UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

BRIEF OF *AMICI CURIAE*

BAYLOR UNIVERSITY,
RICE UNIVERSITY,
SOUTHERN METHODIST UNIVERSITY,
STANFORD UNIVERSITY,
TULANE UNIVERSITY,
UNIVERSITY OF SOUTHERN CALIFORNIA,
VANDERBILT UNIVERSITY, and
WAKE FOREST UNIVERSITY

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I. INTEREST OF AMICI

Amici are -- like Northwestern University -- private universities with athletic programs that include an NCAA Division I football program offering athletic scholarships. Thus, the Board's decision in this case immediately and directly affects each amicus university. Amici see the decision below as a flawed analysis of the Act.[1]

First. Student-athletes are students, not employees of their respective universities. Amici believe that athletics are and have long been recognized as an integral part of university education. The decision ignored the evidence that athletics, like other student activities, are a valuable and integrated part of the educational experience. Student-athletes at Northwestern -- and at these amici universities -- are *students* and their participation in a sport does not change that fact any more than does a student's participation in the student symphony, drama production, debate team or student newspaper. See below, pp. 2-8.

Second. Amici believe that there are serious, unintended consequences that will result from misclassifying student-athletes as employees under the Act (including potentially forfeiting NCAA eligibility, creating uncertainty regarding compliance with the gender parity mandates of Title IX, and infringing on the First Amendment guarantee of academic freedom) which require a determination that these individuals are not employees. See below, pp. 8-15.

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[1]In addition, these amici universities concur in and fully support the additional arguments made by Northwestern and other *amici* opposing coverage under the Act, including, but not limited to, the following: 1) that the burden to show coverage under the Act lies with Petitioner, not Northwestern; 2) that the decision of the Board in *Brown Univ.*, 342 NLRB 483 (2004) should not be modified or overruled; 3) that application of *Brown* results in the conclusion that those in the petitioned-for unit are primarily students; 4) that extending coverage to the student-athletes would not effectuate the purposes and policies of the Act; 5) that extending coverage to the student-athletes would have serious and negative impacts on the collegiate playing field; 6) that outside constraints weigh strongly against coverage under the Act; 7) that the common law employment test is not appropriate for students in the educational context; 8) that even if the common law test is applicable, it was misapplied below; and 9) that the petitioned for unit is inappropriate.

Third. Amici further believe that a determination by the Board that student-athletes are statutory employees will harm rather than advance any reform of intercollegiate athletics. Amici agree that reforms are needed but, as many commentators have made clear, those reforms should be made by the NCAA and conference governing boards, which are already underway, as are various legislative reforms. See below, pp. 15-18.

II. ANALYSIS

A. College Athletes are Students, Not Employees

1. College Athletics are an Integral Part of the University Educational Experience.

Contrary to the assumption in the Regional Director's decision, universities educate their students outside the classroom as well as inside. Northwestern and the amici universities are residential colleges where learning takes place in classrooms, residence halls, laboratories, student government, overseas experiences, volunteer opportunities, and in numerous other activities, including athletics. Northwestern's own Strategic Plan embraces precisely that shared vision: "Students learn best when they apply knowledge to life. They derive great value from academic activities that go beyond the classroom"; and Northwestern embraces diversity and expresses "our community spirit through shared activities and events in the arts, athletics, and academics as both participants and spectators". *Northwestern University Strategic Plan*, pp. 10, 11 (2011), http://www.northwestern.edu/strategic-plan/docs/strategic-plan.pdf.

Simply stated, these activities, including intercollegiate sports, are not services rendered by employees. They are a designed element of a holistic university education. This has been a longstanding tenet of educational philosophy tracing back to the Roman poet Juvenal, whose phrase *mens sana in corpore sano* ("a sound mind in a sound body") encapsulates the logic for athletics in academia. 2 Juvenal & Persius, *A New and Literal Translation of Juvenal and*

Persius 42-43 (Rev. M. Madan trans., T. Tegg 1829). But, recognition of that logic is certainly not limited to classical sources.

Universities consciously include intercollegiate athletics in campus life because athletics provide students with a type of education that cannot be gained in the traditional classroom, and moreover is a proper and long recognized activity within universities' traditional missions.

- College faculty understand that coaching is teaching. Drake University Professor Craig Owens was so impressed with the teaching he observed in the women's basketball team (which he describes as engaged participation, collaboration, Socratic dialogue, and problem-based learning) that he was inspired to start a "Coaching in the Classroom" initiative designed to replicate it in his department's classrooms. Owens, *Bringing the Locker Room Into the Classroom*, The Chronicle of Higher Education (Apr. 7, 2014), http://chronicle.com/article/Bringing-the-Locker-Room-Into/145761.
- Graduate schools favor college athletes in part for lessons learned through sports. For instance, a graduate business school admissions officer (who served at the University of Virginia, the University of Pennsylvania, and Northwestern University) points out that college athletes make the ideal candidates for graduate business schools because "they were confident, team-oriented and had the interpersonal skills to do well in a corporate environment." Shulman & Bowen, *The Game of Life: College Sports and Educational Values,* at p. 91 (Princeton University Press 2001).
- College athletes acknowledge to having been taught much through sports. Secretary of Education Arne Duncan (co-captain of the basketball team at Harvard) offers a short summary of that education: "Student athletes learn lessons on courts and playing fields that are difficult to pick up in chemistry lab... [r]esilience in the face of adversity,

selflessness, teamwork, and finding your passion..." Duncan, *Let's Clean Up College Basketball and Football*, Home Room (Jan. 2010), http://www.ed.gov/blog/2010/01/lets-clean-up-college-basketball-and-football. Former Senator and Princeton All-American Bill Bradley likewise details lessons learned playing college basketball with an entire book dedicated to the subject. Bradley, *Values of the Game* (Crown Business 1998).

It is also apparent that participation in professional sports is not central to most student-athletes. Contrary to common perception, few student-athletes turn pro. For all Division I football student-athletes, less than 2% are drafted by the NFL. http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school. Even among those who student-athletes who reach the NFL, careers tend to be short.[2] Given those statistics, the educational benefit is inescapably the critical factor for virtually all college football student-athletes.[3]

The decision below makes much ado about the lack of professorial titles for coaches and that Northwestern does not give degree credit for athletes.[4] *Nw. Univ. Employer & Coll. Athletes Players Ass'n*, 2014 WL 1246914, at *17 (Mar. 26, 2014) (hereafter "RD Decision"). The suggestion that the absence of academic credit at Northwestern for participation in athletics supports the notion that athletics cannot be education flies in the face of reality. Education is provided in many places at amici universities. Whether a student is working in a lab, volunteering in a homeless shelter, competing on the debate team, playing in the band or orchestra, or writing for the student newspaper, that student gains a valuable educational

[2] While precise numbers are hard to come by, the NFL Players Association has estimated that the average career of an NFL player is approximately 3.5 seasons. NFL Players Association, *NFL Hopeful FAQ's. https://www.nflplayers.com/About-us/FAQs/NFL-Hopeful-FAQs/.*

[3] Even among those who eventually rise to the highest levels in sports, there are numerous examples of individuals putting their education first and graduating. Perhaps the most well-known example is Andrew Luck, who decided to forego a likely first overall selection in the 2011 NFL draft so that he could graduate on time and walk with his class.

[4] The practice among amici is mixed. Some give academic credit for participation in sports, some do not.

experience even if there are no grades or credit given and someone without the title "professor" oversees that learning.[5] As demonstrated above, athletics is widely viewed as an integrated component of education. Indeed, as discussed above on pages 3-4, there is a wealth of published information demonstrating that athletics has an important and direct academic purpose. The essence of academic freedom is for each university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study..." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). How Northwestern teaches in its football program, whether it grants student-athletes academic credit for their effort and whether it gives professorial titles to the football coaches are all part of those "four essential freedoms" guaranteed to every university under the First Amendment. *Id.* The NLRB cannot decide for itself what aspects of a university education are and are not "true" education.

2. Scholarship Football Student-Athletes are not Employees Under the Common Law Test

As Northwestern has noted, the common law test (also known as the "Master-Servant" test) is not the correct test for the academic setting. [*See,* Northwestern's Brief to the Regional Director, at pp. 51-52] Yet, even assuming for the sake of argument that the common law test is appropriate, the decision below was wrong to conclude that student-athletes are common law employees. Particularly striking in the Region's Decision below was the lack of any analysis of the common law test as applied by common law courts. Those courts have long held that student- athletes are not employees under the common law test. E.g., *Waldrep v. Texas Employers Ins. Ass'n*, 21 S.W.3d 692 (Tex. App.—Austin, 2000, pet. denied) (student-athlete

[5]For example, many university band programs and debate programs are overseen by directors who do not teach other courses. Some but not others of those programs provide scholarships or other grants to students conditioned upon participation in those activities and some but not others provide elective academic credit for participation. Similarly, some, but not all, universities have endowed chairs for their coaches and athletic directors that resemble endowed faculty positions.

was not employee of college because letter of intent and financial aid agreement did not constitute a contract for hire); *Shephard v. Loyola Marymount Univ. et al.*, 102 Cal.App.4th 837 (2002) (scholarship athlete was not employee and, thus, could not press race discrimination and breach of contract claims for school's decision not to renew her scholarship); *State Compensation Ins. Fund v. Industrial Comm'n of Colo.*, 314 P.2d 288 (Colo. 1957) (student attending school under athletic scholarship is not "employee"); *Korellas v. Ohio St. Univ.*, 779 N.E.2d 1112 (Oh. Ct. Cl. 2002) (scholarship athlete not "employee" of university); and *Kavanagh v. Trustees of Boston Univ*, 795 N.E.2d 1170 (Mass. 2003) (scholarship basketball student-athletes was not employee nor even an agent of the university).

Under the common law definition, an employee is a person who performs services for another under a contract for hire, subject to the other's control or right of control, and in return for payment. *Brown Univ.*, 342 NLRB 483, 490, fn. 27 (2004) (citing *NLRB v. Town & Country Electric*, 516 U.S. at 94 (1995)).

a. Athletic Scholarships are Not Payment for Services Performed

Northwestern made detailed arguments in its brief as to why it believes that the student-athletes in issue do not meet the common law definition of employee, even assuming for argument sake that such is the appropriate standard. Amici agree with and adopt those arguments. However, we would like to point out a few additional things.

In applying the "in return for payment" prong of the test, the decision below incorrectly characterizes the scholarship tender as consideration for "football services" performed. It is not. In fact, like a debate scholarship, music scholarship, or other academic scholarship, an athletic scholarship is financial aid, administered by the office of financial aid, to attend the university and is subject to ongoing academic eligibility requirements and, as applicable, continued participation in that activity. Repeatedly and explicitly, the athletic scholarship tender addresses

the recipient's academic obligations by requiring the recipient to complete all academic requirements for admission at the school and to maintain eligibility, which -- of course -- includes the NCAA rules on academic qualifications both for admission and for degree progress. And like other financial aid (but unlike compensation paid to actual employees), athletic scholarships are not paid in cash and allow recipients only to use the funds for tuition, room and board and educational expenses. Contrary to suggestions elsewhere, the scholarship tender is not a contract for a side job for college students; academics is an inseparable component in the equation for collegians playing sports.

Also difficult to justify is the Region's false dichotomy between scholarship student-athletes and walk-on's, a conclusion supported solely by the fact walk-ons do not receive athletic scholarships. From an employment perspective, however, this makes no sense. Walk-on student-athletes often receive financial aid scholarships or other merit based scholarships from the same "employer" (and sometimes in amounts greater than those received by scholarship student-athletes). Moreover, a scholarship student-athlete and a walk-on student-athlete may put in identical hours, attend the same practices, ride the same bus to games, and play the same minutes in each game. Yet only one is an employee? Nothing in employment law or in logic is advanced to justify that distinction without a difference because there is no justification—neither scholarship student-athletes nor walk-on student-athletes are employees.

b. The Region's Reliance on Revenue Generated by Northwestern's Football Program Is Misplaced.

Amici also note that the Region's reliance on the revenue generated by men's football is merely a misleading optic with no analytic value. Income or revenue for the putative employer does not prove employment any more than lack of income disproves employment. Similarly, public preference for college football has no place in an analysis of employment status. That the

American public chooses to watch (and networks choose to cover) intercollegiate football, but not intercollegiate wrestling, is irrelevant to any reasoned analysis of employment status.

c. The Region's Analysis of the Time Spent on "Football Activities" is Flawed, and in Any Case Irrelevant.

The Region's determination that the student-athletes in issue were "primarily employees" is based solely on the finding that they spend more time on "football duties" than they spend on their "studies." RD Decision at.18. However, the Region's reliance on the amount of time that football student-athletes spend on football activities is misplaced. First and foremost, as argued above these is no rational basis for distinguishing between hours spent in the Chem lab, band practice, or the football field as they are each integral parts of the educational process. In any event, this statistic is particularly misleading given the Region's lack of any citation to the record demonstrating that the time commitment of those scholarship football student-athletes exceeds the time commitment of non-scholarship athletes in that sport or the time commitment of fellow students in other educational activities outside the classroom. Countless other students at Northwestern and the amici universities spend enormous amounts of time participating in activities such as music, drama, debate, student government, and leadership in student organizations.

B. Labeling Student Athletes As Employees Is Counterproductive

The Supreme Court has held that the term "employee" cannot be determined in a vacuum when attempting to apply the Act to universities; its admonition that "principles developed in the industrial setting cannot be imposed blindly on the academic world" is especially apt here. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 681 (1980). Here the proposed extension is contraindicated on at least three separate levels.

1. The Impact of Wage Payment Laws

According to the Region's analysis, student-athletes are employees in part because their scholarship is compensation. RD Decision at *14 ("players receiving scholarships to perform football-related services for the Employer under a contract for hire in return for compensation are subject to the Employer's control and are therefore employees within the meaning of the Act"). If so, their status as nonemployees under other federal and state laws (*e.g.*, the Fair Labor Standards Act) is at risk; certainly, it is beyond the authority of the Board to say that these individuals are employees under the National Labor Relations Act but forbid other courts and agencies from relying on its decision or reaching a similar conclusion with respect to other statutes.[6] That, however, is where the unintended consequence occurs.

State laws uniformly mandate that "employees" must be paid in cash or negotiable instrument. 820 ILCS 115/4; ("All wages and final compensation shall be paid in lawful money of the United States"); 29 C.F.R. § 531.26 ("Various Federal, State, and local legislation requires the payment of wages in cash"). Northwestern's student-athletes (and all NCAA

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[6] Under the Fair Labor Standards Act ("FLSA") and other wage payment statutes, the definition of "employee" includes not only all common law employees but also some who may not even meet that definition. The FLSA, for example, "defines the verb "employ" expansively to mean "suffer or permit to work." 52 Stat. 1060, § 3, codified at 29 U.S.C. §§ 203(e), (g) [which] stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mutual Ins. v. Darden*, 503 U.S. 318 (1992) (reviewing definitions of "employee" in order to establish the definition of that term under ERISA). See also, Burry, *Testing Economic Reality: FLSA and Title VII Protection for Workfare Participants.* U. CHI. LEGAL F. 561, 567-568 (2009) ("courts have consistently interpreted FLSA as carrying a broader definition of "employee" than Title VII. To make categorical comparisons between FLSA and Title VII, however, FLSA's economic reality test must be broader than Title VII's common law agency test in all cases, such that the latter is subsumed by the former....That is, if one has not been "permitted or suffered to work" by another, then they cannot be an agent either"). Of course, a court interpreting a wage statute may choose to disregard a decision of the Board if it feels that it was wrongly decided. However, it would be folly to assume that deference to the Board's determination will not be urged by the party benefiting from such a determination.

student-athletes) are not paid in cash or check but are paid with minor exceptions[7] in a form made illegal by these statutes: *i.e.*, credit toward tuition, housing, meals and other educational expenses. 29 C.F.R. § 531.26. If its football student-athletes are found to be employees for the purposes of state law, Northwestern may well be required to comply with this Illinois law and pay each the full value of their scholarship in cash or check, without limitation or condition, which each could then spend as he saw fit.

Doing what Illinois law may require, (payment by check, without preconditions or limitations) however, creates a grave risk that some student-athletes may in fact spend a portion of his money (which as an employee he is fee to spend as he sees fit) for some purpose other than those allowed by NCAA rules and thereby become ineligible to play college football. NCAA Bylaw 12.1.2 requires that "An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual (a) Uses his or her athletics skill (directly or indirectly) **for pay in any form** in that sport...." (emphasis added). NCAA Division I Manual, Article 12.1.2.

This, of course, explains why CAPA in its brief to the Regional Director staked out a position that is anomalous for a bona fide labor organization by forswearing any collective bargaining over compensation -- "CAPA will not jeopardize the Players' eligibility by bargaining compensation not permitted by National Collegiate Athletic Association rules." Post Hearing Brief of Petitioner College Athletes Players Association, p. 1. Yet, foreclosing continued eligibility is an unavoidable consequence which flows regardless of bargaining; CAPA simply cannot excuse Northwestern from its obligation should Illinois follow suit in deeming scholarship football student-athletes under this Illinois law nor its obligations to pay the

[7] Upperclassmen who choose to live off campus may be given a stipend of between $1200 and $1600 per month in lieu of room and board to cover living expenses. RD Decision at 3.

minimum wage if its scholarship football student-athletes are deemed to be employees under the Fair Labor Standards Act. *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 713 (1945) (employer's FLSA obligations cannot be waived); *O'Brien v. Encotech Constr. Serv. Inc.*, 183 F.Supp.2d 1047, 1052 (N.D. Ill. 2002) (same, as to Illinois minimum wage law).[8]

While Northwestern could withdraw from the NCAA to avoid that result, that withdrawal is equally fatal. Without membership, Northwestern would be left with no schools to compete against. Withdrawal from the NCAA results in immediate cessation of membership rights and privileges, including participation in bowl games or other championships and even competition against other NCAA schools. NCAA Division I Manual, Article 3.02.3.1. Thus, a decision that these Northwestern football student-athletes are employees could simultaneously be a decision that those same student-athletes are ex-employees.

2. The Impact On Title IX Compliance

Equally problematic is the uncertainty over the potential impact of employee status on Title IX's equality mandate. 34 C.F.R. § 106.41(c) (a school "which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes"). While there are exceptions, Title IX generally requires proportionality in participation (at percentages matching student population) and in athletically-related financial assistance (at percentage matching actual participation in sports by men and women at each school). Title IX is built on the notion of equality of opportunity for men and women student-athletes. Thus a finding that some scholarship student-athlete men are employees, while all student-athlete women are not employees, will greatly complicate efforts by

[8]There could obviously be other unintended consequences outside of wage payment laws. For example, if these statutes require paying student athletes, there will be income tax obligations; schools may also be saddled with worker's compensation insurance costs. Moreover, it is possible that ERISA may require participation under the university's retirement plans.

colleges to comply with Title IX and could have unintended adverse consequences for scholarship student-athletes in sports other than football.

If scholarship football student-athletes are determined to be employees for purposes of the Act, and through collective bargaining receive greater benefits for themselves, the proportionality mandate of Title IX will require that colleges either increase the benefits to female student-athletes proportionately, or decrease the benefits provided to male student-athletes in other sports. Depending on the extent of the additional benefits obtained by the unionized football student-athlete "employees," universities may be required to do both: decrease the number of scholarships in other male sports and increase the benefits provided to female student-athletes.

Determining exactly how universities might respond to such a situation is complicated by the fact that at present, at many universities, it is the revenue sports (football and men's basketball) that contribute toward the funding of the nonrevenue sports (which includes all women's sports). Hearing on Unionizing Student Athletes: Hearing Before the H. Comm. on Educ. & the Workforce, 113th Cong. (2014) (statement of Bernard Muir, Stanford University athletic director, describing football and men's basketball revenues: "All the money that the university receives from these two sports is used to support the overall athletic program, including the 87 percent of our student athletes who participate in those other 34 sports"). Indeed it has been reported that in the past year, only 23 out of 1,100 NCAA member schools had a positive cash flow from athletics. *See*, Louanna Simon and Nathan Hatch (Presidents of Michigan State and Wake Forest respectively), *Why Unionizing College Sports Is A Bad Call,* The Wall Street Journal (April 7, 2014), http://online.wsj.com/news/articles/SB10001424052702304441304579480013097853156.

Accordingly, the Board also should decline to classify scholarship football student-athletes as employees because doing so would undermine the very purposes of Title IX. Indeed some commentators have explicitly decried the covert sexism embedded in the so-called "employee solution." Professor Deborah Brake protested this plainly: "The 'employee solution' to the exploitation of college athletes is reserved for men ..." Brake, Getting In The Game: Title IX and the Women's Sports Revolution, p. 162 (NYU Press 2012). Others concur. Parasuraman, Note, Unionizing NC Division I Athletics: A Viable Solution?, 57 DUKE L.J. 727, 750 (2007) ("unionization of college athletes could reduce university athletic departments to a handful of teams--that is, men's basketball, football, and the lucky women's programs salvaged for Title IX compliance"). No commentators suggest that unionization portends any upside for women's equality in college athletics.

In any event, since the reclassification of male student-athletes as employees will create uncertainty over the Department of Education's regulatory scheme for implementing the Congressional command in Title IX to eliminate sex discrimination in intercollegiate athletic programs, this is one of those rare situations where other Congressional enactments limit the NLRB: "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (reversing NLRB for overriding federal mutiny statute); see also, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) (listing cases where the Supreme Court reversed NLRB decisions that "trench upon federal statutes and policies unrelated to the NLRA").

3. The Impact Of The First Amendment

Where, as here, extending coverage of the Act entails First Amendment problems, there is an applicable canon from Supreme Court jurisprudence that ought to be followed: "[I]n the absence of a clear expression of Congress' intent to bring [the group at issue] within the jurisdiction of the Board, we decline to construe the Act in a manner that could, in turn, call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment ...." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (holding Act must be construed to exclude high school seminary to avoid First Amendment entanglements).

" [U]niversities are fundamentally different from business corporations, government agencies, or churches." Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251, 252 (1989). Because of this, attempting to apply the Act to student-athletes is the first step into a quicksand pit. This is equally true of teams for student-athletes who never seek representation as well as for those who do.

Consider the consequences of employee status in a **nonunion setting**. For example, the strictures of Section 8(a)(2) foreclose employers from dealing with appointed or elected representatives of "employees" in the absence of a bona fide labor organization. Yet, that happens every day in collegiate sports. At Northwestern, Coach Fitzgerald sanctions elections where the team picks their captains because, in Fitzgerald's words, "it's important for the players to have their voice heard." *Northwestern Selects Four 2012 Team Captains*, Northwestern Wildcats (Aug. 24, 2012), http://www.nusports.com/sports/m-footbl/spec-rel/082412aac.html. True, but also a classic unfair labor practice: when management creates a process for electing representative employees to voice concerns with management, it is violating Section 8(a)(2). *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959) (employer violated Act by dealing with elected employee representatives).

Consider separately the consequences of employee status in a **union setting**. Were teams of student-athletes to choose union representation, the problems would be even more intractable. Since academic success (as defined by the NCAA: see fn. 3, above) is a condition precedent to keeping a scholarship in intercollegiate football, finding that a football scholarship is an employment contract means that each aspect of the educational process is a term and condition of employment and hence a mandatory subject of bargaining. This, of course, is incompatible with basic academic freedoms (see pp. 4-5 above) and cannot be ameliorated by what CAPA chooses to raise or not raise at the bargaining table. Because Section 8 (a)(5) prohibits unilateral changes in in these terms and conditions, changes to fundamental academic processes such as class scheduling, the rules to drop and add courses, and the required GPA to continue as a student (and possibly even other more fundamental academic processes) would require advance notice and (upon request) bargaining on the part of the university.

There is of course, no clear mandate in the Act for extension of the Act's processes to the university/student-athlete relationship. In this circumstance, where imposing the Act's mandates onto that relationship would require resolving difficult and sensitive questions arising out of the guarantees of the First Amendment, the "clear expression" rule applies and the Board should decline to interpret the Act in such a manner.

C. Collective Bargaining Can Not Aid Reform

Before engrafting collective bargaining onto college athletics, the Board needs to consider the medical maxim – "first do no harm." There is much that might be improved in college athletics, but thrusting student-athletes into the NLRA's adversarial system designed to equalize bargaining power is not the solution Even the legal analysts who are most vocal in delineating problems in intercollegiate athletics do not recommend collective bargaining as a solution. Davis & Malagrinò, *The Myth of the "Full Ride": Cheating Our Collegiate Athletes*

and the Need for Additional NCAA Scholarship-Limit Reform, 65 OKLA. L. REV. 605, 613 (2013); Mitten et al., *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 801 (2010); Parasuraman, Note, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 740-41 (2007); and Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should be Paid*, 3 VA. SPORTS & ENT. L.J. 226 (2004).

There is already significant reform underway in the NCAA and in the conferences. For example, the Presidents of the PAC-12 universities have signed a letter calling for a ten point reform and urged other conferences to join in urging the NCAA to adopt these reforms, which the Big 10 has now joined. http://www.nytimes.com/2014/06/25/sports/ncaafootball/big-ten-joins-pacific-12-in-pressing-ncaa-for-changes.html?_r=0 Unlike the Board (which can directly affect at most only the 17 private schools out of the 125 that play Division I football in the NCAA's FBS division), these reforms can reach all 125 of those universities – public and private in order to ensure that there is uniformity and fairness in the treatment of all college student-athletes and among the competing schools.

Given all this, the Board should hand off the ball and decline jurisdiction over college athletics, as it has, for instance, over the horse and dog racing industries. 29 U.S.C. § 164(c); 29 C.F.R. § 103.3. Exercising that discretion would *inter alia* permit a more reasoned and universal solution which will hasten rather than slow needed reforms.[9]

There are admittedly significant amounts of money coming to colleges and universities from media contracts, ticket sales and other sources. However, a significant dollar volume does not require the Board to assert jurisdiction. *New York Racing Ass'n Inc. v. N.L.R.B.*, 708 F.2d 46,

[9]Any anticipation that the NLRB's assertion of jurisdiction over student athletes could be a "disruptive innovation" that provokes broader reform is illusory. Harvard historian Jill Lepore explains that disruption theory not only is based on distorted readings of "handpicked case studies" and built on "circular logic" but also -- and critically -- "doesn't explain change [and thus] makes a very poor prophet." Lepore, "The Disruption Machine", *The New Yorker*, pp. 30 – 36 (June 23, 2014).

47-48 (2d Cir. 1983) confirms that precise point. There, the Second Circuit affirmed the Board's decision to decline jurisdiction over horse racing, even though "[t]here is no dispute that the Racing Association's activities affect interstate commerce and generate hundreds of millions of dollars of gross income."

Although there are obvious differences between professional horse racing and intercollegiate athletics, the similarities make declining jurisdiction equally appropriate here. First, like individuals in the horse racing industry, college athletes' careers are "sporadic and short term, marked by high turnover." Second, in both there are already significant layers of regulation in place (*e.g.*, Title IX; NCAA rules; and conference rules). Plus, recent Congressional action may portend even more legislation. *Hearing on Unionizing Student Athletes: Hearing Before the H. Comm. on Educ. & the Workforce*, 113th Cong. (2014) (statement of Representative John Kline: "We share the concerns of players that progress is too slow but forming a union is not the answer"); *see also*, National Collegiate Athletics Accountability Act, H.R. 2903, 113th Cong. (1st Session 2013) (pending in committee and proposing to change current law by, *inter alia*, forcing universities to forfeit funding under the Higher Education Act of 1965 as long as the NCAA maintains its rules forbidding pay to college athletes) and Collegiate Student Athlete Protection Act, H.R. 3545, 113th Cong. (1st Sess. 2013) (proposed bill directing institutions that generate a specified amount of income from athletic program media rights to provide certain academic resources and health-related information and benefits to its student-athletes).

The NLRB should apply the cardinal principle of judicial restraint, that "if it is not necessary to decide more, it is necessary not to decide more." *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part) (internal citations omitted).

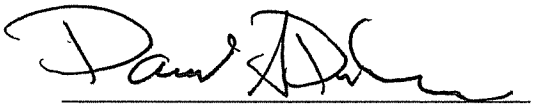
Here too, it is unnecessary to decide today whether student-athletes are employees or not as this is an area over which the Board can and should decline to assert jurisdiction.

III. CONCLUSION

Here, the Board has ample reason to decline jurisdiction. It should do so.

If the Board decides the issue, it should hold that Northwestern's scholarship football student-athletes are not employees within the meaning of the Act. Instead that intercollegiate student-athletes are *students* who study, graduate, and leave campus with the additional educational benefits acquired from their involvement in sports.

Respectfully submitted,



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PROOF OF SERVICE

I, Tomika Thomas, declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is DLA Piper LLP (US), 555 Mission Street, Suite 2400, San Francisco, California 94105-2933. On July 3, 2014, I served a copy of the within document(s):

Northwestern University's Brief to the Board on Review of Regional Director's Decision and Direction of Election

by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 3, 2014, at San Francisco, California.

Tomika Thomas