see also* Dave McMenamin, *LeBron James Calls NCAA Corrupt in Wake of Scandals*, ESPN (Feb. 27, 2018), [http://www.espn.com/nba/story/\\_/id/22596036/lebron-james-calls-ncaa-corrupt-says-nba-give-alternative](http://www.espn.com/nba/story/_/id/22596036/lebron-james-calls-ncaa-corrupt-says-nba-give-alternative).

<sup>208</sup> U.S. Dep't of Justice, *supra* note 2.

<sup>209</sup> Smith, *supra* note 14.

<sup>210</sup> Forde, *supra* note 9.

<sup>211</sup> Student-athletes do receive free college tuition including room and board. *See* Jeffrey Dorfman, *Pay Student Athletes? They're Already Paid up to \$125,000 Per Year*, FORBES (Aug. 29, 2013), <https://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/#17861aeb2b82>. They also have the opportunity to launch a platform for their non-sports career if they choose to take advantage of it. *Id.*

ability.<sup>212</sup> For a high school athlete to challenge the One-and-Done Rule in court, the athlete will have to prove that the non-statutory labor exemption does not apply to the One-and-Done Rule. *Clarett DC* and *Clarett COA* make convincing arguments for and against the application of the non-statutory labor exemption to a sports league's eligibility rules. Though a challenge to the One-and-Done Rule would not likely succeed in the Second Circuit because of *Clarett COA* serving as precedent, a challenge to the rule has merit in other Circuits. The One-and-Done Rule can be interpreted as not being a mandatory subject of bargaining or only affecting individuals outside of the bargaining unit. The key will be arguing at the outset that the non-statutory labor exemption should be interpreted narrowly.

Nevertheless, it is likely that the NBA and NBPA will come to a solution to fix the One-and-Done Rule prior to a high school athlete challenging the One-and-Done Rule in court. The corruption in college sports, the NBA Commissioner's willingness to look at new ideas, and the possibility of competition for high school athletes, *i.e.*, Lavar Ball's JBA and the G-League, makes it likely that a solution to the One-and-Done Rule will happen sooner than later. The proposal of KD's Rule finally puts the decision of an athlete's future into the high school athlete's hands. The high school athlete would, after consultation with family and the NBA Draft Advisory Board, decide to enter the NBA Draft or make the decision to go to college. The former choice allows the athlete to control his own destiny and monetize his athletic abilities. The latter choice commits the athlete to school for two to three years depending on when he completes the credit requirement. However, going to college provides the added benefit of receiving an education and becoming a professional in something other than sports. Also, under KD's Rule, athletes that attended college would have an opportunity to go back to college after the athlete's basketball career is over.<sup>213</sup> Ultimately, no rule

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<sup>212</sup> Although KD's Rule also restricts some athletes who attend college from monetizing their athletic abilities, a beneficial trade-off still exists for those athletes through the education they receive and the College Fund. Further, under KD's Rule, athletes who skip college can maximize their earning capacity, something they could not do under the One-and-Done Rule. *See McCann, supra* note 34 at 135.

<sup>213</sup> Athletes still have the option to go back to school under the One-and-Done Rule. *See Fred Bowen, Why Don't Pro Athletes go Back*

will be able to meet the standard that the NBA, NCAA, and athletes each expect. KD's Rule attempts to find a middle ground with all three groups by protecting the NBA's interests, the NCAA's interests and, most importantly, promoting the interests of the high school athlete. The NBA has done an excellent job taking care of its athletes both past and present. Now it is time for the NBA to usher in a new age by being attentive to the needs of its future athletes and allowing them to make choices for themselves. After all, One-and-Done is no fun.

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*to School?*, WASH. POST (Apr. 20, 2011),  
[https://www.washingtonpost.com/lifestyle/style/why-dont-pro-athletes-go-back-to-school/2011/08/04/AFagivDE\\_story.html?utm\\_term=.915a61cbc427](https://www.washingtonpost.com/lifestyle/style/why-dont-pro-athletes-go-back-to-school/2011/08/04/AFagivDE_story.html?utm_term=.915a61cbc427).  
However, KD's Rule strengthens the notion of going back to college especially for those athletes whose careers never panned out. *Id.*

## Appendix 1

### ARTICLE X<sup>214</sup>

#### PLAYER ELIGIBILITY AND NBA DRAFT (“KD’s Rule”)

##### **Section 1. Athlete Eligibility**

- (a) No athlete may sign a contract or play in the NBA unless he has been eligible for selection in at least one (1) NBA Draft. No athlete shall be eligible for selection in more than two (2) NBA Drafts.
- (b) An athlete shall be eligible for selection in the NBA Draft when he has satisfied all applicable requirements of Section 1(b)(i), b(ii) *or* 1(b)(ii) below:
  - (i.) The athlete is or will be at least eighteen (18) years old and is or will have graduated from high school during the calendar year in which the Draft is held (or, if the athlete did not graduate from high school, since the graduation of the class with which the athlete would have graduated had he graduated from high school).
  - (ii.) The athlete has maintained a permanent residence outside of the United States for at least three years before the NBA Draft, has never completed high school or attended college in the United States and is or will be at least eighteen (18) years old in the calendar year in which the NBA Draft is held (“international athlete”).
  - (iii.) The athlete is attending or previously attended a four-year college or university in the United States, and
    - (A.) has achieved seventy-two (72) school credits; *or*
    - (B.) is or will be at least twenty-one (21) years of age during the calendar year in which the NBA Draft is held.
- (c) **The Going-Back-To-College Fund** is available to all athletes who have been drafted into the NBA under Section 1(b)(iii). All athletes eligible for the fund must apply for the program. Preference is given to athletes who

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<sup>214</sup> The template was taken directly from Article X: Section 1 of the NBA CBA. *See* NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 33.

had a NBA career that lasted fewer than five seasons or can show financial hardship.

- (d) **The Limitations Clause** allows the NBA and NBPA to re-negotiate the terms and conditions of KD's Rule three years after its implementation. The NBA *or* NBPA must show that KD's Rule is a detriment to the NBA.
- (e) The **NBA Draft Advisory Board** must give an evaluation to any athlete seeking to enter the NBA Draft under Section 2(b)(i)-(ii) before the athlete can become eligible for the draft.

## Appendix 2

### Exhibit A

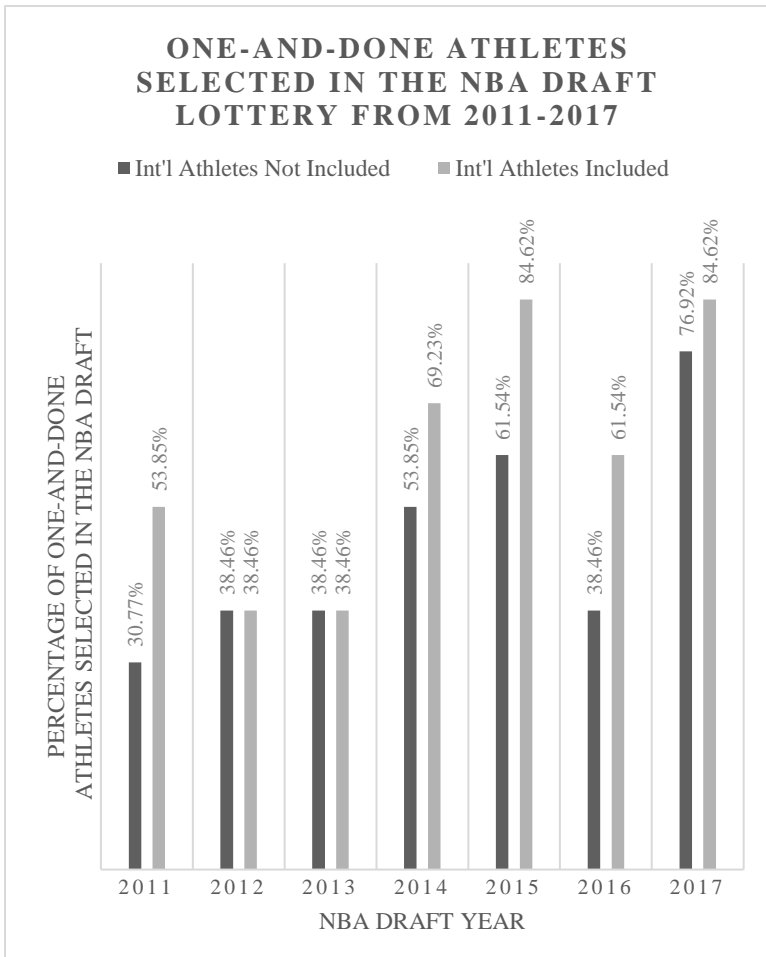


Exhibit A presents the percentage of One-and-Done athletes drafted in the lottery, the first thirteen picks of the NBA Draft, from 2011-2017. In Exhibit A, each draft year has two graphs associated with the year: one that includes international athletes and one that does not include international athletes. International athletes<sup>1</sup> are included in the four exhibits because they too are affected by the One-and-Done Rule and likely would have declared for the NBA Draft a year earlier had the rule not been in place. The orange graph represents international and One-and-Done athletes while the blue graph represents only One-and-Done athletes.

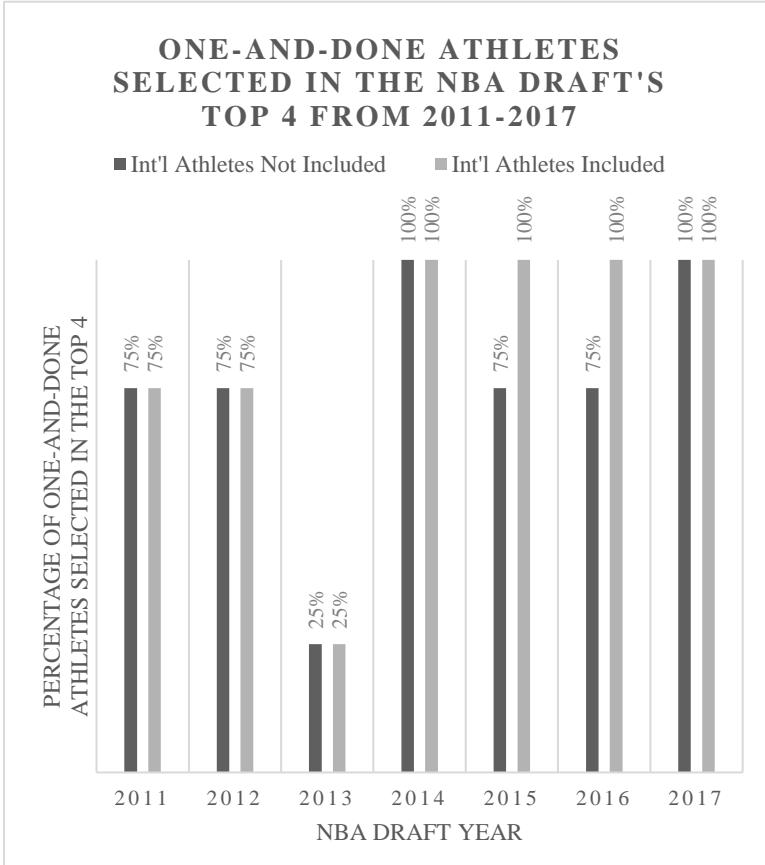
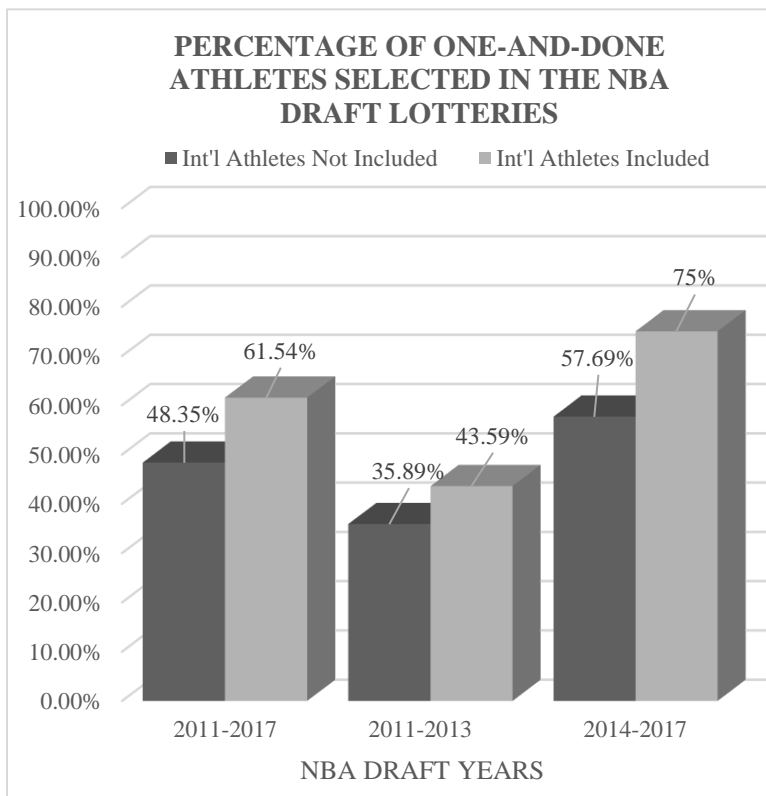
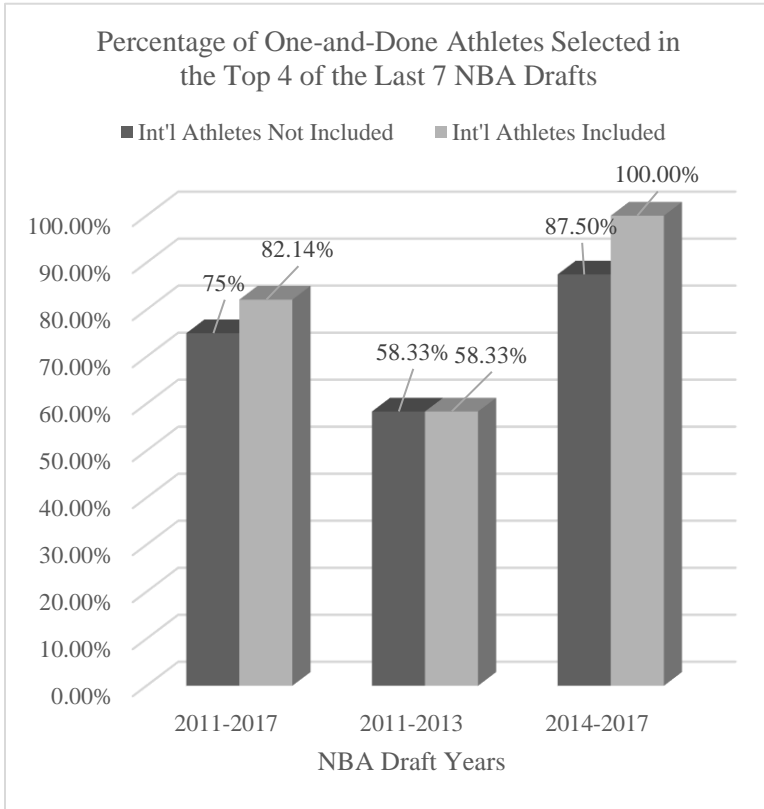
**Exhibit B**

Exhibit B presents the percentage of One-and-Done athletes drafted within the top four picks of the NBA Draft from 2011-2017. The orange graph represents international and One-and-Done athletes while the blue graph represents only One-and-Done athletes. An overwhelming majority of the athletes selected in the top four of the NBA Draft from 2011-2017 have been One-and-Done athletes.<sup>ii</sup> The only outlier among the data set is the 2013 NBA Draft, which was considered a weak draft to begin with.<sup>iii</sup>

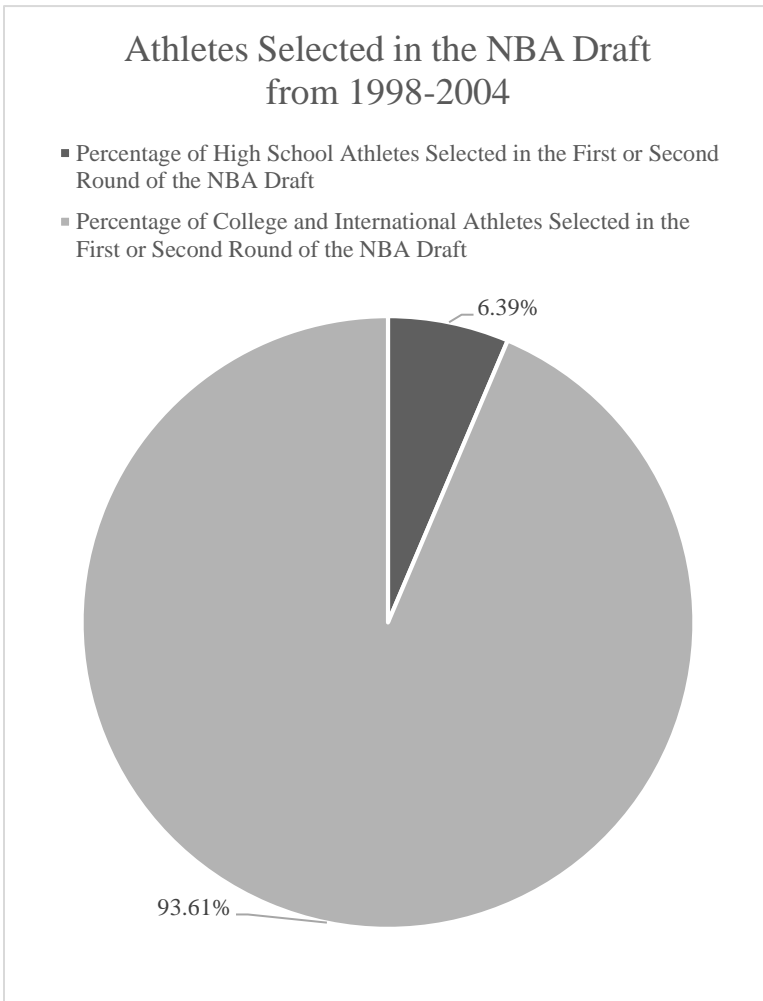
**Exhibit C**

From 2011-2017, 48% of NBA players selected as “lottery picks”<sup>iv</sup> in the NBA Draft were One-and-Done athletes. When international athletes, who are the same age as One-and-Done athletes, are included in the calculation, the percentage increases to 61%. If the seven-year time period is split up between 2011-2013 and 2014-2017, a major increase in One-and-Done athletes getting drafted occurs between the two data ranges. There is a 21.8% increase from 2011-2013 and 2014-2017 among non-international athletes. When the international athletes are included there is a 31.4% increase in the number of athletes drafted between the two time frames.



**Exhibit D**

From 2011-2017, 75% of the top four picks in the NBA Draft were One-and-Done athletes and the statistic increases to 82% when international athletes are included.<sup>v</sup> If the original seven-year time period is split up again between 2011-2013 and 2014-2017, an even larger increase occurs than it did with lottery selected One-and-Done athletes. There is a 29.17% increase among non-international, One-and-Done athletes being selected in the top four from 2011-2013 and 2014-2017, and a 41.67% increase when international athletes are included. Even more striking is that from 2014-2017 87.5% of the top four NBA Draft picks were non-international, One-and-Done athletes, and the statistic increases to 100% when international athletes are included.

**Exhibit E**

There were twenty-six high school athletes selected in the NBA Draft from 1998-2004 out of a possible four-hundred and seven draft picks. Based on the data,<sup>vi</sup> approximately four high school athletes were selected in the NBA Draft each year during the seven years preceding the implementation of the One-and-Done Rule.

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<sup>i</sup> In this context, international athletes refer to nineteen-year-old athletes who declared for the NBA Draft and played in the NBA the subsequent season (i.e. Kristaps Porzingis, Mario Hezonja, Dante Exum, and Frank Ntilikina). International athletes do not refer to athletes who were drafted in the NBA, and then played basketball internationally for a term of years before coming to the NBA. (i.e. Manu Ginobili, Milos Teodosic, and Arvydas Sabonis). Exhibit A's information is compiled from a database that lists all the players who entered the NBA draft.

*2011-2017 NBA Draft*, BASKETBALL REFERENCE, [https://www.basketball-reference.com/draft/NBA\\_2011.html](https://www.basketball-reference.com/draft/NBA_2011.html) (last visited Dec. 9, 2018); *NBA rosters feature 108 international players from 42 countries and territories*, NBA (Oct. 16, 2018), <http://www.nba.com/article/2018/10/16/nba-rosters-108-international-players-start-season-official-release>.

<sup>iiiii</sup> *2011-2017 NBA Draft*, BASKETBALL REFERENCE, [https://www.basketball-reference.com/draft/NBA\\_2011.html](https://www.basketball-reference.com/draft/NBA_2011.html) (last visited Dec. 9, 2018).

<sup>iii</sup> Neil Greenberg, *Man, the 2013 NBA Draft was Truly Awful. Actually, it was the Worst Ever*, WASH. POST (July 15, 2016),

[https://www.washingtonpost.com/news/fancy-stats/wp/2016/07/15/man-the-2013-nba-draft-was-truly-awful-actually-it-was-the-worst-ever/?utm\\_term=.3e1ec68250b5](https://www.washingtonpost.com/news/fancy-stats/wp/2016/07/15/man-the-2013-nba-draft-was-truly-awful-actually-it-was-the-worst-ever/?utm_term=.3e1ec68250b5); Tony Manfred, *This is The Worst NBA Draft in More Than a Decade*, BUS. INSIDER (June 27, 2013), <http://www.businessinsider.com/2013-nba-draft-worst-draft-2013-6>.

<sup>iv</sup> See Exhibit C (Exhibit C's information is compiled from a database that lists all the players who entered the NBA draft) *2011-2017 NBA Draft*, BASKETBALL REFERENCE, [https://www.basketball-reference.com/draft/NBA\\_2011.html](https://www.basketball-reference.com/draft/NBA_2011.html) (last visited Nov. 19, 2018).

<sup>v</sup> See Exhibit D (Exhibit D's information is compiled from a database that lists all the players who entered the NBA draft) *2011-2017 NBA Draft*, BASKETBALL REFERENCE, [https://www.basketball-reference.com/draft/NBA\\_2011.html](https://www.basketball-reference.com/draft/NBA_2011.html) (last visited Jan. 2, 2018).

<sup>vi</sup> Twenty-six athletes divided by the seven drafts results in 3.7 high school athletes being drafted each year of the data set. See Exhibit E (Exhibit E's information is compiled from a database that lists all the players who entered the NBA draft) *2011-2017 NBA Draft*, BASKETBALL REFERENCE, [https://www.basketball-reference.com/draft/NBA\\_2011.html](https://www.basketball-reference.com/draft/NBA_2011.html) (last visited Nov. 19, 2018).