Tennis at Another Crossroads: A Critique on the Employment Misclassification of Men's Professional Tennis Players

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The National Labor Relations Act provides substantial legal protections for employees to organize, collectively bargain, and engage in concerted activity for mutual benefit. Section 2(3) of the Act, however, explicitly excludes independent contractors from NLRA coverage. This regime enables employers to strategically misclassify workers as independent contractors, rather than as statutory employees, thereby denying them the Act's protections.

The Association of Tennis Professionals has exploited this gap in coverage since it became the sport's governing body in the 1990s. While the ATP holds itself out as a professional association composed of independent contractors, this Note argues that professional tennis players should be legally classified as employees of the ATP under the NLRA.

Part I outlines the history of professional tennis, the modern ATP Tour regime, and the labor law framework that applies to independent contractors. Part II applies the NLRB's test for independent contractors to professional tennis players and argues that players should be considered statutory employees of the ATP. Part III addresses how NLRA coverage would allow ATP players to engage in collective action and bargain for the work conditions they actually want without fear of repercussion.

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INTRODUCTION

On the evening of November 17, 2024, Italian professional tennis player Jannik Sinner was crowned champion of the ATP Finals, the season-ending championship of the ATP Tour.[1] Playing

1. *See* Jerome Coombe, *Sinner Conquers Fritz For Maiden Nitto ATP Finals Crown*, NITTO ATP FINALS (Nov. 17, 2024), https://www.nittoatpfinals.com/en/news/sinner-fritz-

in front of a sold-out crowd of more than 12,000 spectators in Turin, Italy, Sinner beat American Taylor Fritz in the tournament final, finishing the event undefeated and earning a tour-record $4.88 million in prize money.[2] Sinner's triumph also secured the year-end world number one ATP Ranking and the top spot in the 2024 ATP Masters Bonus Pool, entitling him to an additional $3.8 million payout.[3] But as the lights dimmed on the ATP Tour's premier stage, the show continued on the Challenger Tour, the ATP's circuit for lower-ranked professional players.[4] An hour after

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nitto-atp-finals-sunday-2 [https://perma.cc/K65F-9S3Q]. The ATP Finals is the year-end championship for the ATP Tour and entry is limited to the Tour's eight highest ranked players. *See* ASS'N TENNIS PROS., THE 2024 ATP OFFICIAL RULEBOOK 67–70 (2024), https://www.atptour.com/-/media/files/rulebook/2024/2024-rulebook_22jan.pdf [https://perma.cc/ZY5C-HFLA] [hereinafter *ATP Rulebook*]. Unlike other events on the ATP Tour, which are single-elimination, the ATP Finals separates players into two groups of four, within which they each play three round-robin matches. *Id.* After the round-robin stage, the top two performers from each group play in single-elimination semifinals and a final to determine the champion. *Id.*

2. *See* Coombe, *supra* note 1. *See also* ATP Staff, *Sinner's Historic Season: Five Fast Facts*, ATP TOUR (Nov. 17, 2024), https://www.nittoatpfinals.com/en/news/sinner-nitto-atp-finals-2024-caps-historic-season [https://perma.cc/3HA5-3NBQ] ("By lifting the Nitto ATP Finals trophy without losing a set, Sinner claimed $4,881,500 in prize money, the biggest winner's prize money in the history of the Tour."). The ATP Finals boasts the largest total prize purse of any ATP Tour event, with the 2024 event offering a prize money pool of $15.25 million. ATP Staff, *Nitto ATP Finals: Prize Money Tops $15 Million for 2024 Event*, ASS'N TENNIS PROS. (Nov. 3, 2024), https://www.atptour.com/en/news/nitto-atp-finals-2024-prize-money [https://perma.cc/5QCV-UM3G]. Prize money at the ATP Finals is distributed per match win, and Sinner's earnings eclipsed the previous record of $4.74 million, set by Serbian player Novak Djokovic at the 2022 ATP Finals. ATP Staff, *Novak Djokovic: Inside A Champion's Mentality*, NITTO ATP FINALS (Nov. 19, 2022), https://www.nittoatpfinals.com/en/news/djokovic-nitto-atp-finals-2022-sf-reaction [https://perma.cc/9SPR-H8QP].

3. *See* ATP Staff, *ATP Finalises Distribution of Record $18.3 Million Profit-Sharing Payout*, ASS'N TENNIS PROS. (Oct. 3, 2025), https://www.atptour.com/en/news/profit-sharing-rounds-out-total-m1000-compensation-2024 [https://perma.cc/SDR4-WBZ9]. The ATP annually distributes "Bonus Pool" and profit-sharing payments to players who earn ranking points at ATP 500, ATP Masters 1000, and the ATP Finals events each season. *See ATP Rulebook*, *supra* note 1, at 11–14.

4. *See generally Tournaments*, ASS'N TENNIS PROS., https://www.atptour.com/en/tournaments [https://perma.cc/W64P-MGBT] (last visited Apr. 10, 2026) (listing the calendar of events on the ATP Tour, ATP Challenger Tour, and ITF Tour). The ATP Tour comprises four primary tournament categories, corresponding to the amount of ranking points awarded to winners: the 250 Series, 500 Series, 1000 Series, and Tour Finals (which awards 1500 points to the winner). *FAQ About ATP Rankings*, ASS'N TENNIS PROS., https://www.atptour.com/en/rankings/rankings-faq [https://perma.cc/U5EJ-E5RX] (last visited Apr. 16, 2026). The ATP also operates five additional tiers of tournaments under the ATP Challenger Tour moniker, again with each successive tournament level offering a more lucrative ranking point allocation. *Id.*; *see also* Coley C. Hungate, The Economics of a Meritocracy: Prize Money in ATP Tennis 3 (Apr. 29, 2021) (B.A. thesis, University of Florida), https://ufdc.ufl.edu/AA00082472/00001/pdf [https://perma.cc/65C5-R3GY] (describing the economic variation across ATP Tour and ATP Challenger Tour events).

Sinner's victory and nearly 4,500 miles away, American player Ethan Quinn prevailed over compatriot Nishesh Basavareddy in the final of the 2024 Champaign-Urbana Challenger.[5] The 100-odd spectators at the Atkins Tennis Center in Illinois applauded as Quinn received his winner's check of $11,200.[6] Basavareddy, meanwhile, quickly licked his wounds and hit the road as his employer, the ATP, had already scheduled him to compete in the first round of the Puerto Vallarta Open in Mexico in 48 hours.[7] Not playing wasn't an option, since the ATP imposes substantial fines for late withdrawal.[8] Despite his obligation to participate, the 19-year-old Basavareddy covered his own expenses for the week with no subsidization from his employer: meals, coaching fees, racquet stringing, a rental car, and plane tickets from Chicago to Puerto Vallarta.[9] After 10 hours of travel and a single day of rest, Basavareddy embarked on his next tournament campaign, again reaching the final at the end of the week.[10] Competing in his tenth match in twelve days, Basavareddy this time prevailed to win the title, earning a modest $5,660 and a spot in the top 150 of the world rankings for the first time.[11]

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5. *See Results: ATP Tour: Champaign 2024*, ASS'N TENNIS PROS. (Nov. 17, 2024), https://www.atptour.com/en/scores/archive/london/637/2024/results [https://perma.cc/Z8VD-Q6VZ].

6. *See id.*

7. *See Results: ATP Tour: Puerto Vallarta*, ASS'N TENNIS PROS. (Nov. 24, 2024), https://www.atptour.com/en/scores/archive/puerto-vallarta/7911/2024/results [https://perma.cc/WPE7-GMTZ].

8. *See ATP Rulebook*, *supra* note 1, at 141, 221 (providing that any player who withdraws after 10am ET on the Friday before an ATP Challenger tournament will be fined between $1,000 and $2,000). Late withdrawal fines steepen at ATP Tour events, ranging from $1,000 all the way up to $80,000 for repeat offenders. *Id.* at 219–20.

9. *See* D'Arcy Maine, *'Why am I Here, Playing for Literally $6': The Stunning Financial Reality of Pro Tennis*, ESPN (Jan. 17, 2023), https://www.espn.com/tennis/story/_/id/35414286/the-stunning-financial-reality-high-cost-pro-tennis [https://perma.cc/6PS5-QRC2] ("Players are responsible for paying for their own transportation to and from tournaments, as well as the support staff who travel with them, including coaches and physios. Accommodations are provided or subsidized for the players at majors and ATP, WTA and Challenger events, but at many lower-level tournaments, like on the ITF tour, players are responsible for accommodation costs.").

10. *See Results: ATP Tour: Puerto Vallarta*, *supra* note 7.

11. *See id.* (listing Basavareddy's matches and results from November 11, 2024 through November 24, 2024); *Ranking History: Nishesh Basavareddy*, ASS'N TENNIS PROS., https://www.atptour.com/en/players/nishesh-basavareddy/b0nn/rankings-history?year=all [https://perma.cc/Y9PG-RUNF] (last visited Apr. 10, 2026) (showing Basavareddy moving from an ATP Ranking of 152 to 139 on the week of November 25, 2024); EdgeAI (@edgeAIapp), X (Nov. 24, 2024, at 20:13 ET), https://x.com/edgeAIapp/status/1860854298936033383 [https://perma.cc/YS84-SLK4] ("Despite taking a few [medical timeouts] during the week and looking fatigued even today . . . [Basavareddy] held up to the end. New career-high ranking of No. 139.").

Despite the stark contrast in compensation and celebrity, all players on the ATP Tour—from stars like Sinner to emerging talents like Basavareddy and Quinn—face similar employment burdens.[12] Players must cover their own expenses for travel, coaching, and competition incidentals, estimated at between $121,000 and $197,000 annually, while often earning minimal profit.[13] They spend between twenty and thirty weeks per year traveling, catching last-minute flights across the world, navigating airports, and living out of hotels.[14] And they are subjected to a stringent set of regulations imposed by their employer—the ATP Tour.[15] Although classified as independent contractors, players face restrictions on personal sponsorships, attire, and scheduling, with noncompliance incurring heavy penalties.[16] They are unable

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12. *See* Maine, *supra* note 9 ("Coaching, training and travel are all exorbitantly expensive. Combine that with small purses at lower-level events and a lack of sponsorship opportunities, and it produces a persistent financial strain. It also sets up an unlevel playing field: While the big-name players are traveling with sizable teams, the lower-ranked ones sometimes don't even take a coach with them to events. It's even more difficult to win without that support, creating an ever-widening gap between those at the top and everyone else.").

13. *See* Michael Kenneth Bane et al., *Has Player Development in Men's Tennis Really Changed? An Historical Rankings Perspective*, 32:15 J. SPORTS SCI. 1477, 1482 (2014) ("[T]he cost of competing on tour has been estimated at a minimum $121,000 per year and only the top 130 professionally ranked athletes earned enough prize money to cover this cost in 2012."). In the decade since, the ATP Tour has committed to raising prize money across the levels of the Tour, including at its lowest-level Challenger Tour events. *See ATP Builds on Record Year with 2026 Season Underway*, ASS'N TENNIS PROS. (Jan. 8, 2026), https://www.atptour.com/en/news/atp-builds-on-record-year-2026 [https://perma.cc/LV9M-PRBS] ("Challenger Tour prize money is projected to reach a record $32.4 million in 2026, up 167 per cent since 2022, underlining ATP's commitment to players at every level of the pathway."). However, even in 2024, players ranked within the top 200 still routinely failed to earn more than $150,000 in prize money. *See, e.g.*, *Player Activity*: *Martin Landaluce*, ASS'N TENNIS PROS., https://www.atptour.com/en/players/martin-landaluce/l0il/player-activity?matchType=Singles&year=2024&tournament=all [https://perma.cc/DL7J-BL63] (last visited Apr. 10, 2026) (showing a former junior world no. 1 who finished 2024 ranked no. 151 professionally and earned $143,000 for the year).

14. *See* Bane et al., *supra* note 13, at 1482 (estimating players' expenses for traveling to thirty tournaments). For ranking purposes, only a player's best 18 results are counted. *See ATP Rulebook*, *supra* note 1 at 250. For top players who consistently reach the later rounds of tournaments, this often means they only compete in 18–22 tournaments per year. *See ATP Rankings*, ASS'N TENNIS PROS., https://www.atptour.com/en/rankings/singles?rankRange=0-100 [https://perma.cc/VJ2K-QF9E] (last visited Apr. 10, 2026). Lower ranked players, however, frequently lose in early rounds of tournaments, and regularly compete in upwards of 25 tournaments per season. *See id.*

15. *See, e.g.*, *ATP Rulebook*, *supra* note 1.

16. *See id.* at 11, 228–248, 365 (listing the "on-site offense provisions" and penalties that apply to players' dress, equipment, and behavior during participation in ATP Tour and ATP Challenger Tour tournaments). Penalties for non-compliance include losing eligibility for various ATP benefits, including (1) year-end bonuses, (2) main draw entry into ATP Tour events, and (3) credit towards the ATP retirement program. *Id.* at 11.

to participate or compete in tennis tournaments or exhibition events that conflict with the ATP calendar.[17] The ATP also limits access to benefits, including medical insurance[18] and pension plans,[19] to players who act "in the best interest" of the Tour.[20] While some regulation can be competitively necessary,[21] the Tour's restrictions and structural obligations essentially tie players to the ATP as their sole employer.[22]

The ATP's controlling, coercive regime suggests that it currently misclassifies professional tennis players as independent contractors when they should be considered employees under the National Labor Relations Act. This misclassification, although not per se unlawful,[23] undercuts core protections that would be otherwise available under the NLRA, grounding the ability to

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17. *See id.* at 17–18, 27 (describing restrictions on players competing in non-ATP Tour events). Any player found to be in violation of these rules will be subject to a Major Offense penalty, which carries a maximum fine of $250,000 and/or suspension from play for a period of up to three (3) years. *Id.* at 18, 244–45.

18. Ass'n Tennis Pros., ATP Insurance Programs, at 1 (Oct. 5, 2024) (on file with the *Columbia Journal of Law & Social Problems*).

19. ATP Staff, *ATP Retirement Plan Record Contribution*, ASS'N TENNIS PROS. (Mar. 25, 2023), https://www.atptour.com/en/news/atp-retirement-plan-record-contribution [https://perma.cc/LP4Q-P5HD]. Formally established in 1990, the ATP Retirement Plan provides income to eligible players for 20 years, beginning at age 50. *Id.* Historically, players needed five years of service (by attaining a year-end ranking of top 125 in singles or top 40 in doubles) to vest in the plan to be eligible for payments from age 50. *Id.* In 2018, a partial vesting component was created for players who qualify for three years. *Id.*

20. *See, e.g.*, Ass'n Tennis Pros., ATP 2024 Membership, at 246 (Oct. 5, 2024) (on file with the *Columbia Journal of Law & Social Problems*) (describing the ATP's internal membership structure). Players whose year-end ranking falls between 1–250 in singles or 1–50 in doubles are eligible to (1) receive income advances through the Baseline program, (2) earn pension credit, and (3) receive year-end bonus payments. *Id.* To be eligible, a player must also (1) be in "good standing" with the Tour, (2) be unaffiliated with any business or entity deemed not in the best interest of ATP or the sport of tennis, and (3) not participate in certain non-ATP tennis events. *Id.*

21. *See* Sida of Hawaii, Inc. v. NLRB, 512 F.2d 354, 359 (9th Cir. 1975) (explaining that employer regulations incorporating requirements imposed by existing commercial contracts and governmental ordinances do not establish an employer-employee relationship (citing Portage Transfer Co, Inc., 204 NLRB 787 (1973)).

22. *See ATP Rulebook*, *supra* note 1, at 11 (explaining that to qualify for benefits and be allowed to compete on the ATP Tour, a player must (1) be in full compliance with all ATP Rules, (2) have completed all obligations to ATP (e.g., fulfilled promotional responsibilities and paid any fines), or (3) be otherwise confirmed in "good standing" by the ATP CEO); *see also supra* note 20 and accompanying text.

23. *See, e.g.*, Velox Express, Inc., 368 NLRB No. 61 at 8–9 (2019) (rejecting the argument that "an employer's misclassification of its employees as independent contractors, standing alone, is a per se violation of the NLRA."). An employer can, however, violate the NLRA when it "intentionally misclassifies (or reclassifies) employees as independent contractors in response to union or protected concerted activity." Atomic Fire Protection LLC, 373 NLRB No. 109 at 14 (2024) (citing Velox Express, 368 NLRB No. 61 at 7).

effectively engage in collective action.[24] Accordingly, players are entrenched in a system where they lack both legal protections and meaningful avenues for bargaining—without NLRA coverage, they cannot collectively challenge inequitable practices or require the ATP to negotiate over improved working conditions.[25] Proper recognition as employees is, therefore, a necessary step toward enabling collective action as a mechanism to address industrywide issues such as revenue distribution, physically and mentally taxing schedules, facility and tournament conditions, or a more equitable governance structure.

This Note argues that the ATP's classification of its players as independent contractors is legally unsound, as it fails to account for the substantive control the Tour wields. Part I outlines the history of professional tennis, the modern ATP Tour regime, and the labor law framework that applies to independent contractors. Drawing on recent developments in the National Labor Relations Board's test for evaluating employment classification status, Part II contends that professional tennis players should challenge their classification status and be recognized as statutory employees under the NLRA. Part III addresses how NLRA coverage would allow ATP players to engage in collective action without fear of retribution and hypothesizes how players might leverage that landscape to bargain for improved work conditions they actually want, combatting unequal treatment by the ATP.

I. THE HISTORY OF GLOBAL TENNIS AND AMERICAN LABOR LAW

Catalyzed by the "tennis boom" of the 1970s,[26] professional tennis has become a global entertainment industry and one of the world's most popular sports.[27] But while the scale and management of the professional tennis tour has transformed

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24. *See* 29 U.S.C. § 152(3) (2018) (explicitly declining to include independent contractors in the statutory definition of "employee").

25. *See id.* § 157 (explaining that only statutory "employees" have the "right to self-organization . . . to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection").

26. *See* GREG RUTH, TENNIS: A HISTORY FROM AMERICAN AMATEURS TO GLOBAL PROFESSIONALS 196 (2021).

27. *See* NISA BAYINDIR & DUNCAN KAVANAGH, GLOBALWEBINDEX, SPORTS AROUND THE WORLD: GWI INSIGHT REPORT 2018 7 (2018), https://iccopr.com/wp-content/uploads/2019/03/Sports-Around-the-World-report.pdf [https://perma.cc/5X2D-68X5] (listing tennis as the fourth most-watched sport globally).

dramatically in the intervening five decades, the legal framework surrounding professional players is stuck wearing Stan Smiths.[28] This Part begins by detailing the history of professional tennis, tracing its development from a series of ad hoc exhibitions and contract-leagues into the consolidated and heavily regulated ATP Tour.[29] It then details the coercive regime of the present-day ATP Tour, explaining how the Tour exercises substantial employer control over ATP players (as purported independent contractors), while simultaneously restraining entrepreneurial opportunity. Finally, this Part discusses the history of the NLRA as applied to independent contractors and the Board's development of the common law test for determining employment classification status.

A. HISTORICAL DEVELOPMENT OF THE ATP TOUR

Unlike athletes in professional team sports, tennis players do not belong to franchises, are not salaried according to any contract, and do not have a traditional competition season with a fixed number of events.[30] Rather, professional tennis players compete

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28. *See* RUTH, *supra* note 26, at 242 ("The players, the national associations, and the international federation that governed tennis had long competed for both control of [the] game and the degree of commercialization in the sport. For four decades, the touring professionals chipped away at . . . opposition to open tennis until in 1968 the best players in the world could play in the game's most historic tournaments. The game's global and commercial footprint grew exponentially over the next twenty years."). *See Stan Smith Shoes,* ADIDAS, https://www.adidas.com/us/stan_smith [https://perma.cc/5ZXE-EUXT] ("[A]didas Stan Smith shoes are named after American tennis legend Stan Smith, a two-time major singles champion and a world No. 1 player. The shoe was first produced in 1964 and named after French player Robert Haillet. But by the early '70's the shoe had been renamed and began carrying Smith's face and signature on the tongue logo.").

29. *Contrast* RUTH, *supra* note 26, at 237–38 (describing the various competing professional tennis tours in the 1970s and 1980s and the ability of top players to "work[ ] around the official schedule[s] through the efforts of their . . . agents, who secured for them prize-money guarantees for one-off exhibition matches"), *with ATP Rulebook*, *supra* note 1 at 9–18 (providing that ATP Tour members must participate in specific tournaments throughout the year, attend mandatory player meetings, complete internal "ATP University" courses, engage in promotional activities at tournaments, and abide by certain sponsorship and apparel guidelines; additionally providing that Tour members must *not* participate in other "special event exhibitions" without express exemption by the ATP CEO).

30. *See* Matthew Futterman, *Grand Slam Prize Money is Enormous. The Economics of Tennis Tournaments is Complicated*, N.Y. TIMES: THE ATHLETIC (Jan. 6, 2026), https://www.nytimes.com/athletic/6043299/2026/01/06/tennis-prize-money-grand-slams-revenue/ [https://perma.cc/9XEA-95FW] (acknowledging that "tennis is different from the NBA," for example, because there are "so many tournaments of all shapes and sizes in so many countries" and that prize money awards vary between tournaments based on performance and profit-sharing formulas).

year-round across the globe in a mix of mandatory and discretionary tournaments and are paid by the ATP according to their performance.[31] In addition to the ATP, the International Tennis Federation[32] organizes the four Grand Slam events,[33] which award ranking points to competitors by agreement with the ATP Tour.[34] The opening of the Slams to professional players in 1968 marked the beginning of the "Open Era" and largely kickstarted the ability for players to make a living playing professional tennis, as crowds flocked to see the world's best amateurs compete against professional players for the first time.[35]

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31. *See* Ass'n Tennis Pros., 2025 Calendar (Nov. 25, 2024) (on file with the *Columbia Journal of Law & Social Problems*) (outlining the 64 tennis tournaments spaced across 51 weeks in 31 countries that comprise the 2025 ATP Tour). For example, at the 2024 Indian Wells Masters 1000 event, first-round losers earned $30,050, while players who advanced but lost in the second-round earned $42,000. Ass'n Tennis Pros., BNP Paribas Open: Draw & Prize Money (Mar. 2024) (on file with the *Columbia Journal of Law & Social Problems*). The discrepancy in prize money becomes increasingly lucrative in subsequent rounds. *See id.* The Indian Wells champion took home $1.1m, the runner-up earned $585,000, and the two losing semi-finalists each received $325,000. *Id.*; *see also* Hungate, *supra* note 4, at 4 (describing the Tour's use of "tournament theory," an economic concept meant to preserve competitive balance in individualistic sports by establishing large inequalities in prize money distribution between consecutive tournament rounds, so as to motivate competitors to achieve greater results).

32. *See generally What We Do*, INT'L TENNIS FED'N, https://www.itftennis.com/en/about-us/organisation/what-we-do/ [https://perma.cc/S8HC-DAGB] (last visited Apr. 10, 2026) (describing the ITF's role in global tennis development). Founded in 1913, the ITF was the original global organizer of tennis tournaments and codified the sport's rules. *See History of the ITF*, INT'L TENNIS FED'N, https://www.itftennis.com/en/about-us/organisation/history-of-the-itf/ [https://perma.cc/6P8D-6EC8]. ITF sanctioned events, including the Grand Slams, were held exclusively for amateurs until 1968. *See id.* The ITF also runs the ITF World Junior Tennis Tour, an amateur circuit for players under the age of 18, and the ITF World Tennis Tour, an entry-level professional tennis circuit that provides an on-ramp for players to the ATP Challenger Tour and ATP Tour. *About the Men's ITF World Tennis Tour*, INT'L TENNIS FED'N, https://www.itftennis.com/en/itf-tours/mens-world-tennis-tour/ [https://perma.cc/M59E-XXJ6] (last visited Apr. 10, 2026).

33. *Grand Slam Tournaments*, INT'L TENNIS FED'N, https://www.itftennis.com/en/itf-tours/grand-slam-tournaments/ [https://perma.cc/T9P7-QKDE] (last visited Apr. 10, 2026). Known today as the Australian Open, Roland Garros (also called the French Open), Wimbledon, and the US Open, the Grand Slams are the four oldest and most prestigious events in tennis, having been held annually since 1905, 1891, 1877, and 1881, respectively. *Id.* The Slams originated as national championships for their individual countries before being officially sanctioned as the four premier international tournaments by the ITF in 1924. *Id.*

34. *See ATP Rankings FAQ*, ASS'N TENNIS PROS., https://www.atptour.com/en/rankings/rankings-faq [https://perma.cc/B4ZG-4TSF] (last visited Apr. 10, 2026) (explaining that ITF tournaments award ATP Ranking points); *About the Men's ITF World Tennis Tour*, *supra* note 32 ("The results of ITF tournaments are incorporated into the ATP Ranking, which enables professionals to progress to the ATP Challenger Tour and ATP Tour, and ultimately the Grand Slams.").

35. *See* Ruth, *supra* note 26, at 163, 179 (discussing how "[e]ven for the best players and their promoters, professional tennis was not that great to them before 1968" and how

The Open Era thrust professional tennis into a gilded age of competition—both on and off the court.[36] The following decades were characterized by a fierce rivalry between the ITF's Grand Prix Circuit and the World Championship Tennis Circuit, then the two dominant professional leagues, and the emergence of player organizations.[37] In response to the ITF banning WCT players from its tournaments,[38] a group of current and former professional players formed the ATP as a new association to advocate for the interests of players.[39] The ATP immediately emerged as a powerful influence in the sport, first brokering an agreement between the ITF and WCT to lift the ITF's ban,[40] then later that year staging a player strike of Wimbledon.[41]

In short order, the ATP demonstrated that the players had a strong collective voice, prompting the ITF to partner with ATP leadership to form the Men's Tennis Council, a nine-member governing body, consisting of three ITF executive members, three ATP player members, and three tournament director members, to

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Roland Garros increased its revenue over 1000% year-over-year between the 1967 and 1968 tournaments).

36. *See id.* at 178 ("[F]ans came in droves to watch the competitors, both amateur and professional, play brilliantly against one another . . . and the pocketbooks of the fans who came to watch the 1968 Open Championships validated that claim. During the first five days in 1967, the French Championships reported 13,000 francs in gate receipts. That number increased more than 1,000 percent in 1968 to 142,000 francs.").

37. *See, e.g.*, Bud Collins, *The Bud Collins History of Tennis: An Authoritative Encyclopedia & Record Book* 154 (3d ed. 2017) (describing how the ITF launched its Grand Prix Circuit with prize-money awards at the start of the 1970 season in a bid to keep players from signing guaranteed contracts with the rival WCT Circuit).

38. *See id.* at 159 ("Unfortunately for much of the [1971] season, the 34 men under contract to [the WCT] and the [ITF's] 'independent pros' . . . played separate tournaments.").

39. UNITED STATES LAWN TENNIS ASSOCIATION, OFFICIAL ENCYCLOPEDIA OF TENNIS 165 (1st ed. 1972); *see also*, Ruth, *supra* note 26, at 186 ("In 1972 [Jack Kramer] leveraged his prior experience managing players . . . to form a new player union with Donald Dell and Cliff Drysdale called the Association of Tennis Professionals.").

40. *See* Collins, *supra* note 37, at 164 (discussing how ATP organizers Donald Dell and Jack Kramer met with leaders of the ITF and WCT to find a way to "reunify the men's game" and reached an agreement to evenly split the 1973 season between the WCT and ITF circuits).

41. *See* Collins, *supra* note 37, at 168 ("The [Wimbledon boycott] became a test of the will and organization of the new association. Many ATP leaders felt that if they gave in on this first showdown, they would never be strong, whereas if they held firm and proved to the [ITF] that even Wimbledon was not sacred, the ATP's unity and power would never be doubted in the future."); *see also* Ruth, *supra* note 26, at 186–87 ("On June 20, 1973, ATP president Cliff Drysdale announced what amounted to a player-led strike at the highest-profile tournament of the year.").

administer and regulate participation in the Grand Prix Circuit.[42] But although the ATP's influence had grown, the MTC's governance structure left the players with a minority voice, as the ITF and tournament representatives combined to represent the powerful interests of the Slams and could consistently outvote the ATP representatives.[43] Over the ensuing decade, players became increasingly disgruntled with the MTC's management.[44] By 1985, the Grand Prix Circuit had swelled to 74 sanctioned events in 23 countries, prompting top players to complain that the disorganized calendar was confusing to consumers,[45] difficult to market to potential sponsors,[46] and resulted in the sport having virtually no off-season.[47]

Finally, on August 30, 1988, Hamilton Jordan, former White House Chief of Staff to President Jimmy Carter and the newly appointed ATP CEO, stood in a parking lot in Queens, New York outside the gates of the U.S. Open.[48] Behind him stood not White

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42. Ruth, *supra* note 26, at 188 ("During its first year of operation, in 1974, one-third of the [MTC] came from the [ITF], one-third from the ATP, and one-third from prominent tournament directors.").

43. *Id.* at 237 ("[T]he governance structure of the [MTC] held the influence of the professionals in check. The ITF representatives and the tournament representatives serving on the council could outvote the player representatives to set the year's Grand Prix playing calendar.").

44. *Id.* at 238–39 (explaining how the expansion of the professional tennis calendar in the 1980s "brought simmering problems forward . . . [In 1988], new [ATP] leadership . . . articulated players' dissatisfaction with the current status of the game").

45. *See* Steve Tignor, *1988: The ATP's Parking Lot Revolution*, TENNIS (Aug. 6, 2015), https://www.tennis.com/news/articles/1988-the-atp-s-parking-lot-revolution [https://perma.cc/24MT-TU4M] (quoting McEnroe as saying the players wanted to "present a better image of tennis to the public, so they'll see more big matches between the top players.").

46. *See* Ruth, *supra* note 26, at 238 ("[D]isorganization made the sport confusing to consumers and more difficult for management companies . . . to market to potential sponsors than necessary if a more unified structure existed.").

47. *See* Ruth, *supra* note 26, at 240 (describing the off-season as "practically nonexistent under the Grand Prix" structure); Peter Alfano, *Control of Men's Tennis at Issue in Suits*, N.Y. TIMES, Nov. 10, 1985, at 6, https://www.nytimes.com/1985/11/10/sports/control-of-men-s-tennis-at-issue-in-suits.html [https://nyti.ms/4sZrCGJ] ("[T]here is a great demand among tournament directors and sponsors to lure the top names . . . When the players' agents also have a financial stake in various tournaments, a temptation exists to pressure players to play in those events. And in addition to an already glutted tournament schedule, there are lucrative exhibitions and unsanctioned events that the stars prefer to play.").

48. *See* Tignor, *supra* note 45 ("With Hamilton Jordan . . . the ATP decided at the '88 Open to announce that the players would go their own way at the start of 1990 . . . Jordan, with Mats Wilander, Yannick Noah, Brad Gilbert and other players alongside him, made his announcement just outside the Open's grounds.").

House aides, but a handful of the world's top tennis players.[49] Men's professional tennis was at a "crossroads," with its athletes drained by the volume of tournaments on the calendar, unhappy with the marketing of the sport, and frustrated with their diminished voice on the governing MTC.[50] In response, the ATP announced that it would break away and form its own player-run professional tennis tour.[51]

Since 1990, the ATP has organized the ATP Tour, the global tournament circuit for male professional tennis players.[52] While the Tour has since expanded significantly, evolving into a global enterprise with tournaments on every inhabited continent,[53] it never fully realized its initial vision of player independence.[54] Shortly after announcing its break from the MTC, the fledgling ATP reached a partnership agreement with established tournament organizers to secure necessary funding, sponsors, and a guaranteed series of events for the Tour.[55] Instead of 100% player control, the ATP Board was split between three player representatives, three tournament representatives, and a Chairperson elected by supermajority of the Board.[56] Three

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49. *See* Ruth, *supra* note 26, at 239 ("[O]n August 30, Swedish professional Mats Wilander spoke for eighty-five of the world's top one hundred ranked players from a hastily erected ATP podium in a Flushing Meadows parking lot. The ATP would move ahead with a player-run professional tennis tour.").

50. *Id.* at 238–39 (describing the ATP's famous "Tennis at the Crossroads" parking lot protest and critique of the professional tennis landscape).

51. *Id.* at 239.

52. *See id.* at 240 ("Determined to achieve player autonomy, the ATP . . . unanimously rejected the Grand Prix in favor of the ATP Tour. At once ATP executives set about approaching tournament partners to build the new player-led tour.").

53. *See* Ass'n Tennis Pros., 2025 Calendar, *supra* note 31 (showing the ATP's 2025 calendar, which spans 51 weeks across the globe).

54. *See* Lydia Victor, *A Brief History of the ATP*, THE TRIANGLE (Nov. 13, 2020), https://www.thetriangle.org/sports/a-brief-history-of-the-atp/ [https://perma.cc/H774-AQ54] ("While the name ATP stayed . . . the players had only 50 percent of the power, with the rest going to the tournaments . . . Since 1990, there have been two attempts at a players-only association: once in 2003 and again in 2011. Neither were successful.").

55. *See id.* ("[After the Parking Lot Revolution], the ATP didn't have the resources to start a new tour by themselves, instead choosing to partner with tournament directors.").

56. *See id.* (describing the structure of the ATP Board of Directors in 1990). Today, there are four player representatives (selected by a 12-member Player Advisory Council), four tournament representatives (selected by a 9-member Tournament Advisory Council), and the ATP Chairman. *See* Peter Bodo, *Checking in on the Professional Tennis Players Association (Part 1 of 3)*, TENNIS.COM (Dec. 18, 2023), https://www.tennis.com/news/articles/checking-in-on-the-professional-tennis-players-association-part-1-of-3 [https://perma.cc/DR2Q-KT9E] [hereinafter *Interview with PTPA CEO Ahmad Nassar (Part 1)*]. Moreover, "because major decisions of the ATP Board require a supermajority vote, and *at least* two Player and Tournament Class Representative votes, each, any meaningful [changes are]

decades after the Parking Lot Revolution, "tennis finds itself back where it started"—players struggle to assert economic, governance, and working condition control within a system controlled by tournament and corporate stakeholders.[57]

B. THE MODERN COERCIVE REGIME OF THE ATP TOUR

Today, the ATP exerts a remarkable level of influence and control over all phases of its players' careers, largely without player input.[58] By outnumbering the player representatives on the ATP Board, the tournament organizers and executives control all governance decisions.[59] In classifying players as independent contractors, the ATP prevents players from bargaining for desired working conditions.[60] Amidst the Tour's growing revenue from selling broadcast and data analytics rights, players have expressed concern at the disproportionate allocation of increased profits

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tied to the will of the two Tournament Class Representatives." Second Amended Complaint at 24, Pospisil v. ATP Tour, No. 1:25-cv-02207 (S.D.N.Y. Sep. 26, 2025).

57. Victor, *supra* note 54; *see also Interview with PTPA CEO Ahmad Nassar (Part 1)*, *supra* note 56 ("Tennis players have been left behind over the last 30 years. It started as a noble concept [in 1988] of, 'Okay, this is a player-owned tour.' But over time, the players lost control of the structure.").

58. *See Interview with PTPA CEO Ahmad Nassar (Part 1)*, *supra* note 56 ("[I]f you're going to ignore players, don't be surprised when bad things happen. We have made significant outreach to . . . the ATP . . . but we're not on the same side of the table. They really predominantly represent the tournaments and the tour[ ] and their commercial partners.").

59. *See supra* note 56 and accompanying text (explaining that major decisions of the ATP Board, including election of the Chairperson, require a supermajority vote, and at least two player and tournament representatives in agreement, meaning that the tournament representatives always hold an effective veto over governance decisions); Christopher Clarey, *Board Meetings, Not Backhands, Are the Talk of Men's Tennis*, N.Y. TIMES (Mar. 11, 2019), https://www.nytimes.com/2019/03/11/sports/atp-tour-chris-kermode-novak-djokovic.html [https://perma.cc/EH83-6UUM] ("[P]utting a more 'player friendly' ATP chief in place looks all but impossible with the tournament representatives effectively possessing veto power on the board."). Although player Board representatives are selected by vote of the ATP Player Advisory Council, those Board candidates are "pre-determined" and "carefully screened and selected by" an executive search firm retained by the ATP. Second Amendment Complaint at 25, Pospisil v. ATP Tour, No. 1:25-cv-02207 (S.D.N.Y. Sep. 26, 2025). Player representatives also "explicitly owe legal fiduciary duties to the ATP," weakening the claim that these Board representatives "have the players' best interests at heart." *Id.* at 24.

60. *See* Mark D. Schneider, *Unions for Independent Contractors*, 37 A.B.A J. LAB. & EMP. L. 393, 394 ("National labor policy promotes collective bargaining as a mechanism to secure appropriate wages and other terms and conditions of employment for workers. However, there is no easy path forward for independent contractors who wish to bargain collectively through a union. . . . Congress excluded independent contractors from the definition of 'employee' under the [NLRA]. Thus, independent contractors generally cannot organize . . . and typically there can be no NLRA unions of independent contractors.").

between tournament organizers and players, the physical and mental demands imposed by the lengthy calendar, and the lack of a voice in governance, echoing complaints of the 1980s.[61]

To compete in ATP Tour events, players must first pay membership dues and contractually agree to the Tour's rules.[62] The ATP Rules prescribe, among other requirements, which tournaments players must participate in,[63] how their matches will be scheduled,[64] when they must participate in on-site activities for ATP Tour sponsors,[65] how they speak and act in public,[66] what equipment they use in competition,[67] what drink containers they

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61. *See supra* notes 44–50 and accompanying text (describing the ATP's breakaway from the MTC because of its failure to respond to player demands for increased compensation and a stronger voice in governance). Although tennis' popularity and commercialization have soared during the Open Era, so have the psychological demands on players. *See* Bane et al., *supra* note 13, at 1482–83 ("Tennis is now more commercialized and prize money/corporate sponsorship has increased. Media attention is greater today, and athletes increasingly require good media and public-speaking skills to cope."). In 2021, for example, women's world number two Naomi Osaka made headlines when she was fined $15,000 for skipping a mandatory post-match press conference at the French Open. *See* Matthew Futterman, *Naomi Osaka Quits the French Open After News Conference Dispute*, N.Y. TIMES (May 31, 2021), https://www.nytimes.com/2021/05/31/sports/tennis/naomi-osaka-quits-french-open-depression.html [https://perma.cc/8TYR-8H98]. Leading up to the tournament, Osaka announced she would not participate in any media obligations for mental health reasons and later withdrew from the Grand Slam after officials threatened her with additional fines and a potential suspension. *Id.*

62. Ass'n Tennis Pros., 2025 Player Consent & Agreement (2025) (on file with the *Columbia Journal of Law & Social Problems*); *ATP Rulebook*, *supra* note 1, at 15 (explaining that players must pay "ATP dues").

63. *See ATP Rulebook*, *supra* note 1, at 10–11 (explaining that singles players ranked within the top 30 of the ATP Rankings must participate in the singles event of all ATP Tour Masters 1000 tournaments, the Nitto ATP Finals (if qualified as a direct acceptance), and four ATP Tour 500 tournaments).

64. *See id.* at 177–80 ("The scheduling of matches and daily order of play in all tournaments shall be prepared by the Referee and/or Tour Manager and approved by a committee composed of the Tournament Director, Supervisor, Referee and the Tour Manager. In cases where the scheduling committee cannot agree, the Supervisor shall make the final decision.").

65. *See id.*, at 16–17 ("All players competing in the main draw of any ATP Tour and Challenger Tour tournament will be required, if asked, to participate in ATP sponsored activities. Each player is obligated to provide up to two hours each week as arranged by ATP staff, for a maximum of up to four separate activities.").

66. *See id.* at 244–45 ("Conduct contrary to the integrity of the game shall include, but not be limited to, publicized comments that unreasonably attack or disparage any person or group of people, a tournament, sponsor, player, official or ATP. Responsible expressions of legitimate disagreement with ATP policies are not prohibited. However, public comments [or behavior] that one . . . knows, or should reasonably know, will harm the reputation or financial best interests of a tournament, player, sponsor, official or ATP are expressly covered by this section.").

67. *See id.* at 228 ("Every player shall dress and present himself for play in a professional manner. Clean and customarily acceptable tennis attire as approved by ATP shall be worn. A player who violates this section may be ordered . . . to change his attire or

use,[68] and even how much effort they must give in matches.[69] The ATP Rules also govern the terms and nature of outside endorsement contracts that players may enter into, with the ATP reserving the right "to prohibit any identification it deems not to be in the best interest of the game and/or ATP" and mandating that players "include a clause in their contracts permitting them to opt out [of the endorsement] at the end of any year in the event ATP Rules change to prohibit a commercial brand logo" on clothing.[70]

In effect, the ATP unilaterally sets the terms and conditions of employment and controls players' ability to seize entrepreneurial opportunities while simultaneously disclaiming any labor responsibilities as an employer. Fundamentally, players gain entry into more prestigious tournaments as their ranking improves, where the total prize purse and ranking point rewards are higher.[71] This system creates a zero-sum game where a fixed number of top players are able to earn lucrative prize money through their consistent entry into the most prestigious tournaments, such as the Grand Slams and Masters 1000 tournaments.[72] But even for players who cannot enter these

equipment immediately. Failure of a player to comply with such an order may result in an immediate default."). These regulations further restrict the size and placement of sponsorship logos on a player's hat, shirt, wristbands, and shorts. *Id.* at 229–32.

68. *See id.* at 229 ("Players are permitted to use drink containers on-court if they are of reasonable size and they contain no logo or writing of the drink manufacturer . . . The Supervisor may approve for use on-court a reasonably sized drink container that has a logo or writing, not to exceed four [ ] square inches [ ] if: The advertised on-court drink sponsor is the same as the player's drink container manufacturer, or; The advertised on-court drink sponsor(s) is not in the same beverage category as the player's drink container.").

69. *See id.* at 236 ("A player shall use his best efforts during the match when competing in a tournament. Violation of this section shall subject a player to a fine up to $20,000 for ATP Challenger Tour tournaments, $30,000 for ATP Tour 250 tournaments, $40,000 for ATP Tour 500 tournaments, $60,000 for ATP Tour Masters 1000 tournaments for each violation.").

70. *Id.* at 229.

71. *See* Maine, *supra* note 9 ("Every tournament has a set amount of tiered prize money, which varies dramatically depending on the type of event. At the Australian Open [in 2023], the paycheck for someone who loses in the first round will be $73,375.72, with the singles champions ultimately earning $2.05 million . . . The paychecks and ranking points available continue to decrease for lower levels of tournaments. The 1000-level [Indian Wells tournament] . . . offered a $426,010 paycheck to the winners in 2022. A first-round loser walked away with $17,580. At [the] ASB Classic in Auckland, a lower 250-level tournament, the men's winner earned $97,760 . . . with those exiting in the first round earning $6,895.").

72. *See ATP Rulebook*, *supra* note 1, at 146, 159–60 (explaining that the ATP operates tournaments throughout the year, with a set number of direct entry spots available in each). The most lucrative ATP tournaments, for example, have a maximum of 96 slots available for players in the main draw, which will be filled in order by ranking. *See id.* A player

tournaments, the ATP largely prohibits players from participating in any non-ATP event or exhibition tournament through enforcement of its "Special Event,"[73] "Qualified Non-Covered Event,"[74] and "One Tournament Per Week"[75] rules. In essence, the ATP has signed players to exclusivity agreements, or at least coercively stringent non-competes, while classifying them as independent contractors.[76]

Beyond competition opportunities, a player's access to sponsors and endorsement deals is also tied to their ranking, reputation, and employment relationship with the ATP Tour.[77] While many professional players have sponsorship deals for free or low-cost tennis equipment, only top-ranked players are able to negotiate agreements that also offer financial compensation with top brands.[78] Since participation in the Tour's premier tournaments

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ranked outside the top 100, therefore, will likely not gain entry or must compete in a qualifying event for the chance to earn a main draw entry. *See id.* at 147–150, 159–60.

73. *See id.* at 17–18. Special Events are those events "other than Grand Slams, ATP Tour Tournaments or ATP Challenger Tour Tournaments, including all club matches in any country like Bundesliga matches, World Team Tennis, and other non-ATP exhibitions." Ass'n Tennis Pros., Special Events/No Play After Withdrawal/One Tournament per Week/ Playing Another Event Rules Reminder, at 1 (Feb. 2, 2024) (on file with the *Columbia Journal of Law & Social Problems*) [hereinafter *Special Events Reminder*]. This rule only applies to top thirty ranked players and prevents them from participating in such events that are scheduled within the same week as an ATP Tour event, within 30 days and 100 miles of an ATP Tour event, or within the same week as an ATP Challenger Tour event in which they are entered to play. *See ATP Rulebook, supra* note 1, at 17–18.

74. *See ATP Rulebook, supra* note 1, at 26–27. Qualified Non-Covered Events are "[t]hose events other than Grand Slams, ATP Tour tournaments, ATP Challenger Tour tournaments, Laver Cup, Davis Cup, Olympic Games, ITF World Tennis Tour and existing regional league events." *See id.* This rule only applies to top 100 ranked players and prevents them participating in such events that have a duration of three or more consecutive days within a seven day period, involve a commitment of more than 11 days across a calendar year, or include two or more events that are connected through player qualification, entry, ranking system, or any other similar means. *See id.*

75. *See id.* at 144 ("Once a player enters and is accepted into the main draw of singles, doubles, or the qualifying competition, he is committed to that tournament for the week, unless released by the Senior Vice President—Rules & Competition or Supervisor.").

76. *See* FedEx Home Delivery, 361 NLRB 610, 621 (2014) (emphasizing that the lack of a "realistic ability to work for other companies" weighs strongly in favor of employee status); Lancaster Symphony Orchestra v. NLRB, 822 F.3d 563, 569–70 (D.C. Cir. 2016) (explaining that the "limited entrepreneurial opportunity" to "perform with other symphonies" and "pursue other musical endeavors such as teaching" provided "miniscule support for independent contractor status" since it allowed concert musicians to "increase their income only by accepting jobs with other employers").

77. *See* Maine, *supra* note 9 ("[In 2022], Carlos Alcaraz and Iga Swiatek, the year-end top-ranked players in the ATP and WTA, respectively, each earned around $10 million . . . in prize money . . . And then there are endorsements. At the lower levels, some players have deals in which they are sent free gear but not compensated financially.").

78. *See, e.g.*, Shahida Jacobs, *'Style Icon' Jannik Sinner's Big Sponsors—A $158m Nike Deal, Gucci's Statement of Intent and More*, TENNIS365 (Nov. 30, 2023),

is limited,[79] players must effectively work their way up the company ladder, biding their time and improving their ranking by participating in years of tournaments until they can "cash in" on their ATP Tour success via sponsorship agreement.[80] There is, therefore, an inherently coercive pressure for players to frequently participate and maximize their performance in ATP events, often at the expense of pursuing other economic opportunities.[81] These explicit and implicit restrictions prevent players from participating in exhibition events or obtaining endorsements that they should be free to contract into if they were actually independent contractors.

Further shoring up its chokehold over players, ATP Tour supervisors and managers penalize violations of the ATP Rules at their sole discretion and may unilaterally impose fines, suspensions, or forfeiture of ranking points.[82] Players must serve these penalties before playing other Tour events and can appeal them only to an internal ATP Committee.[83] This often puts players in the coerced position of either losing their Tour membership or paying for the opportunity to have the ATP overrule or modify its own prior decision.[84] Danish professional player Mikael Torpegaard, for example, recalled his experience being fined over

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https://www.tennis365.com/tennis-features/style-icon-jannik-sinners-big-sponsors-158m-nike-deal-gucci-alfa-romeo [https://perma.cc/N5BV-C2KJ] (reporting Jannik Sinner's recent $158m Nike contract and ambassador endorsements with Rolex, Gucci, and Alfa Romeo).

79. See *ATP Rulebook*, *supra* note 1, at 159–61 (describing the entry process for ATP tournaments).

80. *Contrast* Jacobs, *supra* note 78 (describing Sinner's endorsement deals, which have a combined value of hundreds of millions of dollars) *with* Maine, *supra* note 9 (explaining how lower-ranked players may, before they earn a high enough ranking to negotiate more lucrative contracts, rely on unpaid partnerships or other players with sponsorship deals to access equipment such as shoes, clothes, and racquets).

81. *See* Maine, *supra* note 9 (describing how some players seek out benefactors or loans to cover their expenses while competing at the lowest levels of the sport so they can focus on earning ranking points to increase their future earning potential).

82. *See ATP Rulebook*, *supra* note 1, at 234–42 (listing the Tour's various offenses and corresponding penalties). A violation of the "Conduct Contrary to the Integrity of the Game" policy, for instance, subjects players to fines up to $250,000 and possible suspension from play in ATP Tour or ATP Challenger Tour tournaments for a period of up to three years. *See id.* at 244–45. Violations of the "Post-Match Media Availability" policy shall subject a player to a fine that varies from $1,000 to $20,000 based on ranking. *See id.* at 241. Violation of various on-court rules, such as ball abuse, racquet abuse, verbal obscenities, and impermissible coaching may incur fines between $350 and $60,000 per offense. *See id.* at 234–42.

83. *See id.* at 242–48 (describing procedures for the determination of violations, imposition of penalties, payment of fines, and appeals).

84. *See id.*

$12,000 when playing in the 2022 Australian Open.[85] After being unable to complete his qualifying round match due to a neck injury, Torpegaard was summoned by tournament officials and fined half of his prize money for "failing to give his best efforts" during the match.[86] Torpegaard, ironically, felt lucky, since the penalty determination was in the Tour's sole discretion and they could have taken the entirety of his prize money or challenged his "good standing" status with the Tour.[87] Since players are legally classified as independent contractors, they cannot formally bargain for a fair disciplinary policy and lack statutory protections to engage in collective action, leaving them exceedingly vulnerable to the arbitrary imposition of penalties by the Tour.[88]

C. THE INDEPENDENT CONTRACTOR TEST UNDER THE NLRA

National labor policy promotes collective bargaining as a mechanism to secure appropriate wages and other terms and conditions of employment for workers.[89] There is, however, no easy

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85. Telephone Interview with Mikael Torpegaard, professional ATP player from 2013–2023 (Sep. 20, 2024) (notes on file with author).

86. *See id.* (explaining that after flying 10,000 miles to Melbourne, Torpegaard woke up on the morning of his match with a neck injury and was unable to turn his head; afraid of the financial loss from not competing, he attempted to play his match but was forced to retire within the first ten minutes due to severe pain). *Cf.* Maine, *supra* note 9 ("Because of the high earnings potential, players have attempted to compete at majors even when suffering from injuries. At the 2022 French Open, Facundo Bagnis showed up to his opening-round match with a heavily strapped right calf. He struggled to move around the court but earned $65,000 in a very lopsided loss to Daniil Medvedev.").

87. Telephone Interview with Mikael Torpegaard, *supra* note 85 (describing Torpegaard's opinion that the Tour knows that players are financially unable to hire legal support and can therefore get away with coercing players into paying fines or imposing other penalties that players cannot meaningfully challenge).

88. *See* Velox Express, Inc., 368 NLRB No. 61 at 14 (2019) ("[I]ndependent contractors . . . have no right under Section 7 of the [NLRA] to form, join, or assist unions for purposes of collective bargaining, or to engage in concerted activity for mutual aid or protection. Consequently, employers are free to discipline or dismiss independent contractors for engaging in those activities."). The lack of NLRA protection, therefore, means that the ATP may legally fine, exclude, or otherwise retaliate against players who challenge its policies or engage in collective action. *See id.* If players were instead considered "employees" under the NLRA, they would be protected from employer retaliation and could designate a union to bargain and negotiate for employment conditions on their behalf. *Cf.* Diego De La Vega, *Flag on the Policy: The NFL's Discipline Problem*, 1 OHIO ST. J. ON DISP. RESOL. ONLINE 69 (2023) (discussing the NFL Player's Association's ability to collectively bargain on behalf of players and agree to the specific implementation of the NFL's Personal Conduct Policy).

89. *See* 29 U.S.C. § 151 (declaring it the policy of the United States to eliminate obstructions to commerce by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of

path forward for independent contractors who wish to bargain collectively through a union.[90] In the midst of the Great Depression, Congress in 1935 passed the National Labor Relations Act.[91] In contrast with prior labor legislation,[92] the NLRA was sweeping in its broad recognition and protection of workers' rights to organize, collectively bargain, and otherwise engage in concerted activity.[93] In a single act of Congress, the NLRA established the subjects over which employers were required to negotiate with employees, as well as an independent regulatory agency—the National Labor Relations Board—to enforce the regime.[94]

While the Supreme Court quickly affirmed the Board's discretion to define the NLRA's coverage,[95] there remains debate over which workers are protected under the Act.[96] In *NLRB v. Hearst Publications,* the Court held that determination of whether

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negotiating the terms and conditions of their employment or other mutual aid or protection").

90. *See* Schneider, *supra* note 60, at 394 (explaining that employers may freely discharge or retaliate against independent contractors when they seek to unionize, bargain, or engage in other collective action because they are explicitly excepted from the NLRA's coverage).

91. Kate Andrias, *The New Labor Law*, 126 YALE L. J. 2, 13–14 (2016).

92. *Contrast, e.g.*, Clayton Act, ch. 323, 15 U.S.C. §§ 12–27 (passed in 1914, exempting labor unions from the antitrust laws) *and* Adamson Act, ch. 436, 49 U.S.C. §§ 28301, 28302 (passed in 1916, establishing the eight-hour standard workday for private interstate railroad workers) *and* Keating-Owen Child Labor Act, ch. 432, 39 Stat. 675 (1916), *invalidated by* Hammer v. Dagenhart, 247 U.S. 251 (1918) (barring the interstate sale of goods produced in factories utilizing child labor) *with* National Labor Relations Act, ch. 372, 29 U.S.C. §§ 151–169 (passed in 1935, declaring it the "policy of the United States" to eliminate "obstructions to the free flow of commerce" by encouraging and protecting "collective bargaining . . . full freedom of association, self-organization, and designation of representatives . . . for the purpose of negotiating the terms and conditions of . . . employment" for "any employee").

93. *See* 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.").

94. Andrias, *supra* note 91, at 14.

95. *See* NLRB v. Hearst Publ'ns, 322 U.S. 111, 130 (1944) ("It is not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act.").

96. *See infra* notes 107–112 and accompanying text (discussing the repeated reversals by the NLRB on the proper test for determining whether a worker is a statutorily covered employee or excluded independent contractor); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324–25 (1992) ("In each case, the Court read 'employee' to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning.").

an individual is a covered employee within the meaning of the NLRA should be left to the NLRB.[97] Acknowledging that there were not "simple, uniform, and easily applicable" distinctions between independent contractors and employees, the Court articulated a policy-based test in light of the Act's broad statutory purpose,[98] allowing the Board to apply the Act to workers who were employees "as a matter of economic reality."[99] But this grant of discretion to the Board was controversial,[100] and Congress reacted in 1947 by explicitly excluding independent contractors from coverage under the Act.[101]

The Court's subsequent decision in *NLRB v. United Insurance Company of America* articulated that the definitive test for determining employment status under the NLRA is the common-law test from Section 220 of the Restatement (Second) of Agency.[102]

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97. *See Hearst Publ'ns*, 322 U.S. at 130 ("Determination of 'where all the conditions of the relation require protection' involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers.").

98. *Id.* at 120, 131–32 (finding "the primary consideration" in determining whether an individual is a covered "employee" is whether their inclusion would further the "declared policy and purposes of the Act" to remedy inequalities of bargaining power in controversies over wages, hours and working conditions).

99. United States v. Silk, 331 U.S. 704, 713 (1947) (noting that since the purpose of the NLRA was to eliminate labor disputes and industrial strife, the term "employee" for purposes of the Act "included workers who were such as a matter of economic reality" (citing *Hearst Publ'ns*, 322 U.S. at 111–131)).

100. *See, e.g.*, *Hearst Publ'ns*, 322 U.S. at 135–36 (Roberts, J., dissenting) (Congress "did not delegate to the [NLRB] the function of defining the relationship of employment" and in Section 2(3) stated "as clearly as language could do it" that the provisions of the Act extended only to those who bore the "named relationship" of employer-employee, as it was understood at common law.).

101. *See* Robert J. Rosenthal, *Exclusions of Employees Under the Taft-Hartley Act*, 4 INDUS. & LAB REL. REV. 556, 565 (1951) ("The 1947 Taft-Hartley amendments added 'independent contractors' among the categories to be excluded from the coverage of the National Labor Relations Act in Section 2(3) . . . The apparent reason for this exclusion was to limit the wide discretionary powers which the Supreme Court gave the board in the determination of such conceptions as 'employee' and 'employer' in its decision in *NLRB v. Hearst Publications*."); Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, § 2(3), 61 Stat. 136, 137–38 (1947) ("The term 'employee' . . . shall not include . . . any individual having the status of an independent contractor.").

102. *See* 390 U.S. at 256 (holding that the NLRA incorporated this ten factor "common law agency test . . . in distinguishing an employee from an independent contractor"). The factors are:

> (a) [T]he extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a

In *United Insurance*, the Court reasoned that "no shorthand formula or magic phrase" can be used to determine the employment relationship—instead all "incidents of the relationship must be assessed and weighed with no one factor being decisive."[103] Under this standard, the NLRB and reviewing courts are bound to assess the "total factual context" of a worker's employment conditions in light of common law agency principles.[104] The Restatement test remains the governing authority for determining employment classification status under the NLRA.[105]

The Board has since refined its application of Section 220, holding that "entrepreneurial opportunity" and "employer control" are the essential principles through which to analyze the Restatement factors.[106] That is, each common law factor should be weighed according to whether its application to the particular facts of a workplace point more toward employer control or independent entrepreneurial opportunity.[107] In this framing, an independent

specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business. RESTATEMENT (SECOND) OF AGENCY § 220(2) (A.L.I. 1958).

103. *See United Ins.*, 390 U.S. at 258.

104. *Id.*

105. *See* St. Joseph News-Press, 345 NLRB 474, 478 (2005) ("Supreme Court precedent 'teaches us not only that the common law of agency is the standard to measure employee status but also that we have no authority to change it.'" (quoting Dial-A-Mattress Operating Corp., 326 NLRB 884, 894 (1998))); Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d 1195, 1213 (D.C. Cir. 2018) ("This court too has relied specifically on Section 220 . . . to determine whether a worker is an employee or independent contractor under traditional common-law principles in [NLRA] cases.").

106. *See, e.g.*, Standard Oil Co., 230 NLRB 967, 971 (1977) (finding that workers had "no significant entrepreneurial opportunity" because their "limited opportunities to take risks and influence their profits by their own business decisions are more consistent with an employment, than with an independent contractor, relationship"). The Board has traditionally considered entrepreneurial opportunity as a factor in its classification inquiry, though it has vacillated in its approach. *Contrast* FedEx Home Delivery (FedEx II), 361 NLRB 610, 610 (2014) (analyzing entrepreneurial opportunity by assessing, as a separate factor, whether putative contractors "render services as part of an independent business") with SuperShuttle DFW, Inc., 367 NLRB No. 75 at 9 (2019) ("[E]ntrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain.").

107. *See* SuperShuttle DFW, Inc., 367 NLRB at 11 ("[T]he Board has [previously] found that specific common-law factors may or may not demonstrate entrepreneurial opportunity depending on the overall circumstances of the case. Going forward, we will continue to consider how the evidence in a particular case, viewed (as it must be) in light of all the

contractor has meaningful economic freedom, whereas an employee is subjected to significant employer control.[108] This analytical framework was established by the D.C. Circuit in *FedEx Home Delivery v. NLRB* (*FedEx I*), where it noted that, over time, the Board's analytical framework evolved to analyze whether putative independent contractors had "significant entrepreneurial opportunity for gain or loss."[109] According to the D.C. Circuit,[110] therefore, entrepreneurial opportunity is not an individual factor to consider, but is instead a principle to help evaluate the overall thrust of the Restatement factors.[111]

It was not until 2019, however, that a newly-appointed Republican Board adopted the D.C. Circuit's reasoning from *FedEx I* and reinstated entrepreneurial opportunity as a "principle by which to evaluate the significance of the common-law factors," rather than cabined to a single, non-enumerated factor.[112] In *SuperShuttle*, the Board ruled that franchisee operators of ride-share vans at the Dallas-Fort Worth Airport were independent contractors, citing their ability to set their schedules, control their routes, and retain the fares they collected.[113] In its reasoning, the

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common-law factors, reveals whether the workers at issue do or do not possess entrepreneurial opportunity.").

108. *See id.* at 9 ("[I]n general, the more control, the less scope for entrepreneurial initiative, and vice versa.").

109. FedEx Home Delivery v. NLRB (FedEx I), 563 F.3d 492, 497 (D.C. Cir. 2009) (overturning the Board's decision for failing to adequately consider the entrepreneurial opportunity available to the FedEx drivers in question and noting that "while the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism").

110. In FedEx Home Delivery v. NLRB (FedEx III), 849 F.3d 1123 (D.C. Cir. 2017), reflecting law-of-the-circuit doctrine, the D.C. Circuit denied enforcement of *FedEx Home Delivery (FedEx II)*, 361 NRB 610 (2014), a Board decision that followed *FedEx I* and again purported to alter the independent contractor test. *FedEx III,* 849 F.3d at 1127–28 ("Having chosen not to seek Supreme Court review in *FedEx I*, the Board cannot effectively nullify this court's decision in *FedEx I* by asking a second panel of this court to apply the same law to the same material facts but give a different answer."). The Board in *FedEx II* assessed entrepreneurial opportunity as a single "independent-business factor," rather than as an "animating principle" to assess the Section 220 factors. *Id.* at 1126 (internal quotation marks omitted). The D.C. Circuit ultimately affirmed its prior conclusion that those factors must be examined "through the lens of entrepreneurial opportunity" to comply with *FedEx I*. *Id.*

111. *See FedEx III*, 849 F.3d at 1126 (describing the proper "treatment of entrepreneurial opportunity . . . as an 'animating principle' for determining whether a worker is an 'employee' or an 'independent contractor' under the [NLRA]" (quoting *FedEx I*, 563 F.3d at 497)).

112. SuperShuttle DFW, Inc., 367 NLRB No. 75, at 9 (2019).

113. *See id.* at 12–14.

Board held that entrepreneurial opportunity is the key "principle by which to evaluate the overall effect of the common-law factors" on a worker's economic independence when the "specific factual circumstances of the case make such an evaluation appropriate."[114] Thus, because SuperShuttle had "little control over the means and manner" of the franchisees' performance and received no compensation related to fares collected, the individual operators had "significant entrepreneurial opportunity, strongly point[ing] toward independent-contractor status."[115]

Then, in 2023, the Biden-appointed Board decided *Atlanta Opera*, marking another shift in the NLRB's approach to the independent contractor analysis.[116] In determining that makeup artists, wig artists, and hairstylists working for the Atlanta Opera should be classified as employees under the NLRA, the Democrat-majority Board explicitly overruled *SuperShuttle* and reinstated the NLRB's original *FedEx* standard as extant law.[117] In repudiating the "animating principle" approach to entrepreneurial opportunity, the Board concluded that, in addition to the ten-factor common-law test, it should separately consider whether the worker is "rendering services as part of an independent business," giving weight only to actual (not merely theoretical) entrepreneurial opportunity[118]—notwithstanding the fact that the D.C. Circuit has rejected that interpretation on two different occasions.[119]

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114. *Id.* at 9. Notably, the *SuperShuttle* Board emphasized that the entrepreneurial opportunity principle need not be mechanically applied to each of the ten common-law factors. *Id.* Rather, the Board may "evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate." *Id.*

115. *Id.* at 14.

116. *See* 372 NLRB No. 95, at 17 (2023) (explaining that, in assessing "entrepreneurial opportunity," the Board must consider "whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business," in addition to "weighing all relevant, traditional common-law factors").

117. *See id.* at 2 ("[W]e have decided to overrule *SuperShuttle* and to reinstate the Board's *FedEx II* standard as extant law. Applying this reinstated standard, we find that the workers at issue in this case . . . are employees under Section 2(3) of the [NLRA] and not independent contractors.").

118. *Id.* at 12.

119. *See id.* at 28 (Member Kaplan, dissenting in part and concurring in part) ("[It is] settled law in the D.C. Circuit that entrepreneurial opportunity [is] 'an important animating principle by which to evaluate' the traditional common law factors used to differentiate employees from independent contractors . . . In short, my colleagues' position relies on one conclusion: the D.C. Circuit is wrong." (citations omitted)). The Board has historically adopted a policy of non-acquiescence, declining to change precedent based on appellate court decisions when it believes it has articulated the correct approach. *See*

Today, *Atlanta Opera* remains the governing NLRB precedent.[120] It is likely, however, that the Board will eventually return to its *SuperShuttle* test given the D.C. Circuit's repeated repudiation of the *FedEx II* standard.[121] Although the D.C. Circuit had previously found that the Board is not entitled to any deference on its interpretation of the common-law agency test,[122] its decisions in *FedEx I* and *III* carry additional weight after *Loper Bright*, where the Supreme Court clarified that it is the duty of courts to "decide all relevant questions of law" when reviewing legal determinations made by administrative agencies.[123] Since the D.C. Circuit is therefore unlikely to enforce any NLRB order under the *Atlanta Opera* standard, this Note pragmatically adopts and applies the *SuperShuttle* test to the plight of professional tennis players.[124]

Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L. J. 679, 745 n.312 (1989) (describing the NLRB as one of "the two agencies most often involved in nonacquiescence disputes").

120. *See, e.g.*, Atomic Fire Protection, LLC, 373 NLRB No. 109, at 12 (2024) (citing *Atlanta Opera*). *Atomic Fire* is the most recent NLRB opinion considering classification status and applies the *Atlanta Opera* framework. *Id.* at 13–14 (analyzing, as a separate factor, whether the workers were "rendering services as part of an independent business").

121. For additional information on the D.C. Circuit's rejection of the NLRB's *FedEx II* test, see *supra* notes 109–112 (citing *FedEx I* and *III* and explaining how the D.C. Circuit has twice held that, as a matter of law, entrepreneurial opportunity is properly treated as an animating principle and not as an independent factor in the common law analysis).

122. *See, e.g.*, NLRB v. United Ins. Co. of Am., 390 U.S. 254, 260 (1968) ("[A] determination of pure agency law involve[s] no special administrative expertise that a court does not possess."); FedEx Home Delivery v. NLRB (FedEx III), 849 F.3d 1123, 1128 (D.C. Cir. 2017) (declining to give the Board's finding of employee status deference because it had *not* applied established law to particular facts, but was instead formulating a new legal test).

123. Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 398 (2024) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) and 5 U.S.C. § 706 (2018)). The Board has, so far, been reluctant to change its practice. *See, e.g.*, Airgas USA, LLC, 373 NLRB No. 102, at 1 n.2 (2024) (refusing to change its approach to remedies after rejection in circuit court "under the Board's long-established policy of nonacquiescence"); NAT'L LAB. RELS. BD., NLRB BENCH BOOK: AN NLRB TRIAL MANUAL § 13-100 (Jeffrey D. Wedekind et al. eds., 2025) https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/2025-nlrb-alj-bench-book-final_0.pdf [https://perma.cc/6H2V-YCKF] ("Administrative law judges must follow and apply Board precedent, notwithstanding contrary decisions by courts of appeals, unless and until the Board precedent is overruled by the Supreme Court or the Board itself."). But following *Loper Bright*, nonacquiescence has come under renewed scholarly scrutiny. *See, e.g.*, Alexander MacDonald, *Uniformity*, Loper Bright, *and the National Labor Relations Board: Can the Board's Nonacquiescence Policy Survive in a Post-*Chevron *World?*, 100 NOTRE DAME L. REV. REFLECTION 183, 187 (2025) ("Under *Loper Bright*, the Board has no more right to disagree with a circuit court on federal law than it does with the universe on the law of gravity. The Board cannot simply disagree, respectfully or otherwise, with a court on the meaning of a federal statute.").

124. *See supra* notes 110–111 and accompanying text (describing how the D.C. Circuit twice refused enforcement of the NLRB's classification determination in *FedEx I* and *FedEx*

II. CLASSIFICATION ANALYSIS

Drawing on the overlap between the NLRB's standard in *SuperShuttle* and *Atlanta Opera*, Part II of this Note analyzes the employment relationship between the ATP and its players by examining each common law factor from Section 220 through the lens of entrepreneurial opportunity. A finding of employee status under *SuperShuttle* would almost certainly result in a finding of employee status under *Atlanta Opera*, which is considered more favorable to workers.[125] This Part, accordingly, analyzes the employment relationship between the ATP and men's professional tennis players under *SuperShuttle*'s more stringent approach.

Part II.A applies the Restatement factors to the factual circumstances of ATP players and determines whether each factor points in favor of employee or independent contractor status. Part II.B then weighs all of the factors, concluding that professional tennis players should be classified as statutory employees under the NLRA.

A. EMPLOYER CONTROL AND RESTRAINT OF ENTREPRENEURIAL OPPORTUNITY ON THE ATP TOUR

1. *Extent of Employer Control*

The ATP meticulously controls the essential "details of the work"[126] of its players, making this factor highly indicative of employee status.[127] This element requires examining "the extent of the actual supervision exercised by a putative employer over the

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III). There is also a notably thin gap between the *SuperShuttle* and *Atlanta Opera* standards. *See, e.g.*, Todd Lebowitz, *No Need To Panic: The NLRB's Atlanta Opera Decision Is Unlikely To Have a Major Impact on Independent Contractor Classification Disputes*, THE BARGAINING TABLE BLOG (June 14, 2023), https://www.thebargainingtableblog.com/blogs/nlrb-atlanta-opera-decision-unlikely-to-have-major-impact-on-independent-contractor-classification-disputes/ [https://perma.cc/W9XU-QCA2] (suggesting giving weight only to actual, and not theoretical, entrepreneurial opportunities "is a distinction without a difference").

125. *See, e.g.*, John Kingston, *NLRB Decision in Opera Case Favors Defining Workers as Employees, Not ICs*, FREIGHTWAVES (June 14, 2023), https://www.freightwaves.com/news/nlrb-decision-in-opera-case-favors-defining-workers-as-employees-not-ics [https://perma.cc/R647-J5G5] ("[*SuperShuttle* made] it easier to define workers as [independent contractors] rather than employees.").

126. RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (A.L.I. 1958) ("[T]he extent of control which, by the agreement, the master may exercise over the details of the work.").

127. *Id.* at § 220(2) cmt. h ("[A]n agreement for close supervision or de facto close supervision of the [individual]'s work" suggests an employer-employee relationship).

means and manner of the workers' performance."[128] Courts have treated employer control as "the most important factor in the common law,"[129] and the Board has routinely afforded it "significant weight,"[130] in ultimately determining whether an individual should be classified as a statutory employee.[131] As detailed in Part I, the ATP controls "virtually all aspects"[132] of its players' careers by regulating tournament entry, unilaterally setting the time and place of matches, restricting their ability to work for other employers and take endorsements, and imposing a strict dress code and disciplinary regime.[133] This ultimate authority to set and amend the terms of employment, as well as unilaterally punish violations, mirrors the control typically associated with an employer-employee relationship.[134]

The Tour maintains direct control over the performance of its players' duties by unilaterally setting the annual tournament calendar and retaining discretion to schedule individual tournament matches.[135] And the ATP automatically enters top ranked players into its Masters 1000 events—which are staged in eight countries spread across nine months[136]—where participation

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128. C.C. Eastern, Inc. v. NLRB, 60 F.3d 855, 858 (D.C. Cir. 1995) (emphasis omitted) (internal quotation marks omitted).

129. Crew One Prods., Inc. v. NLRB, 811 F.3d 1305, 1311 (11th Cir. 2016).

130. SuperShuttle DFW, Inc., 367 NLRB No. 75, at 17 (2019).

131. *See id.* (concluding that employer control "should be afforded significant weight" in determining classification status because it may "reliably signal" a lack of entrepreneurial opportunity); Velox Express, Inc. 368 NLRB No. 61, at 26 (2019) (explaining that evidence of employer control "weighs heavily in favor of employee status"); Lancaster Symphony Orchestra, 357 NLRB 1761, 1763 (2011) (finding that employer control over the "manner and means" of work "tips heavily in favor of employee status"); Atlanta Opera, Inc., 372 NLRB No. 95, at 25 (relying on "evidence demonstrating the Employer's control over the work performed" in concluding that workers were employees).

132. Lancaster Symphony Orchestra v. NLRB, 822 F.3d 563, 566 (D.C. Cir. 2016).

133. *See supra* Part I.B (describing the extent of the ATP's control over player working conditions and ability to pursue external entrepreneurial opportunities).

134. *See* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258–59 (1968) (describing an employer's ability to "unilaterally" promulgate and change "the terms and conditions" of employment as a "decisive factor[ ]" in finding employee status); *see also* Stamford Taxi, 332 NLRB 1372, 1373 (2000) (noting that employer's ability to unilaterally draft, promulgate, and change the terms of the driver's lease arrangements "weigh[s] heavily in favor of employee status").

135. *See ATP Rulebook*, *supra* note 1, at 177 ("The scheduling of matches and daily order of play in all tournaments shall be prepared by the Referee and/or Tour Manager and approved by a committee composed of the Tournament Director, Supervisor, Referee and the Tour Manager.").

136. *See generally* Ass'n Tennis Pros., 2025 Calendar, *supra* note 31 (listing the nine Masters 1000 tournaments that are hosted across North America, Europe, and Asia between March and November every year).

is mandatory.[137] A player's work schedule is, therefore, dictated by the ATP in a way that often constrains entrepreneurial opportunity.[138] At the 2018 Stockholm Open, for instance, American player Tennys Sandgren requested an afternoon match time so that he could register for an ATP 500 Series tournament in Vienna the following week before the Tour-imposed 9pm deadline.[139] The ATP, instead, scheduled his match in the evening, resulting in Sandgren not finishing until after 10pm and costing him the opportunity to play the more lucrative Vienna tournament.[140] The Board has found this kind of schedule control indicative of an employer-employee relationship in analogous performance industries.[141] In *Lancaster Symphony Orchestra*, the NLRB reasoned that, although the musicians at issue could decide "whether and for which programs" they wanted to work for the Orchestra, they were still at the behest of the symphony's initial scheduling decisions, and were in this way dissimilar to "true independent contractor[s]" who, when hired, "can mutually

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137. *See ATP Rulebook*, *supra* note 1, at 138 ("For the mandatory ATP Masters 1000 tournaments . . . entries are automatic."). In addition, "once a player is accepted in the main draw of [a Masters 1000 event] . . . his result in this tournament shall count for his ranking, whether or not he participates." *Id.* at 250. And if a player withdraws absent a medical condition or physical injury, he receives a ranking penalty. *Id.* at 221–22, 250–51.

138. *See id.* at 177–78 (explaining how ATP supervisors unilaterally schedule matches and set the daily order of play in all tournaments, though the committee "should . . . consider[ ] the needs of players, television, tournament and the public" in doing so).

139. Telephone Interview with Tennys Sandgren, professional ATP player from 2008–2024 (Sept. 19, 2024) (notes on file with author). Under the Tour's "special exemption" rule, Sandgren needed to finish his match in Stockholm before signing into the tournament in Vienna. *See ATP Rulebook*, *supra* note 1, at 152–55 ("If, on the day prior to the start of qualifying, a player does not finish his match by nine (9) p.m. local time at the qualifying site and subsequently loses his match, then he is not eligible to be signed in for qualifying or for a special exempt[ion].").

140. Telephone Interview with Tennys Sandgren, *supra* note 139. Had Sandgren won his match, the "special exemption" rule would have allowed Sandgren to skip qualifying and earn direct acceptance into the Vienna main draw. *See id.* Instead, because he lost, ATP's rules required him to sign-in for Vienna's qualifying draw by the 9pm deadline—which had already passed. *See id.* Nor could Sandgren withdraw from Stockholm to guarantee his qualifying spot in Vienna without incurring the Tour's penalties. *See ATP Rulebook*, *supra* note 1, at 221–22, 250–51.

141. *See* Royal Palm Theatre, 275 NLRB 677, 681–82 (1985) (finding that an employer exercised control over the work of musicians where the theater's music director selected the music, the instruments, the time and place of sessions, and dictated rehearsal times, seating arrangements, and breaks); Atlanta Opera, Inc., 372 NLRB No. 95, at 20–21 (2023) (finding that an employer exercised "substantial control over the essential details of stylists' day-to-day work" where they dictated the "time and place of rehearsals and performances, the stylists' daily schedules, and the availability of breaks and overtime").

arrange . . . when to do [the work] and control how long it takes."[142] Like the musicians in *Lancaster*, ATP players have "no control over their worktime" once they "sign up" and "are selected" to compete in a tournament.[143] And although players schedule their own "practice[s]" and control their own match performance, the ATP remains the "ultimate authority to whom all the [players] must defer."[144]

The ATP's restrictions on players' ability to participate in exhibition events and obtain endorsements also evince the organization's substantial control.[145] The Tour largely prohibits its players from participating in any non-ATP tournament or exhibition that geographically or temporally conflicts with an ATP event, or any non-ATP competition that has Tour-like features.[146] The ATP also prevents players from changing commercial apparel logos during the calendar year,[147] requires players to include endorsement opt-out clauses in their private contracts,[148] and restricts players from displaying any logo it deems "not to be in the best interest of the game and/or ATP."[149] This control interferes with players' freedom to contract and negotiate with entrepreneurial freedom since these stipulations reduce

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142. Lancaster Symphony, 357 NLRB 1761, 1764 (2011) (contrasting art models, who could "simply appear or not at any scheduled classes" with concert musicians who are "required to attend all rehearsals on dates and at times set by the music director and all performances on dates set by the Symphony").

143. *Id.*

144. Lancaster Symphony Orchestra v. NLRB, 822 F.3d 563, 568 (D.C. Cir 2016).

145. *Cf.* Crew One Prods., Inc. v. NLRB, 811 F.3d 1305, 1311 (11th Cir. 2016) (finding that stagehands have "entrepreneurial interests" when they "are free to accept or reject offered work without retaliation and are free to accept work from other labor providers").

146. *See supra* Part I.B (explaining the Tour's Special Event, Qualified Non-Covered Event, and One Tournament Per Week rules). The ATP considers these rules "integral to [its] ability to achieve and promote a successful worldwide circuit of men's professional tennis and advances the interests of tournaments, players, sponsors, and tennis fans alike." *Special Events Reminder*, *supra* note 73. These rules prohibit players from entering any non-ATP event that lasts more than three consecutive days, are held over an aggregate of 11 or more days within a calendar year, or include two or more events connected through player qualification, entry, ranking system, or similar means. *Id.*

147. *See ATP Rulebook*, *supra* note 1, at 231 ("Once a player has competed in the first match of his first event with a commercial brand logo in either of the two locations (shirt front and/or hat/headband), he may not change brands during that calendar year, unless approved by ATP.").

148. *See id.* ("Players shall include a clause in their contracts permitting them to opt out at the end of any year in the event ATP rules change to prohibit a commercial brand logo on the front of a shirt, sweater or jacket.").

149. *See id.* ("Tobacco and companies associated with tennis gambling will be prohibited from any endorsements on player clothing. ATP reserves the right to prohibit any identification it deems not to be in the best interest of the game and/or ATP.").

bargaining power. The Tour, in essence, offers its players "entrepreneurial opportunities that they cannot realistically take," which the courts and the Board have held do not "add any weight to the company's claim that the workers are independent contractors."[150]

In assessing control, courts and the Board have also "focused on the presence, or lack thereof, of discipline imposed" by employers.[151] Usually the "discipline imposed and threatened by [an employer] further evinces control."[152] Here, the ATP disciplines its players for failure to comply with the ATP Rules through ranking penalties, fines, and suspensions.[153] More significant infractions may also result in the loss of medical benefits, pension plan accrual, and year-end bonus payments.[154] And, as courts have found "significant,"[155] players often fear retaliation from ATP supervisors for discretionary infractions.[156]

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150. C.C. Eastern, Inc. v. NLRB, 60 F.3d 855, 860 (D.C. Cir. 1995); *see also, e.g.*, Atlanta Opera, Inc., 372 NLRB No. 95, at 13 (2023) (noting the distinction between actual opportunities, which allow for the exercise of genuine entrepreneurial autonomy, and those that are circumscribed or effectively blocked by the employer).

151. NLRB v. Friendly Cab Co., Inc., 512 F.3d 1090, 1099 (9th Cir. 2008); *see also* Stamford Taxi, Inc., 332 NLRB 1372, 1384 (2000) (holding that the fact taxicab drivers who refused dispatch calls were "subject to discipline, denial of further dispatched calls, or lease termination" supported concluding that they were employees); FedEx Home Delivery v. NLRB, 563 F.3d 492, 498 (D.C. Cir. 2009) (finding that a company's lack of a conventional disciplinary system was an indicator of independent contractor status).

152. Lancaster Symphony, 357 NLRB 1761, 1763 (2011) (listing reprimands and the authority to suspend musicians as examples of employer disciplinary measures).

153. *See, e.g.*, *ATP Suspends Nick Kyrgios for Detrimental Conduct*, ESPN (Oct. 17, 2016), https://www.espn.com/tennis/story/_/id/17814034/nick-kyrgios-suspended-atp [https://perma.cc/79QR-LMPE] ("[ATP player] Nick Kyrgios will miss the rest of the season after being suspended by the men's tour and fined an additional $25,000 on Monday for 'tanking' a match and insulting fans . . . The ATP said Kyrgios was sanctioned for 'conduct contrary to the integrity of the game.'").

154. *See ATP Rulebook*, *supra* note 1, at 26–27 (explaining that participation in "Qualified Non-Covered Events" renders players ineligible for "retirement programs, bonus programs, financial security programs, . . . [and] the privilege to actively participate, including voting, in ATP governance"); *Special Events Reminder*, *supra* note 73 ("Any player found to be in violation of the Special Events rule will be subject to a Major Offense penalty. These penalties are classed as the Major Offense of Conduct Contrary to the Integrity of the Game, which carries a maximum fine of $250,000 and/or suspension from play for a period of up to three (3) years.").

155. NLRB v. Friendly Cab Co., Inc., 512 F.3d 1090, 1099 (9th Cir. 2008) (citing City Cab Co. of Orlando, Inc. v. NLRB, 628 F.2d 261 (D.C. Cir. 1980)).

156. Charlie Eccleshare, *Daniil Medvedev's Best Effort Warning at China Open was an Error, ATP Tour Says*, N.Y. TIMES: THE ATHLETIC (Sep. 30, 2025), https://www.nytimes.com/athletic/6676084/2025/09/30/daniil-medvedev-china-open-code-violation-best-effort-rule/ [https://perma.cc/4362-PSGM] (describing ATP player Daniil Medvedev's remark that "every referee in the world [is] trying to intimidate me" after being warned by a Tour official that he would be fined for not giving his "best efforts"). This

This intensity of actual oversight, coupled with the ATP's unilateral discretion to impose fines or other penalties, is highly probative of employee status under the NLRA.[157]

2. *Whether Players Are Engaged in a Distinct Occupation or Business*

ATP players are innately engaged in a distinct occupation as professional tennis players, usually tilting this factor away from employee status.[158] The Board has generally held that "certain specialized occupations are commonly performed by individuals in business for themselves, and workers in such occupations are usually deemed independent contractors."[159] Still, when distinct workers are "fully integrated into the Employer's company and productions," do not meaningfully "engag[e] in an independent business," and "work in tandem with the Employer's other departments," they may look more like employees.[160] The Board has also noted that when a purported contractor's work is virtually inseparable from an employer's regular business, this factor indicates an employer-employee relationship.[161]

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reprimand was later rescinded on appeal because Medvedev was "suffering from debilitating cramps" at the time. *Id.*

157. *Cf. Friendly Cab Co.*, 512 F.3d at 1100 (finding an employer's "strict disciplinary regime" indicative of employee status where managers could "unilaterally" fire or fine taxi drivers for tardiness, disagreements with dispatchers, getting into accidents, or otherwise "not performing their duties in an acceptable manner").

158. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(b) (A.L.I. 1958) ("[W]hether or not the one employed is engaged in a distinct occupation or business").

159. SuperShuttle DFW, Inc., 367 NLRB No. 75, at 20 (2019); *see, e.g.*, Pa. Academy of the Fine Arts, 343 NLRB 846, 847 (2004) (finding that models at an art academy "engaged in the distinct occupation of modeling," supporting contractor status); Comedy Store, 265 NLRB 1422, 1448 (1982) (determining that stand-up comedians pursued a "distinct vocation," favoring contractor status); Puerto Rico Hotel Assn., 259 NLRB 429, 444 (1981) (concluding that hotel musicians were engaged in distinct occupation, suggesting contractor status).

160. Atlanta Opera, Inc., 372 NLRB No. 95, at 21 (2023); *see* FedEx Home Delivery (FedEx II), 361 NLRB 610, 622 (2014) (holding that this factor weighs in favor of employee status where workers are fully integrated into the organization and rely on the employer's infrastructure to perform work).

161. *See* Minn. Timberwolves Basketball, LP, 365 NLRB 1214, 1219–20 (2017) (finding it a "significant" factor in favor of employee status that the "video display on which the crewmembers work[ed]" was "not easily separated from the rest of the product that the employer provides"); SuperShuttle DFW, Inc., 367 NLRB No. 75, at *20 (2019) (noting the close relationship between this factor and whether the work is a part of an "employer's regular business" and whether the "principal is in business"); *see also infra* Part II.A.8 (analyzing the "employer's regular business" factor); *infra* Part II.A.10 (analyzing the "principal is in business" factor).

Like other creative and performance professionals, ATP players "have specific training in this area, and they are hired by the [ATP] to work in this professional niche."[162] They are also, however, "well integrated into [the ATP]'s organization" and rely on its infrastructure to perform their duties.[163] Players, for example, receive and must wear ATP credentials at every tournament they attend.[164] They must adhere to the ATP Rules and are regularly given updated guidance on the Tour's conduct, social media, and other policies.[165] They must attend certain mandatory meetings, hospitality events, and generally serve as a brand ambassador for the ATP.[166] And crucially, players' economic identity is tied to their success on the ATP Tour. Outside of the ATP, there is no other global system for players to regularly compete against each other or track performance.[167] Sponsors and exhibition organizers, therefore, rely on ATP participation and ranking as a proxy for marketability and skill, which are important metrics in deciding

162. *Cf.* Atlanta Opera, Inc., 372 NLRB No. 95, at 21 (2023) (finding this factor tends to favor independent contractor when considering "creative professionals").

163. *Cf.* Minn. Timberwolves Basketball, LP, 365 NLRB at 1219 (explaining that the lack of employer credentials, handbooks, written guidelines, and lack of required meetings or events suggests a lack of integration, whereas clear identification, uniforms and logos, and significant employer guidance suggests integration into an employer's business).

164. *See ATP Rulebook*, *supra* note 1, at 368 ("[T]he Accreditation must be worn correctly at all times . . . and be visible and accessible to be scanned or otherwise checked prior to entry and exit from the Tournament site, and at relevant areas within the Tournament site, at all times."); *cf.* Minn. Timberwolves Basketball, LP., 365 NLRB at 1219 (finding the fact that workers do not "receive Employer credentials, handbook[s], or written guidelines related to their work" suggests that they are not well integrated into an employer's organization).

165. *See* Ass'n Tennis Pros., 2025 Player Consent & Agreement, *supra* note 62 (explaining that players must "comply with and be bound by all of the provisions of the [ATP Rulebook], ATP Tour, Inc.'s [ ] By-Laws, resolutions and regulations [ ], including, but not limited to, all amendments to the ATP Rules"); *see also, e.g.*, *Special Events Reminder*, *supra* note 73 (providing updated guidance on the Tour's exhibition rules); Ass'n Tennis Pros. & Women's Tennis Ass'n, ATP/WTA 2025 Social Media Guidelines (Aug. 2025) (on file with the *Columbia Journal of Law & Social Problems*) ("The purpose of this document is to provide guidelines on social media use by players, player support team members, tournaments and tournament support personnel. . . . Use these guidelines to navigate your social media use so you can get the most out of your social media presence and avoid sanctions.").

166. *See ATP Rulebook*, *supra* note 1, at 14, 16–17 (explaining that players must attend "mandatory" meetings as "scheduled throughout the year . . . by [the] ATP" and, if requested, are "obligated to conduct visits to private sponsor lounges" at tournaments).

167. *See* Second Amended Complaint at 65–66, Pospisil v. ATP Tour, No. 1:25-cv-02207 (S.D.N.Y. Sep. 26, 2025) (explaining that the ATP exercises monopoly and monopsony power in the market for professional tennis players through agreement with the Grand Slams to use ATP ranking as the means of entry for all major professional tennis events).

whether to sign players and how much to compensate them.[168] Players, essentially, must join the ATP to leverage their tennis skills into entrepreneurial opportunities outside of the Tour.

Thus, while ATP players are inherently engaged in a distinct occupation, their "full[ ] integrat[ion]" and essential role in the ATP's business, as well as their inability to "engag[e] in an independent business," suggests this factor weighs only weakly in favor of independent contractor status.[169]

3. *Nature of Supervision in the Industry*

The ATP supervises important aspects of its players' work, though it cannot effectively oversee all aspects of their performance, making this factor inconclusive.[170] In evaluating this factor, the NLRB considers the "nature of the occupation" and discounts a "lack of strict, day-to-day supervision" where the "nature of the work is not reasonably amenable to extensive protocols or direction while it is being performed."[171] The Board also weighs an employer's ability to discipline workers in determining the extent of supervision.[172]

In *Lancaster Symphony Orchestra v. NLRB*, the D.C. Circuit held that the Orchestra's musicians were closely supervised where the employer determined "when the musicians come in, as well as their volume and pitch," and even dictated their "technique."[173]

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168. *See* Tim Newcomb, *The Anatomy of a Tennis Player's Sponsorship Deals*, FORBES (May 4, 2020), https://www.forbes.com/sites/timnewcomb/2020/05/04/the-anatomy-of-a-tennis-players-sponsorship-deals/ [https://perma.cc/8CYR-FC5Y] (explaining that "perceived marketability" hinges largely on ranking and "[t]he higher a player moves up the year-end rankings and the more visibility the player gains outside of tennis, the more clout they have for deals.").

169. Atlanta Opera, Inc., 372 NLRB No. 95, at 21 (2023).

170. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(c) (A.L.I. 1958) ("[T]he kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.").

171. Minn. Timberwolves Basketball, LP, 365 NLRB 1214, 1220 (2017) (internal quotation marks omitted) (citing Sisters' Camelot, 363 NLRB 162, 164 (2015); AmeriHealth Inc./AmeriHealth HMO, 329 NLRB 870, 870 n.1 (1999)).

172. *See* SuperShuttle DFW, Inc., 367 NLRB No. 75, at 19 (2019) (weighing the ability for an employer to issue fines in analyzing this factor); Minn. Timberwolves Basketball, LP, 365 NLRB at 1220 (considering the ability of an employer to discipline a worker by "removing him from the schedule indefinitely" in evaluating this factor).

173. 822 F.3d 563, 566 (D.C. Cir. 2016) (internal quotation marks omitted). The court also concluded that the Orchestra exercised "virtually dictatorial authority over the manner in which the musicians play" because the conductor's role was not "simply to keep time while musicians follow the music," but to "mold the performance into the conductor's personal interpretation of the score." *Id.*

And in *Seattle Opera v. NLRB*, the D.C. Circuit similarly found that the Opera's performers were employees where they were required to observe the employer's "attendance and decorum requirements," incorporate "artistic feedback," and "follow musical and dramatic direction" even when not performing on stage.[174] To be sure, ATP players differ from those Orchestra musicians and Opera performers in that Tour officials do not control the "material details" of how players compete, nor "direct[ ] how they perform" in regards to technique or strategy.[175] The ATP does, however, restrict aspects of performance, including the amount of time players may rest between points, their ability to receive coaching mid-match, the level of effort players must give at all times, and their on-court behavior.[176] The Tour enforces these constraints through its umpires, who monitor and assess penalties during matches, and supervisors, who impose corresponding fines and suspensions post-match.[177] And, as analyzed above, the ATP strictly regulates all aspects of players' working lives off-court through its restrictions on tournament entry, endorsements, social media and public comments.[178]

While the ATP does not supervise all aspects of its players' performance, it does "effectively supervise important aspects of their work."[179] Much of the rest of the labor these players perform simply is not conducive to more immediate, extensive supervision.[180] This factor, accordingly, is inconclusive.

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174. 292 F.3d 757, 765 (D.C. Cir. 2002) (finding that requiring performers to sign in before every rehearsal and performance, adhere to the Orchestra's handbook at all times, and undergo costume fittings and make-up instruction was evidence of material supervision).

175. *Lancaster Symphony Orchestra*, 822 F.3d at 567–68 (quoting *Seattle Opera*, 292 F.3d at 760).

176. *See ATP Rulebook*, *supra* note 1, at 234–41 (describing the rules and corresponding fines if players, for example, take too long between points, receive unauthorized coaching, fail to give their best efforts, or engage in unsportsmanlike conduct).

177. *See id.* at 242 ("The Supervisor shall make a reasonable investigation to determine the facts regarding all player on-site offenses. Upon determining that a violation has occurred, the Supervisor shall specify the fine and/or other punishment in written notice to the player.").

178. *See supra* Part I.B, Part II.A.1 (explaining the extent of the ATP's control over its players' work even when players are not actively playing in matches).

179. Minn. Timberwolves Basketball, LP, 365 NLRB 1214, 1220 (2017).

180. *Cf. id.* at 1220 ("[T]he fact that the Employer does not substantially supervise the crewmembers while they are working a game is partially explained by the nature of the work that the crew performs for the Employer."); Mitchell Bros. Truck Lines, 249 NLRB 476, 481 (1980) (analyzing extent of supervision in the context of "the nature of the occupation").

4. *Skill Required in the Occupation*

ATP players indisputably "exercise considerable skill" in a highly competitive professional environment and are "expected to arrive with the requisite skills and training," likely weighing in favor of independent contractor status.[181] The NLRB has previously recognized that "specialized skillsets" in similar performance industries cut against finding that workers are employees.[182] Significantly, however, the Restatement notes that even skilled workers may be classified as employees when performing "an incident of the business establishment of the employer."[183] Here, where ATP players "employ their skills in furtherance of the [Tour's] core business" they may arguably "look more like employees than contractors."[184] Still, since competing in professional tennis "clearly requires a high degree of skill" and players "personal[ly] invest[ ] in training," this factor tends to point toward independent contractor status.[185]

5. *Who Supplies the Instrumentalities, Tools, and Place of Work*

Players and the ATP both provide necessary components of the instrumentalities for work, likely making this factor inconclusive.[186] When "a worker supplies his own tools," it offers

181. *See* Atlanta Opera, Inc., 372 NLRB No. 95, at 22 (2023) ("[I]n light of the stylists' specialized skills and their personal investment in training and certification, we find that this factor weighs in favor of contractor status."); *see* RESTATEMENT (SECOND) OF AGENCY § 220(2)(d) (A.L.I. 1958) ("[T]he skill required in the particular occupation").

182. *See* Atlanta Opera, Inc., 372 NLRB at 22; *see, e.g.*, Royal Palm Theatre, 275 NLRB 677, 681 (1985) (finding the fact that musicians "were picked on their ability to sight read music so that they could rely on their own skill and ability" suggested contractor status).

183. RESTATEMENT (SECOND) OF AGENCY § 220(2) cmt. i (A.L.I. 1958) ("Even where skill is required, if the occupation is one which ordinarily is considered as . . . an incident of the business establishment of the employer, there is an inference that the actor is [an employee]. Thus, highly skilled cooks or gardeners, who resent and even contract against interference, are normally servants if regularly employed. So too, the skilled artisans employed by a manufacturing establishment, many of whom are specialists, with whose method of accomplishing results the employer has neither the knowledge nor the desire to interfere, are [employees].").

184. *Cf.* Atlanta Opera, Inc., 372 NLRB at 22 (invoking comment (i) from the Restatement but ultimately concluding that the stylists' "specialized skills" weighed in favor of independent contractor status); *see also supra* note 183 (reproducing the text of comment (i)).

185. Lancaster Symphony Orchestra v. NLRB, 822 F.3d 563, 568 (D.C. Cir. 2016); Atlanta Opera, Inc., 372 NLRB at 22.

186. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(e) (A.L.I. 1958) ("[W]hether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.").

"some evidence" of independent contractor status, whereas use of an employer's tools suggests employee status, "especially if they are of substantial value."[187] In similar performance industries, courts and the Board have found this factor neutral when workers provide the "most critical tools" and the employer provides ancillary services, including the venue.[188]

Here, ATP players are reliant upon the Tour to provide the place of work and many of the instrumentalities for their job. Under its own rules, the ATP unilaterally sets and organizes tournament venues and match courts, including the net, benches, on-court scoring system, practice courts, gym facilities, locker rooms, cafeterias, and racquet stringing services for players.[189] The Tour also provides approved tennis balls with ATP branding, towels, and on-site personnel including ball-persons, on-site doctors, physiotherapists, supervisors, umpires, referees, facility security, and hospitality staff, all of whom assist players in their performance.[190] Players, admittedly, bear their own substantial costs for their coaching team and travel to tournaments.[191] And they provide their own competition tools, such as tennis racquets, strings, clothes and shoes, and performance supplements—although even these essential instrumentalities must conform to the strict standards set forth in the ATP Rules.[192] Given the mixed evidence, however, this factor is likely inconclusive.

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187. *Id.* at § 220(2) cmt. k.

188. *See Lancaster Symphony Orchestra*, 822 F.3d at 569 (finding that this factor pointed "in no clear direction" when musicians provided "their instruments" and the Orchestra supplied "music, stands, chairs, and the concert hall").

189. *See ATP Rulebook*, *supra* note 1, at 109–27 (describing the number and specifications of match and practice courts that must be available during tournaments, designated seating capacities for spectators, requirements on hotel accommodation for players, nutritional requirements if running an on-site cafeteria, requirements for the tournament-provided physiotherapist, and on-site gym facilities that the ATP and its tournaments must provide); *cf.* Minn. Timberwolves Basketball, LP, 365 NLRB 1214, 1222 n.37 (2017) (favoring employee status where "the Employer is the sole supplier of the crewmembers' place of work, which consists of Target Arena and the control room therein").

190. *See ATP Rulebook*, *supra* note 1, at 93–105 (explaining that the "ATP shall provide" all relevant personnel at tournament sites).

191. *See* Maine, *supra* note 9 (noting that players cover their own transportation to tournaments and independently pay the support staff that travels with them, including coaches and physiotherapists).

192. *See ATP Rulebook*, *supra* note 1, at 228–232 (explaining that players' hats, shirts, shorts, socks, wristbands, shoes, bags, racquets, and drink containers must all comply with the Tour's branding and logo restrictions).

6. *Length of Employment Relationship*

The ATP also engages in lengthy employment relationships with its players, a factor that "generally . . . indicates employee status."[193] Where "employment [continues] over a considerable period of time"[194] and an individual "perform[s] work for [an] employer for many years, season after season," they are more likely to be classified as employees.[195] The Board has held that this factor supports employee status even when workers are retained pursuant to annual employment agreements.[196] Although players sign annual membership agreements with the ATP,[197] many turn professional in their teenage years and compete on the Tour into their thirties.[198] Players also compete in more than twenty-five weeks of tournaments annually,[199] rather than just a handful of events,[200] and are subject to ongoing requirements, such as random

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193. SuperShuttle DFW, Inc., 367 NLRB No. 75, at 21 (2019); *see* RESTATEMENT (SECOND) OF AGENCY § 220(2)(f) (A.L.I. 1958) ("[T]he length of time for which the person is employed.").

194. RESTATEMENT (SECOND) OF AGENCY § 220(2) cmt. h (A.L.I. 1958) ("[E]mployment over a considerable period of time with regular hours" suggests an employer-employee relationship).

195. Minn. Timberwolves Basketball, LP, 365 NLRB 1214, 1222 (2017).

196. *See* FedEx Home Delivery (FedEx II), 361 NLRB 610, 623 (2014) ("Although drivers enter into 1-year or 2-year Agreements, those Agreements are automatically renewed for successive 1-year periods after the expiration of their initial terms. In effect, drivers 'have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.'" (quoting NLRB v. United Ins. Co. of Am., 390 U.S. 254, 259 (1968))); Minn. Timberwolves Basketball, LP, 365 NLRB at 1222 ("Once a crewmember begins performing work for the Employer and becomes a regular part of the crew, the Employer will generally ask her to continue the following season. This 'potentially long-term working relationship' favors employee status." (quoting Sisters' Camelot, 363 NLRB 162, 165 (2015))).

197. *See, e.g.*, Ass'n Tennis Pros., 2025 Player Consent & Agreement, *supra* note 62 (exemplifying the annual consent and participation agreement that players must sign).

198. *See* Bane et al., *supra* note 13, at 1483 (explaining that, between 1985 and 2010, approximately 70% of top 100 ranked players achieved their first professional ranking between the ages of 16 and 19); Tim Farthing, *The Numbers Prove It: Tennis Players Are Getting Older*, TENNISHEAD (Dec. 14, 2018), https://tennishead.net/the-numbers-prove-it-tennis-players-are-getting-older/ [https://perma.cc/K4CN-NGJ4] ("Twenty-five years ago there were only four 'thirty-somethings' in the world's top [100], whereas there were 42 in [2017's] year-end ranking.").

199. *See* Bane et al., *supra* note 13, at 1482; *supra* note 14 and accompanying text (discussing how players often play between 18 and 35 weeks of tournaments each season); *see also 2025 ATP Calendar*, *supra* note 31 and accompanying text (describing ATP's 2025 Calendar consisting of 64 tournaments across 51 weeks on the ATP Tour and over 200 tournaments on the ATP Challenger Tour).

200. *Cf.* Pa. Interscholastic Athletic Ass'n, Inc. v. NLRB, 926 F.3d 837, 841 (D.C. Cir. 2019) (finding this factor favored independent contractor status where high school sports referees worked "at most, 22–31 days per year" and "on average only 20 hours" annually).

drug testing and promotional obligations, throughout the entire year.[201]

ATP players, therefore, are not like concert musicians who "perform in only a few programs" each year and may "work just 140 to 150 hours a year" for their employer.[202] Instead, they make "commitment[s]" to the Tour beyond a single tournament and have a strong "expectation of continuous or future employment"[203] since they remain on the ATP Rankings year-after-year.[204] Indeed, although players sign annual agreements with the ATP, they are subject to the Tour's regulations indefinitely unless they submit a resignation form.[205] The Board has found that this factor "weighs in favor of contractor status where workers are used on 'project basis rather than for an indefinite time period,' may decline future work, and routinely work for other companies."[206] But that characterization doesn't describe ATP players.[207] The Tour's

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201. *See Anti-Doping Whereabouts FAQ*, INT'L TENNIS INTEGRITY AGENCY, https://www.itia.tennis/anti-doping/whereabouts/ [https://perma.cc/6UGB-ZVRC] (explaining how top 100 ranked players must provide whereabouts information for every day of the year in accordance with the ATP's anti-doping program so that players can be randomly tested with no-advance notice); *ATP Rulebook*, *supra* note 1, at 16 ("All players competing in the main draw of any ATP Tour tournament will be required, if asked, to participate in ATP sponsored activities. Each player is obligated to provide up to two [ ] hours each week as arranged by ATP staff, for a maximum of up to four [ ] separate activities.").

202. *Cf.* Lancaster Symphony Orchestra v. NLRB, 822 F.3d 563, 568 (D.C. Cir. 2016) (finding that this factor suggested independent contractor status but still ultimately concluding that the musicians were statutory employees).

203. *Cf.* Atlanta Opera, Inc., 372 NLRB No. 95, at 22 (2023) (finding that this factor favored independent contractor status where the stylists had no ongoing obligations to work and lacked any expectation of continual employment beyond each individual production).

204. *See, e.g.*, *ATP Rulebook*, *supra* note 1, at 138 ("For each ATP Tour Masters 1000 tournament, players with a PIF ATP Rankings position that qualifies them as a direct acceptance or alternate, shall be automatically entered by ATP."). ATP Ranking operates on a rolling 52-week basis, where points earned in previous years are not removed or replaced until the same week of the following year. *Id.* at 252–57.

205. *See* Int'l Tennis Integrity Agency, Player Retirement Form, at 1 (on file with the *Columbia Journal of Law & Social Problems*) ("In accordance with the ATP/ITF/WTA Rules . . . by signing this retirement form, I understand that I will be removed from the ATP/ITF/WTA rankings . . . as of the next ranking produced after the date of my official retirement as specified below. I also understand that, in the event that I return to competition following retirement, I must provide six months' notice of doing so . . . and that I will again be subject to the [anti-doping program] from the start of that six month period, and thereafter must comply with the [program], including making myself available for Testing (including, if requested, by providing whereabouts information) during that six month period.").

206. Atlanta Opera, Inc., 372 NLRB at 17 (quoting Porter Drywall, Inc., 362 NLRB 7, 10 (2015)).

207. *Cf.* Velox Express, Inc., 368 NLRB No. 61, at 27 (2019) ("In some more typical independent contractor situations, the relationship between the contractor and client ends when the discrete task is performed.").

restrictive and long-term employment relationship with its players prevents them from pursuing other entrepreneurial opportunities and, therefore, tilts this factor towards employee status.

7. *Method of Payment*

The ATP's payment of players is more nuanced, though it ultimately appears to favor employee status.[208] Generally, "being paid by the hour instead of the job weighs in favor of finding that an individual is an employee."[209] Although players are primarily paid based on individual tournament performance via prize money awards from the ATP, which favors independent contractor status, the ATP also provides insurance, year-end bonuses, a financial security program, a pension, and other significant membership benefits,[210] all of which point toward employee status.[211] These benefits are not based on individual match results, but are instead meant to "recognize" the "contributions" of the ATP's "loyal and dedicated [player] Members" to "serving [the] ATP's fans and stakeholders and to the overall well-being, goodwill and success of the ATP Tour."[212]

Since the Tour earns more money from ticket sales and broadcast revenue when its top ranked players participate in tournaments,[213] it has a substantial "motivation to control or direct

208. RESTATEMENT (SECOND) OF AGENCY § 220(2)(g) (A.L.I. 1958) (noting that "the method of payment, whether by the time or by the job" is a factor to be considered when determining whether one is an independent contractor or a servant).

209. Atomic Fire Prot., LLC, 373 NLRB No. 109, at 13 (2024); *see also* RESTATEMENT (SECOND) OF AGENCY § 220(2) cmt. j ("[P]ayment . . . made by the job and not by the hour" suggests independent contractor status).

210. *See ATP Rulebook*, *supra* note 1, at 26 ("These benefits . . . include retirement programs, bonus programs, financial security plans . . . the privilege to actively participate, including voting, in ATP governance, and such other benefits as may be determined by ATP.").

211. *Cf.* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258–59 (1968) (describing an employer providing workers with a "vacation plan and group insurance and pension fund" as a "decisive factor[ ]" in finding employee status).

212. *ATP Rulebook*, *supra* note 1, at 26. ATP pension and bonus benefits are based on accrued service and continual participation on the Tour, *id.*, indicating remuneration for an employer-employee relationship. Benefits may be withheld if a player is not in "good standing" with the Tour, or if they contract with an unapproved sponsor or exhibition event. *Id.*

213. *See, e.g.*, Drew Lerner, *Australian Open Men's Final Sets Nine-Year Viewership High on ESPN*, AWFUL ANNOUNCING (Feb. 6, 2026), https://awfulannouncing.com/tennis/australian-open-final-sets-nine-year-viewership-high-espn.html [https://perma.cc/Z4TY-EGM7] (explaining that the 2026 Australian Open Men's Final between "the two biggest stars in men's tennis secured a nine-year [viewership] record for ESPN"); Eric Fisher, *Australian Open Attendance Boom Fuels Ambitions, Fan Frustrations*, FRONT OFFICE

the manner and means" of the players' work.[214] Moreover, prize money compensation is fixed by the ATP and players have no ability "to negotiate their compensation" or "work for anyone else during the hours they perform" on the Tour.[215] And the ATP itself processes and distributes tournament prize money, even allowing players to opt-into the automatic withholding of taxes and deduction of relevant expenses at certain events.[216]

On balance, therefore, this factor likely weighs in favor of employee status, as the ATP's commercial interest in player performance and its bonus, benefit, and pension structure rely on a continuing employment relationship that disincentivizes players pursuing external entrepreneurial opportunities.

8. *Work as Part of the Regular Business of the Employer*

The nature of the ATP's business also weighs in favor of finding that players are employees of the Tour.[217] When an individual's work "is a part of the regular business of the employer," they are more likely to qualify as employees.[218] The NLRB has repeatedly stated that "this factor will favor employee status where the disputed individuals perform functions that are an essential part of the employer's business."[219] As clearly articulated in their

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SPORTS (Feb. 1, 2026), https://frontofficesports.com/australian-open-attendance-boom-fuels-ambitions-fan-frustrations/ [https://perma.cc/9R75-4399] (noting that Carlos Alcaraz's victory over Novak Djokovic in the 2026 Australian Open Final pushed total attendance for the tournament to 1.37 million people, a 12% increase over the previous record).

214. *Cf.* SuperShuttle DFW, Inc., 367 NLRB No. 75, at 19 (2019) (finding that "the lack of any relationship between the company's compensation" and a worker's performance supported independent contractor status).

215. *Cf.* Velox Express, Inc., 368 NLRB No. 61, at 27 (2019) ("Despite the fact that Velox drivers are nominally paid for by the job, the reality of their situation favors employee status.").

216. *See. e.g.*, Ass'n Tennis Pros., Prize Money Receipt: Cincinnati Masters 1000, at 1 (Aug. 21, 2025) (on file with the *Columbia Journal of Law & Social Problems*) (showing state and federal tax being automatically withheld from a player's prize money award); *cf.* Atomic Fire Prot., LLC, 373 NLRB No. 109, at 13 (2024) ("[T]he failure to deduct taxes or benefits from employee checks generally weighs in favor of a finding of independent contractor status."). *But see* Atlanta Opera, Inc., 372 NLRB No. 95, at 22 (2023) (finding "that the method of payment factor weighed in favor of employee status . . . even though the employer did not deduct payroll taxes or provide fringe benefits." (citing Lancaster Symphony Orchestra, 373 NLRB 1761, 1765–66, 1769 (2011))).

217. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(h) (A.L.I. 1958) ("[W]hether or not the work is a part of the regular business of the employer.").

218. *Id.* at § 220(2) cmt. h ("[T]he fact that the work is part of the regular business of the employer" suggests an employer-employee relationship).

219. Minn. Timberwolves Basketball, LP, 365 NLRB 1214, 1224 (2017) (citations omitted); *see also, e.g.*, Atomic Fire Prot., LLC, 373 NLRB at 13 ("[The workers] were

mission statement, the "ATP is the global governing body of men's professional tennis . . . entertain[ing] a billion fans and showcas[ing] the game's greatest players on its greatest stages."[220] It stages hundreds of tournaments across the globe,[221] promoting its players as members of the ATP Tour and commercially broadcasting their matches.[222] Employing players to compete on the Tour, therefore, is not a side-component of the ATP's business—it is the Tour's essential enterprise.[223]

Courts and the Board have regularly held that such reliance on workers to "carry out [a business's] purpose" is indicative of an employer-employee relationship.[224] In *Lancaster Symphony Orchestra*, the D.C. Circuit and NLRB found that because the Orchestra was "in the business of providing live music in its region"[225] and "the musicians 'are in the business of performing music . . . their work is part of the employer's regular business.'"[226] In *SuperShuttle*, the Board held that because "[the employer] is clearly involved in the business of transporting customers, and its revenue comes from providing that service," the work of SuperShuttle's van drivers was part of its regular business.[227] And in *Atlanta Opera*, the NLRB found that the work of makeup artists, wig artists, and hairstylists was "central" to the Opera's "regular business" of staging opera performances.[228] Like those musicians,

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performing the essential work of Respondent's business . . . a factor weighing heavily in favor of finding that they were employees.") (citing Porter Drywall, Inc., 362 NLRB 7, 11 (2015)).

220. *About the ATP Tour*, ASS'N TENNIS PROS., https://www.atptour.com/en/corporate/about [https://perma.cc/X5A4-6ZLZ] (last visited Apr. 10, 2026).

221. *See id.* ("ATP Tour is an official international circuit, which in 2025 consists of 55 tennis tournaments for male professional tennis players, played across 28 countries. ATP Challenger Tour is an official international circuit, which in 2025 consists of more than 200 tournaments held in at least 50 countries.").

222. *See* Ass'n Tennis Pros., 2026 ATP Media Guide 7 (on file with *Columbia Journal of Law and Social Problems*) ("[T]he ATP Tour helps make players more accessible to media, sponsors, and fans. [Its] broadcasts extend their reach to more than 200 countries.").

223. *Cf.* FedEx Home Delivery v. NLRB (FedEx I), 563 F.3d 492, 502 (D.C. Cir. 2009) (holding that, although "it is not determinative in the face of more compelling countervailing factors," "the essential nature of a worker's role is a legitimate consideration" pointing to employee status).

224. *See, e.g.*, Pa. Interscholastic Athletic Ass'n, Inc. v. NLRB, 926 F.3d 837, 842 (D.C. Cir. 2019).

225. Lancaster Symphony Orchestra, 357 NLRB 1761, 1765 (2011).

226. Lancaster Symphony Orchestra, 822 F.3d 563, 568 (D.C. Cir. 2016).

227. SuperShuttle DFW, Inc., 367 NLRB No. 75, at 20 (2019).

228. Atlanta Opera, Inc., 372 NLRB No. 95, at 23 (2023) ("The Employer's regular business is to stage operas, and stylists perform a function—providing makeup, hair, and wig treatments to onstage performers—that is integral to that endeavor. . . . Accordingly, we find that this factor weighs in favor of employee status.").

drivers, and stylists, ATP players "perform a function . . . that is integral" to the Tour's "core business" of staging professional tennis tournaments—competing in professional tennis matches.[229] This factor, therefore, clearly weighs in favor of employee status.

9. *Intent of the Parties*

The parties' understanding of their relationship is more complicated, likely making this factor inconclusive.[230] Generally, written documentation that identifies workers as independent contractors strongly suggests that the parties do not intend to create an employer-employee relationship.[231] In analyzing this factor, courts and the Board also consider whether an employer provides benefits or insurance, automatically withholds taxes, or allows workers to reject work or negotiate for additional compensation.[232] While the Tour informally treats players as independent contractors, there is evidence that points in both directions.

Although ATP players are required to sign an annual agreement to participate on the Tour,[233] that document does "not

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229. *Id.* at 22, 23.

230. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(i) (A.L.I. 1958) ("[W]hether or not the parties believe they are creating the relation of [employer] and [employee]").

231. *See* SuperShuttle DFW, Inc., 367 NLRB No. 75, at 20 (2019) (finding that a franchisee agreement "unequivocally" stating that a worker is "not an employee" left "little doubt as to the intention of the parties to create an independent-contractor relationship").

232. *See* Crew One Prods., Inc. v. NLRB, 811 F.3d 1305, 1314 (11th Cir. 2016) ("The lack of employee benefits is evidence of the intent of the parties to form an independent contractor relationship.") (citing FedEx Home Delivery v. NLRB (FedEx I), 563 F.3d 492, 498 n.4 (D.C. Cir. 2009)); Pa. Interscholastic Athletic Ass'n, Inc. v. NLRB, 926 F.3d 837, 842 (D.C. Cir. 2019) ("[T]he fact that PIAA provides the officials with certain types of insurance . . . favors employee status."); Lancaster Symphony Orchestra v. NLRB, 822 F.3d, 563, 568 (D.C. Cir. 2016) ("[T]he Orchestra will not withhold taxes, suggesting that both parties "believe" that the Orchestra's musicians are independent contractors."); Porter Drywall, Inc., 362 NLRB 7, 11 (2015) (finding that the ability to "turn down jobs or seek to negotiate for additional compensation to make the job profitable" supports "finding that the parties believe they were creating an independent contractor relationship").

233. *See* Ass'n Tennis Pros., 2025 Player Consent & Agreement, *supra* note 62 (explaining that players are "bound by all provisions" of the ATP Rules but does not delineate the nature of any employment relationship). Despite no explicit characterization, players are widely inferred to be independent contractors. *See, e.g.*, Rachel Reed, *Is an Antitrust Suit Against Top Tennis Organizations a Grand Slam—or an Unforced Error?*, HARV. L. TODAY (June 18, 2025), https://hls.harvard.edu/today/is-an-antitrust-suit-against-top-tennis-organizations-a-grand-slam-or-an-unforced-error/ [https://perma.cc/GKN9-JNP7] ("[T]ennis players are independent contractors . . . These are the rules, and they agree to play by them . . . [T]hey signed our waiver and consent forms." (quoting Peter Carfagna, former Chief Legal Officer for Wimbledon)).

specify [players'] relationship to the" ATP.[234] And any inference that could otherwise be drawn from the agreement's language is undercut by the fact that these are mandatory contracts of adhesion that players lack an "opportunity to negotiate over."[235] The Tour also provides substantial benefits to its players, including medical insurance, year-end bonuses, a pension plan, participation in governance decisions, and ranking protection when injured.[236] While the ATP requires players to provide W-9 forms, this "does not establish [that players] knew or should have known they were entering into putative contractor relationships"[237] and is offset by the fact that the Tour offers opt-in withholding of taxes at some tournaments.[238] Additionally, players' recent organizing efforts, including formation of the Professional Tennis Players Association, suggest that players increasingly view their relationship with the ATP as one of employment.[239] Overall, therefore, there is not a strong basis to infer a clear "shared understanding between the parties,"[240] suggesting this factor is inconclusive.

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234. *Cf.* Atlanta Opera, Inc., 372 NLRB No. 95, at 23 (2023) (explaining that this factor was inconclusive because the stylists entered into informal oral agreements that did not specify their employment relationship to the Opera and there was no other "basis for any shared understanding between the parties").

235. *Cf.* FedEx Home Delivery (FedEx II), 361 NLRB 610, 623 (2014) (noting that this factor was inconclusive even where FedEx required drivers to sign an independent contractor agreement because drivers could not negotiate over their employment status and voiced an interest in union representation); *see also Pa. Interscholastic Athletic Ass'n, Inc.*, 926 F.3d at 842 ("Although PIAA unilaterally created these documents, which somewhat undercuts their value because the officials could not negotiate the terms, the officials still agreed to adhere to them." (citation omitted)).

236. *See supra* Part II.A.7 (discussing the benefits offered to ATP player members); *ATP Rulebook*, *supra* note 1, at 26 (discussing the benefits offered to ATP player members); *cf.* SuperShuttle DFW, Inc., 367 NLRB at 20 ("SuperShuttle does not provide franchisees with any benefits, sick leave, vacation time, or holiday pay," suggesting independent contractor status).

237. *Cf.* Atlanta Opera, Inc., 372 NLRB, at 23 (finding this factor inconclusive even where the Opera required stylists to provide W-9 forms).

238. *See* Ass'n Tennis Pros., Prize Money Receipt: Cincinnati Masters 1000, *supra* note 216 (showing automatic tax withholding from prize money award); Ass'n Tennis Pros., Prize Money Receipt: Brisbane ATP 250, at 1 (Jan. 13, 2026) (on file with the *Columbia Journal of Law & Social Problems*) (showing automatic tax withholding from prize money award).

239. *See Interview with PTPA CEO Ahmad Nassar (Part 1)*, *supra* note 56 ("The strength of the PTPA comes from men and the women banding together and advocating for their organization to be empowered and demanding change within the structure of tennis right now. . . . We have made significant outreach to both the ATP and the WTA, but we're not on the same side of the table. They really predominantly represent the tournaments and the tours and their commercial partners. We represent the players.").

240. Atlanta Opera, Inc., 372 NLRB No. 95, at 23 (2023).

10. *Whether the Principal Is in Business*

The ATP is a global corporation that is "in business" to commercially promote professional tennis, tilting this factor in favor of employee status.[241] The NLRB usually analyzes this element by assessing whether an employer and the disputed individuals are in the same business.[242] And it has noted the close relationship between this factor and those considering whether an individual is engaged in a "distinct occupation" and working "as part of the employer's regular business."[243] Some courts, however, merely assess whether the employer is "in business at all."[244] But resolving that conflict is unnecessary here, as under either formulation this factor weighs in favor of employee status.

The ATP is obviously "in business" and, as analyzed above, it is engaged in the "same business" as its players in providing an entertainment experience for fans.[245] The Tour's "core business" is presenting professional tennis tournaments, and players competing in professional matches therefore constitutes a "key element" of that presentation.[246] Since ATP players play "an essential role" in facilitating the experience that the ATP provides to audiences, this factor supports employee status.[247]

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241. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2)(j) (A.L.I. 1958) ("[W]hether the principal is or is not in business.").

242. Minn. Timberwolves Basketball, LP, 365 NLRB 1214, 1225 n.48 (2017); *see, e.g.*, FedEx Home Delivery (FedEx II), 361 NLRB 610, 624 (2014) ("Because FedEx is engaged in the same business as [its] drivers . . . this factor weighs in favor of employee status."); Porter Drywall Inc., 362 NLRB 7, 11 ("[T]he Employer . . . is engaged in the same business as [its workers], and this factor weighs in favor of employee status.").

243. *E.g.*, SuperShuttle DFW, Inc., 367 NLRB No. 75, at 20 (2019) (assessing these three factors together and concluding that they weigh in favor of employee status); Velox Express, Inc., 368 NLRB No. 61, at 27–28 (2019) (explaining how factors two, eight, and ten "morph into the same analysis" and finding that workers being in the same business of the employer "favors employee status"); *see also supra* Part II.A.2 (analyzing the "distinct occupation" factor); *supra* Part II.A.8 (analyzing the "employer's regular business" factor).

244. *See, e.g.*, Minn. Timberwolves Basketball, LP, 365 NLRB at 1225 n.48 (2017) (internal quotation marks omitted); *see also* Cmty. for Creative Non-Violence v. Reid*,* 490 U.S. 730, 753 (1989) (treating the fact that a putative employer was "not a business at all" as relevant in finding that an individual who rendered services to that entity was an independent contractor); Pa. Interscholastic Athletic Ass'n, Inc. v. NLRB, 926 F.3d 837, 842 (D.C. Cir. 2019) ("[The employer] is in business (factor 10), and so is more likely to hire an employee than a non-market participant.").

245. Minn, Timberwolves Basketball, LP, 365 NLRB at 1225; *see also supra* Part II.A.8 (explaining that ATP players' work is integral to the ATP's regular business).

246. Atlanta Opera, Inc. 372 NLRB No. 95, at 22–23 (2023).

247. *Id.* at 23.

B. COMMON LAW WEIGHING AND ASSESSING

Having applied the common law factors to "all of the incidents of the [employment] relationship"[248] between the ATP and its players through the *SuperShuttle* lens, it is apparent that the Tour significantly constrains players' entrepreneurial activity.[249] Five of the traditional factors—employer control, length of employment, method of payment, involvement in the employer's regular business, and the employer being in business—weigh in favor of employee status. These factors, moreover, substantially restrict the ability of players to freely pursue external economic opportunities. Players can only seek endorsements and participate in non-ATP events that comply with the Tour's guidelines.[250] While they have some discretion over tournament selection, they have no further control over their specific hours or work requirements once selected for an event.[251] Their compensation is nonnegotiable and strictly limited by the ATP's schedule and location restrictions.[252] Players are financially incentivized, and often required, to engage in a continuous employment relationship with the ATP over many years that prevents them from

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248. NLRB v. United Ins. Co., 390 U.S. 254, 258 (1968).

249. *See supra* Part II.A.

250. *See supra* Part I.B (detailing the ATP's restrictions on players' ability to play exhibition tournaments and contract into sponsor deals); *cf.* Lancaster Symphony Orchestra v. NLRB, 822 F.3d 563, 569–70 (D.C. Cir. 2016) (finding little entrepreneurial opportunity for concert musicians even where they were "free to decline performances with the Orchestra and to perform with other symphonies in the area" because those opportunities were incumbent on "accepting jobs with other employers").

251. *See supra* Part II.A.1 (explaining how the ATP unilaterally sets the daily match schedule at all tournaments and requires players to participate in ATP ambassador work at request); *cf.* Minn. Timberwolves Basketball, LP, 365 NLRB 1214, 1226–27 (2017) (finding that although workers controlled their availability to work certain games, they retained little entrepreneurial opportunity because game times are set by the NBA and their employer dictates the exact shifts they must work and how long they must stay at the jobsite).

252. *See ATP Rulebook*, *supra* note 1, at 42–49 (stating that ATP tournaments must pay the specific prize money as established and promulgated by the Tour); *see also* Second Amended Complaint at 56–57, 140 Pospisil v. ATP Tour, No. 1:25-cv-02207 (S.D.N.Y. Sep. 26, 2025) ("The ATP Rulebook . . . require[s] every player to assign his or her [name, image, and likeness] rights to the [ATP Tour] in media, marketing materials, and advertisements to promote the Tours." (citing *ATP Rulebook*, *supra* note 1 at 15–16)); *cf.* Minn. Timberwolves Basketball, LP, 365 NLRB at 1226 (concluding that workers lacked entrepreneurial opportunity where they had no "propriety interest in their work" as their product "bec[ame] NBA or WNBA property" and they could not "retain a copy of the footage" to "sell or license" to another entity).

contracting with other employers.[253] And if a player does not comply with the Tour's directives, they may be subject to discipline.[254]

The factors favoring independent contractor status—that players are engaged in a distinct occupation and that their profession requires a high degree of skill—do not outweigh the many factors supporting the finding that ATP players are statutory employees. While the determination of employment classification "requires more than a quantitative analysis based on adding up the factors on each side,"[255] the weight of the common law elements analyzed above evinces no meaningful freedom to pursue economic gain. Although players are engaged in a distinct occupation requiring substantial training, they depend primarily on ATP Tour success to monetize their unique tennis ability.[256] When the ATP regulates who may enter tournaments, sets ranking point rewards, the schedule for tournaments and matches, and who players may contract with, it inherently impacts players' entrepreneurial activity. Any impediment to a player's ability to increase their standing on the ATP Tour or negotiate other business interests directly impacts their bargaining power and ability to market themselves. In effect, players rely on the ATP to seek entrepreneurial opportunity, making the totality of these factors "decisive" in concluding that ATP players are statutory employees and not independent contractors.[257]

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253. *See supra* Parts I.B, II.A.6 (detailing the lengthy employment relationship between players and the ATP and the coercive pressure to play ATP tournaments to improve their ranking rather than seek other entrepreneurial opportunities).

254. *See supra* Part II.A.3 (explaining how the ATP disciplines players for failing to comply with its rules by issuing fines, suspensions, and ranking penalties); *cf.* NLRB v. O'Hare-Midway Limousine Serv., 924 F.2d 692, 695 (7th Cir. 1991) (finding a company's "right to fine or reprimand the drivers for failure to comply with company procedures" as support for concluding that its drivers were employees).

255. Atlanta Opera, Inc., 372 NLRB No. 95, at 24 (2023) (quoting Austin Tupler Trucking, Inc., 261 NLRB 183, 184 (1982)).

256. *See supra* Part I.B (explaining that players' ability to earn outside endorsements is predicated on their ATP ranking, requiring them to compete for years on the ATP Tour before engaging in outside entrepreneurial activity).

257. *Cf.* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968) (determining the "decisive" common law factors based on the particular factual context of the employment relationship).

III. LOOKING TO THE FUTURE

Having established that ATP players are likely statutory employees under the NLRA, this Part argues that players can formalize their classification through unionization. The Board generally considers classification status during a representation petition, where a defined unit of workers selects a bargaining representative and the employer refutes the putative attempt at organization by asserting that its workers are independent contractors, rather than employees.[258] Part III.A, accordingly, outlines the process of initiating a representation challenge and proposes possible relevant bargaining units. Part III.B analyzes the potential landscape of professional tennis following proper classification and unionization, including the subjects players could bargain over. Part III.C then considers the pragmatic challenges of player organization and articulates an avenue for collective action outside of unionization.

A. PETITIONING FOR REPRESENTATION

A typical representation case begins with a union filing a petition with an employer and the NLRB's relevant Regional Office.[259] In its petition, the union must describe the discrete unit of unrepresented workers that it seeks to represent and demonstrate support from at least 30% of that unit.[260] An initial hurdle ATP players therefore face is defining the bargaining unit.[261]

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258. *See, e.g.*, Minn. Timberwolves Basketball, LP, 365 NLRB 1214, 1214 (2017) (considering the classification status of video-board operators after a union filed a representation petition and their employer contended the workers were independent contractors excluded from NLRA coverage).

259. *Guidance: Steps for Filing a Petition*, NAT'L LAB. RELS. BD. https://www.nlrb.gov/guidance/key-reference-materials/steps-for-filing-a-petition [https://perma.cc/R2HA-ZU3Z] (last visited Apr. 10, 2026).

260. Nat'l Lab. Rels. Bd., Form 502 Representative Certification Petition (RC), at 1, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3040/Form%20NLRB-502%20(RC)%20-%20RC%20Petition.pdf [https://perma.cc/L9YJ-J6JJ].

261. One additional threshold issue is whether the bargaining unit can contain foreign players and whether the NLRA's protections apply to the ATP's labor practices overseas. The Board has previously asserted jurisdiction to recognize unions in mixed-territory workplaces. *See* Detroit & Can. Tunnel Corp., 83 NLRB. 727, 731–32 (1949) (asserting jurisdiction to conduct a representation election where half of the employees' work was performed in the United States); *but see* Pa. Greyhound Lines, 13 NLRB 28, 31–32 (1939) (declining to assert jurisdiction when most of the employees' work was performed abroad). Although the NLRA applies to workers irrespective of citizenship status, the question of its

Players should organize into multiple bargaining units based on ranking or tournament participation thresholds. Similar performance industry unions adopt analogous criteria, such as the Screen Actors Guild, where membership is contingent on working for a certain number of days in a position that is covered by a SAG collective bargaining agreement.[262] And the NLRB has held that employees in distinct, "readily identifiable group[s] who share a community of interest" may organize into separate units to bargain with the same employer.[263]

Since players at different rankings participate in tournaments with varying levels of earnings opportunities and employer control, separate bargaining units allow the distinct interests of each player class to be adequately represented.[264] A "Tour Player" bargaining unit, for example, could consist of any player who has been a direct entry into the main draw of an ATP Masters 1000 or

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extraterritorial application for unfair labor practices is the subject of an existing circuit split. *Contrast* Dowd v. Int'l Longshoremen's Ass'n, 975 F.2d 779, 791 (11th. Cir. 1992) (holding the NLRA applied to an American labor union which engaged in unfair labor practices in Japan) *with* Asplundh Tree Expert Co. v. NLRB, 365 F.3d 168, 180 (3d Cir. 2004) (rejecting extraterritorial application of the NLRA to two employees who held employment in the United States but were discharged while on a temporary work assignment in Canada). Resolving this issue is beyond the scope of this Note, but a suggested approach would have the Board assert jurisdiction via a sufficient-contacts test, identifying that the ATP has an American headquarters in Florida and annually operates four of its mandatory events, as well as dozens of smaller ATP and ATP Challenger Tour events, within the United States. Since players therefore spend at least ten weeks per year working in the United States (more than any other individual country), the NLRB could conclude that the ATP is engaged in sufficient American business to apply the NLRA to its foreign activity. For more information on this topic, *see* Todd Keithley, Note, *Does the National Labor Relations Act Extend to Americans Who Are Temporarily Abroad?*, 105 COLUM. L. REV. 2168–69 (2005) (explaining the circuit split and proposing a two-part effects test and comity analysis to determine whether jurisdiction is proper).

262. *See Steps to Join*, SCREEN ACTORS GUILD—AMERICAN FED'N OF TELEVISION AND RADIO ARTISTS, https://www.sagaftra.org/membership-benefits/steps-join [https://perma.cc/A2WH-DLX4] ("SAG-AFTRA membership is available to those who . . . have completed three [ ] days of work as a background actor under a SAG-AFTRA [ ] collective bargaining agreement . . . or one [ ] day of employment in a principal or speaking role (actor/performer), or as a Recording Artist in a SAG-AFTRA [ ] covered production.").

263. Macy's Inc., 361 NLRB 12, 12 (2014); *see also* Am. Steel Constr., 372 NLRB No. 23, at 4 (2022) ("As various configurations of employees might share a community of interest sufficient for collective bargaining, '[i]t is elementary that more than one unit may be appropriate among the employees of a particular enterprise.'" (alteration in original) (quoting Haag Drug Co., Inc., 169 NLRB 877, 877 (1968))).

264. *Cf.* Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 610 (1991) ("[E]mployees may seek to organize 'a unit' that is 'appropriate'—not necessarily the single most appropriate unit . . . Thus, one union might seek to represent all of the employees in a particular plant, those in a particular craft, or perhaps just a portion thereof." (emphasis omitted) (citations omitted)).

Grand Slam event, roughly according to a top 100 ATP ranking.[265] These players face the most stringent restrictions on their working conditions, are automatically entered into and contractually obligated to compete in those tournaments, and are most concerned about the schedule of events, restraints on endorsements, and revenue sharing distributions at the Tour's premier events.[266] A "Challenger Player" bargaining unit, meanwhile, could consist of any player who has been a direct entry into the main draw of an ATP Challenger Tour event, or who has participated in a set number of those events, roughly equating to an ATP ranking of 500.[267] While player participation in these events is not mandatory, these players are still limited in their ability to compete in exhibitions for additional income and face unique financial instability from the reduced prize money at these events.[268] These players, accordingly, have little interest in bargaining over the working conditions at ATP Tour events, and instead are uniquely concerned with improving the prize money, facility conditions, and burden of incidental expenses at ATP Challenger Tour tournaments.[269] Defining these bargaining units narrowly also advantages players by allowing them to more easily show support from 30% of the relevant unit.

Having defined a bargaining unit and met the threshold showing of interest, players should file a representation petition to have the NLRB conduct an election and select a collective

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265. *See* Ass'n Tennis Pros., ATP Tour Tournament Cut-Offs 2025 (on file with the *Columbia Journal of Law & Social Problems*) (listing the lowest-ranked main draw acceptance for each ATP Tour event in 2025). The average cut-off for ATP Masters 1000 events was an ATP ranking of 104, while the average cut-off for Grand Slam events was an ATP ranking of 99. *See id.*

266. *See supra* Part II.A.1, notes 137–140 and accompanying text (detailing the restrictions on top ranked players and explaining that those who qualify for direct entry into ATP Masters 1000 events and the Grand Slams must play if healthy or face ranking and financial penalties).

267. *See* Ass'n Tennis Pros., ATP Challenger Tour Tournament Cut-Offs 2025 (on file with the *Columbia Journal of Law & Social Problems*) (listing the lowest-ranked main draw acceptance for each ATP Challenger Tour event in 2025). The average cut-off for ATP Challenger events was an ATP ranking of 504. *See id.*

268. *See supra* notes 8–9, 12, 75 and accompanying text (explaining that lower ranked players must still satisfy certain criteria and receive a release from the ATP before participating in exhibition events and detailing the substantially reduced prize money awards at ATP Challenger Tour tournaments).

269. *See, e.g.*, Telephone Interview with Mikael Torpegaard, *supra* note 85 (explaining that players competing on the ATP Challenger Tour face unique burdens from the expenses, lack of resources, and reduced prize money compared to those playing ATP Tour events).

bargaining representative to negotiate with the ATP.[270] The Board will investigate the petition,[271] at which point the Tour is likely to contest the players' ability to organize under the NLRA. The NLRB's relevant regional office would then hold a pre-election hearing and make the initial determination on whether players should be classified as statutory employees eligible for representation.[272] Either party may seek review of regional determinations to the Board where, as analyzed, the players are likely to show they are currently misclassified as independent contractors under the Act.[273]

B. ORGANIZATION IN ATP TENNIS

The ability for players to organize and engage in protected collective action is contingent on their recognition as employees under the NLRA.[274] Coverage under the Act, however, would not automatically ameliorate players' concerns about working conditions, although it would empower them to directly resolve their universal complaint: the lack of a voice.[275] As with any potential bargaining unit, players have divergent interests and will not always agree normatively on how to address Tour management decisions. But the problem is not merely that players disagree with how the Tour is being run; rather, it is the fact that

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270. *NLRB Representation Case-Procedures Fact Sheet*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/news-publications/publications/fact-sheets/nlrb-representation-case-procedures-fact-sheet [https://perma.cc/LF2G-LHNV] (last visited Apr. 10, 2026) ("Representation petitions are filed by employees, unions and employers seeking to have the NLRB conduct an election to determine if employees wish to be represented for purposes of collective bargaining with their employer.").

271. *Id.* ("The Board will investigate these petitions to determine if an election should be conducted and will direct an election, if appropriate.").

272. *Id.* ("In most instances, parties agree on the voting unit and other issues. If parties do not agree, the NLRB's regional office holds a pre-election hearing to determine whether an election should be conducted.").

273. *See supra* Part II.B (concluding that ATP players are likely employees under the *SuperShuttle* or *Atlanta Opera* standards).

274. *See* 29 U.S.C. § 157 (2018) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.").

275. *Contrast, e.g.*, Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (2018) (affirmatively establishing, among other things, the right of employees to a minimum wage, "time-and-a-half" overtime pay when employees work over forty hours a week, and prohibition of child labor) *with* 29 U.S.C. §§ 151–69 (establishing the right to engage in protected activity and collectively bargain for material work conditions of choice).

players lack representation to negotiate for the working conditions they actually want.[276]

Under the NLRA, employers have an obligation to bargain with its employees' exclusive bargaining representative in good faith until an impasse with respect to "wages, hours, and other terms and conditions of employment."[277] Players could, accordingly, immediately force the ATP to come to the table on issues such as prize money, revenue sharing proportions, year-end bonuses, health insurance, and pension plans—topics they have already been lobbying for unsuccessfully—as these are all mandatory bargaining subjects.[278] While the ATP has slowly increased prize money and pension benefits after years of continual pressure, these concessions merely provide "players with the least amount necessary to avoid breaking the system . . . to keep [them] from going off and doing their own thing, [like] starting another tour."[279]

Players, for example, have regularly requested income support or an alternative base earnings system for those within a certain ranking threshold to help offset the costs associated with traveling and competing on the Tour.[280] As a condition that directly impacts

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276. *See* Peter Bodo, *Why Tennis Trading Cards Could Be a Big Deal: Checking in on the PTPA (Part 2 of 3)*, TENNIS.COM (Dec. 19, 2023) [hereinafter *Interview with PTPA CEO Ahmad Nassar (Part 2)*], https://www.tennis.com/news/articles/why-tennis-trading-cards-could-be-a-big-deal-checking-in-on-the-ptpa-part-2-of-3 [https://perma.cc/8B4Q-8H77] ("There's this mythical notion that the players are already represented by the [T]our because there's a Player Council and an ATP Player Board.").

277. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (2018). Mandatory subjects for bargaining generally include work schedules, discipline and discharge procedures, bonuses, legal services, incentive pay, pensions, health insurance, leave of absence, work rules, and meals provided by the employer. *See Mandatory Subjects of Bargaining*, INT'L UNION, SEC., POLICE & FIRE PROS. OF AM., https://spfpa.org/mandatory-subjects-of-bargaining [https://perma.cc/P36V-X8VZ] (last visited Apr. 10, 2026).

278. *See* 29 U.S.C. § 157 ("Employees shall have the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"); *see also* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (explaining that the duty to bargain without yielding is limited to those subjects within [NLRA] Section 8(d), while other matters are discretionary).

279. *Interview with PTPA CEO Ahmad Nassar (Part 2), supra* note 226; *see also, e.g.*, Charlie Eccleshare, *'Really Terrible' Tennis Balls at Rotterdam Open Face More Criticism from Top Players*, N.Y. TIMES: THE ATHLETIC (Feb. 11, 2026), https://www.nytimes.com/athletic/7038183/2026/02/11/tennis-balls-player-complaints-rotterdam-open/ [https://perma.cc/W786-AX67] (describing years of player complaints about quality and disuniformity of tennis balls used on Tour due to "a link between the balls used and an increase in injuries on the tour").

280. *See* Maine, *supra* note 9 (explaining that players have requested "base salar[ies]" as a solution to the disparity between the significant expenses players incur compared to their meager prize money incomes).

wages, the ATP would be forced to negotiate over this term through collective bargaining.[281] But without a union, the Tour is free unilaterally to ignore this request, or implement it in ways that players don't want.[282] For its part, the ATP in 2024 announced its "Baseline" program, "a transformative financial security program[ ]" for players that "guarantees minimum income levels for the Top 250-ranked singles players each season."[283] Despite this billing, however, the Baseline program actually functions in part as a loan system. Rather than provide a salary, the program provides players with a cash-advance that the ATP recoups from players' prize money over the course of a season.[284] The Tour, moreover, even charges interest on outstanding amounts.[285] While the ATP touts Baseline as a "game-changer for the economics of a tennis player" and evidence that the Tour is helping players "build a sustainable career,"[286] it is really another coercive system designed to tether players to the ATP Tour and prevent them from seeking external income opportunities. It, additionally, exemplifies the kind of unilateral change in wage conditions prohibited by the NLRA.[287] While collective bargaining would not

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281. *See Wooster Div. of Borg-Warner Corp.*, 356 U.S. at 349 ("[Section 8(a)(5) and 8(d) of the NLRA] establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment.'" (alteration in original) (citation omitted)).

282. *See, e.g.*, Bob's Tire Co. v. NLRB, 980 F.3d 147, 150 (D.C. Cir. 2020) (explaining that the NLRA's duty to bargain extends only to a union representative of statutory employees).

283. *ATP Unveils 'Baseline', A Pioneering Financial Security Programme For Players*, ASS'N TENNIS PROS. (Aug. 22, 2023) https://www.atptour.com/en/news/baseline-financial-security-programme-august-2023 [https://perma.cc/MN83-BADA] ("In case a player's prize money earnings finishes below the guaranteed threshold, the ATP will step in to cover the shortfall. For the 2024 season, these levels are $300,000 (Top 100), $150,000 (101–175) and $75,000 (176–250). This assurance will empower players to plan their seasons with greater certainty, focus on their game and invest in their teams. This includes covering the expenses of coaches and personal physios, as well as travel.").

284. *See* Ass'n Tennis Pros., Baseline: Frequently Asked Questions, at 4 (on file with the *Columbia Journal of Law & Social Problems*) ("[T]he ATP will recoup prize money from Competitions throughout the 2025 season until the full amount is repaid.").

285. *See id.* ("If any outstanding financial amount remains at the end of the season, a player can perform Off-Court services [such as promotional appearances or other sponsored events] and use the income earned from providing such services to pay back the outstanding amount and any interest due on such amount.").

286. *See id.* at 1 ("The [Baseline] Programme is intended to improve competition, promote ATP members, both players, and indirectly, ATP sanctioned tournaments, and improve stability of ATP's membership."). Qualification for Baseline's "Minimum Guarantee" compensation also requires participation in at least 15 ATP Tour or ATP Challenger Tour events during a given year. *Id.* at 2.

287. *See Bargaining in Good Faith with Employees' Union Representative (Section 8(d) & 8(a)(5))*, NAT'L LAB. RELS. BD. [hereinafter *Bargaining in Good Faith*],

guarantee that players get the exact base salary, increased prize money, or pension benefits they desire, it would ensure they have at least *agreed* to those wages and negotiated for the work conditions that they actually want.

Another frequent demand of current players—echoing complaints from the 1980s—is a larger role in ATP governance decisions.[288] Proper classification would allow players to organize and effectively advocate on their own behalf through a bargaining representative, as well as challenge existing structures that purport to give players a voice.[289] The ATP Player Advisory Council, for example, claims to represent players in Tour governance but functionally exists as an employer-dominated labor organization that is arguably unlawful under the NLRA.[290] Composed of players elected by their peers, the Player Advisory Council is an internal body within the ATP that meets throughout the year to discuss conditions of work on the Tour and recommend changes to the ATP Board.[291] The Tour itself, however, "unilaterally select[s]" the Council's "size" and "structure,"

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https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/bargaining-in-good-faith-with-employees-union-representative [https://perma.cc/PB42-45Q6] (last visited Apr. 10, 2026) (explaining that Section 8(a)(5) of the NLRA makes it unlawful to "make unliteral changes in terms and conditions of employment during the term of a collective-bargaining agreement, unless the union has clearly and unmistakably waived its right to bargain or the change is too minor to require bargaining").

288. *See Interview with PTPA CEO Ahmad Nassar (Part 1)*, *supra* note 56 ("[P]layers are frustrated by . . . the lack of accountability across the tennis ecosystem, and the lack of a voice just for the players.").

289. *See* Matthew T. Bodie, *Labor Interests and Corporate Power*, 99 B.U. L. REV. 1123, 1127–28 ("The most critical role for unions remains serving as the collective bargaining representative for workers who have chosen union representation . . . [T]he [NLRA] requires employers to bargain with labor organizations when a majority of the workers in a particular bargaining unit have selected that representative . . . The NLRA envisions collective bargaining as the framework for labor-management relations and unions as the employees' agents within that framework.").

290. *See* National Labor Relations Act § 2(5), 29 U.S.C. § 152(5) (2018) ("The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."); *id.* § 8(a)(2), 29 U.S.C. § 158(a)(2) ("It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.").

291. *See ATP Announces Player Advisory Council for 2025*, ASS'N TENNIS PROS. (Jan. 9, 2025), https://www.atptour.com/en/news/2025-player-advisory-council [https://perma.cc/M22L-UH2X]. Player Members on the Council are elected to represent a specific rankings category: 1–50 singles, 51–100 singles, 1–25 doubles, 1–75 doubles, and an at-large position. *Id.* Players outside of these ranking positions cannot be elected to the Advisory Council, nor can they vote on their player representatives. *Id.*

including length of service, requirements on who may vote, and the qualifications for candidates.[292] It also determines when the Council meets and the ATP Board has no obligation to follow any recommendations put forward by the Council.[293] Following proper classification, therefore, players could readily allege that the Player Council is an unlawful representative committee whose creation and structure is wholly determined by management.[294] In such scenarios, the Board has remedial authority to order the disestablishment of such committees, which could prompt negotiation over a structural reorganization of the Tour.[295] Although the composition of an employer's board of directors is traditionally a permissive bargaining subject,[296] players could leverage an enhanced role in governance against concessions on other working conditions.

Players could, additionally, bargain over Tour rules, match schedules, discipline procedures, and fine schedules—all frequent topics of ire.[297] These subjects directly impact working conditions

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292. Electromation, Inc. v. NLRB, 35 F.3d 1148, 1169 (3d. Cir. 1992); *see* Telephone Interview with Sem Verbeek, Professional ATP Player since 2016 (Nov. 29, 2024) (notes on file with author). The composition of the Council depends on the region and ranking of elected players, as the Tour sets a limit of five players total coming from Europe. It fills those seats in a hierarchy of top ranked singles players first, followed by lower ranked singles players, then doubles players, then at large players. *See id.* In a recent Council election, a popular European ATP doubles player earned the most votes of any Council candidate but did not receive a spot on the Council because the five European slots had already been filled by singles players. *See id.*

293. *See, e.g.*, Second Amended Complaint at 26, Pospisil v. ATP Tour, No. 1:25-CV-02207 (S.D.N.Y. Sep. 26, 2025) ("Even when the ATP Board solicits the Player Advisory Council's input on certain matters, it ignores the players' concerns out of hand. Player Plaintiff Vasek Pospisil observed the ATP Board repeatedly refuse to engage with players when he served on the Council between 2018 and 2020. When Pospisil and his fellow Council members requested access to the Tour's audits, balance sheets, and other financial statements when they were asked to vote on prize money changes, the ATP Board denied their request.").

294. *Cf.* Electromation, Inc. v. NLRB, 35 F.3d 1148, 1170–71 (3d. Cir. 1992) (holding that any representative committee or group created by management and whose structure is determined by management is a statutory labor organization is per se dominated by management and unlawful under Section 8(a)(2) of the NLRA).

295. *Cf. id.* at 1171 (enforcing the NLRB's order to "disestablish" and "cease and desist from dominating, assisting, or otherwise supporting" an employer's internal committees).

296. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 459–60 (1958) (explaining that employees may not insist on, strike over, or make permissive subjects a deal-breaker during collective-bargaining negotiations).

297. *See* Peter Bodo, *What Novak Djokovic and the PTPA Believe They Can Do to Help Tennis Players (Part 3 of 3)*, TENNIS.COM (Dec. 20, 2023), https://www.tennis.com/news/articles/what-novak-djokovic-and-the-ptpa-believe-they-can-do-to-help-tennis-players-part-3-of-3 [https://perma.cc/MG5S-2FH4] (describing player complaints about player suspensions, fines, and injuries from constantly "having to play with different [tennis] balls on a near week-to-week basis"); *Interview with PTPA CEO Ahmad Nassar (Part 1)*, *supra*

and the Tour therefore has a duty to bargain in good faith over them and may not unilaterally impose new policies.[298] Players accordingly should insist on more freedom in playing exhibition tournaments, greater discretion in scheduling individual tournament matches, and reduced penalties for rule infractions. In professional football, for example, the NFLPA negotiated for reduced fines and the removal of suspensions as a consequence for using banned substances.[299] And unilateral changes, such as the ATP's 2024 "Doubles Trial" and "NextGen and Collegiate Accelerator" programs could be challenged and struck down as unfair labor practices unless bargained over.[300] The Doubles Trial removed an off-day, reduced the amount of time players could rest between points, and eliminated half of the entry slots in the doubles draw.[301] The accelerator programs, meanwhile, decreased the number of direct entry positions in ATP and ATP Challenger Tour tournaments.[302] Players adamantly oppose these programs because of their negative impact on earning potential, but cannot

note 56 (describing player complaints about late night match scheduling and the size of prize money awards); *see also* Ben Rothenberg, *'Like I'm Some Kind of Criminal': Tougher Fines in Tennis*, N. Y. TIMES (July 11, 2019), https://www.nytimes.com/2019/07/11/sports/tennis/fines-wimbledon-french-open.html [https://perma.cc/27VL-GY9M] (quoting professional players describing the Tour's financial penalties as "super unfair" and setting "horrible precedent" for the future).

298. *Bargaining in Good Faith*, *supra* note 287 ("[An employer] may not [m]ake changes in wages, hours, working conditions, or other mandatory subjects of bargaining before negotiating with the union to agreement or overall impasse.").

299. *Associated Press, NFL, NFLPA Agree to Modifications on Substances of Abuse, Performance-Enhancing Substances Policies*, NFL (Dec. 5, 2024), https://www.nfl.com/news/nfl-nflpa-agree-to-modifications-on-substances-of-abuse-performance-enhancing-substances-policies [https://perma.cc/CCL2-A5SD].

300. *See Bargaining in Good Faith*, *supra* note 287 (noting that it is an unfair labor practice for an employer to unilaterally change the terms and conditions of employment without first bargaining to a good faith impasse).

301. Press Release, Ass'n Tennis Pros., Innovative ATP Doubles Trial Kicks Off In Madrid (April 3, 2024), https://www.atptour.com/en/news/innovative-atp-doubles-trial-2024 [https://perma.cc/BVV9-ZZL5] ("The 32-team draw will feature up to 16 slots reserved for teams entering via their singles ranking . . . a simpler and sharper schedule [by compressing the event from seven days to five] . . . and fewer sit-downs to accelerate the pace of play.").

302. Together, these programs granted wildcard opportunities to the highest ranked professional players under the age of 21 and top ranked players in American college tennis at the expense of established professional players who would otherwise be able to enter directly based on their ranking. *See* Sam Jacot, *Next Gen Accelerator Pathway Expands, Benefitting Rising Stars*, ASS'N TENNIS PROS. (Feb. 7, 2025), https://www.atptour.com/en/news/next-gen-accelerator-pathway-expansion-february-2025 [https://perma.cc/PD23-P42H]; Press Release, Ass'n Tennis Pros., ATP & ITA Unite to Accelerate Professional Development for US Collegiate Players (Jan. 18, 2023), https://www.atptour.com/en/news/atp-ita-expand-accelerator-programme-january-2023 [https://perma.cc/AU8R-43ZY].

challenge their imposition unless classified as employees.[303] Collective bargaining would not prevent the Tour from creating these programs, but it would force the ATP to negotiate over their imposition at the risk of collective action and players could extract other concessions in exchange for these new programs, allowing them a voice in the governance of their livelihood.[304]

C. PRAGMATIC CONCERNS AND ALTERNATIVE AVENUES

The political nature of the NLRB suggests that petitioning for representation during a Republican administration may dampen the players' likelihood of success.[305] But as analyzed above, players have strong legal arguments that they are statutory employees under the more stringent *SuperShuttle* test, as well as the more favorable *Atlanta Opera* framework that remains good law.[306] The current composition of the Board, therefore, does not necessarily spell defeat if players immediately seek representation and challenge their classification status. Former Republican Board Member Kaplan, for example, agreed that the hairstylists in *Atlanta Opera* should be properly classified as employees under

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303. *See, e.g.*, Telephone Interview with Sem Verbeek, *supra* note 292 (explaining that doubles players were fiercely opposed to this format change, as it eliminated half of the entry slots available to doubles-exclusive players in the largest and most lucrative tournaments, substantially harming their earning potential); *see supra* note 89 and accompanying text (explaining that an employer only has a duty to bargain collectively with statutory employees under the NLRA and may take retaliatory action against unprotected independent contractors).

304. *See* Richard F. Vitarelli et al., *Uphill Battle for Employer Unilateral Changes as NLRB Returns to "Clear and Unmistakable Waiver" Standard*, JACKSONLEWIS (Dec. 13, 2024), https://www.jacksonlewis.com/insights/uphill-battle-employer-unilateral-changes-nlrb-returns-clear-and-unmistakable-waiver-standard [https://perma.cc/7RRW-4ALY] ("Under the [NLRA], employers have a duty to bargain in good faith with the union that represents its employees about mandatory subjects of bargaining . . . An employer's unilateral change to a mandatory subject of bargaining without first offering to bargain is a violation of the Act."). The NLRA, however, only obligates an employer to bargain collectively with a union representative, not reach an agreement or make concessions. *Employer/Union Rights and Obligations*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employer-union-rights-and-obligations [https://perma.cc/9N6D-XBJ4] (last visited Apr. 10, 2026). If, after "sufficient good faith efforts," no agreement can be reached, the employer may declare impasse and unilaterally implement the last offer presented to the union. *Id.*

305. *Contrast, e.g.*, SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019) (in which a Republican-dominated Board found that ride-share van operators were independent contractors), *with* Atlanta Opera, Inc., 372 NLRB No. 95 (2023) (in which a Democratic-dominated Board found that costume, makeup, and wig stylists were employees).

306. *See supra* Part II (analyzing the Section 220 common law factors through the *SuperShuttle* lens and determining that they suggest an employer-employee relationship between players and the ATP).

either test.[307] While there are factual distinctions between ATP players and those stylists, Member Kaplan's dissent indicates that a majority-Republican Board is open to finding that even high skilled, non-traditional workers, such as professional athletes, are statutory employees when their entrepreneurial opportunity is sufficiently constrained by an employer.[308]

Alternatively, players could engage in collective action without NLRA coverage under the antitrust labor exemption, so long as it is narrowly tailored to their terms of employment.[309] Although not binding on courts,[310] the Federal Trade Commission's January 2025 policy statement announced that the labor exemption from antitrust liability may apply to independent contractors who are engaged in concerted activity to improve labor conditions.[311] The First Circuit, in *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, previously reached a similar conclusion, holding that the labor exemption does not categorically exclude independent contractors from its protections.[312] There, the court concluded that because the workers at issue engaged in a group boycott seeking "higher wages

307. *See* Atlanta Opera, 372 NLRB No. 95, at 22 (2023) (Member Kaplan, dissenting in part and concurring in part) ("Applying *SuperShuttle* here, I find that the workers at issue in this case—makeup artists, wig artists, and hairstylists who work at The Atlanta Opera—are employees under Section 2(3) of the [NLRA] and not independent contractors. I imagine that my colleagues would also conclude that these workers are employees under the test set forth in *SuperShuttle*, which could decide the matter.").

308. *See id.*

309. *See FTC Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability*, FED. TRADE COMM'N (Jan. 14, 2025) [hereinafter *FTC Enforcement Policy*], https://www.ftc.gov/system/files/ftc_gov/pdf/p251201laborexemptionpolicystatement.pdf [https://perma.cc/TM5W-ZZBS].

310. *See* Alexander T. MacDonald, *Parting Shots: The FTC's Outgoing Leadership Expands Antitrust Exemptions for Labor Activity to Independent Contractors*, FEDERALIST SOC'Y (Jan. 17, 2025), https://fedsoc.org/commentary/fedsoc-blog/parting-shots-the-ftc-s-outgoing-leadership-expands-antitrust-exemptions-for-labor-activity-to-independent-contractors [https://perma.cc/S25H-VAVZ] ("The new guidance creates no legal rules; it binds neither private parties nor the FTC itself.").

311. *FTC Enforcement Policy*, *supra* note 309 at 11. The labor exemption's application turns on whether a case involves or grows out of a labor dispute, which is "broadly defin[ed] to include 'any controversy concerning terms or conditions of employment.' A dispute concerning 'the hours, wages, job security, and working conditions' of workers who provide labor services qualifies as 'concerning terms or conditions of employment.' In contrast, disputes concerning the price of commodities or other finished products are not protected." *Id.* (alteration in original) (quoting Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 709 (1982)).

312. F.4th 306, 314 (1st Cir. 2022) (reasoning that "by the express text of the Norris-LaGuardia Act, a labor dispute may exist 'regardless of whether or not the disputants stand in the proximate relation of employer and employee'" (quoting 19 U.S.C. § 113(c))).

and safer working conditions," it was "a core labor dispute [to which] the labor-dispute exemption applies."[313] Adopting this rationale, the FTC indicated in its policy statement it will not engage in antitrust enforcement against "workers who provide labor services and are engaged in protected labor activities that can be shielded by the labor exemption, even if formally classified (or misclassified) as independent contractors."[314] Much like the 1972 Roland Garros and 1973 Wimbledon boycotts, which brought the ITF to the negotiating table, a player-led boycott of an ATP Masters 1000 event could immediately kickstart a new era of player autonomy in professional tennis.[315] Although the Grand Slams remain marquee events, the Tour has a larger financial stake in its own ATP tournaments, making an event like Indian Wells, the most well-attended competition outside of the four Slams, an ideal target for an organized strike.[316]

The labor antitrust exemption, however, does not protect players from retaliatory employment action by the ATP, such as fines, ranking penalties, suspension, or expulsion.[317] And an isolated boycott would not create the same protected pathway to

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313. *Id.*

314. *See FTC Enforcement Policy*, *supra* note 309 at 11. The Supreme Court declined to review *Confederación Hípica*, and the decision remains good law. *See* Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc., 143 S. Ct. 631 (2023) (mem.) (denying petition for writ of certiorari). Meanwhile, though the FTC's policy statement was issued by the outgoing President Biden-era FTC and is not binding, it has yet to be rescinded. *See* MacDonald, *supra* note 310 ("[The policy statement] can't be challenged under the Administrative Procedure Act, which allows challenges only to 'final agency action.' So instead of being reviewed in court, the guidance will probably stay on the books until the FTC's new leadership pulls it down.").

315. *See supra* Part I.A (explaining how the player-led strike of the Grand Slams prompted the ITF to give players representation on the sport's governing Men's Tennis Council).

316. *See* Tim Farthing, *Indian Wells: How a Desert Tournament Became a Billionaire-Backed Powerhouse*, RACKET BUS. (June 5, 2025), https://racketbusiness.com/p/indian-wells-how-a-desert-tournament-became-a-billionaire-backed-powerhouse [https://perma.cc/B8AV-YQNK] ("Just 15 minutes from Palm Springs, the BNP Paribas Open at Indian Wells drew global attention, multimillion-dollar spending, and a who's-who of celebrity guests. This wasn't just a tennis tournament—it's tennis' fifth Grand Slam in everything but name. Indian Wells has become the blueprint for what modern tennis events can be: commercially dominant, meticulously curated, and deeply profitable."); *see also Interview with PTPA CEO Ahmad Nassar (Part 1)*, *supra* note 56 ("[Y]ou have two separate tours [the ITF Tour and the ATP Tour] and the four Grand Slams, which are also independent. There's a lot of fragmentation.").

317. *See FTC Enforcement Policy*, *supra* note 309 at 5 ("[T]his enforcement policy statement addresses only the labor exemption from antitrust liability. [It] thus does not address the legal status of organizing, bargaining, or other labor activity by independent contractors under the National Labor Relations Act or any other statute.").

additional working condition reforms that is available through labor organization and collective bargaining.[318] While a successful strike may force the ATP to capitulate in the short term, there would be no legal mechanism to force particular changes and the Tour could always reverse course later. Seeking coverage under the NLRA as statutory employees is therefore the better route forward for players to meaningfully equalize their relationship with the ATP.

CONCLUSION

The ATP's classification of professional tennis players as independent contractors is a legal fiction that disregards the substantive control the organization exerts over its players. By misclassifying players, the ATP denies them critical protections under the NLRA, including the right to engage in concerted activity for mutual benefit. This misclassification perpetuates a coercive system in which players are subject to stringent rules governing every aspect of their working lives with little recourse to challenge unfair practices and an inability to truly engage in entrepreneurial activity.

Under the common law test from Section 220 of the Restatement, it is evident that professional tennis players meet the criteria for employee status under the NLRA. The ATP dictates the terms and conditions of players' participation, provides the infrastructure and resources necessary for their work, and leverages its monopoly position to restrict entrepreneurial opportunities. The players' work is integral to the ATP's business model, and their ability to earn a living is directly tied to compliance with the ATP's stringent rules and governance structure. These factors collectively undermine the ATP's claim that players are independent contractors free to pursue economic opportunities.

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318. *See* Brian Callaci & Sandeep Vaheesan, *How Antitrust Can Help Tame Capital and Empower Labor*, NEW LAB. FORUM (Oct. 13, 2023), https://newlaborforum.cuny.edu/2023/10/13/how-antitrust-can-help-tame-capital-and-empower-labor/ [https://perma.cc/Z4GP-FJE6] ("While increasing competition among employers for workers' services is one way to reduce employer power, collective bargaining is even more effective. It is always an option, while breaking up large employers into smaller firms is not often feasible. The labor movement thus has a role to play in teaching the antitrust movement about the role of collective bargaining in fighting employer power.").

Recognition of professional tennis players as statutory employees would enable players to collectively address systemic issues, including revenue distribution, scheduling demands, and the physical and psychological toll of the Tour. Given the shortcomings of internal player efforts, the ATP Tour has proven that it is unable to embrace reform without imposition of the labor law. Challenging the misclassification of ATP players is therefore an essential step towards collective action that can make professional tennis a more equitable sport in the future.