

RACIAL PROTEST AND RACIAL PROGRESS IN PROFESSIONAL SPORTS

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ABSTRACT

The summer of 2020 marked significant changes in society, as seen through worldwide protests and an accompanying movement to address social injustice and systemic racism in America. That movement was amplified by and within professional sports as players, teams, and leagues sought to contribute to the goals of anti-racism by working to build a more equitable and just society. With so many other aspects of society shuttered by the COVID-19 pandemic—particularly in the entertainment sphere—the restarting of professional sports provided an even greater platform for athletes and others within sports to participate in this movement to effect change. In particular, professional sports leagues and teams sought to support players in their protest of societal racism and their efforts to seek structural reform in policing and the criminal justice system, among other entities. This type of support stood in stark contrast to how professional sports leagues previously treated athletes’ expressions of racial protest and their free speech rights more generally. In fact, leagues had implemented a variety of policies and rules that dramatically restricted player expression and speech. This article seeks to contextualize this dramatic shift within the context of sports law and the complicated history of racial protests and racial progress in professional sports—and looks to how the summer of 2020 may change sports going forward on these important fronts.

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I. INTRODUCTION

Professional sports have a long and complicated history with racial protests and racial progress. On the one hand, sports have sometimes led on issues of race and equality—moving society forward in meaningful ways. Jackie Robinson breaking the color barrier in Major League Baseball (“MLB”) in 1947 is but one example.¹ On the other hand, sports too often have emulated—or even trailed—society at large in failing to address systemic racism. The continued use of offensive mascots and trademarks in professional sports² and the underrepresentation of persons of color and

¹ See generally JULES TYGIEL, *BASEBALL’S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY* 3 (2008) (describing Jackie Robinson’s performance on the opening day of the 1946 International League season as the first black player in the history of organized baseball).

² See e.g., Laura Sigler, Note, *The Saga Continues: The Redskins, Blackhorse, and the Future of Native American Trademarks in Sports*, 62 WAYNE L. REV. 73 (2016) (exploring the impact of the cancellation of the Washington Redskins’ trademark registration on trademark law and the future of Native American marks and imagery in sports).

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women in coaching, management, and front office positions³ are two prominent examples. Players have, understandably, attempted to advocate for racial progress and use their voices and platforms as professional athletes to raise awareness about issues within sports and in society.⁴ However, instead of receiving support from their teams and leagues, these players were met with a variety of restrictions on their speech and ability to protest, through terms in their leagues' respective collective bargaining agreements ("CBAs") that precluded them from speaking out on racial injustice.⁵

In fact, most professional sports leagues' CBAs contain a variety of restrictions related to player speech—commercial, political, or otherwise.⁶ In many ways, these league policies curtail and even prohibit player activism and other forms of protest. Moreover, some professional sports leagues—such as the National Basketball Association ("NBA")—have certain prescriptions in their CBAs that impose particular player expression or speech.⁷ In particular, the NBA CBA contains a provision that requires players, trainers, and coaches to stand for the national anthem before each game.⁸ In this regard, certain contractual provisions in a professional sports league—whether in the CBA or another governing document in the sport—not only inhibit a player's free speech and ability to protest, but they can also require or force a player into expression that they may feel uncomfortable supporting. To boot, all of these contractual provisions—restrictions and obligations—are protected by federal labor law as they are negotiated through the collective bargaining process.⁹ In short, for the history of American sports through the spring of 2020, there were severe

³ E.g., N. Jeremi Duru, *The Fritz Pollard Alliance, the Rooney Rule, and the Quest to "Level the Playing Field" in the National Football League*, 7 VA. SPORTS & ENT. L.J. 179 (2008); Moetiz Samad, *Addressing Gender Discrimination in the NBA with a "Hammon" Rule*, 31 J. LEGAL ASPECTS SPORTS 335, 337 (2021).

⁴ See Sarah Brown & Natasha Brison, *More Than an Athlete: Constitutional and Contractual Analysis of Activism in Professional Sports*, 7 ARIZ. ST. SPORTS & ENT. L.J. 249, 252–57 (2018).

⁵ See Matthew J. Parlow, *Race, Speech, and Sports*, 52 U. RICH. L. REV. 923, 930–33 (2018) [hereinafter *Race, Speech, and Sports*].

⁶ Brown & Brison, *supra* note 4, at 271–80.

⁷ *Race, Speech, and Sports*, *supra* note 5, at 933.

⁸ See Tim Cato, *The NBA Actually Has a Rule Against Kneeling for the National Anthem*, SB NATION (Sept. 29, 2017, 9:33 PM), <https://www.sbnation.com/2017/9/25/16358070/nation-al-anthem-protest-kneel-kneel-rule> [https://perma.cc/B735-J3WU] (citing NAT'L BASKETBALL ASS'N, OFFICIAL RULES OF THE NATIONAL BASKETBALL ASSOCIATION 2016–2017 61 (2016), <https://ak-static-int.nba.com/wp-content/uploads/sites/3/2016/11/2016-2017-Rule-Book.pdf> [https://perma.cc/HKW9-UDZP]).

⁹ Michael R. Wilson, *Why So Stern?; The Growing Power of the NBA Commissioner*, 7 DEPAUL J. SPORTS & CONTEMP. PROBS. 45, 51 (2010).

limitations on the ability of players to protest racial injustice and otherwise use their voice and platform as professional athletes to advocate for change in society.

The summer of 2020 has seemingly changed that historical reality. Inspired by social movements all over the country and the world, players exerted their influence to speak out about racial injustice and demand various reforms in professional sports and society more generally.¹⁰ Professional sports leagues not only put out statements supporting the Black Lives Matter movement, but they also included these words prominently in their games and advertising.¹¹ As seasons recommenced after delay or suspension due to COVID-19, players in the NBA, National Hockey League (“NHL”), and MLB knelt during the national anthem.¹² The Women’s National Basketball Association (“WNBA”) players walked off the court during the national anthem in protest as well.¹³ This form of racial protest—and the support players received from their respective leagues and teams—provided a stark contrast to the firestorm that the then President Donald Trump set off in criticizing Colin Kaepernick and other NFL players for kneeling during the national anthem a few years earlier.¹⁴ About a month after seasons relaunched, in the wake of the police shooting of Jacob Blake in Kenosha, Wisconsin, all major professional sports leagues suspended games following player walkouts to protest systemic racism and Blake’s

¹⁰ Alexis Reese, *#BlackLivesMatter: 17 Ways NBA, NFL Players and Other Athletes Show Support for Police Reform*, BLACK ENT. TELEVISION (July 23, 2020, 11:23 AM), <https://www.bet.com/news/sports/2020/07/21/black-lives-matter-protest-movement-athletes-kneeling-more.html> [<https://perma.cc/4AFE-AZZU>].

¹¹ Michael Lee, *How the NBA Is Helping Black Lives Matter Gain More Mainstream Acceptance*, ATHLETIC (Aug. 4, 2020), <https://theathletic.com/1969229/2020/08/04/lee-why-black-lives-matter-has-become-more-than-just-a-phrase-with-the-nbas-help/>.

¹² Matt Perez, *Four NHL Players Kneel During the U.S. and Canadian National Anthems*, FORBES (Aug. 3, 2020, 8:20 PM), <https://www.forbes.com/sites/mattperez/2020/08/03/four-nhl-players-kneel-during-the-us-and-canadian-national-anthems/#5eb197621255> [<https://perma.cc/XE22-4WGZ>] (NHL); Christopher Brito, *NBA Players and Coaches Kneel During National Anthem as Season Restarts*, CBS NEWS (July 31, 2020, 12:04 PM), <https://www.cbsnews.com/news/nba-players-kneeling-anthem-protest-lebron-james-colin-kaepernick-bubble/> [<https://perma.cc/D4TL-T3L4>] (NBA); R.J. Anderson, *MLB Players, Including Mookie Betts, Kneel for Opening Day National Anthem to Support Black Lives Matter*, CBS SPORTS (July 24, 2020, 3:33 PM), <https://www.cbssports.com/mlb/news/mlb-players-including-mookie-betts-kneel-for-opening-day-national-anthem-to-support-black-lives-matter/> [<https://perma.cc/DB9Y-G3RD>] (MLB).

¹³ Sanya Mansoor, *WNBA Players Walk Off Court Before the National Anthem and Dedicate Delayed Season to Breonna Taylor*, TIME (July 27, 2020, 2:27 PM), <https://time.com/5871954/wnba-national-anthem-breonna-taylor/> [<https://perma.cc/9U4M-8ARX>].

¹⁴ Michael McCann, *Can an NFL Owner Legally ‘Fire’ a Player for Protesting?*, SPORTS ILLUSTRATED (Sept. 23, 2017), <https://www.si.com/nfl/2017/09/23/donald-trump-fired-roger-goodell-player-protest> [<https://perma.cc/8ZUD-8CQD>].

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shooting.¹⁵ The sports world had fundamentally changed its approach on these important issues.

How did this sudden change take place? Are professional sports changed forever? This article seeks to delve into these questions within the context of how sports supported and thwarted racial protests and racial progress, and the legal and policy frameworks that hindered player activism. Part II provides a brief history of how professional sports have modeled racial progress ahead of societal changes thereafter, while at the same time perpetuating systemic racial inequities. Part III explores the ways in which labor law coalesced with team and league interest to dramatically limit the free speech rights of players. Part IV describes how professional leagues, teams, and athletes made significant and likely long-lasting changes in the ability of players to voice their protest against systemic racism and racial injustice in both sports and society. Part V provides some concluding thoughts on what the summer of 2020 may signal for future collective bargaining negotiations.

II. SPORT AS A SOCIAL INSTITUTION

MLB Commissioner Emeritus Allan “Bud” Selig is fond of saying that baseball is a social institution.¹⁶ By extension, sport is a social institution. What Selig means by this is that sport both reflects and influences society.¹⁷ This observation is true in both positive and negative ways. As Selig correctly points out, baseball has either been ahead of, or kept pace with, society on issues such as civil rights, immigration, and other social movements.¹⁸ Indeed, “[s]port offers a unique opportunity to bring communities together, integrate different ideals and perspectives, and offer what many other parts of our world cannot do.”¹⁹ At the same time,

¹⁵ Doug McIntyre, *Compared to Their Millionaire NBA and MLB Brethren, MLS Players’ Walkout Comes with Added Risks*, YAHOO! (Aug. 27, 2020), <https://sports.yahoo.com/compared-to-their-millionaire-nba-and-mlb-brethren-mls-players-boycott-comes-with-added-risks-202056686.html> [<https://perma.cc/D4CV-NQB9>].

¹⁶ Bud Selig, *Text of Bud Selig’s Baseball Hall of Fame Induction Speech*, MILWAUKEE J. SENTINEL (July 30, 2017), <https://www.jsonline.com/story/sports/2017/07/31/text-bud-selig-baseball-hall-fame-induction-speech/524239001/> [<https://perma.cc/US6Q-JTS5>].

¹⁷ *Id.*; Danny Farber, *Former Commissioner Bud Selig on History of Baseball, His Own Legacy*, BADGER HERALD (Oct. 30, 2018), <https://badgerherald.com/sports/2018/10/30/former-commissioner-bud-selig-on-history-of-baseball-his-own-legacy/> [<https://perma.cc/ZM7Q-FD57>].

¹⁸ Farber, *supra* note 17.

¹⁹ RICHARD E. LAPCHICK, DEVOS SPORTS BUS. MGMT. PROGRAM, THE 2020 RACIAL & GENDER REPORT CARD: NATIONAL BASKETBALL ASSOCIATION 5 (2020) [hereinafter NBA RACIAL &

professional sports have also reflected ways in which society has failed to address issues of racial justice and equity. Indeed, in some areas, professional sports may even lag behind society on these important issues. A brief history of—and some examples involving—each of the ways in which sport is a social institution provides instructive context for understanding the changes in professional sports during the summer of 2020.

A. SPORTS LEADING ON RACIAL PROGRESS

Three examples illustrate well how professional sports led on issues of racial progress—and helped to positively influence society more generally—because of three extraordinary athletes: Jack Johnson, Jackie Robinson, and Fernando Valenzuela. Jack Johnson became the first African American heavyweight boxing champion in 1908.²⁰ Racism and segregation were pervasive at the time, and in particular, practitioners of anthropometry sought to find scientific evidence of biological differences between races.²¹ They were looking to ground society’s racist views and stereotypes in science, specifically that African Americans were inferior to whites.²² Within this context, it is unsurprising that the mere notion of an African American boxing champion was unsettling to white America.²³ Once Johnson won the heavyweight championship, his critics—who were among those seeking to perpetuate the myth of white superiority—searched for the “Great White Hope”: a white man who could vindicate the myths supporting the American racial hierarchy by defeating Johnson in the ring.²⁴ They never succeeded in doing so, as Johnson vanquished all such “Great White Hope” opponents, including James Jeffries in the much-heralded

GENDER REPORT CARD], https://43530132-36e9-4f52811a182c7a91933b.filesusr.com/ugd/7d86e5_9ed7a1185cc8499196117ce9a2c0d050.pdf [https://perma.cc/P8AH-LH74].

²⁰ Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 AKRON L. REV. 529, 533 (1999).

²¹ *Id.* at 532.

²² *Id.* at 532–33.

²³ Jonathan Eig, *Muhammad Ali, the Boxer Who Changed the World for Black America*, AUSTL. FIN. REV. (Sept. 15, 2017, 6:00 AM), <https://www.afr.com/life-and-luxury/arts-and-culture/muhammad-ali-the-boxer-who-also-fought-the-racism-in-his-country-20170912-gyffzgr> [https://perma.cc/YT22-S284]; Daniela Tenjido, Note, *Shut Up and Dribble: The Racial Subordination of the Black Professional Athlete*, 33 ST. THOMAS L. REV. 27, 30 (2020).

²⁴ Morgan, *supra* note 20, at 536.

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“fight of the century.”²⁵ Indeed, Johnson’s very public successes were experienced as a significant setback to the white supremacist ideology that pervaded America at the time.²⁶

Similarly, when Jackie Robinson broke MLB’s color barrier in 1947, America continued to be a highly segregated, racist society.²⁷ In fact, Robinson’s major league debut occurred seven years before the U.S. Supreme Court decided *Brown v. Board of Education*.²⁸ Not only were African Americans brutally murdered in the South, but restrictive covenants barring African Americans from buying homes were legal and widespread.²⁹ There were only two African Americans in Congress, and there were no African American mayors of major cities.³⁰ The legal system mirrored society; in fact, just before Robinson broke the color barrier, the Eighth Circuit Court of Appeals held that the Civil Rights Act of 1966, which was authorized under the Thirteenth Amendment, did not apply to private action.³¹ Robinson faced discrimination and the ill-effects of segregation as well, including being arrested and subsequently court-martialed after refusing to change seats on a military bus, even though the military had already desegregated their buses.³² While Robinson was found not guilty, he reflected on the verdict and society more generally, saying, “[i]t was a small victory, for I had learned that I was in two wars, one against the foreign enemy, the other against prejudice at home.”³³

Within this environment, Robinson’s breaking of MLB’s color barrier was, in and of itself, noteworthy. However, as one scholar noted, Robinson’s most significant accomplishment may well have been

²⁵ Randy Roberts, *Year of the Comet: Jack Johnson Versus Jim Jeffries, July 4, 1910*, in *SPORT AND THE COLOR LINE: BLACK ATHLETES AND RACE RELATIONS IN THE TWENTIETH CENTURY IN AMERICA* 53, 71 (Patrick B. Miller & David K. Wiggins eds., 2004).

²⁶ That is not to say that Johnson did not suffer significant racism and discrimination. *Id.* at 54–56. Johnson was widely criticized for, among other things, dating white women. *Id.* at 53–54. His dating habits so enraged white America that he was charged under the Mann Act for transporting a white woman across state lines for “immoral purposes.” Al-Tony Gilmore, *Jack Johnson and White Women: The National Impact*, 58 *J. NEGRO HIST.* 18, 19 (1973).

²⁷ See Peter Dreier, *Jackie Robinson: A Legacy of Activism*, *AM. PROSPECT* (Jan. 31, 2019), <https://prospect.org/civil-rights/jackie-robinson-legacy-activism/> [<https://perma.cc/95E8-ZTLB>].

²⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁹ Dreier, *supra* note 27.

³⁰ *Id.*

³¹ J. Gordon Hylton, *American Civil Rights Law and the Legacy of Jackie Robinson*, 8 *MARQ. SPORTS L.J.* 387, 395 (1998).

³² Dreier, *supra* note 27.

³³ *Id.*

demonstrating African American success in the white world.³⁴ His success on the field—including being named the MLB’s Rookie of the Year in his first season with the Brooklyn Dodgers—helped shatter the persistent stereotype that African Americans were not qualified to play in the major leagues.³⁵ Indeed, another scholar argues that Robinson’s coming to the plate at his first game on April 15, 1947 was one of the most visible and critically important moments in American civil rights history.³⁶ Robinson’s historic path led to greater integration of MLB. Indeed, from 1949–1960, African American players won 8 of 12 Rookie of the Year awards and 9 out of 12 Most Valuable Player awards in the National League.³⁷ Moreover, Robinson’s historic feat in changing MLB was a precursor to the civil rights movement of the 1960s.³⁸

The final example—for the purposes of this article—occurred in the latter part of the twentieth century when Los Angeles Dodgers rookie phenomenon, Fernando Valenzuela, took the country by storm with “Fernandomania.”³⁹ When Valenzuela began pitching in MLB in the early 1980s, it was a time of fervent anti-immigrant sentiment.⁴⁰ Legislators at the state and federal levels proposed immigration bills that targeted undocumented immigrants.⁴¹ White residents bristled at the notion, and, in some cases, the reality, of members of the Latinx community moving into predominantly white neighborhoods.⁴² There was similarly a societal push for assimilation of Mexican American immigrants and particularly of those

³⁴ Hylton, *supra* note 31, at 387–88.

³⁵ *See id.* at 388; *see also* Dreier, *supra* note 27.

³⁶ *See* Kenneth L. Shropshire, *Where Have You Gone, Jackie Robinson: Integration in American in the 21st Century*, 38 S. TEX. L. REV. 1043, 1047 (1997).

³⁷ Dreier, *supra* note 27. Jackie Robinson was the first African American player to win a Most Valuable Player award in 1949. *Id.*

³⁸ Scott Nakama, *Senate Bill 1070: The Implications of Arizona’s Immigration Law upon MLB*, 8 DEPAUL J. SPORTS & CONTEMP. PROBS. 23, 30, 30 n.40 (2011) (citing Robert Elias, *Introduction to BASEBALL AND THE AMERICAN DREAM: RACE, CLASS, GENDER, AND THE NATIONAL PASTIME* 13 (Robert Elias, ed. 2001)).

³⁹ Vic Wilson, *Fernandomania*, SOC’Y AM. BASEBALL RSCH., <https://sabr.org/journal/article/fernandomania/> [<https://perma.cc/TBY6-5HY2>].

⁴⁰ José M. Alamillo, *Fernando, Los Doyers and Me*, LA VIDA BASEBALL (Apr. 19, 2017), <https://www.lavidabaseball.com/fernando-valenzuela-dodgers-latinos/> [<https://perma.cc/EHE5-RYBH>].

⁴¹ ERIC AVILA, POPULAR CULTURE IN THE AGE OF WHITE FLIGHT: FEAR AND FANTASY IN SUBURBAN LOS ANGELES 234 (2006); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 118 (2012).

⁴² *See id.* at 230–33 (discussing a series of California propositions raised as a response to large-scale immigration from Latin America and Asia) (“[W]hite suburban families defended their distance from the racialized city and, with it, the right to maintain school policies that sent white middle-class children to white schools in white neighborhoods.”).

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who primarily spoke Spanish that was fueled by the anti-immigrant sentiment at the time.⁴³ In Los Angeles specifically, there was a strained relationship between the city and the Mexican American community.⁴⁴ There were many reasons for the tension, but one glaring example had deep roots: the building of Dodger Stadium in Chavez Ravine, just north of downtown Los Angeles.⁴⁵ For generations leading up to the 1950s, Chavez Ravine had been home to a Mexican American immigrant community.⁴⁶ To build a new stadium for the Dodgers, who were relocating from Brooklyn, New York, the City of Los Angeles first took the 300-acre property by eminent domain with the professed intention of building affordable housing units, only to use the land for the new stadium.⁴⁷ In the process, the city razed the community that had been living there and created a deep distrust from the Mexican American community towards their city (and indeed, ambivalence regarding the new baseball team).⁴⁸

When Valenzuela began pitching for the Dodgers in 1981, his dominance took MLB and the Los Angeles community by storm.⁴⁹ He won the National League Rookie of the Year Award, the Cy Young Award, and also led the Dodgers to the 1981 World Series championship.⁵⁰ Valenzuela inspired many in the Latinx community in Los Angeles and across the country at a time when they were marginalized and targeted by society's widespread anti-immigration sentiment.⁵¹ His emergence coincided with a growth of Spanish language radio and television, which helped raise awareness of his meteoric rise in MLB.⁵² At a time when their race was being used against them, many in the Latinx community saw Valenzuela as an example of upward social mobility and what could be possible, despite the negative anti-immigrant political debates.⁵³ Moreover, no Latinx athlete

⁴³ Alamillo, *supra* note 40.

⁴⁴ *See id.*

⁴⁵ Matthew J. Parlow, *Unintended Consequences: Eminent Domain and Affordable Housing*, 46 SANTA CLARA L. REV. 841, 843–46 (2006) [hereinafter *Unintended Consequences*].

⁴⁶ *Id.* at 843.

⁴⁷ *Id.* at 843–44.

⁴⁸ *See* Hector Becerra, *Decades Later, Bitter Memories of Chavez Ravine*, L.A. TIMES (Apr. 5, 2012), <https://www.latimes.com/local/la-xpm-2012-apr-05-la-me-adv-chavez-ravine-20120405-story.html> [https://perma.cc/QL3S-5EEG].

⁴⁹ Alamillo, *supra* note 40.

⁵⁰ Dylan Hernandez, *Fernando Valenzuela Was a Game Changer for the Dodgers, Baseball, and Los Angeles*, L.A. TIMES (Mar. 30, 2011, 12:00 AM), <https://www.latimes.com/sports/la-xpm-2011-mar-30-la-sp-0331-fermandomania-20110331-story.html> [https://perma.cc/5GDS-RBFV].

⁵¹ Alamillo, *supra* note 40.

⁵² Hernandez, *supra* note 50.

⁵³ *See id.*; Alamillo, *supra* note 40.

had been embraced by mainstream America the way Valenzuela was.⁵⁴ President Ronald Reagan even invited Valenzuela to the White House for lunch with Mexico's President Jose Lopez Portillo, and some scholars believe that Valenzuela had a positive influence on the 1986 Immigration Reform and Control Act, which included a path to citizenship for undocumented immigrants.⁵⁵ In these regards, Valenzuela—like Johnson and Robinson before him—helped influence societal change and racial progress.⁵⁶

B. SPORTS REFLECTING SOCIETAL ATTITUDES ON RACE

In other ways, however, sports have merely reflected society's intransigence regarding racial progress, or worse, lagged behind the rest of society in achieving greater equality and representation. For example, in 1961, the then Washington Redskins, recently renamed the Washington Football Team ("WFT"),⁵⁷ refused to integrate their team roster.⁵⁸ Despite the fact that fifteen years had passed since Jackie Robinson broke the color barrier, WFT owner George Preston Marshall, a well-known racist, flaunted his refusal to integrate his team despite mounting public pressure.⁵⁹ Marshall's obstinacy was particularly egregious given that African Americans constituted 16.5% of all NFL players in the league at the time, averaging six African American players per team.⁶⁰ The problem was so blatant that the Kennedy Administration, through the leadership of

⁵⁴ See Jill Painter Lopez, *Fernando Valenzuela Quietly Affirms His Status as a U.S. Citizen*, N.Y. TIMES (Aug. 30, 2015), <https://www.nytimes.com/2015/08/31/sports/baseball/fernando-valenzuela-quietly-affirms-his-status-as-a-us-citizen.html> [<https://perma.cc/VBZ6-MFH6>]. This was even more noteworthy in light of the fact that Valenzuela did not speak English and that there was a strong English-only movement at the time. See *id.*

⁵⁵ See Alamillo, *supra* note 40.

⁵⁶ Valenzuela's impact on the Dodger fan base was clear, both at the time and even today when 40% of the team's fan base is Latinx. See Hernandez, *supra* note 50. Indeed, Dodgers executives estimate that attendance at Dodger games would be 10%–20% less had Valenzuela not played for the team and garnered such a strong and long-standing following from Latinx fans. See *id.*

⁵⁷ See Tom Schad, *Washington' NFL Team to Be Called "Washington Football Team" in 2020 with New Nickname and Logo on Hold*, USA TODAY (July 23, 2020, 5:22 PM), <https://www.usatoday.com/story/sports/nfl/2020/07/23/washington-football-team-redskins-2020-rebranding-logo-dan-snyder/5494337002/> [<https://perma.cc/5VJ5-3N3W>].

⁵⁸ See Thomas G. Smith, *Civil Rights on the Gridiron*, in *SPORT AND THE COLOR LINE: BLACK ATHLETES AND RACE RELATIONS IN TWENTIETH-CENTURY AMERICA* 296, 296 (Patrick B. Miller & David K. Wiggins, eds. 2004).

⁵⁹ See Julian Johnson, *George Preston Marshall's Strange Fruit*, BLEACHER REP. (May 7, 2009), <https://bleacherreport.com/articles/169766-george-preston-marshalls-strange-fruit> [<https://perma.cc/5WKY-PRRL>].

⁶⁰ See Smith, *supra* note 58, at 299.

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Secretary of the Interior Stewart Udall, threatened the team with revocation of its stadium lease, which stood on federal land.⁶¹ With this and increasing negative public attention, NFL Commissioner Pete Rozelle intervened and got Marshall to hire and draft African American players, putting an end to an embarrassing episode for the league.⁶²

While sports history is littered with such examples, sports today continue to lag behind society in two key areas: (1) diversity in the hiring of coaches, general managers, and front office personnel and (2) ceasing to use racist team names and mascots. Diversity hiring in professional sports has long been a topic of discussion, both within the leagues and among sports scholars from a variety of disciplines. While most sports leagues are very diverse with regard to their players,⁶³ the coaching, ownership, and front office positions⁶⁴ within each league stand in stark contrast to the diversity amongst the players.⁶⁵ A major reason for the lack of diversity in such leadership positions in professional sports stems from the common and pervasive hiring practice that most teams and leagues traditionally employ. They hire the same people within the same network and fail to offer opportunities to new candidates or people outside of that sphere of

⁶¹ See *id.* at 302; Johnson, *supra* note 59.

⁶² Smith, *supra* note 58, at 306.

⁶³ According to 2020 data compiled by The Institute for Diversity and Ethics in Sports, the NBA had 83.1% players of color; the NFL had 69.4%, Major League Soccer (“MLS”) had 60.1%, and MLB had 39.8%. See NBA RACIAL & GENDER REPORT CARD, *supra* note 19, at 6; RICHARD E. LAPCHICK, DEVOS SPORTS BUS. MGMT. PROGRAM, THE 2020 RACIAL & GENDER REPORT CARD: NATIONAL FOOTBALL LEAGUE 2 (2020) [hereinafter NFL RACIAL & GENDER REPORT CARD], https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/326b62_b84c731ad8dc4e62ba330772b283c9e3.pdf [https://perma.cc/5NA9-6U6P]; RICHARD E. LAPCHICK, DEVOS SPORTS BUS. MGMT. PROGRAM, THE 2020 RACIAL & GENDER REPORT CARD: MAJOR LEAGUE SOCCER 4 (2020) [hereinafter MLS RACIAL & GENDER REPORT CARD], https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/326b62_b206eccbe5a7467da6b05fcbddda16ea.pdf [https://perma.cc/K3VV-TY6S]; RICHARD E. LAPCHICK, DEVOS SPORTS BUS. MGMT. PROGRAM, THE 2020 RACIAL & GENDER REPORT CARD: MAJOR LEAGUE BASEBALL 2 (2020) [hereinafter MLB RACIAL & GENDER REPORT CARD], https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/a4ad0c_b6693f8943394f2785328f1a992249a1.pdf [https://perma.cc/QT3P-2CRR]. In the 2021 United States census data, approximately 40% of the country identifies themselves as part of a minority group. *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [https://perma.cc/K9VD-FLVF].

⁶⁴ For purposes of this article, “front office positions” will refer to general managers, CEOs/Presidents, and other C-suite executives of professional sports teams.

⁶⁵ E.g., Michael Corey Dawson, *A Change Must Come: All Racial Barriers Precluding Minority Representation in Managerial Positions on Professional Sports Teams Must be Eliminated*, 9 SETON HALL J. SPORT L. 551 (1999); Timothy Davis, *Race and Sports in America: An Historical Overview*, 7 VA. SPORTS & ENT. L.J. 291, 307 (2008).

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influence.⁶⁶ Since historical and existing personnel have tended not to be very diverse, it is perhaps unsurprising that this self-perpetuating cycle of hiring led to underwhelming results. In addition, implicit bias in the employment arena also led the largely white male decision-makers to hire people who had similar backgrounds (and thus oftentimes looked like them).⁶⁷ To combat both this culture and the largely homogenous results, many professional sports leagues adopted diversity-oriented hiring policies: the Selig Rule,⁶⁸ the Rooney Rule,⁶⁹ etc. While particulars vary a bit by league, in general, these policies require teams to interview at least one minority candidate for any open coaching or front office position.⁷⁰

Despite these efforts, professional sports leagues still struggle with diversity in their leadership ranks. For example, at the start of the 2020 season, the NFL had only four minority head coaches⁷¹—far fewer than the record of eight from 2011 and 2018, respectively.⁷² While the NBA and Major League Soccer (“MLS”) have achieved better representation in their coaching ranks—30% and 40.7%, respectively—in both cases, their diversity in coaching lags significantly behind their player representation.⁷³

⁶⁶ See e.g., Jarrett Bell, *Bell: Good Ol' Boy Network Still Exists in NFL*, USA TODAY (Jan. 21, 2013, 9:43 PM), <https://www.usatoday.com/story/sports/nfl/2013/01/21/fritz-pollard-alliance-accuses-nfl-of-good-ol-boy-network-after-minority-hiring-shutout/1853701/> [<https://perma.cc/LM72-S3VD>] (providing data on how many coaches in each league were given second and third chances to coach again).

⁶⁷ See generally Jacquelyn Bridgeman, *The Thrill of Victory and the Agony of Defeat: What Sports Tells Us About Achieving Equality in America*, 7 VA. SPORTS & ENT. L.J. 248 (2008) (examining equality in sports and employment).

⁶⁸ Richard Justice, *'Selig Rule' First of Its Kind in Sports*, MLB.COM (Aug. 26, 2013), <https://www.mlb.com/news/richard-justice-selig-rule-first-of-its-kind-in-sports/c-58500104> [<https://perma.cc/9HJK-HUEK>].

⁶⁹ Duru, *supra* note 3, at 189. While the Rooney Rule focused initially only on head coaches, it was later expanded to include general manager and other front office positions. See Jason Reid, *Rethinking the Rooney Rule*, UNDEFEATED (May 20, 2016), <https://theundefeated.com/features/rethinking-the-rooney-rule/> [<https://perma.cc/8QD9-VCSX>].

⁷⁰ Adam Stites, *NFL's Rooney Rule: What Is It and How Does It Work?*, SB NATION (Jan. 6, 2018, 8:30 AM), <https://www.sbnation.com/2018/1/6/16856550/rooney-rule-nfl-explained-how-it-works-coaches> [<https://perma.cc/Z9RK-2W5Q>].

⁷¹ NFL RACIAL & GENDER REPORT CARD, *supra* note 63, at 8.

⁷² Charlotte Carroll, *What Is the Rooney Rule? Explaining the NFL's Diversity Policy for Hiring Coaches*, SPORTS ILLUSTRATED (Dec. 31, 2018), <https://www.si.com/nfl/2018/12/31/rooney-rule-explained-nfl-diversity-policy> [<https://perma.cc/WN7X-U3J7>]. The NFL recently committed to establishing a permanent minority coaching fellowship program in each of its thirty-two teams to help create a large pool of qualified coaching candidates for future head coaching positions. See Dan Graziano, *NFL Approves Rooney Rule Changes, Tables Minority Hiring Incentives*, ESPN (May 19, 2020), https://www.espn.com/nfl/story/_/id/29194925/nfl-approves-rooney-rule-changes-tables-minority-hiring-incentives [perma.cc/LQT5-NSPW].

⁷³ NBA RACIAL & GENDER REPORT CARD, *supra* note 19, at 2; MLS RACIAL & GENDER REPORT CARD, *supra* note 63, at 4.

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In front office positions, the numbers are even worse. In MLB, Miami Marlins CEO Derek Jeter is the only person of color in the league to hold that title.⁷⁴ Moreover, the highest levels of MLB executives have been notably lacking in terms of representation of persons of color and women.⁷⁵ Since current Commissioner Rob Manfred took office in 2015, only one person of color has been promoted to an MLB executive.⁷⁶ In the NFL, only four persons of color—Jason Wright, Hymie Elhai, Paraag Marathe, and Kim Pegula—hold the CEO position for a team.⁷⁷ Even the NBA—which leads professional sports leagues with six CEOs who are persons of color—only reaches 10.9% diversity for CEOs in the league.⁷⁸ Finally, professional sports team ownership also lacks diverse representation. Out of thirty-two teams, the NFL has only two owners of color who are significantly involved in the operations of an NFL club.⁷⁹ The NBA has four majority owners of color out of thirty teams.⁸⁰ The NHL and MLB each only have one majority owner of color.⁸¹ As these recent statistics show, sports have failed to be a leader in minority hiring for its high-level coaching and front office positions.

Racist team names and mascots are another glaring shortcoming where professional sports leagues have lagged behind society. For decades, Native American groups have protested offensive, stereotypical names and mascots in sports.⁸² These include the Washington Redskins (now, WFT), Kansas City Chiefs, Atlanta Braves, Cleveland Indians, and Chicago

⁷⁴ MLB RACIAL & GENDER REPORT CARD, *supra* note 63, at 18.

⁷⁵ Alex Coffey, *At Its Highest Level, MLB Leadership Has Become Less Diverse in Recent Years*, ATHLETIC (June 26, 2020), <https://theathletic.com/1889328/2020/06/26/at-its-highest-level-mlb-leadership-has-become-less-diverse-in-recent-years/>.

⁷⁶ *Id.*

⁷⁷ NFL RACIAL & GENDER REPORT CARD, *supra* note 63, at 13.

⁷⁸ NBA RACIAL & GENDER REPORT CARD, *supra* note 19, at 7.

⁷⁹ NFL RACIAL & GENDER REPORT CARD, *supra* note 63, at 13.

⁸⁰ NBA RACIAL & GENDER REPORT CARD, *supra* note 19, at 16.

⁸¹ Bob Hille, *Alex Meruelo Purchase of Coyotes Finalized, Making Him NHL's First Latino Majority Owner*, SPORTING NEWS (July 29, 2019), <https://www.sportingnews.com/us/nhl/news/alex-meruelo-purchase-of-coyotes-finalized-making-him-nhls-first-latino-majority-owner/18vztmlltayan12s1tz9wm7w5n> [<https://perma.cc/W28T-7VWF>]; MLB RACIAL & GENDER REPORT CARD, *supra* note 63, at 18 (noting that Arturo Moreno, owner of the Los Angeles Angels, is the only Latinx and majority owner of color of an MLB team).

⁸² NAT'L CONG. AM. INDIANS, ENDING THE LEGACY OF RACISM IN SPORTS & THE ERA OF HARMFUL "INDIAN" SPORTS MASCOTS (2013), http://www.ncai.org/attachments/PolicyPaper_mijApMoUWDbjqFtjAYzQWlqLdrwZvsYfakBwTHpMATcOroYolpN_NCAI_Harmful_Mascots_Report_Ending_the_Legacy_of_Racism_10_2013.pdf [<https://perma.cc/99XG-TFLM>].

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Blackhawks.⁸³ However, professional sports team owners have ignored such concerns and insisted on maintaining their team names and mascots. Other sectors of the country have taken a different approach from these team owners. For example, in 2015, California passed a law banning the word “Redskins” from being used in high school athletics.⁸⁴ In contrast, around that same time, WFT owner Daniel Snyder vociferously insisted that the team would never change its “Redskins” name.⁸⁵ While Snyder was not persuaded by the arguments of the Native American community, he eventually changed his mind in the summer of 2020 when Nike, FedEx, and PepsiCo threatened to terminate their business relationships with the WFT unless it changed its controversial name.⁸⁶ Similarly, while the Cleveland Indians, for decades, ignored the pleas of Native American advocacy groups, the team recently announced in December of 2020 that it planned to change its name after facing similar pressures as the WFT.⁸⁷

The Kansas City Chiefs, on the other hand, announced that while they would not change their name,⁸⁸ they would ban headdresses and Native American style paint at their stadium.⁸⁹ While the team had previously discouraged such attire and paint, it was not until the events during the

⁸³ *Id.* at 9.

⁸⁴ Alex Johnson, *California Becomes First State to Ban ‘Redskins’ Nickname*, NBC NEWS (Oct. 11, 2015, 3:05 PM), <https://www.nbcnews.com/news/us-news/california-becomes-first-state-ban-redskins-nickname-n442561> [perma.cc/EMA9-34M9].

⁸⁵ Rob Goldberg, *Dan Snyder Says He Will Never Change Washington Redskins’ Controversial Name*, BLEACHER REP. (May 9, 2013), <https://bleacherreport.com/articles/1634935-dan-snyder-says-he-will-never-change-washington-redskins-controversial-name> [perma.cc/5K7E-9YTC].

⁸⁶ Patrik Walker & Jared Dubin, *Nike Pulls Gear, FedEx Asks for Name Change on Same Day as Federal Officials Tell Dan Snyder to Do the Same*, CBS SPORTS (July 2, 2020, 9:48 AM), <https://www.cbssports.com/nfl/news/nike-pulls-gear-fedex-asks-for-name-change-on-same-day-as-federal-officials-tell-dan-snyder-to-do/> [perma.cc/5BGQ-HS4L].

⁸⁷ Dayn Perry, *Cleveland Indians to Change Team Name; Here are Some of the Best Options, Including Spiders and Crows*, CBS SPORTS (Dec. 15, 2020, 11:45 AM), <https://www.cbssports.com/mlb/news/cleveland-indians-to-change-team-name-here-are-some-of-the-best-options-including-spiders-and-crows/> [https://perma.cc/27HR-JHG9].

⁸⁸ The team defends the use of the name, claiming it was based on a former Kansas City mayor who was nicknamed “the chief.” Leigh Oleszczak, *Will KC Chiefs Follow Cleveland Indians with Name Change?*, FANSIDED (Dec. 14, 2020), <https://kckingdom.com/2020/12/14/will-kc-chiefs-follow-cleveland-indians-name-change/> [https://perma.cc/725E-23CA]. However, the Native American themes that the team has imbued throughout its fan base raises serious questions regarding the veracity of that defense.

⁸⁹ David Close & Nicole Chavez, *Kansas City Chiefs to Ban Fans from Wearing Headdresses and Native American-Themed Face Paint*, CNN (Aug. 20, 2020, 8:37 PM), <https://www.cnn.com/2020/08/20/sport/kansas-city-chiefs-ban-native-american-headdresses/index.html> [https://perma.cc/SW4X-3XVN].

summer of 2020 that this became an official policy.⁹⁰ The team did not ban the offensive “Arrowhead Chop” that fans did during games, but pledged to review the practice further.⁹¹ Similarly, the Atlanta Braves and the Chicago Blackhawks both recently reiterated their long-standing position that their team names would not be reconsidered.⁹² As these examples demonstrate, professional sports has been incredibly slow to change racist team names and mascots.

III. RESTRICTION ON PLAYER SPEECH AND PROTEST IN PROFESSIONAL SPORTS

Athletes in professional sports have long sought to use their platforms as celebrities to bring greater societal awareness to issues of social justice and racial inequality.⁹³ For example, Muhammad Ali, Arthur Ashe, and Jim Brown all advocated for civil rights during the 1960s and 1970s.⁹⁴ In 2004, Toronto Blue Jays outfielder Carlos Delgado refused to stand during the seventh-inning stretch for the playing of “God Bless America”—a tradition followed by most teams after the September 11, 2001 terrorist attacks—in protest of the United States invading Iraq.⁹⁵ Players on the NBA’s Phoenix Suns wore “Los Suns” jerseys in a game against the San Antonio Spurs in

⁹⁰ *Id.*; Frank Morris, *The Super Bowl-Bound Chiefs Unite Kansas City but Alienate Some Native Americans*, KCUR (Jan. 31, 2020, 7:49 AM), <https://www.kcur.org/sports/2020-01-31/the-super-bowl-bound-chiefs-unite-kansas-city-but-alienate-some-native-americans> [<https://perma.cc/9WR5-QQ8V>].

⁹¹ *A Statement from the Kansas City Chiefs*, CHIEFS.COM (Aug. 20, 2020, 3:00 PM), <https://www.chiefs.com/news/a-statement-from-the-kansas-city-chiefs> [<https://perma.cc/T5RL-7AG8>].

⁹² *Atlanta Braves Not Changing Name, Looking at ‘Chop’ Celebration*, ESPN (July 12, 2020), https://www.espn.com/mlb/story/_/id/29452330/braves-not-changing-name-looking-chop [<https://perma.cc/8YJP-2EZK>]; Allen Kim, *The Chicago Blackhawks Won’t Change Nickname Because It Honors the Life of an Actual Native American*, CNN (July 8, 2020, 12:36 PM), <https://www.cnn.com/2020/07/08/us/chicago-blackhawks-name-spt-trnd/index.html> [<https://perma.cc/FFV4-WH6T>].

⁹³ *See, e.g.*, Kat Chow, *A Brief History of Racial Protests in Sports*, NPR (Dec. 2, 2014, 2:16 PM), <https://www.npr.org/sections/codeswitch/2014/12/02/367766230/a-brief-history-of-racial-protest-in-sports> [<https://perma.cc/HV8M-S82S>]; *see also* Jonathan G. Finck, *Can NFL Players Be Punished for Kneeling? An Analysis of the Banter Surrounding the Star-Spangled Banner*, 21 U. DEN. SPORTS & ENT. L.J. 125, 135–37 (2018) (noting instances of NFL player political protests).

⁹⁴ Danielle Sarver Coombs & David Cassilo, *Athletes and/or Activists: LeBron James and Black Lives Matter*, 41 J. SPORT & SOC. ISSUES 425, 426 (2017).

⁹⁵ *Carlos Delgado: Colin Kaepernick’s Actions Rooted in American Ideals*, ESPN (Sept. 26, 2016), https://www.espn.com/mlb/story/_/id/17648761/carlos-delgado-12-years-later-colin-kaepernick-protest-ideals [<https://perma.cc/BQ8R-DNH5>].

2010 to protest Arizona's anti-immigration laws and policies.⁹⁶ In 2012, prominent members of the NBA's Miami Heat—including LeBron James and Dwyane Wade—wore black hoodie sweatshirts to protest the killing of teenager Trayvon Martin.⁹⁷ When unarmed teenager Michael Brown was shot and killed by a Ferguson, Missouri police officer, members of the then St. Louis Rams protested his killing by making the “hands up, don't shoot” gesture during pregame introductions in a 2014 game.⁹⁸ Also in 2014, several NBA players wore “I Can't Breathe” t-shirts before games to protest Eric Garner's death after being put in a chokehold by a New York City police officer.⁹⁹

Perhaps the most prominent player protest pre-2020 may have been Colin Kaepernick taking a knee during the national anthem in 2016. Beginning in the preseason that year, Kaepernick refused to stand for the national anthem before games and was soon joined by other players in kneeling during its playing.¹⁰⁰ Kaepernick and other players were protesting racial oppression, and in particular, police killings of African American men.¹⁰¹ These protests in the NFL continued throughout the 2016

⁹⁶ Billy Witz, *'Los Suns' Join Protest, then Stop the Spurs*, N.Y. TIMES (May 5, 2010), <https://www.nytimes.com/2010/05/06/sports/basketball/06suns.html> [https://perma.cc/M9Q4-Q224].

⁹⁷ Michael Wallace, *The Heat Stand Tall for Trayvon Martin*, ESPN (Mar. 23, 2012), https://www.espn.com/blog/truehoop/miamiheat/post/_id/13046/the-heat-stand-tall-for-trayvon-martin [https://perma.cc/7VXY-5UJY].

⁹⁸ Caroline Sikes, *Rams Come Out of Tunnel with 'Hands Up, Don't Shoot' Protest*, SPORTING NEWS (Nov. 30, 2014), <https://www.sportingnews.com/us/nfl/news/hands-up-dont-shoot-ferguson-missouri-michael-brown-darren-wilson-st-louis-rams-protest-tunnel-video/vh5segq7m1ra1xv3cdcxfbzylj> [https://perma.cc/Z5KL-DS6P].

⁹⁹ Ira Boudway, *'I Can't Breathe' and the Not-So Protected Speech of Professional Athletes*, BLOOMBERG (Dec. 12, 2014, 1:48 PM), <https://www.bloomberg.com/news/articles/2014-12-12/nba-nfl-and-mlb-dont-always-enforce-rules-restricting-players-speech>.

¹⁰⁰ Arian Foster, *Marcus Peters Among NFL Players Protesting During National Anthem*, SPORTS ILLUSTRATED (Sept. 11, 2016), <https://www.si.com/nfl/2016/09/11/national-anthem-protest-kneel-sit-players-list> [https://perma.cc/9E25-LEH7].

¹⁰¹ Mike Fiore, *NFL: Players Are Encouraged but Not Required to Stand for National Anthem*, NBC SPORTS (Aug. 27, 2016, 1:50 PM), <http://profootballtalk.nbcsports.com/2016/08/27/nfl-players-are-encouraged-but-not-required-to-stand-for-national-anthem/> [https://perma.cc/9Y59-Y64R]; John Branch, *The Awakening of Colin Kaepernick*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/sports/colin-kaepernick-nfl-protests.html> [https://perma.cc/R3DK-PTQS]. Other players showed solidarity in protest with those who were kneeling by interlocking arms during the national anthem, by raising their fists, or placing their hands on their kneeling teammates shoulder. See Adam Sutes, *Seahawks Players Link Arms During National Anthem Instead of Kneeling*, SB NATION (Sept. 11, 2016, 4:04 PM), <https://www.sbnation.com/2016/9/11/12851174/seahawks-players-national-anthem-protest-link-arms-kneeling> [https://perma.cc/47KV-P3ZF]; Mark Sandritter, *A Timeline of Colin Kaepernick's National Anthem Protest and the Athletes Who Joined Him*, SB NATION (Sept. 25, 2017, 10:28 AM), <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl> [https://perma.cc/XJ5E-WY2F].

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season and into the 2017 season, when then President Donald Trump divisively criticized the player protests and created a firestorm of controversy around the issue.¹⁰² In response to the criticism, hundreds of players sat or knelt during the national anthem the same week as President Trump's comments,¹⁰³ with a number of players, coaches, and teams condemning his statements.¹⁰⁴ This national controversy drew a significant amount of attention,¹⁰⁵ but eventually much of the player protest subsided. Moreover, these various acts of protest did little, if anything, to change the perspectives of sports leagues in limiting player expression and free speech. For the reasons described below, the CBAs of professional sports leagues curtailed player protest. Given the general lack of support within sports for issues of social justice and racial equality—coupled with this limiting legal framework contained in the CBAs—it was unsurprising that little changed in terms of racial protest in professional sports before 2020.

A. CBA LIMITATIONS ON PLAYER SPEECH GENERALLY

Professional sports leagues' CBAs, or other governing documents, contain a variety of provisions that significantly limit players' free speech and ability to protest.¹⁰⁶ Some of these limitations derive from general provisions related to player discipline for conduct on or off the field that runs contrary to the best interests of the sport.¹⁰⁷ For example, under the MLB CBA, the league or a team may punish a player “for just cause for

¹⁰² McCann, *supra* note 14.

¹⁰³ Arnie Stapleton, *More than 200 NFL Players Sit or Kneel During National Anthem*, CHI. TRIB. (Sept. 24, 2017, 10:17 PM), <https://www.chicagotribune.com/sports/ct-nfl-national-anthem-kneeling-20170924-story.html> [<https://perma.cc/6C9L-G2BU>].

¹⁰⁴ *NFL Players Who Protested During the National Anthem in Week 3*, ESPN (Sept. 24, 2017), http://www.espn.com/blog/nflnation/post/_id/249755/nfl-players-who-protested-during-the-national-anthem-in-week-3 [<https://perma.cc/B9YD-DVE6>]; Brendan Marks, *Here Are All NFL Statements Issued After Comments by President Trump on Anthem Protests*, CHARLOTTE OBSERVER (Sept. 24, 2017, 6:26 PM), <http://www.charlotteobserver.com/sports/nfl/carolina-panthers/article175144901.html>.

¹⁰⁵ Megan Garber, *They Took a Knee*, ATLANTIC (Sept. 24, 2017), www.theatlantic.com/entertainment/archive/2017/09/why-the-nfl-is-protesting/540927/ [<https://perma.cc/C3E5-M5F9>].

¹⁰⁶ It is worth noting that players in professional sports leagues do not have the same First Amendment rights as they normally would. The First Amendment only applies to state action. U.S. CONST. amend. XIV, § 1. Since professional sports leagues are private associations, the First Amendment does not apply to employer-employee relationships between teams and their players.

¹⁰⁷ John T. Holden & Joanna Wall Tweedie, *The National Football League: Action Versus Activism*, 97 OR. L. REV. 397, 402 (2019).

conduct that is materially detrimental or materially prejudicial to the best interests of Baseball, including, but not limited to, engaging in conduct in violation of federal, state, or local law.”¹⁰⁸ Similarly, the NFL CBA grants the NFL Commissioner the ability to discipline players “for conduct detrimental to the integrity of, or public confidence in, the game of professional football.”¹⁰⁹ The NBA CBA allows player punishment if players do not conduct themselves “according to the highest standards of honesty, citizenship, and sportsmanship . . . [or] do anything that is, in the opinion of the Commissioner of the NBA, materially prejudicial or materially prejudicial to the best interests of the Team or the League.”¹¹⁰ Such broad disciplinary powers also emanate from the standard (or uniform) player contracts within each league. For example, in the NFL standard player contract, each player warrants that they will “conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game.”¹¹¹ Similarly, the NBA’s uniform player contract allows the league to govern the conduct of players on and off the playing court.¹¹² MLB’s uniform player contract provides similar authority to the commissioner to discipline players for conduct off of the field.¹¹³ These various provisions afford a professional sports league or team the ability to punish a player for various actions, including for player speech or

¹⁰⁸ MAJOR LEAGUE BASEBALL PLAYERS ASS’N, 2017–2021 BASIC AGREEMENT 52 (2017) [hereinafter MLB CBA], https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf [<https://perma.cc/L8A7-W5DG>] (still binding as of 2021).

¹⁰⁹ NAT’L FOOTBALL LEAGUE & NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT 277 (2020) [hereinafter NFL CBA], https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf [<https://perma.cc/AXA5-262D>].

¹¹⁰ NAT’L BASKETBALL ASS’N & NAT’L BASKETBALL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT A-4 (2017) [hereinafter NBA CBA], <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [<https://perma.cc/5A3H-WSBS>] (exhibit A or the NBA Uniform Player Contract).

¹¹¹ McCann, *supra* note 14. Indeed, the NFL standard player contract contemplates the possibility of termination of the player’s contract if their conduct “adversely affect[s] or reflect[s] on the [team].” See *id.*

¹¹² NBA CBA, *supra* note 110, at A-3.

¹¹³ Allan H. (“Bud”) Selig & Matthew J. Mitten, *Baseball Jurisprudence: Its Effects on America’s Pastime and Other Professional Sports Leagues*, 50 ARIZ. ST. L.J. 1171, 1179 (2018).

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expression, if they are detrimental to the sport or not otherwise protected under the respective league's CBA or other governing document.¹¹⁴

Professional sports leagues also curtail player speech in other ways. To nurture lucrative sponsorship relationships, leagues and teams restrict, if not ban, player commercial speech on products or companies that are not official sponsors of that league or team. The NBA's uniform player contract forbids players from promoting non-league and non-team sponsors on their jersey or clothing.¹¹⁵ The NFL has a similar limitation on players not being able to promote companies on game day until ninety minutes after the conclusion of the game.¹¹⁶ Professional sports leagues also target player speech with regard to referees and umpires by imposing penalties on players for publicly criticizing officiators.¹¹⁷ However, league restrictions on player speech also extend more specifically to their ability to advocate for social causes or bring awareness to societal issues that matter to them. For example, the NFL forbids players from conveying personal messages in writing or illustration on the day of a game unless they have league permission.¹¹⁸ Indeed, up until the 2020 season, the NFL banned players from expressing themselves with regard to political activism, social causes, or other forms of protest or consciousness-raising speech.¹¹⁹

¹¹⁴ Matthew J. Parlow, *Professional Sports League Commissioners' Authority and Collective Bargaining*, 11 TEX. REV. ENT. & SPORTS L. 179, 189–96 (2010) [hereinafter *Professional Sports League Commissioners' Authority*] (describing commissioner punishment powers generally and highlighting the case of John Rucker); see also Karen Martin Dean, Note, *Can the NBA Punish Dennis Rodman? An Analysis of First Amendment Rights in Professional Basketball*, 23 VT. L. REV. 157, 157 (1998) (noting that the NBA has used such provisions in its CBA to discipline players for racist, sexist, and homophobic statements).

¹¹⁵ See Brown & Brison, *supra* note 4, at 280–81; John Vukelj, *Post No Bills: Can the NBA Prohibit Its Players from Wearing Tattoo Advertisements?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 507, 515–16 (2005).

¹¹⁶ Boudway, *supra* note 99. Many professional sports leagues regulate what players can wear before, during, and after games, and players who violate these policies can be subject to league or team discipline. *Id.*

¹¹⁷ *No Free Speech (or Silence) in the NFL*, LEGAL BLITZ (Nov. 26, 2014), <http://thelegalblitz.com/blog/2014/11/26/no-free-speech-or-silence-in-the-nfl/> [<https://perma.cc/LUR6-66CB>] (quoting Article 51, Section 6 of the NFL CBA); Wilson, *supra* note 9, at 54 (noting the NBA's punishing players for criticizing referees).

¹¹⁸ Nicolas Chavez, *Kaepernick Rolling Out of the Constitutional Pocket: NFL's Restriction of Players' First Amendment Rights*, MIAMI RACE & SOC. JUST. L. REV. (Sept. 19, 2016), <https://race-and-social-justice-review.law.miami.edu/kaepernick-rolling-constitutional-pocket-nfls-restriction-players-amendment-rights/> [<https://perma.cc/B94W-CKVQ>] (citing NFL Rule 5, Section 4, Article 8).

¹¹⁹ Cody "Tick" McElroy, *Take a Knee: Speech Considerations in the NFL*, CIVILIAN (Oct. 5, 2016), <https://sites.lsu.edu/civilian/2016/10/take-a-knee-speech-considerations-in-the-nfl/> [<https://perma.cc/2V89-4W4E>].

As the analysis above demonstrates, professional sports leagues have long sought to restrict player speech and punished players for violating these provisions.¹²⁰ For example, in 2009, the NFL's Houston Texans fined Dunta Robinson \$25,000 for violating the league's speech policies by writing demands for a higher salary from the team on his cleats.¹²¹ The NFL also fined Colin Kaepernick \$10,000 in 2014 for wearing Beats by Dre headphones before a game in violation of the league's commercial promotion policy.¹²² Professional sports leagues have also punished players for making racist, sexist, or homophobic statements or slurs.¹²³

One of the most prominent examples of a sports league punishing a person for offensive speech occurred in 2000 when Commissioner Selig suspended, fined, and imposed diversity training requirements on John Rocker for making racist and homophobic remarks about New York baseball fans.¹²⁴ In 2012, the MLB suspended Yunel Escobar for writing a homophobic slur on his eye black.¹²⁵ The NFL's Kansas City Chiefs suspended Larry Johnson for two weeks, costing him approximately \$600,000 in salary, for making homophobic remarks on Twitter.¹²⁶ Similarly, the NBA fined New York Knicks player Amare Stoudamire \$50,000 for using a homophobic slur in several tweets¹²⁷ and fined Los

¹²⁰ Interestingly—and somewhat paradoxically—at the same time that they seek to quell player speech in various forms, professional sports leagues also seek to compel player speech through various media obligations and requirements. See, e.g., *No Free Speech (or Silence) in the NFL*, *supra* note 117 (describing the NFL CBA's provision that the National Football League Players Association agrees to make best efforts to ensure that its membership—the players—cooperates with the media in reasonable promotion activities); McElroy, *supra* note 119 (describing the NFL Media Access Policy requirements for players).

¹²¹ Boudway, *supra* note 99.

¹²² *Id.*

¹²³ Bethany P. Withers, *Without Consequence: When Professional Athletes Are Violent Off the Field*, 6 HARV. J. SPORTS & ENT. L. 373, 375 (2015); Maria Burns Ortiz, *Social Media: Fines Become Commonplace*, ESPN (Dec. 14, 2012), https://www.espn.com/blog/playbook/trending/post/_id/12233/social-media-fines-become-commonplace [<https://perma.cc/P2TZ-VHRV>] (noting the rise in fines for inappropriate or offensive comments posted on social media).

¹²⁴ HOWARD L. GANZ & JEFFREY L. KESSLER, PRACTISING L. INST., *In the Matter of Arbitration Between the Major League Baseball Players Association and the Commissioner of Major League Baseball (John Rocker)*, *Decision of the Arbitration Panel*, in 1 UNDERSTANDING BUSINESS AND LEGAL ASPECTS OF THE SPORTS INDUSTRY 765, 769–70 (2001).

¹²⁵ Boudway, *supra* note 99.

¹²⁶ Darren A. Heitner & Richard Bogart, *Personal Foul: Conduct Detrimental to the Team. Penalty Declined?*, 5 HARV. J. SPORTS & ENT. L. 215, 228–29 (2014).

¹²⁷ Samantha Levin, Comment, *Tweet Tweet: A First Amendment Wake Up Call Regarding Social Media in the Sports Arena*, 30 J. MARSHALL J. INFO. TECH. & PRIV. L. 117, 139 (2013).

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Angeles Clippers player Chris Paul \$25,000 for sexist comments that he directed towards a female referee.¹²⁸

While some of these examples seem appropriate and consistent with the animating values of various leagues' policies, other examples demonstrate how leagues punish athletes even for violations that were innocuous and even deeply personal. The NFL fined Cam Heyward for writing "Iron Man" on his eye black, to honor his father's fight with cancer.¹²⁹ Similarly, the NFL disciplined Deangelo Williams for wearing pink on his uniform in honor of his mother who lost her battle with cancer.¹³⁰ These two examples show how seriously professional sports leagues take violations of their speech and expression policies. At the same time, there are other examples of leagues choosing not to punish players when they, for example, wore patriotic athletic gear to mark the anniversary of the September 11, 2001 terror attacks¹³¹ and to protest the killing of Michael Brown by staging a "hands up, don't shoot" demonstration.¹³² The WNBA initially fined Minnesota Lynx players in July 2016 for wearing Black Lives Matter t-shirts during pregame warm-ups, though the fines were later rescinded due to the backlash that the league received.¹³³ More concerning, professional sports leagues and teams have been wildly inconsistent in

¹²⁸ Steve Almasy, *Chris Paul Fined \$25,000 by NBA for Comment About Female Ref*, CNN, <https://www.cnn.com/2015/02/07/us/chris-paul-referee-fine/index.html> [https://perma.cc/P85C-5RGD]; see also Jordan Heck, *Nuggets' Nikola Jokic Fined \$25,000 for Homophobic Remark*, SPORTING NEWS (Nov. 7, 2018), <https://www.sportingnews.com/us/nba/news/nuggets-nikola-jokic-fined-25000-for-homophobic-remark/1a3zqn3xdcnw01gufo7lqtfbi7> [https://perma.cc/5WVX-HZK4] (Nikola Jokic's \$25,000 fine); Jeff Zillgitt, *Roy Hibbert Fined \$75K for Homophobic, Vulgar Remarks*, USA TODAY (June 2, 2013, 6:47 PM), <https://www.usatoday.com/story/sports/nba/playoffs/2013/06/02/roy-hibbert-fined-news-conference-interview-indiana-pacers-vs-miami-heat/2382487/> [https://perma.cc/Y5ES-TXXL] (Roy Hibbert's \$75,000 fine); Ryan Rudnansky, *Kobe Bryant: NBA Hits Kobe with \$100k Fine for Uttering Homophobic Slur*, BLEACHER REP. (Apr. 13, 2011), <https://bleacherreport.com/articles/664724-kobe-bryant-nba-hits-kobe-with-100k-fine-for-uttering-slur> [https://perma.cc/C48E-Y8YY] (Kobe Bryant's \$100,000 fine).

¹²⁹ Jake Thorne, *The NFL vs. Freedom of Expression*, MICH. REV. (Nov. 18, 2015), <https://www.michiganreview.com/the-nfl-vs-freedom-of-expression/> [https://perma.cc/26X3-MN9Y].

¹³⁰ *Id.*

¹³¹ Boudway, *supra* note 99 (detailing the example of Lance Briggs and other NFL players seeking to honor the ten-year anniversary of the attacks).

¹³² See Chavez, *supra* note 118 (pointing to the St. Louis Rams players seeking to protest the killing of Michael Brown); Sikes, *supra* note 98.

¹³³ Kavitha A. Davidson, *The Sports World Is Finally Catching Up to the Women Who Were There First*, ESPN (Sept. 27, 2017), https://www.espn.com/espnw/voices/story/_/id/20834406/when-comes-team-wide-demonstrations-women-were-there-first [https://perma.cc/6XVC-NZ36].

punishing players for racist, sexist, and homophobic remarks made on social media and in other settings.¹³⁴ All-in-all, the various speech restrictions in professional sports leagues' governing documents and the inconsistency of punishment for violations has led to a chilling effect on players' ability or willingness to protest or express their opinions of racial injustice and other societal inequality.

B. NATIONAL ANTHEM RESTRICTIONS AND PRESCRIPTIONS IN CBAS

One controversial area of player protest in recent years has been around the playing of the national anthem before games. While the national anthem has been increasingly made a part of professional sports, since it was first played at the opening of the Union Grounds Park in New York in 1862,¹³⁵ it has also been a moment within sports where players and fans alike have sought to express protest regarding racial injustice and societal inequality. For example, in the 1970s, fans refused to stand for the national anthem to protest the Vietnam War.¹³⁶ During the 1990s, in protest of racism and discrimination in the United States, NBA player Mahmoud Abdul-Rauf refused to stand during the playing of the national anthem.¹³⁷ Before 2020, the Colin Kaepernick "taking a knee" controversy was the most recent high-profile example of this form of racial protest involving the national anthem.¹³⁸

¹³⁴ Heitner & Bogart, *supra* note 126, at 230. For example, MLB suspended Houston Astros player Yuli Gurriel for five games for making a racist gesture towards then Los Angeles Dodgers pitcher Yu Darvish. See Chelsea Bailey & Ali Gostanian, *Astros' Gurriel Suspended 5 Games Next Season for Racist Gesture at World Series*, NBC NEWS (Oct. 28, 2017, 10:12 AM), <https://www.nbcnews.com/news/asian-america/astros-first-baseman-yuli-gurriel-be-questioned-after-rationally-insensitive-n815281> [<https://perma.cc/KY5Z-C33G>]. However, MLB allowed Gurriel to finish playing in the World Series and did not institute the punishment until the beginning of the next regular season, making many question MLB's stance on and belief in anti-racism. See *id.*

¹³⁵ Louis Jacobson, *A Short History of the National Anthem, Protest and the NFL*, POLITIFACT (Sept. 25, 2017), <http://www.politifact.com/truth-o-meter/article/2017/sep/25/short-history-national-anthem-and-sports/> [<https://perma.cc/YF6F-T824>] (noting the introduction of the tradition in 1862); AJ Willingham, *The National Anthem in Sports (Spoiler: It Wasn't Always This Way)*, CNN, <http://www.cnn.com/2017/09/25/us/nfl-national-anthem-trump-kaepernick-history-trnd/index.html> [<https://perma.cc/X25Z-3TNY>] (explaining the result of the evolution of the national anthem in professional sports has led to most professional sporting events featuring the playing of the national anthem).

¹³⁶ Jacobson, *supra* note 135.

¹³⁷ Kelly B. Koenig, Note, *Mahmoud Abdul-Rauf's Suspension for Refusing to Stand for the National Anthem: A "Free Throw" for the NBA and Denver Nuggets, or a "Slam Dunk" Violation of Abdul-Rauf's Title VII Rights?*, 76 WASH. UNIV. L.Q. 377, 377-78 (1998).

¹³⁸ Brittney Watkins, Note, *Kaepernick Can Kick It!: Employment Discrimination, Political Activism, and Speech in the NFL*, 59 WASH. UNIV. J. L. & POL'Y 259, 261-64 (2019).

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Professional sports leagues vary in their approach to regulating player speech and protest related to the national anthem. The NBA has a long-standing policy that requires players and coaching staff to stand at attention on the court for the playing of the national anthem.¹³⁹ In this regard, the NBA has historically not only precluded player protest during this pregame ritual, but it also prescribed player expression and speech by requiring that they stand for it. Indeed, when Mahmoud Abdul-Rauf refused to stand for the national anthem during the mid-1990s, the NBA suspended Abdul-Rauf for a game without pay.¹⁴⁰ Abdul-Rauf thus was forced to stand for the playing of the national anthem before games, though the NBA permitted him to pray during it.¹⁴¹ Some twenty years later, when Colin Kaepernick's actions launched the "take a knee" movement in the NFL, the NBA continued to emphasize the requirements of the NBA CBA that players stand for the national anthem.¹⁴² In fact, the league was so firm in its position on this matter that it sent a memorandum to all of its teams, coaches, and players emphasizing this requirement.¹⁴³ The NBA did note in the memo that it supported players expressing their views on various social and political issues and that the league was committed to supporting them in building stronger and safer communities.¹⁴⁴ But regardless of the league's statements in support of players' freedom of expression, the league refused to tolerate kneeling during the national anthem.¹⁴⁵

On the other hand, the NFL, MLB, NHL, and MLS do not have rules or policies within their respective CBAs or other governing documents

¹³⁹ Comment H on the NBA Rulebook details accepted player or team conduct and dress. *Comments on the Rules*, NBA.COM, <https://official.nba.com/comments-on-the-Rules/#conductdress> [<https://perma.cc/V4BH-5TEP>] ("Players, coaches and trainers must stand and line up in a dignified posture along the foul lines during the playing of the American and/or Canadian national anthems."); see also Cato, *supra* note 8 (detailing the NBA's national anthem policy); Tim Bontemps, *NBA Memo Reinforces National Anthem Rule and Encourages Community Engagement*, WASH. POST (Sept. 30, 2017), https://www.washingtonpost.com/news/sports/wp/2017/09/29/nba-memo-makes-clear-players-and-coaches-must-stand-for-national-anthem/?utm_term=.4b80d5d3af27 [<https://perma.cc/R6BA-RA4V>] (noting the history of the rule).

¹⁴⁰ Koenig, *supra* note 137, at 377–78.

¹⁴¹ Kevin Seifert, *How National Anthem Rules Differ Among Sports Leagues*, ESPN (May 24, 2018), http://www.espn.com/nfl/story/_/id/20848575/rules-national-anthem-differ-sports-leagues [<https://perma.cc/D7BR-TEQJ>].

¹⁴² Zach Lowe, *Memo Reinforces Rule that NBA Players, Coaches Stand for Anthem*, ESPN (Sept. 29, 2017), https://www.espn.com/nba/story/_/id/20864858/nba-memo-reinforces-rule-players-coaches-stand-national-anthem [perma.cc/U5R9-54CR].

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

related to player conduct and the national anthem.¹⁴⁶ In these cases, the leagues' CBAs are silent on what is expected of an athlete during the playing of the national anthem before a game.¹⁴⁷ While players in these leagues were often encouraged to stand at attention during the playing of the national anthem, there are no enforcement mechanisms for leagues or teams to use against players because they were not agreed to during the collective bargaining process.¹⁴⁸ That is not to say that these professional sports leagues could not potentially discipline players under some of the more general disciplinary clauses detailed above. The NFL, for example, at least considered doing so, as well as possibly implementing a rule related to standing for the national anthem.¹⁴⁹ However, the NFL ultimately decided not to pursue either approach, and indeed, expressed support for its players and their protest of racial injustice.¹⁵⁰ Similarly, MLB did not discipline Bruce Maxwell—the only MLB player to kneel during the national anthem in 2017 at the height of the “take a knee” movement.¹⁵¹ Whether in solidarity with their players or because of the lack of a concrete provision within their CBAs, these leagues chose not to punish players. Nevertheless, in assessing the collective whole of professional sports leagues and their regulation of player speech, it is relatively clear that leagues have limited, suppressed, and discouraged player speech and protest.

C. LABOR LAW PROTECTIONS FOR CBA TERMS

The kinds of restrictions on players' speech described above are relevant for a number of reasons. Most obviously, they limit and perhaps thwart players using their platforms as professional athletes to speak out about racial injustice and help push for change in society. This dynamic, explored further below, also creates tension between players and their

¹⁴⁶ Seifert, *supra* note 141. The NFL's national anthem policy is part of the NFL's game operations manual and thus, is not subject to collective bargaining. Kevin Seifert & Dan Graziano, *New Policy Requires On-Field Players, Personnel to Stand for Anthem*, ESPN (May 23, 2018), https://www.espn.com/nfl/story/_/id/23582533/nfl-owners-approve-new-national-anthem-policy [<https://perma.cc/TF2F-AWDQ>].

¹⁴⁷ See Seifert, *supra* note 141; Seifert & Graziano, *supra* note 146.

¹⁴⁸ *Race, Speech, and Sports*, *supra* note 5, at 932–33.

¹⁴⁹ Ken Belson, *After Two Days of Talks, N.F.L. Owners Leave Anthem Rules Intact*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/sports/football/nfl-anthem-kneeling.html> [perma.cc/3PPR-YXM6].

¹⁵⁰ *Id.*; Jacobson, *supra* note 135.

¹⁵¹ Jeremy Woo, *Athletics' Bruce Maxwell Becomes First MLB Player to Kneel for National Anthem*, SPORTS ILLUSTRATED (Sept. 23, 2017), <https://www.si.com/mlb/2017/09/23/bruce-maxwell-national-anthem-protest-oakland-athletics> [perma.cc/YQT5-DYS6].

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respective leagues and teams, as the players perceive such speech curtailment as a lack of support for the issues that they care about. Moreover, the limitations placed on player speech by professional sports leagues' CBAs, and other governing documents, are also important because they receive special protection under labor and sports law. This unique legal status derives from the collective bargaining process, and the deference afforded it under federal statutes and related case law.

In a professional sports league like the NBA, NFL, or MLB, the players are represented by a union and the team owners are represented by the respective league's commissioner's office. The two sides negotiate the terms and conditions of employment for players consistent with the National Labor Relations Act.¹⁵² This collective bargaining process requires that certain mandatory subjects be collectively bargained by the two sides: wages, hours, and other conditions of employment.¹⁵³ Importantly, matters of player discipline and grievance procedures are among those terms that must be agreed upon by both the league and players' union.¹⁵⁴ If the owners or players refuse to negotiate in good faith on any of the mandatory subjects for collective bargaining, they commit an unfair labor practice.¹⁵⁵ The resulting document from these negotiations is the CBA, and it becomes the key authority that governs the employment relationship between players and their leagues and teams.¹⁵⁶

The significance of the collective bargaining process—and the agreed-upon terms and conditions of employment—cannot be overstated. Many of the terms of a professional sports league's CBA are restraints on trade and would thus violate antitrust laws.¹⁵⁷ However, because they are collectively bargained, these provisions receive special treatment under labor law and are largely exempt from antitrust challenges.¹⁵⁸ This protection serves both

¹⁵² 29 U.S.C. § 151-69; *see also* Am. League of Pro. Baseball Clubs, 180 N.L.R.B. 190 (1969) (establishing the National Labor Relations Board's jurisdiction over professional sports leagues).

¹⁵³ McElroy, *supra* note 119.

¹⁵⁴ Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 168–69 (1995).

¹⁵⁵ Brian D. Showalter, *Technical Foul: David Stern's Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205, 218 (2007) (explaining the violation of labor law for failing to negotiate on one of the mandatory subjects for collective bargaining); *Brown v. Pro Football, Inc.*, 518 U.S. 218, 237–39 (1996) (detailing the good faith requirement).

¹⁵⁶ Michael A. Mahone, Jr., *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 192 (2008).

¹⁵⁷ John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 704–05 (1977).

¹⁵⁸ Sean W.L. Alford, *Dusting off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C. L. REV. 212, 223 (2009).

the interests of the players and the league. Once agreed to, these terms provide certainty and predictability for both sides. However, a league cannot unilaterally change any of its CBA's terms, nor implement new ones, without the approval of the players.¹⁵⁹ In these regards, the restrictions on player speech and protest that originate from the collective bargaining process and are codified in the league's CBA become somewhat sacrosanct, and thus, can severely limit player speech. On the other hand, as evidenced by the NFL choosing not to seek a new policy during the "take a knee" movement in 2017, players cannot have new limitations—or prescriptions—on their speech imposed without approval from their union.

IV. CHANGES IN ATTITUDES TOWARDS PLAYER PROTEST AND SPEECH IN SUMMER 2020

A. NEGOTIATIONS TO (RE)START THE 2020 SEASONS

The summer of 2020 seemingly changed the approach to player speech and protest in professional sports. After the murder of George Floyd on May 25, 2020,¹⁶⁰ America and indeed the world¹⁶¹ faced a profound racial reckoning.¹⁶² Professional athletes spoke out forcefully and powerfully on social media regarding racial injustice in the United States.¹⁶³ Some players even joined protests to use their platform to draw attention to the problems of police brutality inflicted on the African American community.¹⁶⁴ During this same time, the players' unions, in various professional sports leagues, were negotiating the terms of restarting their respective seasons in the midst

¹⁵⁹ Stiglitz, *supra* note 154, at 173–74. A professional sports league can, however, unilaterally change terms that are not mandatory subjects of collective bargaining. See Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 TEX. REV. ENT. & SPORTS L. 23, 32 (2008) (citing 29 U.S.C. § 158(d)).

¹⁶⁰ Janelle Griffith & Corky Siemaszko, *Derek Chauvin Guilty of Murder in George Floyd's Death*, NBC NEWS (Apr. 20, 2021, 12:30 PM), <https://www.nbcnews.com/news/us-news/derek-chauvin-verdict-reached-trial-over-george-floyd-s-death-n1264565> [perma.cc/D96R-ZXSK].

¹⁶¹ *Protests Across the Globe After George Floyd's Death*, CNN, <https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html> [perma.cc/U654-G4NX] (last updated June 13, 2020, 3:22 PM).

¹⁶² Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump/> [https://perma.cc/K5GX-UJLY].

¹⁶³ Tim Daniels, *LeBron, Colin Kaepernick, Michael Jordan, More Speak on George Floyd's Death*, BLEACHER REP. (June 1, 2020), <https://bleacherreport.com/articles/2894017-lebron-james-joe-burrow-more-athletes-speak-out-on-george-floyds-death> [perma.cc/5FF4-UL6G].

¹⁶⁴ Sopan Deb, *As Protests Spur Posts from Athletes, N.B.A. Players Take to the Streets*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/sports/basketball/george-floyd-nba-protests.html> [perma.cc/S9NN-5CVA].

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of the COVID-19 global health pandemic.¹⁶⁵ On the one hand, these negotiations provided an avenue for players to push their respective leagues towards greater action and support on issues of diversity, equity, inclusion, and social justice. On the other hand, many players rightfully worried that that restarting their season would distract from the social justice movement taking hold in the country.¹⁶⁶ Some players—like the NBA’s Kyrie Irving and Dwight Howard—even proposed cancelling the season to keep the focus on social justice issues and supporting their respective communities.¹⁶⁷ Other players, like the WNBA’s Natasha Cloud and Renee Montgomery, announced that they would skip the 2020 season to devote their time to these social justice causes.¹⁶⁸

These concerns about distracting from the growing social justice movement soon gave way to players negotiating with their respective leagues to ensure that this unique platform of restarting sports during the pandemic helped effect change.¹⁶⁹ For example, the WNBA Player Association (“WNBPA”) President, Nneka Ogwumike explained that the league’s commitment to player advocacy and social justice was a “non-

¹⁶⁵ E.g., Jeff Zillgitt, *NBA, NBPA Support Plan to Resume Season in Florida*, USA TODAY (June 26, 2020, 6:02 PM), <https://www.usatoday.com/story/sports/nba/2020/06/26/nba-nbpa-support-decision-restart-season-disney-orlando-covid-19/3267395001/> [perma.cc/9ZSY-4ZFF]; Jayson Stark, *Memo to Baseball—Don’t Drive off This Cliff!*, ATHLETIC (May 29, 2020), <https://theathletic.com/1843384/2020/05/29/stark-memo-to-baseball-dont-drive-off-this-cliff/>.

¹⁶⁶ Chris Mannix, *NBA Must Not Let Season’s Return Distract from Black Lives Matter Movement*, SPORTS ILLUSTRATED (June 13, 2020), <https://www.si.com/nba/2020/06/13/players-concerned-return-social-justice> [https://perma.cc/69ZU-VQCN].

¹⁶⁷ Jared Weiss, *Weiss: NBA Players Can Make a Big Impact on Social Justice from Orlando*, ATHLETIC (June 15, 2020), <https://theathletic.com/1872615/2020/06/15/weiss-nba-players-can-make-their-biggest-impact-on-social-justice-from-orlando/>.

¹⁶⁸ Mechelle Voepel, *Atlanta Dream’s Renee Montgomery Says She’s Sitting out 2020 WNBA Season*, ESPN (June 18, 2020) [hereinafter *Atlanta Dream’s Renee Montgomery*], https://www.espn.com/wnba/story/_/id/29328867/atlanta-dream-renee-montgomery-says-sitting-2020-wnba-season [https://perma.cc/4MVW-QDDR]; Mechelle Voepel, *Washington Mystics’ Natasha Cloud, LaToya Sanders to Skip WNBA Season*, ESPN (June 22, 2020) [hereinafter *Washington Mystics’ Natasha Cloud*], https://www.espn.com/wnba/story/_/id/29349995/washington-mystics-natasha-cloud-latoya-sanders-skip-wnba-season [https://perma.cc/N6N3-BXA5].

¹⁶⁹ Dorothy J. Gentry, *A Basketball Friendship Became a Tag Team for Social Justice*, N.Y. TIMES (Sept. 2, 2020), <https://www.nytimes.com/2020/09/02/sports/basketball/nba-wnba-activism-natasha-cloud.html> [https://perma.cc/X82K-ZKDP]; Rob Goldberg, *Kyrie Irving Discusses Pushing for NBA Bubble Strike Amid Racial Injustice*, BLEACHER REP. (Oct. 1, 2020), <https://bleacherreport.com/articles/2911585-kyrie-irving-discusses-pushing-for-nba-bubble-strike-amid-racial-injustice> [https://perma.cc/W4BF-CS9E]; Jace Evans, *Dwight Howard Will Play for Lakers When NBA Season Restarts in Orlando Bubble*, USA TODAY (July 6, 2020, 11:46 PM) <https://www.usatoday.com/story/sports/nba/lakers/2020/07/06/dwight-howard-return-los-angeles-lakers-bubble/5388746002/> [https://perma.cc/H8SG-Y9GA].

negotiable” component for the players to return to the court for the 2020 season.¹⁷⁰ National Basketball Players Association (“NBPA”) President Chris Paul similarly stated that any agreement with the league to restart the season would have to include a joint effort between the players and the NBA to use their platform to advocate against systemic racism, police brutality, and social injustice in America.¹⁷¹ The negotiations on restarting the 2020 season focused on three key areas related to the players’ interest in advancing social and racial justice. The first was greater flexibility for the players to express their views on their jerseys and to be able to protest without penalty before games—both of which, as described above, were previously forbidden and heavily regulated. Specifically, players advocated for the ability to have personalized social justice messages on their jerseys—whether in place of, or in addition to, their names.¹⁷² Second, players advocated for greater diversity in head coaching and front office positions within their respective leagues.¹⁷³ Finally, MLB players pushed for their leagues to provide better financial support to the African American communities in their cities, and in particular, to Black-owned businesses and vendors.¹⁷⁴

The leagues were eager to support their players, and to restart their respective season, and the two sides reached agreement in both restarting the season and advancing social justice policies on several fronts. For example, the NBA and NBPA announced that addressing issues of race and inequality would be a priority during the relaunch of the 2020 season.¹⁷⁵ In addition, NBA Commissioner Adam Silver announced that the league would respect player protests during the national anthem, which was a significant change from the strict enforcement of the NBA rule requiring

¹⁷⁰ Mechelle Voepel, *How the WNBA’s Commitment to Social Justice United Players to Return for 2020 Season*, ESPN (July 24, 2020) [hereinafter *Commitment to Social Justice United Players*], https://www.espn.com/wnba/story/_/id/29526083/how-wnba-commitment-social-justice-united-players-return-2020-season [https://perma.cc/3ZJQ-2V99].

¹⁷¹ Malika Andrews, *Dealing with Racial Matters Will Be Shared Goal of NBA, NBPA When Season Resumes*, ESPN (June 24, 2020), https://www.espn.com/nba/story/_/id/29359197/dealing-racial-matters-shared-goal-nba-nbpa-season-resumes [https://perma.cc/PW7U-DBD2].

¹⁷² Marc J. Spears, *NBA Could Allow Players to Wear Social Justice Messages on Jerseys*, ESPN (June 27, 2020) [hereinafter *Social Justice Messages on Jerseys*], https://www.espn.com/nba/story/_/id/29377073/nba-allow-players-wear-social-justice-messages-jerseys [https://perma.cc/46KX-2WAE].

¹⁷³ Andrews, *supra* note 171.

¹⁷⁴ Alyson Footer, *Major League Baseball Celebrates Juneteenth*, MLB.COM (June 19, 2020) [hereinafter *Juneteenth*], <https://www.mlb.com/news/mlb-and-clubs-celebrate-juneteenth-holiday> [https://perma.cc/9MST-22BP].

¹⁷⁵ Andrews, *supra* note 171.

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players to stand.¹⁷⁶ The NFL sent a memo to all of its teams announcing its social justice initiatives as part of the plans for its 2020 season.¹⁷⁷ The NFL also announced policy changes to the Rooney Rule to require teams to interview at least one diverse candidate for general manager, coordinator, and senior staff positions and at least two diverse candidates for head coaching positions.¹⁷⁸ Perhaps most prominently, the WNBA announced that its 2020 season would be dedicated to social justice and that the league, in partnership with the WNBPA, would form the Social Justice Council and launch a new initiative entitled the Social Justice Movement.¹⁷⁹ MLB announced its restart to the 2020 season along with a variety of social justice initiatives, all of which it developed following negotiations with the MLB Players Association (“MLBPA”) and the newly-formed Players Alliance, a group of 150 current and former African American baseball players dedicated to fighting racial injustice.¹⁸⁰ These leagues’ approaches contrasted starkly with the NHL, which had less of a focus on social justice

¹⁷⁶ Tyler Conway, *NBA’s Adam Silver Says He Respects Peaceful Protest Ahead of Restart Opener*, BLEACHER REP. (July 29, 2020), <https://bleacherreport.com/articles/2902180-nbas-adam-silver-on-jazz-pelicans-kneeling-together-respect-peaceful-protest> [<https://perma.cc/56HY-8AXU>].

¹⁷⁷ See Grant Gordon, *NFL Informs Teams of Social Justice Initiatives for Week 1*, NFL.COM (July 27, 2020, 7:21 PM), <http://www.nfl.com/news/nfl-informs-teams-of-social-justice-initiatives-for-week-1> [<https://perma.cc/JDC4-AHZL>] (“As we continue to amplify and elevate the NFL’s ongoing and long-term commitment to social justice, we will be incorporating several prominent elements on the field, into all broadcasts and across league and club platforms to begin the NFL season and beyond[.] . . . In developing these concepts, we have worked directly with players and received input from the NFLPA.”).

¹⁷⁸ Mike Sando & Lindsay Jones, ‘Opening the Valve:’ *What the NFL Is Doing About Its Coaching Diversity Problem*, ATHLETIC (Sept. 25, 2020) <http://theathletic.com/2065600/2020/09/25/opening-the-valve-what-the-nfl-is-doing-about-its-coaching-diversity-problem/?redirected=1>.

¹⁷⁹ Official Release, Nat’l Basketball Ass’n, *WNBA Announces 2020 Season Dedicated to Social Justice* (July 6, 2020), <https://pr.nba.com/wnba-2020-season-social-justice/> [<https://perma.cc/MKJ7-ZPHT>]. The Social Justice Council’s purpose is to educate, amplify, and mobilize educators, activists, and community and business leaders with WNBA players, team and league staff, and fans. *Id.* The Council plans to facilitate community conversations, roundtables, player-produced podcasts, and other endeavors to address racial inequality, implicit bias, and systemic racism. *Id.*

¹⁸⁰ See James Wagner, *On Opening Day, a Rarity for M.L.B.: Support for Black Lives Matter*, N.Y. TIMES (July 23, 2020) [hereinafter *On Opening Day*], <https://www.nytimes.com/2020/07/23/sports/baseball/mlb-black-lives-matter.html> [<https://perma.cc/GY5K-RAFQ>]. In addition, teams like the Chicago Cubs formed diversity committees to adopt best practices in their hiring approaches in order to better diversify team front offices. See Jesse Rogers, *Theo Epstein Vows to Be Better as Cubs Executive, Hopes Others in Baseball Follow Suit*, ESPN (June 8, 2020), https://www.espn.com/mlb/story/_/id/29283585/theo-epstein-vows-better-cubs-executive-hopes-others-baseball-follow-suit [<https://perma.cc/9N54-HMEF>].

and racial equality. In fact, the league dedicated its 2020 season to both social justice activists and front-line COVID workers.¹⁸¹

B. OPENING GAMES

These partnerships, between the leagues and their players, led to unprecedented advances for player protests and speech, as well as concrete commitments from the leagues to further diversity, equity, inclusion, and social justice. For example, at the restart or beginnings of their respective seasons, the leagues permitted various messages advocating for social justice that had not been allowed before.¹⁸² Leagues allowed players to wear messages of support on their uniforms and jerseys. For example, MLB encouraged players to place “Black Lives Matter” or “United for Change” patches on their uniforms, wear Black Lives Matter t-shirts during batting practice, or put messages for social justice on their cleats.¹⁸³ The NBA similarly supported player expression by allowing them to wear jerseys that had social justice messages on their backs instead of, or in addition to, their names.¹⁸⁴ While this approval was a departure from established league rules, the NBA did limit the wording of the messages to a list of twenty-nine pre-selected terms.¹⁸⁵ The NBA also encouraged teams to warm up

¹⁸¹ Press Release, Nat’l Hockey League, NHL to Salute Social Justice Activists, Front-Line Workers on Opening Day (July 31, 2020), <https://www.nhl.com/news/nhl-to-salute-social-justice-activists-front-line-workers/c-317743710?tid=280504338> [<https://perma.cc/NK66-PHY6>].

¹⁸² See *supra* notes 120–134 and accompanying text.

¹⁸³ Ronald Blum, *MLB Allows Black Lives Matter, Social Justice Jersey Patches*, AP NEWS (July 23, 2020), <https://apnews.com/article/53d110a28743445836b80588e2d5a9c2> [<https://perma.cc/59U3-22FP>].

¹⁸⁴ Marc J. Spears, ‘Equality’ Tops List of NBA Players’ Most Popular Social Justice Jersey Messages, ESPN (July 8, 2020) [hereinafter *Equality Tops List*], https://www.espn.com/nba/story/_/id/29430249/equality-tops-list-nba-players-most-popular-social-justice-jersey-messages [<https://perma.cc/5K6N-Q5ZR>]. The NBA also permitted coaches to wear pins that read “Coaches Against Racial Injustice” throughout the restarted season. Malika Andrews & Marc J. Spears, *How the NBA Bubble Has Become a Platform for Social Justice*, ESPN (July 29, 2020), https://www.espn.com/nba/story/_/id/29555143/nba-restart-how-nba-bubble-become-platform-social-justice [<https://perma.cc/GVX8-Z4GK>]. Individual teams similarly showed support for social justice, as the Toronto Raptors—the first team to arrive at the Disney World “bubble” where the restarted season was played—demonstrated as they arrived to the bubble in team buses that had “Black Lives Matter” painted across both sides. Ryan Young, *Raptors Arrive at Disney World Bubble in ‘Black Lives Matter’ Buses*, YAHOO! (July 9, 2020), <https://sports.yahoo.com/toronto-raptors-disney-world-black-lives-matter-busses-nba-restart-bubble-012515704.html> [<https://perma.cc/XKC6-JHYR>].

¹⁸⁵ *Equality Tops List*, *supra* note 184. Approved messages included “Vote,” “Equality,” “Say Their Names,” “I Can’t Breathe,” “Love Us,” and “Education Reform.” *Id.*

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before games in Black Lives Matter t-shirts.¹⁸⁶ The WNBA also approved its players wearing Black Lives Matter t-shirts during warm-ups with “Say Her Name” on the backs of the shirts.¹⁸⁷ In addition, players wore uniforms that displayed Breonna Taylor’s name on the back to raise awareness and honor victims of police brutality.¹⁸⁸ The NFL allowed players to honor victims of systemic racism by wearing helmet decals with victims’ names and by wearing NFL Players Association (“NFLPA”) approved shirts during warm-ups that read, “Injustice against one of us is injustice against all of us.”¹⁸⁹ Similarly, the National Women’s Soccer League (“NWSL”) permitted its players to wear Black Lives Matter shirts during warm-ups and Black Lives Matter armbands during games.¹⁹⁰ The NHL, in somewhat stark contrast, restarted their season with relatively minimal support for social justice in announcing that the NHL’s newly-created #WeSkateFor initiative would celebrate both social justice advocates and healthcare

¹⁸⁶ See Sam Amick, *Amick: The Biggest Storylines of the 2020 NBA Restart*, ATHLETIC (July 30, 2020), <https://theathletic.com/1959665/2020/07/30/amick-the-biggest-storylines-of-the-2020-nba-restart/>.

¹⁸⁷ Press Release, Women’s Nat’l Basketball Ass’n, WNBA’s 2020 Regular Season Tips Off July 25 with Opening Weekend Dedicated to Black Lives Matter Movement (July 13, 2020) [hereinafter WNBA Press Release], <https://www.wnba.com/news/wnbas-2020-regular-season-tips-off-july-25-with-opening-weekend-dedicated-to-black-lives-matter-movement/> [https://perma.cc/J9VD-CZ7W].

¹⁸⁸ *Id.*

¹⁸⁹ James Dator, *The NFL Is Shifting Social Justice off Itself and onto Players, and the Outcome Will Be Unfair*, SB NATION (Sept. 2, 2020, 12:26 PM), <http://www.sbnation.com/2020/9/2/21418264/nfl-black-lives-matter-social-justice-colin-kaepernick> [https://perma.cc/BHM8-7V9X]; Gordon, *supra* note 177 (“In the case of decals, each player will have an option to honor an individual by displaying the person they choose to honor via their name or initials.”). The NFL also allowed coaches to honor victims of systemic racism by wearing such patches on their hats. See Jason Reid, *NFL To Stencil ‘End Racism’ on End Zone Borders as Part of Social Justice Rollout for Kickoff Week*, ESPN (July 27, 2020) http://www.espn.com/nfl/story/_/id/29549338/nfl-stencil-end-racism-takes-all-us-end-zone-borders-kickoff-week [https://perma.cc/K6TW-Q4MA]. Individual players similarly showed additional support on game days, like Kansas City Chiefs players Patrick Mahomes and Tyrann Mathieu who wore red shirts with the Chiefs’ logo with the word “Vote” on the front of the shirt. See Adam Teicher, *Texans Stay in Locker Room While Chiefs Stand for National Anthem*, ESPN (Sept. 10, 2020), http://www.espn.com/nfl/story/_/id/29855968/texans-stay-locker-room-chiefs-stand-national-anthem [https://perma.cc/SF9X-HPL6]. New Orleans Saints star Drew Brees wore a t-shirt with “Say Her Name” on it in reference to Breonna Taylor. See Ken Belson, *N.F.L. Kicks Off Season with Nods to Unrest and Focus on Anthem*, N.Y. TIMES (Sept. 13, 2020), <https://www.nytimes.com/2020/09/13/sports/football/nfl-protests.html> [https://perma.cc/G4P7-3RUQ].

¹⁹⁰ Molly Hensley-Clancy, *N.W.S.L. Players Kneel for Anthem as League Returns to Field*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/sports/soccer/nwsl-anthem-protest-kaiya-mccullough.html> [https://perma.cc/29VF-B566].

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workers,¹⁹¹ although several NHL teams wore Black Lives Matter t-shirts throughout the season.¹⁹²

Leagues also loosened their traditional strictures on player and political speech by displaying words, phrases, symbols, and the like on their fields and courts in support of social justice.¹⁹³ For example, MLB stenciled an inverted league logo that read “BLM” for Black Lives Matter or “United for Change” on the back of the pitcher’s mound, so as to be visible on television.¹⁹⁴ The WNBA displayed Black Lives Matter on the court for games played during the 2020 season.¹⁹⁵ The NBA did the same for all games during the restarted 2020 season in the Disney World bubble.¹⁹⁶ The NHL showed the hashtags #WeSkateForBlackLives and #WeSkateForBetterDays, as well as the phrase “ENDRACISM” on arena jumbotrons.¹⁹⁷ The NFL similarly painted their stadium end zones with the phrase “End Racism.”¹⁹⁸ For opening weekend, all MLB teams played a Black Lives Matter video before games.¹⁹⁹ All of these visible signs of support were a marked departure from the leagues’ past practices.

¹⁹¹ Ryan S. Clark, *‘To Be United Is Important’—Inside the NHL’s Plan to Address Racism*, ATHLETIC (July 24, 2020), https://theathletic.com/1945790/2020/07/24/to-be-united-is-important-inside-the-nhls-plan-to-address-racism/?article_source=search&search_query=inside%20nhl%5C%5C%27s%20plan%20to%20address%20racism.

¹⁹² Pat Pickens, *Maple Leafs Wear Black Lives Matter Shirts in Return to Training Camp*, NHL.COM (July 13, 2020), <https://www.nhl.com/news/maple-leafs-black-lives-matter-shirts-at-training-camp/c-317400764> [<https://perma.cc/GZ7G-NS64>]; Cristina Ledra, *Bruins, Predators Wear T-shirts in Support of Black Lives Matter Movement*, NHL.COM (Aug. 2, 2020), <https://www.nhl.com/news/bruins-predators-wear-t-shirts-in-support-of-black-lives-matter-movement/c-317810574> [<https://perma.cc/3JEN-NBNN>].

¹⁹³ Leagues also did not punish players for refusing to answer reporters’ questions about the game they just played and refocusing their remarks on social and racial justice. See, e.g., Mechelle Voepel, *Storm, Liberty Honor Breonna Taylor Prior to WNBA Opener*, ESPN (July 25, 2020) [hereinafter *Storm, Liberty*], https://www.espn.com/wnba/story/_/id/29536768/storm-liberty-honor-breonna-taylor-prior-wnba-opener [<https://perma.cc/FY5J-Z3UG>]; Andrews & Spears, *supra* note 184.

¹⁹⁴ Blum, *supra* note 183.

¹⁹⁵ WNBA Press Release, *supra* note 187.

¹⁹⁶ Amick, *supra* note 186.

¹⁹⁷ Hemal Jhaveri, *Why Is the NHL So Afraid of Saying Black Lives Matter?*, USA TODAY (Aug. 1, 2020, 11:10 PM), <https://ftw.usatoday.com/2020/08/nhl-so-afraid-of-saying-black-lives-matter> [<https://perma.cc/5TMH-VQP4>]. Notably absent from these words of support in NHL arenas was the phrase “Black Lives Matter.” See *id.*

¹⁹⁸ Teicher, *supra* note 189.

¹⁹⁹ *On Opening Day*, *supra* note 180. Also on opening weekend, the Boston Red Sox also unveiled a 250-foot billboard reading “Black Lives Matter” adjacent to Fenway Park. See *Red Sox Unveil Black Lives Matter Billboard Adjacent to Fenway Park*, ESPN (July 22, 2020), https://www.espn.com/mlb/story/_/id/29520854/red-sox-unveil-black-lives-matter-billboard-adjacent-fenway-park [<https://perma.cc/4HRH-LE24>].

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Indeed, the start or restart of each league's 2020 season provided perhaps the most significant change in approach to player speech and protest: relaxing rules about player actions during the playing of the national anthem before games. Leagues not only allowed, but facilitated player protest, including kneeling, during the playing of the national anthem. For example, when the NBA season restarted, players, coaches, and referees joined together and knelt in unity during the playing of the national anthem.²⁰⁰ Based on Philadelphia Phillies' star Andrew McCutchen's idea, MLB marked the opening games of its 2020 season with coaches and players holding a long, black tapestry while actor Morgan Freeman read a poem written by McCutchen and his wife over the loudspeaker.²⁰¹ Players and coaches then knelt for sixty seconds of silence before the playing of the national anthem.²⁰² While many players and coaches stood for the national anthem, several coaches and players took a knee during the national anthem or raised their right fists to raise awareness about racial injustice in America.²⁰³

The NFL also invoked celebrity star power by asking Alicia Keys to sing the Black national anthem, "Lift Every Voice and Sing" before the opening game of the 2020 season.²⁰⁴ During the playing of the national anthem the Houston Texans stayed in their locker room. After the national anthem, the Texans joined their opponents, the Kansas City Chiefs, at mid-field to link arms for a moment of silence "dedicated to the fight for

²⁰⁰ Nick Selbe, *Pelicans, Jazz Kneel for National Anthem Ahead of NBA Restart's First Game*, SPORTS ILLUSTRATED (July 30, 2020), <https://www.si.com/nba/2020/07/30/pelicans-jazz-kneel-protest-black-lives-matter-national-anthem-nba> [https://perma.cc/N69F-JXK5]. The NBA's position stood in stark contrast to its response just a few years earlier when the "take a knee" movement was in the national spotlight, and Commissioner Adam Silver strongly stated that the NBA's rule regarding standing during the national anthem would be followed. See Steve Aschburner, *NBA Commissioner Expects Players to Stand During Anthem*, NBA.COM (Sept. 28, 2017, 7:32 PM), <https://www.nba.com/news/nba-commissioner-adam-silver-expects-players-stand-during-anthem> [https://perma.cc/Z57V-9PWJ].

²⁰¹ Jeff Passan, *Phillies' Andrew McCutchen Unites with Yankees, Nationals for Pregame Ceremony Acknowledging Injustice*, ESPN (July 23, 2020), https://www.espn.com/mlb/story/_/id/29527461/phils-andrew-mccutchen-unites-yanks-nats-pregame-ceremony-acknowledging-injustice [https://perma.cc/QS53-TG39].

²⁰² *On Opening Day*, *supra* note 180.

²⁰³ Alyson Footer, *Show of Unity: Clubs Support Social Justice*, MLB.COM (July 24, 2020), <https://www.mlb.com/news/opening-day-ceremonies-support-social-justice> [https://perma.cc/VGR9-92ZR].

²⁰⁴ Stephanie Guerilus, *Alicia Keys and NFL Launch \$1B Fund for Black Businesses and Community*, YAHOO! (Sept. 10, 2020), <http://news.yahoo.com/alicia-keys-nfl-launch-1b-004500476.html> [https://perma.cc/LY5S-Z6ER].

equality.”²⁰⁵ Similarly, the WNBA launched its 2020 season with both teams in the opening game leaving the court before the playing of the national anthem.²⁰⁶ The teams then returned to the court for a twenty-six second moment of silence in honor of Breonna Taylor before starting the game.²⁰⁷ For the first time in league history, the NHL had a player, Matt Dumba, of the Minnesota Wild, kneel during the national anthem after delivering an impassioned speech about racial justice as other players surrounded him in support.²⁰⁸ Finally, during the opening game of the NWSL season, every player from both the Portland Thorns and the North Carolina Courage knelt together during the national anthem.²⁰⁹

C. MONETARY SUPPORT

In addition to these newfound forms of player protest, the leagues, teams, players’ unions, and individual players also committed substantial amounts of money and resources to help fuel greater equality in the United States. For example, the NBA announced its partnership with the NBPA in founding the NBA Foundation, a philanthropic enterprise “dedicated to greater economic empowerment in the Black community.”²¹⁰ The NBA’s team owners committed \$300 million—\$30 million annually for ten years—to fund the NBA Foundation.²¹¹ In addition, the NBPA auctioned off the player jerseys from the first week of games during the restarted 2020 season to fund a “player-administered social justice fund . . . housed by the NBPA Foundation.”²¹² The NBPA also committed to funding research aimed at collecting data on jurisdictions where incidents of police brutality

²⁰⁵ Teicher, *supra* note 189. During other opening week games, players knelt during the national anthem in protest. See Ken Belson, *N.F.L. Kicks Off Season with Nods to Unrest and Focus on Anthem*, N.Y. TIMES (Sept. 13, 2020), <http://www.nytimes.com/2020/09/13/sports/football/nfl-protests.html> [<https://perma.cc/EL8L-WB2W>].

²⁰⁶ Storm, Liberty, *supra* note 193.

²⁰⁷ Gillian R. Brassil, ‘We Will Be a Voice for the Voiceless’: The W.N.B.A. Season Is Dedicated to Breonna Taylor, N.Y. TIMES (July 25, 2020), <https://www.nytimes.com/2020/07/25/sports/wnba-seattle-storm-new-york-liberty.html> [<https://perma.cc/KX5C-LHHK>].

²⁰⁸ Morgan Campbell, *Hockey, Rocked by Racist Acts, Embraces Black Lives Matter Campaigns*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/sports/hockey/nhl-racism-protests-george-floyd.html> [<https://perma.cc/7LYP-G6M2>].

²⁰⁹ Hensley-Clancy, *supra* note 190.

²¹⁰ Ohm Youngmisuk, *NBA Establishes Fund to Support Empowerment in Black Community*, ESPN (Aug. 5, 2020), https://www.espn.com/nba/story/_/id/29602899/nba-establishes-fund-support-empowerment-black-community [<https://perma.cc/5D89-56ZH>].

²¹¹ *Id.*

²¹² *Equality Tops List*, *supra* note 184.

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go unpunished.²¹³ Similarly, the NFL committed \$1 billion “aimed at helping Black businesses and communities.”²¹⁴ The NFL and the Players Coalition also donated \$3 million to African American communities hit hardest by COVID-19.²¹⁵ The NHL dedicated a minimum of \$2.5 million per year “to help fund programs and initiatives aimed at increasing diversity and inclusion [in hockey], as well as promoting social justice and racial equality.”²¹⁶ This funding helped support the efforts of the Hockey Diversity Alliance’s charitable work.²¹⁷ MLB committed more financial support to the Jackie Robinson Foundation and the Negro Leagues Baseball Museum, as well as initiated new partnerships—and donated substantial funds to—the NAACP Legal Defense Fund and the NAACP Education Fund.²¹⁸ In addition, MLB established the MLB Diverse Business Partners Recovery Project to help Black-owned businesses that sustained damage during the protests of summer 2020.²¹⁹

Many teams made similar financial commitments to infuse greater economic opportunity in Black communities. For example, the eleven professional sports teams in Los Angeles launched The ALLIANCE: Los Angeles, representing a five-year commitment by the teams to “drive

²¹³ Michael Lee, *A Police Accountability Project Is Just a Start for NBPA Boss Seeking Real Change*, ATHLETIC (July 1, 2020), <https://theathletic.com/1903578/2020/07/01/a-police-accountability-project-is-just-a-start-for-nbpa-boss-seeking-real-change/>. The database would then be shared with various civic organizations to help support and elect prosecutors who would investigate police brutality. *Id.*

²¹⁴ Guerilus, *supra* note 204.

²¹⁵ Curtis Bunn, *Players Coalition and NFL Donate \$3M to Black Communities Hit by Coronavirus*, NBC NEWS (Apr. 22, 2020, 6:02 AM) <http://www.nbcnews.com/news/nbcblk/players-coalition-nfl-donate-3m-black-communities-hit-coronavirus-n1188951> [<https://perma.cc/RQK6-VUDL>].

²¹⁶ NAT’L HOCKEY LEAGUE PLAYERS’ ASS’N, NATIONAL HOCKEY LEAGUE/NATIONAL HOCKEY LEAGUE PLAYERS’ ASSOCIATION MEMORANDUM OF UNDERSTANDING 31 (2020), https://cdn.nhlpa.com/img/assets/file/NHLPA_NHL_MOU.pdf [<https://perma.cc/UG4J-R5ND>] (providing modifications to the collective bargaining agreement entered into on February 15, 2013).

²¹⁷ See Greg Wyshynski, *Evander Kane, Akim Aliu Help Create New Hockey Diversity Alliance*, ESPN (June 8, 2020), https://www.espn.com/nhl/story/_id/29282382/evander-kane-akim-aliu-help-create-new-hockey-diversity-alliance [<https://perma.cc/9WFZ-538W>] (detailing the founding of the Hockey Diversity Alliance); *Our Purpose*, HOCKEY DIVERSITY ALL., <https://hockeydiversityalliance.org/#our-purpose> [<https://perma.cc/H2M4-GEYM>] (detailing the mission, including charitable work, of the organization).

²¹⁸ Alyson Footer, *Nats, Yanks Unify to Promote Social Justice*, MLB.COM (July 24, 2020) [hereinafter *Nats, Yanks Unify*], <https://www.mlb.com/news/mlb-players-social-justice-inclusion-diversity> [<https://perma.cc/8QQP-WJJP>].

²¹⁹ *Juneteenth*, *supra* note 174.

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investment and impact for social justice through sport.”²²⁰ The three professional sports teams in Cleveland formed a similar alliance to “develop a sustainable and direct strategy to address social injustice facing the city and all Northeast Ohio communities.”²²¹ The Minnesota Twins committed \$25 million through its newly-formed foundation to fight racial injustice.²²² During the MLB Draft, the respective heads of baseball operations for each of MLB’s thirty teams announced that they personally and collectively were donating \$311,000 to five charities: NAACP Legal Defense Fund; the Equal Justice Initiative; Color for Change; Campaign Zero; and the Jackie Robinson Foundation.²²³ Team owners then matched and exceeded these executives’ contributions to bring the total to more than \$1 million for these five organizations.²²⁴ The Indiana Fever established the #Fever4Change initiative to raise money for local organizations that work for greater equality and justice in the community.²²⁵ The owner of the Philadelphia 76ers and New Jersey Devils committed \$20 million over five years to invest in organizations aimed at targeting inequality in cities where the teams played and lived in.²²⁶ Finally, though certainly not exhaustively, Charlotte Hornets owner and NBA icon, Michael Jordan, pledged \$100 million over ten years to fight systemic racism.²²⁷

²²⁰ Ken Gurnick, *Dodgers, 10 LA Teams Launch The ALLIANCE*, MLB.COM (July 14, 2020), <https://www.mlb.com/news/dodgers-join-the-alliance-los-angeles> [https://perma.cc/9C7N-6U6R].

²²¹ *Browns, Cavaliers, Indians Link to Fight for Social Change*, ESPN (Aug. 27, 2020), https://www.espn.com/espn/story/_/id/29752125/browns-cavaliers-indians-link-fight-social-change [https://perma.cc/MW69-GUXY].

²²² Courtney Cronin, *Minnesota Twins Donate \$25M, Vikings \$5M to Racial, Social Justice Campaigns*, ESPN (June 10, 2020), https://www.espn.com/nfl/story/_/id/29294630/minnesota-twins-donate-25m-vikings-5m-racial-social-justice-campaigns [https://perma.cc/F7KL-6R8U]. The Twins also removed the statue of former owner, Calvin Griffith, due to his historically racist views and comments. See *Twins Remove Statue of Ex-owner Calvin Griffith over Racist Comments*, ESPN (June 19, 2020), https://www.espn.com/mlb/story/_/id/29334063/twins-remove-statue-ex-owner-calvin-griffith-comments [https://perma.cc/4S36-ZKQC].

²²³ Ken Rosenthal, *Rosenthal: How Some Execs Spurred MLB’s Black Lives Matter Statement on Draft Night*, ATHLETIC (June 12, 2020), <https://theathletic.com/1868382/2020/06/12/rosenthal-how-some-execs-spurred-mlbs-black-lives-matter-statement-on-draft-night/>.

²²⁴ *Id.*

²²⁵ Press Release, Indiana Fever, *Indiana Fever Players Use Platform to Support Local Non-Profits* (July 31, 2020), <https://fever.wnba.com/news/indiana-fever-fever-4-change/> [https://perma.cc/RH9P-LWBW].

²²⁶ Marc J. Spears, *Sixers, Devils Owners Pledge \$20M in Push for Equality*, ESPN (Aug. 17, 2020) [hereinafter *Sixers*], https://www.espn.com/nba/story?id=29679445&_slug_=sixers-devils-owners-pledge-20m-push-equality [https://perma.cc/M9XC-KTHW].

²²⁷ Tyler Conway, *Michael Jordan and Jordan Brand Reveal Partners for \$100M Pledge to Fight Racism*, BLEACHER REP. (July 29, 2020), <https://bleacherreport.com/articles/2902178-michael-jordan-and-jordan-brand-reveal-partners-for-100m-pledge-to-fight-racism> [https://perma.cc/N2HG-AWYN].

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Many professional athletes, individually and in partnership with others, also provided monetary support to advance social justice. Los Angeles Dodgers players raised money for local organizations in the Black community.²²⁸ The Chicago Sky players announced that they would donate \$10 for every point the team scored, \$100 for every win, and \$50 for any loss to local organizations related to race, voting, and similar community causes.²²⁹ Indiana Pacer Malcolm Brogdon established a foundation for social justice reform,²³⁰ while the New Orleans Pelicans' Jrue Holiday and San Antonio Spurs' Patty Mills donated their salaries during the restarted 2020 NBA season, approximately \$5 million and \$1 million respectively, to business, charities, and educational institutions that serve Black and other minority communities.²³¹ The New Orleans Saints' Drew Brees donated \$5 million to "support health care throughout underserved communities in Louisiana."²³² Jalen Ramsey of the Los Angeles Rams donated \$1 million to "level the playing field" for underprivileged kids to help them receive a quality education.²³³ In the NHL, Matt Dumba matched donations up to \$100,000 to rebuild a street that was damaged during the protests following

²²⁸ Andy McCullough, *'We Should Get Together': How Clayton Kershaw, Dodgers Decided to Speak Out*, ATHLETIC (July 20, 2020), <https://theathletic.com/1939254/2020/07/20/we-should-get-together-how-clayton-kershaw-dodgers-decided-to-speak-out/>.

²²⁹ Press Release, Chicago Sky, Chicago Sky Players to Donate \$10 per Point Scored this Season for Social Justice (July 28, 2020), <https://sky.wnba.com/news/skytakesaction/#:~:text=CHICAGO%20%E2%80%93%20The%20Chicago%20Sky%20players,SkyTakesAction%2C%20the%20team%20announced%20today> [<https://perma.cc/ZP29-WTNG>].

²³⁰ Eric Woodyard, *Pacers' Malcolm Brogdon Launches Foundation for Social Justice Reform from Orlando Bubble: 'I've Decided to Do Both'*, ESPN (July 21, 2020), https://www.espn.com/nba/story/_/id/29511770/pacers-malcolm-brogdon-launches-foundation-social-justice-reform-orlando-bubble-decided-do-both [<https://perma.cc/4AQM-QKJK>].

²³¹ Tania Ganguli, *NBA Star Jrue Holiday to Donate \$5 Million of Salary to the Black Business Community*, L.A. TIMES (Aug. 1, 2020, 1:48 PM), <https://www.latimes.com/sports/story/2020-08-01/jrue-holiday-nba-salary-black-business-community> [<https://perma.cc/TL6G-H88R>]; George Ramsay, *San Antonio Spurs' Patty Mills to Donate \$1 Million NBA Salary to Black Lives Matter Charities After Season Restart*, CNN (July 9, 2020, 7:17 AM), <https://www.cnn.com/2020/07/09/sport/patty-mills-san-antonio-spurs-black-lives-matter-donation-spt-intl/index.html> [<https://perma.cc/43Z4-P8HM>].

²³² Mike Triplett, *Drew Brees' Foundation Donating Another \$5 Million*, ESPN (July 27, 2020), http://www.espn.com/nfl/story/_/id/29547808/drew-brees-foundation-donating-another-5-million [<https://perma.cc/2RDM-QLAF>].

²³³ Nick Shook, *Jalen Ramsey Pledges \$1 Million Donation to Nashville School*, NFL.COM (Aug. 26, 2020, 3:15 PM), <http://www.nfl.com/news/jalen-ramsey-pledges-1-million-donation-to-nashville-school> [<https://perma.cc/5BSG-XNNZ>].

the murder of George Floyd.²³⁴ Patrice Bergeron donated \$25,000 to the local chapter of the NAACP and encouraged others to do the same on social media.²³⁵ The New Jersey Devils' P.K. Subban donated \$50,000 to George Floyd's daughter, Gianna Floyd—an amount matched by NHL Commissioner Gary Bettman.²³⁶ All of these forms of monetary support sought to use not just the wealth, but also the celebrity, of professional sports and its athletes to put meaningful resources behind organizations and causes that would advance racial justice.

D. INTERVENING EVENTS DURING THE RESTARTED SEASONS AND EVEN GREATER PROGRESS

The significant advances made in terms of racial protests and racial progress during the summer of 2020 and leading up to the restarting of several professional sports leagues' seasons is hard to overstate. However, the Kenosha, Wisconsin police shooting of Jacob Blake on August 23, 2020, led to even further progress, and, indeed, unprecedented feats of protest in professional sports, born out of this tragedy.²³⁷ On August 26, 2020, the Milwaukee Bucks spurred these historic events by declining to play Game 5 of the NBA's Eastern Conference quarterfinal playoff series in protest of the police violence in their home state.²³⁸ The team used the time instead to call the Attorney General and Lieutenant Governor of Wisconsin to advocate on behalf of the Blake family.²³⁹ The Bucks' walkout would normally have constituted a "failure to appear" under the NBA Operations

²³⁴ See William Douglas, *Dumba Fund to Help Rebuild Minneapolis Area Damaged During Floyd Protests*, NHL.COM (June 22, 2020), <https://www.nhl.com/news/matt-dumba-fundraiser-will-help-rebuild-lake-street-in-minneapolis/c-317235324> [<https://perma.cc/GS2E-TGUQ>].

²³⁵ Greg Wyshynski, *NHL Needs Actions, Not Words, on Racial Injustice*, ESPN (June 8, 2020), https://www.espn.com/nhl/story/_/id/29278500/nhl-needs-actions-not-words-racial-injustice [<https://perma.cc/TF87-76F4>].

²³⁶ *Id.*

²³⁷ Dave McMenamin, *Jacob Blake Sr. 'Floored' that NBA Players Sought His Input on Whether to Proceed with Postseason*, ESPN (Aug. 30, 2020), https://www.espn.com/nba/story/_/id/29771051/jacob-blake-sr-floored-nba-players-sought-input-whether-proceed-postseason [<https://perma.cc/83M2-YK87>].

²³⁸ Ben Pickman, *After Bucks Decide to Sit Out Game 5, NBA Postpones Wednesday's Playoff Games*, SPORTS ILLUSTRATED (Aug. 26, 2020), <https://www.si.com/nba/2020/08/26/bucks-sit-out-magic-game-5-nba-playoffs> [<https://perma.cc/93FC-4W5Z>].

²³⁹ Shams Charania & Joe Vardon, *Bucks Stage Walkout, All of Wednesday NBA Playoff Games Postponed*, ATHLETIC (Aug. 26, 2020), <https://theathletic.com/2025253/2020/08/26/sources-bucks-players-in-serious-talks-about-sitting-out-game-5-vs-orlando/>.

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Manual, resulting in a forfeiture of the game and up to a \$5 million fine.²⁴⁰ However, in solidarity with the Bucks, their opponent, the Orlando Magic, also chose not to play.²⁴¹ The NBA thus postponed rather than cancelled the game.²⁴² Other NBA teams joined the Bucks and Magic, and the league postponed all games for a seventy-two-hour period.²⁴³ Other professional sports teams, with the support of their respective leagues, similarly staged walkouts that led to game postponements. Led by the Milwaukee Brewers and Cincinnati Reds, who chose not to play a game on August 26, 2020,²⁴⁴ MLB postponed eleven games over the course of three days.²⁴⁵ The WNBA postponed the two games scheduled for August 26, 2020 in support of the four teams' players refusing to play.²⁴⁶ Instead, the players from these teams gathered on the court, joined arms, and kneeled at center court in a display of unity.²⁴⁷ The NHL, in contrast, continued to play its games initially, despite pressure from the Hockey Diversity Alliance.²⁴⁸ The league insisted that it would not suspend games unless there was a strong push by the players to do so.²⁴⁹ A day later, on August 27, 2020, the eight teams scheduled to play agreed to a walk-out, leading to the NHL postponing the playoff games for two days.²⁵⁰

²⁴⁰ *What We Know and Don't Know About the Boycotts that Stopped Sports*, ESPN (Aug. 26, 2020), https://www.espn.com/nba/story/_/id/29749540/what-know-know-boycotts-stopped-sports [<https://perma.cc/PJ2N-C78W>].

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Bill Oram, *Lakers Ease Back into Practice with 'Bigger Picture' in Mind*, ATHLETIC (Aug. 28, 2020), <https://theathletic.com/2030395/2020/08/28/lakers-ease-back-into-practice-with-bigger-picture-in-mind/>.

²⁴⁴ *Three MLB Games Postponed as Players Protest Wisconsin Shooting*, ESPN (Aug. 26, 2020), https://www.espn.com/mlb/story/_/id/29748076/brewers-reds-mariners-padres-call-games-focus-issues-more-important-baseball [<https://perma.cc/C9NR-VT6G>].

²⁴⁵ *A's, Astros Walked off Field in Protest, Game Postponed*, ESPN (Aug. 28, 2020), <https://www.espn.com/mlb/recap?gameId=401226161> [<https://perma.cc/KQ9W-7SF6>].

²⁴⁶ Charlotte Carroll, *WNBA Players Take a Stand as All Wednesday Night Games Are Postponed*, ATHLETIC (Aug. 26, 2020), <https://theathletic.com/2026055/2020/08/26/wnba-players-take-a-stand-as-all-wednesday-night-games-are-postponed/>.

²⁴⁷ *Id.*

²⁴⁸ Thomas Drance & Ryan S. Clark, *The Quietest Day: Why the Puck Dropped in the NHL on a Historic Day for Sports*, ATHLETIC (Aug. 27, 2020), <https://theathletic.com/2026430/2020/08/27/the-quietest-day-why-the-puck-dropped-in-the-nhl-on-a-historic-day-for-sports/>.

²⁴⁹ Emily Kaplan & Greg Wyshynski, *Inside the NHL's Decision to Postpone Two Days of Playoff Games*, ESPN (Aug. 28, 2020), https://www.espn.com/nhl/story/_/id/29756099/inside-nhl-decision-postpone-two-days-playoff-games [<https://perma.cc/7N6A-RXPH>].

²⁵⁰ *Id.*

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These walkouts, and the unprecedented forms of player protest that they embodied, also led to more progress in sports' power to demand greater strides for racial and social justice, particularly in the area of promoting voter turnout in the then upcoming 2020 election. For example, the NBA, in collaboration with its players and the NBPA, announced a three-pronged plan in restarting its playoff games: the creation of a social justice coalition within the league aimed at voting, civic engagement, and police reform; using NBA arenas as polling places for the 2020 election; and including more advertising during playoff games to promote civic engagement and voting.²⁵¹ The NHL, which shared a number of arenas with the NBA, similarly announced that their arenas would be used as polling places, and the league designated all future election days in the United States and Canada as league-wide holidays to encourage voting and civic engagement.²⁵² The NHL also partnered with two non-partisan organizations, When We All Vote and RISE, to increase voter participation.²⁵³ The WNBA, which also shares many arenas with the NBA and NHL, announced that their arenas would be polling sites.²⁵⁴ The league also announced various initiatives aimed at voter registration, poll worker training, and the like.²⁵⁵ Finally, the NFL announced its launch of NFL

²⁵¹ Jenny Dial Creech, *With NBA Venues Serving As Voting Sites, Here's How to Register in Each City*, ATHLETIC (Aug. 28, 2020), <https://theathletic.com/2030325/2020/08/28/with-nba-venues-serving-as-voting-sites-heres-how-to-register-in-each-city/>. Individual teams forged local partnerships to advance these voter initiatives. See Josh Robbins, *Orlando Magic Have a 'Superstar' in Their Corner Helping Fight Racial Injustice*, ATHLETIC (Sept. 2, 2020), <https://theathletic.com/2040565/2020/09/02/orlando-magic-desmond-meade-voting/> (describing how Orlando Magic teamed up with the Florida Rights Restoration Coalition to combat racial injustice and voter suppression); Jon Krawczynski, *Timberwolves Launching Voter Drive to Spur Participation in November Election*, ATHLETIC (Sept. 1, 2020), <https://theathletic.com/2036209/2020/09/01/timberwolves-launching-voter-drive-to-spur-participation-in-november-election> (detailing how the Minnesota Timberwolves launched a voter registration and education drive ahead of the 2020 election).

²⁵² Press Release, Nat'l Hockey League, NHL Announces Initiatives to Combat Racism, Accelerate Inclusion Efforts (Sept. 3, 2020) [NHL Press Release], <https://www.nhl.com/news/nhl-announces-initiatives-to-combat-racism-accelerate-inclusion-efforts/c-318873398> [<https://perma.cc/V9NQ-Z7PA>].

²⁵³ *Id.*

²⁵⁴ NBA, *WNBA Ramp up Efforts to Get out the Vote*, NBA.COM (Oct. 24, 2020, 7:43 PM), <https://www.nba.com/news/nba-wnba-ramp-up-efforts-to-get-out-the-vote-ahead> [<https://perma.cc/EE82-CBP3>].

²⁵⁵ *Id.* The Atlanta Dream players found themselves at odds with their team co-owner, U.S. Senator Kelly Loeffler from Georgia, who expressed her opposition to the WNBA's support of the Black Lives Matter movement. See *Dream Co-owner Kelly Loeffler Critical of WNBA's Black Lives Matter Initiative*, ESPN (July 7, 2020), https://www.espn.com/wnba/story/_/id/29424379/dream-co-owner-kelly-loeffler-critical-wnba-black-lives-matter-initiative [<https://perma.cc/5C46-458P>]. The players not only condemned

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Votes, a non-partisan initiative among all league stakeholders to support and encourage voter education, registration, and turnout.²⁵⁶ In addition, many NFL teams made their stadiums available as polling sites for the 2020 election.²⁵⁷

The historic player walkouts also led to further commitments from the leagues and their players to combat racial and social injustice. For example, shortly after the walkouts, the NHL, which had trailed other professional sports leagues in its support of the movements spreading across the United States, finally announced sweeping and concrete initiatives to combat racism.²⁵⁸ The NHL committed to increasing the number of league employees and coaches from underrepresented groups, including women, minorities, and the LGBTQ+ community.²⁵⁹ In addition, the league affirmed its intent to build a more diverse business pipeline with its vendors and to develop a more diverse pipeline of young hockey players throughout Canada and the United States.²⁶⁰ In addition, MLB, in partnership with the Players Alliance, pledged \$10 million to its newly-formed nonprofit organization to finance the recruitment of more Black students into sports internships, to donate baseball equipment to Black community groups, and to fund a player mentorship program.²⁶¹ Moreover, the Players Alliance donated the salaries of its players who played on August 27 and 28, 2020 to support Black families and communities that had been adversely affected

Senator Loeffler's views, but also began openly campaigning for her opponent, the Reverend Raphael Warnock, who wound up defeating her. See Sean Gregory, *'We Did That': Inside the WNBA's Strategy to Support Rachel Warnock—and Help Democrats Win the Senate*, TIME (Jan. 7, 2021, 1:12 PM), <https://time.com/5927075/atlanta-dream-warnock-loeffler/> [https://perma.cc/EV9W-BWM2].

²⁵⁶ *NFL Launches Voting Initiative 'NFL Votes'*, NFL.COM (Aug. 6, 2020, 8:59 AM), <http://www.nfl.com/news/nfl-launches-voting-initiative-nfl-votes> [https://perma.cc/8ADV-8222]. The NFL partnered with various voter-focused organizations—such as I Am a Voter and Rock the Vote—on this initiative. See *id.*

²⁵⁷ *NFL Votes: Team Facilities Being Used for 2020 Election Support*, NFL.COM (Oct. 5, 2020, 7:13 PM) <http://www.nfl.com/news/nfl-votes-team-facilities-being-used-for-2020-election-support> [https://perma.cc/E4RH-GX62].

²⁵⁸ Emily Kaplan, *NHL Launches Initiatives with 'Welcoming, Inclusive' Mandate*, ESPN (Sept. 3, 2020), https://www.espn.com/nhl/story/_/id/29803252/nhl-launches-initiatives-welcoming-inclusive-mandate [https://perma.cc/N6KF-GQKR].

²⁵⁹ NHL Press Release, *supra* note 252.

²⁶⁰ *Id.*

²⁶¹ James Wagner, *Players' Alliance Gets \$10 Million From M.L.B. and Union to Build Diversity*, PLAYERS ALL. (Sept. 21, 2020) [hereinafter *Players' Alliance Gets \$10 Million*], <https://theplayersalliance.com/2020/09/players-alliance-gets-10-million-from-m-l-b-and-union-to-build-diversity/> [https://perma.cc/77G4-UGQK].

by the preceding months.²⁶² In these, and so many other ways, professional sports evolved significantly in both its approach to racial progress and player protest.

V. CONCLUSION

Did the summer of 2020 permanently change professional sports in terms of its framework on player protests and on racial progress in sports and society more generally? As the preceding analysis demonstrates, there were significant advances made in professional sports leagues' support of both player protests and racial equality. Moreover, new milestones in racial and gender progress in sports continue to occur. For example, MLB's Miami Marlins hired Kim Ng, the first woman to serve as general manager of a baseball team.²⁶³ That it took until November of 2020 for her to shatter this glass ceiling in baseball raises reasonable questions of how much professional sports has systemically changed, particularly when MLB colleagues note that while Kim Ng was often the "smartest person in the room,"²⁶⁴ she was put on the slow track "because she was an Asian American woman."²⁶⁵ Moreover, despite some of these historic individual examples, professional sports still has a long way to go to effect greater representation in its coaching, management, and front office ranks.²⁶⁶

Some of the visible signs of support for social justice in professional sports have subsided or gone away. For example, few athletes continue to kneel during the national anthem before games.²⁶⁷ While athletes have

²⁶² *Members of the Players Alliance Donating MLB Salaries To Support Fight Against Racial Inequality*, ESPN (Aug. 27, 2020), https://www.espn.com/mlb/story/_/id/29755262/members-players-alliance-donating-salaries-support-fight-racial-inequality [https://perma.cc/MFQ7-Y7FF].

²⁶³ Lindsey Adler, *Adler: What Kim Ng Becoming Marlins GM Means for Women in Baseball*, ATHLETIC (Nov. 13, 2020), https://theathletic.com/2196518/2020/11/13/kim-ng-marlins-gm/?article_source=search&search_query=%5C%5C%22Kim%20Ng%5C%5C%22.

²⁶⁴ Dylan Hernández, *Baseball Rejoices when Marlins Hire Kim Ng as MLB's First Female General Manager*, L.A. TIMES (Nov. 13, 2020, 6:05 PM), <https://www.latimes.com/sports/story/2020-11-13/kim-ng-marlins-first-female-gm-dodgers> [https://perma.cc/US63-3V3Q].

²⁶⁵ See David K. Li, *Marlins GM Kim Ng Said Some Interviews Likely Weren't on the 'Up-and-Up' Before Historic New Role*, NBC NEWS (Nov. 16, 2020, 10:17 AM), <https://www.nbcnews.com/news/us-news/marlins-gm-kim-ng-said-some-interviews-likely-weren-t-n1247917> [https://perma.cc/8D8D-9JP9].

²⁶⁶ See *supra* notes 71–80 and accompanying text.

²⁶⁷ E.g., Anne M. Peterson, *U.S. Women's National Team Players to Stop Kneeling During the National Anthem: 'We Are Doing the Work Behind the Scenes'*, CHI. TRIB. (Feb. 24, 2021, 3:36 PM), <https://www.chicagotribune.com/sports/soccer/ct-us-womens-national-team-anthem-kneeling-20210224-a7ht4niacvaoxk75wenuipzhu4-story.html>.

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explained that they want to shift the focus to action and change off of the court or field, this general reverting to the norm pre-summer 2020 does raise questions about the commitment of sports to achieving these larger societal goals.²⁶⁸ In particular, as some commentators have noted, many professional sports team owners financially back political candidates who largely do not support the Black Lives Matter movement and similar efforts for social justice.²⁶⁹ This seeming disconnect between the public messages that professional sports leagues and teams sent during their 2020 seasons and where the political donations of team owners go may be a worthwhile tension point to observe going forward. Overall, there is no doubt that the 2020 seasons brought historic change in terms of player protests and racial progress in professional sports. Time will tell whether those are permanent.

²⁶⁸ *Id.*

²⁶⁹ Daniel Kaplan, *Where the NFL, NFLPA's PAC Money Is Going*, ATHLETIC (Oct. 23, 2020), <https://theathletic.com/2152211/2020/10/23/nfl-pac-money/>; see ESPN & FiveThirtyEight, *Election 2020: Inside the Political Donation History of Wealthy Sports Owners*, ESPN (Oct. 28, 2020), https://www.espn.com/nba/story/_/id/30155186/election-2020-political-donation-history-wealthy-sports-owners [<https://perma.cc/WH8Q-VLAU>].