UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,	)	
Employer	)	Case No. 13-RC-121359
v.	)	
COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA),	)	
Petitioner	)	

BRIEF FOR *AMICI CURIAE* MEMBERS OF THE UNITED STATES SENATE COMMITTEE ON HEALTH EDUCATION LABOR AND PENSIONS AND THE UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE

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July 3, 2014

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The undersigned Members of the United States Senate Committee on Health Education Labor and Pensions and the United States House of Representatives Committee on Education and the Workforce (the "Congressional Committee Members") respectfully submit this brief *amici curiae* in response to the request of the National Labor Relations Board (the "Board" or "NLRB") for views regarding whether the Board should find that grant-in-aid scholarship football players are "employees" within the meaning of Section 2(3) of the National Labor Relations Act (the "NLRA" or "Act") and the policy reasons underlying that determination. For the reasons noted herein, the Congressional Committee Members submit that Congress never intended for college athletes to be considered employees covered by the Act, and doing so is incompatible with the student-university relationship.

STATEMENT OF INTEREST

The undersigned Congressional Committee Members include legislators from both branches of the United States Congress. Ranking Member, Senator Alexander, and Senators Burr and Isakson are members of the United States Senate Committee on Health Education Labor and Pensions, which is the United States Senate committee with jurisdiction over legislation and oversight related to both the NLRA and institutions of higher education, such as colleges and universities. Chairman Kline and Members Roe and Foxx are members of the United States House of Representatives Committee on Education and the Workforce, which is the United States House of Representatives committee with jurisdiction over legislation and oversight related to both the NLRA and institutions of higher education, such as colleges and universities.

ARGUMENT

I. COLLEGE ATHLETES ARE NOT EMPLOYEES UNDER THE NLRA

Despite critical distinctions between the university-student and employer-employee relationships, the Regional Director ("RD") artificially conflated and improperly applied principles from the workplace with the educational environment. As a matter of policy and law, this is wrong: scholarship football players are not and should not be treated as Section 2(3) employees. The inevitable conclusion from the RD's analysis in this case would lead to countless undergraduate students – in a variety of extracurricular activities – being considered employees of their colleges and universities. If Northwestern University's scholarship football players are employees, then so are large numbers of students at every other private college and university who participate in programs that are "valuable" to both the institution and the student. This incongruous result was never the congressional design or intent of the NLRA.

A. The University-Student Athlete Model is Inapplicable to the NLRA's Employer-Employee Framework

While Congress has thus far not found it necessary to further define the term "employee" in NLRA Section 2(3), both Congress and the Supreme Court recognize that "principles developed for use in the industrial setting cannot be imposed blindly on the academic world." *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1980). Finding that college student-athletes are employees underscores "the problem of attempting to force the student-university relationship into the traditional employer-employee framework." *Brown University*, 342 NLRB 483, 487 (2004). The relationship between a university and its student-athletes leads to the conclusion that the NLRA's fundamental purpose neither permits such a relationship, nor should it.

While athletic and other extracurricular participation prepares students for eventual careers in a commercial setting, academic settings differ from commercial settings in many critical aspects – and this is particularly notable in the relationship between a university and its student-athletes. As a pre-condition to participation in intercollegiate sports, an athlete must be enrolled as a student, participate as required in the college's academic program, and meet and maintain established academic standards. Unlike a commercial setting, the nature of a university's supervision over its student-athletes differs significantly from that between an employer and employee. Through its athletic coaches or staff, the university supervises student-athletes in a manner predicated upon mutual interests in the development of the student's character and advancement of the student's overall university experience.

Thus, collegiate athletic opportunities have been established in our universities as part of an extensive and wide range of co-curricular opportunities that broaden, deepen and shape the educational experiences provided to students as they prepare for life outside of an academic setting. The importance of intercollegiate athletic programs is underscored after the passage of Title IX of the Education Amendments of 1972. *See* 20 U.S.C. § 1681 *et seq*. Although the statute makes no mention of athletic programs, the Department of Education ("DOE") has interpreted Title IX to require recipients of federal financial assistance operating or sponsoring "interscholastic, intercollegiate, club or intramural athletics" to "provide equal athletic opportunity for members of both sexes." 35 C.F.R. § 106.41(c). In furthering Congress's aims with the passage of Title IX, the DOE has highlighted the "critical values learned from sports participation," including "teamwork, standards, leadership, discipline, self-sacrifice and pride in accomplishment" and has noted that "80 percent of female managers of Fortune 500 companies

have a sports background." *See Title IX: 25 Years of Progress,* U.S. Department of Education (June 1997), http://www2.ed.gov/pubs/TitleIX/part5.html#achievement.

The Supreme Court has recognized that the nature of a university "does not square with the traditional authority structures with which th[e] act was designed to cope in the typical organizations of the commercial world." *Yeshiva*, 444 U.S. at 680. The nature of intercollegiate athletic programs and its recognized value to multitudes of student-athletes, including scholarship athletes in revenue producing sports, does not square with the purpose of the NLRA.

B. The RD Erred by Applying the Common Law Test for Employee Status to Student-Athletes

Despite the significant differences between the student-university and employee-employer (and student athlete-coach and employee-supervisor) relationships that render improper any test for employee status, the RD applied the basic common law definition of an employee to determine that Northwestern University's football players fall within the NLRA's statutory definition of an "employee." Under this common law test, each of the following elements must be present: an individual must perform services of value for another under a contract of hire, subject to the other's control or right of control, and in return for payment. *Decision and Direction of Election*, *Northwestern Univ.*, Case No. 13-RC-121359, at *14 (Region 13, March 26, 2014) ("D&DE"). In both deciding to use and applying this standard, the RD artificially – and in an unprecedented way – separated the students' athletic from their academic activities.

1. The RD Erred in Finding that Student-Athletes Perform Services of Value

Universities offer hundreds of programs outside of the core educational curriculum that they find "valuable," whether in achieving their broader goal of students' overall development,

maintaining or growing their enrollment by attracting new students, enhancing the institutions' reputations, or increasing alumni interest and donations. Students perform valuable services or "work" in these programs, ranging from chess clubs to debate teams, musical ensembles, and theater groups, all of which are under the institutions' rules and control. And in many of these programs, students receive additional "payment" such as complimentary tickets, meals, or clothing in exchange for their participation. Likewise, many of these programs generate revenue directly (such as through ticket sales for admission) or indirectly (through greater tuition revenue from a larger student body enrollment or increased alumni donations).

In the context of higher education, however, this focus on the "value" of student "services" to the university is misplaced.[1] Colleges and universities offer and students participate ("perform services") in these extracurricular programs because they are "valuable" to *both* the student and the institution. Students participate in intercollegiate athletics because they want to, not because it is a "job." The purposes of the NLRA and its coverage of economic relationships between employer and employee are inapplicable in the context of students who, as part of their overall college experience, voluntarily choose to participate in specific programs that, in certain circumstances and at some colleges, may generate positive revenue.

Thus, while there may be a difference in the relative "value" of the "services" students provide to the institution, there is no logical distinction between revenue-generating football teams and other athletic teams, jazz or string ensembles, and debate teams whose members

[1]Although the RD found *Brown University*, 342 NLRB 483, inapplicable to this case, the Board's Notice and Invitation to File Briefs in this case sought comments on whether *Brown* should be overruled. This case is not the appropriate means to revisit *Brown*. The complex facts involving graduate assistants – who perform teaching duties like those for which others at the institution are paid – were not developed in the record in this case, and it would be inappropriate to reconsider that standard without a full and complete record where the parties could address the relevant issues and facts. Here, undergraduate students – whose college educational experience is intended to cover a broader spectrum of curricular and co-curricular activities – participate in a wide variety of athletic and extracurricular activities unlike those for which any others at the university are paid.

"work" to provide a "service" that generates little or no direct revenue for the university. Students in these groups are neither "hired" by a college or university nor do these students provide "services" to the institution; they are participating in the broader educational programs of the institution.

2. The RD Erred in Finding that Scholarship Athletes Have a Contract of Employment

The RD erred in holding that scholarship athletes' letters of intent formed a contract of employment. D&DE, *Northwestern Univ.*, at *14. While a letter of intent may be a *contract* between a college and a student-athlete, it is not a *contract of employment*. Rather than defining "work" requirements, these documents describe the *educational* grant-in-aid for a student's tuition and room and board, and are much like either academic or needs-based scholarships offered to non-athletes that must be signed and accepted by the student.[2] Treating these participants as Section 2(3) employees changes them from students who are student-athletes to professional athletes who are also students.

3. Scholarships Are Not Payment for Services

The RD ignored key facts to artificially distinguish between scholarship and non-scholarship or "walk-on" athletes and find that grant-in-aid scholarships, and only such scholarships, satisfy the common law test for compensation necessary to establish Section 2(3) employee status. First, as Title IX makes clear, the same scholarships are given to many athletes in non-revenue sports. If a college football player is employed and paid to play his sport, then so is the field hockey player who receives a scholarship to play hers. Second, while the value of

[2]Academic and needs-based scholarships likewise constitute a contract between the student and institution to cover tuition and room and board. Contracts are created every time admission by a university is based on an "early admission" application (which requires withdrawal of any additional college applications), or the submission of an acceptance letter and deposit upon regular admission, but none of these are contracts of employment.

college athletic scholarships is not currently treated as taxable income, if a scholarship is considered compensation for work performed, then its value would be taxed. A scholarship is taxable under the Internal Revenue Code to the extent that the recipient is required to perform services as a condition to receiving the scholarship. *See* 26 U.S.C. § 117.

Most significantly, however, the RD ignored the fact that *all* college athletes receive some forms of compensation for participating in their sports, ranging from additional or better meals to lodging, travel, tickets to games, apparel and other benefits. Examples from Northwestern's football program include cash stipends to *all* players ranging from $225 to $425, gifts from bowl game appearances, rings, extra academic support, medical care, possible expense reimbursement for travel home, graduate school exam preparation costs, and other items. *See Northwestern* Tr. 507, 547, 557, 561-62; 861-62, 891-92. National Collegiate Athletic Association ("NCAA") rules allow *all* players to receive four complimentary tickets to all home and away games (six to postseason bowl games), family travel benefits and gifts for bowl games, preseason lodging and meals, snacks and beverages, and other benefits. *See,* NCAA Manual Art. 16. If scholarship athletes receive compensation for performing services, then so do their walk-on peers who vie for the same positions and starting roles and in many cases devote the same amount of time to their sport. The amount of that compensation, however, is irrelevant in determining whether some or all student-athletes are employees. *Seattle Opera v. NLRB*, 292 F.3d 757, 762 fn. 4 (D.C. Cir. 2002) ("Under the [NLRA], the amount of (as opposed to the mere fact of) compensation is irrelevant.").

4. Rules Governing Student-Athletes Do Not Render Them Employees

The RD improperly conflated the degree of control that colleges and universities place on student-athletes with the right of control exercised by an employer. By "attempting to force the

student-university relationship into the traditional employer-employee framework," the RD ignored the fact that many restrictions apply beyond participation in athletics and to academic, residential, and other extracurricular activities. *See Brown University*, 342 NLRB at 488.

Colleges and universities impose a variety of restrictions on all students, including many unrelated to the students' primary educational activities. So while a college may impose rules against plagiarism or cheating on an exam, it might also restrict underclassmen from living off campus or prohibit students from possessing alcohol or having an automobile on campus. Similarly, while academic studies require that students successfully complete specific courses, attend class at scheduled times, and complete required coursework and exams, participation in many extracurricular activities demands adherence to other rules and schedules designed to achieve that group's common goals.

5. Time Devoted to Athletics Does Not Render Student-Athletes Employees

Finally, the RD erred in considering the time spent on football activities to find that student-athletes are employees. Whether many hours or only a few, students ultimately choose how to spend their time on campus – in both required and additional, voluntary hours for any extracurricular activity. Individuals who work as few as four hours per week have been considered employees under the Act. *Davison-Paxon Co.*, 185 NLRB 21 (1970); *Pat's Blue Ribbons*, 286 NLRB 918 (1987). And although the hours spent on any co-curricular activities are irrelevant, like college athletes, other students devote similar hours to both required and voluntary practice for a band or orchestra, or learning their lines for a theater group. In his decision, the RD ignored the fundamental differences between the undergraduate collegiate and

commercial environment that the NLRA was enacted to govern. Scholarship athletes in positive revenue sports are primarily students, not employees who are also students.

C. The RD's Decision Would Confer Employee Status to Countless Additional Students Who Participate in Extracurricular Activities

If student-athletes are Section 2(3) employees, a variety of additional students who perform comparable "services" for their colleges are employees as well. At many institutions, cheerleaders and marching band members receive scholarships. But while, as discussed above, scholarship status should be immaterial, students participating in these activities likewise supply a valuable service to their universities that is integrated into the same football games (or "product") that the players participate in (or "manufacture"). Spectators in the grandstands and on television see and hear cheerleaders, dance squads, and the marching band throughout the entire sporting event as part of the overall game day experience. Colleges and universities include these students as part of the "performance" that they "sell" and for which they receive revenue, whether directly when spectators buy tickets or indirectly via television rights and advertising revenue. If revenue that the RD considered via alumni donations is based in part on a school's athletic prowess, it is also based in part on the bands, cheerleaders and other elements of the collegiate experience that is integral to the overall "performance" that is being "sold."

Whether it is the marching band, dance squad or cheerleaders, all of the student participants devote significant time to that activity. Marching bands prepare and practice choreographed formations and new music for hours before every game, practice their instruments daily outside of scheduled hours, and are subject to academic and non-academic rules and restrictions not unlike those imposed on student-athletes. Cheerleaders attend scheduled practices to perfect their routines, practice and exercise independently to maintain

strength and agility, and are held to specific standards of academic and personal conduct. And like college football players, members of these groups may be compensated with tickets, meals, travel allowances, clothing, gear and equipment. If scholarship athletes are employees who are paid to perform at football games, then cheerleaders and marching band members are likewise employees who are paid to perform as part of these revenue-generating "performances."

Likewise, every other athletic team performs a service for a college or university, whether or not it generates revenue directly. Both national and athletic conference sports networks broadcast a variety of non-revenue sports, which generate television rights and advertising revenue that is dispersed to the academic institutions. As part of the Big 10 Conference, Northwestern University's sporting events are broadcast on the Big 10 Network. In addition to broadcasting positive revenue sports such as men's basketball, football and hockey, the Big 10 Network regularly broadcasts and generates revenue from other sports, including men's and women's soccer, men's wrestling and baseball, and women's volleyball and field hockey. The network likewise broadcasts and generates revenue from conference championship events, including men's and women's gymnastics, track and field, and swimming and diving. *See* Big Ten Network, http://btn.com/about/olympic-sports-on-tv/ (last visited June 21, 2014).

No different than football, a university's championship cross-country or water polo team enhances the institution's prestige, promotes admissions applications and tuition revenue, and generates alumni donations. Student athletes in these sports receive scholarships (or even if not a scholarship, other tangible benefits), and are subject to significant time requirements, rules and restrictions, and other terms like those imposed on college football players. If college football players are Section 2(3) employees, participants in these other sports – and those who perform at events with them such as pep band members – are employees as well.

Finding college football players to be employees has an even broader reach. In addition to college athletes and the other groups that perform "services" during athletic events, many other students perform services for and receive compensation from their academic institutions. Students who participate in a university's symphony orchestra, glee club or jazz band perform services, attend lengthy rehearsals at mandated times, devote hours to practicing their music independently, and are subject to other rules and restrictions on their time and activities. These offerings enhance the university's overall reputation, attract new students and tuition revenue, and provide other "value" to the university. Likewise, each group may generate revenue from alumni donations generally or admission fees from a specific recital or other performance.

Many private high schools offer athletic scholarships, often worth $20,000 or more annually, to attract players for their football teams. Under the same common law test the RD applied here, these high school students are "paid" to provide a service of value under a "contract of employment" and school rules, and therefore would be considered Section 2(3) employees. If college scholarship football players are Section 2(3) employees, then students in secondary and higher education who participate in many other extracurricular activities must be considered employees as well.

In applying the basic common law test of employee status to the university environment, the RD ignored the key distinctions between the student-university and employee-employer relationship. Students who participate in intercollegiate athletics and other extracurricular activities were never intended to be considered employees under the NLRA. The Congressional Committee Members therefore urge the Board to reverse the RD and find that scholarship football players are not employees under the Act.

II. TREATING COLLEGE ATHLETES AS EMPLOYEES UNDER THE NLRA IS UNWORKABLE

A. NLRA Section 7 Rights Are Incompatible with the College Environment

College is a different environment from the workplace. For the first time, most undergraduate students are experiencing independence, living communally and away from home, and being exposed to different cultures and ideas. As a training ground for future leaders, *see, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003), *superseded by constitutional amendment, Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014), universities are charged with bridging, often in a close residential environment, the gap between childhood and adulthood. To do so, universities naturally subject students to rules, including separate codes of conduct, academic standards, and other restrictions. In a broad sense, many of these rules teach the leadership and civic skills that are part of a university's overall mission. They also are designed to maintain civility, promote diversity, protect the peace, and uphold the standards of the university.

"Employees," however, even if not represented by a union, are entitled to the full range of protections set out in Section 7 of the NLRA, which includes the right to engage in "concerted" activity for "mutual aid or protection." 29 U.S.C. § 157. To the extent university rules interfere with employee Section 7 rights, those rules would be unlawful as to scholarship student-athletes even though they would be fully applicable to their non-scholarship teammates. And many of the common sense student-athlete rules cited by the RD, and no doubt a myriad of similar general university policies, likely violate the NLRA:

Rule	**Potential or Actual Violation**
Social media policy restricts what students can post on the internet (D&DE, *Northwestern Univ.*, at *5)	*Design Technology Group LLC d/b/a Bettie Page Clothing*, 359 NLRB No. 96 (2013) (policy that served as the basis for terminating employees for their Facebook posts violative); *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) (policy that prohibited employees from posting electronic statements that could damage the company's reputation violative)
Must permit coaches' friend requests and postings are monitored (D&DE, *Northwestern Univ.*, at *5)	*Cf. Public Service Credit Union*, Case No. 27-CA-21923, 2011 NLRB GCM LEXIS 48 (NLRB GC November 1, 2011) ("Since the Charging Party had restricted access to his 'friends,' he could not have reasonably concluded that the Employer was directly monitoring his Facebook page.") *Cf. Monoc*, Case Nos. 22-CA-29008, 22-CA-29083, 22-CA-29084, 22-CA-29234, 2010 NLRB GCM LEXIS 51 (NLRB GC May 5, 2010) (refusing to issue complaint over monitoring of Facebook page where fellow employees had provided the employer the posts and the employee had restricted access to her "friends," so she could not reasonably conclude that the employer was directly monitoring her Facebook page)
No media interviews unless directed to participate in them and they are arranged by the Athletic Department (D&DE, *Northwestern Univ.*, at *5)	*DirectTV*, 359 NLRB No. 54 (2013) (employer violated the NLRA when it restricted media interviews); *and Trump Marina Assoc.*, 355 NLRB 585 (2010) (employer violated the NLRA when it required employees to receive prior authorization before speaking to the news media)
Embarrassing the team can result in a suspension (D&DE, *Northwestern Univ.*, at *5)	*First Transit, Inc.*, 360 NLRB No. 72 (2014) (rule prohibiting discourteous or inappropriate attitude or behavior to passengers, other employees or members of the public, disorderly conduct violative)
Character policy ("If you embarrass our team") (Jt. Ex. 17)	*Hill and Dales General Hospital*, 360 NLRB No. 70 (2014) (rule requiring employees to represent the hospital in the community in a positive and professional manner in every opportunity violative); *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) (policy prohibiting employees from making statements "that damage the Company, defame any individual or damage a person's reputation" unlawful); *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (2012) ("courtesy rule," which prohibited "disrespectful" conduct and "language which injures the image or reputation" of the employer, unlawful)

Rule	Potential or Actual Violation
University General Code of Conduct requiring all students to promote civility, respect and mature behavior within the context of the educational community (Jt. Ex. 19 at 12)	*Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (2012) ("courtesy rule," which prohibited "disrespectful" conduct and "language which injures the image or reputation" of the employer, unlawful); *First Transit, Inc.*, 360 NLRB No. 72 (2014) (rule prohibiting discourteous or inappropriate attitude or behavior to passengers, other employees or members of the public, disorderly conduct violative)

Applying current Board precedent, these rules – and undoubtedly they are not unique to Northwestern but very much like most other colleges' rules governing students generally, and athletes (whether on scholarship or not) in particular – violate NLRA Section 8(a)(1). 29 U.S.C. § 158(a)(1). The remedy for these unfair labor practices invariably requires rescission of the unlawful rule and a "make whole" remedy for any discipline unlawfully imposed. *See, e.g.*, *Design Technology Group LLC d/b/a Bettie Page Clothing*, 359 NLRB No. 96 (2013).

Irrespective of the unique attributes surrounding the collegiate academic environment, if scholarship student-athletes are Section 2(3) employees – and whether or not they ever consider joining a union – their Section 7 rights supersede and render unlawful many of the common sense policies that colleges impose on their students and student-athletes. Rules applicable to the vast majority of students within the university setting could not be applied to a limited group of students solely by virtue of their scholarship student-athlete status.

Likewise, the NLRA's unfair labor practice process could be invoked to challenge any student-athlete discipline, whether for academic reasons or violating team rules. The player or his union could not only file an unfair labor practice charge, but potentially seek injunctive relief under NLRA Section 10(j). 29 U.S.C. § 160(j). With a limited playing career of 12 to 14 games

over each of four seasons, the claim of irreparable injury from a player missing even one game would be a significant consideration. If a player is reinstated and ruled eligible for a game by a district court for conduct that violates NCAA rules, the team's penalties for the player's participation under NCAA guidelines could include forfeiture of the game. If the player were allowed to dress for the game but received no actual playing time, the university might face either contempt charges from the federal court or new unfair labor practice charges for retaliation. How much playing time does the player deserve? Could holding a player out for the first half (or first set of downs) constitute an unfair labor practice? Would a federal district court eventually issue a Section 10(j) injunction ordering that a player be put in the game?

B. NLRA Collective Bargaining is Incompatible with the College Student-Athlete Environment

Irrespective of whatever limited objectives any prospective union may express for collective bargaining, employees have the right to bargain over all wages, hours and terms and conditions of employment that are mandatory subjects of bargaining. A scholarship football player is subject to a host of rules, regulations, and "working" conditions from his team, the university generally, his athletic conference, and the NCAA. All will be subjects for bargaining, yet: (i) non-scholarship players are subject to the same team rules; (ii) non-scholarship athletes generally, athletes at public universities not subject to the NLRA, and unrepresented private schools are governed by the same conference and NCAA rules; and (iii) the entire student body is subject to the university-wide rules, many of which parallel the football team's rules. Giving a small subset of the student body the ability to negotiate special rules for themselves creates a double standard, often at the expense of their non-scholarship counterparts, that defeats the universal academic and student-oriented purposes behind most of these rules.

1. Scholarship-Athletes Would Have Bargaining Rights Over the Game that Their Non-Scholarship Counterparts Do Not

Scholarship athletes would have the right to negotiate over playing time, for this could be construed as little more than bargaining over the assignment of work. *Antelope Valley*, 311 NLRB 459, 460 (1993) (assignment of work is a mandatory subject of bargaining). Athletes would also have the right to bargain over the right to bid into particular positions on the team, and could insist that seniority or other criteria – such as scholarship status – control the selection of who plays what position. *Weldun International, Inc.*, 321 NLRB 733, 744 (1996) ("It is indisputable that a job-bidding system is a mandatory subject of bargaining were the Union to become the bargaining representative of the employees"). Athletes further would have the right to bargain over the extent to which non-unit employees – the walk-on non-scholarship athletes – even have the right to perform bargaining unit work by playing in games. *Santa Barbara News-Press*, 358 NLRB No. 141 (2012) (unilaterally assigning nonemployee freelancer to perform bargaining unit work unlawful); *Stevens International, Inc.*, 337 NLRB 143 (2001) (assigning unit work to non-unit supervisors without bargaining unlawful). Numerous other "working conditions" typically within a coach's discretion also would be subject to negotiations, including the duration and scheduling of practices and breaks, travel policies, and uniform standards.

All of the rules noted by the RD specific to athletes, scholarship or not, would be mandatory subjects of bargaining. *Randolph Children's Home*, 309 NLRB 341 (1992) (work rules constitute mandatory subjects of bargaining). Notably, while scholarship athletes will be able to bargain over such items, their non-scholarship teammates will not. The football team will be divided into two camps: scholarship employees and non-scholarship student-athletes.

2. Common Rules for Intercollegiate Athletic Competition Would Cease to Exist

Many of the special rules and policies governing intercollegiate athletes that are specifically designed to create a level playing field for all teams – whether imposed by a college, its athletic conference, or the NCAA – are mandatory subjects of bargaining under the NLRA. The RD noted many such rules governing practice time, dress codes, and other conduct in his decision, each of which is negotiable under the NLRA. *See e.g.*, *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 157-58 (1971); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Just as minimum wage laws and statutory overtime requirements do not prohibit employees from bargaining for more than the minimum required (or less than the maximum allowed), conference or NCAA limits will not prevent a union from bargaining for terms within whatever those rules allow.

More importantly, however, a college could not refuse to bargain over deviations from these intercollegiate athletic requirements on the grounds that it is merely complying with athletic conference or NCAA rules. While the NLRA does not require either an employer or union to make concessions, Section 8(d) requires an employer to engage in a good faith attempt to reach an agreement. The unwillingness to deviate from terms at non-union facilities (*i.e.*, colleges and universities where athletes are not represented by a union) may be inconsistent with bargaining in good faith. *See, e.g.*, *Santa Barbara News-Press*, 358 NLRB No. 141 (2012).

Thus, a union could negotiate over the total number of scholarships available, the number of scholarships (and their dollar value) by player position, the duration of any scholarships, and even the duration of a college athlete's eligibility. For example, there is no reason why players should be limited to only four years of eligibility. *Southern California Permanente Medical*

Group, 356 NLRB No. 106 (2011) (cessation of tuition reimbursement violative); *Inland Steel Co.*, 77 NLRB 1, 6-7 (1948) (mandatory retirement). In negotiating the value of any football scholarships, a union seeking better "pay" might demand that a college "shut down" other sports that are funded with football revenue. Assuming that a college could negotiate deviations from conference or NCAA rules and nevertheless remain a conference or NCAA member, any differences in the rules by which collegiate teams compete will: (1) have profound implications for the continued viability of competitive college sports, allowing some schools competitive advantages over others; and (2) quite possibly, eliminate other non-revenue intercollegiate sports teams and the scholarships allowing student-athletes in those sports to acquire a college education.

3. Bargaining May Encompass Scholarships and Academic Standards, Further Infringing Upon the University's Academic Mission

Bargaining easily will extend beyond the playing field. Although being enrolled as a full-time student, making progress towards obtaining a degree, and maintaining a minimum GPA are all *requirements* for remaining eligible to play on the football team, D&DE, *Northwestern Univ.*, at *11, a union would likewise have the ability to negotiate over academic standards, ranging from minimum grade point averages, to class attendance requirements, the number and form of examinations or papers in any class, grievance procedures to challenge a poor grade from a professor, and even potentially graduation requirements. In addition to interfering with a college's academic freedom and core mission and creating a two-tier system between students generally and scholarship student-athletes, any "negotiation" and compromise over these standard educational requirements potentially devalues any athlete's degree from that institution.

Unions arguably could bargain over whether student scholarship athlete-employees even need to enroll as students.

4. Bargaining Will Encompass University Rules Applicable to Students Generally, Creating a Two Class Academic System and Hampering the University's Ability to Govern Students

Other aspects of general university life also would fall under the rubric of a mandatory subject of bargaining – at least for scholarship athletes. While all students, subject to university rules, may live on campus and partake in a campus meal service, for scholarship athletes these would be terms and conditions of employment subject to bargaining. *Mercy Hospital of Buffalo*, 311 NLRB 869 (1993) (unilateral reduction of cafeteria hours an unfair labor practice, for operating hours of cafeteria is a mandatory subject of bargaining); *Granite-Ball Groves*, 240 NLRB 1173 (1979) (employer-built trailer park and dormitories at job site a mandatory subject of bargaining); *American Smelting & Refining Co.*, 167 NLRB 204 (1967), *enf'd*, 406 F.2d 552 (9th Cir. 1969) (company housing a mandatory subject where it is a benefit of employment).

A union could demand to bargain over separate, scholarship-athlete-specific hazing, gambling, academic dishonesty, drug and alcohol use, IT systems, and possession of weapons policies separate and apart from all students generally. *See Northwestern's Request for Review of Regional Director's Decision and Direction of Election*, at pp. 17-18 (April 9, 2014). Even if a union does not successfully negotiate any changes, any attempt by the university to change its policies applicable to all students generally would, absent a clear and unambiguous waiver from the union, require the university to first bargain as to the new rules' applicability to the scholarship athletes. This creates an unworkable system wherein the academic environment is being constricted by labor-related bargaining limited to a small subset of the study body.

5. Grafting Bargaining Obligations Onto the Student Experience Will Further Interfere with the University's Academic Mission and Create Unexpected Consequences

A college campus, for students at least, is not the workplace. While the law of the shop may control in a work setting, it will not transfer over to a student setting. Two situations demonstrate this.

NLRB rules about bargaining a first labor contract and the hiatus period between labor contracts will create special conflicts for college athletics. Where no waiver of the obligation to bargain exists, employers are obligated to notify a union and upon request confer before imposing other than routine discipline. *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012). Whether the discipline involves a violation of NCAA, conference, team, or even academic rules applicable to all students, would that institution need to confer with its players' union before ruling a player ineligible for that Saturday's game? If a student alleges that a bad grade is in retaliation for union activity, would a history professor need to confer with a union representative before imposing the grade or defend an unfair labor practice charge for giving a college athlete a C- or D+ in a class or on a mid-term exam?

Likewise, the collective bargaining process is based on the premise that management and labor can enforce their bargaining demands via economic power: a strike or a lockout. Would student-athletes be permitted to strike just before a game? If so, would their compensation (grant-in-aid tuition and room and board) cease? Would striking athletes need to either pay or vacate their dorms and stop attending class? Could strikers be permanently replaced with other scholarship athletes? Could a college lock out its players, deprive them of scholarships, prevent them from attending classes, and evict them from their dorms to force them to agree to a

contract? As a matter of national educational and labor policy, student-athletes cannot effectively be considered Section 2(3) employees who have the right to bargain collectively.

C. The NLRA's Organizing Process is Incompatible with the College Athletic Environment

The right of student athletes to organize under the NLRA presents substantial practical problems. First, while the current petition seeks to represent all scholarship athletes on Northwestern University's football team, a union need not organize and seek to negotiate for entire teams. If college football players are Section 2(3) employees, Section 9(a) of the NLRA establishes that employees may organize in an appropriate bargaining unit, not the most appropriate bargaining unit. 29 U.S.C. § 159(a). Approving a bargaining unit of only scholarship players, however, would create a fractured unit. *See, e.g.*, *Specialty Healthcare,* 357 NLRB No. 174 (2011). Scholarship and walk-on players play the same positions for the same coaches, attend the same practices and games, receive and wear the identical uniforms and practice gear, are subject to the same rules, eat the same meals, both receive other identical forms of "compensation," and share almost all terms except the value of a scholarship. Even if some other units might be appropriate, excluding non-scholarship athletes is not appropriate.

Section 9(b) of the NLRA provides that presumptively-appropriate bargaining units can be based on a craft, department, facility, or employer-wide. 29 U.S.C. § 159(b). As this Section of the Act and NLRB precedent in other industries show, organizing need not be limited to a single athletic team at any college or university. Potential bargaining units at any NLRA-covered university include all intercollegiate athletes receiving a scholarship, all men's scholarship athletes, the joint men's and women's basketball or cross-country teams, or any of a number of other groups of student-athletes.

A petitioned for unit will be considered appropriate unless a larger group shares an "overwhelming community of interest" with that unit. *Specialty Healthcare of Mobile*, 357 NLRB No. 83 (2011) (emphasis added). An employer that wants to challenge a petitioned-for group must establish that others share this "overwhelming" community of interest with the unit the union seeks, which permits further divisions and potentially multiple bargaining units within any team. With separate offensive and defensive coordinators, position coaches, playbooks, and game plans, a college probably could not prove that the remainder of the football team shares an overwhelming community of interests if a labor union seeks to represent just the team's offense or defense. Likewise, offensive linemen, defensive backs or quarterbacks each may share their own separate community of interests. Because Section 7 guarantees employees the right to refrain from joining a union or bargaining collectively, some groups of athletes may choose to unionize while others elect not to do so.

These types of smaller units are thus inevitable.[3] Each bargaining unit – potentially represented by different unions – would be able to bargain separately over that group's terms and conditions of "employment." The possibility exists that within any team, different groups of players would be unrepresented, while other groups would be covered under different collective bargaining agreements, terms, and rules. This would be impractical to apply in a team sport context.

[3] Likewise, bargaining units could include smaller "appropriate" groups within a university's marching band, jazz band, or symphony orchestra, such as just the brass section or percussionists. Depending on whether those students receive scholarships or other compensation (if that is to be the standard) in exchange for their participation, the test laid out in *Northwestern* would support employee status and union organizing rights.

D. NLRA Collective Bargaining Among College Athletic Teams Would Create Competitive Imbalances

The basis for all competitive sports at both the college and professional level is an equal playing field. In professional sports, every major professional league has a multi-employer collective bargaining agreement covering the league and every team. Professional teams and leagues are all private employers under the NLRB's jurisdiction, and subject to the same Section 7 rights and collective bargaining obligations. Each league's collective bargaining agreement provides a level playing field, whether with salary caps, minimum wage progressions, free agency, drug testing protocols, and even revenue sharing.

This level playing field in professional sports exists because the different teams that compete with each other are permitted to establish common labor terms under a non-statutory labor exemption from the antitrust laws that applies to employers "where its application is necessary to make the statutorily authorized collective bargaining process work as Congress intended." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996). Specifically, protections of unions from antitrust actions by the Clayton and Norris-LaGuardia Acts are intertwined with the congressional policy to promote collective bargaining expressed in the NLRA. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-7; Clayton Act, 15 U.S.C. §§ 12-17; NLRA, 49 Stat. 435 (1935), *amended by* 61 Stat. 141 (1947); 29 U.S.C. §§ 151-69.

Unlike professional leagues, the same will not apply in college athletics. Because Section 2(2) of the Act excludes public universities from its coverage, permitting college athletes to bargain collectively will apply to a small number of schools. 29 U.S.C. § 152(2). It would be unprecedented in American sports to have some teams populated with "employees" covered by collective bargaining agreements, while other teams are not. In the Big 10 Conference, for

example, only Northwestern is a private institution; the remaining thirteen members are all public universities that are governed under state law and not covered under the NLRA. Some states expressly regulate public sector employee collective bargaining, often either limiting it to certain subjects, types of employees, or limited economic action to enforce bargaining demands. For example, the Ohio legislature's recently passed budget that includes language clarifying that athletes at that State's public colleges and universities are not employees. *See* Am. Sub. H.B. 483, 130TH GEN. ASSEMB. (Oh. 2014). On the other hand, some legislators in Connecticut have suggested that they will introduce legislation stating that its public college athletes are, in fact, employees. North Carolina, Virginia, and South Carolina prohibit all collective-bargaining rights for public employees. N.C.G.S. § 95-98; Va. Code. Ann. § 40.1-57.2; *Branch v. City of Myrtle Beach*, 340 S.C. 405 (2000). Arizona, Arkansas, Colorado, Mississippi, and West Virginia have no laws on the subject. And while it is far from clear whether public university student-athletes could be considered employees within the meaning of even those state laws that do permit public sector organizing and bargaining, the inconsistent collective bargaining regimes and eventual patchwork of different terms and rules covering college athletes will cause vastly different playing fields among different teams.

With no single collective bargaining agreement to cover all participants (and any intentional fixing of compensation for other "employee-athletes" not covered by the labor antitrust exemption), every team must fend for itself with its student-athletes. University athletic departments that can afford it may attract the best football players by either themselves providing (if their athletes are non-union) or negotiating with a union for signing and retention bonuses, higher stipends, and other more generous "employment" terms. Because revenue from some

sports helps funds others, more "compensation" for football players may lead those schools to eliminate other non-revenue athletic teams or other programs.

Conversely, colleges with fewer resources may offer its football players less attractive "compensation" and therefore attract less highly-recruited talent, resulting in competitive imbalances that will profoundly change the nature of, interest in, and revenues derived from college sports. Rather than improving the lot of the college athlete, a decision that private college scholarship athletes are employees may cause some colleges and universities to eliminate athletic scholarships entirely.[4] As a result and for the vast majority of college athletes who will never play professional sports, many students who are now receiving scholarships could find a college education unaffordable and beyond their and their family's means. For all these reasons, the NLRA cannot effectively apply to college student-athletes.

CONCLUSION

The undersigned Congressional Committee Members, who are charged with legislative oversight of the NLRB, view with great consternation this attempt to extend the agency's reach into areas never contemplated by Congress. In the current case, the Regional Director ("RD") purports to assert coverage over certain athletic activities conducted by private institutions of higher education that existed at the time the Wagner Act was passed, and which Congress then, and now, never contemplated within the reach of the NLRA. As a matter of both national labor and educational policy, the Congressional Committee Members urge the Board to find that grant-in-aid scholarship football players are not employees within the meaning of Section 2(3) of the Act. The profound and inherent differences between the student-university and employee-

[4] Incongruously, even this core decision might be the subject of an unfair labor practice charge if scholarship athletes are employees. *Textile Wkrs. Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

employer relationship makes employee status unworkable both as a matter of law and in practice. The consequences of such a finding would extend far beyond the case currently before the Board, disrupting both individual educational institutions and intercollegiate sports generally. Even if the Board disregards these distinctions between the different relationships and the practical consequences and nevertheless finds that these college athletes are employees within the meaning of the NLRA, as a matter of policy the Board should decline to assert jurisdiction over college athletic programs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2014, I caused a true and accurate copy of the foregoing Brief for *Amici Curiae* Members of the United States Senate Committee On Health Education Labor And Pensions And The United States House Of Representatives Committee On Education And The Workforce to be filed electronically using the National Labor Relation Board's Electronic Filing System, and that I caused the same to be served via email (where available) or by overnight delivery (where email is unavailable) upon the following addresses:

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I further certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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