Testimony of Tyler A. Sims

Before the United States House of Representatives
Committee on Education & the Workforce
Subcommittee on Health, Employment, Labor, and Pensions and
Subcommittee on Higher Education and Workforce Development

Hearing on "Safeguarding Student-Athletes from NLRB Misclassification"

March 12, 2024

Chairmen Good and Owens, Ranking Members DeSaulnier and Wilson, and members of the Subcommittees:

Thank you for the opportunity to speak with you today about a topic that is very important and personal to me: student-athletes and their potential misclassification as employees under the National Labor Relations Act ("NLRA" or the "Act").

I will begin with an overview of my background. I am a former Division 1 athlete. I played goalie for the men's ice hockey team at Providence College (referred to throughout as "PC") from 2004 to 2008. I played in a program-record 116 games, won PC's Male Athlete of the Year for a team sport in 2006, and, in my senior year, was awarded the Joseph V. MacAndrew Award, which is awarded annually to a male senior varsity athlete who has achieved an outstanding level of performance in academics and athletics during his undergraduate career at PC. I was also a member of the Student-Athlete Advisory Committee, which was a select group of student-athletes that represented the interests of all student-athletes at PC. I graduated in 2008 with a double major in Economics and History.

After graduation, I played professional hockey for three years in the minor leagues and, was also a member of a union called the Professional Hockey Players Association (PHPA), which covered all hockey players in the American Hockey League and East Coast Hockey League. I enjoyed my experience as a member of the PHPA and saw value in union representation in the professional sports setting. My family also has ties to professional sports and unions. My father, Al Sims, played and coached in the National Hockey League (NHL) and, as a player, was a member of the National Hockey League Players' Association (NHLPA). The NHLPA has been great to my father over the years.

Once I realized my childhood dream of following in my father's footsteps by playing in the NHL would not become reality, I turned my focus to becoming a lawyer. I attended Seton Hall Law School from 2012 to 2015 and served as President of the Student Bar Association in my final

year there. While in law school, I also worked as a legal intern for the NHL and completed an externship with the NLRB – Region 22.

I also wrote a Sports Law Journal article on this very topic in law school titled "Student-Athletes are not 'Employees' Under the National Labor Relations Act: The Consequences of the Right to Unionize" by Tyler Sims (shu.edu).[1] I was inspired to write this article in response to the National Labor Relations Board ("NLRB" or the "Board") Regional Director's unprecedented decision finding Northwestern University's grant-in-aid scholarship football players were employees under Section 2(3) of the Act and as such, could participate in a NLRB election to decide whether they wanted to unionize.

After graduating from law school and clerking for New Jersey Superior Court Judge David F. Bauman, I joined Littler Mendelson, P.C. ("Littler") in 2016. Littler is the largest management-side workplace law firm in the world. The firm operates on four continents and, in the United States, we have over 1,100 lawyers working in over 50 offices throughout the country.

This past January, I was elevated to Shareholder at Littler where I serve as a member of Littler's Traditional Labor Law practice group and its Workplace Policy Institute. I wish to emphasize however, that the views I express here today are solely of my own.

Experience As A Student-Athlete

I very much enjoyed my experience as a student-athlete at PC and would not be sitting in front of you today without it. I look back at my time at PC thinking about all the life lessons I learned and how my experience in the classroom and on the ice prepared me to succeed in a career outside of hockey. My experience playing hockey at PC was just as critical to my personal growth, my success in law school, and now in my career as a lawyer as was the rigorous academic courseload I took while at PC.

Below are some of the many lessons I learned as a student-athlete:

- **Competitiveness** – I came to PC as the backup goalie and drove myself to compete for the number one spot. I became the starting goalie toward the end of my freshman year and kept motivating myself so I would not lose my spot. As a team, we were also fiercely competitive with the other teams in the Hockey East conference.

- **Performing under pressure** – I played in several hostile college hockey environments, including Boston University, Boston College, University of Maine, and University of New Hampshire. The Hockey East is one of the most competitive conferences in college

[1] A copy of this article is attached as **Exhibit A**.

hockey so we often played against teams ranked in the top 10 in the country. I also played in the playoffs all four years at PC.

- **Value of hard work** – My hockey game improved with focused practice, dedication, and hard work on the ice and in the weight room. When I arrived at school every September, we started the season with fitness testing and preseason, which consisted of on- and off-ice training sessions. As athletes, we knew that we needed to stay focused and in shape during the summer so we could succeed when we arrived on campus. This helped me stay on task and work hard in the offseason to keep my spot as the team's starting goalie and to be ready for our competition.

- **Discipline** – As student-athletes, we were required to go to class and maintain a minimum GPA. We had to be on time for meetings, practices, and workouts or we would face consequences, which included waking up early for a workout.

- **Teamwork** – I learned how to be a valuable team member and how to work through strategic and personality issues with others.

- **Multi-Tasking** – I was personally driven to perform well in both school and hockey. To do so, I had to learn to effectively multi-task and properly manage my time.

- **Taking direction and constructive criticism from coaches** – In order to become a better hockey player and help the team succeed, I needed to recognize my weaknesses and learn to correct my mistakes.

- **How to handle failure and success** – We routinely had back-to-back games on Fridays and Saturdays. If I had a bad game on Friday, I had to learn how to bounce back with a better game on Saturday.

In short, those student-athlete learning experiences over four years are fundamentally different than the experiences as a professional athlete, who could be cut from a team, traded, or sent down to a lower level at any moment for poor performance or any other reason. In fact, it is those student-athlete experiences that helped me become a professional athlete and deal with the pressures and realities of professional sports. This is really what is lost in the discourse about whether student-athletes should be considered employees under the NLRA—the lack of focus on the education and preparation for life you receive from playing a college sport. And not just in the classroom, but also on the ice, court, field, track, etc. I went to PC to get a college education. For me, playing hockey was part of that education; just as other extracurricular activities such as music, art, dance, community service, etc., are for many other students. I knew the statistics

going to PC that less than 2% of Division 1 athletes would go on and play in the professional ranks.[2]

The Consequences Of Employee Status For Student-Athletes

I do not believe that student-athletes should be classified as "employees" under the Act due to sound policy reasons, practical considerations, the law, and existing precedent.[3] Let me be more specific, the following are potential consequences of employee classification under the Act and unionization on student-athletes:

- **Pay for Play? (or Performance)** – In a typical workplace (or in professional sports), employees must perform well, or they risk losing their job. If student-athletes were to unionize and be subject to the typical terms of a collective bargaining agreement ("CBA"), would schools insist on a clause allowing them to terminate or "cut" a student-athlete for poor performance, which is what happens in professional sports? If I did not perform at the level PC expected, would I be "cut" from the team mid-season? Could I stay in school? Would I have to start paying for school myself? When I was at PC, my scholarship was renewable each year, but losing my promised scholarship or being cut from the team for poor athletic performance was never something I had to worry about. Currently, the power 5 conferences have a rule that prevents multi-year Division 1 scholarships from being canceled or not renewed for any athletic reason like poor performance or injury.[4] Beginning in August 2024, all Division 1 programs will be required to follow this same rule (it was previously optional).[5]

- **Tax Bills** – The federal tax code exempts certain scholarships from gross income, including those given to student-athletes. However, if scholarships are provided as compensation in exchange for their athletic services, those scholarships are not tax-exempt.[6] The tax code specifically states that the exemptions for a "qualified scholarship" do not apply to any "portion of any amount received which represents payment for teaching, research, or ***other services*** by the student required as a condition for receiving the qualified scholarship."[7] Athletic scholarships can cover the traditional tuition, room, board, books, meals, and fees, but also may include the incidental costs of

[2] https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf
[3] *See NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680-81 (1980) (quoting *Syracuse University*, 204 NLRB 641, 643 (1973) ("the Board has recognized that principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'").
[4] https://www.ncaa.org/news/2015/1/18/autonomy-schools-adopt-cost-of-attendance-scholarships.aspx
[5] https://www.ncaa.org/news/2023/4/26/media-center-di-board-of-directors-increases-benefits-for-college-athletes.aspx
[6] 26 U.S.C. § 117(c)(1).
[7] *Id.*

attending college like transportation and miscellaneous personal expenses.[8] If all of this is classified as "compensation" to employees, that compensation would be in exchange for a *service*, i.e. playing college sports, and would be taxable. My scholarship, fees, books, supplies, meals, and board at PC were all completely tax free. If I had to pay taxes on those significant amounts, how would I be able to pay it?

- **Opportunities** – What if the costs of fielding a NCAA sport become more expensive? If student-athletes are classified as employees under the NLRA, why would they not be employees under the Fair Labor Standard Act (FLSA) and other federal and state employment laws? Schools would have to deal with how to classify student-athletes (exempt or non-exempt) under the FLSA, and then determine if they are being paid minimum wage and overtime. These potential costs are in addition to the costs of bargaining with a union and agreeing to better wages and benefits for student-athletes, which would also likely result in additional costs to the schools. If student-athletes are considered employees and the expenses incurred by the schools become unfeasible, will there be fewer opportunities to play a college sport? I have real concerns that schools will start cutting programs to save money, and there will be less opportunity for high school students to play a sport in college and be afforded a college education. NCAA Divisions I and II schools provide more than $3.6 billion in athletics scholarships annually to over 180,000 student-athletes.[9] As you will see in detail below, very few schools actually make a profit on athletics. In addition, we have seen schools cut sports for budgetary reasons before. From March 6 to November 11, 2020, 352 NCAA sports programs were cut due to budget constraints caused by COVID-19; the vast majority were Olympic sports (which traditionally generate less revenue than other college sports).[10] Would schools cut certain sports programs? Would my sport be one of those cut?

- **Strikes and Lockouts** – What would happen if a union called the student-athletes out on strike or the institution locked student-athletes out? The only economic pressure a union can put on an employer to agree to its proposals in bargaining is to strike. Admittedly, I do not know how a strike or lockout would work for a student-athlete. An employer is not required to pay an employee on strike. This could result in lost scholarships and potential lost academic opportunity. Further, a prolonged strike would likely stunt the student-athletes' academic career. Would I have to pay my tuition, room, board, and other fees to continue to go to class? Could I still go to class if I am on strike? What would happen to my education? Could I transfer to another school?

[8] usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073/
[9] https://www.ncaa.org/sports/2014/10/6/scholarships.aspx
[10] https://www.espn.com/olympics/story/_/id/30116720/the-heartbreaking-reality-staggering-numbers-ncaa-teams-cut-pandemic

- **Scheduling** – Many CBAs have clauses governing scheduling and overtime. Would the CBA allow me to put in extra practice with my coaches? What about tutoring for class? Would I be restricted in the number of hours I could voluntarily spend on school or hockey? What about film review or other meetings? If there is an overtime provision in the CBA, which many unions insist on, will the school allow a student-athlete to spend additional hours on practice, training, film study, etc., or will it deny those opportunities to avoid paying the student-athlete overtime as permitted by the CBA?

- **Relationships with Coaches and Administrators** – If student-athletes are considered employees, then their coaches and other administrators would likely be considered supervisors. How will those relationships change? Will I still have direct access to my coaches if I have a problem or do I have to go through the union? When a union and a CBA is involved, coaches and administrators must follow the CBA, or they risk a grievance being filed against them. What if I need help with an issue that is contrary to a CBA provision? Will I get that help?

- **NCAA/Conference Issues** – Many CBAs last for 2-4 years. What happens if the NCAA changes a rule that is inconsistent with the CBA? Would following the CBA unintentionally violate any NCAA or conference rules? If so, would my team be able to play other NCAA teams or compete for a national championship? Would the CBA or NCAA still allow me to transfer schools for a better opportunity?

Student-Athletes Have Never Been Employees Under The Act

The NLRA was enacted back in 1935. Since it was enacted, neither the NLRB nor any court has held that student-athletes are employees under the Act or any other federal or state law.[11]

In 2015, in a rare unanimous decision on an important policy issue, Chairman Mark Pearce and other members of the Board rightly declined to exercise jurisdiction over the student-athletes in *Northwestern*:

> After careful consideration of the record and arguments of the parties and amici, we have determined that, ***even if the scholarship players were statutory employees*** (which, again, is an issue we do not decide), ***it would not effectuate the policies of the Act to assert jurisdiction***. Our decision is primarily premised on a finding that, because of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of FBS football (in which the overwhelming majority of competitors are public colleges and universities over which the

[11] *Northwestern University,* 362 NLRB No. 167 (Aug. 17, 2015); *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016) (holding that track and field athletes at the University of Pennsylvania were not employees under the FLSA because they had no real expectation of earning an income).

> Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case.

362 NLRB No. 167, 1352 (emphasis added). In short, the NLRB made a unanimous policy decision that asserting the NLRB's jurisdiction over student-athletes is not proper under the Act. The Board had the opportunity to decide whether student-athletes are employees and declined to do so for important policy reasons. The Board noted several times in the decision that they addressed "this case in the absence of explicit congressional direction regarding whether the Board should exercise jurisdiction" over student-athletes. 362 NLRB No. 167, 1350.

The Board's decision in *Northwestern* got it right and made several salient points:

- "[T]he scholarship players are unlike athletes in undisputedly professional leagues, given that the scholarship players are required, inter alia, to be enrolled full time as students and meet various academic requirements . . . ." 362 NLRB No. 167, 1353.

- "[E]ven if scholarship players were regarded as analogous to players for professional sports teams who are considered employees for purposes of collective bargaining, such bargaining has never involved a bargaining unit consisting of a single team's players, where the players for competing teams were unrepresented or entirely outside the Board's jurisdiction." *Id.*

- "The NCAA's members have also given the NCAA the authority to police and enforce the rules and regulations that govern eligibility, practice, and competition. The record demonstrates that the NCAA now exercises a substantial degree of control over the operations of individual member teams, including many of the terms and conditions under which the scholarship players (as well as walk-on players) practice and play the game. As in professional sports, such an arrangement is necessary because uniform rules of competition and compliance with them ensure the uniformity and integrity of individual games, and thus league competition as a whole." *Id.*

- "Many terms applied to one team therefore would likely have ramifications for other teams. Consequently, 'it would be difficult to imagine any degree of stability in labor relations' if we were to assert jurisdiction in this single-team case." *Id.* at 1354 (quoting *North American Soccer League*, 236 NLRB 1317, 1321-22 (1978)). "[A]ll previous Board cases concerning professional sports involve leaguewide bargaining units. *Id.* (citing *National Football League*, 309 NLRB 78, 78 (1992); *Blast Soccer Associates*, 289 NLRB 84, 85 (1988) (leaguewide representation for Major Indoor Soccer League players); *Major League Rodeo*, 246 NLRB 743 (1979); *North American Soccer League*, 245 NLRB 1301, 1304 (1979); *American Basketball Assn.,* 215 NLRB at 281; *National Football League Management Council*, 203 NLRB 958, 961 (1973) (indicating that before the National Football League (NFL) merged with the rival American Football League, the latter league's players had leaguewide representation)).

- The Board cannot assert jurisdiction over a vast majority of FBS teams because all but 17 out of the roughly 125 colleges and universities are state-run and outside the jurisdiction

of the NLRA. *Id.* At the time, Northwestern was the only private school that is a member of the Big Ten Conference. *Id.* "In such a situation, asserting jurisdiction in this case would not promote stability in labor relations." *Id.* "Some states . . . permit collective bargaining by public employees but others limit or prohibit such bargaining." *Id.*

- The Board also noted as an additional consideration that terms and conditions of scholarship athletes have changed significantly in recent years, including allowing "FBS teams to award guaranteed 4-year scholarships, as opposed to 1-year renewable scholarships, [which] has reduced the likelihood that scholarship players who become unable to play will lose their educational funding, and possibly their educational opportunity." *Id.* at 1355.

Those same important policy considerations in the *Northwestern* decision apply today. Only 18 of 133 Division I[12] FBS football schools are private[13] and only 124 of all 363 Division I schools are private.[14] As the *Northwestern* decision highlighted, the NLRA only covers private schools, not public. If student-athletes are considered employees, the public-school student-athletes would fall under that school's state's individual laws related to public employees and collective bargaining, which are not uniform. For example, Ohio and Michigan have laws stating that student-athletes at public universities are not employees. *See* Ohio Rev. Code Sec. 3345.56; Mich. Comp. Laws Sec. 423.201(1)(e)(iii). Wisconsin and several other states have laws limiting public sector union collective bargaining. *See* Wis. Stat. § 111.91(3)(a) (wages only). And other states like North Carolina, Texas, and Georgia prohibit public sector collective bargaining all together. *See* N.C. Gen. Stat. Ann. § 95–98; Tex. Gov't Code § 617.002(a); Ga. Code Ann. 20-2-989.10. The NLRB's lack of jurisdiction over about two-thirds of Division I schools will not promote labor stability, an important purpose of the NLRA.

Also, the NCAA and individual conferences continue to set the rules and regulations governing college athletics, including for recruiting, eligibility, academic requirements, compensation, etc. As the *Northwestern* decision stated, "uniform rules of competition and compliance with them ensure the uniformity and integrity of individual games, and thus league competition as a whole." 362 NLRB No. 167, 1353. Therefore, collective bargaining between student-athletes and their individual schools is not consistent with Board precedent and would not effectuate the purposes of the Act.

Finally, since 2015, the NCAA has continued to improve benefits for student-athletes, which was another factor noted in the *Northwestern* decision. In 2021, the NCAA adopted a rule allowing student-athletes to be compensated for their name, image, and likeness without affecting their NCAA eligibility.[15] In 2022, the NCAA passed a rule that student-athletes who transfer will be

[12] There are three NCAA Division I subdivisions: 130 FBS schools (schools that sponsor football programs eligible for the national championship); 125 FCS schools (schools that sponsor football programs that have a separate bracketed NCAA tournament); and 97 Division I Subdivision schools (schools that do not sponsor football). To be a Division 1 member, FBS schools must sponsor a minimum of 16 sports, and FCS and Division I Subdivision schools must sponsor a minimum of 14 sports. https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx

[13] https://web3.ncaa.org/directory/memberList?type=12&division=I-FBS&sportCode=MFB

[14] https://web3.ncaa.org/directory/memberList?type=12&division=I

[15] https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx

guaranteed their financial aid at their next school through graduation.[16] Beginning in August 2024, all Division 1 programs must provide additional benefits to student-athletes such as: prohibiting programs from canceling or refusing to renew multi-year Division 1 scholarships for any athletic reason like performance or injury; providing medical coverage for athletically-related injuries for at least two years after graduation; covering out-of-pocket medical expenses (copayments, deductibles, etc.) during a student-athlete's playing career; offering degree completion funds for up to 10 years after a student-athlete's eligibility concludes; and providing a second seat on the NCAA Division I Board of Directors for a student-athlete.[17]

In addition to the important policy concerns highlighted in the *Northwestern* decision, there are other significant policy and practical considerations that weigh in favor of the NLRB continuing to follow *Northwestern* and declining to exercise jurisdiction over student-athletes.

First, union representation and bargaining will be complicated for student-athletes because of the rapid turnover of college sports teams. At most, a student-athlete will graduate and leave the school every 4-5 years. However, there are new rules related to the transfer portal, which make it more likely that student-athletes will transfer to a new school before their four years of athletic eligibility are over.[18] In short, students who transfer schools are no longer required to sit out for a year, which was the case when I played at PC, and students who transfer multiple times can play immediately as well.[19] There are also student-athletes who will choose to leave the team or leave school to turn pro or for other reasons. The Board has recognized the serious administrative issues involved in conducting elections and effectively remedying alleged violations of the NLRA within industries with this type of employee turnover.[20] It is possible that at the end of the CBA, there will be an entirely new bargaining unit that never voted on unionization. As such, the instability of the potential bargaining unit comprised of student-athletes does not promote stability in labor relations and is inconsistent with the purpose of the Act.

Second, the potential for increased costs to schools and athletic departments could be significant. If unions demand higher wages and benefits for student-athletes and those student-athletes strike over their demands, schools may feel like they have to concede to those demands. This could drive up costs and expenses for schools, which could lead to significant budget cuts in other sports, especially for those sports that do not generate the most revenue. The top revenue generating college sports are football, basketball, men's hockey, and baseball.[21] Other sports, many of them known as "Olympic" sports, generate little revenue compared to the other four sports previously mentioned. The chart below from 2016, the latest year for which I could find such a chart, shows the average athletic revenue—not profit—for schools by sport in Division I.[22]

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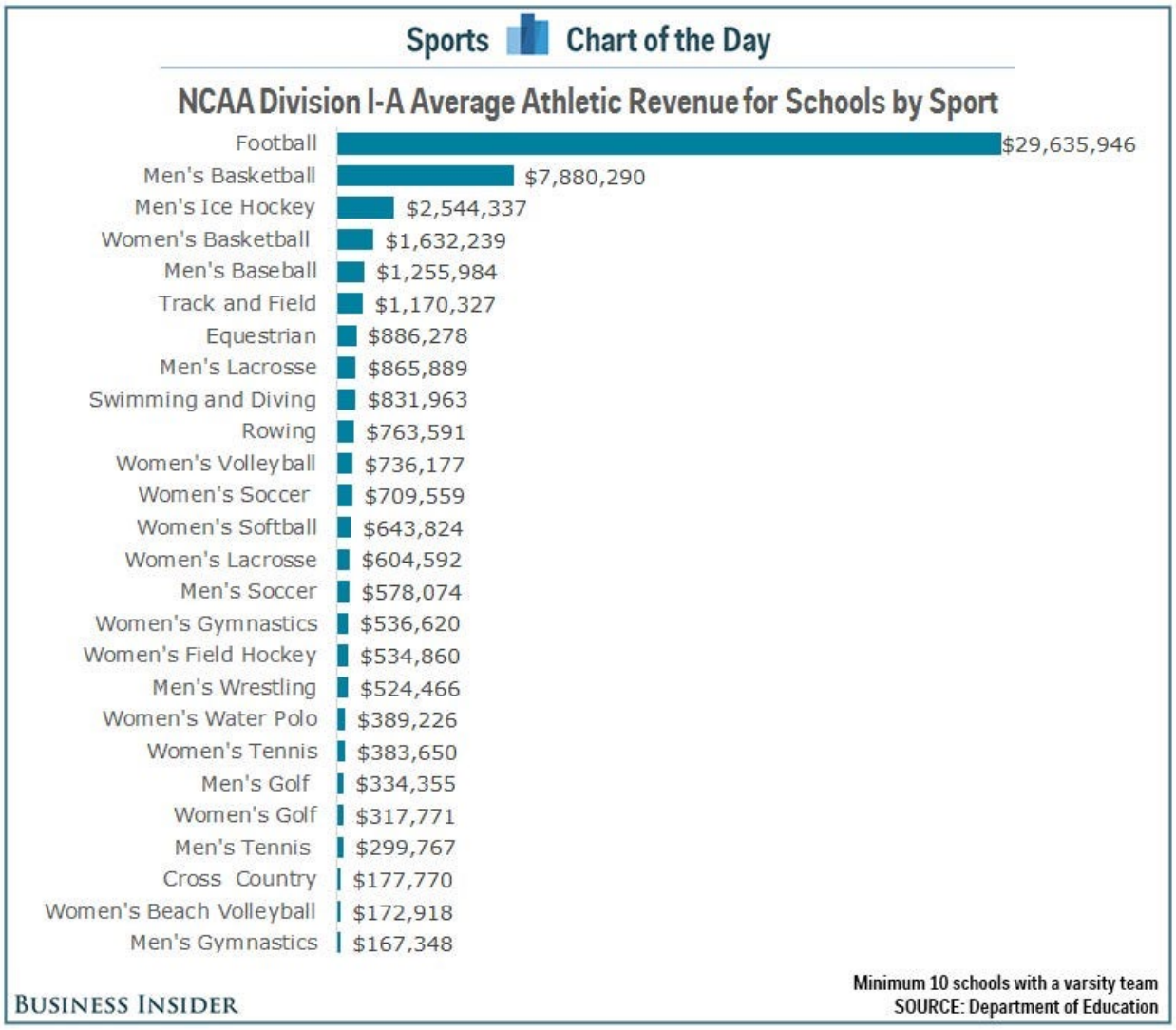
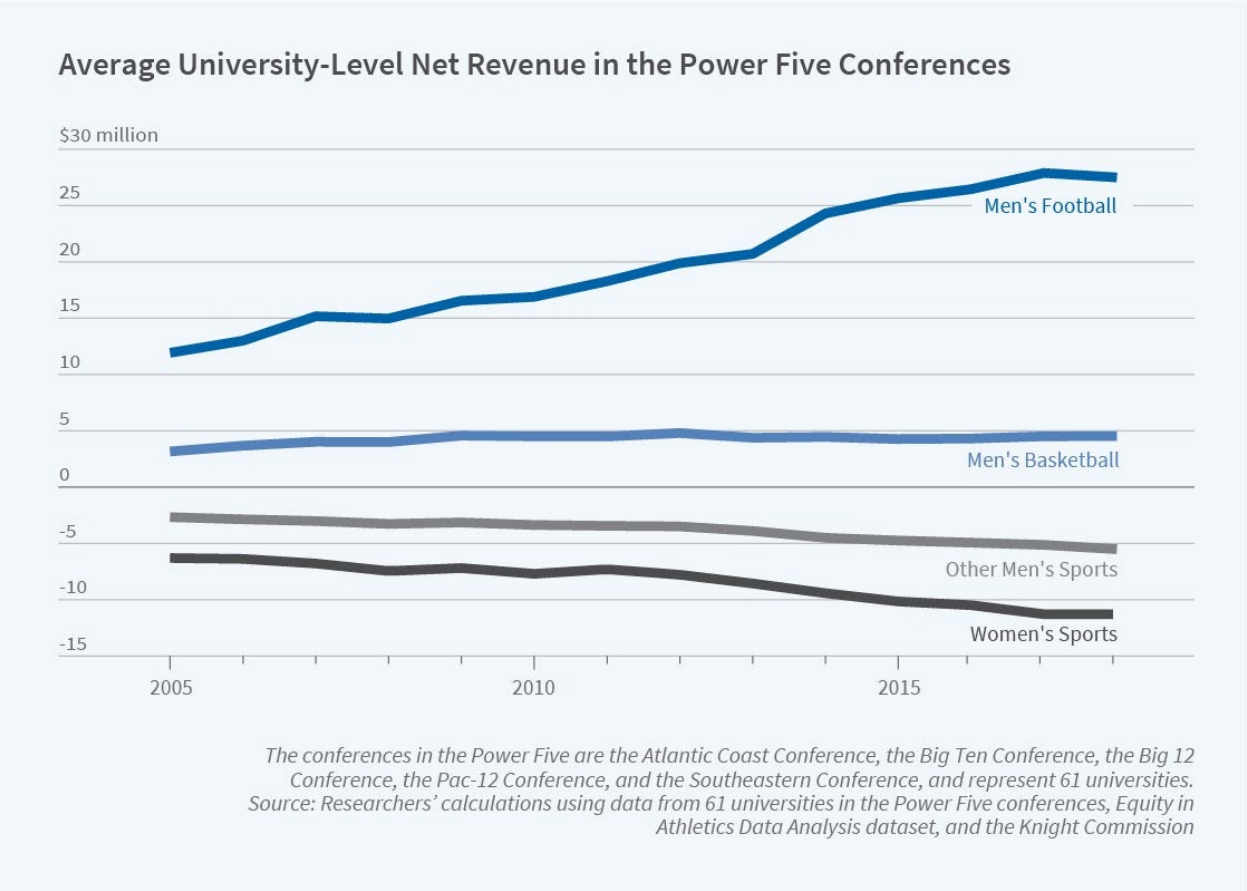
[16] https://www.ncaa.org/news/2022/8/31/media-center-division-i-board-adopts-changes-to-transfer-rules.aspx
[17] https://www.ncaa.org/news/2023/4/26/media-center-di-board-of-directors-increases-benefits-for-college-athletes.aspx
[18] https://theathletic.com/5158115/2023/12/22/ncaa-multi-transfer-football-fall-2024/
[19] *Id.*
[20] 29 C.F.R. § 103.3.
[21] https://finance.yahoo.com/news/college-sports-most-money-130012417.html
[22] https://www.businessinsider.com/college-sports-revenue-2016-10



In the power 5 football conferences (SEC, ACC, Big 10, Pac-12, and Big 12)—known as FBS Autonomy—only 26 of those 65 schools recorded positive ***net*** generated revenue in 2022.[23] For the 39 schools that lost money, the median loss was $15.7 million.[24] The chart below highlights the net revenue disparities between football and basketball and the rest of college sports.

[23] https://www.ncaa.org/sports/2019/11/12/finances-of-intercollegiate-athletics-database.aspx
[24] *Id.*



Further, of the 64 Division 1 schools outside of the power 5 conferences, all but two lost money in 2022 with a median deficit of $23.3 million per school. In total, only 28 public[25] Division 1 programs generated more money than they spent in 2022 and each of those 28 schools is a FBS school.[26] Of the FCS schools, all 123 schools reported a negative net generated revenue in 2022 with a median loss of $15.4 million.[27] Of the Division I Subdivision schools, all 97 lost money in 2022 by an average of $15.1 million.[28] None of the Division II schools turned a profit in 2022.[29] While Division III student-athletes do not receive athletics scholarships, none of the Division III schools generated revenues that exceeded expenses from 2017-2020, which is the most recent data I could find.[30] Schools also made significant cuts due to the COVID-19 pandemic. In total, 112 Division I sports were cut by 35 schools and 77 have not been reinstated.[31] Shockingly, between March 11 and November 6, 2020, a total of 352 NCAA sports programs were cut and the vast majority were Olympic sports.[32] The reason for the cuts were

[25] Private schools are not required to release revenue data.
[26] https://www.ncaa.org/sports/2019/11/12/finances-of-intercollegiate-athletics-database.aspx
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] https://www.ncaa.org/sports/2021/2/16/our-division-iii-story.aspx; https://www.ncaa.org/sports/2013/11/19/archives-of-ncaa-revenues-and-expenses-reports-by-division.aspx
[31] https://businessofcollegesports.com/tracker-college-sports-programs-cut-during-covid-19-pandemic/
[32] https://www.espn.com/olympics/story/_/id/30116720/the-heartbreaking-reality-staggering-numbers-ncaa-teams-cut-pandemic

budget shortfalls due to COVID-19. This is the unfortunate reality if costs go up for athletic departments, which is possible if student-athletes are classified as employees under the NLRA.

Third, there may be Title IX and other legal issues that schools will have to navigate. Title IX requires that female and male student-athletes receive athletics scholarship dollars proportional to their participation.[33] If a women's basketball team secured a CBA that provided for greater scholarship dollars, would the school have to provide those same dollars to a men's team? Also, Title IX requires the equal treatment of female and male student-athletes in the provisions of: (a) equipment and supplies; (b) scheduling of games and practice times; (c) travel and daily allowance/per diem; (d) access to tutoring; (e) coaching, (f) locker rooms, practice and competitive facilities; (g) medical and training facilities and services; (h) housing and dining facilities and services; (i) publicity and promotions; (j) support services and (k) recruitment of student-athletes.[34] If a women's basketball team negotiated certain other benefits in a CBA, would a school have to provide those same benefits to a men's team? If a school refuses to bargain over certain terms and conditions because of Title IX issues, will the school be the subject of a failure to bargain charge by the union?

Fourth, there are taxation and other statutory issues that weigh in favor of the NLRB continuing to decline to assert jurisdiction over student-athletes. This includes the tax bills that will be imposed on student-athletes for the compensation they receive, as discussed previously. If a CBA requires student-athletes to be paid wages, schools will incur payroll taxes resulting in additional costs. If student-athletes are employees, this could lead to a shift in policy by the Internal Revenue Service (IRS), which has historically exempted athletic departments from paying taxes on profits because of their educational purpose.[35] If student-athletes are considered employees by the IRS, the profits generated by athletic departments may be classified as unrelated business income and subject to corporate tax rates of between 15-35% at the federal level alone.[36] However, the most severe tax consequences for athletic departments would be the elimination of tax-deductible contributions.[37] Contributions to athletic departments are the largest source of income for athletic departments.[38] In addition, any gift over $14,000 would be subject to the gift tax (up to 45%) and the donors could not deduct the donation.[39] Finally, tax-exempt bonds used to build athletic facilities may no longer be available to the schools.[40] These tax consequences would put an additional strain on the schools' total expenses and net revenue.

If student-athletes are classified as employees under the NLRA, would student-athletes also be considered employees under other federal and state employment laws? If student-athletes are employees under the FLSA for example, schools would have to classify them as exempt or non-exempt employees. If they are non-exempt, schools would have to calculate hours worked against the amount student-athletes are paid through scholarships, etc. to determine if those

[33] https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions.aspx#how
[34] *Id.*
[35] https://www.espn.com/college-sports/story/_/id/6768571/legal-issues-arise-paying-student-athletes
[36] https://andersen.com/publications/newsletter/september-2014/student-athlete-athlete-employee-tax-consequences-for-sure
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*

student-athletes have to be paid overtime or minimum wage. This would result in an administrative nightmare for Human Resources departments at these schools. Since forms of non-monetary compensation paid to employees can be taxable, would schools have to issue W-2s for scholarships or 1099s for other benefits, i.e., travel, hotels, meals, housing, apparel, tickets, etc.? Do schools immediately need to comply with state employment laws such as wage and hour or employee records laws?

Fifth, there is the potential expansion of the definition of employee to include students that participate in other extracurricular activities, like dance, music, band, choir, theater, etc. For example, a college dance team may perform at a theater where the public pays for tickets and the school receives revenue from those ticket sales. Those team members may receive dance outfits, shoes, complimentary tickets and other forms of non-monetary compensation like student-athletes. They also may have their travel paid for if they go to competitions and have certain scheduling requirements. Are they employees? Is any student an employee who engages in extracurricular activities and receives something of value from the school in return? Would colleges eliminate these activities all together to avoid the headache? What about high school student-athletes? Many high school sports receive revenue and provide athletes with free equipment, travel, etc., and the NLRB has previously ruled that employees who are minors are protected under the Act.

Sixth, there are over 25,000 international students on student visas participating in NCAA sports.[41] If the Board asserts jurisdiction over student-athletes and classifies them as employees, it will likely conflict with an F-1 student visa's work limits.[42] The student visa allows for limited work opportunities that match the restrictions on weekly athletic activities during a playing season set by the NCAA.[43] Should these international student-athletes be reclassified as employees, they will be ineligible for student visas.[44]

Conclusion

I have been thrilled to see the positive changes and benefits that student-athletes have received over the last ten years, many of which I discussed above. I encourage student-athletes to continue to speak up for themselves and their teammates. However, I also value the educational purpose behind college athletics and for all the foregoing reasons, I do not believe that classifying student-athletes as "employees" under the National Labor Relations Act will result in a positive outcome for student-athletes. The reliance of many young men and women on college athletics for the opportunity to receive a quality college education should not be jeopardized by their classification as employees. Chairmen Good and Owens, Ranking Members DeSaulnier and Wilson, and other members of the Subcommittees, I really appreciate the opportunity to discuss this important issue with you and am happy to respond to any and all of your questions.

[41] https://www.ncaa.org/sports/2018/3/21/international-student-athlete participation.aspx#:~:text=More%20than%2025%2C000%20international%20student,divisions%20participate%20in%20NCAA%20sports
[42] https://news.bloomberglaw.com/daily-labor-report/college-athletes-status-as-employees-puts-student-visas-at-risk
[43] *Id.*
[44] *Id.*

EXHIBIT A

2015

Student-Athletes are not "Employees" Under the National Labor Relations Act: The Consequences of the Right to Unionize

Tyler Sims

Student-Athletes are not "Employees" under the National Labor Relations Act: The Consequences of the Right to Unionize

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Part I: Introduction

The debate over allowing student-athletes to be considered "employees" under the National Labor Relations Act ("NLRA" or the "Act") has reached its tipping point. *Northwestern University v. College Athletes Players' Association (CAPA)* ("*Northwestern*")[1] has brought national attention to the idea of collegiate student-athletes joining a union and engaging in collective bargaining with their respective colleges, in addition to other topics including image and likeness restrictions, pay-to-play, lifetime medical benefits, etc. Although the Northwestern University ("Northwestern") scholarship football players were deemed to be "employees" by Regional Director Peter Sung Ohr ("Director Ohr") of the National Labor Relations Board ("NLRB" or the "Board"), Region 13, Northwestern appealed the decision, which is now pending in front of the full NLRB in Washington D.C. Director Ohr's decision has reignited the argument about whether student-athletes, especially in revenue-generating sports like men's football and basketball, should be paid a salary and other benefits in addition to the scholarships they receive that cover tuition, housing, books, and food.

Director Ohr held that Northwestern failed to carry its burden to prove that it had properly denied scholarship football players employee status.[2] He inappropriately utilized the common law test, which asks whether the employees "perform services for another under a

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[1] Northwestern Univ., Case 13-RC-121359 *2 (Mar. 26, 2014).
[2] *Id.* at *13.

contract of hire, subject to the other's control or right of control, and in return for payment."[3] The common law test fails to address the unique nature of a student's educational relationship with a university. Therefore, Director Ohr mistakenly declined to use the four-factor test promulgated in *Brown University*, 342 N.L.R.B. 483 (2004) ("*Brown*") that was applied to graduate assistants,[4] which are the closest group of potential employees to the Northwestern scholarship football players. Director Ohr reasoned that *Brown* does not control because, in that case, the overall relationship between the university and the graduate assistants was primarily educational, not economic, whereas the Northwestern players' football-related duties are unrelated to their academic studies.[5] Unfortunately, Director Ohr errs in his analysis of why the *Brown* test does not apply and in his assessment of how vital playing a collegiate sport is to the educational development of young people. The *Brown* four-factor test was used by the Board to determine *if* the questioned employees' (graduate assistants) relationship with the university was primarily academic,[6] not in determining what test should be used for determining an "employee" under the Act. Further, collegiate athletics develop leadership skills that college education strives to instill "such as strategic and tactical planning, persistence, sensible risk-taking, resilience, self-discipline, time management, a sense of fairness, teamwork, an understanding of one's adversaries, and sportsmanship (being both a good winner and a good loser)."[7] Furthermore, student-athletes are required to maintain a minimum Grade Point Average and

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[3] *Id.* (citing Brown Univ., 342 N.L.R.B. 483, 490 n.27 (2004) (internal citation omitted)).
[4] *Id.* at *18.
[5] *Id.*
[6] *Brown Univ.*, 342 N.L.R.B. at 492.
[7] Robert J. Sternberg, *College Athletics: Necessary, Not Just Nice to Have*, NACUBO.ORG, http://www.nacubo.org/Business_Officer_Magazine/Business_Officer_Plus/Bonus_Material/College_Athletics_Necessary_Not_Just_Nice_to_Have.html (last visited Apr. 10, 2015).

complete a certain amount of coursework each year,[8] which helps motivate the student-athlete to succeed in academics so they can stay on the team.

In Part II of this Note, I will discuss the relevant portions of the Act and the process of conducting a union election through the NLRB. Additionally, Part II will address NLRB precedent on the issue and a case summary of *Northwestern*. In Part III, I will argue that student-athletes should not be considered "employees" under the NLRA based on the proper standard, which is determining whether student-athletes have a primarily educational or economic relationship to their respective institution and is formulated through NLRB precedent, legislative history, and public policy concerns. I will also argue that these same athletes should not *want* to be "employees" under the NLRA because of the unintended consequences that would diminish the rich collegiate experience enjoyed by all student-athletes. Finally, in Part IV, I will analyze the alternative, more effective methods of seeking positive changes for all student-athletes in the National Collegiate Athletic Association (NCAA).

Part II: Overview of the Act and the National Labor Relations Board

The process of forming a union can be complicated, especially if the employer, in our case the "university," decides to fight the formation of the union. There are two ways to form a union under the NLRA: 1) file an election petition with the nearest NLRB Regional Office; or 2) persuade an employer to recognize the union by showing majority support from employees.[9] Since the second method is highly unlikely in most instances, the employees, in our case the "student-athletes," filing a petition is the most relevant method for this analysis. If a student-

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[8] *Remaining Eligible: Academics*, NCAA.ORG, http://www.ncaa.org/remaining-eligible-academics ("In Division I, student-athletes must complete 40 percent of the coursework required for a degree by the end of their second year. They must complete 60 percent by the end of their third year and 80 percent by the end of their fourth year. Student-athletes are allowed five years to graduate while receiving athletically related financial aid. All Division I student-athletes must earn at least six credit hours each term to be eligible for the following term and must meet minimum grade-point average requirements that are related to an institution's own GPA standards for graduation").

[9] NATIONAL LABOR RELATIONS BOARD, www.nlrb.gov/what-we-do/conduct-elections (last visited Nov. 7, 2014).

athlete or team seeks an election petition, he/she/they must file a petition with the nearest NLRB Regional Office containing union support from at least 30% of student-athletes within the proper unit.[10] Once the election petition is filed, the Regional Office will investigate to ensure that the office has jurisdiction and there are no other issues that would bar an election.[11] If an election is warranted, the Regional Director will issue an order directing the university to conduct an election and will oversee the election process.[12] After the election has occurred, the university may appeal the Regional Director's order to the Board in Washington D.C.[13] If an appeal is filed, the election results are sequestered until the Board renders a decision.[14] Next, if the Board upholds the Regional Director's decision, the results of the election are released to determine if the union won the election.[15] This could end the university's challenge because a majority of the Northwestern players could vote against the union. If the union does prevail, the university still retains the ability to challenge the validity of the election.

The university could take two routes to challenge the validity of the election. First, the university could take a direct appeal of the Board's decision to the appropriate United States Circuit Court of Appeals then, if necessary, to the United States Supreme Court.[16] Second, the employer could refuse to bargain with the union, which constitutes an unfair labor practice under section 8(a)(5) of the Act.[17] A complaint and notice of hearing before the Board would then be issued to the employer by any member of the Board or its agent[18] to determine if, in fact, the employer has engaged in an unfair labor practice; if it has, the Board will issue a cease and desist

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/what-we-do/decide-cases (last visited Apr. 20, 2015).
[17] 29 U.S.C. § 158(a)(5) (2012).
[18] *Id.* at § 160(b).

order for the employer to stop the unfair labor practice and commence good-faith bargaining with the union.[19] If the employer continues to disregard the Board's order to bargain with the union, the Board then has the power to seek enforcement of its order with any court of appeals of the United States (most likely the D.C. Circuit).[20] At this proceeding, the employer would renew its claim that the employees are not "employees" under section 2(3) of the Act, and the court of appeals will issue a judgment and decree that is final, unless an appeal is filed with the United States Supreme Court.[21]

A. Statutory Background

Congress enacted the National Labor Relations Act (or Wagner Act) in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices that harmed the general welfare of workers, businesses and the U.S. economy.[22] The Labor Management Relations Act, better known as the Taft-Hartley Act, passed in 1947 narrowed the definition of "employee" in the NLRA by excluding supervisors.[23] The relevant section for purposes of this Note is section 2(3), which reads:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer . . . .[24]

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[19] *Id.* at § 160(c).
[20] *Id.* at § 160(e).
[21] *Id.*
[22] NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/resources/national-labor-relations-act (last visited Nov. 8, 2014).
[23] NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/who-we-are/our-history/1947-taft-hartley-substantive-provisions (last visited Apr. 25, 2015).
[24] 29 U.S.C. § 152(3) (2012).

Anyone found to be an employee under this definition is known as a "statutory employee." In addition to this seemingly guideless definition of "employee" by the NLRA, the United States Supreme Court and the NLRB have both expanded on the definition.

The U.S. Supreme Court has held that in applying this broad definition of "employee" it is necessary to consider the common law agency doctrine.[25] The common law definition of "employee" includes four parts: (1) a person who performs services for another; (2) under a contract for hire; (3) is subject to the other's control or right of control; and (4) in return for payment.[26] However, the Supreme Court carved out an exception to the common law definition in *NLRB v. Bell Aerospace Co.*, where the Court determined that managerial employees should not be considered statutory employees because Congress never intended them to be covered under the Act.[27] The Supreme Court has also been careful in applying the broad common law definition to *any* potential employee, especially in academia, considering the intent and policy behind the NLRA.[28] In *Yeshiva University*, the Supreme Court followed its own decision in *Bell Aerospace* when it excluded faculty as statutory employees because of their managerial function within the university.[29] Specifically, the Supreme Court noted that, "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'"[30] The overriding principle from this section is the definition of an "employee" under the NLRA has evolved over the years and has constantly been applied to effect the goals and policies underlying the Act.

B. NLRB Precedent

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[25] NLRB v. Town & Country Elec., 516 U.S. 85, 94 (1995).
[26] Brown Univ., 342 N.L.R.B. 483, 490, n.27 (2004) (citing *Town & Country Elec.*, 516 U.S. at 94).
[27] 416 U.S. 267, 283 (1974).
[28] *See* Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989) (stating it is a fundamental canon of statutory interpretation that the words of a statute must be read in the context of the overall statutory scheme).
[29] NLRB v. Yeshiva Univ., 444 U.S. 672, 679 (1980).
[30] *Id.* at 681 (quoting Syracuse Univ., 204 N.L.R.B. 641, 643 (1973)).

Since the Supreme Court has only decided one case, *Yeshiva University*, deciphering the meaning of "employees" under the NLRA in the university context, the NLRB's decisions have been the main source or interpretation for section 2(3) of the Act as it relates to universities. In 1972, the NLRB first discussed the meaning of "employee" in the university context.[31] It addressed the issue of whether graduate teaching and research assistants should be included in the bargaining unit that consisted of full-time and part-time faculty.[32] The Board held that since graduate teaching and research assistants were supervised by the faculty and were primarily students, they should not be included in the bargaining unit.[33]

In 1974, the Board decided its first case that dealt directly with whether graduate students are employees under section 2(3) of the Act.[34] This decision involved the possible unionization of 83 research assistants in the Physics Department of Stanford University. First, the Board held that the payments received by the research assistants were not wages, but stipends or grants given as financial aid to pursue advanced degrees and were not based on services rendered or the type of research performed.[35] The research assistants also did not receive vacation, sick leave, or retirement benefits, but they did have privileges granted to all students such as access to student health insurance, student housing, and various campus activities.[36] Significantly, the Board also pointed to the fact that the research assistants were students who had not yet obtained their degrees and were engaged in research for the advancement of their degree requirements.[37] The Board drew a sharp contrast between the research assistants and research associates because the

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[31] *See* Adelphi Univ., 195 N.L.R.B. 639 (1972).
[32] *Id.*
[33] *Id.* at 640.
[34] Leland Stanford, 214 N.L.R.B. 621 (1974).
[35] *Id.*
[36] *Id.* at 622.
[37] *Id.*

latter are full-time, professional employees who have already achieved their degrees and are subject to discharge for unsatisfactory work.[38]

In *Cedars-Sinai Medical Center* and *St. Clare's Hospital*, the Board upheld the rule from *Adelphi University* and *Leland Stanford* in holding that medical interns, residents, and clinical fellows were not employees under section 2(3).[39] In so holding, the Board said that the interns, residents, and clinical fellows were students because they were primarily engaged in graduate educational training at the hospital as a requirement to practice medicine, not to earn a living.[40] The Board noted that it has "universally excluded students" from bargaining units of non-student employees and from being represented in their own separate unit.[41] In 1999, the Board overturned *Cedars-Sinai* and *St. Clare's Hospital* and ruled that medical interns, residents, and fellows, who notably already received their academic degrees, are indeed "employees" under the NLRA, but did not address the status of graduate assistants who are still seeking their academic degrees.[42]

The only decision from the Board that holds graduate student assistants to be "employees" under section 2(3) and overturns 25 years of Board precedent was decided in 2000.[43] In *NYU*, the Board affirmed the Regional Director's decision that categorized graduate assistants as statutory employees, but excluded graders and tutors.[44] The Board relied on *Boston Medical Center* and applied the common law agency doctrine (discussed herein Part II A) to determine that the conventional master-servant test was satisfied.[45] Ignoring the fact that the

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[38] *Id.* at 623.
[39] *See* 223 N.L.R.B. 251 (1976) and 229 N.L.R.B. 1000 (1977).
[40] *Cedars-Sinai*, 223 N.L.R.B. at 253.
[41] *St. Clare's Hosp.*, 229 N.L.R.B. at 1002.
[42] Brown Univ., 342 N.L.R.B. 483, 487 (2004) (citing Boston Med. Ctr., 330 N.L.R.B. 152 (1999)).
[43] New York Univ., 332 N.L.R.B. 1205 (2000).
[44] *Id.*
[45] *Id.* at 1205-1206 (citing NLRB v. Town & Country Elec., 516 U.S. 85, 93-95 (1995)).

Supreme Court has found additional exceptions to section 2(3) (see Part II A), the Board noted there is not a clear exception in the Act for students who seek to be considered as employees.[46] The Board rejected the university's congressional intent and public policy arguments that the relationship between the graduate assistants and the university in primarily educational and collective bargaining will infringe on basic academic freedoms.[47] Four years later in *Brown* the Board would overrule *NYU*, and the debate over which ruling controls student-athletes would ultimately come to a head when a group of Northwestern football players decided to petition to join a labor union on January 28, 2014.[48]

The *Brown* case came before the NLRB in 2004 and overturned *NYU*, returning to 25 years of prior Board precedent when it deemed graduate student assistants were not employees under the NLRA.[49] The union in *Brown* petitioned to represent 450 graduate students consisting of teaching assistants, research assistants, and proctors.[50] The Board looked at the underlying purposes of the Act and found that it was passed to cover economic relationships, not primarily educational relationships.[51] The Board looked to four factors to determine whether the graduate student assistants' relationship with Brown University was primarily academic. First, the graduate student assistants were all students at the university.[52] Second, a graduate student assistant's role in teaching and research is essential to the core elements of the Ph.D. degree they are pursuing.[53] Third, they acted under the direction and control of the university faculty.[54] And

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[46] *Id.* at 1206.
[47] *Id.* at 1207-1208.
[48] Tom Farrey, *Kain Colter starts union movement*, ESPN.COM (Jan. 28, 2014, 9:08 PM), http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union.
[49] Brown Univ., 324 N.L.R.B. 483, 483 (2004)
[50] *Id.*
[51] *Id.* at 488.
[52] *Id.* at 489.
[53] *Id.*

fourth, the financial support received was financial aid for a student since it did not extend past graduation and was not based on the work completed each year.[55] The Board reasoned that collective bargaining would "unduly infringe upon academic freedoms" because decisions made by administrators and faculty such as class size, time, length, and location, and specific duties hours, and stipends would be subjects of collective bargaining.[56] Further, the individual and personal nature of education would be subject to the demands of the collective or group.[57] The Board also noted that the test as applied has been used in even older cases such as *Sheltered Workshops of San Diego* (1960),[58] in which the Board found that the disabled workers in question were determined to have a primarily rehabilitative relationship rather than an economic one with the employer rehabilitation program and, therefore, were not statutory employees.[59]

Although the NLRB has never ruled on the status of student-athletes under the Act, the NLRB has relied on two different tests when deciding cases involving whether graduate student assistants must be treated as employees under the Act. The first test, known as the "master-servant test," or "common law test" is satisfied "when a servant performs services for another, under the other's control or right to control, and in return for payment."[60] This test was applied in *Boston Medical Center* (medical school graduates serving as interns, residents, and fellows found to be employees)[61] and *NYU* (graduate student assistants found to be employees).[62] Prior

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[54] *Id.*
[55] *Id.*
[56] *Id.* at 490.
[57] *Id.*
[58] 126 N.L.R.B. 961.
[59] *Brown Univ.*, 324 N.L.R.B. at 491 n.30.
[60] *Id.* at 483 n.3.
[61] *Id.* at 483 n.4.
[62] *Id.* at 483.

to *NYU*, "the Board's principle was that graduate student assistants are primarily students and not statutory employees."[63]

The second test espoused in *Brown* should be utilized in the student-athlete context. The essential inquiry of the test is whether the graduate student assistants' relationship with the university was primarily academic, rather than economic.[64] I will address this test as the "primarily economic relationship test." This test was first utilized in *Adelphi* (graduate student assistants could not join the faculty bargaining unit) and *Leland* (graduate student assistants were not employees under the Act) and was specified even further in *Brown* (graduate student assistants were not employees).[65]

B. *Northwestern* Case Summary

The *Northwestern* case is the Board's first opportunity to decide whether student-athletes at a private university who receive grant-in-aid scholarships are "employees" within the meaning of the Act.[66] The College Athletes Players Association brought this claim under Section 9(c) of the Act against Northwestern University, alleging that a substantial number of players wished to be represented for collective bargaining and Northwestern wrongfully declined to voluntarily recognize CAPA as the student-athletes' representative.[67] On March 26, 2014, Director Ohr ruled that the student-athletes are "employees" under the Act and mandated an election be held allowing football players that have received grant-in-aid scholarships and have not exhausted their playing eligibility to vote for or against unionization.[68]

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[63] *Id.*
[64] *Id.*
[65] Adelphi Univ., 195 N.L.R.B. 639, 639 (1972); *See* Leland Stanford, 214 N.L.R.B. 621 (1974).
[66] Northwestern Univ., Case 13-RC-121359 *2 (Mar. 26, 2014).
[67] 29 U.S.C. § 159(c) (2012).
[68] Northwestern Univ., Case 13-RC-121359 *2.

Director Ohr noted a litany of facts to justify his view that student-athletes are properly categorized as employees. He stated that they satisfy the common law or master-servant test set forth in *Town & Country Electric* because they 1) perform services for Northwestern in the form of playing football 2) do so under a contract for hire, which is a tender letter that entitles the student-athletes to a scholarship if he plays football for Northwestern 3) are subject to Northwestern's control or right of control because their coach schedules the practices, meetings, video, workouts, etc. and 4) receive payment in return for services in the amount of their scholarship, which ranges from $61,000 per year up to $76,000 per year.[69] Director Ohr also stressed the fact that Northwestern receives services performed by the football players that result in revenue exceeding $235 million from 2003-2012.[70] He determined that the amount of time spent on football-related activities (40-50 hours per week during the season) was evidence of Northwestern's control or right to control the players.[71] He limited the holding in this case to scholarship players because "walk-on" players do not sign a tender letter and do not receive payment from the school in return for their services.[72]

Director Ohr decided that the Northwestern scholarship football players are still employees under the Act if he followed the *Brown* test.[73] First, he noted that the grant-in-aid scholarship football players are not "primarily students" because the amount of time spent on football is much greater than the time spent on their studies.[74] Second, the players' athletic duties do not constitute a core element of their educational degree requirements since they do not receive academic credit for playing football, aside from a possible credit for physical

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[69] *Id.* at *14.
[70] *Id.*
[71] *Id.* at *15-16.
[72] *Id.* at *17.
[73] *Id.* at *18.
[74] *Id.*

education.[75] Third, Northwestern's academic faculty does not supervise the football players' athletic duties: instead their supervisors are the football coaches.[76] Finally, the compensation received by the scholarship football players was not akin to the financial aid compensation received by the graduate assistants in *Brown*.[77]

After determining that the Northwestern football players were statutory employees, Director Ohr ordered an election by secret ballot that included all grant-in-aid scholarship players on the Northwestern football team who had not exhausted their playing eligibility.[78] The election would decide whether CAPA would serve as the players' exclusive bargaining representative.[79] The secret-ballot election took place on April 25, 2014 at Northwestern.[80] However, the NLRB has sequestered the ballots because Northwestern filed its Request for Review with the NLRB of the Regional Director's Decision on April 9, 2014.[81] On April 16, 2014, CAPA filed its Opposition to the Request for Review.[82] The Board granted Northwestern's Request for Review because it "raises substantial issues warranting review."[83] As of July 31, 2014, both Northwestern and CAPA have fully briefed the issues to the Board and are awaiting a decision.[84]

Part III: Scholarship Athletes are NOT "Employees" under the NLRA

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[75] *Id.* at *19.
[76] *Id.*
[77] *Id.* at *20.
[78] *Id.* at *23.
[79] *Id.*
[80] Tom Farrey and Lester Munson, *NU Players Cast Historic Vote*, ESPN.COM (Apr. 25, 2014, 10:50 AM), http://espn.go.com/chicago/college-football/story/_/id/10833981/northwestern-football-players-poised-historic-vote-whether-unionize.
[81] Request for Review of Employer at 50, Northwestern Univ., Case 13-RC-121359 (Apr. 9, 2014).
[82] Opposition of Petitioner to Request for Review at 31, Northwestern Univ., Case 13-RC-121359 (Apr. 16, 2014).
[83] Order Granting Request for Review at 1, Northwestern Univ., Case 13-RC-121359 (Apr. 24, 2014).
[84] NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/case/13-RC-121359 (last visited Nov. 28, 2014).

Unfortunately, if the holding in the *Northwestern* case is upheld by the Board, the decision would change the landscape of college athletics and could severely diminish the important benefits of being a scholarship student-athlete. The Board should follow the *Brown* precedent and rule that scholarship athletes are not "employees" under the NLRA because their relationship with Northwestern is primarily educational. Additionally, the Board should consider congressional intent and recognize the policy implications when deciding this case. Being able to go to college for free and having the opportunity to compete at the highest levels of athletics contributes to the overall educational experience and should be valued highly by the Board and student-athletes. The focus for the Board should remain on the educational experience of participating in Division 1 athletics because education is always the primary objective of higher learning institutions.

Director Ohr erred for three reasons: (1) he applied master-servant test from *NYU* and engaged in improper analysis of the primarily economic relationship test from *Brown* to the facts of this case; (2) he failed to recognize that Congress did not intend for the Act to cover student-athletes; and (3) he ignored the unintended consequences of his decision.

A. The Legal Application of *Brown*

Since the status of scholarship student-athletes is an issue of first impression, the Board should adhere to the teaching of *Brown* and apply the "primarily economic relationship test" to determine whether student-athletes are employees under the Act. The major flaw in Director Ohr's analysis in *Northwestern* was that he used the incorrect legal standard: the common law definition of employee.[85] The Supreme Court case that used the common law definition that is

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[85] Northwestern Univ., 13-RC-121359 *13 (Mar. 26, 2014) (citing NLRB v. Town & Country Elec., 516 U.S. 85, 94 (1995)).

relied on by Director Ohr is distinguishable from *Northwestern.*[86] The critical difference in that case is that the "employees" in question were engaged in a *primarily economic relationship* with the employer.[87] The Court also examined the underlying purposes of the Act to find that the union organizers were statutory employees in *Town & Country.*[88] Additionally, the Supreme Court found "managerial employees" were not covered under the Act even though they may satisfy the common law definition of employee because the Act was not intended to cover managerial employees.[89] Along with the common law test, the Board should reject the master-servant test from *NYU* as applied to student-athletes because a student's relationship with an educational institution does not involve providing services to the institution. In fact, it is the exact opposite; the institution provides educational services to its student-athletes.

The legal standard enunciated in *Brown* focuses on whether the overall relationship between the graduate student assistants and the university is primarily educational (not employees) or primarily economic (employees).[90] The primarily economic relationship test should also be used because it more closely reflects the intent and purpose of the Act. The congressional intent argument will further address this issue in Part III, B, herein.

Here, the Board should follow *Brown* and rely on four non-dispositive factors to determine whether the graduate student assistants in that case had a primarily educational relationship with the university.[91] The first factor considered was whether the graduate student

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[86] *See e.g. Town & Country Elec.*, 516 U.S. 85 (1995) (holding that paid union organizers are statutory employees); *see also* Seattle Opera v. NLRB, 292 F.3d 757 (D.C. Cir. 2002) (holding that the opera's auxiliary choristers are statutory employees).
[87] *Brown Univ.*, 342 N.L.R.B., 483, 491 (2004).
[88] *Id.*
[89] *Id.*
[90] *Id.* at 489.
[91] *Id.*

assistants are *students* at the university.[92] The *Brown* Board defined a student to be one who is enrolled in the university, is pursuing a degree, and his/her status as a graduate student assistant is contingent on his/her continued enrollment as a student.[93] The Regional Director fails in his attempt to show that the student-athletes on the Northwestern football do not meet the first factor in *Brown*. The Regional Director attempts to redefine the first factor by arguing that the football players are not "primarily students," instead, they are "primarily football players" since, according to the Regional Director, they spend around 40-50 hours on football only 20 hours on academics.[94] There are factual discrepancies to the analysis because the NCAA limits the amount of time a student-athlete can devote to athletics to 20 hours per week.[95] Therefore, the Regional Director points to voluntary hours spent by the student-athletes who are *trying* to improve their skills.

The legal analysis is flawed for two reasons. First, the Regional Director misstates the "student" requirement because the requirement in *Brown* states that you must first and foremost be a student enrolled at the university.[96] In fact, in order to be a collegiate athlete, you must be admitted by the institution as a regularly enrolled, degree-seeking student.[97] In addition, a student-athlete must be enrolled in a "minimum full-time program of studies" that leads to a degree, which consists of not less than 12 semester or quarter hours in order to compete for the institution.[98] There are also minimum "progress toward degree" requirements, including minimum GPA, that the student-athletes must meet to be eligible for competition.[99] First, a

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[92] *Id.* at 488 (emphasis added).
[93] *Id.*
[94] Northwestern Univ., 13-RC-121359 *18 (Mar. 26, 2014).
[95] *NCAA Division I Manual*, Section 17.1.7.1 (2014-2015).
[96] *Brown Univ.*, 342 N.L.R.B. at 488.
[97] *NCAA Division I Manual*, Section 14.1.1.
[98] *Id.* at Section 14.2.2.
[99] *Id.* at Section 14.4.

student-athlete at Northwestern classifies as a student at the university. Secondly, the Regional Director dismisses the fact that receiving a grant-in-aid scholarship to play football is contingent upon the student-athlete's enrollment at the university as not being dispositive to the inquiry under the first factor in *Brown.*[100] The Regional Director apparently does not give any weight to the fact that *but for* the student-athletes status as a student, they would not have the opportunity to participate in intercollegiate sports.[101] The language from *Brown* states that because "their status as a graduate student assistant is contingent on their continued enrollment as students, we find that they are primarily students."[102] The language from *Brown* requiring the analysis of student status is unambiguous and the fact that the Regional Director dismisses this essential point demonstrates that the first factor in the *Brown* test was not analyzed properly in *Northwestern.*

The next factor in the *Brown* analysis considers the role of graduate student assistantships in graduate education.[103] *Brown* states that for a number of graduate students, teaching is so essential to their program that they will not receive a degree unless that requirement is satisfied.[104] However, the Board is noted that although that fact is relevant to the analysis, it is not necessarily critical and would not require the Board to find employee status if this requirement was missing.[105] Even though the Regional Director correctly noted that playing football is not part of the degree requirements at Northwestern,[106] he unfairly diminishes the educational value of playing a division one collegiate sport. Categorizing intercollegiate

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[100] Northwestern Univ., 13-121359 *18 (Mar. 26, 2014).
[101] *Big Labor on College Campuses: Hearing on Examining the Consequences of Unionizing Student-athletes Before the H. Comm. on Educ. and the Workforce*, 113th Cong. (2014) (statement of Judge Ken Starr, President, Baylor University).
[102] Brown Univ., 342 N.L.R.B. 483, 488 (2004).
[103] *Id.* at 489.
[104] *Id.* at 488.
[105] *Id.* at 488 n.24.
[106] Northwestern Univ., 13-RC-121359 *19 (Mar. 26, 2014).

athletics as a mere ancillary element to a student-athlete's education is problematic given the many institutions "that take the institutional mission considerably beyond the classroom and into the development of the entire person."[107] Additionally, given that around 1% (9.4% for baseball) of all NCAA athletes go on to play professional sports,[108] the role of being a student-athlete is primarily educational. My own experience as a student-athlete imparted necessary life skills such as being a leader, being a team player, hard work, competitiveness, and the ability to handle constructive criticism. Participation in a collegiate sport is essential to a student-athlete's education because so most of what is learned in college takes place outside of the classroom in the form of extracurricular activities and employers are more inclined to hire collegiate athletes because of the benefits that translate to the real world.[109]

The third factor outlined in *Brown* analyzes whether the graduate student assistants' perform their roles under the direction and control of the university's faculty. Similarly, the Northwestern football players perform their athletic duties under the direction and control of their coaches.[110] However, the Regional Director conveniently chooses to distinguish coaches from faculty and athletics from the classroom.[111] This is another example of the Regional Director dismissing the educational value of intercollegiate athletics. In fact, Northwestern believes that education takes place in more than just the classroom and certainly on the athletic field in preparing for and participating in competition.[112] Several of the Northwestern football

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[107] *Big Labor on College Campuses: Hearing on Examining the Consequences of Unionizing Student-athletes Before the H. Comm. on Educ. and the Workforce*, 113th Cong. (2014) (statement of Judge Ken Starr, President, Baylor University).
[108] *Probability of Competing in Athletics Beyond High School*, NCAA (last updated September 2013) http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school.
[109] Sternberg *supra* note 7.
[110] Northwestern Univ., 13-RC-121359 *19.
[111] *Id.*
[112] Brief of Employer at 21, 13-RC-121359 (July 3, 2014).

players testified that they viewed their coach as an "educator and mentor" and he takes his job very seriously to prepare the student-athletes for life after college.[113]

Fourth, and finally, *Brown* looks to the financial support given to the graduate student assistants.[114] The Board notes that this financial assistance is only provided to students and is not extended beyond the period of the students' enrollment at the university.[115] Again, student-athletes satisfy this requirement because they are only provided financial support while they are students and only receive aid for tuition, fees, room, board, books, food, health insurance, and clothes required to be worn by the team while traveling to games.[116] The Regional Director in *Northwestern* curiously opines that the scholarship football players' receive is not financial aid because they can lose their scholarship if they voluntarily withdraw from the team.[117] This argument lacks merit because students routinely receive performance-based academic and music scholarships that may be revoked for poor performance.[118] These scholarships are certainly still considered financial aid from the institution.

Additionally, scholarships are tax-exempt,[119] and therefore, any form of compensation received by the student-athletes for playing football could invalidate the tax-exempt nature of the scholarship.[120] In fact, the Internal Revenue Code provides that scholarships are not exempt from taxes on any amounts received, which represents payment for services rendered by the

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[113] *Id.* at 23.
[114] Brown Univ., 342 N.L.R.B. 483, 489 (2004).
[115] *Id.*
[116] Northwestern Univ., 13-RC-121359 *3 (Mar. 26, 2014).
[117] *Id.* at *20.
[118] *See Undergraduate Student Handbook*, UNIVERSITY OF COLORADO BOULDER - COLLEGE OF MUSIC, http://www.colorado.edu/music/academics/undergraduate-degrees/advising/undergraduate-student-handbook (last visited Apr. 26, 2015).
[119] *Student-Athlete/Athlete-Employee: Tax Consequences, For Sure*, FOR THE RECORD (AndersenTax, San Francisco, Cal.), Sept. 2014, available at http://www.andersentax.com/publications/newsletter/september-2014/student-athlete-athlete-employee-tax-consequences-for-sure.
[120] *Id.*

student required as a condition to receiving the scholarship.[121] Further, athletic departments themselves have tax-exempt status because of their close relationship to the educational mission of the university.[122] The Regional Director is also factually inaccurate when he states that Northwestern never offers a scholarship to a prospective student unless they intend to provide an athletic service to the university.[123] Northwestern gives $126 million dollars in total scholarships to undergraduates and 45% of undergraduates receive a Northwestern University Scholarship.[124]

In viewing the overall relationship between Northwestern and its student-athletes, the relationship is primarily educational and, therefore, the student-athletes are not employees under section 2(3) of the Act and the Board should reverse the Regional Director's decision determining that the election for union representation is not valid.

B. Congress did not intend for Student-Athletes to be "Employees"

Even if the Board finds the student-athletes fall within the literal meaning of "employee," the Supreme Court has consistently recognized that individuals may still be excluded from the Act's coverage based on a consideration of congressional intent and national labor policy.[125] The historical examination of the congressional intent behind the NLRA shows that the Act was not intended to govern the authority structure of a university.[126] The congressional history shows that a dispute between an employer and a college professor would not be covered by the Act.[127] Congress also listed professional employees covered in a new statutory provision without

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[121] Theodore Connolly, *Should College Athletes Want to be Employees?*, http://www.lgllp.com/should-college-athletes-want-to-be-employees/ (last visited Nov. 13, 2014).
[122] *Id.*
[123] Northwestern Univ., 13-RC-121359 *20.
[124] *Undergraduate and Financial Aid: Northwestern Scholarships*, NORTHWESTERN UNIVERSITY http://undergrad aid.northwestern.edu/types-of-aid/scholarships-grants/northwestern-scholarships.html (last visited Nov. 28, 2014).
[125] Boston Med. Ctr., 330 N.L.R.B. 152, 175 (1999) (Brame III, J., dissenting).
[126] Yeshiva Univ., 444 U.S. 672, 680 (1980); *See also* Adelphi Univ., 195 N.L.R.B. 639, 648 (1972).
[127] S. Rep. No. 74-573, at 7 (1935).

mentioning teachers.[128] In 1979, Congress rejected a bill that would have overruled *Cedars-Sinai/St. Clare's* and mandated that medical school interns would be treated as unit employees.[129]

The Act was created to address conflicting economic interests of the employer to minimize costs and the employees to maximize wages.[130] The educational process is predicated on a mutual interest in the advancement of the student's education and is therefore academic in nature.[131] The student's educational process is inherently personal and individualized so the primary purpose of collective action under the Act fails to apply to higher education.[132] Education by its nature is the transfer of knowledge by those who know to those who don't know, which makes it inherently authoritarian.[133]

Congress had over 25 years to correct the Board's precedent prior to *NYU I* if it disagreed with the Board's interpretation of the Act as it applied to graduate student assistants.[134] The central purposes behind the Act demonstrate that Congress has never meant to apply collective action to student-athletes.

C. The Unintended Consequences of Being "Employees"

If the Board does not overrule Director Ohr's decision, the student-athletes will find some of the unintended consequences unfavorable to their plight. First and foremost, the entire landscape of collegiate athletics could be changed if student-athletes are considered employees under the NLRA and allowed to unionize because the costs to the institutions will rise dramatically. In addition, there are certainly other state and federal laws that are implicated if

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[128] H.R. Rep. No. 80-510 at 36 (1947); *See also* S. Rep. No. 80-105, at 11, 19 (1947).
[129] *Boston Med. Ctr.*, 330 N.L.R.B. at 169 (Hurtgen, J., dissenting).
[130] *St. Clare's Hosp.*, 229 N.L.R.B. 1000, 1002 (1977).
[131] *Id.*
[132] *Id.*
[133] *Boston Med. Ctr.*, 330 N.L.R.B. at 178-79 (Brame III, J., dissenting) (internal citation omitted).
[134] Brown Univ., 342 N.L.R.B. 483, 493 (2004).

student-athletes are found to be employees. While the costs to the institutions will rise with unionization, the costs to the student-athletes as a whole will also increase.

1. Costs to the Institutions

If student-athletes are allowed to bargain collectively for a weekly salary, improved benefits, and pensions, the costs to athletic departments will significantly rise. Now, only about ten percent of Division 1 college sports programs make a profit and most of them even lose money.[135] In fact, 154 out of 230 public universities' athletic departments received over half of their total revenue from state subsidies in 2013.[136] Only 23 out of 228 public schools generated enough revenue to cover their athletic departments' total expenses.[137] Private institutions do not have to release their budget figures because of a state exemption.[138] A number of consequences from student-athletes unionizing would only see the numbers on the expense side of the ledger increase.

If unionization resulted in player salaries as opposed to scholarships, those earnings would likely be taxed and the universities would have to pay more to each student-athlete to match the value of the scholarship.[139]

If the university is considered the employer, it might be held responsible for any tort committed by one of its employees (student-athletes) within the scope of employment (athletic event) on a theory of vicarious liability.[140]

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[135] Patrick T. Harker, *Student-athletes Shouldn't Unionize*, Op.-Ed., N.Y. TIMES, Apr. 1, 2014, www.nytimes.com/2014/04/02/opinion/student-athletes-shouldnt-unionize.html.
[136] Steve Berkowitz, et al., *Most NCAA Division I athletic departments take subsidies*, USATODAY.COM (July 1, 2013, 12:48 PM), http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/.
[137] *Id.*
[138] *Methodology for NCAA athletic department revenue database*, USATODAY.COM (June 4, 2014, 4:52 PM), http://www.usatoday.com/story/sports/college/2013/05/10/college-athletic-department-revenue-database-methodology/2150123/.
[139] Harker, *supra* note 135.

Also, student-athletes as employees may jeopardize the history of the courts showing deference to athletics as a part of the universities' educational mission.[141] This could lead to a shift in policy at the Internal Revenue Service ("IRS"), who has exempted athletic departments from paying taxes on profits.[142] If student-athletes are considered employees by courts and the IRS, the profits generated by athletic departments may be classified as unrelated business income and subject to corporate tax rates of between 15-35% at the federal level alone.[143] However, the most severe tax consequences for athletic departments would be the elimination of tax-deductible contributions.[144] Contributions to athletic departments are the largest source of income for athletic departments.[145] In addition, any gift over $14,000 would be subject to the gift tax (up to 45%) and the donors would not be able to deduct the donation.[146] Lastly, tax-exempt bonds that are used to build athletic facilities may no longer be available to the universities.[147] All of these tax consequences would put an additional strain on the universities' total expenses and revenue.

Another potential cost that universities would incur is workers' compensation and unemployment insurance. As employees, the student-athletes would be eligible for workers' compensation claims for their injuries. Up to now, courts have ruled that student-athletes are not employees eligible for workers' compensation.[148] Adding upwards of 200 new employees

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[140] Ivan Maisel, *Paying Players Might Create Havoc*, ESPN.COM, July 15, 2011, http:// espn.go.com/college-sports/story/_/id/6768571/legal-issues-arise-paying-student-athletes.
[141] *Id.*
[142] *Id.*
[143] For the Record: *Student-Athlete/Athlete Employer: Tax Consequences, For Sure*, ANDERSEN TAX, Sept. 2014, http://www.andersentax.com/publications/newsletter/september-2014/student-athlete-athlete-employee-tax-consequences-for-sure.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *See* Waldrep v. Tex. Emp'rs Ins. Ass'n, 21 S.W.3d 692 (Tex. Ct. App. 2000) (holding a former TCU football player who was paralyzed while playing college football does not qualify for workers' compensation because he is not an employee of the university).

(student-athletes) would certainly burden the athletic departments who are already struggling to break even.

While it is true that some Division I football and basketball programs make a profit, the rest of the sports at the institution generally operate at a loss and use that profit to fund those other sports.[149] If the costs of the football and basketball programs increase, it is natural for the athletic departments to look to other sports to offset this cost. This could lead to less collegiate scholarship opportunities for men and women who do not play basketball or football in the form of fewer sports and/or less scholarships.[150] One may argue that the scholarship football players should not bear that cost of the entire athletic department but Congress has already done so by enacting legislation such as Title IX.

2. Costs to the Student-athletes

The first and most obvious cost to student-athletes will be the payment of union dues. Most unions across the United States charge between 1-3% of an employee's base salary.[151] Since the Northwestern players are estimated by Director Ohr to make up to $76,000 per year, the union dues would likely be in the range of $760 to $2,280.

Additionally, there will be tax implications for student-athletes if they are deemed to be employees under the Act. Section 117 of the Internal Revenue Code ("IRC") excludes from gross income any amount received by an individual through a qualified scholarship as long as the individual is a candidate for a degree.[152] The IRC provides that scholarships are not exempt from taxes for any amount received as payment for services the student provides as a

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[149] Connolly *supra* note 121.
[150] *Id.*
[151] Ben Casselman, *Closer Look at Union vs. Nonunion Workers' Wages*, WSJ.COM (Dec. 17, 2012, 3:40 PM), http://blogs.wsj.com/economics/2012/12/17/closer-look-at-union-vs-nonunion-workers-wages/.
[152] I.R.C., § 117(a) (2013).

requirement for the scholarship.[153] Again, Director Ohr found that Northwestern football players receive the equivalent of up to $76,000 annually.[154] Therefore, student-athletes would be facing a tax bill of between $8,000 and $10,000 from the federal government in addition to a smaller state tax bill.[155]

The question becomes: Can student-athletes afford the union dues and taxes they would be required to pay? The likely answer, especially from those from low-income families is "no." Some might say yes because they can bargain for higher wages. However, bargaining is a give and take so if the student-athletes want higher wages they would likely need to sacrifice in other areas which could be just as detrimental.

Third, the Title IX consequences of Director Ohr's decision may force many universities to cut back on the number of scholarships they offer and, therefore, the number of teams they carry. Title IX prohibits discrimination based on sex as it pertains to the participation in, receiving the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.[156] This federal law also has been applied to collegiate athletics.[157] A university will be found to violate Title IX if it ineffectively accommodates students' interests and abilities.[158] This "effective accommodation" test can be satisfied in two ways: (1) intercollegiate participation opportunities for men and women is not substantially proportionate to their respective enrollment, and (2) the interests and abilities of the

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[153] Id. at § 117(c)(1).
[154] Northwestern Univ., 13-RC-121359 *3 n.4 (Mar. 26, 2014).
[155] Connolly, *supra* note 121.
[156] 20 U.S.C.S. § 1681(a) (LexisNexis 2014).
[157] *See* 34 C.F.R. § 106.41(a) (2014); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608 (6th Cir. 2002) (holding that male athletes could not state a valid discrimination claim under Title IX when male sports programs were dropped for female programs because the university equalized athletic opportunities for both genders).
[158] Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993); *See also* Roberts v. Colo. Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993); Kelley v. Board of Trustees, 35 F.3d 265, 268 (7th Cir. 1994).

underrepresented sex are not effectively accommodated by present practices.[159] There are ten factors that the Director of Education will examine to determine if a university is providing equal opportunities to both sexes in athletics:

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; and (10) Publicity.[160]

The logical result of the Northwestern football players forming a union and bargaining for better wages and benefits would be the university ensuring that the female athletes received many of those same benefits, which would increase the university's financial burden because many schools have upwards of 200 scholarship athletes.[161] Lawsuits and adverse reactions from advocacy groups raising Title IX concerns would emerge all across the country if scholarship football players received better benefits than other student-athletes.[162] In fact, the President of the University of Delaware has noted that many schools, including his own, have had to trim varsity sports in recent years and if the costs go up even further, many schools will face pressure to cut back even more.[163] This financial burden on institutions will result in the elimination of entire sports and in less scholarship athletes and, therefore resulting in fewer opportunities for high school students to have their college education paid for based on their athletic ability.[164]

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[159] *Id.* at 897-898.
[160] 34 C.F.R. 106.41(c)(1)-(10) (2014).
[161] Connolly, *supra* note 121.
[162] *Hearing on: Big Labor on College Campuses: Examining the Consequences of Unionizing Student-athletes Before the H. Comm. on Educ. & Workforce*, 113th Cong. (May 8, 2014) (statement of Ken Starr, Pres. and C. of Baylor Univ.).
[163] Harker, *supra* note 135.
[164] Connolly, *supra* note 121.

The final, yet most important cost to student-athletes would be the decreased emphasis on the valuable education these young men and women are provided. It is true that some scholarship athletes find it difficult to balance schoolwork with the demands of playing a Division I sport when the scholarship obligates educational opportunity, but one can only imagine how difficult this would become if these athletes were being paid to play and perform at a high level.[165]

Part IV: Alternate Means to Effect the Changes Needed for Student-Athletes

Although, as a former student-athlete myself, I admire quarterback Kain Colter's resolve to effect change at Northwestern, the improvements he seeks will likely be stalled because of the NCAA and its regulation of Division 1 college athletics. I agree that scholarship student-athletes in all NCAA-sanctioned sports should receive guaranteed scholarships, medical benefits that extend past the student-athlete's playing career, and additional stipends based on demonstrated financial need. However, bargaining with Northwestern will not result in any of these changes that many student-athletes, including Colter, seek. Instead, since only 17 of the 120 Division 1 football schools are private, the change needs to come at the NCAA level since it regulates all of Division 1 athletics.

In fact, since Colter's attempt at unionization, there have already been major changes being made by the NCAA and its members. In April 2014, the NCAA approved unlimited meals and snacks for Division 1 athletes.[166] The NCAA also approved a measure to reimburse student-athletes' families for travel to see their student-athletes play in the Final Four or College Football

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[165] Harker *supra* note 135.

[166] Steve Berkowitz, *NCAA Increases Value of Scholarships in Historic Vote*, USATODAY.COM (Jan. 17, 2015, 11:05 PM), http://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073/.

Playoff.[167] The Big Ten now offers guaranteed four-year scholarships and the Pacific Athletic Conference (PAC-12) guaranteed scholarships and postgraduate healthcare benefits. [168] Additionally, 65 schools and 15 athlete representatives voted on January 17, 2015 to expand athletic scholarships to pay for items such as transportation and miscellaneous personal expenses.[169] All Division 1 schools have a Student-Athlete Advisory Committee (SAAC), which should be a forum for student-athletes to show solidarity and bring issues and concerns to the administration. Student-athletes and parents need to continue voicing their concerns to their coaches, institutions, conferences and the NCAA.

Part V: Conclusion

The holding in the *Northwestern* case needs to be overturned by the Board for the reasons given above. The reliance of many young men and women on college athletics to have an opportunity to receive a quality education should not be jeopardized with an employer/employee relationship. Although changes such as allowing players to profit off their likeness, extending medical benefits past college, and guaranteeing scholarships need to be made, private unionization against one of the hundreds of NCAA institutions will not be effective in bringing about those changes and will only hurt student-athletes in the long run. The players, their families, their coaches, and especially the institutions need to be proactive in approaching the NCAA about the changes listed above. However, a change in employee status will not result in a positive change for student-athletes.

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[167] *NCAA to pay for family travel for CFP, Final Fours under pilot program*, NCAA.COM (JAN. 6, 2015, 3:09 PM), http://www.ncaa.com/news/ncaa/article/2015-01-06/ncaa-pay-family-travel-cfp-final-fours-under-pilot-program.
[168] Michael Powell, *A Threat to Unionize, and Then Benefits Trickle In for Players*, N.Y. TIMES, Jan. 12, 2015, at B13, *available at* http://www.nytimes.com/2015/01/13/sports/ncaafootball/with-threat-of-union-comes-a-trickle-of-benefits-to-college-football-players.html?_r=0.
[169] *Id.*