UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND OTHER HIGHER EDUCATION ASSOCIATIONS IN SUPPORT OF EMPLOYER

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CASES

Allied Chem. & Alkali Workers of Am. v. Pittsburg Plate Glass Co.,
404 U.S. 157 (1971) 16

Boston Med. Ctr. Corp.,
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Briggs Mfg. Co. (Detroit, Mich.),
75 NLRB 569 (1947) 16

Brown University,
342 NLRB 483 (2004) ..... passim

Goodwill Indus. of Tidewater, Inc.,
304 NLRB 767 (1991) 16

Graczyk v. Workers' Comp. Appeals Bd.,
184 Cal. App. 3d 997 (Cal. Ct. App. 1986) 23

Grove City Coll. v. Bell,
465 U.S. 555 (1984), superseded by statute as stated, NCAA v. Smith, 525 U.S. 459 (1999) 21

Hanson v. Kynast,
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Kavanagh v. Trs. of Boston Univ.,
795 N.E.2d 1170 (Mass. 2003) 11–12, 23

Land v. Workers' Comp. Appeals Bd.,
102 Cal. App. 4th 491 (Cal. Ct. App. 2002) 12, 13

Marshall v. Regis Educ. Corp.,
666 F.2d 1324 (10th Cir. 1981) 23–24

Nationwide Mut. Ins. Co. v. Darden,
503 U.S. 318 (U.S. 1992) 24

NCAA v. Bd. of Regents,
468 U.S. 85 (1984) 7–8

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1974) 16

NLRB v. Catholic Bishop,
440 U.S. 490 (1979).....16

NLRB v. Town & Country Elec.,
516 U.S. 85 (1995).....16

NLRB v. Yeshiva Univ.,
444 U.S. 672 (1980).....7, 16, 26

Rensing v. Ind. State Univ. Bd. of Trs.,
444 N.E.2d 1170 (Ind. 1983).....13–14, 23

State Comp. Ins. Fund v. Indus. Comm'n,
314 P.2d 288 (Colo. 1957).....23–24

Sweezy v. New Hampshire,
354 U.S. 234 (1957).....26

The Leland Stanford Junior Univ.,
214 NLRB 621 (1974).....18, 19

Todd Sch. for Boys v. Indus. Comm'n,
107 N.E.2d 745 (Ill. 1952).....12, 13

Townsend v. State,
191 Cal. App. 3d 1530 (Cal. Ct. App. 1987).....13

Univ. of Denver v. Nemeth,
257 P.2d 423 (Colo. 1953).....23

Van Horn v. Indus. Accident Comm'n,
219 Cal. App. 2d 457 (Cal. Ct. App. 1963).....23

Waldrep v. Tex. Emp'rs Ins. Ass'n,
21 S.W.3d 692 (Tex. Ct. App. 2000).....14

Wall v. Gill,
225 S.W.2d 670 (Ky. 1949).....12

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20 U.S.C. § 1087kk.....15

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36 U.S.C. § 220501 et seq. 17

42 U.S.C. §§ 2751–2756b 17

42 U.S.C. § 2000e 20

Pub. L. No. 93-380, 88 Stat. 612 (1974) 20

Pub. L. No. 100-259, 102 Stat 28 (1988) 21

Pub. L. No. 101-542, 104 Stat. 2381 (1990) 17

Title VII of the Civil Rights Act of 1964 ..... 2, 20, 21, 22

REGULATIONS AND ADMINISTRATIVE DECISIONS

34 C.F.R. § 106.37 21

34 C.F.R. § 106.38 21

34 C.F.R. § 106.41 21

34 C.F.R. § 600.2 8

34 C.F.R. § 668.8 8

43 Fed. Reg. 58,070 (Dec. 11, 1978) 20

Rev. Rul. 77-263, 1977-2 C.B. 47 (1977) 23

LEGLISLATIVE AUTHORITIES

Big Labor on College Campuses: Examining the Consequences of Unionizing Student-athletes: Hearing Before the House Education and the Workforce Committee, 113th Congress (2014) 10

Civil Rights Act of 1984, Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary 20–21 (May 9, 15–17, 21, 22, 1984) 22

130 Cong. Rec. E3493 (daily ed. Oct. 2, 1984) 22

130 Cong. Rec. E4164 (daily ed. Aug. 8, 1984) 22

131 Cong. Rec. H822 (daily ed. Feb. 28, 1985) 22

131 Cong. Rec. S1309 (daily ed. Feb. 7, 1985) 22

132 Cong. Rec. S17056 (daily ed. Oct. 17, 1986) 22

H.R. Rep. No. 81-2319 (1950).....23

S. Conf. Rep. No. 93-1026, reprinted in 1974 U.S.C.C.A.N. 4206.....20

S. Rep. No. 81-2375 (1950), reprinted in 1950 U.S.C.C.A.N. 3053.....23

OTHER AUTHORITIES

American Council on Education, Report of the Special Committee on Athletic Policy (Feb. 16, 1952).....4, 5

Baylor University, Glenn R. Capp Fellows Scholarship, http://www.baylor.edu/communication/index.php?id=64867 (last visited June 25, 2014).....3

College Sports Tainted by Bounties, Carnegie Fund Finds in Wide Study, N.Y. Times, Oct. 24, 1929.....17

W.L. Dudley, Athletic Control in School and College, 11 The Sch. Rev. 95, 95 (1903).....3, 4

Arne Duncan, United States Secretary of Education, Time to Bring Your "A" Game—in Academics and Athletics (Jan. 11, 2012), available at http://www.ed.gov/news/speeches/time-bring-your-game-academics-and-athletics. 11

Harvard College, Report Upon Athletics, with Statistics of Athletics and Physical Exercise, and the Votes of the Governing Boards (1888).....4, 9, 26

Knight Commission on Intercollegiate Athletics, A Call To Action: Reconnecting College Sports and Higher Education (2001), available at http://www.knightcommission.org/images/pdfs/2001_knight_report.pdf.....5, 9, 28

Knight Commission on Intercollegiate Athletics, Reports of Knight Foundation Commission on Intercollegiate Athletics (1991–1993), available at http://www.knightcommission.org/academic-integrity/academic-integrity-commission-report 5

Knight Commission on Intercollegiate Athletics, Restoring the Balance: Dollars, Values, and the Future of College Sports (2010), available at http://www.knightcommission.org/restoringthebalance.....5, 7

Richard Lapchick et. al., The Institute for Diversity and Ethics in Sport (TIDES) at the University of Central Florida, Keeping Score When It Counts: Assessing the Academic Records of the 2013-2014 Bowl-bound College Football Teams (Dec. 9, 2013), available at http://www.tidesport.org/Grad%20Rates/2013_Bowl_study.pdf. 10

Lehigh University, Undergraduate Admissions Types Aid, Snyder Family Marching 97 Scholarships, http://www4.lehigh.edu/admissions/undergrad/tuition/aidtypes.aspx (last visited June 25, 2014) 3

Middle States Commission on Higher Education, Middle States Guidelines: Athletic Programs, available at https://www.msche.org/documents/P3.3-AthleticPrograms.doc.....6

National Center for Education Statistics, The Condition of Education, Institutional Retention and Graduation Rates for Undergraduate Students (May 2014), available at http://nces.ed.gov/programs/coe/indicator_cva.asp 10

National Collegiate Athletic Association, 2013–14 Division I Manual 8, 15

National Collegiate Athletic Association, Reform Efforts, http://www.ncaa.org/governance/reform-efforts#awg (last visited June 30, 2014) 10

National Collegiate Athletic Association, Revenues & Expenses: NCAA Div. II Intercollegiate Athletics Programs Report tbls. 3.30 & 4.30 (2004–2011) 27

National Collegiate Athletic Association Research Staff, Trends in Graduation-Success Rates and Federal Graduation Rates at NCAA Division I Institutions 5 (Oct. 2013) 10

National Labor Relations Board, Interfering with Employee Rights, http://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1 (last visited June 25, 2014).....25

New England Association of Schools and Colleges, Commission on Institutions of Higher Education, Standards for Accreditation (July 1, 2011), available at http://cihe.neasc.org/downloads/Standards/Standards_for_Accreditation.pdf. 6

North Central Association Higher Learning Commission, Criteria for Accreditation (Feb. 2012), available at http://policy.ncahlc.org/Policies/criteria-for-accreditation.html.....6

Northwestern University Brief to the Regional Director (Mar. 17, 2014).....4

D. Oberteuffer, The Athlete and His College, 7 J. of Higher Educ. 437 (1936) 4

Plato, The Republic.....3

Purdue University, http://www.purdue.edu/pmo/faq.shtml (last visited June 25, 2014).....3

Purdue University, Varsity Glee Club, http://www.purdue.edu/pmo/glee/glee.shtml (last visited June 25, 2014).....9

Restatement (Second) of Agency § 220.....12

Howard J. Savage et al., American College Athletic Bulletin Number 23 (1929) 17

Ryan Schuster, Women Serve as Editors-in-Chief of all Five of William & Mary's Law Journals, William and Mary Law Sch. (May 7, 2014), http://law.wm.edu/news/stories/2014/women-serve-as-editor-in-chief-of-all-five-of-william--marys-law-reviews.php 9

Southern Association of Colleges and Schools Commission on Colleges, The Principles of Accreditation: Foundations for Quality Enhancement (2011), available at http://www.sacscoc.org/pdf/2012PrinciplesOfAcreditation.pdf.....6

David Welch Suggs, Jr., Ph.D., Myth: College Sports Are a Cash Cow, The Presidency (Spring 2012), available at http://www.acenet.edu/the-presidency/Pages/Spring-2012.aspx 7

United States Department of Justice, Title IX Legal Manual, available at http://www.justice.gov/crt/about/cor/coord/ixlegal.php. 21

University of Illinois, Scholarships for the College of Fine and Applied Arts, School of Art and Design (A&D), http://admissions.illinois.edu/cost/scholarships_FAA.html (last visited June 25, 2014) 3

Western Association of Schools and Colleges, Senior, Collegiate Athletics Policy, available at http://www.wascsenior.org/files/Collegiate_Athletics_Policy.pdf. 6

William & Mary Law School, Scholarships, https://law.wm.edu/admissions/financialaid/scholarships/index.php (last visited June 25, 2014) 3

STATEMENT OF INTEREST

Amicus American Council on Education ("ACE") represents all higher education sectors. Its approximately 1,800 members include a substantial majority of United States colleges and universities. Founded in 1918, ACE seeks to foster high standards in higher education, believing a strong higher education system to be the cornerstone of a democratic society. ACE regularly contributes *amicus* briefs on issues of importance to the education sector. The Addendum contains information on other *amici* on this brief: Association of Governing Boards of Universities and Colleges, Association of Public and Land-Grant Universities, College and University Professional Association for Human Resources, and the National Association of Independent Colleges and Universities.

SUMMARY OF ARGUMENT

Students who participate in intercollegiate athletics ("student-athletes") and receive athletic scholarships are not employees and therefore not subject to the National Labor Relations Act ("NLRA"). Athletics is part of the educational experience; it enriches learning and imparts lessons for life. Students pursue intensively a range of extra-curricular and co-curricular activities, among them athletics, as part of the overall education college affords. The institutions' mission is education, and virtually no institutions earn a surplus from the athletics program. Student-athletes participate for their own benefit; they do not render services for compensation. Athletic scholarships, which are calibrated to the cost of attendance, not services rendered, and are similar to other forms of conditional financial aid, do not change this equation.

Neither the Board's precedents nor Congressional intent support the Regional Director's opposite view. Declaring students to be employees would be contrary to the policy of the NLRA. And under Brown University, 342 NLRB 483 (2004), intercollegiate student-athletes are not subject to the NLRA because they are "primarily students".

Congress, courts, and executive agencies have consistently recognized that college athletics is part of the educational program, not employment. Thus Congress twice enacted Title IX protections for intercollegiate athletics instead of relying on Title VII employment discrimination protections, and for that same reason student-athletes are treated as students, not employees, in a multitude of other legal contexts.

Declaring scholarship student-athletes employees subject to the NLRA would have far-reaching negative consequences. It would undermine the relationship between students and their coaches and teachers. And it would entangle the Board and courts in matters traditionally left to educators and thus would trench on academic freedom and disserve students.

ARGUMENT

I. SCHOLARSHIP STUDENT-ATHLETES ARE STUDENTS, NOT EMPLOYEES.

Student-athletes participate in athletics as a component of the educational experience provided by colleges and universities, not as employees rendering services. An athletic scholarship is no more compensation for services than is a scholarship conditioned on completion of a particular academic program or on participation on the debate team or the marching band. Whether or not recipients of athletic scholarships, student-athletes are students, not employees—under the common law, the NLRA or any other recognized legal test.

A. Intercollegiate Athletics Is Part of the Educational Experience.

The mission of every college and university is to provide education. Intercollegiate athletics, a feature of that education, provides a powerful learning experience.

1. Intercollegiate athletics enriches education.

Students with diverse talents and interests come to the nation's colleges and universities to learn. Much of that learning takes place outside the classroom. It occurs in college newspaper pressrooms, campus radio station studios, debate societies, and chess clubs; it happens in musical

practice rooms, on concert hall stages, and on the sports field. To broaden the educational environment, colleges and universities offer merit and need-based scholarships to students who bring special perspectives or talents. Many scholarships are conditioned on participation in an extracurricular activity.[1] The overriding goal is to engage each student and educate the whole person. Educational opportunities beyond the classroom help students to cross the bridge to adulthood and prepare for life's work.

Athletics is an ancient and venerable component of education. In The Republic, Plato has Socrates emphasize physical training—"gymnastics"—as integral to a complete education. For more than a century, our nation's colleges and universities have embraced athletics for much the same reason. "The principal object of education" is to prepare students "to be better citizens," and "athletic sport" is "a powerful factor in the physical and moral development of youth." W.L. Dudley, Athletic Control in School and College, 11 The Sch. Rev. 95, 95 (1903) (internal quotations and citation omitted). One commentator declared: "[T]he ultimate purpose of education is to teach students to get a better control of life . . . . Then what manner of experience are our varsity contests! They most surely are one form of the education of a man"—and,

[1] See, e.g., Baylor University, Glenn R. Capp Fellows Scholarship, http://www.baylor.edu/communication/index.php?id=64867 (describing scholarship limited to students "active in the Baylor debate program" who maintain a 3.0 grade-point average) (last visited June 25, 2014); Lehigh University, Undergraduate Admissions Types of Aid, Snyder Family Marching 97 Scholarships, http://www4.lehigh.edu/admissions/undergrad/tuition/aidtypes.aspx (scholarship for those who "agree to participate fully in the Marching Band" and "maintain at least a 2.8 grade point average") (last visited June 25, 2014); Purdue University, http://www.purdue.edu/pmo/faq.shtml (separate scholarships for Glee Club members and members of other Purdue Music Organizations) (last visited June 25, 2014); University of Illinois, Scholarships for the College of Fine and Applied Arts, School of Art and Design (A&D), http://admissions.illinois.edu/cost/scholarships_FAA.html (tuition waiver for students "based on the quality of their portfolio") (last visited June 25, 2014); William & Mary Law School, Scholarships, https://law.wm.edu/admissions/financialaid/scholarships/index.php (scholarship for the law review editor-in-chief) (last visited June 25, 2014).

equally, of a woman. D. Oberteuffer, The Athlete and His College, 7 J. of Higher Educ. 437, 439 (1936). Northwestern University's mission, typical among colleges and universities today, embraces this vision of athletics as part of the educational experience. "[T]he success of the athletic program is inextricably linked to the educational mission of the University," the mission statement provides, "especially with regard to the academic and personal development of student-athletes . . . ." Northwestern Univ. Br. to the Reg'l Dir. at 2–3 (Mar. 17, 2014).

The higher education community has a historical commitment to maintaining education as the purpose and foundation of the athletics program. In 1888, Harvard College appointed a faculty committee to examine "the whole subject of athletics." Harvard Coll., Report Upon Athletics, with Statistics of Athletics and Physical Exercise, and the Votes of the Governing Boards (1888) ("Harvard Comm. Report"). The committee studied the "total time necessary for practice" and found that 21 hours per week of "training . . . is not so severe as to make the time devoted to study of less value to members of teams than to other students." See id. at 20. The Committee concluded that "athletic sports do not seriously interfere with attendance on College courses," and found "proof" that "except in the Freshman year, study is not interfered with by athletics." Id. at 17.

Educators have grappled with the best ways to keep students focused on academic pursuits even while they enjoy participation in, and benefits from, sports. A century ago, one commentator prescribed that "[a] definite time within which to matriculate and a minimum [required] amount of college work" could prevent students "from attending college for the main purpose of taking part in athletic games. . . ." Dudley, supra, at 102. Over the decades, *Amici* and their members have continued to take self-critical looks at how to keep athletics part of the educational mission. In 1952, ACE issued its Report of the Special Committee on Athletic

Policy, which recommended lodging control of athletics in the institution's regular administration and requiring all students to meet standard admissions criteria and make satisfactory academic progress. See ACE, Report of the Special Committee on Athletic Policy (Feb. 16, 1952). The Committee called for accrediting agencies to adopt and enforce pertinent standards. Id. Later, the Knight Commission on Intercollegiate Athletics ("Knight Commission") called for the college or university's president to control the athletics program and endorsed strengthening of initial academic eligibility requirements and financial integrity. See Reports of Knight Foundation Commission on Intercollegiate Athletics (1991–1993), available at http://www.knightcommission.org/academic-integrity/academic-integrity-commission-report; A Call To Action: Reconnecting College Sports and Higher Education (2001), available at http://www.knightcommission.org/images/pdfs/2001_knight_report.pdf; Restoring the Balance: Dollars, Values, and the Future of College Sports (2010), available at http://www.knightcommission.org/restoringthebalance. The Commission declared: "[P]residents and other leaders of Division I institutions have done much to improve governance policies and to raise academic expectations. The result has been better classroom outcomes for athletes and greater accountability for their coaches, teams, and institutions." Restoring the Balance at 1.

These efforts reflect the higher education community's deep commitment to maintaining and furthering primacy of education in athletics. Today, all of the nation's higher education regional accreditors have implemented standards applicable to athletics. Three of the five accreditors expressly require institutions to ground athletics in education. The Western Association of Schools and Colleges ("WASC") provides that "[s]ports and athletics of all kinds—intercollegiate, intramural, and recreational—are deeply rooted in educational institutions and in American society. Well-conducted programs of athletics add significantly to the

educational experience, and to a collegiate atmosphere of wholesome competition of athletics in an institution's educational mission." WASC, Collegiate Athletics Policy, available at http://www.wascsenior.org/files/Collegiate_Athletics_Policy.pdf. To that end, WASC reviews whether athletics programs are "integrated into the larger educational environment of the institution." Id. The New England Association of Schools and Colleges ("NEASC") similarly requires that athletics programs be "conducted in a manner consistent with sound educational policy, standards of integrity, and the institution's purposes." NEASC, Commission on Institutions of Higher Education, Standards for Accreditation 6.16 (July 1, 2011), available at http://cihe.neasc.org/downloads/Standards/Standards_for_Accreditation.pdf. "Educational programs and academic expectations" must be the "same for student athletes as for other students." Id. at 18. The Middle States Commission on Higher Education ("MSCHE") provides that "athletics programs should be fully integrated into the larger educational environment of the campus and linked to the institutional mission." Middle States Guidelines: Athletic Programs, 1, available at https://www.msche.org/documents/P3.3-AthleticPrograms.doc. "All expenditures for and income from athletics, from whatever source, and the administration of scholarships, grants, loans, and student employment, should be fully controlled by the institution and included in its regular budgeting, accounting, and auditing procedures." [2] Id. at 2.

[2] The Southern Association of Colleges and Schools Commission on Colleges ("SACSCOC") requires that an institution's chief executive officer exercise "ultimate responsibility for, and . . . appropriate administrative and fiscal control over, the institution's intercollegiate athletics program." SACSCOC, The Principles of Accreditation: Foundations for Quality Enhancement 3.2.11 (2011), available at http://www.sacscoc.org/pdf/2012PrinciplesOfAcreditation.pdf. The North Central Association Higher Learning Commission ("HLC") requires that institutions operate athletics programs with integrity. See HLC, Criteria for Accreditation 2.A (Feb. 2012), available at http://policy.ncahlc.org/Policies/criteria-for-accreditation.html.

2. The overriding purpose of college athletics is education, not profit.

Contrary to a popular canard, for nearly all colleges and universities the athletics program does not generate net income. The notion that colleges and universities offer athletic opportunities to generate revenue is demonstrably false. E.g., David Welch Suggs, Jr., Ph.D., Myth: College Sports Are a Cash Cow, The Presidency (Spring 2012), available at http://www.acenet.edu/the-presidency/Pages/Spring-2012.aspx. Northwestern's 19 sports teams, for example, in aggregate do not generate net revenue. To the contrary, despite net revenues from its football program, Northwestern annually subsidizes its sports programs with approximately $12.7 million in general revenue.

Only a tiny fraction of athletics programs at a tiny fraction of colleges and universities generate net revenue. See id. "[M]ost institutions require institutional funding to balance their athletics operating budget." Knight Commission, Restoring the Balance at 6. And this economic reality is likely to remain the case into the future. Indeed, "athletics subsidies will continue to grow, both in real terms and as a percentage of institutional budgets." Suggs, Jr., supra.

Given that athletics programs as a whole do not generate revenue, what motivates institutions to offer them? The answer is straightforward: like many other campus activities, intercollegiate athletics is an integral part of the educational experience. The institutions are not in the sports business; rather, "the 'business' of a university is education . . . ." NLRB v. Yeshiva Univ., 444 U.S. 672, 688 (1980).

3. Like others who participate intensively in college activities, student-athletes must be students.

Athletic eligibility rules illustrate a stark distinction between student-athletes and professionals; a student-athlete who fails to graduate from high school and progress toward a degree is barred from the field of play. See NCAA v. Bd. of Regents, 468 U.S. 85, 101–02

(1984) (noting that these characteristics distinguish college football from professional sports). Full-time student status and academic success are prerequisites for intercollegiate athletics participation.

Under NCAA Division I rules and common institutional practices, to be eligible for competition a student must, among other things, meet NCAA and institutional criteria for admission and be duly enrolled as an undergraduate student; meet all financial obligations to the institution, including payment of tuition and fees; and make sufficient academic progress toward a degree (this NCAA rule means completion of 40% percent of the coursework required for a degree by the end of the second year, 60% by the end of the third year, and 80% by the end of the fourth year). See, e.g., NCAA 2013–14 Division I Manual §§ 14.1.6.1, 14.01.2. NCAA rules also prohibit student-athletes from participating in more than 20 hours per week of mandatory sport-related activities. Id. § 17.1.6.1.

The Regional Director appeared to place weight on the finding that during the fall semester Northwestern football team members spent 40–50 hours per week on football. Reg'l Dir., Decision and Direction of Election, 6 (Mar. 26, 2014). Yet the fact that student-athletes spend substantial time on athletics is not surprising and does not diminish their status as students. As a threshold matter, NCAA rules permit only 20 hours of mandatory athletic activity during the week, meaning more than half of the 40 to 50 hours was voluntary. But even a 40-to-50 hour-per-week schedule would not signify that a student-athlete is other than a student. Even a student who chooses to devote more than 20 hours per week to football would be able to complete a full-time course load as defined by the U.S. Department of Education. See 34 C.F.R. §§ 600.2, 668.8 (defining a full-time academic load for federal student financial aid purposes as a minimum of 12 semester hours per semester, which translates to 36 hours' total academic work

per week). Students have time both to meet academic standards and to give intensive effort to extracurricular activities.

There is nothing unusual about the time commitment students make to college athletics teams. Many students choose to throw themselves into activities with an intensity that equals or exceeds that of student-athletes. And like college sports, no few of these activities benefit the institutions. Whether as editors of student publications (see, e.g., Ryan Schuster, Women Serve as Editors-in-Chief of all Five of William & Mary's Law Journals, William and Mary Law Sch. (May 7, 2014), http://law.wm.edu/news/stories/2014/women-serve-as-editor-in-chief-of-all-five-of-william--marys-law-reviews.php ("The editors' descriptions of their experiences show that serving as editor-in-chief of a journal is no small feat, involving long hours and the management of large staffs and deadlines for the publication of multiple volumes each year.")) or performing artists (e.g. Purdue University, Varsity Glee Club, http://www.purdue.edu/pmo/glee/glee.shtml (last visited June 25, 2014) ("Founded in 1893, this select ensemble has entertained on behalf of Purdue University for campus, community, state, national and international events, averaging between 50-60 appearances each year")), college students transcend the 40-hour work week. Campuses buzz with activity 24 hours per day. The intensive effort and focused commitment students give to activities is something to be admired, not viewed as exploitation. And the effort itself imparts valuable lessons. "Above all, intercollegiate [athletic] contests . . . drive home a fundamental lesson: Goals worth achieving will be attained only through effort, hard work, sacrifice, and sometimes even these will not be enough . . . ." Knight Commission, A Call to Action at 20; see Harvard Comm. Rep. at 22 ("the discipline, the regularity of life, and the perseverance required of contestants in athletic sports would tend to make athletes more efficient men . . .").

Student-athlete goals and graduation rates demonstrate the primacy of their role as students. Only three percent of student-athletes ever turn professional, and only twelve percent even want to do so. A. Grasgreen, "For athletes, a different kind of helicopter parent," Inside Higher Ed. (Apr. 15, 2014) (citing study presented at annual conference of American College Personnel Association). About 65% of Division I student-athletes earn their degrees within six years—a rate comparable to or better than that of the overall group of students entering college.[3] Among Bowl-bound Division I college football teams, the overall graduation rate was 72% after adjusting for transfers.[4] NCAA rules in effect in 2014–15 bar from post-season play teams from institutions that fail to attain mandated graduation rates. Reform Efforts, http://www.ncaa.org/governance/reform-efforts#awg (last visited June 30, 2014).

In sum, in the words of one former Division I college football player, intercollegiate athletics is not "separate and distinct from [the] educational experience," but "integral." Big Labor on College Campuses: Examining the Consequences of Unionizing Student-athletes: Hearing Before the House Education and the Workforce Committee, 113th Congress (2014) (testimony of Patrick C. Eilers).[5] The prerequisite for participation is academic success. Like

[3] Compare NCAA Research Staff, Trends in Graduation-Success Rates and Federal Graduation Rates at NCAA Division I Institutions 5 (Oct. 2013) (finding 65% graduation rate among Division I student-athletes entering in 2006), with Nat'l Ctr. for Educ. Statistics, The Condition of Education, Institutional Retention and Graduation Rates for Undergraduate Students (May 2014), available at http://nces.ed.gov/programs/coe/indicator_cva.asp (U.S. Department of Education statistics reporting that 59% of students nationwide entering in fall 2006 completed their degrees within six years).

[4] See Richard Lapchick et. al., The Institute for Diversity and Ethics in Sport (TIDES) at the University of Central Florida, Keeping Score When It Counts: Assessing the Academic Records of the 2013-2014 Bowl-bound College Football Teams 1 (Dec. 9, 2013), available at http://www.tidesport.org/Grad%20Rates/2013_Bowl_study.pdf.

[5] In a 2012 speech, the U.S. Secretary of Education Arne Duncan—himself a student-athlete—explained that "when athletic programs do have their priorities in order" they are "an ideal training ground for learning the skills of discipline, resilience, selflessness, taking responsibility, and, above all, leadership." "Like most student athletes, I felt it was an incredible privilege and

students in many other educational activities, some student-athletes receive scholarships designated for participants. Ultimately, though, scholarship student-athletes are required to meet academic standards and make adequate academic progress. They are students, not employees.

B. Scholarship Student-Athletes Are Not Common Law Employees.

The receipt of a scholarship does not alter the basic relationship between student and institution, turning student-athlete into employee. Under the common law definition, an employee is one who performs services "for another" or "in the service of another" under a contract of hire, subject to the other's right of control and in return for payment. Boston Med. Ctr. Corp., 330 NLRB 152, 160 (1999). Student-athletes fail this test because they do not perform services for educational institutions, and accordingly athletic scholarships are not compensation for services rendered. Nothing about the receipt of a scholarship transforms the student into an employee.

As with many of their other programs, colleges and universities may benefit in a range of ways from the athletic program, but that fact does not convert the student-athlete to an employee. Like other scholarship students, student-athletes who receive athletic scholarships participate in athletics to their own benefit as part of the educational experience. "Students attend school to serve their own interests, not the interests of the school." Kavanagh v. Trs. of Boston Univ., 795 N.E.2d 1170, 1174–75 (Mass. 2003). The "benefits that may accrue to a school from the attendance of particularly talented athletes is conceptually no different from the benefits that schools obtain from the attendance of other forms of talented and successful students—both as undergraduates and later as alumni." Id. at 1175. "The fact that a college or university has

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an honor to represent my university, not a form of exploitation." Arne Duncan, United States Secretary of Education, Time to Bring Your "A" Game—in Academics and Athletics (Jan. 11, 2012), available at http://www.ed.gov/news/speeches/time-bring-your-game-academics-and-athletics.

facilitated a student's ability to attend that institution by providing a scholarship or other financial assistance does not transform the relationship between the academic institution and the student into any form of employment relationship . . . ." Id. at 1174–1176 (citing the Restatement (Second) of Agency § 220 and holding that scholarship Division I basketball student-athlete did not qualify as a university employee for purposes of vicarious liability).

1. Scholarship student-athletes do not render services.

The Restatement Second of Agency § 220 defines a "servant" as a person "employed to perform services in the affairs of another." (Emphasis added). Nothing could be farther from the reality of student participation in collegiate athletics. The "students of a school . . . are not employees, but consumers of its product, education." Land v. Workers' Comp. Appeals Bd., 102 Cal. App. 4th 491, 496 (Cal Ct. App. 2002). Colleges 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—but these roles are readily distinguished from that of a student who participates in an educational opportunity. Hanson v. Kynast, 494 N.E.2d 1091, 1095 (Oh. 1986) (student-athlete was "not performing in the course of the principal's business, *i.e.*, he was not educating students . . . . On the contrary, he was participating in one of the educationally related opportunities offered by the university"); Wall v. Gill, 225 S.W.2d 670, 672 (Ky. 1949).

The distinction between employment and participation in a college's educational offerings cannot be ignored and replaced by asking, as the Regional Director did, whether the activity generates revenue or benefits the institution. See, e.g., Hanson, 494 N.E.2d at 1095; cf. Todd Sch. for Boys v. Indus. Comm'n, 107 N.E.2d 745, 747 (Ill. 1952) ("[T]hat the work of the students was directed by faculty members and resulted in benefits to the school does not in itself create a relation of employer and employee."). Such a broad standard would sweep in a wide range of campus organizations and activities that indisputably do not involve employment, such

as every *a cappella* singing group that performs a scholarship benefit concert and every extracurricular activity that generates modest revenue to offset cost. It conflates student participation in activities that enhance education, with work for which an institution would otherwise have to employ non-students—work unconnected to the education students receive. Compare Land, 102 Cal. App. 4th at 496 (recognizing that a student can be a school employee "when a student works in the school's cafeteria or library for wages in addition to attending classes"), with id. (although entitled to a portion of the net revenue on sale of animals, student injured in animal husbandry class did not qualify as an employee for purposes of worker's compensation law; the university was "'rendering service' to the student by providing its full panoply of educational resources for the student's use"); cf. Todd Sch., 107 N.E.2d at 747.

As explained above, supra I.A, intercollegiate athletics is one of many educational opportunities colleges and universities provide to students. As the California court of appeals explained when it rejected vicarious liability of a university for conduct of a student-athlete:

> [O]f all of the various sports programs, at least in California, only two, i.e., basketball and football, generate significant revenue. These revenues in turn support the other nonrevenue producing programs.
>
> Thus, conceptually, the colleges and universities maintaining these athletic programs are not in the "business" of playing football or basketball any more than they are in the "business" of golf, tennis or swimming. Football and basketball are simply part of an integrated multisport program which is part of the education process. Whether on scholarship or not, the athlete is not "hired" by the school to participate in interscholastic competition.

Townsend v. State, 191 Cal. App. 3d 1530, 1536 (Cal. Ct. App. 1987); cf. Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170, 1174 (Ind. 1983) (holding scholarship student-athletes are not employees; "[i]f a student wins a Rhodes scholarship or if the debate team wins a national

award that undoubtedly benefits the school, but does not mean that the student and the team are in the service of the school") (internal quotation marks and citation omitted).

The example of walk-on student-athletes is illuminating. Walk-ons, whom the Regional Director agreed are not employees, are subject to the same rigorous schedule as scholarship athletes. Yet it would be absurd to characterize their participation as rendering services to the institution. For one thing, they pay tuition without athletic aid. The notion that a student-athlete would remunerate the institution for the privilege to render services is illogical and counter to experience; employees do not pay employers for the opportunity to work. The reason thousands of students play collegiate sports without any athletic scholarship is that they benefit from the experience. Yet if walk-ons do not render services, the same must be true of scholarship athletes, as both groups of students are subject to the same expectations as team members.

Student-athletes do not render services to the institution; rather, as untold numbers of former and current student-athletes can attest, rewards flow to the student in the form of personal growth.

2. Athletic scholarships are not compensation.

Scholarship-athletes do not fit the common law definition of employee for another reason: the scholarships they receive are not compensation for services rendered. Fundamentally, athletic scholarships are tuition discounts for students as consumers of the college's educational offerings.

Scholarships earmarked for students pursuing particular academic or extracurricular activities are common in higher education. See part I, supra & n.1 (collecting examples); Waldrep v. Tex. Emp'rs Ins. Ass'n, 21 S.W.3d 692, 701 (Tex. Ct. App. 2000) ("Financial-aid awards are given to many college and university students based on their abilities in various areas, including music, academics, art, and athletics."). Conditional scholarships enhance the

educational environment by attracting talented students who contribute to campus life, but that intangible benefit does not transform these scholarships into contracts for hire. See id. An academic scholarship, for example, may be conditioned on completion of a particular educational program; yet plainly it is not compensation for services rendered—even though the institution and the department may benefit from the student's attendance, set degree requirements, and supervise the student's completion of the academic program.

Athletic scholarships bear no meaningful resemblance to a contract of hire. All the student-athlete need do is participate in the activity, just like a student on a scholarship for the debate team, the marching band, or English majors. As with other forms of financial aid—and distinct from compensation—the scholarship amount is based on the student's cost of attendance, not hours "worked" or contribution to the team. See 20 U.S.C. § 1087kk (capping the amount of federal student financial aid for the neediest students at the cost of attendance); cf. NCAA, 2013–14 NCAA Division I Manual §§ 15.01.6, 15.02.5 (capping award of financial aid at "cost of attendance that normally is incurred by students enrolled in a comparable program at that institution" and capping athletic scholarship at cost of tuition and fees, room and board, and required course-related books). The athlete's skill level, star power, and statistical performance on the field do not affect the amount of award, as would be the case with a contract of hire. In sum, scholarship student-athletes are not common law employees.

II. SCHOLARSHIP STUDENT-ATHLETES ARE NOT EMPLOYEES UNDER THE NLRA.

Because scholarship student-athletes are not common law employees, the Board need not revisit Brown University, 342 NLRB 483 (2004). But even if they were common law employees, they would not be employees for purposes of the NLRA because they are "primarily students"

under Brown. A contrary conclusion would conflict with Congressional intent and settled understandings.

The NLRA defines "'employee'" to "include any employee . . . ." 29 U.S.C. § 152. Confronted with a tautology, the Board looks first to the common law. See Brown, 342 NLRB at 495; NLRB v. Town & Country Elec., 516 U.S. 85, 93–95 (1995). However, Congressional intent controls. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974) (holding that Congress intended to exclude "managerial employees"); Brown, 432 NLRB at 488 ("We look to the underlying fundamental premise of the Act, viz. the Act is designed to cover economic relationships."); cf. NLRB v. Catholic Bishop, 440 U.S. 490, 507 (1979) ("Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools 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 Religion Clauses.").[6]

Congress has never provided or intended that scholarship student-athletes qualify as university employees under the NLRA. In fact, when Congress passed the NLRA it "was thought that congressional power did not extend to" nonprofit colleges and universities. Yeshiva Univ., 444 U.S. at 679.

[6] The dissent in Brown seemed to fault the majority for looking to Congressional intent rather than applying only the common law test. But the Supreme Court has recognized that in "doubtful cases resort must still be had to economic and policy considerations to infuse s 2(3) with meaning." Allied Chem. & Alkali Workers of Am. v. Pittsburg Plate Glass Co., 404 U.S. 157, 392 (1971); see also Town and Country, 516 U.S. at 94 (contemplating that the NLRB may "depart[] from the common law of agency with respect to particular questions"). The Board has departed from the common law on a number of occasions. E.g., Goodwill Indus. of Tidewater, Inc., 304 NLRB 767, 768 (1991) (holding that the disabled who are in primarily rehabilitative rather than economic or industrial work relationships are not statutory employees); Briggs Mfg. Co. (Detroit, Mich.), 75 NLRB 569, 571 (1947) (asserting applicants for employment are protected by the NLRA).

Since before the NLRA's enactment and through today, intercollegiate athletics has generated public commentary and Congressional interest. For example, a 1929 Carnegie Foundation Report calling for sports reform—which in 1991 the Knight Commission declared still "rings true"—made the front page of The New York Times.[7] Against this backdrop, after scores of hearings on intercollegiate athletics since passage of the NLRA, Congress has never expressed the view that student-athletes are or ought to be employees protected by the NLRA, and it has never seriously considered amending the NLRA to bring intercollegiate athletics within its scope, even though it has legislated in other areas involving amateur athletics, including college sports. For example, as the Knight Commission was preparing its report, Congress passed in 1990 the Student Right to Know Act requiring transparency in graduation rates for scholarship student-athletes. See Pub. L. No. 101-542, 104 Stat. 2381 (1990); see also Amateur Sport Act, 36 U.S.C. § 220501 et seq. The legislative record shows that Congress knows exactly how to classify college students as employees when it intends to do so. For example, Congress has recognized students as employees outside the athletic context, such as the federal work-study program. See 42 U.S.C. 2751–2756b. Yet Congress has never declared scholarship student-athletes to be university employees.

This silence is hardly surprising. Congress enacted the NLRA to address "strikes, industrial strife and unrest that preceded the Act . . . caused by the 'inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers.'" Brown, 342 NLRB at 487 (citation omitted). "The Act was premised on the view that there is a fundamental conflict between the interests of the employers and employees engaged in collective-bargaining under its auspices and that [t]he parties . . . proceed

[7] Howard J. Savage et al., American College Athletic Bulletin Number 23 (1929); College Sports Tainted by Bounties, Carnegie Fund Finds in Wide Study, N.Y. Times, Oct. 24, 1929.

from contrary and to an extent antagonistic viewpoints and concepts of self-interest." Id. at 487–88 (citation and internal quotations omitted). Against this background, application of the NLRA in the context of a college student's extracurricular athletic activity is plainly misplaced. Indeed, citing decades of Board precedent, the Board concluded in Brown that Congress never intended the NLRA to cover "primarily student" relationships. Id. at 488.

Under Brown, the question is whether the purported employees have a "primarily educational, not economic, relationship with their university." See id. at 487–88 ("The Board's longstanding rule [is] that it will not assert jurisdiction over relationships that are 'primarily education' . . . ."). If so, they are not NLRA employees regardless of the common law. See id. at 488–91; The Leland Stanford Junior Univ., 214 NLRB 621, 623 (1974). In Brown, the Board found persuasive evidence that a "primarily student" relationship existed between the university and its graduate student assistants and concluded that the NLRA did not apply. Brown at 488–91 (emphasizing "the status of graduate student assistants as students, the role of graduate student assistantships in graduate education, the graduate student assistants' relationship with the faculty, and the financial support they receive to attend Brown").

Like the graduate student assistants in Brown, scholarship student-athletes are primarily students. As in Brown and Stanford, the prerequisite to participation is enrollment as a student. E.g., 342 NLRB at 488 ("We emphasize the simple, undisputed fact that all the petitioned-for individuals are students and must first be enrolled at Brown to be awarded a TA, RA, or proctorship."). Further, as explained above, participation in intercollegiate athletics is an "'integral part'" of the "'educational program.'" Id. at 489 (citation omitted). And, importantly, scholarship student-athletes must achieve satisfactory academic progress before they may participate in sports, and eligibility is thus inextricably intertwined with a school's academic

requirements. This fact undercuts the importance the Regional Director placed on whether an institution awards academic credit for athletic participation. The question is not whether the institution awards such credit, but whether academic eligibility may become a subject of collective bargaining; and if scholarship student athletes were deemed employees, there is no principled basis to assume it would not. As the Board concluded in Brown, bargaining would become entangled with a school's academic standards, and the same academic freedom concerns cited in Brown and Stanford would arise.

There is another important reason that scholarship student-athletes are primarily students. Like the scholarships in Brown and Stanford, and unlike payment to employees, athletic scholarships are not dependent on the nature or intrinsic value of any services allegedly performed by, or the skill or function of, the recipient. Athletic scholarships are calibrated to the cost of attendance so as to enable students to obtain an education, see 342 NLRB at 487, and the student receives a fixed amount regardless of value added to the team. This calculation method further underscores that scholarship student-athletes are "primarily students"—indeed, they are fully students—and therefore not statutory employees under Brown.[8]

III. CONGRESS, FEDERAL AGENCIES, AND COURTS HAVE RECOGNIZED THAT COLLEGE ATHLETICS IS PART OF THE EDUCATIONAL PROGRAM, NOT EMPLOYMENT.

To hold that student-athletes are employees would be at odds with numerous pronouncements by Congress, the courts, and executive agencies. All three branches of government have repeatedly and consistently distinguished intercollegiate athletics from employment.

[8] For the same reasons "it simply does not effectuate the national labor policy to accord them collective bargaining rights, because they are primarily students. In this regard, the Board has the discretion to determine whether it would effectuate national labor policy to extend collective bargaining rights to such a category of employees." Brown, 342 NLRB at 492.

For example, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in "any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. When Congress enacted Title IX in 1972, Title VII of the Civil Rights Act of 1964 already prohibited sex discrimination in employment, echoing the NLRA's definition of "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e. Still, Congress found it necessary in Title IX to prohibit sex discrimination in education programs or activities. Two years later, in 1974, Congress amended Title IX to specify that it applied to intercollegiate athletics and directed the U.S. Department of Health, Education and Welfare to publish implementing regulations. See Pub. L. No. 93-380, 88 Stat. 612 (1974).[9]

Carrying out this mandate, not only did the U.S. Department of Education's predecessor agree that Title IX applied to intercollegiate athletics, but the agency specifically construed the statute to cover revenue-producing intercollegiate sports. "'[R]evenue producing intercollegiate athletics are so [i]ntegral to the general undergraduate education program of an institution of higher education that sex discrimination in the administration of a revenue producing athletic activity would necessarily infect the general undergraduate education program of the institution.'" 43 Fed. Reg. 58,070, 58,076 (Dec. 11, 1978) (NPRM). That interpretation would have been superfluous if the student-athletes in revenue sports were employees covered by Title VII.

[9] This legislation grew out of an effort by one Senator to exclude "'revenue producing'" intercollegiate athletic activities from Title IX. Congress specifically rejected that amendment, instead directing the U.S. Department of Education's predecessor to publish regulations applicable to intercollegiate athletics. S. Conf. Rep. No. 93-1026, reprinted in 1974 U.S.C.C.A.N. 4206, 4271 ("The Senate amendment, but not the House bill, amends title IX (prohibition of sex discrimination) of the Education Amendments of 1972 by stating that the prohibition against sex discrimination contained therein shall not apply to intercollegiate athletic activity to the extent that such activity does or may produce revenue or donations to the institution necessary to support such activity. . . . The conference substitute adopts only that portion of the Senate provision directing the Commissioner to prepare and publish regulations, but includes a provision stating that such regulations shall include with respect to intercollegiate athletic activities reasonable provisions concerning the nature of particular sports.").

Indeed, Title IX's implementing regulations draw a bright line between protections applicable to "athletic scholarships or grants-in-aid" and the separate rules applicable to "[a] recipient which employs any of its students." Compare 34 C.F.R. § 106.37 ("Financial assistance") with id. § 106.38 ("Employment assistance to students," incorporating protections in part 106, subpart E, applicable to employment); see also id. § 106.41 (providing for equal educational opportunity in the "[a]ssignment and compensation of coaches and tutors") (emphasis added). If student-athletes were employees, this application of Title IX to intercollegiate athletics would be unnecessary, as the "enforcement schemes of Title IX and Title VII overlap in the area of employment discrimination."[10]

If it were necessary for Congress to make any clearer that scholarship student-athletes are not employees for purposes of the non-discrimination laws, Congress did just so—again—about a decade later. Soon after Title IX opened the door to equitable athletic scholarships, a Supreme Court decision threatened to close it. In 1984, the Court ruled that Title IX applied only to the specific program or activity that received federal financial assistance, not to an entire institution. See Grove City Coll. v. Bell, 465 U.S. 555, 566 (1984), superseded by statute as stated, NCAA v. Smith, 525 U.S. 459 (1999). That decision meant that because most intercollegiate athletic programs did not receive direct federal assistance, Title IX would no longer apply. Congress again could have indicated or assumed that Title VII would fill the gap by protecting student-athletes as employees. Yet it did not do so. Instead, it responded to Grove City by passing the Civil Rights Restoration Act of 1987 ("CRRA"), Pub. L. No. 100-259, 102 Stat 28 (1988).

The CRRA clarified that Title IX applied to an athletic program (and all other educational programs or activities) if any part of the institution received federal financial assistance. By

[10] DOJ, Title IX Legal Manual, available at http://www.justice.gov/crt/about/cor/coord/ixlegal.php.

deeming the CRRA necessary, Congress rejected the idea that the discrimination prohibition of Title VII applies to scholarship student-athletes and thus rejected the idea that such students are university employees. The legislative history confirms this Congressional understanding. See, e.g., 131 Cong. Rec. S1309 (daily ed. Feb. 7, 1985) (statement of Senator Pell) (arguing that without the passage of the CRRA, opportunities for female collegiate athletes would be diminished); 131 Cong. Rec. H822 (daily ed. Feb. 28, 1985) (statement of Representative Schneider); 130 Cong. Rec. E3493 (daily ed. Oct. 2, 1984) (statement of Representative Kaptur); 130 Cong. Rec. E4164 (daily ed. Aug. 8, 1984) (statement of Representative Simon). The Congressional Record vividly demonstrates that Congress never considered, and never intended to consider, college athletes as employees. See Civil Rights Act of 1984, Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary 20–21 (May 9, 15–17, 21, 22, 1984) (statement of Representative Snowe); id. at 19 (statement of Representative Colman).

Other enactments such as the federal tax code reiterate Congressional intent on the point. Athletic scholarships are not taxable compensation for services rendered. Generally, qualified scholarships for degree-seeking students are not taxable unless they are "payment for teaching, research, or other services by the student." See 26 U.S.C. § 117(c)(1). Given the prominence of athletic scholarships, Congress easily could have included athletics in the enumerated examples of "payment for . . . services" rendered. It did not do so. See, e.g., 132 Cong. Rec. S17056 (daily ed. Oct. 17, 1986) (reporting exchange between Senator Danforth, who expressed "concern" that "normal student activities that may be required as a condition of receiving the scholarship (such as playing a sport for a recipient of an athletic scholarship . . .) do not constitute 'other services' for which these students are being compensated," and Senator

Packwood, who affirmed that "[t]he term 'other services' does not include normal student activities required as a condition for receiving a scholarship."). Consistent with Congressional intent, the Internal Revenue Service has ruled that athletic scholarships are not compensation for services rendered. See Rev. Rul. 77-263, 1977-2 C.B. 47, at *2 (1977).

Further, when Congress adopted the unrelated business income tax for nonprofit entities, it made clear that intercollegiate athletics is substantially related to a college or university's educational program and therefore not unrelated business income. See H.R. Rep. No. 81-2319, at 109 (1950) (declaring that income from "admissions to football games would not be deemed to be income from an unrelated business"); S. Rep. No. 81-2375, at 505 (1950), reprinted in 1950 U.S.C.C.A.N. 3053, 3082; H.R. Rep. No. 81-2319, at 109 (1950) ("athletic activities are substantially related to [the university's] educational program"); S. Rep. No. 2375, at 505 (1950) (concluding that "a university would not be taxable on income derived from a basketball tournament sponsored by it").

Courts, too, "in various contexts," including public immunity and vicarious liability, have consistently "rejected the theory that scholarship athletes are 'employees' of their schools." Kavanagh v. Trs. of Boston Univ., 795 N.E.2d 1170, 1175 (Mass. 2003) (collecting cases). For example, state workers' compensation cases hold that scholarship student-athletes are not employees. See Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170, 1174 (Ind. 1983) (collecting cases).[11] At least one court construing "employee" under the Fair Labor Standards

[11] The very few cases finding particular circumstances in which scholarship student-athletes may qualify as employees for purposes of state workers' compensation laws, see Van Horn v. Indus. Accident Comm'n, 219 Cal. App. 2d 457, 465 (Cal. Ct. App. 1963); Univ. of Denver v. Nemeth, 257 P.2d 423, 429–30 (Colo. 1953) (en banc), have either been abrogated by statute, see Graczyk v. Workers' Comp. Appeals Bd., 184 Cal. App. 3d 997, 1002, 1005–06, n.4 (Cal. Ct. App. 1986) (statute expressly declared that scholarship student-athletes are not employees) or distinguished, see State Comp. Ins. Fund v. Indus. Comm'n, 314 P.2d 288, 290 (Colo. 1957) (en

Act, which is even broader than the NLRA,[12] has reached the same conclusion. Marshall v. Regis Educ. Corp., 666 F.2d 1324, 1328 (10th Cir. 1981).

Congress, agencies, and courts have all recognized that scholarship student-athletes are not employees. A Board decision to the contrary would conflict with Congressional intent and upset this settled understanding.

IV. TO DECLARE STUDENT-ATHLETES EMPLOYEES WOULD SUBVERT RELATIONSHIPS ON WHICH THE PROCESS OF HIGHER EDUCATION DEPENDS.

A Board decision to treat scholarship student-athletes as employees would compromise the education colleges and universities provide. Student-athlete unionization would intrude on academic freedom and jeopardize the concept of athletics as an integral part of an institution's educational offerings. Paradoxically, student-athlete unionization could render union athletes ineligible to participate in intercollegiate play and cause colleges and universities to act like real employers—eliminating athletic scholarships and/or non-revenue sports and the educational opportunities they provide.

A. To Declare Student-Athletes Employees Would Undermine Education.

To cram into the educational environment the extensive rights and mechanisms designed for the workplace would create countless unintended and, in the aggregate, substantially harmful consequences. The resulting regime would endanger common-sense policies designed to protect students and nurture the academic setting and would involve the Board in adjudicating matters historically left to the discretion of educators. For example, Sections 7 and 8(a)(1) could open a college or university's academic or disciplinary apparatus to government oversight. As the

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banc) (distinguishing Nemeth and holding whether student-athlete was an employee turned on whether the student's separate part-time job was conditioned on sport participation).

[12] See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (the FLSA "defines the verb 'employ'" with "striking breadth").

Board's website explains, employers "may not . . . discipline or discharge a union-represented employee for refusing to submit, without a representative, to an investigatory interview the employee reasonably believes may result in discipline." NLRB, Interfering with Employee Rights, http://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1 (last visited June 25, 2014). The rules the Board enforces are inapposite because colleges and universities stand in a fundamentally different relationship with students than an employer with employees. And the implications of a declaration that scholarship student-athletes are NLRA employees would be far-reaching and harmful, for Sections 7 and 8(a)(1) protect employees who do not form a union as well as those who do.

Collective bargaining in this context would harm education. As the Board recognized in Brown, when a college or university bargains as employer with employees, there are no special rules taking academic or educational issues off the table. All aspects of a scholarship student-athlete's educational relationship presumably would be subject to bargaining and government supervision. This list would be virtually endless, including, for example: class times, class duration, and class location in relation to sports obligations and facilities; academic eligibility for athletics participation; class attendance requirements; student and athlete codes of conduct and procedures for adjudicating alleged violations; and so on. To have union leaders negotiate these matters, under Board oversight, is inconsistent with longstanding governmental deference to educators on educational matters. Rigid bargaining structures are ill-suited to account for academic needs, such as gauging the different requirements of academic departments. Centralized bargaining would threaten to nullify traditional shared governance, which lodges authority over academic matters with the faculty. Academic freedom protects a sphere of institutional and faculty decision making; collective bargaining on terms of student-athlete

"employment" would trench on that freedom, in such decisions as whether and how class attendance and participation affect a student's grade. See NLRB v. Yeshiva Univ., 444 U.S. 672, 688 (1980) ("[A]cademic policies . . . largely are formulated and generally are implemented by faculty governance decisions").

Union bargaining and Board regulation of contract terms inevitably would spill over into such key questions as what constitutes student eligibility for intercollegiate athletics and thus would implicate the core concept of satisfactory academic progress. Such government oversight of academic matters threatens the "four essential freedoms" of a 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) (citation omitted) (Frankfurter, J., concurring).

B. Scholarship Student-Athlete Unionization Would Not Address Recognized Problems in Intercollegiate Athletics.

For over a century, the higher education community has endeavored to keep education at the heart of intercollegiate athletics. Although for the most part the effort has succeeded, the track record is not perfect. In 1882 the Harvard Committee wrote "[a]lmost every year there are rumors that teams accept players whose connexion with the University is but nominal. . . . The great difficulty with athletic contests, in and out of the College, is the passionate desire to win. It leads men to strain the rules of sport and sometimes to break them . . . ." Harvard Comm. Rep. at 24. Higher education quality entails a continuous process of institutional self-improvement, but unionization of scholarship student-athletes does not and cannot solve any flaws in the system. Indeed, treating scholarship student-athletes as employees would only exacerbate the criticism that intercollegiate athletics entails insufficient focus on education.

A decision to treat scholarship student-athletes as employees could not in a principled way be limited to revenue sports or Division I sports. Participation in a varsity intercollegiate athletics program involves a substantial time commitment, a coaching staff, and team expectations. Seeking to distinguish NLRA-covered sports from others—based on such parameters as degree of institutional "control" or time spent on athletics compared with academics, to which the Regional Director ascribed heavy weight—would lead the Board and courts to wrestle with an unsolvable line-drawing problem. For example, Division II colleges and universities offer athletic scholarships, and nearly all Division II programs generate some athletic revenue— although not enough to cover expenses. See NCAA, Revenues & Expenses: NCAA Div. II Intercollegiate Athletics Programs Report tbls. 3.30 & 4.30 (2004–2011). They would thus be covered, according to the Regional Director's conception, which viewed scholarship student-athletes as employees in that context. Stretching the definition of employee to cover scholarship student-athletes would require the Board either to invent a test that lacks any statutory foundation to limit it to revenue sports or to extend "employee" status broadly to every athletic-scholarship recipient in every sport that offers athletic scholarships.

Union bargaining would interfere with educational decisions and distort the relationship between educators and students. Presumably, a union could negotiate for a benefit that violates NCAA rules, such as an increase in scholarship amounts above the NCAA-permitted level, and thus jeopardize an institution's standing with the NCAA. A regime of stifling regulation could be imposed. If viewed as employees under the NLRA, scholarship student-athletes may be entitled to the wide range of rights due employees under federal and state law. The U.S. Department of Labor administers over 100 federal statutes governing the employment relationship, many patterned on the NLRA's definition of employee. Institutions may also

become vicariously liable for scholarship student-athletes' torts and need to insure against this risk. An unwarranted, costly administrative burden would fall on institutions, to the detriment of students. And the increased costs of compliance could lead institutions to increase tuition or reduce the number of athletic offerings they are able to fund. The consequences of collective bargaining between higher education institutions and their scholarship student-athletes thus would be far-reaching and detrimental to educational institutions and their students.

All in all, to hold that scholarship student-athletes are employees would be an unprecedented intrusion into the educational missions of universities. It would undermine education by impinging on academic freedom and would exacerbate many of the problems critics find with intercollegiate athletics. The Knight Commission, which gave serious study to reform of intercollegiate sports over a period of years, considered the very same proposal that is now before the Board, and rejected it, for sound reasons. To those who would "drop the student-athlete concept [and] put [students] on the payroll," the Commission responded: "We reject the argument." "Such a scheme," it concluded, "has nothing to do with education, the purpose for which colleges and universities exist." Knight Commission, A Call to Action at 25.

CONCLUSION

For all the foregoing reasons, the Board should reverse the Regional Director's decision in this matter and dismiss the petition.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing American Council on Education *amicus* brief was served this 3rd day of July, 2014 on the following by electronic mail.

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ADDENDUM: *AMICI CURIAE* ON THIS BRIEF

- The American Council on Education is described at page 1 of this brief.

- The Association of Governing Boards of Universities and Colleges ("AGB") is the only national association that serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership. Its mission is to strengthen, protect, and advocate on behalf of citizen trusteeship that supports and advances higher education. AGB has consistently conveyed its commitment to ensure the integrity of intercollegiate athletics, most recently through a report in November, 2012, on "Governance and Intercollegiate Athletics: Boards Must Know the Score."

- The Association of Public and Land-grant Universities ("APLU") is a research, policy, and advocacy organization representing public research universities, land-grant institutions, state university systems, and affiliated organizations. Founded in 1887, APLU is the nation's oldest higher education association with member institutions in all 50 states, the District of Columbia, and four U.S. territories. Annually, its 193 U.S. member campuses enroll 3.9 million undergraduates and 1.2 million graduate students, award 1 million degrees, employ 1.2 million faculty and staff, and conduct $38.7 billion in university-based research.

- The College and University Professional Association for Human Resources ("CUPA-HR") serves as the voice of human resources in higher education, representing more than 17,000 human resources professionals and other campus leaders at over 1,900 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 77 percent of all master's institutions, 57 percent of all bachelor's institutions, and 600 two-year and specialized institutions. Higher education employs over 3.8 million workers nationwide, with colleges and universities in all 50 States.

- The National Association of Independent Colleges and Universities ("NAICU") serves as the unified national voice of private, nonprofit higher education in the United States. It has more than 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business, and other professions. NAICU represents these institutions on policy issues primarily with the federal government, such as those affecting student aid, taxation, and government regulation.