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## Making the Extraordinary Ordinary: Examining the Impact of Shifting Immigration Policies on Professional Athletics in the United States

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MAKING THE EXTRAORDINARY ORDINARY:  
EXAMINING THE IMPACT OF SHIFTING IMMIGRATION  
POLICIES ON PROFESSIONAL ATHLETICS IN THE  
UNITED STATES

I. A GLOBAL PHENOMENON: AN INTRODUCTION TO THE  
INTERNATIONALITY OF THE AMERICAN SPORTS INDUSTRY

The beginning of professional sports in the United States can be traced back to 1871 with the establishment of the National Association of Professional Base Ball Players (“NA”), the country’s first professional sports league.<sup>1</sup> The years following the NA’s establishment saw the emergence of competing professional baseball leagues to capitalize on the sport’s popularity.<sup>2</sup> Most notable of the new leagues were the National League of Professional Baseball Clubs (“NL”) and the American League (“AL”), which were established in 1876 and 1901, respectively.<sup>3</sup> The two leagues merged two years later, resulting in the Major League Baseball (“MLB”) system we know today.<sup>4</sup>

Even in the earliest days of professional sports leagues in the United States, teams’ rosters featured foreign-born players.<sup>5</sup> Cuban player Esteban Bellan made his professional debut in 1871 for the Troy Haymakers, a team in the NA.<sup>6</sup> In the league’s first year, En-

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1. See Steven A. Reiss, *Professional Team Sports in the United States*, OXFORD RESEARCH ENCYCLOPEDIAS (Feb. 2017), <https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-198> [<https://perma.cc/8237-JQD4>] (recounting origins of professional baseball in America). The NA folded only five years later in 1876, when its strongest teams absconded and joined the National League of Professional Baseball Clubs. See “National Association of Professional Base Ball Players,” BASEBALL REFERENCE, [https://www.baseball-reference.com/bullpen/National\\_Association\\_of\\_Professional\\_Base\\_Ball\\_Players](https://www.baseball-reference.com/bullpen/National_Association_of_Professional_Base_Ball_Players) [<https://perma.cc/PVR6-9MDA>] (last visited Mar. 1, 2019) (providing brief history of NA).

2. See Reiss, *supra* note 1 (describing establishment of various leagues during early days of professional baseball).

3. See *id.* (noting years of origination for NL and AL).

4. See *id.* (“[The AL] merged with the NL in 1903, setting up the first World Series.”).

5. See *First Foreign Born Major League Baseball Players*, BASEBALL ALMANAC <https://www.baseball-almanac.com/firsts/first13.shtml> [<https://perma.cc/3NKT-GYBA>] (last visited Jan. 25, 2020) (listing first players from various countries to play professional baseball in United States).

6. See *id.* (recognizing that, if NA players are considered “Major League players,” then “the first player from Cuba was Esteban Bellan who made his debut on May 9, 1871, with the Troy Haymakers”). The Troy Haymakers were dissolved in 1882 to create space in the National League for the New York Gothams (later

gland's Al Nichols of the New York Mutuals and Ireland's Andy Leonard of the Boston Red Caps were the only two foreign born players included in the NL.<sup>7</sup> Similarly, the only two international players on AL rosters in the league's first year were Colombia's Luis Castro on the Philadelphia Athletics and Switzerland's Otto Hess on the Cleveland Indians.<sup>8</sup> The percentage of foreign-born players in the MLB has continually grown over time.<sup>9</sup> For example, in 1900, 2.7% of MLB players were immigrants, but that proportion increased to 28.5% as of 2019.<sup>10</sup>

International athletes also played a significant role in the early days of other professional sports and continue to do so today.<sup>11</sup>

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renamed the New York Giants and relocated to San Francisco in 1958). *See also* Steve Wulf, *Remembering the long-ago major league history of Troy, N.Y.*, ESPN (Aug. 24, 2016), [https://www.espn.com/mlb/story/\\_/id/16292570/remembering-long-ago-major-league-history-troy-ny](https://www.espn.com/mlb/story/_/id/16292570/remembering-long-ago-major-league-history-troy-ny) [<https://perma.cc/8M5W-5RDU>] (recounting early days and eventual end of Troy Haymakers professional baseball team).

7. *See First Foreign Born Major League Baseball Players*, *supra* note 5 (noting when Nichols and Leonard began playing in NL). The Boston Red Caps were eventually renamed the Boston Braves and relocated to Atlanta, Georgia in 1966. *See* Lacey Davis, *How Atlanta Became the Home of the Braves*, BLEACHER REPORT (Mar. 21, 2014), <https://bleacherreport.com/articles/2000953-how-atlanta-became-the-home-of-the-braves> [<https://perma.cc/97JH-SCAS>] (recounting early days of Boston Red Caps, also known as Red Stockings, and gradual changes that resulted in Atlanta Braves of today).

8. *See First Foreign Born Major League Baseball Players*, *supra* note 5 (noting when Castro and Hess began playing in AL). The Philadelphia Athletics relocated to Kansas City in 1955 and later to Oakland in 1968, where they remain today. *See* William Nack, *Lost in History*, SPORTS ILLUSTRATED (Aug. 19, 1996), <https://vault.si.com/vault/1996/08/19/lost-in-history-from-1929-to-1931-the-philadelphia-as-were-the-best-team-in-baseball-with-four-future-hall-of-famers-and-a-lineup-that-dominated-babe-ruths-legendary-yankees-so-why-hasnt-anyone-heard-of-them> [<https://perma.cc/Y7K6-2QQZ>] (describing dominance of Philadelphia Athletics baseball team in early twentieth century and recounting moves to Kansas City and Oakland).

9. *See Opening Day rosters feature 254 players born outside the U.S.*, MLB (Mar. 30, 2018), <https://www.mlb.com/press-release/opening-day-rosters-feature-254-players-born-outside-the-u-s-270131918> [<https://perma.cc/H6LP-2XFP>] (announcing that twenty-one different countries were represented by players on MLB rosters in 2018, indicating "another year of unprecedented diversity" in league).

10. *See* Stuart Anderson & L. Brian Andrew, *Coming to America: Baseball and the Contributions of Foreign-Born Players to America's Pastime*, NAT'L FOUND. FOR AMERICAN POLICY at 6 (Oct. 2006), <http://www.nfap.com/researchactivities/studies/BaseballComing1006.pdf> [<https://perma.cc/5TTJ-HT32>] ("2.7 percent of major league players were foreign-born in 1900"); *see also* *MLB rosters feature 251 international players*, MAJOR LEAGUE BASEBALL (Mar. 29, 2019), <https://www.mlb.com/news/mlb-rosters-feature-251-international-players> [<https://perma.cc/TWH4-9C6P>] (noting 251 players from 882-player league were from outside United States for 2019 MLB season).

11. *See A history of international players in the NBA*, NAT'L BASKETBALL ASS'N (Sept. 12, 2019), <https://www.nba.com/history-international-players-nba> [<https://perma.cc/6C9X-AMRD>] (recognizing participation of international basketball players in early professional basketball).

The National Basketball Association (“NBA”)’s first season saw five foreign players competing.<sup>12</sup> In the opening games of the 2019-2020 NBA season, 108 foreign-born athletes took the floor, comprising approximately a quarter of the league’s players.<sup>13</sup> The National Hockey League (“NHL”), on the other hand, did not include a player from outside the United States or Canada until nearly sixty years after its inception.<sup>14</sup> Nonetheless, 31% of NHL players today were born outside of North America.<sup>15</sup> Even the National Football League (“NFL”), which is distinctly American, included players representing thirty countries outside of the United States by 2011.<sup>16</sup> The NFL has also spearheaded the International Player Pathway, which resulted in the addition of four international players to NFL practice rosters in 2019.<sup>17</sup>

Professional athletes in individual sports have also sought to enter the United States in order to hone their skills and compete at

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12. See *id.* (“The NBA was far from the global brand it is today when, initially known as the Basketball Association of America, its first season tipped in 1946. But even then there was an international presence, with five foreign players seeing action during that inaugural campaign.”).

13. See Marc Stein, *The N.B.A. Elite Are Now From Everywhere*, N.Y. TIMES (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/sports/basketball/nba-stars-international-giannis-luka.html> [<https://perma.cc/JD6S-MXSE>] (“There were 108 foreign-born players on opening-night rosters this season, meaning there were more than 300 American-born players.”).

14. See Ed Miller, *The Evolution of Europeans in the NHL*, HOCKEY WRITER (Oct. 11, 2017), <https://thehockeywriters.com/the-evolution-of-europeans-in-the-nhl/> [<https://perma.cc/EY9U-UDVG>] (acknowledging Ulf Sterner in 1965 as first European hockey player to join NHL team).

15. See *Active NHL Players Totals by Nationality*, QUANT HOCKEY, <https://www.quanthockey.com/nhl/nationality-totals/active-nhl-players-career-stats.html> [<https://perma.cc/Z8FR-7RHP>] (last visited Mar. 5, 2020) (providing data about national origins of NHL players by country).

16. See Cork Gaines, *SPORTS CHART OF THE DAY: The International Origins of NFL Players*, BUS. INSIDER (Nov. 17, 2011), <https://www.businessinsider.com/chart-international-origins-of-nfl-players-2011-11> [<https://perma.cc/3GSN-ZQJM>] (“[D]espite the overwhelming dominance by Americans, there are still another 30 countries represented in the NFL.”).

17. See *Four international players added to rosters ahead of 2019 season*, NAT’L FOOTBALL LEAGUE (Apr. 9, 2019), <http://www.nfl.com/news/story/0ap3000001025740/article/four-international-players-added-to-rosters-ahead-of-2019-season> [<https://perma.cc/ZTA3-UB4L>] (announcing additions of Australia’s Valentine Holmes to New York Jets’ practice squad, Germany’s Jakob Johnson to New England Patriots’ practice squad, Brazil’s Durval Quieroz Neto to Miami Dolphins’ practice squad, and England’s Christian Wade to Buffalo Bills’ practice squad). See generally *International Player Pathway Program Pro Day*, NAT’L FOOTBALL LEAGUE (Mar. 20, 2019), <http://www.nfl.com/news/story/0ap3000001024156/article/international-player-pathway-program-pro-day> (describing International Player Pathway Program as “provid[ing] elite international athletes the opportunity to compete at the NFL level, improve their skills, and ultimately earn a spot on an NFL roster”).

a high level.<sup>18</sup> For instance, many European golf fans have raised concerns about the volume of professional golfers leaving the continent to play in the United States.<sup>19</sup> Similarly, many of the world's best international tennis players have been relocating to the United States to live and train since the beginning of the Open Era in the mid-twentieth century.<sup>20</sup> Beyond professional athletes, a number of foreign-born athletes come to the United States each year to compete at the collegiate level.<sup>21</sup>

Experts have opined that diversity in professional sports produces increased levels of competition, thereby creating better athletes.<sup>22</sup> However, current trends in the United States' immigration law and policy indicate that diversity in professional sports may

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18. For further discussion about foreign professional athletes traveling to America for individualized training and competition, see *infra* notes 19-21.

19. See Ewan Murray, *European Tour concerned about 'talent drain' of golfers to United States*, THE GUARDIAN (Nov. 20, 2012), <https://www.theguardian.com/sport/2012/nov/20/european-tour-talent-drain-golfers> [<https://perma.cc/WJD5-T356>] ("The desire of European players to seek fortunes in the United States is nothing new.").

20. See Steve Tignor, *How Florida Became the Tennis Capital of the World*, TENNIS (Mar. 24, 2017), <https://www.tennis.com/pro-game/2017/03/florida-tennis-capitol-world-nick-bollettieri-chris-evert/64979/> [<https://perma.cc/S2CM-6CYA>] (remarking on expansion of private tennis academies in Florida since Open Era began, which has attracted international players, including Martina Navratilova of Czechoslovakia, Maria Sharapova of Russia, Martina Hingis of Switzerland, Mary Pierce of France, Tommy Haas of Germany, Kei Nishikori of Japan, Monica Seles and Jelena Jankovic of Serbia, and Ivo Karlovic of Croatia, to live and train in Florida).

21. See *International Student-Athletes*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/student-athletes/future/international-student-athletes> [<https://perma.cc/9W3L-TPZZ>] (last visited Jan. 26, 2020) ("There are over 20,000 international student-athletes enrolled and competing at NCAA schools."); see also, e.g., CJ Moore, *Why Creighton is going overseas to help address its recruiting needs*, THE ATHLETIC (May 18, 2020), <https://theathletic.com/1815244/2020/05/18/why-creighton-is-going-overseas-to-help-address-its-recruiting-needs/> [<https://perma.cc/8V72-V56E>] ("A review of the 75 rosters in high-major leagues (the Power 5 football conferences plus the Big East) in 2019-20 found that 24 [basketball] teams had at least one player from overseas who had not played high school basketball or at a previous college in North America. Eight schools had two such players and one (California) had three.").

22. See Edmund J. Malesky & Sebastian M. Saiegh, *Diversity is good for team performance in soccer*, WASH. POST (June 2, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/06/02/diversity-is-good-for-team-performance-in-soccer/> [<https://perma.cc/S6YN-M3X3>] (noting "almost all interlocutors recognize the benefits of diverse talents, perspectives and experiences"); see also Anderson & Andrew, *supra* note 10, at 2 ("The [National Foundation for American Policy] study concludes Americans have benefited from our nation's openness toward skilled immigrant baseball players, just as the country has gained from the entry of other skilled foreign-born professionals.").

soon decrease.<sup>23</sup> A series of travel bans instituted by President Donald Trump's administration threaten to inhibit professional athlete immigration from an expanding list of majority Muslim countries, while a border wall between the United States and Mexico has the potential to introduce tension into the countries' athletic relationship.<sup>24</sup> Additionally, visa issuances to professional athletes have decreased on the grounds that applicants fail to demonstrate "extraordinary ability."<sup>25</sup> Further, the recently re-introduced Reforming American Immigration for a Strong Economy ("RAISE") Act aims to reduce legal immigration to the United States by 50% within the next decade and eliminate the visa categories most relevant to professional athletes in favor of a generalized, points-based merit system.<sup>26</sup> These trends and restrictions all comport with President Donald Trump's "America First" social and economic policy, an effort to prioritize American citizens in matters of employment and employment-related benefits.<sup>27</sup>

This Comment observes the likely impact that immigration policies and proposed legislation supported by the Trump administra-

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23. For further discussion about factors likely to lead to a decrease in diversity within professional sports in the United States, see *infra* notes 177-192 and accompanying text.

24. For further discussion about the ongoing travel ban imposed by the Trump administration and its border wall with Mexico, see *infra* notes 146-152 and accompanying text.

25. See Louise Radnofsky, *Athletes Seeking Green Cards Find Proving They're Exceptional Has Gotten Tougher Under Trump*, WALL STREET J. (Dec. 11, 2019), <https://www.wsj.com/articles/elite-athletes-seeking-visas-face-heightened-scrutiny-by-the-trump-administration-11576060200?mod=searchresults&page=1&pos=2> [<https://perma.cc/84CF-Z68Q>] (noting approval rate for immigrant visa petitions based on "extraordinary ability" category, often sought by professional athletes, has dropped from 82.1% in fiscal year 2016 to 56.3% in fiscal year 2019); see also Louis F. Hess, *Why O-1 Visas are Harder to Get*, LUIS F. HESS, PLLC (May 10, 2019), <https://www.luishesslaw.com/blog/2019/05/why-o-1-visas-are-harder-to-get/> [<https://perma.cc/S8DX-QYU6>] (identifying recent policies and procedures making procurement of O-1 nonimmigrant visas, frequently used by professional athletes, more difficult).

26. See Eric Ruark, *Reforming American Immigration for a Strong Economy*, WASH. TIMES (Apr. 17, 2019), <https://www.washingtontimes.com/news/2019/apr/17/american-workers-get-good-news-with-the-reintroduc/> (summarizing provisions and goals of RAISE Act).

27. See *The 45th President of the United States Donald J. Trump*, DONALD J. TRUMP FOR PRESIDENT, INC., <https://www.donaldjtrump.com/about/> [<https://perma.cc/A4D6-5DJF>] (last visited Jan. 30, 2020) ("President Trump is working hard to implement his 'America First' platform, continuing his promise to the American people to lower taxes, repeal and replace Obamacare, end stifling regulations, protect our borders, keep jobs in our country, take care of our veterans, strengthen our military and law enforcement, and renegotiate bad trade deals, creating a government of, by and for the people.").

tion would have on the professional sports industry.<sup>28</sup> Namely, it argues that certain characteristics of professional athletics make the industry likely to be harmed as a byproduct of the current emphasis on decreasing legal immigration.<sup>29</sup> Section II begins with an outline of the tradition of immigrants participating in American professional sports, as well as the historical context of laws and regulations which control the ability of international athletes' to enter the United States today.<sup>30</sup> Additionally, Section II discusses the legislative history and provisions of the RAISE Act, as well as executive orders introduced by the Trump administration to curtail legal immigration.<sup>31</sup> Section III analyzes the impact of current immigration policy in the United States that may inhibit professional athletes' ability to immigrate to the United States and the likely impact the RAISE Act will have on athlete immigration, if passed.<sup>32</sup> Finally, Section III points to evidence tending to show that a reduction in athlete immigration may adversely impact the American sports industry.<sup>33</sup>

## II. WARMING UP: THE PAST, PRESENT, AND FUTURE OF ATHLETE IMMIGRATION IN THE UNITED STATES

### A. Laws Governing Foreign-Born Professional Athletes in U.S. through History

Professional sports leagues in the United States have included immigrant athletes since their inception.<sup>34</sup> Foreign-born profes-

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28. For further discussion about the effect of changing visa policies and the RAISE Act on professional athletes, see *infra* notes 100-126 and 165-171 and accompanying text.

29. For further discussion about factors unique to professional athletics that make the industry vulnerable to policies and legislation resulting in decreased immigration levels, see *infra* notes 224-239 and accompanying text.

30. For further discussion about the laws governing immigrants playing professional sports in America throughout history and today, see *infra* notes 34-99 and accompanying text.

31. For further discussion about the RAISE Act and Trump administration executive orders aimed at legal immigration, see *infra* notes 127-171 and accompanying text.

32. For further discussion about the consequences that current policy changes and executive actions, as well as the proposed RAISE Act, will likely have for foreign-born professional athletes, see *infra* notes 172-205 and accompanying text.

33. For further discussion about how reduced athlete immigration would likely harm the American athletic industry, see *infra* notes 224-239 and accompanying text.

34. For further discussion about the origins of professional sports leagues in the United States and immigrants' participation in them, see *supra* notes 1-17 and accompanying text.

sional athletes in the late nineteenth and early twentieth centuries had a more straightforward path to American citizenship than today's immigrant athletes do.<sup>35</sup> Early immigration law and policies were originally classification-based; therefore, visa applicants were rarely required to satisfy positive requirements, with the exception of paying the requisite tax.<sup>36</sup> The exclusionary immigration policies during this time, including the 1917 Immigration Act, which barred Asian immigrants, and the 1921 Emergency Quota Act, which created numerical quotas for immigrants in favor of northern and western European countries, tended to be inapplicable to foreign-born professional athletes.<sup>37</sup> Due to racial segregation in professional sports at the time, such immigration policies, failed to have a blanket effect on professional athletics while potentially impacting some immigrant athletes at an anecdotal level.<sup>38</sup>

It was not until the latter half of the twentieth century that Congress began instituting immigration acts to prioritize family reunification and skilled immigrants over national origin quotas.<sup>39</sup> For one, the Immigration and Nationality Act of 1952 marked the introduction of the United States' "exceptional ability" standard by

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35. See *Early American Immigration Policies*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/history-and-genealogy/our-history/overview-ins-history/early-american-immigration-policies> [<https://perma.cc/2ZSS-6D3F>] (last visited Feb. 4, 2020) ("Americans encouraged relatively free and open immigration during the 18th and early 19th centuries, and rarely questioned that policy until the late 1800s.").

36. See *id.* ("The general Immigration Act of 1882 levied a head tax of fifty cents on each immigrant and blocked (or excluded) the entry of idiots, lunatics, convicts, and persons likely to become a public charge.").

37. See, e.g., D'Vera Cohn, *How U.S. immigration laws and rules have changed through history*, PEW RESEARCH CENTER (Sept. 30, 2015), <https://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/> [<https://perma.cc/CR39-LNQY>] (summarizing Immigration Act of 1875, Chinese Exclusion Act, 1891 Immigration Act, Immigration Act of 1903, and 1917 Immigration Act).

38. See *Racial Segregation in American Sports*, SPORTS CONFLICT INST., <https://sportsconflict.org/racial-segregation-american-sports/> [<https://perma.cc/P6X9-6V2Y>] (last visited Feb. 17, 2020) (noting racial segregation of American professional sports at beginning of 20th century).

39. See Kevin K. McCormick, *Extraordinary Ability and the English Premier League: The Immigration, Adjudication, and Place of Alien Athletes in American and English Society*, 39 VAL. U. L. REV. 541, 545 (2004) (describing codification of all prior immigration legislation into Immigration and Nationality Act of 1952, which "made significant changes to the treatment of professional athletes"); see also *Immigration and Nationality Act of 1965*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1951-2000/Immigration-and-Nationality-Act-of-1965/> [<https://perma.cc/37Q6-6XXF>] (last visited Feb. 17, 2020) (describing Immigration and Nationality Act of 1965 as "a legal framework that prioritized highly skilled immigrants and opened the door for people with family already living in the United States").



authorizing admission for aliens with “exceptional ability in the arts and sciences” or “distinguished merit and ability.”<sup>40</sup> Although the statutory language did not specifically extend this standard to athletes, the USCIS and lower immigration courts interpreted the “arts” to include athletics.<sup>41</sup> Further, the Immigration and Nationality Act of 1965 finally abolished the national-origins quota system that had long been a fixture of American immigration law.<sup>42</sup> With the exception of amendatory acts aimed at improving the system for certain defined immigrant classes, Congress did not pass another wholesale immigration reform act until the Immigration Act of 1990, which remains the controlling legislation today and contains many provisions directed specifically at immigrant athletes.<sup>43</sup>

## B. The Current Regime for Athletes Immigrating to the United States

Currently, foreign-born athletes hoping to immigrate to the United States have various options.<sup>44</sup> The Immigration Act of 1990 (“Immigration Act”) created the EB-1 immigrant visa, as well as the O-1 and P-1 nonimmigrant visas, each offering international athletes the opportunity to come to the United States provided they meet a set of defined criteria.<sup>45</sup> This section begins by describing the Immigration Act’s journey to ratification before analyzing the provi-

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40. See McCormick, *supra* note 39 (citing § 203(a)(3) and § 101(a)(15)(H)(i) of Immigration and Nationality Act of 1952 and explaining that “‘exceptional ability’ denoted a higher standard than ‘distinguished merit and ability’ through interpretations made at the administrative and federal levels”).

41. See *id.* (stating that “immigration courts liberally applied the generic definition of ‘arts’ to categorize athletes under ‘arts’” and “the USCIS annually placed athletes among those occupations admissible as temporary workers”).

42. See Muzaffar Chishti, Faye Hipsman & Isabel Ball, *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POLICY INST. (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states> [https://perma.cc/6QQQ-8QW6] (noting “[i]n major revision to U.S. immigration law in 1952, the national-origins system was retained” and “the 1965 law abolished the national-origins quota system”).

43. See Cohn, *supra* note 37 (describing series of immigration acts passed between 1965 and 1990, including 1975 Indochina Migration and Refugee Assistance Act, Immigration and Nationality Act Amendments of 1976 and 1978, and Refugee Act of 1980). For further discussion about the Immigration Act of 1990 and its provisions directly applicable to foreign professional athletes, see *infra* notes 50-99 and accompanying text.

44. See Lionel Sobel, *Chapter 5: Immigration: Performances by Foreign Entertainers and Athletes*, INT’L ENTMT LAW (2013) (“There are several different kinds of visas, each with its own eligibility requirements.”).

45. See generally Warren R. Leiden & David L. Neal, *Highlights of the U.S. Immigration Act of 1990*, 14 FORDHAM INT’L L. J. 328, 330, 333 (1990) (surveying provisions of Immigration Act of 1990).

sions most salient for foreign athletes in depth: the O-1, P-1, and EB-1 visas.<sup>46</sup> It also notes a downward trend in the number of accepted visa applications in these categories and examines the heightened “extraordinary ability” standard immigration officials appear to be imposing on foreign athletes.<sup>47</sup> It then discusses the Trump administration’s ongoing travel ban and the border wall with Mexico, which are two executive actions currently impacting professional athletes’ ability to immigrate to the United States.<sup>48</sup> Finally, it concludes with an explanation of the RAISE Act, which was introduced in early 2019 and may impact foreign athletes’ ability to move to the United States if it is passed.<sup>49</sup>

### 1. *Immigration Act of 1990*

The Immigration Act marked the first legislative effort aimed at legal immigration since the eradication of the national origin system in 1965.<sup>50</sup> The Immigration Act, unlike pieces of legislation that came before it, was not designed to combat illegal immigration but to reform immigrants’ ability to come to America legally.<sup>51</sup> It both increased immigration quotas and added and refined a number of employment-based visa categories.<sup>52</sup> Senator Ted Kennedy initially introduced the Immigration Act in 1989, and President

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46. For further discussion about the Immigration Act’s legislative history and relevant provisions, see *infra* notes 50-60 and accompanying text.

47. For further discussion about the heightened standard of “extraordinary ability” being used to deny visa applications at a higher-than-average rate, see *infra* notes 118-126 and accompanying text.

48. For further discussion about the Trump administration’s ongoing travel ban and border wall with Mexico, see *infra* notes 132-152 and accompanying text.

49. For further discussion about the RAISE Act’s legislative history and relevant provisions, see *infra* notes 153-171 and accompanying text.

50. See Charles C. Foster, *The New Immigration Act of 1990: Major Reform of Legal Immigration*, Hous. Law. J. 26, 26 (1991) (“The 1990 Act is the first major *legal* immigration legislation since 1965, when Congress abolished the national origin system that gave overwhelming preference to immigrants from European nations.”). See generally *The Immigration Act of 1924 (The Johnson-Reed Act)*, U.S. DEP’T OF STATE, <https://history.state.gov/milestones/1921-1936/immigration-act> [<https://perma.cc/E3EN-QCQU>] (last visited Jan. 25, 2020) (providing general overview of Immigration Act of 1924).

51. See Foster, *supra* note 50, at 26 (highlighting distinction between Immigration Act and Immigration Reform and Control Act of 1986, which primarily addressed issues stemming from illegal immigration).

52. See *id.* at 27 (“In addition to significant quota increases, the 1990 Act provides the following: protection for certain family members of aliens who were legalized under IRCA; places the first limitation or cap on both permanent and several forms of temporary immigration; [and] makes significant improvement in the nonimmigrant working visa classification . . .”).

George H.W. Bush ultimately signed it into law on November 29, 1990.<sup>53</sup>

Among the numerous visa categories that the Immigration Act introduced, the EB-1, O-1, and P-1 visas were the most closely tied to foreign athletes' ability to immigrate to the United States.<sup>54</sup> The EB-1 visa is an employment-based, first-preference visa reserved for those exhibiting extraordinary ability, and it allows its recipients to remain in the United States permanently as legal residents.<sup>55</sup> The O-1 visa authorizes individuals with an extraordinary ability in one of a number of enumerated fields to remain in the United States for a limited period (initially, up to three years).<sup>56</sup> With a P-1 visa, on the other hand, an athlete may come to the United States temporarily for the purpose of performing at a specified athletic competition.<sup>57</sup> O-1 and P-1 visas are so named in accordance with the subsection of the Immigration and Nationality Act in which their specifications can be found.<sup>58</sup> EB-1, on the other hand, is shorthand for "employ-

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53. See *S.358 (101st): Immigration Act of 1990*, GovTRACK <https://www.govtrack.us/congress/bills/101/s358/summary> [<https://perma.cc/9GZE-LJQW>] (last visited Jan. 25, 2020) (providing summary of Immigration Act's legislative history).

54. For further discussion about the specifications of EB-1, O-1, and P-1 visas, see *infra* notes 61-99 and accompanying text.

55. See *Employment-Based Immigration: First Preference EB-1*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> [<https://perma.cc/ZJ2S-TLAW>] (last visited Jan. 25, 2020) (delineating criteria for EB-1 visa applicants).

56. See *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/o-1-visa-individuals-extraordinary-ability-or-achievement> [<https://perma.cc/FNG2-GMF4>] (last visited Jan. 25, 2020) (explaining eligibility criteria for O-1 visa applicants).

57. See *P-1A Athlete*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/p-1a-athlete> [<https://perma.cc/U92E-AK7G>] (last visited Jan. 25, 2020) (noting how P-1A visa applicants may support their applications).

58. See Sobel, *supra* note 44 ("The reason [the visa titles] are not descriptive is that they actually correspond to the subsections of the U.S. Immigration and Nationality Act that define the various categories of people who are eligible for them . . . an 'O-1' visa is available to those performers who are described in section 101(a)(15) of the Act in subsection 'O(i),' a 'P-2' visa is available to those who are described in subsection 'P(ii),' and so forth.") .

ment-based, first-preference.”<sup>59</sup> The specific eligibility provisions of each are discussed in more depth below.<sup>60</sup>

a. Nonimmigrant Visas

Visas that authorize individuals to remain in the United States for only a temporary duration are called “nonimmigrant visas.”<sup>61</sup> There are two types of nonimmigrant visas typically sought by professional athletes.<sup>62</sup> The first type is the O-1 visa, which is available to individuals with extraordinary ability in certain specified fields.<sup>63</sup> The second is the P-1 visa, which may be granted to athletes of international recognition who compete either as an individual or as a member of a team, or by certain highly regarded performers performing as members of a group.<sup>64</sup>

i. O-1 Visa

Nonimmigrant individuals who possess extraordinary ability in one of a number of specifically enumerated fields may receive O-1 visas.<sup>65</sup> Athletes in particular can be eligible for O-1A visas.<sup>66</sup> O-1

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59. *Employment-Based Immigration: First Preference EB-1*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> [<https://perma.cc/UER7-9WWN>] (last visited Jan. 28, 2020) (defining shorthand meaning of EB-1 visa).

60. For further discussion about the specific criteria of eligibility for EB-1, O-1, and P-1 visas, see *infra* notes 65-99 and accompanying text.

61. See *Requirements for Immigrant and Nonimmigrant Visas*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/travel/international-visitors/visa-waiver-program/requirements-immigrant-and-nonimmigrant-visas> [<https://perma.cc/H9SQ-RAZD>] (last visited Mar. 17, 2019) (“Nonimmigrant visas are for foreign nationals wishing to enter the United States on a temporary basis . . .”).

62. For further discussion of the two types of non-immigrant visas typically sought by professional athletes, see *infra* notes 65-91 and accompanying text.

63. For further discussion about the eligibility criteria of O-1 visas, see *infra* notes 65-73 and accompanying text.

64. For further discussion about the eligibility criteria of P-1 visas, see *infra* notes 74-91 and accompanying text.

65. See *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (last visited Jan. 26, 2020), <https://www.uscis.gov/working-united-states/temporary-workers/o-1-visa-individuals-extraordinary-ability-or-achievement> [<https://perma.cc/8NPP-3EG6>] (stating O-1 visas may be granted to individuals “who possess extraordinary ability in the sciences, arts, education, business, or athletics, or who have a demonstrated record of extraordinary achievement in the motion picture or television industry and have been recognized nationally or internationally for those achievements”).

66. See *id.* (providing O-1A visas may be granted to individuals “with an extraordinary ability in the sciences, education, business, or athletics”).

visa applicants must continue to work in their area of “extraordinary ability” during their temporary tenure in the United States.<sup>67</sup>

The United States Citizenship and Immigration Services (“USCIS”) defines “extraordinary ability” in two ways, paralleling the O-1A and O-1B visa categories.<sup>68</sup> For O-1A applicants, “extraordinary ability” is defined as “a level of expertise indicating that the person is one of the small percentage who has risen to the very top of the field of endeavor.”<sup>69</sup> Successful O-1 applicants may remain in the United States for up to three years, with the USCIS retaining authority to extend the life of the visa up to one year as it deems necessary for the applicant to accomplish the event or activity the visa was granted for.<sup>70</sup>

Although the USCIS does exercise discretion in determining whether applicants qualify for an O-1 visa, it must make such determinations within the framework of a delineated set of evidentiary criteria.<sup>71</sup> Athletes may satisfy this criteria by providing evidence of an internationally-recognized award, such as an Olympic medal.<sup>72</sup> In the absence of such an award, athletes may also provide evidence from at least three other sources tending to show their “extraordinary ability,” including nationally or internationally recognized awards, membership in selective associations within their sports, or high salaries.<sup>73</sup>

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67. *See id.* (noting O-1 beneficiaries must be “coming temporarily to the United States to continue work in the area of extraordinary ability”).

68. *See id.* (providing definitions of “extraordinary ability” specific to O-1A visa applicants in “sciences, arts, education, business, or athletics” on the one hand, and O-1B visa applicants in “motion picture or television [industries]” on the other).

69. *O-1 Visa, supra* note 65 (defining “extraordinary ability” for purposes of O-1A visa applications). For O-1B visa applicants, “extraordinary ability” means “distinction,” defined further as “a high level of achievement in the field of the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.” *See id.* (defining “extraordinary ability” for purposes of O-1B visa applications).

70. *See O-1 Visa, supra* note 65 (relating Period of Stay/Extension of Stay for successful O-1 visa applicants).

71. *See id.* (listing evidentiary criteria for O-1A and O-1B visas).

72. *See id.* (noting “[e]vidence that the beneficiary has received a major, internationally-recognized award, such as a Nobel Prize,” constitutes sufficient evidence of O-1 visa applicants’ eligibility).

73. *See id.* (providing O-1A visa applicants may also show eligibility by providing at least three sources of evidence from following criteria: “receipt of nationally or internationally recognized prizes” or “awards for excellence in the field of endeavor; membership in associations in the field for which classification is sought which require outstanding achievements, as judged by recognized national or international experts in the field; published material in professional or major trade publications, newspapers or other major media about the beneficiary and the ben-

ii. *P-1 Visa*

Athletes of international recognition who compete either as an individual or as a member of a team, as well as certain highly regarded performers performing as members of a group, may obtain P-1 visas.<sup>74</sup> In order to acquire a P-1 visa, applicants must maintain a residence in their home country, among other criteria dependent on their profession.<sup>75</sup> While P-1B visas apply to entertainers, P-1A visas apply to those coming to the United States for a specific athletic purpose.<sup>76</sup> The statute identifies five categories of potential athletic applicants, each with slightly varying criteria for approval.<sup>77</sup>

The first two categories for athletic applicants applying for P-1A visas are (1) individuals and (2) members of teams who are internationally recognized and traveling to the United States to participate in a specific competition.<sup>78</sup> The eligibility criteria for athletes in these categories are nearly identical; they are only distinguished by the types of evidence required to prove eligibility.<sup>79</sup>

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eficiary's work in the field for which classification is sought; authorship of scholarly articles in professional journals or other major media in the field for which classification is sought; a high salary or other remuneration for services as evidenced by contracts or other reliable evidence; participation on a panel, or individually, as a judge of the work of others in the same or in a field of specialization allied to that field for which classification is sought; [or] employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation"); *see also, e.g., Wolf Rifkin Lawyer Jordan Butler Obtains O-1 Visa for Tennis Star Yulia Putintseva*, TENNIS VIEW MAGAZINE (Aug. 22, 2017), <http://www.tennisviewmag.com/wolf-rifkin-lawyer-jordan-butler-obtains-o-1-visa-tennis-star-yulia-putintseva> [<https://perma.cc/FV4F-Q7E8>] (noting Russian-born Yulia Putintseva successfully supported her O-1 visa application by providing evidence of "an official letter of invitation to compete in the most prestigious U.S.-based tennis events, such as the U.S. Open; a quarterfinal appearance at the French Open in 2016; an accompanying lifetime membership in the exclusive Final Eight Club at Roland Garros; and, demonstrated success throughout her junior and professional career").

74. *See Sobel, supra* note 44 (providing P-1 visa may be obtained by "internationally recognized *athlete* who competes as an individual or as part of [a] team, or a *performer* who is part of a nationally or internationally recognized entertainment group") (emphasis added).

75. *See* U.S. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(B) (1990) (requiring P-1 visa applicants have "a residence in a foreign country which [they have] no intention of abandoning").

76. *See* 8 U.S.C. § 1101(P)(i)(a) (directing readers to § 1184(c)(4)(A) for nonimmigrant alien criteria "relating to athletes" and § 1184(c)(4)(B) for nonimmigrant criteria "relating to entertainment groups").

77. *See P-1A Athlete, supra* note 57 (stating five categories of potential P-1A visa applicants and enumerating evidentiary requirements for each in detail).

78. *See* 8 U.S.C. § 1184(c)(4)(A) (1990) (noting P-1A applicants must compete "at an internationally recognized level of performance"); *see also P-1A Athlete, supra* note 57 (consolidating requisite criteria for P-1A visa applicants).

79. *See P-1A Athlete, supra* note 57 (noting both individual athletes and teams must have achieved "international recognition" and must be participating in com-

Such applicants may prove that they are internationally recognized by demonstrating “a degree of skill and recognition substantially above that ordinarily encountered.”<sup>80</sup> Further, P-1A visa applicants must do more than show that they have achieved international recognition; they must also demonstrate the rigor of the United States competition in which they are competing.<sup>81</sup> While the USCIS has supplied a detailed framework for determining the former, it has provided little guidance for examining the latter, rendering decisions about the rigor of athletic competitions highly subjective and suggesting that these decisions may primarily turn on the skill and renown of the competitions’ participants.<sup>82</sup>

P-1A visas are also available to athletes on professional sports teams.<sup>83</sup> These athletes may prove their eligibility by demonstrating

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petitions that have “distinguished reputation” and “require the participation of internationally recognized [athletes or teams, respectively]”). The USCIS considers internationally recognized individuals and teams together in enumerating the types of evidence sufficient to warrant the grant of a P-1A visa. *See id.* (enumerating evidentiary criteria “For Internationally Recognized Individuals or Teams” applying for P-1A visas).

80. *See P-1A Athlete, supra* note 57 (describing evidentiary standard for requisite skill level of P-1A visa applicants).

81. *See id.* (stating that “rigor” of athletic competitions may be demonstrated by showing “distinguished reputation” and “participation of an athlete or athletic team that has an international reputation”); *see also, e.g.,* Scott Jenkins, *Golf’s Rookie of the Year Sungjae Im Doesn’t Actually Have a Home in the United States*, SPORTCASTING (June 1, 2020), <https://www.sportscasting.com/golfs-rookie-of-the-year-sungjae-im-doesnt-actually-have-a-home-in-the-united-states/> [<https://perma.cc/K82G-PL36>] (listing accomplishments and American acclaim of South Korean golfer and P-1 visa recipient Sungjae Im).

82. *See P-1A Athlete, supra* note 57 (providing evidentiary requirements to demonstrate “international recognition” of individuals and teams). The USCIS has provided that individual athletes or teams may offer to prove they have garnered international recognition by demonstrating at least two of the following: “[1 e]vidence of having participated to a significant extent in a prior season with major United State sports league; [2 e]vidence of having participated in international competition with a national team; [3 e]vidence of having participated to a significant extent in a prior season for a U.S. college or university in intercollegiate competition; [4 a] written statement from an official of the governing body of the sport which details how you or your team is internationally recognized; [5 a] written statement from a member of the sports media or a recognized expert in the sport which details how you or your team is internationally recognized; [6 e]vidence that you or your team is ranked, if the sport has international rankings; or [7 e]vidence that you or your team has received a significant honor or award in the sport.” *See id.* (listing types of evidence sufficient to support P-1A visa applications by individual athletes or teams). However, to gauge the rigor of the athletic competition that P-1A visa applicants are traveling to the United States to compete in, the USCIS has stated only that the competition must have a “distinguished reputation” and “requires participation of an athlete or athletic team that has an international reputation.” *See id.* (listing P-1A evidentiary requirements to support rigor of relevant athletic competitions).

83. *See P-1A Athlete, supra* note 57 (enumerating eligibility criteria for professional, including minor-league, foreign athletes).

that they are employed by a professional sport team in the United States and that a sport league governs the team's conduct and athletic competition.<sup>84</sup> The Creating Opportunities for Minor League Professionals, Entertainers, and Teams through Legal Entry Act of 2006 (COMPETE Act) slightly amended this section of the statute.<sup>85</sup> Today, a professional athlete employed by "[a]ny minor league team that is affiliated with" an association satisfying the criteria above is also eligible for a P-1A visa.<sup>86</sup>

Athletic applicants can also be eligible to apply for P-1A visas if the individuals are amateur athletes or coaches who are traveling to the United States as part of a team or franchise located within the United States and are members of a foreign league or association.<sup>87</sup> The foreign leagues or associations referred to are themselves subject to a number of requirements.<sup>88</sup> They must be comprised of at least fifteen amateur sports teams, render participants ineligible to

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84. *See id.* (requiring professional athletes applying for P-1A visas be employed by "[a] team that is a member of an association of six or more professional sports teams whose total combined revenues exceed \$10 million per year," and the association "must govern the conduct of its members and regulate the contests and exhibitions in which its member teams regularly engage").

85. *See Sobel, supra* note 44 ("Section 214(c)(4)(A) was amended in 2006 by the Creating Opportunities for Minor League Professionals, Entertainers, and Teams through Legal Entry Act of 2006 . . .").

86. *P-1A Athlete, supra* note 57 (providing professional athletes "coming to the United States to be employed as an athlete by [. . .] [a]ny minor league team that is affiliated with an association [of six or more professional sports teams whose total revenues exceed \$10 million per year]" may be eligible for P-1A visas). The COMPETE Act has made athletes and coaches who compete in amateur or foreign leagues in any sport eligible for P-1 visas in addition to H-2B visas, which were previously their only option; critical response to the Act has been mixed, because on the one hand, athletes and coaches benefit from being eligible for uncapped P-1 visas, but on the other hand, a scarcity of guidelines have made it difficult to uniformly determine eligibility under the Act. *See Christine Swenson, 11 crucial concepts about U.S. immigration for international athletes*, LAW IN SPORT (Feb. 27, 2020), <https://www.lawinsport.com/topics/features/item/11-crucial-concepts-about-us-immigration-for-international-athletes> [<https://perma.cc/7L4Y-JFS5>] ("Until the Code of Federal Regulations is amended to address these inconsistencies, the COMPETE Act of 2006 will continue to be a hurdle international athletes have to overcome when looking to the U.S. for a career.").

87. *See P-1A Athlete, supra* note 57 (providing amateur athletes or coaches applying for P-1A visa "must be coming to the United States to perform as an athlete or coach as part of a team or franchise that is located in the United States and a member of a foreign league or association").

88. *See id.* (noting P-1A applicants must belong to foreign leagues that "consist of 15 or more amateur sports teams," "make players temporarily or permanently ineligible under National Collegiate Athletic Association rules to . . . [e]arn a scholarship in the sport at a U.S. college or university . . . or [p]articipate in the sport at a U.S. college or university," constitutes "the highest level of amateur performance of that sport in the relevant foreign country," and feature a "significant number of . . . individuals who play in the league or association" and are "drafted by a major sports league or a minor league affiliate").



play college sports in the United States, constitute the highest level of amateur competition in the relevant sport in the country at issue, and send a significant number of participants to professional teams or their local affiliates.<sup>89</sup>

The final category of individuals eligible for P-1A visas are theatrical ice skaters.<sup>90</sup> These applicants “must be coming to the United States to participate in a specific theatrical ice skating production or tour as a professional or amateur athlete who performs individually or as part of a group.”<sup>91</sup>

#### b. Immigrant (Permanent) Visas

Individuals seeking to live and work in the United States as permanent residents may also apply for an EB-1 visa, which is an employment-based, first-preference immigrant visa.<sup>92</sup> EB-1 visas are available to (1) those who can “demonstrate extraordinary ability in the sciences, arts, education, business, or athletics”; (2) outstanding professors and researchers; and (3) multinational managers or executives.<sup>93</sup> The USCIS has determined that applicants in the first category must demonstrate that their achievements have been extensively documented.<sup>94</sup> The requirements of “extensive documentation” in this context closely parallel, but do not precisely imitate, the evidentiary requirements for an O-1A visa.<sup>95</sup>

Like O-1A visa applicants, EB-1 applicants must either provide evidence of a one-time, internationally recognized award, such as a Pulitzer Prize or an Olympic Medal, or satisfy three out of ten lesser

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89. *See id.* (enumerating evidentiary criteria for P-1A visa applicants); *see also*, e.g., Tal Pinchevsky, *A Mexican Hockey Player Looks for a Place to Lace Up His Skates*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/sports/hockey/hector-majul-mexico-lithuania.html> [<https://perma.cc/894W-VVT9>] (discussing Mexican-born hockey player Hector Majul, who secured P1 visa to play hockey at amateur level during years between high school and college).

90. *See P-1A Athlete*, *supra* note 57 (specifying evidentiary criteria for theatrical ice skaters applying for P-1A visas).

91. *See id.* (basing P-1A eligibility for theatrical ice skaters on nature of events in which they participate).

92. *See EB-1: Permanent Workers – Extraordinary Ability/Outstanding Professor/Multinational Executive*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <https://www.uscis.gov/forms/explore-my-options/eb-1-employment-based-immigration-permanent-workers-extraordinary-abilityoutstanding> [<https://perma.cc/948X-7MC9>] (last visited Jan. 28, 2020) (providing applicants can apply to become Legal Permanent Residents once EB-1 petitions are approved and priority dates are current).

93. *See id.* (delineating categories of EB-1 visa applicants and providing evidentiary requirements for determining eligibility).

94. *See id.* (mandating EB-1 visa applicants’ “achievements must be recognized in [their] field through extensive documentation”).

95. For further discussion about the evidentiary requirements to procure an O-1A visa, see *supra* notes 65-73 and accompanying text.

criteria.<sup>96</sup> For example, Zimbabwean golfer Nick Price secured an EB-1 visa after collecting eighteen wins on the PGA tour, a former “number one” world ranking, and an induction into the World Golf Hall of Fame.<sup>97</sup> Another example of an EB-1 visa recipient is Robert Cheseret, an accomplished collegiate long-distanced runner from Kenya.<sup>98</sup> Notably, applicants exhibiting “extraordinary ability” need not have received an offer of employment from a United States entity.<sup>99</sup>

### c. Decreasing Visa Approval Rates

Since 2016, the percentage of individuals granted EB-1 visas has been steadily declining.<sup>100</sup> At the end of 2016, 82.1% of EB-1 applicants received a visa.<sup>101</sup> However, by the end of 2018, that rate

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96. See *EB-1*, *supra* note 92 (providing list of qualifying evidentiary criteria). The enumerated categories of evidence that may be used to demonstrate “extraordinary ability” is as follows: “[e]vidence of receipt of lesser nationally or internationally recognized prizes or awards for excellence; [e]vidence of . . . membership in associations in the field which demand outstanding achievement of their members; [e]vidence of published material about [the applicant] in professional or major trade publications or other major media; [e]vidence that [the applicant has] been asked to judge the work of others, either individually or on a panel; [e]vidence of [the applicant’s] original scientific, scholarly, artistic, athletic, or business-related contributions of major significance to the field; [e]vidence of [the applicant’s] authorship of scholarly articles in professional or major trade publications or other major media; [e]vidence that [the applicant’s] work has been displayed at artistic exhibitions or showcases; [e]vidence of [the applicant’s] performance of a leading or critical role in distinguished organizations; [e]vidence that [the applicant commands] a high salary or other significantly high remuneration in relation to others in the field; [or] [e]vidence of [the applicant’s] commercial successes in the performing arts.” *Id.* (listing potential evidentiary criteria to support EB-1 visa application).

97. See *EB-1 Extraordinary Ability Visa for Athletes*, JURAS LAW FIRM, <https://juras-law.com/eb-1-extraordinary-ability-visa-for-athletes/> [<https://perma.cc/VY9V-B3GH>] (last visited July 12, 2020) (“An example of a foreign professional athlete who has been awarded EB-1 visa and green card is professional golfer Nick Price, a native of Zimbabwe. He has 18 PGA tour wins (3 majors), a former #1 world ranking to his credit and was inducted into the World Golf Hall of Fame.”).

98. See *id.* (stating Cheseret had “won the men’s title for the U.S. at the 2011 NACAC Cross Country Championships,” “had a total of eight Pac-10 titles during his career- the most ever by a Pac-10 track and field athlete,” “went on to capture the NCAA West Regional individual crown, “and “was the Pac-10’s top finisher at the NCAA Championships with a tenth-place finish”).

99. See *id.* (noting EB-1 applicants claiming extraordinary ability need not show offer of employment within United States).

100. See generally Radnofsky, *supra* note 25 (reporting decreased levels of approved EB-1 visa applications).

101. See Amy L. Peck & Gregg E. Clifton, *USCIS Denials in Extraordinary Ability Category on the Rise*, JACKSON LEWIS PC IMMIGRATION BLOG (Dec. 17, 2019), <https://www.lexology.com/library/detail.aspx?g=6e55ecb5-0ca9-4d81-bdae-1653f20b2529> [<https://perma.cc/LSG4-5GME>] (“The approval rate for the extraordinary ability category at the end of the Obama administration was 82.1%.”).

had declined to 69.4%.<sup>102</sup> Only a year later, the admittance rate for EB-1 visa applicants in 2019 dropped drastically again, to 56.3%.<sup>103</sup> Further, the acceptance rate in instances where the government requested applicants to provide additional evidence for their applications was 34.4% at the end of 2019, which represents a 13.4% decline since 2016.<sup>104</sup> This phenomenon is not unique to EB-1 visa applicants.<sup>105</sup> O-1 visa applications have faced declining approval rates as well.<sup>106</sup> This phenomenon is not unique to athletes, as highly-skilled immigrants in other fields also rely on EB-1 and O-1 visas to live in the United States.<sup>107</sup> Nonetheless, decreases in approval rates for these types of visas disproportionately impact foreign professional athletes, as these athletes primarily rely on EB-1 and O-1 visas in order to live and work in the United States.<sup>108</sup>

Discrete changes to national immigration policy can partially explain the decreasing rate of acceptance for the O-1 visa classification.<sup>109</sup> For instance, the processing fee associated with expediting an O-1 visa application has recently increased from \$1,225 to \$1,410.<sup>110</sup> Additionally, as of 2018, USCIS is no longer required to request further information from an O-1 applicant before declining

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102. *See id.* (“For FY 2018, the rate fell to 69.4% . . .”).

103. *See Radnofsky, supra* note 25 (recounting U.S. Citizenship and Immigration Services data).

104. *See id.* (“For petitions in which the government requested additional evidence, which it is doing more often, the approval rate fell from 37.8% in fiscal 2016 to 37.3% for fiscal 2018 and 34.4% for fiscal 2019.”).

105. *See Latest USCIS Data Confirm Continued High Rates of Nonimmigrant RFEs and Denials in FY 2019*, FRAGOMEN, <https://www.fragomen.com/insights/alerts/latest-uscis-data-confirm-continued-high-rates-nonimmigrant-rfes-and-denials-fy-2019> [<https://perma.cc/45P8-62KN>] (last visited Feb. 16, 2020) (describing decreasing approval rates for O-1 and O-2 visa petitions).

106. *See id.* (“During the first three quarters of FY 2019, the approval rate for O-1 and O-2 petitions fell to 90.9% from 92.8% in 2018.”).

107. *See O-1 Visa vs EB-1 Green Card — Differences, Approval Rate, Processing Time*, SGM LAW GROUP (Feb. 2, 2017), <https://www.immi-usa.com/o-1-visa-vs-eb-1-green-card-differences-approval-rate-processing-time/> [<https://perma.cc/F5LQ-4XAT>] (providing “scientists, researchers, doctors, business executives, educators, [and] academics,” amongst others, may petition for EB-1 visas and that “researcher[s], scientist[s], academic[s], business professional[s], or professional agents,” as well as workers “in the entertainment industry such as art, television, or theater” may petition for O-1 visas).

108. For further discussion about how foreign professional athletes rely primarily on EB-1, O-1, and P-1 visas to gain authorization to live and work in the United States, see *supra* notes 61-99 and accompanying text.

109. *See Hess, supra* note 25 (describing various procedural changes making O-1 visas more difficult to obtain).

110. *See id.* (noting recent increase in processing fee for O-1 visa applications).

to grant them a visa.<sup>111</sup> In another subtle, but significant shift, labor unions providing consultation letters for O-1 visa applicants may now submit those letters directly to the USCIS.<sup>112</sup> O-1 applicants are typically required to provide such letters from labor organizations associated with their field of employment, and until this change, applicants were granted the opportunity to rebut the letters if they were negative.<sup>113</sup> Finally, petitions to extend O-1 visas are now considered anew, a marked change from the deference previously afforded to approved O-1 visa applications.<sup>114</sup>

However, painting a full picture of the decreasing acceptance rate for both O-1 and EB-1 visa applications may require going beyond changes to national immigration policy and exploring how immigration officials are responding to the Trump administration's efforts to curtail legal immigration.<sup>115</sup> For example, USCIS has narrowed the scope of comparative data used to determine whether O-1 visa applicants meet the "high salary requirement."<sup>116</sup> Where before O-1 applicants' salary would be provided by their employers and compared against Bureau of Labor Statistics' data for average compensation in the relevant *field*, applicants are now required to

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111. See *Policy and Practice Changes Impact the O-1 Visa*, CARLTON FIELDS (Nov. 7, 2018), <https://www.carltonfields.com/insights/publications/2018/policy-and-practice-changes-impact-the-o-1-visa> [<https://perma.cc/8P93-3G4F>] (describing "new USCIS policy of denying petitions where the criterion is not met without [a request for further evidence]").

112. See *id.* ("USCIS under Trump has, however, made a subtle change that allows labor unions, peer groups, or management organizations to submit a negative consultation letter directly to USCIS."); see also *Policy and Practice Changes*, *supra* note 111 ("Now, the labor union can address the negative consultation directly with USCIS without first providing it to the O-1 applicant to rebut.")

113. See Hess, *supra* note 25 (considering change in policy "may be denying legitimate applicants an opportunity to explain their side of the story").

114. See *id.* ("USCIS no longer has to give any weight to a prior determination and can be [denied] an extension even if the O-1 applicant has had no change in circumstance and was declared eligible previously."); see also *Policy and Practice Changes*, *supra* note 111 (stating "USCIS no longer gives deference to prior O-1 petitions" and "must apply the same level of scrutiny to an O-1 petition extension as it would to a brand new O-1 petition").

115. See Refugee, Asylum, and International Operations Directorate, *RAIO Directorate – Officer Training*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Dec. 20, 2019), [https://www.uscis.gov/sites/default/files/files/nativedocuments/Discretion\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Discretion_LP_RAIO.pdf) [<https://perma.cc/4D7A-AWJU>] (noting USCIS cases involving employment authorization, such as employment-based visa applications, are subject to officials' exercise of discretion and stating that "[e]ligible applicants may be denied a benefit through an officer's exercise of discretion").

116. See Hess, *supra* note 25 (citing "narrowness" of high salary requirement interpretation by USCIS).

personally compare their salary data to that of others holding the same *position*, a narrower inquiry.<sup>117</sup>

As the eligibility criteria for O-1 and EB-1 visas closely parallel one another, it is unsurprising that immigration officials are also exercising their discretion more stringently to deny more EB-1 visas.<sup>118</sup> A recent review of rejected EB-1 petitions by the Wall Street Journal demonstrates that foreign professional athletes today have a markedly more difficult time convincing immigration officials that they possess “extraordinary ability” compared to their predecessors.<sup>119</sup> In one particularly illustrative case, a Japanese gymnast named Koji Uematsu was denied an EB-1 visa because he had allegedly failed to show that he was among the best gymnasts in the country, despite qualifying for the Japanese national team, one of the best in the world.<sup>120</sup> In another instance, a swimmer who had placed within the top ten at the European swimming championships was denied a visa on the grounds that he had failed to demonstrate that he had received an award for excellence.<sup>121</sup> These cases interpret immigration eligibility requirements far more narrowly than courts have indicated is proper.<sup>122</sup> In fact, appellate courts may even find an abuse of discretion where there is “no evidence to support [a] decision or if the decision was based on an improper understanding of the law.”<sup>123</sup>

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117. *See id.* (noting USCIS now requires “specific corroborating evidence of the applicant’s salary beyond just statements from the employer” and that applicant shows “comparisons between salaries that are specific to the exact field the applicant is in”).

118. *See Radnofsky, supra* note 25 (citing examples of athletes whose EB-1 applications have been denied due to strict exercises of USCIS discretion). For further discussion about eligibility criteria for O-1 and EB-1 visas, see *supra* notes 65-73 and 92-99 and accompanying text.

119. *See Radnofsky, supra* note 25 (“[The reviewed denied EB-1 appeals] show that it has become significantly harder in the past three years to get green cards for the would-be coaches, training partners and teammates of Americans through the longstanding ‘extraordinary ability’ route.”).

120. *See id.* (describing circumstances surrounding denial of Koji Uematsu’s EB-1 visa petition).

121. *See id.* (summarizing grounds of denial of professional European swimmer’s EB-1 visa petition).

122. *See generally, e.g., Muni v. Immigration and Naturalization Serv.*, 891 F. Supp. 440 (N.D. Ill. 1995) (holding Muni’s National Hockey League magazine awards, high salary in comparison to other league defensemen, and publications established his extraordinary ability and condemning INS’s “overly grudging interpretation” of standards).

123. *See Kazarian v. United States Citizenship and Immigration Servs.*, 596 F.3d 1115, 1118 (9th Cir. 2010) (holding USCIS’s denial of theoretical physicist’s extraordinary ability visa did not constitute abuse of discretion).

Athletes have raised challenges to such visa denials, asserting that they were based on overly-stringent interpretations of eligibility criteria.<sup>124</sup> For instance, professional Canadian ice skater Christine Carreira brought suit after the USCIS denied her visa application, despite her being one-half of the world's top junior ice dance team and having won ten medals in international competition in two years.<sup>125</sup> Although the USCIS has always maintained that membership on a professional sports team alone is insufficient to satisfy the extraordinary ability standard, refusals in the face of success at an elite, nationally-recognized level indicates that the Trump administration is raising that standard beyond its previous bounds.<sup>126</sup>

## 2. *Trump Administration Executive Orders*

President Donald Trump was sworn into office on January 20, 2017, following a campaign that emphasized putting “America First.”<sup>127</sup> Not long after his inauguration, he began issuing execu-

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124. See, e.g., Andrew Keshner, *Gold medal-winning figure skater sues government over refusal to deem her ‘extraordinary’*, MARKETWATCH (Nov. 1, 2018), <https://www.marketwatch.com/story/medal-winning-ice-skater-sues-over-authorities-refusal-to-deem-her-extraordinary-2018-10-23> [<https://perma.cc/72WY-UP6A>] (reporting on lawsuit brought by Canadian ice skater in response to visa petition denial).

125. See *Carreira v. United States Citizenship and Immigration Servs.*, 1:2018-cv-02406 (D.C. 2018) (challenging USCIS denial of EB-1 visa for professional ice skater with gold and silver medals in various international competitions). See also Keshner, *supra* note 124 (quoting USCIS August 2018 decision denying Carreira’s visa application as follows: “[Your awards] were not directly awarded to you . . . They were awarded for your performance as part of a sports team. . . . [W]e do not consider such honors to be a nationally or internationally recognized prize or award for excellence in the field of endeavor, because it is limited to members of that association and participants of those competitions”).

126. See Heather E. Morrow, *The Wide World of Sports Is Getting Wider: A Look At Drafting Foreign Players into U.S. Professional Sports*, 26 HOUS. J. INT’L L. 649, 653 (2004) (“The [INS] has stated that membership on a professional team alone does not fulfill the extraordinary ability standard, making it more difficult for players with emerging talent to gain entry to American sports.”). Although the Immigration and Naturalization Service was abolished in 2003 and replaced by three separate departments within the Department of Homeland Security, including the United States Citizenship and Immigration Service, the USCIS retained the INS’s standards for determining visa eligibility. See Sobel, *supra* note 44 (noting USCIS retained INS visa standards following its establishment).

127. See Carrie Johnson, *In Inaugural Address, Trump Decries ‘Carnage’ And Promises ‘America First’*, NAT’L PUB. RADIO (Jan. 20, 2017), <https://www.npr.org/2017/01/20/510746700/donald-trump-sworn-in-as-the-45th-president-of-the-united-states> [<https://perma.cc/EZf6-Z23S>] (summarizing President Trump’s inaugural address after being sworn into office on January 20, 2017); see also Ryan Teague Beckwith, *Read Donald Trump’s ‘America First’ Foreign Policy Speech*, TIME (Apr. 27, 2016), <https://time.com/4309786/read-donald-trumps-america-first-for-eign-policy-speech/> [<https://perma.cc/W972-5QTM>] (quoting President Trump as saying, “America first will be the major and overriding theme of my administration”).

tive orders aimed at addressing what he viewed as lax American immigration laws.<sup>128</sup> Of these orders, those concerning President Trump's colloquially named "travel ban" and border wall with Mexico are most likely to impact foreign athletes trying to compete in the United States.<sup>129</sup> The travel ban refers to a presidential proclamation issued in September 2017 for the stated purpose of restricting travel from an enumerated list of countries deemed to have inadequate information-sharing protocols.<sup>130</sup> The Trump administration also authorized the construction of a border wall with Mexico in January 2017 in an effort to reduce illegal immigration into the United States.<sup>131</sup>

a. "Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats"

On January 27, 2017, President Trump issued Executive Order 13769, entitled "Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States."<sup>132</sup> This order suspended visa allowances to residents of countries deemed by the Secretary of Homeland Security to have inadequate information-sharing protocols in place with the United States.<sup>133</sup> Executive Order 13769 also automatically barred travelers from seven "high-risk" countries for ninety days, suspended the United States Refugee Admissions Program for 120 days, and suspended the entry of all Syr-

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128. See *President Donald J. Trump Achievements: Immigration*, DONALD J. TRUMP FOR PRESIDENT, <https://www.promiseskept.com/achievement/overview/immigration/#> [<https://perma.cc/4ZNB-AYVY>] (last visited June 12, 2020) (listing actions taken by President Trump to restrict immigration and noting "President Trump protects American communities and restores law and order at the border so Americans can feel safe in their communities").

129. For further discussion about how President Trump's executive orders instituting a travel ban and border wall may impact professional athletes' ability to travel to the United States to train and compete, see *infra* notes 177-192.

130. For further discussion about President Trump's ongoing travel ban, see *infra* notes 132-145 and accompanying text.

131. For further discussion about President Trump's border wall between the United States and Mexico, see *infra* notes 146-152 and accompanying text.

132. See Exec. Order No. 13,769, 3 C.F.R. § 8977 (Mar. 6, 2017) ("It is the policy of the United States to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.").

133. See *id.* (calling for review of information-sharing protocols between foreign nations and United States and "[s]uspension of [i]ssuance of [v]isas and [o]ther [i]mmigration [b]enefits to [n]ationals of [c]ountries of [p]articlar [c]oncern").

ian refugees indefinitely.<sup>134</sup> The district court for the Western District of Washington temporarily enjoined the order, and the Ninth Circuit Court of Appeals upheld the injunction.<sup>135</sup> A revised version of the executive order, entitled Executive Order 13780, was also enjoined nine days after its issuance.<sup>136</sup> Following a challenge by the federal government, the Supreme Court allowed Executive Order 13780 to go into limited effect until the Court could formally rule on its legality in October of 2017.<sup>137</sup>

Prior to the Supreme Court's formal ruling on Executive Order 13780, President Trump issued a third iteration of his administration's travel ban ("Proclamation") on September 24, 2017, restricting travel into the United States by citizens from seven countries.<sup>138</sup> After the Fourth and Ninth Circuit Courts of Appeals upheld injunctions barring enforcement of the Proclamation, the Supreme Court reversed in *Trump v. Hawaii*.<sup>139</sup> In a five-to-four decision, the Court held that it was within the President's broad discretion under the Immigration and Nationality Act of 1990 to

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134. See *id.* §§ 3(c), 5(a), 5(c) (suspending entry into United States by travelers from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen for 90 days; all refugees for 120 days; and Syrian refugees indefinitely).

135. See *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (denying stay of temporary restraining order against Executive Order 13769 on grounds that federal government (1) did not show likelihood of success on merits of claim that order did not violate aliens' rights of due process; and (2) did not show necessity of emergency stay).

136. See Exec. Order No. 13780, 3 C.F.R. § 13209 (2017) ("[I]n order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.").

137. See *Federal Travel Ban: Trump Administration Actions Limiting Noncitizen Travel to the U.S. and Courts*, NAT'L CONFERENCE OF STATE LEGISLATURES, <https://www.ncsl.org/research/immigration/federal-travel-ban.aspx> [https://perma.cc/T9QK-92PV] (last visited June 14, 2020) ("On June 26, 2017, the Supreme Court announced that it would allow the president to proceed with a limited version of the second executive order, while deciding to hear arguments in October and allowing the order to ban travelers from Iran, Libya, Somalia, Sudan, Syria, and Yemen if the visitors lacked a 'credible claim of a bona fide relationship with a person or entity in the United States.'").

138. See *Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, WHITE HOUSE (Sept. 24, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/> [https://perma.cc/C8AW-AZ76] (instituting travel restrictions for citizens of Chad, Iran, Libya, North Korea, Somalia, Syria, and Yemen, as well as certain government officials from Venezuela).

139. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review.").



restrict foreign travel in matters of national security.<sup>140</sup> Further, the Court determined that President Trump's inflammatory public remarks regarding Muslims did not render his legitimate purpose pretextual.<sup>141</sup>

As of this writing, the Proclamation remains in effect and has been expanded to encompass travelers from an increasing number of countries.<sup>142</sup> Despite the Proclamation's facial religious neutrality, critics continue to denounce its perceived targeting of Muslim-majority nations.<sup>143</sup> Further, the Proclamation specifically exempts certain classes of travelers from the travel ban; however, these exemptions are inapplicable to foreign professional athletes.<sup>144</sup> While

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140. See *id.* at 2422 (acknowledging President's discretion in matters of national security by writing: "the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving 'sensitive and weighty interests of national security and foreign affairs'").

141. See *id.* at 2418 (framing Court's decision not as "whether to denounce [President Trump's] statements" but "the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility").

142. See Tara C. Mahadevan, *Trump Administration Adds 6 New Countries to Travel Ban*, COMPLEX (Feb. 1, 2020), <https://www.complex.com/life/2020/02/donald-trump-administration-broadens-travel-ban-encompass-6-new-countries> [<https://perma.cc/95NC-4QPJ>] (reporting new travel restrictions on travelers from Nigeria, Eritrea, Tanzania, Sudan, Kyrgyzstan, and Burma, in addition to existing restrictions on travelers from Chad, Iran, Libya, Somalia, Syria, Yemen, Venezuela, and North Korea).

143. See Stef W. Kight, *The evolution of Trump's Muslim ban*, AXIOS (Feb. 10, 2020), <https://www.axios.com/trump-muslim-travel-ban-immigration-6ce8554f-05bd-467b-b3c2-ea4876f7773a.html> [<https://perma.cc/YB7Z-Z8BQ>] (stating "Donald Trump's campaign call for all Muslims to be barred from entering the United States has morphed over the past three years into a complex web of travel and immigration restrictions placed, to varying degrees, on 7% of the world's population" and noting Muslim populations of countries encompassed by travel ban).

144. See Shoba Sivaprasad Wadhia, *Trump's Travel Ban Two Years Later*, AMERICAN CONSTITUTION SOC'Y. (Jan. 30, 2019), <https://www.acslaw.org/expertforum/trumps-travel-ban-two-years-later/> [<https://perma.cc/XG4U-JPL6>] (listing categories of persons exempt from Proclamation as "[l]awful permanent residents (green card holders)[, f]oreign nationals admitted or paroled to the United States on or after the effective date[, f]oreign nationals with travel documents that are not visas that are valid before or issued after the effective date[, d]ual nationals traveling on a passport that is not one of the affected countries[, t]hose traveling on a diplomatic or related visa[, and f]oreign nationals who have already been granted asylum, refugees who have already been granted admittance, and those who have been granted withholding of removal, advanced parole, or protections under the Convention Against Torture"); see also Lester Munson, *How Trump's Immigration Ban Might Affect Sports and Athletes*, ABC NEWS (Jan. 30, 2017), <https://abcnews.go.com/Sports/trumps-immigration-ban-affect-sports-athletes/story?id=45153120> [<https://perma.cc/U4P3-NMGK>] (stating "the order allows admission into the United States for citizens from these countries when 'denying admission would cause undue hardship,' but '[t]o prove the 'hardship' exemption, sports agents and lawyers for athletes would have to argue and challenge legal authorities on an issue that is without precedent in immigration law'").

the Proclamation created a waiver program to exempt covered individuals on a case-by-case basis, scrutiny of the program has revealed few applicants have successfully received visas through the waiver program.<sup>145</sup>

b. “Executive Order: Border Security and Immigration Enforcement Improvements”

As early as 2014, President Trump touted the construction of a border wall between the United States and Mexico as a primary presidential campaign promise.<sup>146</sup> Mere days after taking office, President Trump acted on this campaign promise by issuing an executive order on January 25, 2017 calling for the “immediate construction of a physical wall on the southern border [of the United States].”<sup>147</sup> In order to finance the border wall following inadequate congressional funding, President Trump declared a national emergency on February 15, 2019, which authorized his administration to divert military resources to the project.<sup>148</sup> The United States

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145. See Betsy Fisher & Samantha Power, *The Trump Administration is Making a Mockery of the Supreme Court*, N.Y. TIMES (Jan. 27, 2019), <https://www.nytimes.com/2019/01/27/opinion/trump-travel-ban-waiver.html> [<https://perma.cc/FWH4-UDQG>] (noting that visa waivers may be granted under Proclamation where 1) denial of entry would cause undue hardship, 2) entry would be in national interest, and 3) entry would pose no threat to national security; further, pointing out lack of published instructions regarding how to apply for waiver and stating that approximately 98% of waiver applications between December 2017 and April 2018 were denied).

146. See Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 5, 2014, 4:34 PM), [https://twitter.com/realDonaldTrump/status/496756082489171968?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E496756082489171968&ref\\_url=https%3A%2F%2Fwww.nytimes.com%2F2018%2F01%2F18%2Fus%2Fpolitics%2Ftrump-border-wall-immigration.html](https://twitter.com/realDonaldTrump/status/496756082489171968?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E496756082489171968&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2018%2F01%2F18%2Fus%2Fpolitics%2Ftrump-border-wall-immigration.html) [<https://perma.cc/VUC3-KPJJ>] (“SECURE THE BORDER! BUILD A WALL!”); see also Ron Nixon & Linda Qiu, *Trump’s Evolving Words on the Wall*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html> [<https://perma.cc/R97N-Q7E4>] (quoting President Trump on October 28, 2015 as saying, “As far as the wall is concerned, we’re going to build a wall. We’re going to create a border”).

147. See Exec. Order No. 13767, 82 C.F.R. § 8793 (Jan. 25, 2017) (“It is the policy of the executive branch to . . . secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism . . .”).

148. See *Presidential Proclamation on Declaring a national Emergency Concerning the Southern Border of the United States*, WHITE HOUSE (Feb. 15, 2019), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/> [<https://perma.cc/XQ5Y-RC2T>] (“I hereby declare that this emergency requires use of the Armed Forces and . . . that the construction authority provided in . . . [the] United States Code, is invoked and made available . . .”); see also Jessica Taylor & Brian Naylor, *As Trump Declares National Emergency To Fund Border Wall, Democrats Promise Fight*, NAT’L PUB.

District Court for the Western District of Texas initially enjoined the Trump administration's use of emergency funds for the project, but the Fifth Circuit reversed, allowing construction of the border wall to continue as planned.<sup>149</sup>

As of this writing, the Trump administration has erected approximately 371 miles of a steel-and-concrete wall along the United States-Mexico border.<sup>150</sup> President Trump publicly guaranteed that at least 500 miles of the structure would be completed by the end of 2020, coinciding with his campaign for re-election.<sup>151</sup> In accor-

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RADIO (Feb. 15, 2019), <https://www.npr.org/2019/02/15/695012728/trump-expected-to-declare-national-emergency-to-help-fund-southern-border-wall> [<https://perma.cc/29UZ-WJG7>] ("Trump said he was declaring an emergency because of 'an invasion of our country with drugs, with human traffickers, with all types of criminals and gangs.'"). The remainder of funding for the border wall came in the form of a \$1.3 billion congressional grant while \$6.7 billion was diverted from other government projects. See Bobby Allyn, *Appeals Court Allows Trump To Divert \$3.6 Billion In Military Funds For Border Wall*, NPR (Jan. 9, 2020), <https://www.npr.org/2020/01/09/794969121/appeals-court-allows-trump-to-divert-3-6-billion-in-military-funds-for-border-wa> [<https://perma.cc/3LJH-HWD2>] (noting "Congress maintained border wall funding at \$1.3 billion" in its 2020 spending package and that "[w]hen the president declared the national emergency over border security, he ordered federal agencies to find \$6.7 billion in funding from other government projects to finance construction").

149. See *El Paso Cty. v. Trump*, 408 F.Supp.3d 840, 860 (W.D. Tex. 2019) (holding President Trump's redirection of military funds to build border wall violated Consolidated Appropriations Act § 739); see also *El Paso Cty. v. Trump*, 1:2020-cv-19-51144 (5th Cir. 2020) (stating "[t]he application for a stay of the district court's injunction pending appeal is GRANTED" and noting the Supreme Court recently stayed a similar injunction in *Trump v. Sierra Club*, 140 S. Ct. 1 (2019)). It should be noted that on September 25, 2020, the Court of Appeals for the District of Columbia Circuit authorized the House of Representatives to pursue legal action against the Trump administration on the grounds that it was unconstitutional for the President to use emergency funds to spend more on the border wall than Congress had initially permitted. As of this writing, the House's underlying claim had not yet been heard on the merits. See *United States House of Representatives v. Mnuchin*, 2020 WL 5739026 at \*8 (holding that House of Representatives had "a distinct injury" and "standing to bring this litigation"); see also Charlie Savage, *Appeals Court Permits House to Sue Over Trump's Border Wall Spending*, N.Y. TIMES (Sept. 25, 2020), <https://www.nytimes.com/2020/09/25/us/politics/trump-border-wall-lawsuit.html> [<https://perma.cc/K2ET-5KRD>] ("The House may pursue a constitutional lawsuit challenging President Trump's use of emergency powers to spend more public funds on a southwestern border wall than Congress was willing to appropriate . . .").

150. See *Border Wall System*, U.S. CUSTOMS AND BORDER PROTECTION (Oct. 19, 2020), <https://www.cbp.gov/border-security/along-us-borders/border-wall-system> [<https://perma.cc/4YXW-J4B7>] (stating that approximately 371 miles of border wall had been constructed as of October 19, 2020).

151. See *id.* (stating "Trump has promised to build at least 500 miles of new fencing by early next year" and explaining that "[t]o meet the president's targets, crews will need to add about 30 linear miles of barrier per month throughout 2020, more than double the current pace of construction").

dance with this goal, construction of the border wall continued, and even accelerated, during the COVID-19 pandemic of 2020.<sup>152</sup>

### C. Proposed Reforming American Immigration for a Strong Economy Act

#### 1. *Background and Legislative History of the RAISE Act*

On February 13, 2017, Senators Tom Cotton (R-AR) and David Perdue (R-GA) first introduced the RAISE Act before the Senate.<sup>153</sup> The stated purpose of the bill was “to eliminate the Diversity Visa Program, to limit the President’s discretion in setting the number of refugees admitted annually to the United States, to reduce the number of family-sponsored immigrants, [and] to create a new nonimmigrant classification for the parents of adult United States citizens.”<sup>154</sup> The RAISE Act received support from President Donald Trump for “prioritiz[ing] immigrants based on the skills they bring to our Nation while safeguarding the jobs of American workers.”<sup>155</sup>

Groups across the country praised the bill for its potential to return jobs to American citizens.<sup>156</sup> For instance, NumbersUSA president Roy Beck issued the statement, “[s]eeing the President standing with the bill’s sponsors at the White House gives hope to the tens of millions of struggling Americans in stagnant jobs or

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152. See Simon Romero, *Arizona Finds Coronavirus among Border Wall Workers*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/us/coronavirus-border-wall-workers-arizona.html> [<https://perma.cc/T8N2-VVWN>] (reporting at least two individuals working on U.S./Mexico border wall tested positive for coronavirus after “[t]he federal government declined to suspend construction and even accelerated work along some stretches of the border”).

153. See *S.354 – RAISE Act*, LIBRARY OF CONGRESS, <https://www.congress.gov/bill/115th-congress/senate-bill/354> [<https://perma.cc/2AQM-6TWS>] (last visited Jan. 26, 2020) (providing overview of RAISE Act).

154. See *id.* (stating purpose of bill as “[t]o amend the Immigration and Nationality Act, to eliminate the Diversity Visa Program, to limit the President’s discretion in setting the number of refugees admitted annually to the United States, to reduce the number of family-sponsored immigrants, to create a new nonimmigrant classification for the parents of adult United States citizens, and for other purposes”).

155. *President Donald J. Trump Backs RAISE Act*, WHITE HOUSE (Aug. 2, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/> [<https://perma.cc/LB29-U8X3>] (providing ways Act accomplishes stated goal, such as implementation of merit-based system).

156. See Priscilla Alvarez, *Can a Decades-Old Immigration Proposal Pass under Trump?*, THE ATLANTIC (Aug. 21, 2017), <https://www.theatlantic.com/politics/archive/2017/08/can-a-decades-old-immigration-proposal-pass-under-trump/537138/> [<https://perma.cc/L383-RENC>] (noting support for President Trump’s endorsement of RAISE Act from immigration restrictionist groups).

outside the labor market altogether.”<sup>157</sup> However, the RAISE Act also attracted some critics.<sup>158</sup> Specifically, immigrants’ rights groups viewed the bill as “conflict[ing] with many core values the United States has traditionally embraced, such as providing equal opportunities for all, fighting discrimination of all sorts, protecting minorities and disadvantaged groups, and preserving family unity.”<sup>159</sup> Nonetheless, it stalled after being introduced in the Senate.<sup>160</sup> There was no word on the bill until it was reintroduced in April 2019, this time with Senator Josh Hawley (R-MO) adding his name as a sponsor of the legislation.<sup>161</sup>

The stated purpose of the bill, slightly revised from its 2017 iteration, is now 1) to update the Immigration and Nationality Act by instituting a skills-based point system for immigrants; 2) to limit family-sponsored immigration to spouses and young children; 3) to eliminate the Diversity Visa Program; and 4) to reduce refugees in the U.S., among other things.<sup>162</sup> Ultimately, the RAISE Act is designed to reduce legal immigration by 50% in the United States in an attempt to increase employment opportunities for American citizens.<sup>163</sup> In particular, the Act’s de-prioritization of many characteristics unique to professional athletes threatens to disproportionately reduce legal immigration, and therefore competitive balance, in that field.<sup>164</sup>

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157. *See id.* (quoting praise given to RAISE Act by NumbersUSA president Roy Beck).

158. *See The RAISE Act: What Lies Beneath the Proposed Points System?*, AMERICAN IMMIGRATION COUNCIL (Aug. 11, 2017), <https://www.americanimmigrationcouncil.org/research/raise-act> [<https://perma.cc/A2RU-C96M>] (identifying intended and unintended consequences of RAISE Act).

159. *See id.* (criticizing RAISE Act’s ideology and implications).

160. *See S.354 – RAISE Act*, *supra* note 154 (listing “Introduced in Senate” as only action taken on RAISE Act).

161. *See Ruark*, *supra* note 26 (announcing reintroduction of RAISE Act in April 2019 and noting that companion legislation had been introduced in House of Representatives).

162. *See H.R. 2278: RAISE Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr2278> [<https://perma.cc/MRJ5-3QVC>] (last visited Jan. 26, 2020) (providing additional propositions such as creating prerequisite for naturalization).

163. *See Ruark*, *supra* note 26 (stating RAISE Act would “reduce . . . labor competition” and reduce legal immigration by around fifty percent over decade).

164. For further discussion about how the RAISE Act’s failure to accord sufficient weight to immigration characteristics unique to professional athletes and the likely negative consequences in competitive balance as a result, see *infra* notes 165-171 and accompanying text.

2. *Provisions of the RAISE Act Relevant to Immigrant Athletes*

Among the measures proposed by the RAISE Act, the elimination of employment-based immigration categories in favor of a generalized point system, under which applicants must achieve a specified number of points in order to gain entry to the United States, has the greatest potential to negatively impact foreign-born professional athletes.<sup>165</sup> The RAISE Act's proposed point system would continue to take into account some characteristics recognized by the current employment-based immigration regime.<sup>166</sup> For instance, applicants would receive points for certain extraordinary achievements, job offers from United States employers, and investment activity and entrepreneurialism.<sup>167</sup> However, this system would also prioritize applicant characteristics that are currently unaccounted for in the employment-based immigrations system, such as age, education level, and proficiency of the English language.<sup>168</sup> These provisions fail to take into account the unique circumstances of immigrants who petition to live in the United States as professional athletes.<sup>169</sup> For instance, foreign athletes who begin competing professionally without entering college first would be disadvantaged by this system.<sup>170</sup> Foreign athletes in individualized

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165. See Reforming American Immigration for Strong Employment (RAISE) Act, H.R. 2278, 116th Cong. § 5 (2019) (enumerating proposed point system to replace employment-based visa categories). While the RAISE Act contains various other provisions besides the implementation of a point-based merit system that would alter the United States' current immigration system, an in-depth discussion of these provisions is beyond the scope of this comment. See generally *US immigration proposals: What's in the Raise Act?*, BBC NEWS (Aug. 3, 2017), <https://www.bbc.com/news/world-us-canada-40814625> [<https://perma.cc/L4CC-62MS>] (summarizing provisions of RAISE Act).

166. See *id.* § 5(d)(1)(f)-(h) (describing proposed point allotments for job offers, extraordinary ability, and investments).

167. See *id.* (awarding, for example, twenty-five points for Nobel Prize or comparable recognition in scientific study, fifteen points for Olympic or equivalent medal within past eight years, five points for annual salary at least 150% of average household income in state of residency, and six points for commercial investment of at least \$1.35 million).

168. See *id.* § 5(d)(1)(c)-(e) (describing point allotments for age, education level, and English language proficiency).

169. For further discussion about how the RAISE Act may disadvantage professional athletes wishing to immigrate to the United States, see *infra* notes 192-205.

170. See, e.g., Jared Diamond & Tom McGinty, *MLB Sends a Message to High Schoolers: Go to College*, WALL STREET J. (June 7, 2019), <https://www.wsj.com/articles/mlb-sends-a-message-to-high-schoolers-go-to-college-11559905200> [<https://perma.cc/9J9F-ZJ2K>] (noting twenty-four percent of MLB players in 2019 season entered draft immediately following high school); see also, e.g., Associated Press, *For elite gymnasts, going pro is a complicated choice*, USA TODAY (July 20, 2016), <https://www.usatoday.com/story/sports/olympics/2016/07/20/for-elite-gymnasts-going-pro-is-a-complicated-choice/87340808/> [<https://perma.cc/9LC7-LW57>] (imply-

sports would also be disadvantaged, because sponsorships constitute the majority of wages in such sports.<sup>171</sup>

### III. SCANNING THE FIELD: THE ADVERSE IMPACT OF PRESENT AND FUTURE IMMIGRATION RESTRICTIONS ON BOTH IMMIGRANT AND AMERICAN ATHLETES

Donald Trump's presidential campaign was largely focused on instituting measures to end illegal immigration to the United States as well as reducing the rate of legal immigration in order to protect American workers' employment opportunities.<sup>172</sup> Indeed, since his earliest days in the White House, President Trump has taken numerous actions in furtherance of these goals, including narrowing the interpretation of visa eligibility criteria and instituting executive orders, such as a travel ban and border wall, to reduce immigration into the United States.<sup>173</sup> This section first observes ways in which the Trump administration's crackdown on immigration has

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ing gymnasts who wish to compete in United States are pressured by various factors to go professional during late teenage years, immediately following high school age); Gary Santaniello, *College Hockey Alumni Rise in Prominence in the N.H.L.*, N.Y. TIMES (Oct. 20, 2018), <https://www.nytimes.com/2018/10/20/sports/hockey/nhl-college-coaches.html> [<https://perma.cc/K4AQ-J5VN>] (stating only one-third of players in NHL had played in college before competing professionally as of 2018).

171. See RAISE Act, § 5(g) (allocating points for immigrants who have been offered jobs with salaries constituting at least 150% of median household income in state in which they are employed); see also Nasha Smith, *13 Athletes who Make More Money Endorsing Products than Playing Sports*, BUS. INSIDER (June 17, 2019), <https://www.businessinsider.com/athletes-endorsements-nba-golf-tennis-2019-6> (listing high-profile foreign athletes, including Roger Federer, Rafael Nadal, Kei Nishikori, and Usain Bolt, whose endorsement earnings surpassed athletic salaries).

172. See Michael Collins, John Fritze, Deirdre Shesgreen, & Paul Davidson, *Build the wall? Travel ban? Tax cuts? After Trump's State of the Union, here's where he stands on promises*, USA TODAY (Feb. 5, 2020), <https://www.usatoday.com/story/news/politics/2020/02/05/state-union-where-donald-trump-stands-promises/4645277002/> [<https://perma.cc/M8YH-8U8G>] ("Perhaps no other issue animated Trump's campaign as much as immigration. From his proposed 'impenetrable physical wall' on the U.S. border with Mexico to the dramatic changes he proposed to the legal immigration system, Trump hammered away at what he described on the campaign trail as one of the 'greatest challenges facing our country today.'").

173. See *Immigration*, DONALD J. TRUMP FOR PRESIDENT, INC., <https://www.promiseskept.com/achievement/overview/immigration/#> [<https://perma.cc/27GV-GFGS>] (last visited Feb. 18, 2020) (enumerating various actions taken to reduce both legal and illegal immigration to the United States). See generally Sarah Pierce, *Immigration-Related Policy Changes in the First Two Years of the Trump Administration*, MIGRATION POLICY INST. (May 2019), <https://www.migrationpolicy.org/research/immigration-policy-changes-two-years-trump-administration> [<https://perma.cc/6Y9A-ACDD>] (noting every change to United States immigration policy made by Trump administration as of 2019).

uniquely impacted professional athletes in their efforts to come to the United States, including not only the decreasing approval rates for the types of visas traditionally used by professional athletes mentioned above, but also the issuance of executive orders and immigration policy changes that implicate foreign athletes.<sup>174</sup> It then discusses the probability of the RAISE Act passing and asserts that the Act would exacerbate the hindering effects on professional athlete immigration already being witnessed.<sup>175</sup> Finally, this section concludes by analyzing the impact of decreased foreign-born athlete immigration on American professional athletics and arguing that restrictive immigration policies are likely to harm the United States' professional sports industry.<sup>176</sup>

#### A. Trump Administration Actions Currently Impacting Athlete Immigration

Amongst the various actions the Trump administration has taken to restrict both illegal and legal immigration, two in particular have the potential to significantly impact professional athletics: (1) changing policies and standards in the visa context and (2) the administration's ongoing travel ban.<sup>177</sup> This section briefly recaps the factual circumstances surrounding decreasing rates of approval for EB-1 and O-1 visas as well as their demonstrated impact on professional athletes thus far.<sup>178</sup> It then analyzes the direct and indirect repercussions to professional athletics that are likely to result from the Trump administration's ongoing travel ban and border wall in light of present backlash from the affected countries.<sup>179</sup>

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174. For further discussion about actions already taken by the Trump administration that have restricted professional athletes' ability to come to the United States, see *infra* notes 177-192 and accompanying text.

175. For further discussion about how passage of the RAISE Act would further limit professional athletes' ability to immigrate to the United States, see *infra* notes 193-205 and accompanying text.

176. For further discussion about how restrictions on athlete immigration would harm the American professional sports industry, see *infra* notes 224-239 and accompanying text.

177. See generally Munson, *supra* note 144 (analyzing travel ban's potential effects on domestic and international athletic competition); Rahul Soni, *Foreign Athletes Now Struggle to Demonstrate They Have "Extraordinary Ability,"* FRAGOMEN (Dec. 20, 2019), <https://www.fragomen.com/insights/blog/foreign-athletes-now-struggle-demonstrate-they-have-extraordinary-ability> [<https://perma.cc/UU2C-P39Q>] (recounting foreign athletes' current difficulties in procuring American visas).

178. See Peck & Clifton, *supra* note 101 (noting decreasing approval rates for EB-1 visas and analyzing factors responsible for trend); see also *Latest USCIS Data*, *supra* note 105 (stating that approval rates for O-1 and O-2 visa petitions have decreased year over year).

179. For further discussion about the Trump administration's ongoing travel ban and border wall, the international reaction to the executive orders, and its



The Trump administration's stringent interpretations of existing visa eligibility criteria has already restricted the number of foreign athletes entering the United States to train and compete, and enhanced procedural obstacles and narrower discretionary determinations of "extraordinary ability" have resulted in a steady decrease of EB-1 and O-1 visas since 2016.<sup>180</sup> Further, President Trump has taken actions beyond limiting the availability of visas that may curtail professional athletes' ability to immigrate to the United States, namely the ongoing travel ban and border wall described above.<sup>181</sup> These restrictions could have negative consequences for certain sports and professional leagues in the United States which feature a high proportion of Muslim, Central American, or South American athletes.<sup>182</sup> For instance, Iran and the United States have long enjoyed a close relationship in professional wrestling, while many NBA and NFL players hail from Muslim-majority nations.<sup>183</sup> Additionally, MLB teams have long benefited from an influx of talented athletes from Central and South American countries.<sup>184</sup> While the border wall has no bearing on visa ap-

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likely effects on professional athletes, see *infra* notes 180-192 and accompanying text.

180. For further discussion about how narrow interpretations of visa eligibility criteria under the Trump administration have curtailed the number of foreign athletes entering the United States, see *supra* notes 100-126.

181. For further discussion about how Trump administration executive actions threaten to limit professional athletes' ability to immigrate to the United States, see *infra* notes 182-192 and accompanying text.

182. See Jere Longman, *Trump's Immigration Order Could Have a Big Impact on Sports*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/sports/trump-refugee-ban.html> [<https://perma.cc/YQ7N-E3RP>] (discussing potential impact of Trump administration's travel ban on sports).

183. See Kay Armin Serjoe, *U.S. Wrestlers in Iran Practice Hands-On Diplomacy*, TIME (Feb. 17, 2017), <https://time.com/4674646/usa-iran-wrestling/> [<https://perma.cc/F2WY-NQ6P>] ("Since [U.S. wrestlers traveled to Iran in 1998, the first U.S. athletes to do so since the Islamic Revolution of 1979], the United States and Iran have exchanged wrestling teams 32 times, making the sport a mainstay of people-to-people diplomacy even when the two governments were at an impasse over Iran's nuclear activities."); see also Allan Smith, *Here are some of the greatest Muslim-American athletes*, BUS. INSIDER (Dec. 7, 2015), <https://www.businessinsider.com/some-great-muslim-american-athletes-2015-12> [<https://perma.cc/JBU6-TSK7>] (highlighting various notable Muslim professional athletes, including NBA's Hakeem Olajuwon and Kenneth Faried and NFL's Ameer Abdullah, Husain Abdullah, and Muhammad Wilkerson, among others).

184. See Laura Depta, *Latin American Countries Produce the Most MLB Players*, BLEACHER REPORT (May 1, 2015), <https://bleacherreport.com/articles/2450131-latin-american-countries-producing-the-most-mlb-players> [<https://perma.cc/Q2HZ-Z65Q>] ("Latin American countries produce some of baseball's top talent, with the Dominican Republic and Venezuela leading the way."). Some notable baseball players from South America include David Ortiz of the Boston Red Sox (Dominican Republic), Miguel Cabrera of the Detroit Tigers (Venezuela), Yasiel Puig of the Los Angeles Dodgers (Cuba), and Carlos Ruiz of the Philadelphia Phil-

plications and thus may have a limited direct impact on Central and South American athletes, the provisions of the ongoing travel ban contain no exceptions applicable to foreign athletes and thereby directly inhibit foreign athletes in the affected countries from traveling to the United States.<sup>185</sup>

Additionally, beyond harming domestic competition, the actions undertaken by the Trump administration may also ripple outward to impact nearly every American professional sport which competes internationally, as the actions have created tension in foreign relations between the United States and other governments.<sup>186</sup> This possibility is illustrated by foreign sports officials' immediate reactions to the travel ban upon its announcement in 2017.<sup>187</sup> At that time, Iranian officials contemplated instituting a retaliatory ban against American athletes in response.<sup>188</sup> Additionally, experts feared an impact at that time on the United States' chances of hosting the 2024 Summer Olympics in Los Angeles.<sup>189</sup> Although this ban apparently never materialized and the United States has been designated to host the Summer Olympics in 2028, these initial reactions beg considering the types of fallout in international competition that the United States may experience as the Trump administration's travel ban possibly grows to encompass more coun-

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lies (Panama), among others. *See id.* (providing examples of professional baseball players hailing from Latin American countries).

185. *See* Munson, *supra* note 144 (“[T]he order allows admission into the United States for citizens from these countries when ‘denying admission would cause undue hardship,’” but “[t]o prove the ‘hardship’ exemption, sports agents and lawyers for athletes would have to argue and challenge legal authorities on an issue that is without precedent in immigration law.”).

186. *See* Rebecca Davis O'Brien, Ben Cohen, Matthew Futterman & Sara Germano, *Sports World Wonders How Trump's Immigration Order Will Affect Athletes*, WALL STREET J. (Jan. 29, 2017), <https://www.wsj.com/articles/sports-world-wonders-how-trumps-immigration-order-will-affect-athletes-1485731121> [<https://perma.cc/JV2F-Z67B>] (discussing athletes' and officials' concern that travel ban would impact United States' ability to compete in or host international athletic events).

187. For further discussion about sports officials' initial reactions to the Trump administration's travel ban upon its announcement in 2017, *see infra* notes 188-192 and accompanying text.

188. *See* Munson, *supra* note 144 (“There was talk from Iranian officials of a retaliatory ban on American athletes for the men's freestyle World Cup wrestling championships scheduled for western Iran in February.”).

189. *See* Longman, *supra* note 182 (“President Trump's ban on visitors from seven predominantly Muslim nations could have a wide impact on international sports, including jeopardizing a warm relationship between the United States and Iran in wrestling competitions and threatening the chances of Los Angeles hosting the 2024 Summer Olympics and of the United States securing soccer's 2026 World Cup.”).

tries.<sup>190</sup> Similarly, foreign MLB players have expressed fear that they will experience a “hostile environment” in the United States as a result of President Trump’s commentary surrounding the border wall.<sup>191</sup> Additionally, just as some experts feared that President Trump’s travel ban would negatively impact the United States’ ability to host an upcoming Olympic Games, others have expressed worry that his administration’s border wall could complicate the United States’ bid to co-host the men’s FIFA World Cup with Mexico and Canada in 2026.<sup>192</sup>

## B. Hypothesizing the Potential Impact of the RAISE Act

### 1. *Analyzing the RAISE Act’s Point System*

The RAISE Act would eliminate employment-based immigration categories in favor of a generalized point system.<sup>193</sup> While it would continue to take into account certain extraordinary achievements and job offers in the United States, the Act makes no specific reference to professional athletes.<sup>194</sup> For those point-bearing characteristics of the RAISE Act that apply to foreign-born professional athletes, the Act would drastically narrow the field of criteria for

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190. *See id.* (acknowledging USA Wrestling competitors had received visas to travel to Iran for men’s freestyle World Cup wrestling championships in 2017); *see also* Jennifer Calfas, *Here’s When the Olympics Will Return to the U.S. Next*, TIME (Feb. 10, 2018), <https://time.com/5142839/when-olympics-return-to-united-states/> [<https://perma.cc/9B2R-7UJP>] (noting Paris will host 2024 Summer Olympics and Los Angeles will host 2028 Summer Olympics).

191. *See* Jorge L. Ortiz, *A Trump presidency raises concerns among Major League Baseball players*, USA TODAY (July 7, 2016), <https://www.usatoday.com/story/sports/mlb/2016/07/07/donald-trump-major-league-baseball-mexico-wall/86828582/> [<https://perma.cc/XWA6-ZVG6>] (stating President Trump’s commitment to constructing border wall between United States and Mexico “not only stand in contrast with MLB’s attempts to tap into the Mexican market and talent pool,” but have “also raised concerns among foreign major leaguers” and quoting San Francisco Giants infielder Ramiro Pena as saying, “It does worry me a lot that [Donald Trump] could be elected president . . . [f]or the Latin community, I think it would make things more difficult when it comes to immigration, based on what he has said . . . [t]he comments he has made about Mexicans worry you”).

192. *See* Longman, *supra* note 182 (“In June, Sunil Gulati, president of the United States Soccer Federation, told reporters that a Trump presidency could complicate an American bid [to host the World Cup], especially if it were a joint bid with Mexico, given Mr. Trump’s plans to build a wall across America’s southern border.”).

193. *See* Reforming American Immigration for Strong Employment (RAISE) Act, H.R. 2278, 116th Cong. § 5 (2019) (enumerating proposed point system to replace employment-based visa categories).

194. For further discussion about characteristics taken into account by the RAISE Act’s point system, *see supra* notes 165-171 and accompanying text.

eligibility.<sup>195</sup> Specifically, “extraordinary ability” in athletics could only be shown by proving that applicants had “earned an individual Olympic medal or placed first in an international sporting event in which the majority of the best athletes in an Olympic sport were represented.”<sup>196</sup> Further, proof that an applicant satisfied this criteria would still only merit him or her fifteen points, half of the amount needed to receive an immigrant visa under the Act.<sup>197</sup> This would significantly inhibit the ability of athletes competing in individualized sports to immigrate to the United States, as it would not only raise the requisite standard of extraordinary ability but also render such ability a necessary but insufficient ground for entry.<sup>198</sup>

For foreign-born athletes competing in team sports, the RAISE Act’s point system creates an equally bleak outlook.<sup>199</sup> A number of the most popular team sports in the United States lack extensive opportunities to compete at a high international level besides the Olympics.<sup>200</sup> For instance, the International Federation of Basketball World Cup and Pan-American Games are the only global professional basketball competitions that approach the competitive level of the Olympics.<sup>201</sup> Similarly, professional baseball’s only in-

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195. For further discussion about the qualifying evidentiary criteria for immigrant athletes under the Immigration Act of 1990, see *supra* notes 61-99 and accompanying text. For further discussion about the qualifying evidentiary criteria for immigrant athletes under the proposed RAISE Act, see *supra* notes 165-171 and accompanying text.

196. RAISE Act, § 5(d)(1)(f)(2) (“An applicant may accrue, for extraordinary achievement under this subsection . . . 15 points if the applicants, during the 8-year period immediately preceding the submission of an application under section 203(b)(1), earned an individual Olympic medal or placed first in an international sporting event in which the majority of the best athletes in an Olympic sport were represented, as determined by the Director of U.S. Citizenship and Immigration Services.”).

197. See *id.* § 5(d)(1)(b) (providing thirty points are required to merit acceptance of visa petition under proposed RAISE Act).

198. Compare *id.* § 5(d)(1)(g) (providing immigrant athletes must have competed in Olympics or comparable Olympic-level athletic events), with *Employment-Based Immigration: First Preference EB-1*, *supra* note 59 (providing immigrant athletes may satisfy eligibility requirements by showing “receipt of lesser nationally or internationally recognized prizes or awards for excellence” in conjunction with at least two other qualifying criteria).

199. For further discussion about how athletes competing in team sports could be harmed by provisions of the RAISE Act, see *infra* notes 200-205 and accompanying text.

200. For further discussion about the lack of extensive international competition beyond the Olympics in certain team sports, see *infra* notes 201-202 and accompanying text.

201. See *About USA Basketball*, USA BASKETBALL, <https://www.usab.com/about/about-usa-basketball.aspx> [<https://perma.cc/W82S-GVPL>] (last visited Feb. 22, 2020) (describing Olympic Games, FIBA World Cup, and Pan American Games, as well as discussing amateur competitions, including U19/U18 Champi-

ternational competition that compares to the Olympics in competitive level is the World Baseball Classic.<sup>202</sup> Given immigration officials' recent narrow interpretation of qualifying international competition in the context of foreign athletes seeking visas, it is likely that this provision would be scrutinized with equal rigidity under the RAISE Act.<sup>203</sup> Further, as the provision requires competition either in the Olympics or in a similarly elite international event, it is likely that participants in qualifying events would often overlap.<sup>204</sup> This would effectively cap the number of professional athletes from any given country receiving visas at the number permitted on an Olympic roster in their respective sports, in contrast to the current visa system, which more broadly accounts for varied levels of international athletic competition.<sup>205</sup>

## 2. *Comparing the RAISE Act to Merit-Based Systems in Canada and Australia*

Supporters of instituting a point-based immigration system in the United States may point to similar systems in Canada and Australia, where they have been largely successful.<sup>206</sup> However, the ideological and political differences of Canada and Australia compared to the United States may render such comparisons more

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onships, U17/U16 Championships, Nike Hoop Summit, and 3x3 World Championships).

202. See Austin Schindel, *The 25 Coolest International Sporting Events*, BLEACHER REPORT (Apr. 18, 2011), <https://bleacherreport.com/articles/669379-the-25-coolest-international-sporting-events#slide3> [<https://perma.cc/4TJ5-883M>] (noting “[i]nternational baseball competitions have never been a significant part of the game,” even including Olympics, until introduction of World Baseball Classic in 2005).

203. For further discussion about immigration officials exercising discretion narrowly in determining whether professional athletes petitioning for visas exhibit extraordinary ability, see *supra* notes 115-126 and accompanying text.

204. See Reforming American Immigration for Strong Employment (RAISE) Act, H.R. 2278, 116th Cong. § 5(d)(1)(f)(2) (2019) (limiting qualifying immigrant athletes to those who had “earned an individual Olympic medal or placed first in an international sporting event in which the majority of the best athletes in an Olympic sport were represented”).

205. See *id.* (providing qualifying immigrant athletes would have either competed in Olympics or in competition where Olympic athletes were represented). For further discussion about the various visa types currently available to foreign athletes, see *supra* notes 54-99.

206. See generally Tania Karas, *Can a ‘merit-based’ immigration system like Canada’s or Australia’s work in the US?*, THE WORLD (May 17, 2019), <https://www.pri.org/stories/2019-05-17/can-merit-based-immigration-system-modeled-canada-or-australia-work-us> [<https://perma.cc/ZX3X-38B3>] (summarizing Canadian and Australian point-based immigration systems and discussing possible adoption of similar system in United States).

complex than they initially appear.<sup>207</sup> Additionally, as the professional sports industry in the United States is more robust than in Canada or Australia, a comparison of their systems is unlikely to illuminate how a point-based system would impact professional athletes in the United States.<sup>208</sup>

Employment-based immigration has long been a pillar of the Canadian and Australian immigration systems.<sup>209</sup> On the contrary, family-based immigration is foundational in the United States, accounting for a far greater percentage of total immigration than in almost any other country.<sup>210</sup> These differences are deep-seated and largely attributable to the unique history of each country.<sup>211</sup> Passage of the RAISE Act would not only overhaul United States immigration policy but also attempt to redefine the very role of immigration in our society as a singularly economic pursuit.<sup>212</sup> Sweeping, wholesale changes to American immigration policy are rare, and it is uncertain at best that one piece of legislation could bring about a fundamental change in the nation's long-held immigration narrative.<sup>213</sup> It should also be noted that Canada and Australia's employment-based merit systems result in a far greater proportion of immigrants as compared to total population than currently exists in the United States.<sup>214</sup> This implies that adopting a similar system could cut against President Trump's "Buy Ameri-

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207. *See id.* (noting differences between Canada and Australia, on one hand, and United States, on another, that could complicate efforts to implement point-based immigration system).

208. For further discussion about differences between professional sports in the United States, on the one hand, and Canada and Australia, on the other hand, see *infra* notes 209-223 and accompanying text.

209. *See* Quoc Trung Bui & Caitlin Dickerson, *What Can the U.S. Learn From How Other Countries Handle Immigration?*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/interactive/2018/02/16/upshot/comparing-immigration-policies-a-cross-countries.html> [<https://perma.cc/C7RM-AWX8>] (noting Canada and Australia have "relied heavily on immigrants who were admitted based on employability").

210. *See id.* (stating United States immigration system is distinct because of "its focus on family ties, a framework that accounts for two-thirds of all residency visas, more than any other country").

211. *See* Karas, *supra* note 206 (providing "[t]he way nations approach immigration is often rooted in their histories" and describing relevant history in Australia and United States that led to respective immigration systems).

212. *See id.* (noting "[a] points-based system] would require a fundamental shift in how the US approaches, uses and invests in its immigration system" and describing RAISE ACT as "moving the United States' immigration system toward one that prioritizes high-skilled workers over people with family links to the US").

213. For further discussion about changes to American immigration policy through history, see *supra* notes 34-43 and accompanying text.

214. *See* Bui & Dickerson, *supra* note 209 (explaining that both Australia and Canada "allow in far more immigrants as a percentage of their population").

can, Hire American” ideology.<sup>215</sup> Certain aspects of Canada and Australia’s political systems also make them more conducive to point-based immigration.<sup>216</sup> For instance, these countries’ parliaments are sufficiently flexible to adjust point-based determinations according to their economic needs.<sup>217</sup> The United States’ political system is far less flexible, as changes to immigration policy must make their way through Congress.<sup>218</sup>

The relative sizes of the professional sports industries in Canada and Australia compared to the United States also complicates an effort to hypothesize how professional athletes would fare under a point-based immigration system in the latter based on such systems’ success in the former.<sup>219</sup> For instance, spectator sports brought in approximately \$4 billion in revenue in Canada in 2019.<sup>220</sup> In contrast, the NFL alone accounts for more than triple this revenue, bringing in approximately \$13 billion per year on average.<sup>221</sup> Adding to this total, the MLB averages \$9.5 billion annually, while the NBA brings in \$4.8 billion per year on average.<sup>222</sup>

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215. *See id.* (“If the United States were to follow [Canada’s and Australia’s] lead, it would involve admitting millions more people.”); *see also* Exec. Order No. 13788, 82 C.F.R. § 18837 (2017) (stating “[i]t shall be the policy of the executive branch to buy American and hire American”).

216. For further discussion about political differences that make Canada and Australia more amenable to a point-based immigration system than the United States, *see infra* notes 217-218 and accompanying text.

217. *See* Karas, *supra* note 206 (quoting immigration policy analyst Kate Hooper as stating that “[a] points system only really works if you have an immigration system that allows you to adjust how the points are administered on a really regular basis”).

218. *See id.* (contrasting parliamentary systems in Canada and Australia with Congress in United States).

219. For further discussion about differences in the sizes of the professional sports industries in Canada, Australia, and the United States, *see infra* notes 220-223 and accompanying text.

220. *See Spectator Sports in Canada – Market Research Report*, IBIS WORLD (May 2020), <https://www.ibisworld.com/canada/market-research-reports/spectator-sports-industry/> [<https://perma.cc/YVZ2-64XE>] (noting spectator sports in Canada account for roughly \$4 billion annually). A parallel statistic is unavailable for Australia; nonetheless, Canadian and American sports leagues account for a majority of professional sports revenue, implying that Australia’s professional sports leagues are responsible for less revenue than Canada’s. *See* Devon Anderson, *Ranking Professional Sports Leagues by Revenue*, ULTIMATE CORP. LEAGUE (Apr. 10, 2019), <https://ultimatecorporateteague.com/ranking-professional-sports-leagues-by-revenue/> [<https://perma.cc/U2EJ-YHS3>] (ranking global professional sports leagues by amount of revenue earned and noting that “the top 5 places are dominated by American or Canadian sports league”).

221. *See* Anderson, *supra* note 220 (providing amount of revenue earned by NFL, amongst other sports leagues).

222. *See id.* (providing amount of revenue earned by MLB and NBA, among other sports leagues).

This disparity means that Canada and Australia may not be apt comparators in an attempt to hypothesize how a point-based immigration system like theirs would impact foreign professional athletes attempting to immigrate to the United States.<sup>223</sup>

### C. Consequences for American Athletic Industry

Foreign professional athletes hoping to immigrate to the United States to train and compete are uniquely vulnerable to the restrictive immigration policies already put in place by the Trump administration.<sup>224</sup> Additionally, pending legislation has the potential to further exacerbate this state of events.<sup>225</sup> Nonetheless, the unintended consequences of these policies will likely extend beyond foreign professional athletes hoping to immigrate to the United States and impact American athletes and sports officials, as well.<sup>226</sup>

Sports analysts have considered the role of diversity in various athletic contexts and have primarily arrived at the same conclusion: it is good for professional sports.<sup>227</sup> On an anecdotal level, experts have pointed to the 2013-14 San Antonio Spurs, more than half of whose wins were achieved by a combination of seven international players, and the Detroit Tigers, who won four consecutive division

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223. For further discussion about differences in the professional sports industries of the United States, Canada, and Australia, see *supra* notes 219-222 and accompanying text.

224. For further discussion about how immigration policies put in place by the Trump administration disadvantage foreign professional athletes, see *supra* notes 100-126 and 177-192 and accompanying text.

225. For further discussion about how the RAISE Act and supplemental legislation has the potential to further limit professional athletes' ability to immigrate to the United States, see *supra* notes 193-205 and accompanying text.

226. For further discussion about how restrictive immigration policies will likely harm the American sports industry, see *infra* notes 227-239 and accompanying text.

227. See, e.g., David Berri, *How Sports Makes a Clear Case for Immigration*, TIME (Nov. 20, 2014), <https://time.com/3597917/immigration-reform-sports-economists/> [<https://perma.cc/43WZ-5WFS>] ("By expanding the population of talent a league draws upon, competitive balance in a sport can improve."); Keith Ingersoll, Edmund J. Malesky & Sebastian M. Saiegh, *Heterogeneity and Group Performance: Evaluating the Effect of Cultural Diversity in the World's Top Soccer League*, SOCIAL SCIENCE RESEARCH NETWORK, at 1 (Dec. 1, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2333289](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333289) [<https://perma.cc/5376-FXL2>] (analyzing data from UEFA Champions League between 2003 and 2013 and finding that "by incorporating additional (culturally inherent) skills to its roster, an average team could change an outcome from a tie to a win once in every three games"); Martin B. Schmidt and David J. Berri, *On the Evolution of Competitive Balance: The Impact of an Increasing Global Search*, ECON. INQUIRY (Mar. 26, 2007), <https://onlinelibrary.wiley.com/doi/full/10.1093/ei/cbg037> [<https://perma.cc/3ERK-TT5D>] (advocating for increase in size of labor pool to increase competitive balance in MLB).



titles while being led by three international players.<sup>228</sup> The phenomenon has also been studied at an academic level, and the results support the notion that diversity has a tendency to increase competitive balance in professional athletics.<sup>229</sup> For instance, as far back as 2007, scholars applied traditional economic principles to the MLB and concluded that the league should expand the size of its labor pool in order to increase its talent level, including an increased number of athletes from beyond the United States.<sup>230</sup>

Similar findings resulted following an examination of the competitive balance in professional soccer, namely in the UEFA Champions League, the most elite in the world.<sup>231</sup> In a reflection on this study, two of its authors specifically distinguished professional soccer as especially likely to be directly aided by increased diversity, due to the unique aspects of athletic competition as compared to competition in other fields of employment, where stakeholders' priorities may diverge more.<sup>232</sup> The authors wrote:

[S]occer teams are engaged in the same pursuit- to score goals and win games. The benefits of a diverse talent pool will have the same theorized benefit for every team. This differs dramatically from business analyses that must compare widely diverse sectors where talent and creativity are employed very differently in the production cycle.<sup>233</sup>

Put more simply, "If you wish to employ the best talent, your talent search must be global."<sup>234</sup>

For professional athletes and sports personnel already in the United States, a reduction in competitive balance could eventually

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228. See Berri, *supra* note 227 (noting more than half of Spurs' games during the 2013-14 season were won with combination of seven international players on court and describing success achieved by immigrant-led Detroit Tigers between 2011 and 2014).

229. See, e.g., Schmidt & Berri, *supra* note 227 (applying economic analysis to MLB in finding favorable correlation between diversity and team performance); Ingersoll et al., *supra* note 227, at 12-18 (applying statistical analysis to determine more favorable performance by soccer teams with more diverse players).

230. See Schmidt & Berri, *supra* note 227 (acknowledging increases in size of MLB's talent pool over time had paralleled increases in talent and advocating for continuation of expanding talent pool).

231. See Ingersoll et al., *supra* note 227, at 1 ("We find that more diverse teams outperform less diverse ones.").

232. See *id.* (noting aspects of professional sports unique from other industries that render increased diversity more straightforwardly positive).

233. *Id.* (providing example to explain direct benefit of diversity in athletics).

234. See Berri, *supra* note 227 (stating also that "[i]f you restrict your talent search to the population born in the United States- less than 5% of the world population- your odds of employing the 'best' talent seem fairly low").

result in decreased profits and a deflated athletic economy.<sup>235</sup> Researchers have illuminated a link between game performance and profitability in three of the United States' most popular sports leagues: the MLB, the NBA, and the NHL.<sup>236</sup> Interestingly, these leagues are also among the most diverse in the United States.<sup>237</sup> If wealth in professional sports tends to increase conversely with success, and success tends to increase conversely with diversity, then it could be argued that greater diversity could ultimately result in increased profitability for professional athletes, teams, and leagues.<sup>238</sup> Further, the possibility remains that the opposite may also be true, cutting against President Trump's contention that more restrictive immigration policies will boost the American economy, at least in the context of professional sports.<sup>239</sup>

#### IV. THE BALL IS IN OUR COURT: REFORMING IMMIGRATION WITH AN EYE TOWARDS ENHANCING THE AMERICAN SPORTS INDUSTRY

Foreign athletes have played a significant role in American professional sports since their earliest days.<sup>240</sup> Through extensive analysis, foreign athletes have been shown to improve the competi-

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235. For further discussion about how lower levels of athletic talent may lead to decreased profits for American athletes and sports teams, see *infra* notes 236-239 and accompanying text.

236. See John Charles Bradbury, *Determinants of Revenue in Sports Leagues: An Empirical Assessment*, ECON. INQUIRY (Sept. 11, 2018), <https://onlinelibrary.wiley.com/doi/full/10.1111/ecin.12710> [<https://perma.cc/QJ7T-7SYE>] ("Revenue is positively associated with on-field success in baseball (MLB), basketball (NBA), and hockey (NHL), but not in football (NFL)."). Curiously, this is true even in light of the restricted labor market for professional sports as compared to other industries. See, e.g., Stuart Anderson, *27% Of Major League Baseball Players Are Foreign-Born*, FORBES (Apr. 27, 2018), <https://www.forbes.com/sites/stuartanderson/2018/04/27/27-of-major-league-baseball-players-are-foreign-born/#5f3993047712> [<https://perma.cc/9NK2-QWDS>] (noting restricted number of jobs in professional sports as result of roster system, in contrast to traditional labor market).

237. For further discussion about immigration levels in the MLB, NBA, and NHL, see *supra* notes 11-17 and accompanying text.

238. See Bradbury, *supra* note 236 (noting positive slope between athletic performance and revenue); see also Ingersoll et al., *supra* note 227, at 3 (noting positive slope between diversity and athletic performance in professional soccer); Schmidt & Berri, *supra* note 227 (noting positive slope between diversity and athletic performance in professional baseball).

239. See generally Catherine E. Schoichet, *What 'merit-based' immigration means, and why Trump keeps saying he wants it*, CNN (May 16, 2019), <https://edition.cnn.com/2019/05/16/politics/merit-based-immigration-explainer/index.html> [<https://perma.cc/67JX-4644>] (recounting President Trump's rationale for reducing legal immigration and instituting stricter merit-based system).

240. See, e.g., Mark Naison, *Why Sports History is American History*, WITH A BROOKLYN ACCENT (Mar. 5, 2010, 9:41 AM), <http://withbrooklynaccent.blogspot.com/2010/03/why-sports-history-is-american-history.html> [<https://perma.cc/>

tive balance of American sports, playing a direct role in the economic performance of professional teams and leagues.<sup>241</sup> As a result, United States immigration policy should presumably account for these athletes.<sup>242</sup> If recent efforts to curtail both illegal and legal immigration in the country are successful, however, the outcome may be the opposite.<sup>243</sup> The Trump administration's ongoing travel ban and discrete changes to existing immigration criteria have already limited certain athletes' abilities to compete in the United States.<sup>244</sup> Further, the proposed RAISE Act has the potential to exacerbate this impact if passed.<sup>245</sup> While decreasing immigration to the United States may boost American participation in certain economic industries, unique aspects of the professional sports industry render the industry particularly likely to be harmed by the active discouragement of immigration.<sup>246</sup> Any changes to the United States' immigration policy should recognize the benefits of international participation in American professional sports and attempt to encourage, rather than dissuade, foreign athlete immigration.<sup>247</sup>

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4CMS-W9BA] (describing "role of sports in Americanizing immigrants" beginning in early 20th century).

241. For further discussion about foreign athletes' impact on professional sports teams' athletic and economic performance, see *supra* notes 224-239 and accompanying text.

242. See Berri, *supra* note 227 ("So the world of sports teaches a clear lesson on immigration. The search for talent can't be confined to the borders of a single nation.").

243. For further discussion about changes and proposed changes to United States immigration policy that have the blanket effect of decreasing professional athletes' ability to immigrate, see *supra* notes 100-171 and accompanying text.

244. For further discussion about how Trump administration executive orders and immigration policy have limited foreign athletes' opportunities to immigrate to the United States, see *supra* notes 177-192 and accompanying text.

245. For further discussion about the proposed RAISE Act's effect on professional athlete immigration in the United States, see *supra* notes 193-205 and accompanying text.

246. For further discussion about why professional sports in the United States are particularly likely to be harmed by efforts to decrease immigration, see *supra* notes 172-239 and accompanying text.

247. See Berri, *supra* note 227 ("Not only does immigration increase the pace of innovation, it also helps improve the performance of the entire economy. So if you wish to see the economy of the United States improve, you should be in favor of immigration.").

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