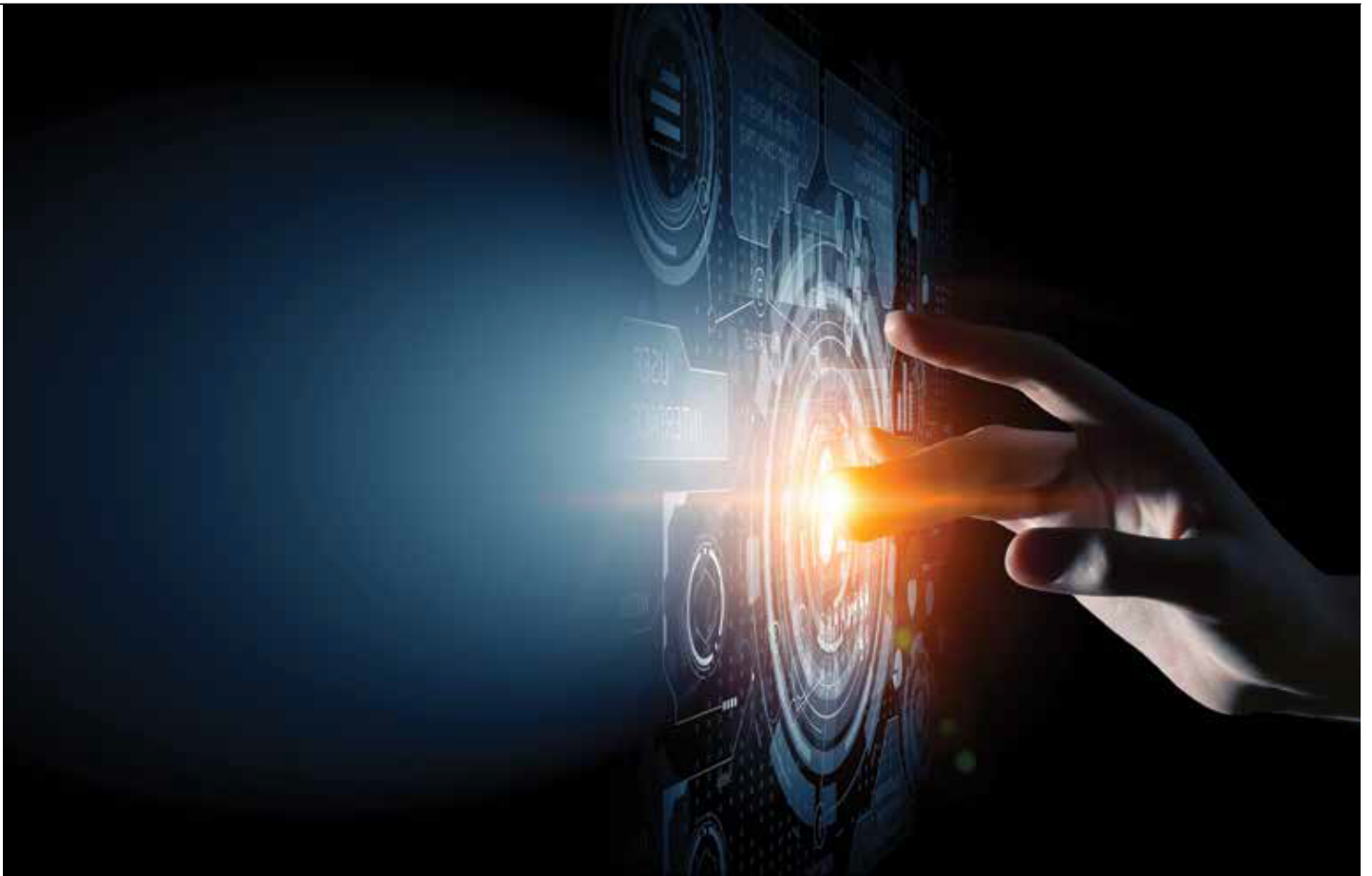




Genesis of an Industry: The Emerging Workforce and Regulations of esports

Employment and Labor



Did you play *Pong*? Atari's table tennis game, played on a screen, debuted in 1972 and quickly became the dominant video game of the era. If you played *Pong*, then you were playing esports! The "e" stands for electronic and "sports" is a proxy for competition — intense competition. Now imagine playing in a *Pong* tournament for huge amounts of money, in front of thousands of fans, who are watching from around the world.

This is what we mean by esports today. It is a space where video games, players, fans, and prize money converge in a new market, expected to [exceed the billion-dollar mark](#) in revenue this year. Everyone wants "in" on this burgeoning field. [Venture capital firms](#), sports celebrities, and professional sports leagues, as well as owners and player associations, have joined the fray.

At the center of this frenzy are the "employees" of esports — the players who win championships worth millions of dollars. With complex affiliations to teams, organizations, and countries, the nearly 600-player workforce is raising questions about employment terms and labor management across borders and technology. By closely following this process, in-house counsel can learn lessons that will not only shape the employment law in this emerging industry, but also for other new industries that will follow.

Whether you believe that video gaming is truly a sport, a hobby, or just an expensive way to waste time, the industry is growing rapidly. There are many organizing entities: The World Esports Association (WESA), National Basketball Association Esports League (NBA 2K), and the British Esport Association (BEA) are all groups of esports players.

For example, esports in South Korea are governed by the Korea eSports Association. The Association was established by South Korea's Ministry of Culture, Sports, and Tourism to support the growing esports industry in 2000.

They have been followed by game publishers such as Activision Blizzard, Valve, Tencent, and Riot Games, which produce and support game titles such as *League of Legends* (LOL), *Call of Duty*, *Overwatch* (OW), *Halo*, *Counter Strike Global Offensive* (CS:GO), and *Hearthstone*.

They differ from traditional sports because the game publishers own their intellectual property. No one owns the game of American football, so anyone can start a new league, as recently happened with the first season of the Alliance of American Football in February 2019. Conversely, in esports, publishers definitely own their games and thus are in complete control of the emerging industry (if they choose to be).

Some esports organizational charts aim to reflect traditional sports structures: competing leagues, teams, coaches, managers, and players. However, this scheme goes awry when you consider who owns the game itself. While some game producers, such as Activision Blizzard and Valve, create the league for their game, others, such as Microsoft Studios and Nintendo, have taken a pass and remain solely the game producer.

In 2016, the United Kingdom took another crack at [regulating esports](#), but this time with an independent governing body, known as the British Esports Association, working alongside the United Kingdom's government.

These different ownership structures might impact the laws that apply to these quasi-league structures the most. This might lead publishers to maintain complete control of the professional competition involving their games and be both league and team owners. As viewership and revenues expand, this single entity structure might be the wave of the future.

Who watches esports?

No matter which entity takes control of the competitions, the set-up is always the same. An in-person arena-style competition and/or an online event has teams and their players compete for prize money before an audience that watches live or via stream. The audience has surpassed spectator numbers for traditional sports, like the National Football League's (NFL) 22.2 million live versus esports' 143 million. The prize money has reached millions, such as US\$24.6 million in one competition.

In the last 12 months on YouTube, people have logged 50 billion hours of gaming watch time according to VentureBeat. More than 200 million people reportedly watch gaming videos on the platform every day.

In 2017, the total number of frequent eSports viewers and enthusiasts amounted to 143 million. This number is projected to reach 250 million in 2021, according to [statista.com](#). [NFL audience members for 2017](#).

The largest prize pool in esports history is 2017's [DOTA 2 international](#), totaling US\$24.6 million

Lest you think this is only an online phenomena, [esports-specific stadiums](#) are being constructed in Hong Kong, China; Seoul, South Korea; and Oakland, California in the United States. One of the top online multiplayer battle video games, LOL, hosted a stellar 2018 World Championship finals when it

attracted a record-breaking 99.6 million viewers, according to Riot Games, which publishes the game.

Fans have already embraced esports as a form of entertainment. The fans mirror the multicultural makeup of the professional players who game at the elite level. Viewership numbers are rising rapidly, especially among the 12-34 age range, and traditional sports owners are scrambling to compete for these youthful eyeballs.

With traditional television sports viewership skewing more toward the older generation, it is no surprise that traditional sports are trying to get in front of the younger generation that they so desperately need to survive. For example, during the 2018 Super Bowl, esports viewership experienced only a three percent decrease from the previous day, suggesting that this younger generation was [not following the Super Sunday crowds](#). The [fanbase is young](#), employed, and diverse, [attracting sponsors](#) like Coca-Cola, Pepsi, Intel, T-Mobile, Audi, Nike, Adidas, and Twitch.

An emerging industry brings unanswered legal questions

As the esports fan community matures, so do the number of lawyers working to understand the space. The authors of this article, who have decades of experience in sports and labor law, and one of whom manages a players association for one esports game (OW), are watching this space to see how it develops.

While esports law is in its infancy, video game jurisprudence will likely grow quickly. Just how the legal cases in this realm will follow or impact the precedents in traditional sports is unknown at this time. Often referred to as the “wild wild west,” esports law is a rowdy, unrestrained, and often lawless legal landscape.

Labor and management

In our attempt to tame this field, we will first focus on the labor and employment issues that are starting to take shape. Our discussion would be shorter if the professional gamers were all employees or all independent contractors, but this is not the case. Our analysis would be even shorter if the game publishers or the teams were the sole employers, but their roles are different and distinct.

Let's start with the gamers' contracts. Players are as young as 15 years old when they enter into their first contract. The age of majority for an individual to acquire full legal capacity to enter a gamer's contract depends on their location. If the player is based in Europe, the [age of majority is 18](#), unless married or a parent. This is the case in all member states of the European Union with the exception of Scotland, where the age of majority is 16.

On the other side of the pond, in the United States, the [age of majority tends to be 18](#), with some outliers. For example, a minor can also be emancipated, or declared a legal adult, by a court or the state. This usually occurs when a minor is contracting for certain necessities such as food, shelter, education, or car expenses.

In Alabama, a minor over the age of 15 may purchase health, life, and auto insurance. In New Jersey, a married 17-year-old may sign property contracts. In the end, it is the responsibility of the gamers' employers to verify their age as it relates to the applicable country or state laws to avoid the

contract being voided by the court.

Once the minor or legal guardian executes the playing agreement, it is important for the gamer to know what type of relationship they have with the team. In the early days of esports, players were deemed “independent contractors,” primarily because they were paid solely via prize money from (mostly) online competitions. However, [as esports have matured](#), more and more pro gamers have been deemed “employees.” Generally, as the team controls more of their workday, it becomes easier to define them as employees.

The difficulty truly comes when the gamer-employees on one team reside in different countries. For example, in differentiating between independent contractors and employees, German courts look at the parties’ agreement and whether, in reality, the contractors can freely determine how, when, and where to perform their services. Conversely, in the Netherlands, one is [assumed to be an employee](#) unless they seek and obtain an exemption from the Netherlands tax authorities to be treated as an independent contractor.

For the few pro gamers who still play under an independent contractor arrangement, it is not likely they will continue to survive legal scrutiny. Like Germany, the United States also looks to the [degree of control](#) over the individual. Specifically, who has the right to control what the workers/contractors do, how they perform their services, and where they perform them are important considerations.

Independent contractor agreements that require the player to wear certain brands or logos (or prohibit the wearing of others), stream their play on specific platforms, reside in specific locations, subject the player to fines for their conduct, and, more crucially, require that the player provide services *exclusively* to that company, involve a level of control typically wielded by an employer.

Assuming esports are moving toward classifying pro gamers as employees, there is still potential ambiguity as to who is the employer. Determining the hierarchy of the employment relationship has become increasingly important as more issues arise between game publishers, teams, and leagues. For now, the publishers develop the conditions and standards for teams to compete in their games. In return, the teams adopt these requirements and incorporate them into their employee/pro gamer agreements.

The audience has surpassed spectator numbers for traditional sports, like the National Football League’s (NFL) 22.2 million live versus esports’ 143 million.

At this point, game publishers have not imposed any requirements on teams that significantly affect players’ terms and conditions of employment. But should they do so in the future, a question could arise as to whether publishers are joint employers.

While the definition of a joint employer in collective bargaining situations has been evolving over the years, a few recent cases at the US National Labor Relations Board (NLRB) have complicated the issue. In 2015, the NLRB issued a decision in *Browning-Ferris Industries of California, Inc.*, revising the standard for determining when two or more separate organizations employ the same employees.

The NLRB relied on the current changes in the workplace to determine if an employer possesses sufficient control over employees to qualify as a joint employer. Specifically, NLRB relied on two factors to determine if two or more entities are joint employers of a single workforce: (1) they are both employers within the meaning of the common law; and if (2) they share or codetermine those matters

governing the essential terms and conditions of employment.

When applying NLRB's finding to esports, it could be argued that both the game producer and/or the league exercises control over the terms and conditions of employment indirectly, through an intermediary (the teams).²⁰ However, before the ink dried on the 2015 decision, the new Republican-majority NLRB reversed the *Browning-Ferris* decision in December of 2017 in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017).

The *Hy-Brand* decision was extremely controversial because no notice was given to interested parties and no amicus briefs were solicited. However, *Hy-Brand* was subsequently vacated: A NLRB member in the majority had failed to recuse himself after coming directly from the law firm representing a party in the matter.

Despite the hiccup, the NLRB has [proposed a rule](#) to reverse *Browning-Ferris* to establish that "an employer may be considered a joint employer of another employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction." A final rule should be issued in 2019, although a legal challenge is expected.

Regardless of how the joint employment question develops, the growth of professional esports will bring [labor-management issues](#) to the fore. (As of 2018, the top 12 esports companies fielded a total of 588 players on 97 teams.) Not surprisingly, players are beginning to realize it is time to protect their interests.

Owners are imposing employment terms, including a defined transfer window period when players can be traded or dropped, and players are feeling the squeeze. They are beginning to push back by creating their own players associations (PA).

Player organizations

To date, three professional players groups have emerged, comprising players of the games LOL, OW, and CS:GO. Each of them has taken a different path. We focus on the structure of each.

In 2017, Riot Games, the publisher of the immensely popular LOL game, created the LOL Players Association (LOLPA). Tencent, the owner of Riot Games, is the sole funder of the new entity, and hired Hal Biagas, a former attorney at the National Basketball Association (NBA) Players Association, as its executive director.

Observers of the esports industry criticized the LOLPA as a "company union" with no legal basis to collectively represent the LOL players. To those in the industry, it has been viewed as a trade association. Biagas disagrees: "The players have not given up any rights under the NLRA. Riot exerts no control over the LOLPA."

Not surprisingly, Riot agrees, stating "Fully launched, the Players' Association provides centralized representation for players in tri-party negotiations (Riot-Owners-Players) ..." However, the plain language of section 8(a)(2) of the NLRA, prohibiting employer financial support, means that players would have to form their own union to achieve a collective bargaining agreement.

Conversely, Steve Kaplan, the International Representative of the International Alliance of Theatrical Stage Employees views the Riot PA as a "company union." The IATSE, a labor union created in

1893, representing technicians, artisans, and craftspersons in the entertainment industry, has seen the support of unions come and go over the centuries, but Kaplan believes today's environment is seeing a "unionization awakening" and believes the "pro gamers will eventually come around and see the power they will have collectively, versus individually."

The second players association movement involves players of OW. The [Overwatch Players Association \(OWPA\)](#) is led by OW coach and former player Thomas "Morte" Kerbush and one of the authors of this piece. OWPA is likely to take on some aspects of the National Football Players Association (NFLPA).

But they may differ. First, the OW pro gamers might remain a trade association (and not become a union, as opposed to the NFL players) in order to take advantage of US antitrust laws. Keeping the power of antitrust laws in the players' pocket could be a critical component of their leverage going forward.

Should they decide to unionize, then under US laws, antitrust protection no longer applies. The players would fall under the antitrust exemption, which has its roots in the landmark 1992 Supreme Court decision in *Federal Baseball Club of Baltimore, Inc. v. National League*.

The US Supreme Court, in its resolution of Federal Baseball Club of Baltimore, Inc. v. National League, held that baseball was not engaged in interstate commerce, and therefore was entitled to immunity from the proscriptions of the Sherman Act. 259 U.S. 200 (1922). No other sport has obtained this immunity, to date. In 2016's Direct Marketing Association v. Brohl, then-Judge, now Supreme Court Justice Neil Gorsuch discussed Federal Baseball in his concurrence as a precedent that by now, applies only to baseball: "But though it has long since rejected the reasoning of Federal Baseball, the Supreme Court has still chosen to retain the holding itself – continuing to rule baseball effectively immune from the antitrust laws, if now only out of respect for the reliance interests the Federal Baseball decision engendered in that particular industry. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam). And, of course, Congress has since codified baseball's special exemption. See 15 U.S.C. § 26. So it is that the baseball rule now applies only to baseball itself, having lost every away game it has played." 814 F.3d 1129 (10th Cir. 2016).

On the other hand, should the players form a US-based union, the resulting collective bargaining agreement (CBA) would preempt state laws covering "just about everything," according to Richard Berthelsen, the former general counsel at the NFLPA for over 40 years.

Berthelsen knows firsthand the dangers of assuming a state law will not preempt a CBA because "the reach of the state jurisdictions is something you always have to keep an eye on." While this movement remains at the "discussion" stage, another group of pro gamers has taken the step to create their own PA in 2018.

The Counter-Strike Professional Players' Association (CSPPA) includes players in the ESL Pro League and the FACEIT ECS league. CSPPA partnered with the Danish Elite Athletes Association (DEAA) and is headed by eSports broadcaster Scott "SirScoots" Smith and Danish attorneys Michael Doi and Mads Øland (legal advisors for the DEAA).

CSPPA's founding board consists of seven professional CS:GO players from around the world. According to reports, about 90 of the top players have joined the association, with the goal of having a total membership of about 225 pro gamers. Unlike the Riot PA, this association is notably independent. While they are in their infancy, the group will no doubt have to jump hurdles as it deals

across borders, confronting multiple [labor laws around the globe](#).

Regardless of how the joint employment question develops, the growth of professional esports will bring labor-management issues to the fore.

How quickly the organization of professional gamers gains momentum will depend on their employment conditions and players' perceptions of how fully they are sharing in the success (and the revenues) of the professional esports industry. While incidents of mistreatment are few today, they are gaining in numbers. It was reported in June 2017, more than a year after the ASEAN Games for Esports (AGES) was held in Malaysia, that tournament winners still had not received their prize money.

Another incident receiving greater media attention involved a CS:GO pro player, Owen "smooya" Butterfield. Due to his behavior (he told another player to kill himself), his team, Epsilon, benched him, resulting in a salary reduction from US\$2,000/month to US\$700/month.

The benching decision effectively brought his career to an early end. While he considered going to another team, he learned his contract had a buyout clause of nearly three times his total salary — rendering him much more expensive for another team to acquire.

Some of the things that players have complained about are very similar to issues in traditional sports, such as the rights to their intellectual property (image, likeness, avatar); a balanced daily routine (most pro gamers practice/game 12 hours per day, on average); quality and term of housing (many game publishers provide housing for the team solely during the season, which has averaged about eight to nine months so far); year-round medical insurance; workers compensation; post-career development; and media training.

Privacy issues

Since esports operate in cyberspace, there are emerging issues involving privacy and personal data. For example, the Bay Area company HUMM is developing a headband called Edge that, when worn, will track cognitive patterns, eye movement, heart rate, and other biometrics.

While these metrics might be used to enhance health and safety for pro gamers, the questions of privacy and data ownership will almost certainly be a negotiating issue in player agreements. After all, what would prevent an employer from using data points against a player's value? If a team knows a player's eye movements have slowed over time, it might deem him/her of lesser value during the next player contract negotiations. The data can also provide teams with information on

What jurisdiction will emerge as the best forum for disputes?

Should any professional gamer organizations achieve a collective bargaining agreement (CBA), the agreements would likely provide stability. While the governing laws can be determined by contracts such as the CBA, standard player agreements, and league/team licensing contracts, it will not stop players, teams, game producers, and leagues from forum shopping for the best laws.

For example, when NFL Quarterback Tom Brady was accused of deflating the football in a game, instead of the league waiting for the NFLPA to file in Minnesota or Massachusetts (where the ruling likely would be more favorable to Brady because of the appointed pro-union judges), the NFL filed

first, in New York. Another example of forum shopping was evident in the case of *Lewis v. NFL*, a matter focused on antitrust laws.

Lewis filed the case in Minnesota, where a pro-union judge oversees NFL matters, while the league filed for dismissal in the District of Columbia. The [DC Court stated](#), “While each party has accused the other of engaging in impermissible forum shopping in choosing the situs of this lawsuit, it is plainly evident that both sides have filed their respective cases in a jurisdiction favorable to their respective positions.”

Sports organizations engage in forum shopping quite frequently, trying to maximize their advantage by finding the state or country laws that are most favorable to their argument. After all, part of securing the best outcome for a client is [picking the best court](#) for attempting to secure that outcome.

This forum shopping has mostly occurred within a single country — the United States — for some traditional sports such as the NFL and the US Olympic Committee. Two countries are the norm for the National Hockey League and Major League Baseball, which file in the United States and Canada.

But there will be many more forum possibilities in the world of esports. As a global entity, esports is played in Australia, Russia, Japan, the United States, China, South Korea, the United Kingdom, the European Union, and many other corners of the world. Thus, the forum shopping will be extensive and whichever country develops the best — or first — laws might determine the governing law for many organizations.

A global framework

Beyond the future governing law issues, the stakeholders in the esports space cause lawyers to hesitate when trying to get their heads around the best organizational structure to ensure growth and stability. Unlike the NBA or the NFL, there are numerous esports titles, leagues, game publishers, and event organizers. No central entity oversees all these stakeholders and for now, they are each making up their own rules and regulations to function and meet their end goals.

Organizations such as [WESA](#), the [Professional Esports Association](#) (PEA), and the [International Esports Federation](#) (IESF) are all vying for the top spot in the sport. If and when a “winner” emerges, it could bring more stability to this global sport, and it might lead to the formation of an International Federation that the International Olympic Committee ultimately recognizes as the lead entity in bringing [esports to the Olympics](#) in 2024.

Should a global organization be created, players might need a mirror image of this new entity, a global players’ association, to gain equality at the bargaining table. Creating a global union or governing entity will require an international framework, with laws and rules that would apply to all the teams that are members of such organizations.

The challenge of creating a workable international framework agreement between owners and players’ organizations involves creating trust among all stakeholders — game producers, event operators, players, agents, associations, and media platforms. Additionally, there must be confidence that dispute resolution mechanisms are fairly, faithfully, and promptly adjudicated.

The likelihood of at least one global organization being created is significant, since the International Olympic community will most likely add esports in 2024. This inclusion will require a National Governing Body (NGB) within each country and an International Federation to oversee the NGBs.

Any initiative to establish a global organization would include a close look at organizations that deal with similar issues, like the Fédération Internationale de Football Association (FIFA) or the International Olympic Committee (IOC).

Creating global organizations for sports, like international federations, has been the norm to include a sport in the Olympics. However, esports are not like other sports. As noted earlier, no one owns the game of curling or golf, so entities can be created with no intellectual property (IP) litigation hovering over the new entity.

This is not the case in esports. Game publishers hold on to their IP as if their lives depended on it, and so they might try to force a global organization to incorporate in countries with friendly intellectual property laws. However, this might conflict with the needs and interests of players' associations.

No matter where these issues get decided, and no matter how the courts intervene in this new sport, one cannot help but think all this work could be for naught. The games of today may not last the test of time. It is highly likely that the games that are popular today could just as easily be games of the past in a heartbeat.

While the legal work involving the current roster of games will greatly impact the new games coming down the pipe, we cannot be certain if esports will be around as long as soccer or baseball. After all, Pong was created by the then-largest game producer, Atari, and it brought the company much success: 150,000 units were sold by the late 1970s. But when was the last time you — or anyone else — played *Pong*?

Just where the current popular esports titles will be in 2019 is unknown. In-house counsel should monitor this emerging industry, with its inherent unknown risk, to see how businesses and regulations will respond to an area of law that isn't fully formed.

Whatever the outcome, the law will continue to develop around esports, affecting various fields along the way, and despite the current "wild wild west" atmosphere, for the time being, all parties involved will be applying traditional law to a most untraditional industry.

[Ellen M. Zavian](#)



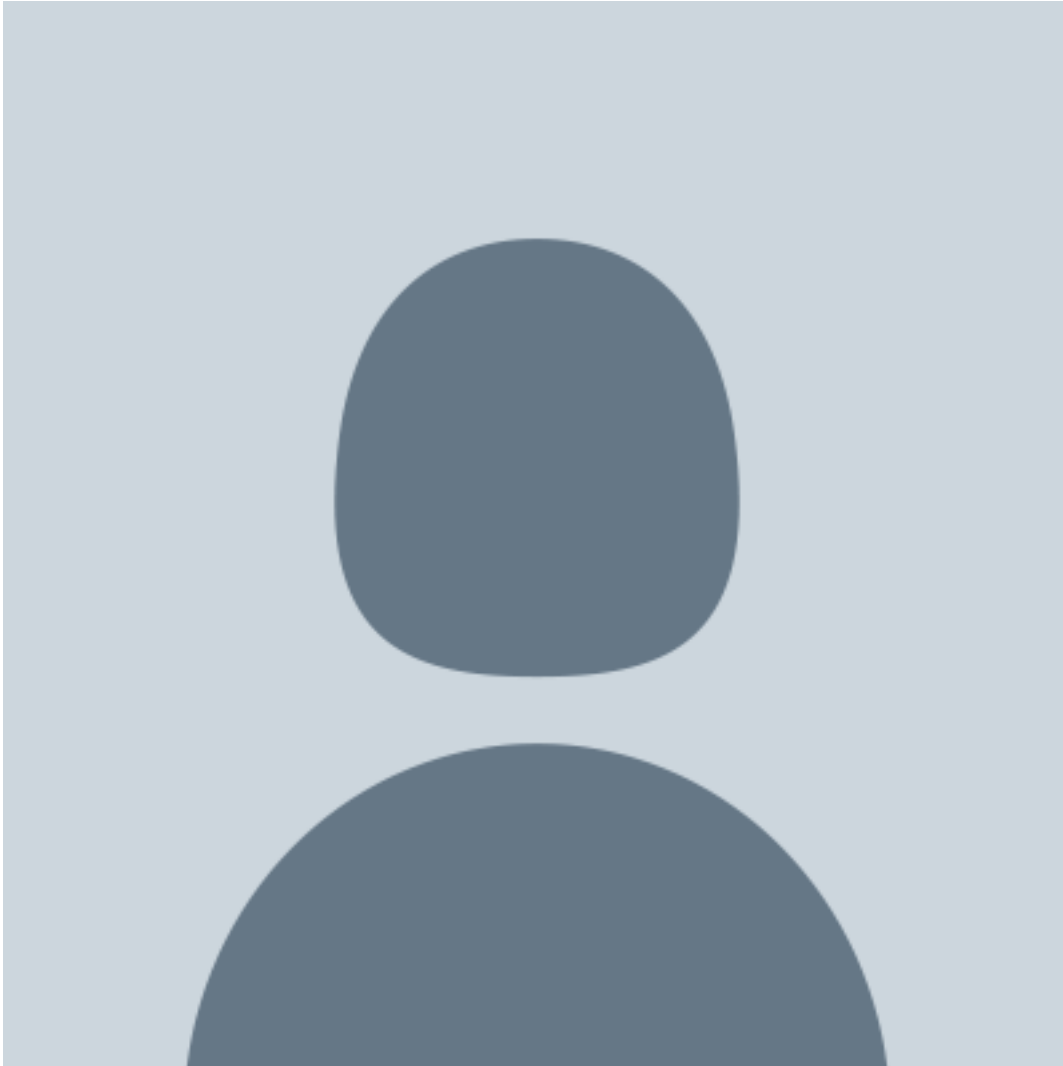
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