UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,	)	
	)	
Employer,	)	
	)	
and	)	Case 13-RC-121359
	)	
COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA),	)	
	)	
Petitioner.	)	

REPLY BRIEF FOR PETITIONER COLLEGE ATHLETES PLAYERS ASSOCIATION

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The briefs of *amici curiae* that are cited in this reply will be identified as follows:

American Federation of Labor and Congress of Industrial Organizations	AFL-CIO Br.
Major League Baseball Players' Association, National Hockey Players Union, Major League Soccer Players Union, National Football League Players Association, and National Basketball Players Association	Players' Assns. Br.
Hausfeld LLP	Hausfeld Br.
Sports Economists and Professors of Sports Management	Sports Econ. Br.
American Association of University Professors	AAUP Br.
Labor Law Professors	Law Prof. Br.
Alexia M. Kulweic	Kulweic Br.
National Collegiate Athletic Association, *et al.*	NCAA Br.
Big Ten Conference, Inc.	Big Ten Br.
National Association of Collegiate Directors of Athletics, *et al.*	AD Br.
American Council on Education, *et al*.	ACE Br.
Association for the Protection of College Athletes	APCA Br.
University of Notre Dame, Trustees of Boston College and Brigham Young University	Notre Dame Br.
Baylor University, *et al.*	Baylor Br.
Higher Education Council of the Employment Law Alliance	HEC Br.
Members of the Senate Committee on Health Education Labor and Pensions and the House Committee on Education and the Workforce	Members' Br.

INTRODUCTION

Northwestern and its *amici* do not show error in the Regional Director's findings that the players work long hours under close supervision in service to Northwestern's multimillion dollar football business, in return for scholarships which they receive only as long as they are willing to perform football services. Those findings establish that the players are employees under the Act, notwithstanding the contention of Northwestern and its *amici* that common law employees cannot be statutory employees if they are "primarily students." That contention is based on cases that address student work performed as *part and parcel of academic programs*, such that collective bargaining would intrude on institutional academic decisions. Those cases are dubious precedents. But even if we were to assume they were rightly decided, they have no application to football services, which are unrelated to the players' academic programs. Indeed, the attributes of the football program that Northwestern and its *amici* tout as "educational" – team work, character building, and meeting responsibilities – are attributes of *employment.*

According to Northwestern and its *amici* who oppose allowing the players to exercise rights under the NLRA, the Director's determination that the players have the right to bargain over the terms and conditions of their football work means that the sky is falling. It is not, and there is no justification for depriving the players of their NLRA rights. Northwestern is part of a massive commercial enterprise, generating billions in revenue and priceless publicity for universities. Many non-players share in the fruits of the players' labor, including coaches and administrators. Head coaches, like Northwestern's Patrick Fitzgerald, often are the highest compensated employees of their universities, paid millions in salary and benefits. Self-serving statements of lofty purpose by Northwestern, other universities, the NCAA and interest groups

that support them do not establish that a football business like Northwestern's is or should be immune from collective bargaining under the Act.

Northwestern and its *amici* have enormous self-interests in maintaining the system whereby the universities, coaches and athletic directors, the NCAA, and others – who do not risk concussion and other injury – share multi-millions in revenue generated by the players' labor. It is not surprising that they propound the notion that the so-called "student-athletes" who generate those massive revenues must be "protected" from the NLRA rights afforded other workers; as commentators have observed, "[t]he NCAA purposely created the term 'student-athlete' as propaganda, solely to obscure the reality of the university-athlete employment relationship and to avoid universities' legal responsibilities as employers [and in] the ensuring fifty years, the NCAA, colleges, and universities have profited immensely from the vigorous defense and preservation of this myth." Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 Wash. L. Rev. 71, 86 (2006).

Players want to be heard by those who control their working conditions, and as employees they have the right to bargain over the terms and conditions under which they work, even if recognition of that right is inconvenient for, or philosophically disagreeable to, or adverse to the economic interests of their employer.

ARGUMENT

I. THE PLAYERS ARE EMPLOYEES

The record supports the Director's findings that establish that the players are employees under the common law: the players perform services for Northwestern under Northwestern's

control, in return for payment. *See* CAPA Br. 9-21. To the extent that Northwestern and its *amici* argue otherwise, their contentions are refuted by the record.[1]

A. The Record Supports the Director's Findings As to Employee Status.

1. Unable to show that the players devote *less* time to football than to academics, Northwestern now contends that the time spent on football is "*no greater than*" the time spent on academics, and faults the Director for supposedly overstating the time the players must devote to football. NU Br. 12. An individual who spends as much time on academics as on work – or even *more* time – can be a statutory employee, so Northwestern's critique is beside the point. Employee status is not based on a percentage test. In any event, the Director's findings are supported by Kain Colter's testimony, which was uncontroverted, and by a wealth of other evidence, including the schedules prepared by the coaching staff.[2] *See* CAPA Br. 14-15.

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[1] Northwestern's contention that the Director erroneously required it to satisfy a burden of proof on those matters, NU Br. 13, is without merit. Where an employer argues that an individual is not a statutory employee because he falls into some other category – here, "primarily a student" – the employer has the burden of establishing the exclusion. *See, e.g., BKN, Inc.*, 333 NLRB 143, 144 (2001) (in determining whether an individual is a statutory employee or an independent contractor, "the party asserting that an individual is an independent contractor has the burden of establishing that status"). But the issue is moot, because the Director found that the evidence affirmatively establishes employee status. CAPA therefore prevails regardless of who has the burden of proof.

[2] The NCAA incorrectly asserts that Colter's testimony was controverted by witnesses Pace, Bartels and Ward, who supposedly "testified … that football-student athletes spend more time on academics than athletics, both because of existing NCAA rules and of Northwestern's stringent application of those same rules." NCAA Br. 4 n.2. They gave no such testimony. None said one word about how the amount of time spent on athletics compared to the time spent on football, or about NCAA rules, or about the extent of Northwestern's compliance with those rules. *See* Tr. 1215-1256 (Bartels), 1257-1292 (Pace), 1292-1328 (Ward).

As for the NCAA time-reporting rules, Northwestern admits that they ignore the amount of time actually spent by players on game days. *See* NU Br. 12 n.9. But Northwestern fails to acknowledge other respects in which the NCAA rules ignore services performed by the players, including, for example, the 50-60 hours per week that the players devote to mandatory duties

Nor did the Director err in recognizing that what Northwestern characterizes as "voluntary activities," NU Br. at 12, are part of the players' jobs. *See* CAPA Br. 15-16 and n.9. And, although Northwestern and its *amici* continue to maintain that the receipt of a football scholarship while a player is injured or benched is inconsistent with employee status, the professional Players' Associations confirm that similar protections exist in professional sports. *See* Players' Assns. Br. 22-24; CAPA Br. 19 n.13.

2. Northwestern is wrong in suggesting that players are free to neglect their football duties when that would enhance their academic endeavors. *See* CAPA Br. 16-17. That the coaches make efforts to reduce conflicts between class schedules and football duties does not change the fact that where there *is* a conflict, football comes first. Coach Fitzgerald, as well as other witnesses, admit that the football schedule determines what classes a player is "*allowed*" to take, CAPA Br. 16; and the evidence shows that the players' obligations to the football program are fully in the nature of a *job*, on which the players' compensation depends. As Northwestern Associate Athletic Director Brian Baptiste testified, if a player "just refused to go to practice" or "decided, I'm going to skip some games," Northwestern would consider "that that individual has voluntarily withdrawn from the team; and, therefore, there's a reason for the institution to cancel their athletic aid." Tr. 577:12-24.[3]

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during the August training camp. Tr. 514:13-17 (Baptiste). In faulting the Director for supposedly "ignor[ing] the fact that the academic year is more than twice as long as the football season," NU Br. 12, it is Northwestern that ignores the fact that the players' football duties are not confined to the *academic* year but extend throughout the entire *calendar* year. *See* CAPA Br. 4-6.

[3] As we have explained, CAPA Br. 16-17, to the extent that the coaches sometimes make limited scheduling accommodations, so do other employers. For example, in *Kendall College*, 228 NLRB 1083, 1087 (1977), *enfd*. 570 F.2d 216 (7th Cir. 1978), the Board noted that in determining the times when a faculty member would be required to conduct classes, the college

3. Upholding the Director does not mean that students who engage in other extracurricular activities must be employees. It may well be that other student activities fit the model posited by Northwestern of a world in which academics comes first and students are free to devote as much or as little time to an extracurricular activity as they may choose. Where that is the case, although the activity may have some value to the university, *see* Members' Br. 4-6, students participating in it are not *providing services to the university under the university's control* within the meaning of the common law test.

In this respect, the profit-seeking nature of football programs at schools like Northwestern is significant. The amount of money at stake is staggering, and schools run these programs on the model of a commercial enterprise. *See* CAPA Br. 7, 13-14; Sports Econ. Br.; Law Prof. Br. 11-17; Hausfeld Br. 10-12. Although the record does not contain evidence regarding other extracurricular activities, it should come as no surprise if players whose services are crucial to the realization of Northwestern's huge football profits have, with respect to those services, a relationship with the University that is far different from that of students who participate in other kinds of activities.

B. No Additional Finding of a "Contract of Hire" Is Required.

Amicus HEC argues that even where an individual performs services for another under the other's control and for payment, employee status cannot be found unless there has been "a 'hiring' in which the 'hiring party' engages the 'hired party' to perform work." HEC Br. at 9. That is incorrect; the common law does *not* "impose … 'hire' requirements as pre-requisites to employee status." *Hubbard v. Henry*, 231 S.W.3d 124, 129 (Ky. 2007). *See* CAPA Br. 9 n.3.

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had a practice of "accommodat[ing]" a faculty member's "outside employment" and "personal problems or predilections."

In the cases cited by HEC, litigants sought to establish employee status by addressing the factors listed in the Restatement of Agency that serve to distinguish an employee from an independent contractor. *See O'Connor v. Davis,* 126 F.3d 112, 115 (2d Cir. 1997). Because compensation is a characteristic of both contractors *and* employees, it is not listed as a differentiating factor. The cases cited by HEC merely recognize that compensation is an "essential condition" of employee status even though it also is an attribute of contractor status. *Id. See also Kemether v. Pa. Interscholastic Athletic Assn.,* 15 F. Supp. 2d 740, 758-59 (E.D. Pa. 1998) (following *O'Connor*) (rejecting employee status due to absence of compensation); *Graves v. Women's Prof'l Rodeo Assn.,* 907 F.2d 71, 73 (8th Cir. 1990) (cited in *O'Connor*) (rejecting employee status because "[c]ompensation … is an essential condition to the existence of an employer-employee relationship").[4]

The Director correctly found that Northwestern's scholarship football players *do* receive compensation for their services. *See* CAPA Br. 7, 18-21. The Director thus made all of the findings that the cases cited by HEC would require.[5] *See also* CAPA Br. 21 n.16 (explaining

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[4] Taking the erroneous "contract of hire" argument one step further, Notre Dame incorrectly contends that employee status can be found only where there is a *demonstrated intent* to form such a contract. Notre Dame Br. at 5-16. The cases cited by Notre Dame in which individuals were found not to be common law employees turned on the factor just discussed – the absence of compensation. *See WBAI Pacifica Found.*, 328 NLRB 1273 (1999); *Pappas v. City of Calumet City*, 9 F. Supp. 2d 943, 950 (N.D. Ill. 1978); *Bd. of Educ. of City of Chi. v. Indus. Comm'n*, 53 Ill. 2d 167, 171-72 (1972). Other cases cited by Notre Dame required proof of a "contract of hire" not because the courts regarded this as a *common law* requirement, but because they were applying a state workers' compensation statute which included such a requirement. *See Waldrep v. Texas Employers Ins. Assn.*, 21 S.W.3d 692, 698-99 and n.10 (Tex. App. 2000); *Rensing v. Indiana State Univ. Bd. of Trs.*, 444 N.E.2d 1170, 1172-73 (Ind. 1983).

[5] Notre Dame cites a statement in *Kavanagh v. Trs. of Boston Univ.*, 795 N.E.2d 1170 (Mass. 2003), that, "[i]n determining whether an employer-employee relationship exists, various factors are to be considered, including '… whether the parties themselves believe they have created an employer-employee relationship."' *Id.* at 1174, quoting Restatement (Second) of Agency § 220(2)(i) (1958). The Restatement provision invoked in *Kavanagh* states that the ten

that if a "contract of hire" were required, the scholarship tender each player signs would satisfy that requirement).

C. The Players' Status as Employees Under the Act Does Not Depend on, Nor Should it Affect, How the IRS Treats Football Scholarships.

Under IRS rulings, football scholarship tuition grants are not taxable; and by virtue of the special rules that apply to scholarships, that should remain the case if the players are employees under the NLRA. *See* CAPA Br. 41-42. This is consistent with legislative history cited by *amicus* ACE indicating that Congress did not want "student activities," such as sports, to be considered "other services" for purposes of 26 U.S.C. § 117(c)(1). *See* materials cited in ACE Br. 22-23. The tax treatment of scholarships thus is a matter of tax policies that are unrelated to any NLRA policy, embodied in statutory language that does not even use the term "employee," but uses a term of art ("other services") to which Congress ascribed a tax-specific meaning. No relevant inferences can be drawn from how the parties have treated the taxation of football

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factors listed in that subsection are simply matters to be "considered," "among others," "[i]n determining whether one acting for another is a servant or an independent contractor." Section 220(2) does not state that employee status exists only when the parties "believe" it does, any more than the provision states that employee status exists only when an individual works in a particular "kind of occupation," which is one of the listed factors, *see* § 220(2)(c), or when "the skill required" for the work is of some particular kind, which is another of the factors, *see* § 220(2)(d), or when "the employer … supplies the … tools," which is another of the factors, *see* § 220(2)(e). By treating the parties' "belief" regarding the existence of an employment relationship as merely one of ten factors to be considered, "among others," in determining whether an individual is an employee or an independent contractor, the Restatement makes clear that the parties' belief as to the legal nature of their relationship is *not* a *sine qua non* of employee status.

scholarships to date, and (if it were relevant here) there is no reason to think that the Board's decision will affect taxation in the future.[6]

D. The Conclusion that the Players Are Employees Under the NLRA is Not Called Into Question By Decisions Under Other Statutes.

Contrary to contentions by Northwestern and *amici*, caselaw under other statutes is not inconsistent with the Director's application of the common law test of employee status here.

1. FLSA

Northwestern concedes that there are no cases addressing the employee status of college athletes under Title VII or the FLSA. *See* NU Br. 43.[7] Northwestern nevertheless tries to make something out of *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1328 (10th Cir. 1981), where the court, in holding that resident assistants in college dormitories were not employees under the FLSA, stated without elaboration that the RAs were "legally indistinguishable from athletes and leaders in student government who received financial aid." That fleeting reference to athletes

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[6] There consequently is no need to consider Northwestern's professed concern that taxing football scholarship tuition grants "could deprive a student-athlete of the chance to earn a college degree." NU Br. 30. In any event, both Northwestern and the NCAA profess to follow a policy of providing scholarships that are sufficient to enable players to attend the University without having to tap their own resources or those of their family. If any development, pertaining to taxes or anything else, were to make it necessary that the amount of a football scholarship be increased in order to continue to accomplish that purpose, Northwestern's football profits would enable the University to do so.

[7] Some of the *amici* incorrectly assert the opposite. The Big Ten Conference declares that "Federal courts routinely conclude that scholarship student-athletes are not 'employees' for FLSA purposes." Big Ten Br. at 15. But of the four cases cited, only one even involves college athletes, and that case does not involve the FLSA. Furthermore, far from distinguishing college athletes from employees, the case cited by the Big Ten analogizes the NCAA's drug testing rules to regulations applicable to *professional* jockeys. *See O'Halloran v. Univ. of Wash.*, 679 F. Supp. 997, 1003 (W.D. Wash. 1988). So too, the NCAA suggests that scholarship athletes have been found not to be employees under Title VII, *see* NCAA Br. 6, but the case it cites concerns a referee's claim against an athletic association. *See Kemether*, 15 F. Supp. 2d at 759 n.11.

who were not participating in any program remotely comparable to the Northwestern football program provides no guidance here.

FLSA cases considering whether students performing other functions are employees turn on their facts,[8] and in several cases students have been found to be employees under the FLSA. *See, e.g., Reich v. Shiloh True Light Church*, 895 F. Supp. 799 (W.D.N.C. 1995), *aff'd*, 85 F.3d 616 (4th Cir. 1996) (students in church-run vocational school who performed construction work were employees under FLSA); *Marshall v. Baptist Hosp., Inc.*, 473 F. Supp. 465 (M.D. Tenn. 1979) (students who worked as X-ray technicians as part of college program's clinical training were FLSA employees), *aff'd on relevant grounds, rev'd on other grounds*, 668 F.2d 234 (6th Cir. 1981). Notably, in *Reich*, an important factor supporting the finding of employee status was that the program was a "commercial enterprise involving hundreds of thousands of dollars," 895 F. Supp. at 818, such that the students' labor generated substantial revenue for the employer, *id.* at 802, 805.[9]

2. Title VII

As with the FLSA, there are no cases addressing the employee status of scholarship athletes under Title VII. *See supra* at 8 and n.7. Northwestern cites cases in which some student

[8] For example, at Regis RAs were found not to be employees, but in *Marshall v. Marist Coll.*, No. 74 Civ. 4713, 1977 WL 869, at *2-3 (S.D.N.Y. June 30, 1977), RAs at another school were found to be employees.

[9] Northwestern relies on *Bobilin v. Bd. of Educ.*, 403 F. Supp. 1095 (1975), where a State Board of Education regulation required all students in grades 4-12 to perform cafeteria duties, and *Blair v. Wills*, 420 F.3d 823 (8th Cir. 2005), where a Baptist boarding school required all students to perform household chores as part of the school's "Accelerated Christian Education" program. With little reasoning, the courts found that the chores were part of the educational curriculum and denied FLSA claims on that basis. *See Baptist Hosp., Inc.*, 473 Supp. at 468 n.3 (criticizing *Bobilin*). Whatever may have been the relationship between the chores and the curriculum in those cases, football chores are not part of Northwestern's curriculum.

workers were found not to be employees for Title VII purposes, but in all those cases either the work was integral to the students' academic program,[10] or the students were not compensated,[11] or both.

3. Workers' Compensation Statutes

As Northwestern and some *amici* admit, courts have reached varying conclusions as to whether scholarship athletes are covered under particular state workers' compensation statutes.

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[10] *See Pollack v. Rice Univ.*, No. H-79-1539, 1982 WL 296, at *1 (S.D. Tex. Mar. 29, 1982); *Piotrowski v. Barat Coll.*, No. 93C 6042, 1994 WL 594726, at *1 (N.D. Ill. Oct. 27, 1994); *Ferguson v. Edward J. Derwinski*, EEOC DOC 01903150, 1990 WL1109724, at *3 (EEOC Office of Fed. Ops. Sept. 12, 1990).

[11] *See Jacob-Mua v. Veneman*, 289 F.3d 517, 521 (8th Cir. 2002). In that connection, Northwestern is incorrect in suggesting that Title VII precedents hold that scholarships cannot be considered compensation supporting employee status. The EEOC requires that there be "significant remuneration *in some form.*" EEOC Office of Legal Counsel Informal Discussion Letter, *Federal EEO Laws: When Interns May be Employees* (Dec. 8, 2011) (emphasis added). The appellate decision on which the EEOC's position principally relies identified "scholarships" and "tuition reimbursement" as among the benefits received by an alleged "volunteer" that could support a finding of employee status under Title VII. *Haavistola v. Comty. Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 221 (4th Cir. 1993). Nor do the cases cited by the NCAA and Notre Dame for the proposition that athletic scholarships cannot constitute compensation, *see* NCAA Br. 6-7; Notre Dame Br. 19, actually so hold. In *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012), the Seventh Circuit noted that athletes and universities are part of a labor market, "though the price [the universities] pay involves in-kind benefits as opposed to cash." *Id*. at 347. In so stating, the court *rejected* as "unconvincing" the dicta in its prior decision in *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992), on which the NCAA relies. *Agnew*, 683 F.3d at 346-47. And in *Crue v. Aiken*, 204 F. Supp. 2d 1130 (C.D. Ill. 2002), the court held only that, for purposes of determining First Amendment speech rights, a graduate teaching assistant does not "forfeit[ ] all of her rights as a student and become an employee *in the same class as part-time faculty members who are not also students.*" *Id.* at 1140 (emphasis added). As to whether a graduate teaching assistant could be an employee, albeit one with different speech rights then faculty employees, the court acknowledged that this could well be the case. *Id.* Indeed, the court cited *Graduate Emps. Org. v. Ill. Educ. Labor Relations Bd.*, 733 N.E.2d 759 (Ill. App. Ct. 2000), which held that it was "clearly erroneous" to deny graduate teaching assistants the right to organize under state labor law simply because the compensation they received was termed "financial aid," *id.* at 765, and concluded that graduate students receiving financial assistantships should have "the same statutory right to organize" as other university employees as long as their work is not "so related to their academic roles that collective bargaining would be detrimental to the educational process." *Id.*

See NU Br. at 41 n. 40; ACE Br. at 23 n. 11; Big Ten Br. at 18 n.5. Where injured players have been found not to be employees, the courts have relied on factors that are not applicable here. In particular, all of those cases applied a "contract of hire" requirement, which we have shown is *not* a prerequisite to employee status at common law. *See Waldrep*, 21 S.W.3d at 298; *Rensing*, 444 N.E.2d at 1172; *Coleman v. W. Mich. Univ.*, 125 Mich. App. 35, 37 (1983); *State Compensation Ins. Fund v. Indus. Comm'n*, 135 Colo. 570, 572 (1957).

Furthermore, in a 1957 decision cited by Northwestern, the Colorado Supreme Court found it "significant" to its analysis "that the college did not receive a direct benefit" from its football program. *State Compensation Ins. Fund*, 135 Colo. at 573. *See also Coleman*, 125 Mich. App. at 42 ("Defendant is not a commercial venture benefitting financially from its football team."). And in the most recent case to address a workers' compensation claim by a scholarship athlete, the court acknowledged that the factual record contained evidence from which the jury could have found that the player *was* an employee. *Waldrep*, 21 S.W.3d at 701, 702. Cautioning that "college athletics has changed dramatically over the years since Waldrep's injury" in 1974, the court recognized that a finding of employee status might be appropriate "in an analogous situation arising today." *Id.* at 707.

In a well-reasoned 1963 opinion, a California appeals court ruled that a college football player was an employee under that state's workers' compensation statute. *Van Horn v. Indus. Accident Comm'n*, 219 Cal. App. 2d 457 (1963). As some *amici* note (*see* ACE Br. 23 n.11; Big Ten Br. 18 n.5), the California legislature subsequently amended its statute to exclude college athletes. That reflected an understanding on the part of that legislature that, absent an explicit exclusion, college football players might properly be found to fall within the category of

"employees."[12] A state legislature is of course free to decide who will be included in, and who will be excluded from, its workers' compensation program. That says nothing about who is covered by the NLRA.

4. Title IX

ACE argues that Title IX would be superfluous if college football players were employees because employees already are protected from sex discrimination by Title VII. ACE Br. 19-22. But it is settled that Title IX *does* cover university employees who also are covered by Title VII. *See* CAPA Br. 43. As to employees as well as others who are involved in university programs, Title IX reaches practices that Title VII does not reach – for example, a failure to provide sufficient participation opportunities for female athletes, whether those athletes are employees or not. *See* 34 C.F.R. § 106.41.

5. Wage Payment Laws

Although the point does not go directly to employee status, *amici* Baylor *et al.* assert that if the players have the right to organize, this will lead to "unintended consequences" under the Illinois wage payment law because that law generally requires that employees be paid in cash. Baylor Br. 9. However, that prohibition is inapplicable "if there exists a valid collective bargaining agreement which provides…for different arrangements for the payment of wages." 820 ILCS 115/4. Baylor's citation to FLSA wage payment requirements also is misplaced, as those regulations explicitly include "meals, dormitory rooms, and tuition furnished by a college to its student employees" within the definition of "other facilities" by which payment may be made. 29 C.F.R. § 531.32.

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[12] *Van Horn* was one of the developments that led the NCAA to contrive the notion of the "scholar-athlete" in an effort to "obscure the reality of the university-athlete employment relationship and to avoid universities' legal responsibilities as employers." McCormick & McCormick, 81 Wash. L. Rev. at 85-86. *See also* Tr. 402:25-403:14 (Berri).

II. THE PLAYERS CANNOT BE DENIED THEIR NLRA RIGHTS ON THE THEORY THAT THEY ARE "PRIMARILY STUDENTS"

1. Arguing as if it were 1951, when the Board was quick to assume that "all of [t]he activities" of a university were aimed directly at "the promotion of education," *Columbia Univ.*, 97 NLRB 424, 425 (1951), *overruled by Cornell Univ.*, 183 NLRB 329 (1970), Northwestern argues that every activity it supports, including its "hundreds of extracurricular activities," must be an "educational" activity, or "there would be no reason for the university to undertake this expense." NU Br. 13, 20-21.

This is false. Since *Cornell*, the Board has recognized that although education is the "primary goal" of a university, "to carry out its educative functions, the university has become involved in a host of activities which are commercial in character," such that today a university's income typically is "derived not only from the traditional sources, such as tuition and gifts, but from …purely commercial avenues," including activities that "realize[ ] a commercial profit." *Cornell*, 183 NLRB at 332. At Northwestern, one of those commercial activities is football, from which Northwestern derives substantial profit. That activity provides entertainment that contributes to the quality of life of the student body and fans but does not contribute to the students' education, just as Northwestern's food and housing programs contribute to students' quality of life but do not constitute any form of education. Northwestern's suggestion that it runs its football program not for the enjoyment of the students and alumni who attend the games, and not for the millions of dollars in profit, but rather to provide an "educational opportunity" for the small number of students who play football, is fanciful.

2. In any event, Northwestern and its *amici* cannot show that football is an educational activity in any meaningful sense. Their arguments and mission statements establish

only that football promotes traits such as leadership and an ability to work well with others, and that a football player's need to find time for academics while devoting so much time to football may lead the player to cultivate time management skills. *See, e.g.,* ACE Br. at 9 (football imparts the value of "effort, hard work [and] sacrifice"); APCA Br. at 11 (football imparts skills including "time management," proper "attitude," and "working under pressure"); *id.*, Attachment 1 (statements by former college athletes that the "educational value of sports" consists of inculcating a "work ethic" pursuant to which athletes "work hard" and improve their time management).[13]

Although these have value, they do not differentiate the football program from employment. Cultivating leadership, ability to work with others, and a dedication to hard work are attributes of *employment. See* CAPA Br. 35-36. Coach Fitzgerald testified that the "life lessons" he imparts are those that he learned as an assistant coach – that is to say, lessons he learned *as an employee*. *Id.* And it is perverse to assert that a "40 hour [athletic] 'work week,'" APCA Br., Attachment 1 at 4, confers an *educational benefit* by forcing athletes to learn time management skills so as to limit the *interference with academics* that their athletic obligations otherwise would entail.

So too, that Northwestern provides academic support for athletes, NU Br. 8, 22, is not an indication that football duties *enhance* education, but rather that they *interfere with* education such that special programs are necessary to compensate.[14]

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[13] At another point, APCA describes "the educational value of athletics" as including "providing … fun and enjoyment" and "making more friends." *Id.* at 7.

[14] It was with good reason that the employers of former players Bartels and Pace were "amazed" that they succeeded in demanding academic programs while playing football. Tr. 1238:8-18 (Bartels), 1278:25-1279:4 (Pace). In no way does recognition of this fact – or anything in the Regional Director's decision or CAPA's submissions – reflect a "'dumb jock'

3. There is no force to claims that, in other contexts, Congress has characterized college football as "educational."

a. In concluding that revenue-producing sports can be an "education program or activity within the meaning of Title IX," the then-Department of Health, Education and Welfare explained that "Congress intended that term to have an expansive meaning," extending to a wide range of programs or activities – including, for example, social fraternities and sororities, which HEW stated would qualify as "education program[s] [or] activit[ies]" had they not been explicitly excluded. 43 Fed. Reg. 58070 (Dec. 11, 1978). As Representative Panetta put it, in Title IX Congress was animated by the principle that "[m]orally, we have no business providing taxpayer funds, Federal funds, to any institution, school district, what have you, that discriminates." Civil Rights Act of 1984: Hearings on H.R. 5490 Before the Committee on Education and Labor, 98th Cong. 17 (1984). *See also* legislative materials cited (but mischaracterized) in NCAA Br. 8-9; ACE Br. 19-22. That Congress found it appropriate to require universities receiving federal funds not to engage in sex discrimination in their athletic programs hardly lends support to the notion that the protections of the NLRA must be denied to college athletes who are employees.

b. Similarly meritless is the contention that because income from college athletics is excluded from the unrelated business tax, Congress must have made a determination that

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stereotype," as APCA claims. *See* APCA Br. 8. CAPA is well aware that players at Northwestern need academic support services not because of any lack of aptitude, but because they have to devote so much of their time to football. And it bears noting that universities are not the only employers that provide educational support services such as Northwestern describes. *See* "Starbucks College Achievement Plan," http://www.starbucks.com/careers /college-plan (accessed July 12, 2014) (Starbucks will provide students who are working toward a bachelor's degree with financial assistance and "a personal level of support, custom-built for each [employee], including a dedicated enrollment coach, financial aid counselor and academic advisor").

athletics is part of a university's academic mission. ACE Br. 23. A university activity need not be educational in nature in order to be considered sufficiently "related" to a university's "business" as to be excludable from the "unrelated income" category. For example, the legislative history cited by ACE states that "income from dining halls, restaurants, and dormitories operated for the convenience of the students would be considered related income and, therefore, would not be taxable." S. Rep. No. 81-2375 (1950), *reprinted in* 1950 U.S.C.C.A.N. 3053, 3082.[15]

4. In struggling to characterize football as "educational," Northwestern and its *amici* fail to recognize that merely because an activity may be characterized as "educational" in some broad sense, that does not mean that individuals who participate in it are excluded from coverage under the Act. Thus university faculty members are not excluded from bargaining "merely because they determine the content of their own courses, evaluate their own students, and supervise their own research." *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690-91 n.31 (1980). *See, e.g., Univ. of Great Falls,* 325 NLRB 83 (1997) (approving unit of university faculty).[16]

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[15] Furthermore, ACE is relying on legislative history from 1950. Recent analysis from the Congressional Budget Office suggests that views as to whether football income at Division I-A schools constitutes unrelated business income may be changing. *See Tax Preferences for College Sports,* Pub. No. 3005 (May 2009).

[16] Faculty are excluded from organizing and bargaining only if they have such pervasive authority over academic decisionmaking as to make them "managerial employees" under the definition that applies generally to industries covered by the Act. *Yeshiva*, 444 U.S. at 682. Thus, the admonition in *Yeshiva* that "principles developed for use in the industrial setting cannot be 'imposed *blindly* on the academic world,'" *id.* at 681 (quoting *Syracuse Univ*., 204 NLRB 641, 643 (1973) (emphasis added)), was not a suggestion that universities have special rights or privileges under the Act. *Yeshiva* simply recognizes that because of the tradition of faculty governance, practices at some schools with respect to the authority of faculty may differ from what is typical of other types of employees. Nor is Northwestern helped by the Board cases involving cooperative education programs cited in NU Br. 18 n.18. In those cases the Board, applying the "control" analysis that is part of the common law test, found that an employment relationship did not exist because the ostensible employer was required to share control over the

With one ill-considered exception that does not support Northwestern,[17] the only cases in which the Board has held that student employees cannot exercise NLRA rights are where the Board has found that the students' work was *part and parcel of their academic programs* so that bargaining would encompass academic decisionmaking, conflicting with the institution's academic freedom to make such decisions without restraint. *See* cases discussed in CAPA Br. 25-30. Even if those cases were rightly decided (*but see Brown University.*, 342 NLRB 483, 499-500) (2004) (Members Liebman and Walsh, dissenting) by no stretch of the imagination do they apply here. To say that the football experience at Northwestern may be valuable, and even that it may be of "educational" value in the expansive sense that Northwestern uses that term, does not mean that bargaining over football would amount to bargaining over academic decisionmaking.[18] Nor is football an "intensely personal" endeavor, as the majority characterized "the educational process" in *Brown*, 342 NLRB at 489. Rather, as a team sport, football inherently involves "collective treatment," *id.* at 490, which the *Brown* majority found to be the hallmark of a relationship that is *not* educational and is appropriate for collective bargaining.

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duties at issue with a high school teacher-coordinator. *See Towne Chevrolet*, 230 NLRB 479 (1977); *Firmat Mfg. Corp*., 255 NLRB 1213, 1225 (1981), *enfd*. 681 F.2d 807 (3d Cir. 1982).

[17] *See* CAPA Br. 26-27 n.19, discussing *San Francisco Art Inst.*, 226 NLRB 1251 (1976).

[18] Although Northwestern studiously avoids admitting that *any* kinds of student employees can have rights under the Act, *amicus* ACE acknowledges that "[c]olleges and universities do at times employ students to perform services on their behalf, of course – in dining halls, as office assistants, and in a variety of traditional jobs." ACE Br. 12. ACE asserts that "these roles are readily distinguished from that of a student who participates in an educational opportunity." *Id.* But the Act does not contain an "educational opportunity" exclusion, and if it did, for the reasons we have discussed football would not qualify.

So too, the dichotomy posited by the *Brown* majority between the "mutual interest" of teachers and students in "the advancement of the student's education," *id.*, on the one hand, and the potentially conflicting interests that characterize an economic relationship that is grist for collective bargaining, on the other, *id.* at 489-90, does not pertain here. Northwestern has declared that its interests lie in preventing the players from achieving economic gains through collective bargaining because "football program revenue is an essential part of Northwestern's ability to offer [non-revenue] varsity sports to both its men and women student-athletes." Northwestern's Request for Review at 45. Contrary to assertions by Northwestern and its *amici* (*see* APCA Br. 16), nothing requires that "gains for unionized players … be paid by the non-revenue athletes," *id.*, rather than by reducing coaches' salaries or other expenses or by taking steps to increase revenues. But, given the concerns expressed by Northwestern and its *amici* regarding the costs of any gains the players might negotiate, it defies reality for Northwestern to assert that this situation does not involve an economic relationship under which "the employer wants to maximize productivity and minimize costs," NU Br. 15, giving rise to the adversity of interests that animates collective bargaining under the Act.[19]

III. THE "UNINTENDED CONSEQUENCES" AND "POLICY" ARGUMENTS ADVANCED BY NORTHWESTERN AND ITS *AMICI* LACK BOTH SUBSTANCE AND RELEVANCE

Northwestern and its *amici* have conjured up a plethora of reasons why bargaining by college players supposedly would be harmful to universities, the NCAA, and college sports. These are unmoored from reality; and even if they were more plausible, none has any connection

[19] Nor do the interests of Northwestern and the players coincide with respect to other terms and conditions of the players' employment. For example, Associate Athletic Director Baptiste made clear in his testimony that the University was not inclined to take any steps to reduce the players' risk of head trauma, even though on cross-examination he was forced to admit that there are steps Northwestern could take in that regard. Tr. 539:20-540:2, 597:22-25.

to the text and purposes of the Act or to any public policy that would justify denying the players their NLRA rights.

A. Recognizing Players' Section 7 Rights Would Not Jeopardize Legitimate University Interests.

1. The Committee Members state that if the players are held to be employees, many of the rules Northwestern imposes on them would violate their Section 7 rights and therefore would constitute unfair labor practices. Members' Br. 12-15. But the Board decisions cited by the Members simply hold that employers may not adopt policies under which employees may be punished for engaging in concerted criticism of employment practices. [20] Universities are not entitled to a special right to punish such protected employee speech, whether by football players or by other employees.[21]

As for the Members' assertion that ULP charges, and even 10(j) injunctions, will be the order of the day whenever players are subjected to "any … discipline, whether for academic

[20] Specifically, those decisions protect concerted speech such as "Facebook postings [that constitute] complaints among employees about the conduct of their supervisor as it related to the terms and conditions of employment and about management's refusal to address the employees' concerns," *Design Technology Group LLC*, 359 NLRB No. 96, at (2013); "concerted communications protesting the [employer's] treatment of its employees," *Costco Wholesale Corp.*, 358 NLRB No. 106, at 2 (2012); "expression to the media of employee disagreement with the [employer] over wages, hours, and other terms and conditions of employment," *DirecTV*, 359 NLRB No. 54, at 2 (2013); "communications concerning employment" that the employer regards as reflecting an "inappropriate attitude," *First Transit, Inc.*, 360 NLRB No. 72, at 2-3 (2014); "public statements … that are not perceived as 'positive' toward the [employer] on work-related matters," such as "public protests of unfair labor practices," *Hill and Dales General Hospital*, 360 NLRB No. 70 at 2 (2014); and "statements … that object to [employees'] working conditions and seek the support of others in improving them," *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 at 1 (2012).

[21] Neither are universities entitled to immunity from EEOC charges, as the *amici* Athletic Directors seem to wish. *See* AD Br. 22.

reasons or violating team rules," Members' Br. 14-15, suffice it to say that the Members do not explain how the Act would lead to such results, and we cannot imagine why it should.

2. When they are not asserting that bargaining by players would be too *circumscribed*, *see infra* at 21, Northwestern and its *amici* assert that bargaining would be too *expansive*, intruding into academic decisions, coaching decisions and student conduct rules. *See, e.g.,* NU Br. 24; Members' Br. 16, 19. Such fears are unfounded. None of those subjects is part of CAPA's agenda. Experience with bargaining by graduate assistants, like the experience with bargaining by faculty, shows that employees do not seek to bargain over academics, even where, unlike football, their work is closely related to academics. *See* AAUP Br. 14-18. And the associations that represent players in the five major sports have shown that athletes do not bargain over who should play or how they should play, or to undermine the coach's authority. *See* Players' Assns. Br. 28-29.

Suggestions that scholarship players might demand rules disfavoring walk-ons, *see* Members' Br. 16, also are disconnected from reality. If walk-ons should be included in the unit, CAPA would "welcome them into the unit." Tr. 1206:12-16 (CAPA counsel). [22] And even if walk-ons are not in the unit, CAPA intends to bargain for improvements that would benefit them as well as the scholarship players. *See* Tr. 292:4-5 (Colter) (CAPA intends to negotiate

[22] It is not clear that the duties of walk-ons are fully comparable to those of the scholarship players. For example, the Director found that walk-ons are given greater leeway than the scholarship players to take courses that conflict with practice. *See* DDE 11. That finding is supported by the testimony the Director cited, *id.*, and also by the fact that Employer Exhibit 22 lists several team members as having taken courses at times that conflicted with practice and yet Northwestern's witness on this subject could only identify a single instance in which a *scholarship* player had done so. Tr. 1007:1-9 (Blais). In any event, there obviously is a fundamental difference between scholarship players and walk-ons with respect to *compensation.* CAPA has made clear that it was solely on this basis that CAPA's proposed unit was confined to only scholarship football players.

protections against head trauma "to benefit not just the scholarship players, but the walk-ons"); Tr. 293:2-3 (Colter) ("[t]here's a lot of great things that you could get … for all the players" without violating NCAA eligibility rules).

If a players' union *were* to seek to bargain over inappropriate matters or to make unreasonable demands, a university would be free not to agree to such proposals. A university also could invoke *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and its progeny, which recognize management's right to make certain unilateral decisions. *See* CAPA Br. 32. Northwestern's speculative concerns about possible subjects of bargaining "puts the proverbial cart before the horse." *Boston Med. Ctr. Corp.*, 330 NLRB 152, 164 (1999). "The contour of collective bargaining is dynamic," and the Board can and should "address those issues later, if they arise." *Id.* *See* CAPA Br. 28, 33-34. The players' rights to bargain over subjects such as safety and benefits cannot be denied based on speculation that players might some day seek to bargain over other subjects.

B. Contentions that Bargaining Would Be Restricted by Outside Constraints are Irrelevant.

The contention of Northwestern and its *amici* that bargaining by college football players would be constrained by NCAA rules is overstated; but more to the point, it is irrelevant. *See* CAPA Br. 36-38; AFL-CIO Br. 8-9; Players' Assns. Br. 4-10; Kulweic Br. 18-19. Northwestern concedes that constraints on bargaining would be relevant only if the Board were to overrule *Management Training Corp.*, 317 NLRB 1355 (1995). *See* NU Br. at 28 & n.26. No grounds for overruling *Management Training Corp.* have been advanced.

C. Speculation About the Impact of Collective Bargaining on College Sports Provides No Grounds for Denying the Players Their Statutory Rights.

The NCAA is a private association formed and run by its member schools, including Northwestern. Most of those schools are public, while some, like Northwestern, are private. Consequently, in many areas of activity some member schools are governed by federal law while others are governed by the laws of various states.

One of the areas in which state laws differ from each other and from federal law is as to labor relations. Where an association, athletic or otherwise, chooses to include in its membership both public and private employers, it must accept the fact of labor law nonuniformity. Consequently, that football players at some public universities would not have a right to bargain cannot preempt the NLRA rights of private employees.[23]

Furthermore, Northwestern and its *amici* never explain how and why, if players at some schools can bargain while others cannot, the result must be "a fragmented system [that] cannot work." NU Br. 27. If Northwestern is assuming that players who engage in bargaining will get

[23] The Board should *not* foreclose collective bargaining out of deference to NCAA rules as Northwestern and its *amici* suggest. CAPA would welcome a policy debate over the NCAA's "amateurism" rules, but this is not the forum for that debate. The Supreme Court has made clear that the NCAA's desire to foster amateurism "will not validate an otherwise [unlawful] practice." *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 n.23 (1984). The Court held that NCAA rules regarding amateurism are relevant to *antitrust* analysis, insofar as some of those rules may have the procompetitive effect of preserving the existence of the "particular brand of football" that constitutes the "product" offered by the NCAA and its member institutions. *Id.* at 101-02. That does *not* mean that promotion of that product may be achieved at the expense of the labor laws. In any event, no principled concept of amateurism dictates that the financial benefits schools offer to football players must be limited in whatever ways the NCAA may dictate at any particular point in time, or that benefits must be uniform from school to school. And there is good reason to believe that many of the restrictions the NCAA has imposed in the name of "amateurism" are self-interested restraints of trade, redounding to the financial benefit of the NCAA and its members and to the detriment of college athletes. *See* CAPA Br. 40 and n.28; Hausfeld Br. 12-14, Law Prof. Br. 13-17.

much greater compensation than those who do not, such an assumption is speculative. Northwestern hardly can assert, as it does, that the players do not provide valuable services to the University and yet claim that the services the players provide are so valuable that if bargaining were allowed and the NCAA restrictions were loosened, the University inevitably would agree to substantial increases in the financial consideration the players receive.

If a union of college football players were to demand undue increases in compensation, the university involved could reject the demand –and it certainly would do so if, as would be the case today, agreeing to such a demand would violate NCAA rules and render the school and its players ineligible to compete.[24] Where improvements *are* permitted by NCAA rules (which, as all parties recognize, are in a state of flux, *see* CAPA Br. 37 nn.24, 25; NU Br. 10 n.7), non-bargaining schools could match improvements attained through bargaining at Northwestern or other schools. To the extent that they might choose not to do so, that would not harm competitive balance in college sports. *See* CAPA Br. 39 n.26; Sports Econ. Br. 21-24. And more to the point, no public policy would be violated if the economic benefits received by college football players, which already vary from school to school, [25] to vary to a somewhat greater extent.

CONCLUSION

The players are employees, and they seek to bargain over their employment, not over academics. Arrayed against them in this case are the interested parties who reap huge financial

[24] Of course, no union would make such a self-destructive demand in the first place.

[25] For example, Northwestern currently provides four-year football scholarships, while some other schools provide one-year scholarships. Tr. 580:12-581:9 (Baptiste). Indiana University recently announced that it will provide financial support to former athletes who return to complete their degrees, while other schools do not offer such support. *See* CAPA Br. 37 n.24. And many NCAA member schools are actively seeking the ability to provide additional financial benefits to their football players. *See id.* n.25.

benefits from the labor of college football players: the schools, coaches and NCAA administrators. Collective bargaining by college players does not threaten the groves of academe; classes and research will remain unchanged. What will change is what *must* change: the system under which football businesses operated by universities like Northwestern make multimillion dollar profits from the work of players who are not allowed to bargain over protections against head trauma, or improvements in insurance and other benefits, or anything else. Nothing in the Act or public policy justifies denying the players the right to bargain collectively over the work by which they produce such profits for Northwestern's football business. The Regional Director's Decision and Direction of Election should be affirmed.

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