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BIG LABOR ON COLLEGE CAMPUSES: EXAMINING THE CONSEQUENCES OF UNIONIZING STUDENT ATHLETES

HEARING

BEFORE THE

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, MAY 8, 2014

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BIG LABOR ON COLLEGE CAMPUSES: EXAMINING THE CONSEQUENCES OF UNIONIZING STUDENT ATHLETES

Thursday, May 8, 2014
House of Representatives,
Committee on Education and the Workforce,
Washington, D.C.

The committee met, pursuant to call, at 10:03 a.m., in Room 2175, Rayburn House Office Building, Hon. John Kline [chairman of the committee] presiding.

Present: Representatives Kline, McKeon, Foxx, Roe, Thompson, Walberg, Guthrie, DesJarlais, Rokita, Bucshon, Brooks, Messer, Byrne, Miller, Scott, Tierney, Holt, Davis, Bishop, Courtney, Fudge, Polis, Bonamici, and Pocan.

Staff present: Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Senior Legislative Assistant; Amy Raaf Jones, Director of Education and Human Resources Policy; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk; James Martin, Professional Staff Member; Zachary McHenry, Senior Staff Assistant; Daniel Murner, Press Assistant; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Jenny Prescott, Legislative Assistant; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Mandy Schaumburg, Education Deputy Director and Senior Counsel; Alex Sollberger, Communications Director; Alissa Strawcutter, Deputy Clerk; Juliane Sullivan, Staff Director; Alexa Turner, Legislative Assistant; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Jody Calemine, Minority Staff Director; Melissa Greenberg, Minority Staff Assistant; Eunice Ikene, Minority Staff Assistant; Brian Kennedy, Minority Senior Counsel; Julia Krahe, Minority Communications Director; Brian Levin, Minority Press Secretary; Leticia Mederos, Minority Director of Labor Policy; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Rich Williams, Minority Education Policy Advisor; Michael Zola, Minority Deputy Staff Director; and Mark Zuckerman, Minority Senior Economic Advisor.

Chairman KLINE. A quorum being present, the committee will come to order. Well, good morning. I would like to begin by welcoming our guests and thanking our witnesses for joining us. We

appreciate the time you have taken to share your thoughts and expertise with the committee.

College sports have become a favored pastime for millions of Americans. Whether filling out a tournament bracket—never works for me, by the way—to tailgating on a Saturday afternoon, or simply cheering on an alma mater for many fans college sports is a way to spend time with loved ones and stay connected with old friends. Where fans are known for their loyalty, student athletes are renowned for their passion and talent, and look to leverage their athletic ability in pursuit of different dreams. For some, competing at the collegiate level is a step toward a career in professional sports.

For others, in fact for most student athletes, playing a college sport is a ticket to an education they simply couldn't access without an athletic scholarship. Regardless of why student athletes play, their dreams can be turned upside down by a sports-related injury. When that happens, institutions must step up and provide the health care and academic support the student needs. Most institutions are doing just that, and standing by their athletes for the long haul. But some are not.

No student athlete injured while representing their school on the field should be left behind because of the misplaced priorities of a college or university. Can the NCAA and institutions do more to protect students? Absolutely. They can start by giving students a greater role in shaping policies that govern college athletics. They could also work to help ensure a sports injury doesn't end a student's academic career, and find a responsible solution that will deliver the health care injured players may need. While promoting change is often difficult, student athletes deserve a determined effort to address these concerns.

Does that mean that unionizing student athletes is the answer? Absolutely not. When he signed the *National Labor Relations Act,* President Franklin Delano Roosevelt declared, "A better relationship between labor and management is the high purpose of this act." It is hard to imagine President Roosevelt thought the law would one day apply to the relationship between student athletes and academic institutions. Yet that is precisely where we are.

A regional director of the National Labor Relations Board recently ruled football players at Northwestern University are employees of the school for the purpose of collective bargaining. The ballots cast in an April 25 election have been impounded, pending review by the full board. Given the track record of this NLRB, I suspect the board will rubber stamp the regional director's decision, setting a dangerous precedent for colleges and universities nationwide. In the meantime, schools, athletic organizations, students and the public are searching for answers to countless questions stemming from this unprecedented ruling.

For example, what issues would a union representing college athletes raise at the bargaining table? Would a union negotiate over the number and length of practices? Perhaps a union would seek to bargain over the number of games. If management and the union are at an impasse, would players go on strike? Would student athletes on strike attend class and have access to financial aid? How would student athletes provide financial support to the

union? Would dues be deducted from scholarships before being dispersed to students? Or are students expected to pay out of pocket?

We know many student athletes struggle financially. How will they shoulder the cost of joining a union? Speaking of cost, where will smaller colleges and universities find the resources to manage labor unions with student athletes? A lot of institutions operate on thin margins, and college costs are soaring. Are these schools ready to make some difficult decisions, such as cutting support to other athletic programs like lacrosse and field hockey, or even raising tuition? And finally, how will other NLRB policies affect your higher education system?

Are college campuses prepared for micro unions and ambushed elections? Are administrators equipped to bargain with competing unions representing different athletic programs? Will students be able to make an informed decision about joining a union in as few as 10 days, while attending class and going to practice? These are tough questions, and they should be discussed before students and administrators are forced to confront a radical departure from longstanding policies. We share the concerns of players that progress is too slow, but forming a union is not the answer. Treating student athletes as something they are not is not the answer.

The challenges facing student athletes should be addressed in a way that protects the athletic and academic integrity of higher education. The recent NLRB decision takes a fundamentally different approach that can make it harder for some students to access a quality education. I strongly urge the Obama board to change course, and encourage key stakeholders to get to work.

I look forward to today's discussion, and will now recognize the senior Democratic member of the committee, Mr. George Miller, for his opening remarks.

[The statement of Chairman Kline follows:]

Prepared Statement of Hon. John Kline, Chairman, Committee on Education and the Workforce

Good morning. I'd like to begin by welcoming our guests and thanking our witnesses for joining us. We appreciate the time you've taken to share your thoughts and expertise with the committee.

College sports have become a favored pastime for millions of Americans. Whether filling out a tournament bracket, tailgating on a Saturday afternoon, or simply cheering on an alma mater, for many fans, college sports is a way to spend time with loved ones and stay connected with old friends.

Where fans are known for their loyalty, student athletes are renowned for their passion and talent and look to leverage their athletic ability in pursuit of different dreams. For some, competing at the collegiate level is a step toward a career in professional sports. For others – in fact, for most student athletes – playing a college sport is a ticket to an education they simply couldn't access without an athletic scholarship.

Regardless of why student athletes play, their dreams can be turned upside down by a sports-related injury. When that happens, institutions must step up and provide the health care and academic support the student needs. Most institutions are doing just that and standing by their athletes for the long-haul, but some are not. No student athlete injured while representing their school on the field should be left behind because of the misplaced priorities of a college or university.

Can the NCAA and institutions do more to protect students? Absolutely. They could start by giving students a greater role in shaping policies that govern college athletics. They could also work to help ensure a sports injury doesn't end a student's academic career and find a responsible solution that will deliver the health care injured players may need. While promoting change is often difficult, student athletes deserve a determined effort to address these concerns.

Does that mean unionizing student athletes is the answer? Absolutely not. When he signed the National Labor Relations Act, President Franklin D. Roosevelt declared, "A better relationship between labor and management is the high purpose of this Act." It's hard to imagine President Roosevelt thought the law would one day apply to the relationship between student athletes and academic institutions, yet that is precisely where we are.

A regional director of the National Labor Relations Board recently ruled football players at Northwestern University are "employees" of the school for the purpose of collective bargaining. The ballots cast in an April 25th election have been impounded pending review by the full board. Given the track record of the Obama NLRB, I suspect the board will rubber stamp the regional director's decision, setting a dangerous precedent for colleges and universities nationwide. In the meantime, schools, athletic organizations, students, and the public are searching for answers to countless questions stemming from this unprecedented ruling.

For example, what issues would a union representing college athletes raise at the bargaining table? Would a union negotiate over the number and length of practices? Perhaps the union would seek to bargain over the number of games. If management and the union are at an impasse, would players go on strike? Would student athletes on strike attend class and have access to financial aid?

How would student athletes provide financial support to the union? Would dues be deducted from scholarships before being disbursed to students? Or are students expected to pay out of pocket? We know many student athletes struggle financially. How will they shoulder the cost of joining a union?

Speaking of costs, where will smaller colleges and universities find the resources to manage labor relations with student athletes? A lot of institutions operate on thin margins and college costs are soaring. Are these schools ready to make some difficult decisions, such as cutting support to other athletic programs like lacrosse and field hockey, or even raising tuition?

And finally, how will other NLRB policies affect our higher education system? Are college campuses prepared for micro-unions and ambush elections? Are administrators equipped to bargain with competing unions representing different athletic programs? Will students be able to make an informed decision about joining a union in as few as 10 days, while attending class and going to practice?

These are tough questions that should be discussed before students and administrators are forced to confront a radical departure from long-standing policies. We share the concerns of players that progress is too slow, but forming a union is not the answer; treating student athletes as something they are not is not the answer.

The challenges facing student athletes should be addressed in a way that protects the athletic and academic integrity of higher education. The recent NLRB decision takes a fundamentally different approach that could make it harder for some students to access a quality education. I strongly urge the Obama board to change course and encourage key stakeholders to get to work.

I look forward to today's discussion, and will now recognize the senior Democratic member of the committee, Representative Miller, for his opening remarks.

Mr. MILLER. Thank you, Mr. Chairman. I am glad that we are having a hearing to better understand what is really happening in college athletics, to air out the very legitimate grievances that have been raised by the Northwestern University and around the country. Let's start by setting the stage. The nostalgic days when student athletes really were, "students," first, and when college sports was just about learning teamwork, self-discipline and sportsmanship while getting some exercise and friendly competition, those days are pretty much over in high-level athletic programs.

During the last four decades, colleges and universities, through the NCAA, have perfected the art of monetizing athletic play of their best football and basketball players and teams, while steadily encroaching on the players' academic opportunities. They have created nothing less than a big sports empire. The empire is consumed and driven by a multibillion dollar exclusive television, radio, multimedia deals, branding agreements, primetime sports shows and celebrity coaches with seven-figure salaries. Our nation's talented athletes have become commodities within this empire.

They are units of production that are overscheduled and overworked, left without safeguards for their health and safety, encouraged to put their education on the back burner in favor of success on the field. Some athletes have figured this out, and now they are starting to ask really smart questions about this whole arrangement. They want to know what happens to them if they suffer a catastrophic injury on the field that leaves them with a lifetime disability. Will they lose their scholarship, and with it the chance of an education and a career?

How much of their health care will they and their families need to pay out of pocket? They are reading about new studies in long-term effects of head injures, and they want to know if the schools and coaches are doing all that they can to prevent concussion and brain injury on the field. Will their health come first when the decision is being made about whether or not they are fit to play, or will their team's desire to win trump the health concerns of the individual player? They are raising questions about the adequacy of their scholarships and the restrictions that leave them with little or no support for out of pocket and incidental expenses they face.

Why are some of the teammates finding themselves unable to afford enough food to eat or books for their classes while the university makes millions from their effort? They want to know why so many players didn't finish their academic programs. They want to discuss a fairer transfer policy. How can policies be changed to support the players' success in academics, not just athletics? The National Labor Relations Board decision regarding Northwestern University football players documents an all-consuming, sometimes eye-popping demand of a college football player in today's mega-profit-driven NCAA world.

At Northwestern, the daily life of a football player revolves around practice and preparation, commonly a 40-to 50-hour a week commitment during the fall season, with any classes or homework squeezed on top. You can see the sample schedule displayed here, I believe, on the screen of the Northwestern players. Oh, it is over on—underneath the screen, excuse me. Players are expected to report to their training room by 6:15 on Monday mornings for their medical checks. By 7 a.m., it is various and team and position meetings, then pads and helmets until noon.

At night, they meet with coaches to review game films. And there are always the agility drills, conditioning, weightlifting, workouts and playbooks to study in between. From the beginning of the month-long August training camp, through the grueling 12-week season, to post-season bowl play into mid-January, winter warm-ups to February winning edge week, to mandatory spring workouts, to high-stakes football preparation, nonacademic obligations become the focus of these players' lives and the obsession of their coaches. Meanwhile, players worry about their health and safety, their financial future and their prospects for jobs after graduation.

The big-business empire of college sports is doing very well. Its revenues are up 32 percent in the last six years. And many universities are hiking tuition and fees, turning to underpaid, overstretched adjunct faculty and cutting student services. So the NCAA and the superstar football programs are making more and more money, and the athletes they depend on are getting less and

less. In the end, this is a classic labor dispute. The NCAA empire is holding all the cards, making all the rules, capturing all of the profits. The hardest-working, most valuable components in this system, the players, are left with little to say, little leverage, and no blocking or tackling but themselves.

By banding together and bargaining, these athletes can win the kinds of things union workers have demanded, and won, across the country: a say about avoiding serious injury on the job, medical benefits and securities if something goes wrong, meaningful input into how they will balance their work—in this case, football is their work—with their academic needs and their other responsibilities, the respectful treatment and care they so richly deserve.

I look forward to today's hearing and hearing from today's witnesses about how we can do more to help protect and support these hardworking student employees.

Chairman KLINE. I thank the gentleman.

Pursuant to committee rule 7(c), all committee members will be permitted to submit written statements to be included in the permanent hearing record. Without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing will be submitted in the official hearing record.

It is now my pleasure to introduce our distinguished panel. And in light of my failing voice and the very, very long resumes of our witnesses, I am going to be extraordinarily brief.

Starting to my left, we have the Honorable Ken Starr. He is president and chancellor of Baylor University in Waco, Texas. Mr. Bradford Livingston is a partner in Seyfarth Shaw, LLP in Chicago, Illinois. Mr. Andy Schwarz is a partner at OSKR LLC in Emeryville, California. Mr. Bernard Muir is director of athletics for Stanford University in Stanford, California. And Mr. Patrick Eilers is managing director at Madison Dearborn Partners in Chicago, Illinois and former Minnesota Viking. Okay, I couldn't stop.

Before I recognize you to provide your testimony, let me briefly remind everyone of the 5-minute lighting system. The system is pretty straightforward. When I recognize you, you will have five minutes to give your testimony, the light will be green. After four minutes, it will turn yellow. I would hope that you would be looked to wrapping up your testimony. When it turns red, please wrap up as expeditiously as you can. I have told witnesses before I am very loathe to gavel down a witness. We are here to listen to you, you are here to give us the benefit of your expertise. I am less loathe to gavel down my colleagues when we get into our 5-minute questioning session. But please, try to be respectful of the other witnesses, and wrap up your testimony.

All right, let's start with the Honorable Ken Starr. Sir, you are recognized.

[The statement of Mr. Miller follows:]

Prepared Statement of Hon. George Miller, Senior Democratic Member, Committee on Education and the Workforce

Mr. Chairman, I am glad we are having a hearing to better understand what is really happening to college athletes, and to air out the very legitimate grievances that have been raised at Northwestern University and around the country.

Let's start by setting the stage:

The nostalgic days where student-athletes really were "students" first—and where college sports were JUST about learning team work, self-discipline, and sportsmanship while getting some exercise and friendly competition—are pretty much over for high-level athletic programs.

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They are units of production that are over-scheduled and over-worked, left without safeguards for their health and safety, and encouraged to put their education on a backburner in favor of their success on the field.

Some athletes have figured this out, and now they are starting to ask really smart questions about this whole arrangement.

They want to know what happens to them if they suffer a catastrophic injury on the field that leaves them with a lifetime disability.

Will they lose their scholarship—and with it their chance for an education and a career?

How much of their health care will they and their families need to pay for out of pocket? They are reading about the new studies on the long-term effects of head injuries.

And they want to know if the schools and coaches are doing all they can to prevent concussions and brain injury on the field.

Will their health come first when a decision is being made about whether or not they're fit to play? Or will the team's desire to win a game trump the health concerns of an individual player?

They are raising questions about the adequacy of their scholarships and the restrictions that leave them with too little support for the out-of-pocket and incidental expenses they face.

Why are some of their teammates finding themselves unable to afford enough food to eat or books for their classes, while their university makes millions from their efforts?

They want know why so many players don't finish their academic programs, and they want to discuss fairer transfer policies.

How can policies be changed to support players' success in academics, not just athletics?

The NLRB's decision regarding Northwestern University football players documents the all-consuming, sometimes eye-opening, demands of a college football player in today's mega-profit-driven NCAA world.

At Northwestern, the daily life of a football player revolves around practice and preparations— commonly a 40- to 50-hour-a-week commitment during the fall season—with any classes or homework squeezed on top.

You can see a sample schedule displayed here.

Players are expected to report to the training room by 6:15 on Monday mornings for their medical checks. By 7:50 a.m., it's various team and position meetings, then pads and helmets until noon.

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Meanwhile, players worry about their health and safety, their financial future, and their prospects for a job after graduation.

The big business empire of college sports is doing very well. Its revenues are up by 32 percent over just the last six years.

And many universities are hiking tuitions and fees; turning to underpaid, overstretched adjunct faculty; and cutting student services.

So the NCAA and superstar football programs are making more and more money, and the athletes they depend on are getting less and less.

In the end, this is a classic labor dispute.

The NCAA empire is holding all the cards, making all the rules, and capturing all the profits.

The hardest-working, most valuable components of this system—the players—are left with little say or leverage, with no one blocking or tackling but themselves.

By banding together and bargaining, these athletes can win the kinds of things union workers have demanded and won across the country:

* a say about avoiding serious injury on the job,
* medical benefits and security if something does go wrong,
* meaningful input into how they balance their work—in this case football—with their academic needs and other responsibilities, and
* the respectful treatment and care they so richly deserve.

I look forward to hearing from today's witnesses about how we can do more to help, protect, and support these hard- working student employees.

STATEMENT OF HON. KEN STARR, PRESIDENT AND CHANCELLOR, BAYLOR UNIVERSITY, WACO, TEXAS

Judge STARR. Thank you, Mr. Chairman. It is an honor to be here and to discuss this very important issue for private higher education. As the chair kindly recognized, I serve as president and chancellor of Baylor University. I have served as president and CEO of Baylor University since June of 2010. Baylor University is located in Waco, Texas. It is a private Christian university. It is ranked as a high research, comprehensive university, and it is a vibrant community home to over 15,000 students, including over 600 student athletes.

Baylor is a founding member of the Big 12 Conference, established in 1994. We sponsor 19 varsity teams. We are very blessed at Baylor to have student athletes who succeed both in the classroom and on the playing field. Over the past three years, Baylor University has been the most successful Division 1 program in combined winning percentages of football and men's and women's basketball. But these accomplishments do not count, ultimately, in terms of what we emphasize at Baylor.

As commencement approaches next week on our campus, we are celebrating our academic accomplishments. In fact, we gathered together on Monday evening at Baylor's Ferrell Center to do exactly that; to honor our student athletes' performance in the classroom. During the prior academic year, Mr. Chairman, 86 percent of senior student athletes at Baylor received their undergraduate degrees, and many have gone on to pursue advanced degrees. This past fall semester—the grades are not in for the spring—our student athletes achieved a cumulative GPA of 3.27. That is an all-time high.

And 347 of our student athletes were named to the Big 12 commissioners' honor roll. So these are remarkable times for Baylor and its athletic program. Yet the reality is, is that even in these best of times college athletics, including at Baylor, is not a profit-generating activity. It does not generate profits for Baylor, nor for the vast majority of institutions of higher education. The NLRB regional director's recent decision in the Northwestern University case has characterized our student athletes as employees. This is an unprecedented ruling, as the chairman noted. In our view, it is misguided.

The term "student athletes" is real on our campus. We would invite members to come to our campus and see for themselves. At bottom, it is a relationship which provides a college education and

even beyond. That at Baylor, student athletes are first and foremost students, and they are expected to be and required to be. We are far removed from a professional sports franchise. We are dedicated to each and every student's welfare, including our student athletes.

Now at Baylor, and across the nation, student athletes benefit from a wide array of services that are specifically designed to maximize their potential as students, and then to prepare the student athletes for their journeys in life after college. These services and programs contribute significantly to their ultimate academic success. They include academic advising, degree planning, career counseling. Many institutions, including Baylor, provide very high-quality academic support, such as tutoring service, computer labs, and study lounges. We have study hall.

Student athletes also receive specific financial benefits, which help them progress toward degree completion. And these traditional benefits are very familiar: tuition, room, board, fees, books, and other related educational expenses.

Now, what is the purpose? The purpose in offering financial assistance is to encourage our student athletes to carry on, and to complete, their academic work. And the vast majority do. Now, the NLRB has expressed a view that the legal issue of employee status is ultimately a matter of congressional intent, and we agree with that.

In instance however, the regional director has mechanically, and we believe erroneously, applied a rigidly wooden test drawn from the common law, notwithstanding, as the chairman suggested, the absence of any congressional intent to include college athletics as an employment venue.

Now, the decision, by its terms, applies only to private institutions. But it does create a dichotomy. For example, the decision rightly notes that Northwestern University is nonsectarian. But the NLRB has been struggling in various dimensions with religious liberty limitations on its own jurisdiction.

So we should reasonably expect some private, religiously-affiliated universities to challenge the board's authority to be regulating institutional missions expressly grounded in a religious world view.

The second and more structurally significant disparity is the decision's implicit exclusion of state institutions. In intercollegiate athletics, private universities compete with state institutions and this will likely create many discrepancies among the nation's universities.

Thank you, Mr. Chairman.

[The statement of Judge Starr follows:]

Introduction

Good morning and thank you, Mr. Chairman, for this opportunity to testify about a highly important subject in private higher education. I currently serve as President and Chancellor of Baylor University in Waco, Texas. I have served as President and CEO of Baylor University since June 2010. I also have the privilege of serving on the Board of Directors for the National Association of Independent Colleges and Universities (NAICU) and President of the Southern University Conference.

The decision by the National Labor Relations Board (NLRB) Region 13 Director to characterize student-athletes as "employees" presents a fundamental paradigm shift with respect to the relationship between universities and their student-athletes. While limited by its terms to private institutions, the decision is bound to affect all Division I athletic programs – public and private alike. A variety of questions and unintended consequences arise out of this ruling with far-reaching legal, regulatory, and financial implications that may significantly affect the future of intercollegiate athletics.

About Baylor

Baylor University is a private Christian university. It is a nationally-ranked, comprehensive research institution, characterized as having "high research activity" by the Carnegie Foundation for the Advancement of Teaching. The university provides a vibrant campus community for 15,616 students (of whom 13,292 are undergraduates) from all 50 states and over 80 foreign countries. Baylor blends interdisciplinary research and educational excellence, buttressed by our dedicated faculty's commitment to teaching, mentoring, and scholarship.

Baylor is a founding member of the Big 12 Conference (established in 1994). It was a founding member of the Southwest Conference throughout the latter's storied 81-year history. Baylor sponsors 19 varsity athletic teams, including men's baseball, basketball, cross country, football, golf, tennis, and track and field; and women's basketball, cross country, equestrian, golf, acrobatics and tumbling, soccer, softball, tennis, track and field, and volleyball.

At Baylor, we are blessed to have student-athletes who seek to succeed in the classroom and on the playing field. Over the last three years, Baylor University has been the most successful Division I program in combined winning percentages of football, men's basketball, and women's basketball. During the current academic year, Baylor student-athletes have participated in the program's first BCS bowl game; reached the Elite Eight in women's basketball and the Sweet Sixteen in men's basketball; secured 7 Big 12 Conference championships; and won the national championship in the men's triple jump. This also marked the third consecutive year a women's basketball player won the prestigious Wade Trophy as national player of the year.

However, we do not count these accomplishments as our student-athletes' greatest successes. As our spring commencement approaches next weekend on Baylor's campus, we celebrate the academic success and graduation of our student-athletes. We gathered together at Baylor's Ferrell Center on Monday evening (May 5) to do exactly that – to honor our student-athletes' performance in the classroom. During the prior academic year, 86% of senior student-athletes at

Baylor received their undergraduate degrees. Many are going on to pursue advanced degrees. This past fall semester, Baylor student-athletes achieved a cumulative GPA of 3.27, an all-time high. During that same period, 347 Baylor student-athletes were named to the Big 12 Commissioner's Honor Roll.

In short, these are remarkable times for Baylor University and its dynamic athletic program. Yet, the reality is that even in these best of times, college athletics pursued at its highest institutional level is not a net profit-generating activity. It does not generate profits for Baylor – nor for most institutions of higher education. Unfolding legal developments threaten to add yet further to the considerable cost of intercollegiate athletics.

Employee Status

As the Committee knows, the NLRB Regional Director's recent decision in the *Northwestern* case has characterized scholarship student-athletes as "employees." This unprecedented ruling, in our view, is misguided.

For decades, the term "student-athlete" has been widely employed to describe the primary relationship of the student to the institution of higher learning – at bottom, an academic relationship which provides a college education during the students' formative years. Student-athletes at Baylor are first and foremost students of the University. We – along with our colleagues in higher education – are convinced that our athletic programs provide important co-curricular contexts for learning, teamwork, and leadership development.

Baylor University is emphatically not a professional sports franchise. Rather, it is a non-profit, educational institution which seeks, above all, to fulfill its educational mission of "educating men and women for worldwide leadership and service by integrating academic excellence and Christian commitment within a caring community." We are wholly dedicated to engaging each and every student in Baylor's educational mission and to ensuring that all our student-athletes benefit fully from a transformational educational experience. Regardless of the student's performance on the playing field or status as a scholarship or non-scholarship student-athlete, we are committed to providing educational opportunities for all of our students at the highest level. To that end, it has long been institutionally important to integrate student-athletes fully into the broader student body.

At Baylor and across the nation, student-athletes benefit from a wide array of services that seek to maximize their potential as students and to prepare student-athletes for their journeys in life. These services and programs contribute significantly to the ultimate academic success of Baylor student-athletes by providing academic advising, degree planning, and career counseling. Many institutions, including Baylor, provide high-quality academic support, such as tutoring services, computer labs, and study lounges. Baylor's goal, first and foremost, is for each student-athlete to reach his or her fullest potential for academic success and to prepare for success in life.

Student-athletes also receive specific financial benefits which help them progress toward degree completion. These traditional benefits include tuition, room, board, fees, books, and other educational expenses. Baylor's purpose in offering such financial assistance is to encourage student-athletes to carry on and complete their academic work. The same can be said when the

institution provides financial support to students in other areas of the university, such as music, theatre, or debate.

The NLRB itself has expressed a view that the legal issue of "employee" status is ultimately a matter of Congressional intent. In this case, however, the Regional Director has mechanically – and erroneously – applied a rigidly wooden test drawn from the common law, notwithstanding the absence of Congressional intent to include college athletics as an "employment venue."

In contrast to the traditional vision of institutional arrangements between a university and student-athletes, the Regional Director's decision holds that athletic grant-in-aid scholarship recipients are not "primarily" students. As indicated by Northwestern University in its petition for review, the Regional Director struggled to distinguish the NLRB's prior holding in *Brown University*, 342 NLRB 483 (2004), to be able to shift the analysis to only the common-law test instead of whether the student-athlete relationship is primarily an economic or academic relationship. The Board's decision in *Brown University* itself demonstrates a presumptive reluctance to "force the student-university relationship into the traditional employee-employer framework" that would, because of the issues discussed below, likely require negotiation of matters that are uniquely student issues.

This conclusion appears to be based largely on a comparison of the amount of time spent between academic effort and athletic effort and the relationship of the activity to "core" academic requirements. Inasmuch as those factors range widely both by student (and his/her individual choice) and by institution, they do not provide sound reasons for a legal or policy distinction between student-athletes and their fellow students.

In particular, a student-focused distinction based on time allocated to sports largely ignores the individual's status as a student as an irreducible condition precedent to the entire relationship between the university and its student-athletes. At the most basic level, but for their student status, student-athletes would not have any opportunity to participate in intercollegiate sports. Not only that, specific limitations are imposed on the amount of time a student-athlete may devote to intercollegiate athletics – 20 hours per week (and contests are counted as three hours maximum). As a full-time student, a student-athlete must carry at least 12 hours of academic credit. Accounting for class time, study time, official study hall and tutoring appointments, student-athletes predictably spend as much or more time as students than as athletes, even during the course of the playing season. Robust voluntary involvement in co-curricular activities could, of course, have academic consequences. However, as long as the student-athlete maintains the requisite standards of academic success (minimum grade point average, minimum course load, and progress toward a degree program), then the institution should not be in the position of dictating the total amount of time devoted by the student to his or her own personal development.

As a related matter, the Regional Director's analysis about what constitutes a "core" academic program is likewise problematic. Many institutions, public and private, take the institutional mission considerably beyond the classroom and into development of the entire person. Mission trips, service programs, student interest groups, physical and spiritual development are all part of the broader academic mission. Co-curricular activities have historically served as a pivotal part of academic life and student development; a myopic focus solely on the classroom component fails to reflect the wide ambit of higher education. These co-curricular activities, when coupled

with traditional classroom or laboratory experiences, provide virtually countless avenues for students' personal and professional growth as they prepare for lives beyond graduation. The attempt to separate out a "core" purpose from student-related development will create additional fact questions about what constitutes the "core" of any academic program. For example, will debate students who are obliged not only to practice, but to conduct research, likewise be considered employees because performance is not part of a narrowly defined educational experience?

What is more, even if the impact of the Regional Director's decision is limited to the National Labor Relations Act, the decision (if upheld) will raise significant questions for years to come. The NLRB regulatory enforcement process is itself cumbersome. It includes an administrative processing of complaints of alleged non-compliance to the regional agency office; administrative hearings; decisions by regional directors; review by the full National Labor Relations Board; and ultimately judicial review by the federal appellate courts and, at the final stage of appellate review, the U.S. Supreme Court. Collegiate athletic conferences stretch across several states and regions; therefore, regional decisions could create enormous complexity for ensuring equality across the athletic conferences.

Simply put, the Regional Director's decision will result in uncertainty and instability across the higher education landscape. Here are a few of the myriad issues we foresee:

Scope of the Decision: The decision apparently applies only to private institutions of higher education. This dichotomy creates at least two potential disparities in the impact on various colleges and universities. For example, the decision rightly notes that Northwestern is a non-sectarian university. The NLRB has been struggling for years with religious-liberty limitations on its jurisdiction. We should reasonably expect some private, religiously-affiliated universities to challenge the Board's authority to regulate institutional missions expressly grounded in a religious worldview.

The second – and more structurally significant – disparity is the decision's implicit exclusion of state institutions. In intercollegiate athletics, private universities compete with state institutions. This will likely create additional discrepancies among the nation's universities, although there is likely some foreseeable impact on state institutions and their student-athletes (which will be addressed below) if student-athletes are "employees" who may (or may not) organize under the laws of fifty States. It is likely that the pro-competitive purposes of intercollegiate athletics will be substantially undermined by the potential for differing degrees of potential unionization within the large pool of universities that field intercollegiate teams.

Scope of Bargaining: As to the National Labor Relations Act itself, the Regional Director's decision will likely leave in its wake years of litigation with respect to the appropriate scope of bargaining as to "wages, hours, and other terms and conditions of employment." In view of the threshold requirement of student status, that status would seem to constitute a bedrock condition of employment subject to mandatory bargaining.

For example, a student-athlete must maintain the proper grade point average and make satisfactory progress toward receiving an academic degree. Because these requirements could well be considered "conditions of employment" under the Regional Director's decision, those requirements would likely fall within the scope of mandatory bargaining. If such fundamental

academic issues do indeed fit within mandatory bargaining's scope, then academic hours and hours of athletics could all become compensable and thus lead to bargaining about (or statutory entitlement to) employment benefits impacting the academic setting. If some student-athletes could unionize and bargain about academic issues that constitute "conditions of employment," it will predictably create division and friction within the student body, inasmuch as the university (by definition) will be required to treat some students differently than others.

As a further example, if maintenance of "student" status is a condition of employment as a student-athlete, then all rules relating to student status may become negotiable (with respect to student-athletes). For example, while student conduct administration has historically been viewed rightly as an internal process, it is foreseeable that issues of misconduct, including academic and honor code violations, may become negotiable for some (but not the vast majority of) students. In short, in light of the Regional Director's decision, it appears that institutions would be required to treat student-athletes differently as students, not just as "employees."

It would also appear that such basic issues as the length of practice sessions and the season schedule itself may likewise fall within the scope of mandatory bargaining. Even more troubling, the ultimate tools of the employee-employer bargaining relationship are the strike and lockout. Not only that, schedules may be disrupted because of impasses reached during the course of the bargaining process. Additionally, the most traditional academic activities of a student-athlete may be threatened. For example, would student-athletes on strike sit out of classes and avoid other university-related functions? Would they be protected in doing so?

Collective bargaining could also extend beyond "conditions of employment" during employment and reach into post-eligibility – or "post-employment" – benefits that relate to welfare benefit plans. These types of issues further delineate a special class of students who have "benefits" that exceed those available to the general student population.

Appropriateness of the Bargaining Unit: Historically, the NLRB has applied a "community of interest" standard to determine the appropriateness of a bargaining unit. Among other things, this means that an appropriate unit neither embraces those with conflicting interests nor omits those with similar economic interests.

Putting aside the common-law analysis of "control," the core economic interests relate to student scholarships. For the vast majority of institutions, there is no overall economic profitability in which to have an interest. In addition, because only one or two percent of athletes in some sports, notably football and men's basketball, become professionals, little common interest exists in the economics of use of images. In fact, that limited economic interest on the part of a handful of student-athletes arguably creates a conflict of interest within the purported unit. This overall lack of common interest – beyond scholarships as students – undermines not only the appropriateness of any bargaining unit, but triggers the very basic question about being classified as "employees" with an economic interest in the undertaking of intercollegiate athletics.

Several other issues arise with respect to the appropriateness of the bargaining unit. Under the Regional Director's decision, members of a team who have no grants-in-aid could be subjected to the full panoply of rules negotiated by the exclusive bargaining representative, even though no duty of "fair representation" would exist as to those adversely affected by the university-union negotiations. Not all sports provide full grants-in-aid; football happens to do so. However, the

logic of the Regional Director's decision (that scholarship funds are compensation for services) would extend to all players with partial grants-in-aid. This, in turn, spawns fundamental questions about what is an appropriate bargaining unit within an institution with many students competing in numerous (non-football) sports with full or partial grants-in-aid.

A separate but related question is whether some topics are non-negotiable at the institutional level because of the lack of institutional discretion in setting the competitive rules. Universities do not act unilaterally in many matters related to intercollegiate athletics. They are members of the NCAA and of conferences. This possibility also creates a situation where it may well be in the institution's best interest to eliminate all partial grants-in-aid in order to avoid legal gray areas. To state the obvious, a loss of partial grants-in-aid would harm literally tens of thousands of student-athletes nationwide, virtually all of whom are participating in sports (with no meaningful professional athletic prospects) but who are relying on partial grants-in-aid to help fund their college education.

Other Labor Organizations: It is not uncommon for universities to create student-athlete advisory committees to provide a voice for student-athletes with respect to the student-athlete experience. Baylor has such a committee, which does important work. Under the NLRA, it is possible that such communication channels will be prohibited as an asserted labor organization (other than the certified collective bargaining representative) that "deals with" the institution as "employer."

Unintended Consequences

If a determination is ultimately reached that student-athletes are "employees" and that a grant-in-aid constitutes "wages" as compensation for services, myriad related legal and regulatory issues will immediately arise. I will identify a few, although the following is by no means exhaustive. As one would expect, as with any employee relationship, potential employment issues include disabilities, workers compensation, unemployment compensation, statutory leave entitlements, wrongful discharge, and non-compete agreements.

Residual Impact if No Union: If student-athletes are deemed "employees," they would still – even if there was no union – be "employees." As a result, significant collateral questions arise simply by virtue of the employee-status determination. In short, numerous employee-related issues will arise even in the absence of a union. So too, it is possible that a student-athlete could constitute an "employee" for some purposes but not for others.

Antitrust: Payment of wages is directly contrary to a guiding principle of the collegiate model to preserve the competitive model of intercollegiate athletics. What are the antitrust implications when pro-competitive justifications are eliminated from the traditional business model? If antitrust principles and collective bargaining eliminate pro-competitive limitations on payments and benefits, there may literally be no "competitive" intercollegiate sports.

Impact on Student-Athletes: If payment is considered "wages" (even in the absence of a union), then it would logically follow that student-athletes and the universities (even public institutions) will be required to treat such payments as wages, subject to withholding for federal income taxation, Social Security, and Medicare. Equally worrisome, institutional contributions may be required in addition to withholding obligations.

For example, a Baylor football player receiving a football scholarship would possibly be required to pay taxes on the full scholarship (tuition, fees, room, board and books). The student-athlete may also be subject to taxation on "soft" benefits, such as academic counseling and medical services that are not as fully available to other students. That same student-athlete may likewise be obligated to pay taxes on the gift package at a bowl game. This situation would be further complicated by two additional factors – state taxes and school discount rates. Student-athletes at Northwestern, for example, would face the specter of paying state taxes on the value of their scholarship while student-athletes in Texas would not (since no state income tax exists here in Texas). Thus, the value of a scholarship – and the tax consequences of that scholarship – would become a factor to be weighed in deciding where (and, in particular, what State) to attend college.

As for discounted tuition, student-athletes would presumably be taxed on the full sticker price of tuition, room and board even though the average payment for students (at least in private higher education) is actually discounted well below the listed "sticker" price. Since college athletics has often served as a vital facilitator for low-income students who availed themselves of a scholarship (and thus perhaps being the first in their family to attend college), it would be particularly problematic if one of the long-term outcomes of the Regional Director's decision was a tax regime rendering it more difficult for low-income families to accept athletic scholarships.

Title IX: Title IX prohibits sex discrimination in college athletics and thus facilitates enhanced educational opportunities for women student-athletes. Under current principles of Title IX, the amount of financial aid awards for student-athletes must be in the same proportion as the intercollegiate sports' participation rate of male and females. The impact of the Regional Director's decision is not clear in this respect, but if left undisturbed, the ruling runs the risk of mandating (under Title IX) substantial increases in financial aid awards in non-revenue generating sports. Providing "employees" who play football a package benefits not afforded to other student-athletes – and specifically to women – raises serious questions under Title IX. At a minimum, the NLRB-enforced disparity in treatment would predictably result in widespread litigation and, at a minimum, adverse reaction from various advocacy groups. Other unintended consequences are possible, especially by limiting intercollegiate opportunities for men and women in an effort to maintain overall compliance.

At the other end of the spectrum, compensated "employees" arguably should not even count as "student" participants for purposes of Title IX. This odd consequence would result, ironically, in males becoming significantly underrepresented in the mix of student-athletes under what remains of Title IX, which could lead to (unanticipated) curtailed opportunities for female athletes.

Employment Non-discrimination Principles: It seems likely that "employee" status will also implicate principles of employment non-discrimination with respect to race, color, national origin, sex, and other protected characteristics under Title VII of the 1964 Civil Rights Act, as well as other federal statutes. Also implicated would be Executive Order 11246 with respect to affirmative action. It seems unlikely that the various requirements to maintain applicant flow data and to articulate legitimate, non-discriminatory reasons for a particular decision will easily fit within in a world of intercollegiate athletics – and coaches' efforts to recruit talent needed to create a highly competitive team.

Fair Labor Standards Act: Will student-athletes be deemed "employees" for purposes of the Fair Labor Standards Act? If so, will student-athletes be exempt or non-exempt, subject to recordkeeping, minimum wage requirements, and overtime? Also, will non-scholarship students on a team be considered "volunteers" excluded from coverage? If being a student is a bedrock condition of "employment," then it may also follow that time spent in class and in studying will require compensation, as would any and all voluntary athletic efforts an employer "suffers or permits" under the FLSA.

Occupational Safety and Health: Will the Occupational Health and Safety Administration assert jurisdiction? Unfortunately, physical injuries are an inherent part of intercollegiate athletics (and indeed in any sport). Regardless of the sport, Baylor is fully committed to the long-term health and safety of every student-athlete. Nonetheless, OSHA's potential assertion of authority to regulate rules of contact in certain sports is entirely conceivable.

Immigration Law: As a matter of national policy, immigration principles would seem to contradict the Regional Director's decision. International student-athletes who enter the United States on a student visa face significant limitations on the amount and location of employment. If the student-athlete relationship ceases to be grounded in student status, will international student-athletes – classified as "employees" – be required to secure an employment-based visa to enter the country which also permits full-time status as a student?

Worker Adjustment and Retraining Notification Act: Triggered by instances of layoffs, this federal statute could apply in the event a university determines to eliminate one or more sports.

* * * *

These important legal issues raise the specter of a sea change in the fundamental relationship between a university and its student-athletes. A university's primary obligation to all students, including student-athletes, is to help equip these young men and women with the skills needed to succeed in the marketplace of life. That journey begins with a commitment by the student-athlete to study and to graduate. There are different obligations and responsibilities an employer owes to an employee, and for his part, the employee has clear obligations and responsibilities to his/her employer. The conflict between obligations to employees, on the one hand, and obligations owed to students, on the other, will ultimately create tension within the core mission of the university.

Financial Impact on Institutions and Intercollegiate Athletics

Aside from myriad legal and regulatory issues suggested above, the potential financial impact of the Regional Director's decision for higher education institutions – and their athletic departments – is deeply worrisome. At a minimum, the financial impact of college-athlete unionization and collective bargaining would significantly impact any institution's operating budget.

Baylor University does not profit – and has never profited – from its athletic department's admirable success. Baylor's two revenue-generating sports – football and men's basketball – subsidize the remaining 17 non-revenue-generating sports and other important student support programs. In fact, only 23 Division I institutions generated a profit from their athletics programs during the last fiscal year. To allow unionization (and thus further increase costs) will

inexorably lead to unfortunate outcomes, including programmatic cutbacks or escalating tuition – at a time when many institutions of higher learning are struggling to keep costs low and thereby better maintain college affordability.

Other than the 23 enviably-positioned athletic programs, institutions are heavily reliant on two revenue streams to make up the deficit. First, contributions from alumni and university supporters; second, student-athletic fees charged to the general student population. As to the first, it is reasonable to believe that donors' gifts to collegiate athletics may decline as student-athletes are legally redefined as university "employees" who earn taxable income. Any significant decline in donor support has the unfortunate potential to trigger a downward spiral as to an athletic department's ability to support a full range of teams and athletic activities. As to the second, while student fees have generally been readily accepted by the student body, this funding source could well become a source of division (or at least friction) if students perceive they are paying to provide athletes with enhanced (employment-based) benefits not available to the general student body.

The Regional Director's decision could thus add a significant number of "employees" to the employment roles at any university. For Baylor, this decision could mean 402 additional employees (scholarship student-athletes) to the staff of the university, representing a significant staff increase (14.7 percent). This sudden growth will undoubtedly add to the administrative costs at a time when universities are being severely criticized for the rising costs of tuition and asserted administrative bloat.

* * * *

Closing Statement

By virtue of the Regional Director's decision, a host of complex legal questions arise for private universities. These issues will likely take years to sort out if the Regional Director's decision is allowed to stand. A number of unintended consequences will likewise arise. Collegiate athletics does not provide a profit center for the vast majority of institutions of higher education. This decision has the potential to impact significantly the financial and academic support that can be granted to student-athletes.

As the president of a private university, I can assure the Committee that student-athletes are first and foremost students of our university. Our primary goal with students-athletes is to provide them with an empowering educational experience (through curricular and co-curricular activities) to prepare them for their lives after a collegiate playing career. The Regional Director's decision presents a substantial paradigm shift on the relationship between a university and its student-athletes, which threatens the entire model of intercollegiate athletics. We hope and trust that the decision will not stand.

Thank you for the opportunity to address the Committee. I warmly welcome your questions.

Appendix A

Biography of President & Chancellor, Ken Starr

A distinguished academician, lawyer, public servant and sixth-generation Texan, Judge Ken Starr serves as the chief executive officer of Baylor University, holding the titles of President and Chancellor. On June 1, 2010, Judge Starr began his service as the 14th president to serve Baylor University and was named to the position of President and Chancellor on November 11, 2013. In providing the additional title, he is charged with the task of increasing Baylor's influence in the nation and around the world.

Judge Starr also serves on the faculty of Baylor Law School as The Louise L. Morrison Chair of Constitutional Law and teaches a seminar on current Constitutional issues. Judge Starr is a member of the Board of Directors for the National Association of Independent Colleges and Universities (NAICU) and currently serves as President of the Southern University Conference. In addition, he serves as a member of the Board of Trustees for the Baylor College of Medicine and the Board of Trustees for Baylor Scott & White Health.

In September 2010, Judge Starr established his first fundraising priority: The President's Scholarship Initiative, a three-year challenge to raise $100 million for student scholarships which was completed five months ahead of its goal. He also is leading Baylor into the future under Pro Futuris, a new strategic vision developed with the collective wisdom of the extended Baylor family.

Judge Starr has argued 36 cases before the U.S. Supreme Court, including 25 cases during his service as Solicitor General of the United States from 1989-93. He also served as United States Circuit Judge for the District of Columbia Circuit from 1983 to 1989, as law clerk to Chief Justice Warren E. Burger from 1975 to 1977 and as law clerk to Fifth Circuit Judge David W. Dyer from 1973 to 1974. Starr was appointed to serve as Independent Counsel for five investigations, including Whitewater, from 1994 to 1999.

Prior to coming to Baylor, Judge Starr served for six years as The Duane and Kelly Roberts Dean and Professor of Law at Pepperdine, where he taught current constitutional issues and civil procedure. He has also been of counsel to the law firm of Kirkland & Ellis LLP, where he was a partner from 1993 to 2004, specializing in appellate work, antitrust, federal courts, federal jurisdiction and constitutional law. Judge Starr previously taught constitutional law as an adjunct professor at New York University School of Law and was a distinguished visiting professor at George Mason University School of Law and Chapman Law School. He is admitted to practice in California, the District of Columbia, Virginia and the U.S. Supreme Court.

Judge Starr is the author of more than 25 publications, and his book, "First Among Equals: The Supreme Court in American Life," published in 2002, was praised by U.S. Circuit Judge David B. Sentelle as "eminently readable and informative...not just the best treatment to-date of the Court after (Chief Justice Earl) Warren, it is likely to have that distinction for a long, long time."

Chairman KLINE. Thank you.

Mr. Livingston, you are recognized.

STATEMENT OF MR. BRADFORD L. LIVINGSTON, PARTNER, SEYFARTH SHAW, LLP, CHICAGO, ILLINOIS

Mr. LIVINGSTON. Good morning, Mr. Chairman and members of the committee. As the Supreme Court has noted, principles developed for the industrial setting cannot be imposed blindly in the academic world. While I fully support the NLRA's purposes in allowing employees the freedom to choose whether or not to form a labor union and bargain collectively, the NLRB itself has recognized the problem of attempting to force the student-university relationship into the traditional employer-employee framework. That problem is apparent here.

A university's primary mission is to educate its students, including student athletes. Student athletes are neither hired by a college, nor providing it services for compensation. Athletes are students who are participating in its programs with a dual role as both student and athlete. Treating these participants as NLRA-covered employees changes them from students who are student athletes to professional athletes who are also students. But even if student athletes could be considered employees—and the term is undefined in the NLRA—employee status conflicts with the remaining principles contained in that act.

Consistent with labor agreements from other industries, a college athletes' union could negotiate over the scheduling and duration of practice time, distribution of playing time, scholarship allocation by dollar value and player position; whether non-bargaining unit players—in this case, walk-ons—have the right to perform bargaining unit work by playing in games in the broad range of statutory wages, hours, and other terms and conditions of employment described in NLRB precedent. They could likewise negotiate over academic standards, including minimum grade point averages, class attendance requirements, the number and form of examinations or papers in any course.

Grievance procedures could challenge a professor's grade, and even potentially graduation requirements. And unlike with statutory requirements, a college cannot refuse to bargain over changes to its own, its conference, or NCAA rules. Eventual differences in the conditions under which collegiate teams practice and compete will guarantee competitive imbalances. If college football players are employees, the NLRA makes it clear that they may organize in an appropriate bargaining unit, not the most appropriate bargaining unit. Because the petition for a unit will be considered appropriate unless a larger group now shares an overwhelming community of interest with that group, a college would have difficulty proving that the remainder of the football team shares an overwhelming community of interest if a labor union seeks to represent just the team's offense, perhaps just its quarterbacks.

Different potential union rules among discrete groups within one team are modest, however, compared to what will happen when college teams compete under different work rules negotiated with their respective unions. In professional sports, every team is a private employer under the NLRA's jurisdiction that can therefore be

covered under a single collective bargaining agreement. The major professional sports leagues have their own multi-employer collective bargaining agreements that cover the league and all of its teams. Those agreements provide a relatively level playing field, whether with salary caps, minimum wage progressions, free agency, drug testing protocols, and even revenue sharing.

Unlike professional leagues, the same will not be true in college football. Because its jurisdiction is limited to this, to private employers, the NLRB is creating rules for student athletes at only 17 schools, fewer than 15 percent of the participants. And it is almost certain that the NLRA's regime for recognizing and bargaining with unions will not apply to the remaining 85 percent that are public universities governed by state laws and beyond the NLRB's jurisdiction. Some states expressly regulate public sector employee collective bargaining, others often either limiting it to certain subjects or types of employees.

Other states have no laws, or prohibit public sector bargaining entirely. A bill before Ohio's house of representatives clarifies that student athletes at its public colleges and universities are not employees. Conversely, too, Connecticut legislators indicate that they will introduce legislation stating that their public college athletes are, in fact, employees. Without a unified collective bargaining agreement like the NBA or NFL, every college team must fend for itself with its employee athletes. Athletic departments that can afford it may be able to hire the best players. Institutions whose fortunes and job offers are not as robust may attract lesser talent.

The resulting patchwork of conflicting statuses as employees or not, bargaining rights, labor contracts, and student athlete rules will create competitive imbalances. The *National Labor Relations Act* is not an appropriate vehicle to address student athletes' concerns or disputes with their colleges and universities, athletic conferences, or the NCAA. For these and the other reasons contained in my written testimony, treating these student athletes as employees covered by the NLRA is simply unworkable.

Mr. Chairman and members of the committee, I thank you for the opportunity to share my thoughts with you today.

[The statement of Mr. Livingston follows:]

Statement of

Bradford L. Livingston
Seyfarth Shaw LLP

Before the United States House of Representatives
House Committee on Education and Labor

Hearing on "Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes"

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Hearing on "Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes"

May 8, 2014

Good morning, Chairman Kline and Members of the Committee. My name is Bradford L. Livingston, and I am pleased to present this testimony concerning the consequences of permitting collegiate student–athletes to organize and bargain collectively under the National Labor Relations Act (NLRA or Act). I am a Partner with the law firm of Seyfarth Shaw LLP. Seyfarth Shaw is a national firm with ten offices nationwide, and one of the largest labor and employment practices in the United States. Nationwide, over 350 Seyfarth attorneys provide advice, counsel, and representation in connection with labor and employment matters and litigation affecting employees in their workplaces.[1]

For roughly the past decade, I have served as the Chairperson or Co-Chairperson of Seyfarth's Labor Relations Practice Group, whose practitioners include a former Member of the National Labor Relations Board (NLRB or Board), its former Executive Secretary, and numerous former NLRB attorneys and employees. Our labor lawyers have written and contributed to a number of leading treatises on labor law; advised thousands of employers on NLRA compliance issues; and in numbers too large to count, negotiated collective bargaining agreements, handled and litigated NLRB unfair labor practice charges, advised on grievances under collective bargaining agreements,

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[1] I would like to acknowledge Seyfarth Shaw attorneys Mary Kay Klimesh, Anne D. Harris, Bryan Bienias, Kevin A. Fritz, and Ronald J. Kramer for their invaluable assistance in the preparation of this testimony.

litigated labor arbitrations, and trained managers and supervisors with respect to compliance with the NLRA.

For well over 30 years, I have practiced across the country in all these areas of labor law. My office is in Chicago, Illinois, and I am a member of both the Illinois and Wisconsin bars. In addition to my practice, I teach labor law as an Adjunct Professor at John Marshall Law School in Chicago, Illinois.

I. Introduction

I have been invited to provide testimony today on the consequences that will likely occur if college student-athletes are permitted to organize and be represented by a labor union for purposes of collective bargaining under the NLRA. In this case of first impression, let me be clear from the outset that I fully support the purposes behind the NLRA, under which employees can freely choose whether or not to form or assist a labor union and to bargain collectively. But from both a practical and a strictly legal perspective, whatever the equities in college athletics and its economic structures, the NLRA is simply not an appropriate vehicle to address that environment.

Over the past thirty years, I have negotiated for or advised clients in reaching hundreds of collective bargaining agreements. Those negotiations have occurred from coast to coast, covered bargaining units ranging from a handful to tens of thousands of employees, and included most major labor unions. Irrespective of the many additional labor and employment law consequences,[2] on both a legal and practical level, intercollegiate sports are incompatible with scholarship athletes being covered under the NLRA.

This incompatibility stems from the faulty initial premise that college student-athletes are employees covered by Section 2(3) of the Act.[3] Treating

[2] If scholarship recipients are employees, they may have additional rights among a host of other federal, state or local statutes, such as Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, the Americans with Disabilities Act, ERISA, and state unemployment and workers' compensation and other laws. For example, are student-athletes "on the clock" and entitled to compensation if a coach requires attendance in class or at study halls? If a player is late for practice and as a penalty must spend time in an extra study hall session, is that time compensable? Under the Americans with Disabilities Act, could a player with a doctor's note be excused from practice, but still expect to play in the game? During the break between the Spring and Fall semesters when athletes are no longer receiving their scholarships, are they entitled to unemployment compensation? Could the EEOC challenge a university's scholarship offers and acceptances under a disparate impact analysis? Could the EEOC challenge a failing grade in a class under disparate treatment analysis? If they are considered employees, would student-athletes' scholarships be considered taxable income that is subject to withholding and income tax, and if so, would it make a college education unaffordable for many current scholarship recipients?

[3] Section 2(3) of the NLRA, 29 U.S.C. § 152(3), defines who is covered as an employee under the Act.

them as employees changes students from student-athletes to professional athletes who are also students. And even if these student-athletes could be considered employees within the undefined text of Section 2(3), such employee status is inconsistent with the remaining principles contained within the NLRA covering the employer-employee relationship generally and as to collective bargaining specifically. Yet this eventual conflict is precisely what will happen if scholarship athletes at private colleges and universities are found to be employees covered by the NLRA.

It is also important to note that because most major college football programs are part of public institutions, the NLRB has statutory jurisdiction over only 17 of the roughly 120 colleges and universities that play major college football.[4] In asserting jurisdiction, the NLRB's rules would apply to these teams in ways inapplicable to more than eighty-five percent of their intercollegiate competitors. And those remaining 100 or so public institutions are subject to, where such laws exist, a variety of conflicting state statutes as to whether or not their public universities' student-athletes could organize and, if so, over what subjects they could bargain collectively. The resulting patchwork of laws, differing collective bargaining agreements, and uneven terms governing student-athletes would be unworkable.

II. College Athletes Are Not Employees under the NLRA

Students who participate in intercollegiate athletics are not "employees," regardless of whether the program generates revenue for the university. The term "employee" in Section 2(3) of the NLRA is not defined in any meaningful way, and as a result, its parameters must be examined based on the Act's purpose and focus,[5] which is to address economic relationships between employer and employees.[6] But "principles developed for the industrial setting cannot be imposed blindly on the academic world."[7] Yet claiming that college student-athletes are employees begets "the problem of attempting to force the student-university relationship into the traditional employer-employee framework."[8] An analysis of the relationship between the academic institution

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[4] Section 2(2) of the Act specifically excludes from coverage as an "employer" any of the states or their political subdivisions, which includes all public colleges and universities. 29 U.S.C. § 152(2).

[5] A fundamental canon of statutory construction is that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. *See e.g., Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see also Wbai Pacifica Found.*, 328 NLRB 1273, 1275 (1999) (analyzing the purpose behind the NLRA to determine whether volunteer staff constituted employees under Section 2(3) to conclude that these individuals did not meet the definition of employee under the NLRA).

[6] *Brown University*, 342 NLRB 483, 488 (2004).

[7] *Yeshiva*, 444 U.S. at 697.

and its student-athletes can only lead to the conclusion that the NLRA's fundamental purpose does not cover such a relationship, nor should it.

Intercollegiate athletic programs have historically existed as part of the overall collegiate experience. These athletic opportunities have been established in our universities as part of a broad-based scope of educational opportunities that embellish, enhance and shape the experiences provided to students as they prepare for life outside of an academic setting. As stated by US Secretary of Education Arne Duncan:

> Student athletes learn lessons on courts and playing fields that are difficult to pick up in chemistry lab. Resilience in the face of adversity, selflessness, teamwork, self-discipline, and finding your passion are all values that sports can uniquely transmit. Many of those character-building traits are every bit as critical to succeeding in life as sheer book smarts.[9]

One need look no further than former United States Presidents Gerald R. Ford and George H. W. Bush to see examples of successful careers, wholly unrelated to sports, enjoyed by former college student-athletes.

Academic settings themselves are undeniably different from commercial settings in many critical aspects – and this is particularly notable in the relationship between a university and its student-athletes. In order to participate in any athletic endeavor at any institution of higher learning, the athlete must be enrolled and participate as a student in the college or university's academic program. Student-athletes must meet and maintain established academic standards as a pre-condition to their ability to participate on an intercollegiate basis. Unlike a commercial setting, even the nature of the supervision the university has over its student-athletes differs significantly from that between an employer and employee. Through its athletic coaches or staff, the university supervises student-athletes in a manner predicated upon mutual interests in the development of the student's character and advancement of the student's overall university experience.[10]

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[8] *Brown University*, 342 NLRB at 487.

[9] *See* Arne Duncan, *Let's Clean Up College Basketball and Football,* HomeRoom, The Official Blog of The U.S. Dept. of Education (Jan. 15, 2010), http://www.ed.gov/blog/2010/01/lets-clean-up-college-basketball-and-football.

[10] At least one study has shown that student-athletes are at least as engaged overall, and in some areas are more engaged, compared with their non-athlete peers. Student-athletes also report that they perceive their campus to be more supportive of their academic and social needs. *See* Umbach, P. D., Palmer, M. M., Kuh, G. D, & Hannah, S. J., Intercollegiate athletes and effective educational practices: Winning combination or losing effort? *Research in Higher Ed.* 709, 725 (2006).

The NLRB has drawn distinctions between individuals engaged in a commercial relationship and those that – while arguably falling into the most literal definition of "employee" under Section 2(3) – nevertheless fall outside the Act's reach due to the innately non-commercial nature of the educational relationship at issue.[11] The Supreme Court and the NLRB have recognized that the nature of a university "does not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world."[12] For example, in rejecting petitions to organize students who also worked for their academic institutions as janitors and cafeteria workers, the NLRB refused to direct an election of the student workers despite their dual status as employees, because they were primarily student.[13] In *Brown University,* the Board focused on whether the relationship of the purported employee and the University is primarily educational or primarily economic to conclude that graduate assistants and research assistant were not employees under Section 2(3) because they had a primarily educational relationship with the University.[14]

In determining whether Northwestern University's football players fell within the statutory definition of an "employee" under the NLRA, the Regional Director found *Brown University* to be inapplicable and rather reached his decision by applying the common law definition of an employee, *i.e.*, whether the athletes perform services for another under a contract of hire, subject to the other's control or right of control, and in return for payment. Using the common

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[11] *See Brevard Achievement Center, Inc.,* 342 NLRB 982 (2004); *Goodwill Industries of Denver,* 304 NLRB 764 (1991); *Wbai Pacifica Found.*, 328 NLRB at 1275; *see also NLRB v. Yeshiva University,* 444 U.S. 672, 688 (1980) (in excluding faculty members who exercise managerial judgment from coverage under the Act, the Court observed that "the 'business' of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions"); *Allied Chem. Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971) ("the legislative history of § 2(3) itself indicates that the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire").

[12] *Yeshiva*, 444 U.S. at 697.

[13] *Saga Food Service of California, Inc.*, 212 NLRB 786, 787 (1974); *San Francisco Art Inst.*, 226 NLRB 1251 (1976).

[14] In *Brown University*, the Board further emphasized that the individuals at issue were students who were admitted to the University, not hired by it to serve as graduate teaching or research assistants even though the students performed teaching duties and research for the university and received compensation from the University in the form of stipends or grants and tuition remission. The Board was also influenced in its decision by the fact that the continued receipt of a stipend and tuition remission depended on graduate assistants' continued enrollment as students, and was not dependent upon the nature or value of the teaching or research services. *See Brown University*, 342 NLRB at 490 fn. 27, 492.

law test, the Regional Director artificially – and in an unprecedented way – separated the students' athletic from their academic activities.

The purposes of the NLRA and its coverage of economic relationships between employer and employee is inapplicable in the context of students who participate in programs that may, in certain circumstances, generate revenue. Revenue generation should not be determinative of the NLRA's application to any particular student-athletes; the women's water polo and men's cross-country teams, like many other intercollegiate sports teams and other extracurricular organizations, generate negligible if any revenue but have significant costs. In fact, if their student-participants were employees, those student-athletes might have even more reason to unionize due to fears about their programs' possible cancellation that are not felt by athletes in revenue-generating sports. Employees of many unprofitable commercial businesses might be more inclined to organize to negotiate for possible protections from plant closure or layoffs, while their peers in highly-profitable businesses see no need for union representation because they already receive generous wage increases or profit sharing they never sought. Under the NLRA, the economics or profitability of the employer should be irrelevant. Thus, there is no logical distinction between the athletic teams, jazz or string ensembles, and debate teams that generate no revenue but perform a service for the university and the sports teams that generate revenue. And the fact that students in each of these groups are "hired" to perform a "service" for the university in exchange for some perks or "payment" does not make them Section 2(3) employees.

The primary purpose of the University's mission, which includes athletic and many other programs, is to educate its students, including student-athletes. Student-athletes are not "hired" by a college or university and are not providing "services" to the institution; they are participating in the programs of the institution. As such, a determination of whether student-athletes are employees under Section 2(3) of the Act should be based on an analysis of the purposes of the Act and the status of the student-athlete, based on both of the student's roles, not just the role of the student as an athlete. Treating these participants as Section 2(3) employees changes them from students who are student-athletes to professional athletes who are also students.

III. Treating College Athletes as Employees Under the NLRA Is Unworkable

a. The NLRA Rights of Employees Are Incompatible with the College Athletics Environment

College is a different environment from the workplace. Students are subject to rules imposed by their individual academic institutions, including separate codes of conduct, academic standards, and other restrictions. Student-athletes, whether on scholarship or not, are subject to further restrictions imposed by their universities, their athletic conferences, and the NCAA:

> The players must also abide by a social media policy, which restricts what they can post on the internet, including Twitter, Facebook, and Instagram. In fact, the players are prohibited from denying a coach's "friend" request and the former's posting are monitored. The Employer prohibits players from giving media interviews unless they are directed to participate in interviews that are arranged by the Athletic Department. Players are prohibited from swearing in public, and if a player "embarrasses" the team, he can be suspended... .[15]

Cited by the Regional Director in his Decision and Direction of Election, these and many other similar restrictions apply to all student-athletes (whether on scholarship or not) and stem either from Northwestern University, the Big 10 Conference within which it competes, or the NCAA. Rules like these, whether from a school, its athletic conference, or the NCAA, are applicable at every university to either all students or all student-athletes. As a training ground for future leaders, [16] universities are charged with bridging, often in a close residential environment, the gap between childhood and adulthood. In both an academic and competitive intercollegiate environment, each of these rules makes sense.[17]

All employees covered under the NLRA, however, are guaranteed certain rights whether they are represented by a labor union or not.[18] As employees, student-athletes would be entitled to the full range of protections set out in Section 7 of the NLRA, which includes the right to engage in "concerted" activity for "mutual aid or protection."[19] The mere maintenance of policies that have the potential to "chill" the exercise of those rights is unlawful, even if they are never applied to concerted behavior under the NLRA. And each of the common sense student-athlete rules cited by the NLRB's Regional Director, if applied outside the university environment for which they were specifically established, likely violates the NLRA.[20]

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[15] D&DE, *Northwestern Univ.,* Case No. 13-RC-121359, at *5 (Region 13, March 26, 2014).

[16] *See, e.g., Grutter v. Bollinger,* 539 U.S. 306, 332 (2003).

[17] In a broad sense, many of these rules teach the leadership and civic skills that are part of a university's overall mission. And on a much more immediate level, no coach wants an exuberant nineteen year-old player's media interview or Facebook post to become bulletin board fodder for next week's opponent.

[18] *Amglo Kemlite Laboratories, Inc.,* 360 NLRB No. 51, at *5 (2014); *Greater Omaha Packing Co., Inc.,* 360 NLRB No. 62 (2014).

[19] 29 U.S.C. § 157.

[20] *See, e.g., Design Technology Group LLC d/b/a Bettie Page Clothing*, 359 NLRB No. 96 (2013) (employer ordered to rescind portions of overbroad policy that served as the basis for terminating employees for their Facebook posts); *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012)

When employers maintain policies such as these that restrict employees' Section 7 rights, they commit unfair labor practices. Applying settled Board precedent to the rules the NLRB's Regional Director cited in the *Northwestern* case – and undoubtedly they are not unique to Northwestern but very much like most other colleges' rules governing students generally, and athletes (whether on scholarship or not) in particular – such provisions violate NLRA Section 8(a)(1).[21] Their enforcement violates Sections 8(a)(1) and (3).[22] The remedy for these unfair labor practices invariably requires rescission of the unlawful rule and a "make whole" remedy for any discipline that was imposed.[23]

So irrespective of the unique attributes surrounding the collegiate academic environment, if college student-athletes are employees within the meaning of NLRA Section 2(3) – and whether or not they ever consider joining a union – their Section 7 rights supersede and render illegal many of the common sense policies that colleges impose on their students and student-athletes.

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

The application of NLRA Section 7 rights to rules governing student-athletes may pale in comparison to the implications for collective bargaining. Irrespective of whatever limited objectives the College Athletes Players Association (CAPA) may currently have or express for collective bargaining, once it is certified at Northwestern, those goals may change. Under pressure from its members, unions often expand their demands. And because CAPA has no exclusive franchise to organize college athletes, neither it nor any other labor unions that organizes college athletes is bound by earlier promises to negotiate over a limited slate of issues.

Under the NLRA, mandatory subjects of bargaining include "wages, hours, and other terms and conditions of employment."[24] Not merely limited to

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(employer ordered to rescind policy that prohibited employees from posting electronic statements that could damage the company's reputation); *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (2012) (employer to rescind social media policy requiring employees to be "courteous, polite, and friendly" to customers and employees and not to use "language which injures the image or reputation" of the employer); *DirectTV*, 359 NLRB No. 54 (2013) (employer violated the NLRA when it restricted media interviews); and *Trump Marina Assoc.*, 355 NLRB No. 107 (2010), (employer violated the NLRA when it required employees to receive prior authorization before speaking to the news media).

[21] 29 U.S.C. § 158(a)(1).

[22] 29 U.S.C. § 158(a)(3).

[23] *See, e.g., Design Technology Group LLC d/b/a Bettie Page Clothing*, 359 NLRB No. 96 (2013); *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (2012).

[24] NLRA Section 8(d), 29 U.S.C. § 158(d).

compensation, health care and any post-retirement benefits, the NLRB construes these subjects very broadly.[25] Typical collective bargaining agreements, which often contain hundreds of pages, include provisions for job assignments, seniority, promotions, working hours, overtime assignment and distribution, discipline and discharge, grievance and arbitration, and many other terms within the workplace.

Applying settled NLRA precedent, scholarship athletes would have the right to negotiate over playing time, whether non-bargaining unit (walk-on) players have the right to perform bargaining unit work by playing in games, and other "working conditions" typically within a coach's discretion. A union could conceivably negotiate over the total number of scholarships available since any NCAA limits would be fair game for discussion. Likewise, mandatory bargaining subjects would include the number of scholarships (and their dollar value) by player position, such as a minimum of three quarterbacks on scholarship at any one time but no more than one full (or two half) scholarships allowed for the kickers on its special teams, the duration of any scholarships, and even the duration of an employee-athlete's eligibility.[26]

A student-athlete-employees' union would likewise have the ability to negotiate over academic standards, ranging from minimum grade point averages, to class attendance requirements, the number and form of examinations or papers in any class, grievance procedures to challenge a poor grade from a professor, and even potentially graduation requirements. In addition to interfering with a college's academic freedom, any "negotiation" and compromise over these standard educational requirements potentially devalues any athlete's degree from that institution.[27] In fact, unions arguably could bargain over whether employee-athletes even need to enroll at the university as a student.

Many of the special rules and policies governing intercollegiate athletes that are designed to create a level playing field for all teams – whether imposed by a college, its athletic conference, or the NCAA – are mandatory subjects of bargaining under the NLRA. The NLRB's Regional Director noted many such

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[25] Mandatory subjects of bargaining include such esoteric issues as the prices of snacks in employee cafeteria vending machines and the existence of and potential locations for hidden surveillance cameras in the workplace. *See Ford Motor Co. v. NLRB,* 441 U.S. 488 (1979); *Anheuser-Busch, Inc.,* 342 NLRB No. 49 (2004).

[26] Under the NLRA, there is no reason why players should be limited to only four years of eligibility.

[27] *See, e.g.,Yeshiva*, 444 U.S. at 680-81 (1980) (noting that "principles developed for the industrial setting cannot be imposed blindly on the academic world").

rules governing practice time, dress codes, and other conduct in his decision, each of which is negotiable under the NLRA.[28]

And it would be no defense to argue that Northwestern or any other university is merely complying with its athletic conference's or NCAA rules. The NLRA's obligation to bargain in good faith does not automatically allow an employer to avoid good faith negotiations merely because it is complying with external guidelines. First, even if Big 10 Conference or NCAA rules limited the maximum practice time, a union could always demand lesser requirements. Just as minimum wage laws and statutory overtime requirements do not prohibit employees from bargaining for more than the minimum (or less than the maximum), conference or NCAA limits will not prevent a union from bargaining for more or less than those rules allow. And as described more fully below, any differences in the rules by which collegiate teams compete will have profound implications for the continued viability of competitive college sports.

More important, however, the individual conference and NCAA guidelines will likely not be a defense to any university's refusal to bargain over them. It is unclear whether any rules on transferring among institutions, limits on years of playing eligibility, and even limits on the number of scholarships would be able to withstand scrutiny.

Additionally, the NLRB arguably might assert jurisdiction over individual athletic conferences and the NCAA itself as a joint employer with any individual college or university. Joint employers are businesses that are entirely separate entities except that they both codetermine or "take part in determining the essential terms and conditions" of employment of a group of employees.[29] Given the extensive regulation of and revenue sharing within college athletics, it takes little imagination to believe that the NLRB could find either a conference or the NCAA to be a joint employer with any member institution. As a joint employer, the college or university along with its athletic conference or the NCAA would be required to bargain together with any union representing that college's employee-athletes. In Northwestern's case, as the only private university in its conference, this might mean that the Big 10 Conference and Northwestern would jointly bargain with a union for Northwestern's players, while the remaining 13 public institutions in the Big 10 would not be covered by any resulting labor agreement.

Further, if Northwestern and the Big 10 were to bargain jointly, it is no defense for the conference (or the NCAA) to claim that it is merely applying the same rules it applies to all its other "non-union" facilities. While the NLRA does not require either an employer or union to make concessions, Section 8(d)'s

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[28] *See e.g., Pittsburgh Plate Glass,* 404 U.S. at 157-58; *NLRB v. Borg-Warner Corp.,* 356 US 342 (1958).

[29] *Capitol EMI Music, Inc.,* 311 N.L.R.B. 997, 999 (1993).

requirements make clear that an employer must engage in a good faith attempt to reach an agreement. The unwillingness to deviate from terms at non-union facilities (i.e., colleges and universities where athletes are not represented by a union) may be inconsistent with bargaining in good faith.[30]

Even if Northwestern or any other academic institution could negotiate an individual collective bargaining agreement to cover its athletes, however, other NLRA principles present additional practical problems. It has been widely reported that vast disparities exist among the fortunes of college athletic programs, with some making a so-called profit while many other institutions have expenses that exceed revenue. Any institution claiming that its finances do not permit it to meet its players' economic demands will have a well-established obligation to justify those claims under the NLRA.[31] And once the college or university opens the books, will a union be able to argue that the institution should "shut down" its money-losing sports in favor of those that generate greater revenue such as men's football or basketball?

Other NLRB rules about bargaining a first labor contract and the hiatus period between labor contracts create special conflicts for college athletics. The NLRB holds that "waivers," terms in a labor contract that give management a right to act unilaterally (typically imposing discipline, laying off employees, and possibly making changes to some benefit plans), normally expire during the hiatus period after expiration of and before execution of a new collective bargaining agreement.[32] And there are no waivers during first contract negotiations; employers are obligated to notify a union and upon request confer before imposing discipline on any bargaining unit member.[33] Whether the discipline involves a violation of NCAA, conference, team, or even academic rules applicable to all that college's students, would that institution need to confer with its players' union before ruling a player ineligible for that Saturday's game? If a student alleges that a bad grade is in retaliation for union activity, would a history professor need to confer with a union representative before imposing the grade or defend an unfair labor practice charge for giving a college athlete a C- or D+ in a class or on a mid-term exam?

But whether or not a waiver exists and there is an obligation to confer before imposing discipline, the NLRA's unfair labor practice processes could be invoked to challenge any discipline. If a player were suspended for a game due to the violation of that team's social media rules, for example, the player or his

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[30] *See, e.g., Ampersand Publishing, LLC,* 358 NLRB No. 141 (2012).

[31] *Nielsen Lithographing Co.,* 305 NLRB 697 (1991).

[32] *Beverly Health & Rehabilitation Services,* 335 NLRB 635, 636 (2001).

[33] *Alan Ritchey, Inc.,* 359 NLRB No. 40 (2012).

union could not only file an unfair labor practice charge, but potentially seek injunctive relief under NLRA Section 10(j).[34] With a limited playing career of 12 to 14 games over each of four seasons, the claim of irreparable injury from a college football player missing even one game would be a significant consideration. If a player is reinstated and ruled eligible for a game by the court for conduct that violates NCAA rules, the team's penalties for the player's participation under NCAA guidelines could include forfeiture of the game. If the player were allowed to dress for the game but received no actual playing time, the university would likely face either contempt charges from the federal court or new unfair labor practice charges for retaliation. How much playing time does the player deserve? Could holding a player out for the first half (or first set of downs) constitute an unfair labor practice? Would a federal district court eventually issue a Section 10(j) injunction ordering that a player be put in the game? And as discussed above, if the discipline was for an academic rules violation, the NLRB's processes interfere with a university's academic freedom.

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

The right of student athletes to organize and form bargaining units under the NLRA presents substantial practical problems. First, while the College Athletes Players Association seeks to represent the scholarship athletes on Northwestern's football team, the NLRB has made it clear that a union need not organize and seek to negotiate for entire teams.[35] If college football players are Section 2(3) employees, Section 9(a) of the NLRA makes it clear that employees may organize in an appropriate bargaining unit, not the most appropriate bargaining unit.[36]

Section 9(b) of the NLRA describes that bargaining units can be based on a craft, department, facility, or employer-wide.[37] As this Section of the Act and NLRB precedent in other industries shows, organizing and collective bargaining need not be limited to a single athletic team at any college or university.

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[34] 29 U.S.C. § 160(j).

[35] While other bargaining units may be appropriate, in approving a bargaining unit of only scholarship players at Northwestern, the NLRB would be creating a fractured unit – one of the few units it has tried to avoid. *See, e.g., Becker College*, 01-RC-081265 (June 12, 2012). Scholarship and walk-on players play the same positions for the same coaches, attend the same practices and games, receive and wear the identical uniforms and practice gear, are subject to the same rules, eat the same meals and share almost all terms except the value of a scholarship. Even if some other units might be appropriate, the one approved by the NLRB's Regional Director in *Northwestern* is difficult to justify.

[36] 29 U.S.C. § 159(a).

[37] 29 U.S.C. § 159(b).

Potential bargaining units at any NLRA-covered university include all intercollegiate athletes receiving a scholarship, all men's scholarship athletes, the joint men's and women's basketball or cross-country teams, or any of a number of other groups of student-athletes.

Relatively recently, the NLRB has expanded the types of groups that may organize into smaller separate bargaining units. In *Specialty Healthcare of Mobile*, the NLRB found that a petitioned for unit will be considered appropriate unless a larger group shares an "overwhelming community of interest" with that group.[38] An employer that wants to challenge a petitioned-for group must establish that others share this "overwhelming" community of interest with the group the union seeks. As the dissent noted in *Specialty Healthcare*, this gives a union a significant advantage in being able to petition for a bargaining unit within which it can win an election.[39] But even with the typical bargaining units historically approved by the Board, the NLRB's current standard would permit further divisions and potentially multiple bargaining units within any team.[40]

With separate offensive and defensive coordinators, position coaches, playbooks, and game plans, a college would face an uphill battle in meeting its burden of proving that the remainder of the football team share an overwhelming community of interests if a labor union seek to represent just the team's offense or defense. Likewise, offensive linemen, defensive backs or quarterbacks each may share their own separate community of interests. And because unions petition for bargaining units where they believe they can win an NLRB election, these types of units are inevitable.[41]

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[38] 357 NLRB No. 83 (2011)(emphasis added).

[39] *Id.* at *21-28.

[40] Different unions frequently represent different crafts and production employees within a single facility. For example, within a single manufacturing facility, the International Union of Operating Engineers may represent employees in the boilerhouse, International Brotherhood of Electrical Workers the plant's electricians, International Association of Machinists the remainder of the maintenance workforce, the United Steelworkers the production employees, and the International Brotherhood of Teamsters the warehouse employees.

[41] Likewise any group of students who perform a "service" for a college or university may now fit the NLRB's definition of a Section 2(3) employee. Under the Regional Director's Decision in *Northwestern*, it is not inconceivable to envision bargaining units of a university's marching band, its symphony orchestra, its cheerleaders, or debate team – or smaller "appropriate" groups within them such as the brass section or percussionists. Depending on whether those students receive scholarships or other compensation (if that is to be the standard) in exchange for their participation, the test laid out in *Northwestern* would support employee status and union organizing rights. This, of course, returns to the threshold issue concerning the principal purpose behind most extracurricular activities.

Each bargaining unit – potentially represented by different unions – would be able to bargain separately over that group's terms and conditions of "employment." The possibility exists that within any team, different groups of players would be unrepresented, while other groups would be covered under different collective bargaining agreements, terms, and rules. While these differences are workable in an industrial or office setting, they would be difficult to apply in a team sport context.[42]

d. NLRA Collective Bargaining among College Athletic Teams Would Create Competitive Imbalances

The practical problems in applying different rules to discrete groups within the same team pale in comparison to those that would arise when different college teams compete under different sets of rules negotiated with their unions. It would be unprecedented in American sports to have some teams populated with "employees" covered by collective bargaining agreements, while other teams are not. From a practical standpoint, the basis for both college and professional sports is a level playing field. The NCAA has different Divisions, each of which has its own rules and competes with others in that group. Likewise, Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League all have multi-employer collective bargaining agreements covering the league and every team. Each league's collective bargaining agreements provide a level playing field, whether with salary caps, minimum wage progressions, free agency, drug testing protocols, and even revenue sharing. And in professional sports, every team is a private employer under the NLRB's jurisdiction that can therefore be covered under a single collective bargaining agreement.

This level playing field in professional sports occurs because the different teams – all competitors with each other – can "fix" labor terms under a well-acknowledged non-statutory labor exemption from the antitrust laws.[43] Because labor law requires collective action, the exemption applies to employers "where its application is necessary to make the statutorily authorized collective bargaining process work as Congress intended."[44] Stated simply, because the

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[42] For example, the offense might negotiate to practice in the morning, while the defense demanded afternoon practices. To press their bargaining demands for better training table meals or nicer hotels with single rather than double-occupancy rooms when traveling for away games, just the quarterbacks – as a separate bargaining unit – might decide to go on strike just before a big game.

[43] Specifically, protections of unions from antitrust actions by the Clayton and Norris-LaGuardia Acts are intertwined with the congressional policy to promote collective bargaining expressed in the NLRA. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988 & Supp. 11 1990); Clayton Act, ch. 323, § 7, 38 Stat. 730, 731-32 (1914); and the NLRA, 49 Stat. 435 (1935), *amended by* 61 Stat. 141 (1947), 29 U.S.C. §§ 151-169 (1988).

[44] *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996).

product of collective bargaining can be argued to stifle competition, the contracts – whether with a single employer or multi-employer association such as an entire sports league – negotiated by organized labor have been largely exempted from antitrust scrutiny.

Unlike professional leagues, the same will not be true in college athletics. Because the NLRA does not apply to the public institutions, the NLRB is creating rules for "employee"-athletes who represent less than fifteen percent of the participants. And it is almost certain that the NLRA's regime for recognizing and bargaining with unions will not apply to the remaining eighty-five percent. In the Big 10 Conference, for example, only Northwestern is a private institution. In the Pac-12 Conference, only Stanford and the University of Southern California are private institutions. The remaining thirteen members of the Big 10 and ten members of the Pac-12 are all public universities. Without a single, common collective bargaining agreement covering every team in a conference or the NCAA, any attempt among the separate "employer-universities" to "fix" the compensation of "employee-athletes" in that conference enjoys no labor antitrust exemption.

Some states expressly regulate public sector employee collective bargaining, often either limiting it to certain subjects or types of employees.[45] Other states prohibit public sector bargaining altogether or have no laws on the subject.[46] And while it is far from clear whether public university student-athletes could be considered employees within the meaning of even those state laws that do permit public sector organizing and bargaining, the likely patchwork of different terms and rules will lead to vastly different playing fields among different teams.[47]

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

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[45]Ohio and Wisconsin are expressly stating that college athletes are not public employees, and Texas bars public sector collective-bargaining rights aside from police officers and firefighters.

[46] North Carolina and Virginia prohibit all collective-bargaining rights for public employees. Arizona, Arkansas, Colorado, Mississippi, and West Virginia have no laws on the subject.

[47] For example, a bill is advancing in Ohio's House of Representatives clarifying that athletes at that State's public colleges and universities are not employees. *See* H.B. 483, 130th Gen. Assemb. (Oh. 2014) On the other hand, some legislators in Connecticut, including State Rep. Patricia Dillon, D-New Haven, have suggested that they will introduce legislation stating that its public college athletes are, in fact, employees.

every athletic department wants to win. And because those institutions whose fortunes are not as great may be left with less attractive "compensation" to offer and therefore less highly-recruited talent, the resulting competitive imbalance will profoundly change the nature of college sports.[48]

IV. The NLRB Should Decline to Assert Jurisdiction Over College Athletics

For all these reasons, the NLRA cannot effectively apply to college athletics. College student-athletes are not employees under NLRA Section 2(3). Even if they were considered so, however, applying the Act's other provisions and bargaining rules to the 17 teams over which the NLRB may claim jurisdiction creates an unworkable series of legal and practical problems. Applying the NLRA, a statute that covers fewer than fifteen percent of the competitors in major college football, is a mistake that would profoundly change the nature of intercollegiate sports.

Even where it has jurisdiction, however, in its discretion under Section 14(c) of the Act, the NLRB may "decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction."[49]

For over half a century, the NLRB has consistently declined to assert jurisdiction over labor disputes in the horseracing and dog racing industries as well as over labor disputes involving employers whose operations are an integral part of these racing industries, even where there is evidence of an effect on commerce.[50] In declining jurisdiction, and like the extensive conference and NCAA regulation over college athletics, the Board noted the extensive state laws and regulations already in place, such as state laws governing the racing dates at the tracks, the state's share of gross wagers, the licensing of the industries' employees, the supervision over the industries through state racing

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[48] Rather than improving the lot of the college athlete, the NLRB's decision that scholarship athletes are employees may have the perverse effect of causing some colleges and universities to eliminate athletic scholarships entirely. As a result and for the vast majority of college athletes who will never play professional sports, many students who are now receiving scholarships could find a college education unaffordable and beyond their and their family's means.

[49] 29 U.S.C. § 164(c).

[50] 29 C.F.R. 103.3; *Los Angeles Turf Club, Inc.*, 90 NLRB 20 (1950) (horseracing track); *Jefferson Downs, Inc.*, 125 NLRB 386 (1959) (horseracing track); *Meadow Stud Inc.*, 130 NLRB 1202 (1961) (horse owner/breeder); *Hialeah Race Course, Inc.*, 125 NLRB 388 (1959) (horseracing track); *Walter A. Kelley*, 139 NLRB 744 (1962) (horse owners/breeders); *Centennial Turf Club, Inc.*, 192 NLRB 698 (1971) (horseracing track); *Yonkers Raceway Inc.*, 196 NLRB 373 (1972) (horseracing track); *Jacksonville Kennel Club*, Case 12–RC–3815 (May 5, 1971) (dog racing track) (not reported in NLRB volumes).

commissions, and the ability of certain states to discharge employees whose conduct jeopardized the "integrity" of the industries.[51]

Likewise and like with the limited tenure and rapid turnover of college athletes, the NLRB has historically considered the sporadic nature of the employment in the racing industries, including high turnover resulting in a relatively unstable work force. The Board recognized serious administrative problems that would be posed both by attempts to conduct elections and effectively remedy alleged violations of the NLRA within the highly compressed timespan of active employment characteristic of the industries.[52]

Even if it were to conclude that college athletes are employees within the meaning of the NLRA, the Board – which could only claim jurisdiction over 17 of the 120 or so teams that play major college football – should exercise its discretion and decline to assert jurisdiction over college football programs and scholarship athletes at private colleges and universities.

V. Conclusion

I believe the National Labor Relations Act is not an appropriate vehicle to address student-athletes' concerns or disputes with their colleges and universities, athletic conferences, or the NCAA. The legal and practical results of deeming these student-athletes to be employees within the meaning of the Act would be profound and unworkable. Chairman Kline and Members of the Committee, I thank you for the opportunity to share my thoughts with you today. Please do not hesitate to contact me if I can be of any help in further addressing the implications of student-athletes being allowed to organize and bargain under the NLRA.

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[51] *See, e.g.*, *Walter A. Kelly*, 139 NLRB 744 (1962).

[52] 29 C.F.R. 103.3.

Chairman KLINE. Thank you.

Mr. Schwarz, you are recognized.

STATEMENT OF MR. ANDY SCHWARZ, PARTNER, OSKR, LLC, EMERYVILLE, CALIFORNIA

Mr. SCHWARZ. Chairman Kline, Ranking Member Miller, members of the committee, thank you for allowing me to testify on these issues related to college football. My name is Andy Schwarz, I am an economist who specializes in antitrust and the economics of college sports. I am a partner with the firm OSKR, but I am testifying today solely on my own behalf.

As the members of the committee know, the NLRB authorized an election for Northwestern football athletes. And so to start, I want to provide a few facts from those proceedings. Scholarship football athletes at Northwestern devote 40 to 60 hours per week during a 5-month season and 15 to 25 hours per week the rest of the year. They receive no academic credit, they are not supervised by faculty, and football is not a direct part of the curriculum of their undergraduate majors.

I understand this panel is focused on unintended consequences of unionizing college football. So I want to explain that the biggest threat to college sports from collective action is the current price fixing cartel called the NCAA. By price fixing, I am focused on how 351 Division 1 schools, including my own beloved Stanford, stifle healthy economic competition through collusion to impose limits on all forms of athlete compensation. College football is an enormously popular consumer product. It generates passion from fans and billions in revenues from schools, for broadcast television networks, for merchandisers and apparel companies.

FBS football is a professional sports industry. FBS football alone reported 3.2 billion in revenue in the most recent federal filings. D1 basketball added another 1.4 billion. Individual athletic departments regularly generate more revenue than almost all NHL and NBA teams. Former NCAA president, Miles Brand, explained that maximizing revenue was the only responsible path for college sports. That is exactly how a vibrant business should behave. But there is an economic dark side to college sports that comes from collective action, which is price fixing.

The NLRA and the antitrust laws work together to ensure that when sports leagues and athletes form partnerships negotiations are fair. And either choice is valid; in a unionized, collective bargaining path, or a more free market approach governed by the antitrust laws. Given the one-sided power imposed by collusion, it is not surprising that players have turned to labor law and to unionization for a modicum of countervailing bargaining power. Other American sports involve a league, negotiating with a union, to achieve a competitive outcome. Leagues generally encourage unionization.

In 2011, the NFL players sought to end their union. But the NFL went to court to demand they remain a union, against the players' wishes. As an economist I focus on the athletes' free market value, which is high. But as a union, CAPA is focused on very different things. They are focused on enhancing educational and safety component of the bargain, better medical coverage, reducing head trau-

ma, improving graduation rates and establishing educational trust funds to ensure athletes can finish their degrees.

Because of time limits I will summarize my points and leave the rest for the question period. Because most athletes do not go on to work in the NFL, NCAA collusion effectively denies 95 percent or more of college athletes of their four best sports earning years of their entire career. For some, those may be their four best earning years. Money that would go to male athletes is, instead, funneled to coaches and into elaborate recruiting palaces. College football coaches can make as much as $7 million a year. Shunting money to coaches also deprives women athletes of Title IX matching funds.

Collusion shifts the burden from a private school like Northwestern to taxpayer-funded Pell grants, sometimes even food stamps, or by forcing students to leave school to support their families. The current tax code exempts from taxation the tuition portion of athletic scholarships as well as tuition remission paid to university employees as part of a broader compensation package. Nothing in the NLRB ruling should change that and, if it did, Congress itself has the power to make sure that doesn't happen.

Finally, the NCAA limits consumer choice with a centrally-planned, one-size-fits-all product offering. I also want to say that the term "student athletes" itself was created to dodge legal responsibilities for athletes' safety and to avoid economic competition. But the resources from new TV deals alone are sufficient for an orderly transition from a command and control economy to a market-based one. Americans have a legal right to economic markets free of collusion. Until that right is respected for college athletes of course they will seek collective alternatives.

An athlete who has bargained, individually or collectively, to ensure he is well fed, given real access to a full range of majors and programs at a school, and provided with health and safety rules that lower the risk of serious head trauma or lifelong disability is going to be in a better position to benefit from a true education than a hungry or concussed athlete forced into a dead end major.

Thank you for your time.

[The statement of Mr. Schwarz follows:]

Expanded Written Testimony of Andy Schwarz

Before the Committee on Education and the Workforce

United States House of Representatives

May 8, 2014

Hearing on Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes

Chairman Kline, Ranking Member Miller, and Members of the Committee, thank you for allowing me to testify on these issues related to College Football. My name is Andy Schwarz. I'm an economist who specializes in antitrust economics. I have also spent a good part of my career studying and writing about the economics of college sports. I am a small business owner, a Stanford, Johns Hopkins, and UCLA graduate, and a proud Californian. Among other things, I am the author of "Excuses, Not Reasons: 13 Myths About (Not) Paying College Athletes." I am a partner with the firm OSKR, but I am speaking only for myself, and not for my firm or any of our clients.

As the members of the committee know, the NLRB authorized an election for Northwestern FBS football athletes, and so to start I want to provide a few facts from those proceedings:

- Scholarship Football Athletes at Northwestern devote 40 to 60 hours per week during a five-month season, and 15 to 25 hours the rest of the year.
- They receive no academic credit, are not supervised by faculty, and football is not a direct part of the curriculum of their undergraduate majors.

I understand this panel is focused on unintended consequences of unionizing college football, so I am here to explain that the biggest threat to college sports from collective action is the current price-fixing cartel called the NCAA. By price-fixing, I am focused on how the 351 Schools in Division I stifle healthy economic competition through collusion to impose limits on all forms of athlete compensation.

College Football Is Big Business

College football is an enormously popular consumer product, generating passion from fans and billions in revenue for schools, broadcast television networks, merchandisers, and apparel companies. As Americans, many of us love college sports, especially college football and basketball, and that's an important economic fact to recognize. In our vibrant capitalist economy, popular products generate large revenues, so the fact that FBS football is a successful, professional sports industry is nothing to be ashamed of. We should celebrate that FBS Football programs alone reported $3.2 billion in revenue in the most recent federal filings and that D1 basketball programs added another $1.4 billion. College football is great entertainment which is

why individual athletic departments regularly generate more revenue than almost all NHL and NBA teams.

Former NCAA President Myles Brand explained that maximizing revenue was the only responsible path for college sports. He stated that college athletics

"... has an obligation to conduct its revenue-generating activities in a productive and sound business-like manner. Anything less would be incompetence at best and malfeasance at worst."

As a free-market oriented antitrust economist, I agree with Mr. Brand's view: the economic success of college sports is fantastic for the American economy and the NCAA's efforts to commercialize the sport are exactly how a vibrant business like College Football should behave. Bravo for the NCAA's pursuit of profit!

College Football is Produced by a Price-Fixing Cartel

There is an economic dark-side to the process by which this product is produced. It's called Price Fixing. Annually, 351 Division 1 schools come together and agree to stifle economic competition. They take a market that would normally be extremely competitive, with many buyers and many sellers, and create what amounts to a buyers monopoly, what economists call a monopsony, where every school agrees to fix the price offered to the athletes who help to create this beloved American sport.

In our economy, the NLRA and the Antitrust laws work together to ensure that when sports leagues and athletes form partnerships, negotiations are fair, whether done through collective or individual bargaining. Either choice is valid – a unionized, collective bargaining path or a more free market approach, where the antitrust laws prohibit collusion among teams. Given the one-sided market power imposed by collusion, it's not surprising that the players have turned to labor law and unionization for a modicum of countervailing bargaining power.

I believe very strongly in the power of economic competition to create the best economic outcomes -- that is why I work in antitrust. As a country, we should enforce our antitrust laws just as vigorously with respect to college football (and other college sports) as we do other examples of price or wage fixing. Whether it's through an Act of Congress, intervention by the Department of Justice, or through a legal decision in the Courts, the long-standing Cartelization of college sports needs to end.

Most American Team Sports Involve Partnerships between Leagues and Unions

Other American Sports involve a League negotiating with a Union to achieve a competitive outcome. Leagues generally encourage unionization. This is because in the context of collective bargaining, restrictions on economic competition that would generally be illegal under the antitrust laws can be exempt. Consider that in 2011, NFL players sought to end their Union, but the NFL demanded the Courts re-form the NFLPA against the players' wishes. The NFL's

teams may have gone to Court for their right to continue its partnership with the NFLPA because of evidence from major European soccer leagues, Europe's football, where there are no collective bargaining agreements and player pay reaches 60-70% of total revenue rather than the 50% athletes in the NFL get.

So if garden-variety American-style economic competition through a free market is too much to expect from the 128 schools that produce FBS college football at great profit, or from all 351 Division I schools, they have a second alternative open to them, the collective bargaining outcome chosen by the NFL, NBA, MLB, and NHL. From the point of view of an industry that is currently price fixing, a legally negotiated collective bargaining agreement that brings with it an antitrust exemption with respect to labor issues may be a far more palatable alternative than unfettered, non-collusive economic competition.

Instead we have neither true market competition nor collective bargaining. We have the worst economic outcome, a monopoly formed through collusion. The NCAA creates artificial market power that permits price fixing which in turn distorts the market, and this imposes a high cost on young men, many of whom come from families who do not have the luxury of shrugging off that economic loss. The valid economic options to correct those distortions are either to break up the NCAA's union power by enforcing the antitrust laws, or to choose a collective bargaining approach where both sides negotiate as collectives, and in exchange, the antitrust laws are suspended in favor of a collectively bargained partnership.

The Term Student-Athlete is a Term of Art Created in an Attempt to Evade Legal Liability

In some ways, the NCAA has turned its founding purpose upside down. The NCAA was famously organized at the behest of trust-buster Republican Teddy Roosevelt to address health and safety issues, but today we live in a world where the NCAA devotes millions to investigate suspicions of possible market compensation while it denying it has any legal responsibility to protect the heads or bodies of its athletes.

The NCAA's former Executive Director Walter Byers has acknowledged that the NCAA coined the term "student-athlete" to specifically to dodge legal responsibilities for athlete safety and medical expenses. In time, that term has also served to disguise its economic collusion.

That perversion of the original mission remains to this day: Athletes like Louisville's Kevin Ware, who broke his leg during last year's NCAA basketball tournament, are excluded from workers compensation benefits that would provide immediate and long-term medical care. Far more effort was spent to determine whether Johnny Manziel received a market rate of compensation for his autograph than was spent investigating whether Matt Scott of Arizona, who showed clear signs of concussion during a televised game (that I myself watched), was put at risk by quickly returning to play in the same game.

FBS Football is a Full-Time Endeavor

The athletes who play College Football in FBS work at their craft as a full-time job, and they pull this off while also juggling the difficulty of being a full-time student. One thing NCAA president Mark Emmert and Northwestern graduate Kain Colter agree on is that FBS football athletes put in over 40 hours per week into their craft. Colter laid out facts that people who study college sports already know: FBS athletes put in 40 to 60 hours per week from August through January, 15-25 hours for the rest of the year with only 3 weeks off. Northwestern's head football coach Pat Fitzgerald acknowledged in the press and under oath that football players' responsibilities amount to a full time job.

Just as FBS athletes work outside the classroom, many non-athlete students also work at jobs during college, often for the university itself. Whether working full- or part-time, it's silly to think that having a job undermines one's college education or that the number of hours spent studying changes your employee status. In the classroom, college athletes are students. On the field, they are valuable contributors to an economic engine that generates billions. Being a student, an athlete, and employee are not mutually exclusive.

Like other employees, FBS Football players are already compensated for what they do. They are paid, sometimes in cash, for their room and board, and they receive tuition remission and their required books. Because this compensation, unlike that of a student who is not an athlete, is subject to price fixing, they receive far below their actual market value.

As with all university employees, universities exert significant control over college athletes and their time. Because of the demands of classes and of their craft, what is often sacrificed are all of the soft benefits that non-NCAA students like me got from college -- a chance to study abroad or the luxury of time to hang out with friends in the dorms, friends who go on to be valuable business connections.

The Antitrust Laws Protect Workers' Rights to Competitive Markets

Like almost every employee in America, athletes who play FBS football come to their craft voluntarily. Like you or me, they could always pursue a different career, but the same is true for employees everywhere in America. One critical difference however is that other employees have access to competitive markets for their service, and if they do not, the Courts and the Executive Branch step in to protect those rights.

Just last week, the Department of Justice and eBay agreed that eBay would stop colluding with its competitors to limit the employment choices of their high tech employees, and Apple and Google settled similar charges by paying affected workers hundreds of millions of dollars. In banning eBay's collusive conduct, the DOJ explained that when firms collude to limit employment choices, the American worker and the American economy suffers:

"These actions by the Antitrust Division remind us all that the antitrust laws guarantee the benefits of competition to all consumers, including working men and women. The agreements we challenged here not only harmed the overall competitive process but, importantly, harmed specialized and much sought after technology employees who were prevented from getting better jobs and higher salaries. Stifling opportunities for these talented and highly-skilled individuals was bad for them and bad for innovation in high-tech industries."

The same is true when the colleges collude to limit the economic freedom of athletes.

A Seat at the Table

College Athletes undertake the rigorous twin tasks of being a full-time student and also being a full-time athlete, and I do not envision that either a free market or a union solution to the current NCAA collusion will likely change that -- being great at something requires a tremendous investment of time, and time is a scarce commodity. But what a market or union outcome would do is provide athletes with a voice in determining how best to make that tradeoff. For example, a player in a free market or a union could negotiate for a guarantee that no matter how long it takes, that student could finish his degree, and could study abroad in the years after his football eligibility were up. An athlete who has bargained, individually or collectively, to ensure he is well fed, given real access to the full range of majors and programs at a school, and provided with health and safety rules that lower the risk of serious head trauma or life-long disability is going to be in a better position to benefit from a true education than a hungry or concussed athlete forced into dead-end majors.

Although as an economist I focus on the mismatch between the current fixed price and athletes' free market value, as a union CAPA has a very different focus. CAPA's goals aim to enhance the educational component of what FBS football athletes receive in trade for their services, through better medical coverage for sports-related injuries, a focus on reducing head trauma, improved graduation rates, and educational trust funds to ensure that athletes can finish their degrees after their sports eligibility is done. Giving athletes a say in their own education, allowing them to exercise their basic economic rights as Americans to negotiate the terms and conditions by which they will provide their skills and revenue-generation potential in exchange for, among other things, the promise of a college education will tend to enhance their educational AND economic outcomes.

Collusion Harms Athletes, Taxpayers, and Consumers

In the rest of my testimony, I would like to focus on some of the ways the current system, where a Cartel imposes its rules on the industry without negotiating with anyone but themselves, harms athletes, harm taxpayers, and harms the country as a whole.

- Because most athletes do not go on to work in the NFL, the current system denies more than 95% of college football players access to the four best earnings years of their sports careers.

I am sure you have heard that fewer than 5% of college athletes, even in sports like football, go on to receive a salary as athletes after they leave college. This is often trotted out as a reason why receiving an education and a degree is so important for the other 95%-plus. And that's true -- education plays a tremendous role in all of our lives and in our lifetime earning power. But stop for a second and think about that statistic: if 95% or more of the enormously talented young men with rare skill who play college football or college basketball will not earn money from sports after college, then the current collusion among colleges not to compete economically is robbing those highly skilled college athletes of what will be their four or five highest earning years in their sports careers, and possibly for their entire life.

If we had a true market for college football players, most major colleges would find it economically profitable to provide greater levels of compensation than they do currently. Economic research by Dan Rascher of USF and Chad McEvoy of Syracuse has shown that consumer demand for winning, as measured by attendance and TV ratings, is actually greater at the college level than in the NFL. College Athletes are Americans with unique skill that the market would reward handsomely, but-for the collusion among the schools that profit from their skills.

- The current tax code exempts from taxation the tuition portion of athletic scholarships, and tuition remission paid to university employees as part of broader compensation. Nothing in the NLRB ruling should change that, and if it did, Congress itself can prevent that.

The specific proposals by the Union at Northwestern do not involve compensation beyond the current scholarship, and thus would not likely change the current compensation or tax status with respect to athletic scholarships. Through Revenue Ruling 77-263, the IRS has long recognized that the tuition piece of an athletic scholarship is not taxable as long as that scholarship is not cancelled in the event of injury. Similarly, Section 117 of the tax code exempts from taxation tuition remission provided to a university employee if that employee is compensated with a mix of pay and tuition remission, just as athletes receive cash for room and board in addition to having their tuition price waived or reduced.

And of course, to the extent you in Congress are specifically worried that somehow IRS policy would change, you -- Congress - have the power under our Constitution to ensure such an unintended consequence is avoided.

Though it is not part of CAPA goals, as an economist I can envision that the market that would arise through market competition would likely involve increased compensation. Holding down that aspect of competition is part of much greater set of negative consequences, intended or not,

that the current system has generated as a result of our nation's failure to enforce our antitrust laws against price fixing by colleges.

- Collusion denies young men with valuable skills the opportunity for to be fairly compensated for their football skills while they are students, shifting the burden to taxpayer-funded Pell grants and food stamps or forcing students to leave school to support their families.

One negative consequence is to deny many athletes a path to lift themselves out of poverty and their dependence on government handouts. Approximately 40 to 45% of all FBS football athletes come from families with low enough means that they receive Pell Grants. As one example, in 2006, 65% of UCLA's Football Athletes received these government grants. In other cases, athletes qualify for food stamps. If collusion among major colleges were ended, economic competition would turn those Pell Grant recipients into skilled earners. As pay rose, these hard working young men would taxes on the portion of their earnings above and beyond the athletic scholarship instead of being recipients of taxpayer-funded welfare. I can't imagine Congress would be in favor of private institutions like Northwestern colluding with their competitors for the purpose of pushing would-be taxpayers onto government assistance.

- One negative consequence of collusion in the market for male athletes is that money that would go to male athletes is funneled to their coaches and into elaborate recruiting palaces. College Football coaches make as much as $7 million.

One direct and unintended consequence of price fixing for male athletes is that the market price for coaches has risen precipitously albeit artificially. Effectively the money the market would channel towards male athletes is diverted into coaching pay and all other substitutes for direct compensation that can be used to recruit athletes. This includes the large and lavish practice facilities, which I refer to as Recruiting Palaces. There is a reason why FBS locker rooms are more ostentatiously appointed than NFL locker rooms – in the NFL, pay is the primary recruiting tool, while in FBS it is construction and coaching.

As an example, in the NFL and NBA, the best paid coaches earn about 7% of the total payroll of the team. Coaching pay is also not rising nearly as fast in the NFL as in FBS. In college, football coaches can earn as much as $7 million -- more than double the total listed value of the entire team's compensation in the form of athletic scholarships. In basketball, the highest coach earns over $9 million and the ratio of coach-to-athlete compensation is far higher than in football. It is a settled matter of antitrust law that it is illegal for schools to collude on coaching pay and that is good. Collusion against any workforce is harmful to the American economy. But enforcing that same law with respect to athletes would bring coaching pay back to a more realistic level because the balance would shift and money would flow to male athletes instead of to their coaches.

- Collusion shunts money to coaches in lieu of increased financial aid to male athletes. Thus capping compensation to male athletes also deprives female athletes of their Title IX matching funds. Caps also limit opportunities for male athletes outside of football and basketball.

This current system's emphasis on coaching pay also harms female athletes. As I am sure members of this committee know, Title IX has provisions that provide that financial aid provided to male athletes must be substantially proportional to financial aid provided to women. However, Courts have ruled there is no similar Title IX requirement to match male and female coaching pay. Thus, after football and basketball athletes, the next biggest victim of NCAA collusion are female athletes, who find their matching funding reduced proportionally by each dollar that shifts from male players to their coaches or to investments in Recruiting Palaces.

For those who say the NCAA is deeply concerned with Title IX enforcement, I would ask you to judge them by their own rules. The NCAA has no minimum requirements for women's scholarships, either in terms of the value or number of scholarships given. To the contrary, the NCAA actually impose limits, both to the total value of any one woman's scholarship and to how many scholarship equivalents can be given out. If the NCAA were genuinely interested in ensuring an increase in scholarship aid to women, schools would impose a minimum rather than maximum number and value of women's scholarships. The same NCAA rules that limit economic competition for men also hinder women's economic and educational opportunity.

Similarly, for men's sports other than football and basketball, rather than requiring that schools fully fund scholarships, the NCAA actually prevents its member schools from doing so. As one example, it takes six men to form a full men's volleyball team, but NCAA rules punish a school if it provides more than 4.5 scholarships for the entire team. Soccer is similar, with a team requiring at least 11 players (and rosters are typically larger than that) but the NCAA prohibiting a school from granting for than 9.9 full scholarships. If the NCAA were truly concerned with the potential reduction in men's non-revenue sports, they could easily allow or even require its members to field teams where every athlete has a full scholarship rather than forbidding that outcome.

Even to call these sports "non-revenue" is a misnomer. Like other elements of a campus -- such as the drama, music or art department, men's sports other than football and basketball generate interest from would-be students, generate excitement on campus that makes for a better campus community, and also generate successful alumni who serve as the backbone of contributions to the school, in terms of their success, their involvement after graduation, and their financial contributions.

We know that even if all of the billions that FBS football generates were to vanish, schools derive value from a thriving non-revenue sport community. And as we see from Division II and Division III schools that sponsor these sports, even those with little or no football revenues, that

the fate of men's wrestling, lacrosse, or volleyball does not rest on continued collusion against men's football or basketball athletes.

Now is the Opportunity to Move Away from a Command-and-Control Economy

College football is currently enjoying healthy revenue growth. The Sports Business Journal estimates that by 2020, FBS annual revenue will have grown by more than a billion dollars. The resources exist for an orderly transition from a command-and-control economy to a market-based one. As Americans, we all have a legal right to economic markets free of collusion. The Sherman and Clayton Antitrust Acts enshrine those rights into law. Until those rights are respected for college athletes, of course they will seek collective alternatives. This is the unforeseen consequence of collective action by the schools that comprise Division I athletics. If you must be outraged, look no further than collusion by 351 Division I colleges and universities, which denies athletes a free-market alternative to unionization.

If the NCAA were no longer able to violate the antitrust laws without consequence, schools might find they actually would prefer to negotiate with a nationwide union, as is the case in the NFL and NBA, and it should also be the choice of athletes to follow that path as well. That choice is their right, as is their right to choose a collusion-free market for their talent if they opt not to unionize.

There is an Economic Consensus that NCAA Price Fixing Harms the Market

The Supreme Court has made clear that the Sherman Act is the "Magna Carta of Free Enterprise." The economic harm of the NCAA's current collusive system may be an unintended consequence, but economists have long understood the harm brought about by the Cartelization of Intercollegiate Sports. Among those economist's work is that of Nobel Prize winner Gary Becker, who passed away just last week. Becker, who in addition to receiving the Nobel Prize for Economics was also given our nation's highest civilian honor, the Presidential Medal of Freedom in 2007 by President George W. Bush quoted the Supreme Court about NCAA price-fixing, saying: "good motives alone will not validate an otherwise anticompetitive practice."

Becker went on to dissect some of the unintended consequences of this anticompetitive behavior:

"A large fraction of the Division I players in basketball and football, the two big money sports, are recruited from poor families; many of them are African-Americans from inner cities and rural areas. Every restriction on the size of scholarships that can be given to athletes in these sports usually takes money away from poor athletes and their families..."

Becker concluded with a simple diagnosis of how competition would improve the market:

"It is time for the court to apply the same valid reasoning to the restrictions on scholarships and other aspects of the competition by colleges for athletes, and to declare these restrictions also a

violation of the Sherman Act. Were that done, both student-athletes and schools with greater concern for academic performance of their athletes would gain at the expense of colleges that put athletic competition before academic achievements."

So if this panel wants to improve the economic and educational outcomes for college athletes I would suggest you focus on the root of the problem: price-fixing and the distortions to the American economy it brings.

Thank you for the opportunity to present this testimony.

Chairman KLINE. Thank you.
Mr. Muir, please?

STATEMENT OF MR. BERNARD M. MUIR, DIRECTOR OF ATHLETICS, STANFORD UNIVERSITY, STANFORD, CALIFORNIA

Mr. MUIR. Chairman Kline, Ranking Member Miller and members of the committee, I am pleased to be here to provide some comments about the experiences of student athletes at Stanford University. My comments are specific to Stanford and are not focused on the details of the case currently before the National Labor Relations Board. But I hope to help illuminate some of the larger issues you are addressing today.

Stanford has 7,000 undergraduate students and nearly 9,000 graduate students. And the university is recognized internationally for its academic quality. We offer 36 varsity sports, 20 for women and 16 for men. About 900 students participate in intercollegiate sports; 53 percent of them men and 47 percent of them women. Stanford has won the Directors Cup, which honors the most successful program in NCAA Division 1 sports for the last 19 years. We are very proud of the athletic achievements of our student athletes.

But what I want to emphasize in my testify this morning is that, in athletics, we never lose sight of the university's larger mission. Stanford is a university first, and its academic mission comes first. We believe the most important thing for our student athletes walk out the door with, when they leave Stanford, is a Stanford degree. Ninety-seven percent of our student athletes achieve this goal, including 93 percent of our football student athletes. The athletic experience is not pursued at the expense of the academic experience or separate and apart from it. Each enhances the other.

One out of every eight undergraduate students at Stanford is a student athlete. So this is not a separate group having a separate experience from the rest of the student body. They are in the same classes, the same laboratories, the same undergraduate housing. They have the same exam schedules, even if it means to take a proctored examination on the road, and the same degree completion requirements as other students. The rigor of the academic enterprise begins with the admissions process. Stanford does not admit anyone it is not confident can succeed academically at the university.

Stanford reviews each applicant for undergraduate admission holistically, looking at the academic excellence, intellectual vitality and the personal context each brings to the table. This evaluation occurs in the admissions office independent of the athletic department. Our student athletes demonstrate how importantly they view a Stanford education by taking all steps they need to complete it. As two brief examples, Andrew Luck of the Indianapolis Colts and pitcher Mark Appel of the Houston Astros organization both bypassed the opportunity to leave Stanford with a year of eligibility left and enter the professional sports world.

Instead, they remained at Stanford to complete their degree. Even among the few Stanford athletes, student athletes, who do not complete a degree before becoming professional athletes, many do come back to finish later. The overwhelming majority of our stu-

dent athletes will not go on to earn a living in professional sports, but whatever path they take their Stanford experience will provide them with outstanding preparation for success in the world. The academic grounding they receive is solid, and the athletic experience builds on it by teaching leadership, strategy, team dynamics, problem-solving, and other capacities critical to success. I discuss all of these issues more extensively in my written testimony.

I want to address a related question about how revenue from athletics is used. At Stanford, while football and men's basketball generate net revenue through ticket sales and TV contracts, the vast majority of our 36 sports do not. All the revenue that the university receives from these two sports is used to support the overall athletic program, including the 87 percent of our student athletes who participate in those other 34 sports. We use these revenues to support athletic opportunities for the broad cross-section of our students, both men and women. Providing these opportunities is very important to us.

Let me close by discussing how we address the needs and concerns of student athletes. We work very hard to ensure that both the academic and athletic experiences of our student athletes are excellent and properly supported. Soliciting honest feedback from our students is critical to that objective, and we have a variety of avenues for doing so. Many of the issues that have been identified by the union seeking to represent student athletes are issues we are already addressing at Stanford. Although there are areas where our actions are governed by NCAA regulations, we are always open to making improvements that are within our purview, and to working with the NCAA to improve its rules on issues such as minimum academic progress for student athletes and scholarships that include fair stipends for student athletes' expenses.

I hope the strengths and benefits of programs such as ours will be considered, as the national discussion of these issues continues. I also recognize that there is a variation on these issues from school to school. And that while I have been speaking today about Stanford, there may well be differences at other institutions. Stanford stands ready to talk with and work with others who are likewise interested in continually improving the experience of student athletes across the country.

Thank you.

[The statement of Mr. Muir follows:]

Testimony of

Bernard Muir
The Jaquish & Kenninger Director of Athletics
Stanford University

Before the
United States House of Representatives
Education and the Workforce Committee

May 8, 2014

Chairman Kline, Ranking Member Miller, and Members of the Committee, I am pleased to be here today to provide some comments about the experiences of our student-athletes at Stanford University.

While I am confident there are other institutions around the country that share many of the values we promote at Stanford, my comments are specific to Stanford. The case involving scholarship football players and collective bargaining rights at Northwestern University raises broad implications for student athletics and the college experience. That case is currently before the National Labor Relations Board, and I will refrain from addressing the intricacies of that case. In my testimony, I hope to illuminate some of the larger issues by discussing how we approach student athletics and academics at Stanford.

Many of you are familiar with Stanford, but by way of brief overview, the University has 7,000 undergraduate students and nearly 9,000 graduate students. Our faculty are internationally recognized as leaders in their fields and include 22 Nobel Laureates. Those faculty members pursue an extraordinarily ambitious research portfolio, with more than 5,000 sponsored research projects underway, and they work to link that research with the undergraduate teaching they perform. Stanford offers a 5-to-1 student-faculty ratio for undergraduates, with rich opportunities for students to both engage in the creation of knowledge and put it to use in the world, particularly through the interdisciplinary approach to problem solving for which Stanford is widely recognized.

I serve as the Director of Athletics and have served in that capacity since 2012. Before coming to Stanford, I served as athletic director at the University of Delaware and at Georgetown University, and as deputy director of athletics at the University of Notre Dame. I was a student-athlete myself, playing on the basketball team as an undergraduate at Brown University. I am blessed to have the opportunity to serve the student-athletes at Stanford, where we offer 36 varsity sports – 20 for women and 16 for men. About 900 students participate in intercollegiate sports at Stanford – 53 percent of them men, 47 percent of them women – numbers that are consistent with the demographics of our overall undergraduate population. We offer about 300 athletic scholarships annually.

Stanford has won the Directors' Cup, which honors the most successful program in NCAA Division I sports, for the last 19 years. Our student-athletes have won a total of 104 team NCAA championships and 448 individual NCAA titles.

We are very proud of those results. But what I want to emphasize in my testimony today is that notwithstanding the tremendous athletic success of our student-athletes, we never lose sight of the university's larger mission. *Stanford is a university first and foremost, and its academic mission comes first.* We firmly believe that the most important thing our student-athletes walk out the door with when they leave Stanford is not a varsity letter or a national championship ring – it is a Stanford degree. Fully 97 percent of our student-athletes achieve this goal. Over many years, with the leadership of many dedicated people, we have built a successful athletic program at Stanford, with a relentless focus on the fact that our primary responsibility is to provide the best possible educational experience for all of our students. The athletic experience is NOT something pursued at the expense of the academic experience, or separate and apart from it. Each enhances the other.

Many of our student-athletes talk about this themselves. Chase Beeler, a football student-athlete who graduated from Stanford in 2011, has written in a blog post about his concerns early in college about having to choose between being a great athlete and a great student. Through his Stanford experience, he writes,

> "I have not only reconciled the athletic and intellectual components of my identity, but I have also learned that, far from being incompatible, the two are actually different sides of the same coin. In spite of popular cultural stereotypes that tell us scholarship and athletics are not intended to mix, as if there is some sort of Manichean divide separating the two worlds and that never the twain shall meet, my experiences at Stanford have prompted me to realize that there are in fact far more similarities between the two than differences, and that if properly managed, the relationship between the two is actually mutually beneficial and reinforcing. The same values and mindset that foster success in the classroom can be applied on the field of competition as well (or in any phase of life for that matter)."

Allow me to describe the academic experience of student-athletes at Stanford just a bit further. As I mentioned, we have about 900 student-athletes, in an undergraduate student body of about 7,000. That means that one out of every eight members of the undergraduate student body is a student-athlete. This is not a separate group of people off on its own, having a separate experience from the rest of the student body. They are in the very same classes, they are in the very same laboratories, they are in the very same libraries, they are in the very same undergraduate housing with other students from every conceivable background and walk of life. They have the same exam schedules – even if it means taking a proctored examination on the road at the site of a competition – and the same degree-completion requirements as other students. They also select challenging majors in subjects including human biology; science, technology and society; engineering; management science and engineering; and political science. They have access to a range of academic support services as other students do, including an academic adviser, a major adviser, and skill-building programs in various areas of interest to them. This is a robust educational experience, in close touch with world-class faculty and elbow-to-elbow with other immensely talented students from across the nation and around the world.

Kelsey Gerhart, a Stanford student-athlete who played softball and graduated last year, once discussed what it was like to be part of such a community. "This is a community," she said, "where ties and connections made with students, faculty, and alumni last a lifetime; where we enter college as a teen, and leave as well-educated young adults prepared to maintain a stable life and make a difference in the world; where we are molded through successes and failures in the classroom, through the social aspects of college, and through interacting with the diverse population that makes up Stanford's campus." That is the kind of rich, integrated student-athlete experience we seek to provide.

The rigor of the academic enterprise at Stanford begins with the admission process itself. Simply put, Stanford does not admit anyone it is not confident can succeed academically at the University. Stanford reviews each applicant for undergraduate admission holistically, looking at the academic excellence, intellectual vitality and personal context each brings to

the table. But at the end of the day, the admissions office is charged with upholding the academic integrity of Stanford by ensuring that every admitted student has the ability to succeed academically there. This is a process that occurs independently of the Athletic Department, and the admissions office does not make exceptions to its standards.

Our student-athletes demonstrate how importantly they view a Stanford education by taking all the steps they need to complete it. As referenced earlier, 97 percent of our student-athletes earn degrees. For the football team, the rate is 93 percent. One need look only as far as quarterback Andrew Luck of the Indianapolis Colts and pitcher Mark Appel of the Houston Astros organization – both recent Stanford graduates – to recognize that even those who *do* go on to professional sports careers see the value of completing their Stanford degree. Both Andrew and Mark bypassed the opportunity to leave Stanford with a year of eligibility left to enter professional sports, remaining instead at Stanford to complete their degrees.

We also have a number of student-athletes each year – there will be 30 this year – who complete a master's degree at Stanford at the same time as their bachelor's degree. Coby Fleener, a Stanford football student-athlete also currently with the Indianapolis Colts, is one of these who graduated from Stanford with two degrees. He has written about his original decision to attend Stanford, emphasizing the importance to him of a strong academic grounding given the uncertainties and injury possibilities in the NFL. "A diploma from Stanford speaks for itself in any job interview, anywhere," he wrote.

Even among the few Stanford student-athletes who do not complete a degree before becoming professional athletes, many come back to finish their degrees when they are able. For example, basketball student-athletes Jarron Collins, Josh Childress and Curtis Borchardt returned to complete their degrees after careers in the NBA and in Europe; football student-athletes Bob Whitfield, Amon Gordon, and T.J. Rushing, meanwhile, returned to earn their degrees after NFL careers of fifteen, nine, and four years, respectively. In other cases, former student-athletes return to the academic environment to pursue advanced degrees: Another Stanford football student-athlete, Owen Marecic,

decided to forego an NFL career to attend medical school and is currently back working in a Stanford lab in preparation.

We have woven this emphasis on academic priorities into the University's expectations of those who coach our student-athletes. We have made clear to our coaches that academic achievement is a primary goal for their performance as leaders of Stanford athletic teams. To that end, the achievement of certain academic benchmarks is an important part of how we evaluate the performance of our coaches.

As noted earlier, at Stanford we believe that athletics and academics enhance each other. Athletics offer a meaningful additional component to an individual's university education – teaching leadership, strategy, team dynamics, problem solving, time management, health and fitness maintenance, and persistence, among many other things. I can point to many examples of student-athletes who have come out of Stanford and applied their skills to make tremendous achievements in their professional lives. Dr. Milt McColl, a Stanford football student-athlete, now CEO of Gauss Surgical, Inc.; Lisa Falzone, CEO and co-founder of Revel Systems, recently named to Forbes' "30 Under 30" list, a Stanford women's swimming student-athlete; Cory Booker, a Stanford football student-athlete, a member of the United States Senate; John Elway, a Stanford football student-athlete, general manager of the Denver Broncos; Sally Ride, a tennis student-athlete who became the first American woman in space; Charles Schwab, who was a Stanford golf student-athlete before heading the company that bears his name; Dr. Geoff Abrams, Stanford team physician and orthopedic surgeon, an All-American tennis student-athlete; Josh Nesbit, co-founder of Medic Mobile and named as one of Forbes' "Impact 30," a Stanford men's soccer student-athlete – the list goes on.

In summary, our student-athletes at Stanford do not receive salaries, but they receive something far more valuable – and that is an academic experience of the very highest quality, funded in many cases by scholarship support, that rigorously prepares them for leadership and success in the world. The vast majority of our student-athletes will not go on to earn a living in professional sports careers. But whatever path they take, their

Stanford experience, including their athletic experience, will provide them with outstanding preparation for success in the world.

I hope I have conveyed the centrality of the academic experience to the overall student-athlete experience at Stanford. We seek to make it an integrated experience that fulfills each student's educational aspirations. But I also want to address a related question that often enters conversations on this subject, and that is the question of revenue from intercollegiate athletics and how that revenue is used.

As mentioned earlier, at Stanford we offer 36 varsity sports for men and women. That is one of the largest offerings of intercollegiate sports in the country. While football and basketball generate net revenue through ticket sales and TV contracts, the vast majority of sports that provide athletic opportunities to our students do not. *All of the revenue the University receives from these two sports is used to support the athletic program, including the 87 percent of student-athletes who participate in the other 34 sports that do not generate net revenue.* These funds received by the University enable the Athletic Department to support scholarships, travel, medical staff, training staff, equipment, facilities, maintenance, and all the other costs that come with offering a broad sports program that appeals to the interests and talents of a breadth of students. Investing in that breadth of activities, to support athletic opportunities for a cross-section of students, both men and women, is very important to us.

Let me close by discussing briefly one of the other key issues, and that is how we address the needs and concerns of student-athletes themselves. At Stanford, we work very hard to ensure that the academic and athletic experiences of our student-athletes are excellent and properly supported. There are two things that are important to understand about that commitment.

First is what we already do. I have looked through the list of issues that have been identified by the union seeking to represent Northwestern student-athletes. The majority of them are issues we are already addressing at Stanford. Whether it is covering the

medical costs of injuries, protecting scholarship support for students who are medically disqualified from playing, promoting player safety, researching the prevention and effects of concussions, or a range of other issues, we are present and active.

Second, as proud as we are of our record on these issues, we are never satisfied, and we seek to exceed the expectations of all of our student-athletes. We take proactive measures to understand their needs by extending the offer for student-athletes to tell us when and where we can be doing better. We have formal bodies at Stanford for doing so, such as our Student-Athlete Advisory Committee. But our student-athletes can also communicate their views to coaches, sport administrators, the Faculty Athletic Representative, or me as Athletic Director. All athletics programs need to ensure that they are making every effort to provide a high-quality experience that empowers their students with tools to achieve success in their post-college lives, and soliciting honest feedback from the students themselves is critical to that objective. Although there are areas where our actions are governed by NCAA regulations, we are always open to making improvements that are within our purview – and to working with the NCAA to improve its rules and enforcement on issues such as minimum academic progress for student-athletes and scholarships that include fair stipends for student-athletes' expenses.

We have worked very hard at Stanford to create an environment where we offer outstanding opportunities for the academic and athletic development of incredibly talented young people. We believe the educational opportunity provided to our student-athletes is incredibly rich and beneficial, and we know from countless conversations with student-athletes who have benefitted from the Stanford experience over the years that the students who choose to come to Stanford understand and appreciate that. We are immensely proud of our student-athletes, and it is the constant mission of those of us in leadership positions to seek to do everything we can, every day, to support them and make their experience at Stanford a rewarding one. I hope that the strengths and benefits of systems such as ours will be considered as the national discussion of these issues continues. I also recognize that there is variation on these issues from school to school, and that while I have been speaking today about the Stanford experience, there may well be differences at other institutions.

Stanford stands ready to talk with, and work with, others who are likewise interested in continually improving the experience of student-athletes across the country.

Thank you for the opportunity to provide my perspective. I will do my best to respond to any questions you may have.

Chairman KLINE. Thank you.
Mr. Eilers?

STATEMENT OF MR. PATRICK C. EILERS, MANAGING DIRECTOR, MADISON DEARBORN PARTNERS, CHICAGO, ILLINOIS

Mr. EILERS. Mr. Chairman, Ranking Member Miller, and members of the committee, thank you for the opportunity to appear before you today and present my views on the ongoing quest to improve the environment for student athletes on college campuses. Before I do so, I would like to make it clear that my comments today are strictly my own. Although I was a student athlete at the University of Notre Dame and later obtained a master's degree from the Kellogg Graduate School of Management at Northwestern University, I do not speak for nor do I represent these institutions. I speak only for myself.

I graduated from the University of Notre Dame in 1989 with a bachelor of science degree in biology, while also pursuing a second undergraduate degree in mechanical engineering, which I received a year later. While I was a student at Notre Dame, I played four years of varsity football and also played on the varsity baseball team. I had transferred from Yale University at the beginning of my sophomore year and had a fifth year of academic eligibility, affording me the opportunity to complete my second degree. I transferred to Notre Dame to pursue excellence in the classroom and on the football field.

I felt Notre Dame offered me the opportunity to do well in both. While it wasn't easy, it certainly was achievable. The infrastructure was, and remains, in place to assist student athletes to achieve at Notre Dame. I have a daughter who is currently a collegiate student athlete there, and I have witnessed even further improvements in the program such as mandatory study hall for all incoming freshman athletes. I am here today as a former collegiate student athlete, and I am not an attorney versed in labor law so I will leave the legal arguments to the experts to my right.

The impetus for today's panel is the NLRB regional director's ruling that college athletes are deemed employees which would enable them to potentially unionize under the *National Labor Relations Act.* The union pursuit is a means to an end, a vehicle if you will, to implement improvements to our collegiate athletic system. I believe there is little debate about necessary logical improvements, which I will describe. I believe the debate today should, instead, be focused on seeking the most effective vehicle to cause the implementation of these improvements.

The crux of the problem is that the student athletes should be students first and foremost. I am concerned that calling student athletes employees will make the system more of a business than it already is. In my mind, we need to gravitate collegiate athletics towards a student-centric model, not the other way around. I also worry about the unintended consequence of being deemed an employee and what unionization could bring to college athletics. That said, as a former student athlete I support many of the goals of the National College Players Association and the College Athletes Players Association that the ranking member described in front. I favor

mandated four-year scholarships, health insurance benefits, and stipends. I will address transfer eligibility briefly.

Four-year scholarship: as a student athlete you should be able to maintain an athletic scholarship for at least four, and debatable five, years from the date you entered college, assuming you maintain the school's academic and disciplinary standards, with the goal of obtaining an undergraduate degree. The obligation should be maintained regardless of your productivity on the athletic field, and even if you sustain a permanent injury. The sad reality at some colleges is, if the student athlete is not performing on their field their athletic scholarship may not be renewed year to year. This incents student athletes to only focus on scholarship renewable at all costs, rather than striking the right balance of performance in the classroom and on the field of play.

Health and insurance benefits: after sustaining a sports-related injury, a student athlete's scholarship should neither be reduced nor eliminated, and there should be guaranteed coverage for medical expenses for current and former players. Student athletes that sustain permanent injuries should be afforded health care insurance benefits for life. I also hasten to around that all college athletic programs should enhance their efforts to minimize the risk of sports-related traumatic brain injuries.

Stipend: student athletes should be afforded stipends so they can handle out of pocket expenses associated with attending college, at the very least on a needs-based assessment.

Transfer: if four-year scholarships are mandated, not at the option of each college, then I am okay with current transfer restrictions. I was a product of these transfer restrictions. I was ineligible my sophomore year at Notre Dame. However, if honoring four-year scholarships is not required, then the one-time, no-penalty transfer option should be afforded to all student athletes, not just select sports.

So in conclusion, these initiatives are, in my mind, obvious and necessary improvements. The first three have monetary implications which I recognize make them more difficult to implement for athletic programs that already operate in the red. However, I believe there is clearly plenty of money in the system for necessary improvements that have been highlighted.

The National Collegiate Athletic Association is, "dedicated to safeguarding the well-being of student athletes and equipping them with the skills to succeed on the playing field and in the classroom, and throughout life."

If this mission statement is true, why then haven't these goals already been implemented? I believe this problem exists simply because of the fact that the NCAA is a membership-driven organization, "made up of colleges and universities, but also conferences and affiliated groups." Perhaps because of this charter, it appears to me that the NCAA may not have been able to get consensus from its diverse membership on these issues. I don't have a solution to this problem, but I question the need to unionize to effectuate the implementation of these initiatives.

One final note. It is difficult to maintain that we truly have a student athlete system, given the relatively low graduation rates for student athletes at many institutions across the country. This

is not an acceptable outcome, and I don't see how classifying these student athletes as employees is going to improve the situation.

So finally, I was a student athlete at Notre Dame, period. I was not an employee of the university, nor did I want to be one. Conversely, I played six years of professional football, including three here for the Redskins where I was an employee and I wanted to be one.

Thank you. I would be pleased to answer any questions you have.

[The statement of Mr. Eilers follows:]

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to appear before you today and present my views on the on-going quest to improve the environment for student-athletes on college campuses. Before I do so, I would like to make it clear that my comments today are strictly my own. Although I was a student-athlete at the University of Notre Dame and later obtained a masters degree from the Kellogg Graduate School of Management at Northwestern University, I do not represent or speak for either of these institutions. I speak only for myself.

I graduated from the University of Notre Dame in 1989 with a Bachelor of Science degree in Biology (pre-Med) while simultaneously pursing a second undergraduate degree in Mechanical Engineering -- which I received a year later in 1990. While I was a student at Notre Dame, I played four years of varsity football and I also played on the varsity baseball team. I had transferred to Notre Dame from Yale University at the beginning of my sophomore year and therefore I had a fifth year of athletic eligibility, affording me the opportunity to complete my second degree.

I transferred to Notre Dame to pursue excellence in the classroom and on the football field. Yale's football program wasn't competing for National Championships. I don't mean this as a criticism of Yale, just a reality. I should say, however, Yale does compete for championships in other sports, like their 2013 National Championship in hockey. I transferred because I believed I didn't have to sacrifice football in the name of academics. Further, Notre Dame didn't sacrifice their academic program for football; I felt Notre Dame offered me the ability to pursue excellence both in the classroom and on the football field. While it wasn't

easy, it certainly was achievable. The infrastructure was and remains in place to assist student-athletes to achieve both at Notre Dame. I have a daughter who is currently a collegiate student-athlete there, and I have witnessed even further improvements in the program -- such as mandatory study hall for all freshmen.

I am here to today as a former collegiate student-athlete. I am not an attorney and versed in labor law, so I'll leave the legal arguments to the experts.

It's apparent the impetus for today's panel is the NRLB regional director's ruling that college athletes are deemed "employees," which would enable them to potentially unionize under the National Labor Relations Act. This union pursuit is a means to an end, a vehicle if you will, to implement improvements to our collegiate athletic system. I believe there is little debate about the necessary logical improvements – which I will describe. I believe the debate today should instead be focused on seeking the most effective vehicle to cause the implementation of these improvements.

The crux of the problem is that student-athletes should be students, first and foremost, as the description suggests. I'm concerned that calling student-athletes "employees" will make the system more of a business than it is already is. In my mind, we need to gravitate collegiate athletics toward a student centric model -- not the other way around. I also worry about the unintended consequences of being deemed an "employee" and what unionization could bring to college athletics.

That said, as a former student-athlete, I support many of the goals of the National College Players Association ("NCPA") and the College Athletes Players Association ("CAPA).

I favor mandated four-year scholarships, health and insurance benefits, and stipends. I will address transfer eligibility briefly.

Four-year scholarship

As a student-athlete, you should be able to maintain your athletic scholarship for at least four (or perhaps five) years from the date you entered college, assuming you maintain the school's academic and disciplinary standards, with the goal of obtaining an undergraduate degree. This obligation should be maintained regardless of your productivity on the athletic field and even if you sustain a permanent injury.

The sad reality at some colleges is if the student-athlete is not performing on the field their athletic scholarship may not be renewed year-to-year. This reality incents student-athletes to focus only on scholarship renewal at all cost, rather than striking the right balance of performance in the classroom and on the field of play. The system is a total charade, in my opinion; if in general, the student-athlete doesn't graduate with a degree in hand.

Health and Insurance Benefits

After sustaining a sports-related injury, a student-athlete's scholarship should neither be reduced nor eliminated, and there should be guaranteed coverage for medical expenses for current and former players. Student-athletes that sustain permanent injuries should be afforded healthcare and insurance benefits for life. I also hasten to add that all college athletic programs should enhance their efforts to minimize the risk of sports-related traumatic brain injuries.

Stipend

Student-athletes should be afforded stipends so they can handle out-of-pocket expenses associated with attending college; at the very least on a needs based assessment.

Transfer

If four-year scholarships are mandated, not at the option of each college, then I'm ok with current transfer restrictions. I was a product of these transfer restrictions; I was ineligible my sophomore year at Notre Dame. However, if honoring four-year scholarships is not required, then the one-time no-penalty transfer option should be afforded to all student-athletes, not just select sports.

Conclusion

These four initiatives are, in my mind, obvious and necessary improvements. The first three have monetary implications, which make them more difficult to implement for athletic programs that already operate in the red. However, there is clearly plenty of money in the system, making this impediment an unacceptable excuse.

The National Collegiate Athletic Association ("NCAA") is quote "dedicated to safeguarding the well-being of student-athletes and equipping them with the skills to succeed on the playing field, in the classroom and throughout life." If this mission statement is true, why then haven't these goals already been implemented? I believe this problem exits simply because of the fact that the NCAA is a membership-driven organization; quote "made up of colleges and universities, but also conferences and affiliated groups." Perhaps because of this

charter, it appears to me that the NCAA may not have been able to get consensus from its diverse membership on these issues. I don't have a solution to this problem, but I question the need to unionize to effectuate the implementation of these initiatives.

One final note: It is difficult to maintain that we truly have a student-athlete system given the relatively low graduation rates for student-athletes at many institutions across the country. This is not an acceptable outcome, and I don't see how classifying these student-athletes as "employees" is going to improve this situation.

In conclusion, I was a student-athlete at Notre Dame. Period. I was not an employee of the University – nor did I want to be one.

Thank you. I would be pleased to answer any questions that you may have.

Chairman KLINE. Thank you. Thank all of the witnesses. A panel of true experts.

Because you are on a roll there, Mr. Eilers, I am going to start with you. Guy from St. Paul that goes on to do all these things, we are very proud of you. I know that when you were at Notre Dame I think you were part of a national championship team, and I am just deeply disappointed you couldn't help the Vikings be a Super Bowl team.

You mention that your daughter is playing lacrosse at Notre Dame. And I am—with her—watching her experience and your experience, I am wondering if you were ever discouraged at Notre Dame from taking a class or pursuing a major because you were a student athlete.

Mr. EILERS. I was not, and I think, further, they encouraged us to pursue our academic passions, Mr. Chairman.

Chairman KLINE. And you wisely moved on from a bachelor's degree in biology, which I also had and found useless, so—I think probably most of us on this panel, I know I can't speak for everybody on both sides of the aisle, but you mentioned a lot of issues that could be and should be addressed. Injuries, for example you had a sort of a list of things that ought to be looked at. And your conclusion was that is something that the universities, Notre Dame and all of them, including Baylor and Stanford, ought to be addressing. And that being a member of a union, a student athletes' being a member of a union, being employees, wouldn't help that. Is that—am I oversimplifying your position there?

Mr. EILERS. I don't think you are oversimplifying. I would say that I think Judge Starr's Baylor, Bernard's Stanford, like, you know, Notre Dame, it is an option to provide for your scholarships. Each of our institutions provide that for our student athletes. That is not universally adopted across the country. And I think for a student athlete not to graduate from a university with a degree in hand is a total disservice.

Chairman KLINE. Thank you. And I think, Judge Starr, you mentioned something like 86 percent. Could you take about your graduation rate for your student athletes again, very quickly?

Judge STARR. Yes. This last year, academic year, 82 percent did, in fact, graduate. A number did, in fact, as did Pat, go on to pursue degrees, as well; advanced degrees, graduate degrees. And here is the key point. It is individual choice. What is the culture? That is the responsibility of the university. Does the university create a culture that encourages the student to do the best that he or she can? There are obviously important issues to be addressed. We completely agree with that, and we are part of a conversation that is nationwide, with respect to what can we do better.

We know there are things that can, in fact, be improved. Especially the full cost of attendance. Completely agree with that. But the real question, I think, with respect to the NLRB, Mr. Chairman, is are we going to, in fact, use the *National Labor Relations Act* as a tool for negotiating improvements. And it seems to be exactly the wrong way to go. For starters, if I may just make one additional point, the collective bargaining unit that was recognized by the regional director doesn't include the entire football team.

So if you are a walk-on, if you are one of the 35 members of the football team at Northwestern, the representative, if the union is, in fact, elected, is not going to be representing you. You are going to be outside the unit. Quite apart, then, from the non-revenue sports. And that is a fundamental issue. We are treating all of our student athletes the same, and we want to, in fact, encourage this culture that we want you to go to school, we want you to earn your degree, and we want to help prepare you for your journey in life.

Chairman KLINE. Thank you.

And Mr. Muir, back to Stanford. In your testimony you talked about how football and basketball were moneymakers, and that money went to the other sports. Could you just remind us again of how that distribution goes?

Mr. MUIR. Yes. The resources that we derive—

Chairman KLINE. Your microphone.

Mr. MUIR.—from our TV, our media rights, goes back into supporting 36 sports, in our case, which is one of the larger offerings around the country. But it is to enhance that experience overall for all of our student athletes, the 900 that we support. And so we think that is very important.

Chairman KLINE. Okay, thank you.

Mr. Miller?

Mr. MILLER. Thank you, Mr. Chairman.

Mr. Starr, I assume you weren't calling for a larger bargaining unit.

[Laughter.]

Mr. STARR. No, I was not. But it does raise, Mr. Miller, the issue.

Mr. MILLER. I appreciate that. I just want to make it clear.

Mr. STARR. Yes, the continuity of interest, the community of interest.

Mr. MILLER. Mr. Eilers, I want to thank you very much for your testimony. Because you testified in a very straightforward manner about the issues that the students at Northwestern were raising that are endemic, I believe, to the football programs around the country. And that really was, as you pointed out, the security of their scholarship—four-year scholarship as opposed to year-to-year that can be used as a weapon against the student or performance or to get out of—to add somebody else to the squad. The health and insurance benefits, the concern when you are injured or you have suffered disability as a result of that, or you lose your athletic ability and you lose your scholarship.

These things start to accumulate on some students. The stipend issue that you have raised and the transfer issue. These are the issues that these students felt necessary to form a union around because they weren't getting satisfaction. And I suspect you would find that if you traveled to most of the college campuses that have sports programs, that the students feel that they are just—they are caught up in a cog, and they are only there for four years, five years, for whatever period of time. And they are not being addressed.

I find it interesting that other witnesses held their testimony to that notion, and that is their belief that this is a student athlete. These—your student athletes at Northwestern said what about the athletic side of it? What about where we spend 50 hours a week?

What is this imposition on us, and what security do we have? And apparently that can never quite get addressed.

And, Mr. Schwarz, that brings me to you. If you read Mr. Livingston's testimony, he can tell you why this labyrinth, this integral work between conferences and the NCAA and the colleges, and maybe even the media, would not be a shield against issues raised by this bargaining unit. They could travel all over and even has them going into the academic side. But that same network is used as a weapon against the athletes.

Mr. SCHWARZ. That is right.

Mr. MILLER. That same network is used as a weapon when they want to talk about is our stipend fair, are our policies—because they don't have any voice in that at all. And then, well, the school is happy giving you a four-year—but that is not every school in the league, maybe not even in the PAC–12, I don't know. But, you know, we have to check with the conference. And the conference, well, you know, we are bound by the rules. And also remember, today, what conference you get in—I mean, conferences are like commodities. They are moving them around to generate TV revenues.

It is no longer allegiance to the fans or the old rivalries. It is about what are the revenues that will be generated on—you know, mid-week, weekend playoffs. So you want to explain a little bit how this is a—if you are a handful of student in the Northwestern program, how you are going to be heard and how you are going to get results during your career?

Mr. SCHWARZ. Sure. If I could just address a couple things. One of the statements I heard here is that Baylor treats all of its student athletes the same. That is not true. There is a cap on how many students can receive scholarships, and walk-ons are prohibited from receiving scholarships if they exceed that. So there is already, in some sense, a caste system that is created—that is a term that Mr. Muir has used to describe paying athletes—that distinguishes between scholarship athletes and other athletes who likely would get a scholarship if the school were actually allowed to exercise individual choice. But instead, there is a collusive cap that prevents it.

Directly to your point, the way I like to think about the claim that schools are poor in their athletic departments is that it is similar to, say, like a Wall Street banker who brings in a million dollars of salary but maybe he has been divorced twice and so he has alimony payments. Maybe he has kids in college, maybe he has a couple mortgages. And so once he is done paying for all those things there is not a lot of money left and Wall Street banking doesn't pay that well.

Mr. MILLER. Well, I think that is sort of the point that the Knight Commission found in 2010. There is not enough money to provide those scholarships, there is not enough money to help the other sports. But as they pointed out, the escalating coaches' salaries are creating an unsustainable growth of athletic expenses.

Mr. SCHWARZ. That is right. Once you spend—

Mr. MILLER. And you can bury $7 million into a coach's salary or $3 million into coaches' salaries. And I recognize that is the exception. But more and more people are joining that fraternity. But

then you plead, poor mouth, that you can't quite take care of your athletic obligations, campus-wide.

And so I think that we see here is that the NCAA has constructed a very, very interesting and overwhelming network to be used against these kinds of questions being raised. Even a commission as prominent as the Knight Commission that examined this impact of, and the relationship, if you will, of student athletes. And that is why these students chose to become employees. Because they recognize the situation that they were in. Classical employer-employee relationship.

Thank you.

Chairman KLINE. The gentleman's time has expired.

I ask unanimous consent to submit for the record a letter from the American Council on Education, which warns that treating student athletes as employees, "would have a range of negative and troubling consequences."

[The information follows:]

One Dupont Circle NW
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acenet.edu

Leadership and Advocacy

May 7, 2014

The Honorable John Kline
2439 Rayburn House Office Building
United States House of Representatives
Washington, DC 20515

Dear Representative Kline:

On behalf of the American Council on Education (ACE), the coordinating association of all sectors of American higher education, I write in connection with your May 8 hearing, "Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes."

ACE is deeply concerned about the March 26 finding by a National Labor Relations Board (NLRB) regional director that Northwestern University varsity football players, who are on athletic scholarships, are employees of the University. We strongly hold that the football players are student-athletes, not employees, and that a contrary interpretation of the National Labor Relations Act (NLRA) would have deleterious consequences for American higher education and the nation.

To adopt the novel proposition that student-athletes who receive athletic scholarships are employees would disserve the students' education and impede colleges' and universities' ability to perform their essential missions. Such a dramatic change in federal policy should not be made by an administrative agency. If our government is to address this weighty and consequential policy matter, the proper forum is the legislative branch.

Students with diverse talents and backgrounds come to the nation's colleges and universities for an education. They come to learn not just in the classroom, but in college newspaper pressrooms, on the stages of concert halls, and on the sports field. A college education is the product of countless teachable moments from all aspects of college life, but especially from institution-provided curricular, co-curricular, and extra-curricular activities. Institutions facilitate these moments with an overriding goal: to build on and interact with each student's unique gifts to educate the whole person.

For more than a century, dating from long before Congress enacted the NLRA, college and university educational offerings have included intercollegiate athletics. Intercollegiate athletics are among the most challenging and character-building opportunities colleges and universities offer. Participation provides an exceptional education in teamwork, leadership, time management, and hard work. Student-athletes must meet an institution's academic standards for admission and academic progress before they can set foot on an intercollegiate field or court. The overriding goal for student-athletes and colleges and universities alike is education. And student-athletes complete their educational programs at a rate at least as high as that of the student body generally.

Congress neither intended nor provided that student-athletes be considered employees under the NLRA. In the course of numerous hearings on intercollegiate athletics, Congress never to our knowledge suggested that players at private universities should be considered employees under the NLRA. Nor are we aware of any state that considers student-athletes at public universities to be employees under state collective bargaining laws.

To treat student-athletes who receive athletic scholarships as employees, as the NLRB regional director ruled, would have a range of negative and troubling consequences. For example:

- Were student-athletes employees, they would logically no longer be amateurs, but professionals barred from playing in National Collegiate Athletic Association (NCAA) athletics.
- Athletic scholarships and other benefits would no longer constitute "qualified scholarships" under the Internal Revenue Code and would become taxable income, potentially leaving such athletes with less ability to finance their higher education.
- Collective bargaining between such athletes and their colleges and universities would undermine the collegial, academic culture and compromise the athletes' relationships with educators, including faculty members and coaches. Union leaders would have the power to negotiate "workplace" issues that affect educational matters, which are in the purview of faculty. For example, athletes could potentially negotiate over academic course loads or the manner in which coaches instruct players and conduct practice.
- To the extent collective bargaining increased compensation of athletes who participate in sports that generate net revenues, the reallocation would jeopardize institutions' ability to offer other sports and the educational opportunities they provide to male and female athletes who may not receive athletic scholarships.

Congress enacted the NLRA in 1935 in reaction to large, violent strikes that preceded and punctuated the Great Depression and were adversely affecting the commerce of the United States. The NLRA presupposes management at loggerheads with labor, with competing economic interests best resolved by collective bargaining. The NLRA focuses on the economic interests of management and labor. The NLRB is not in a position to consider all of the collateral consequences of a decision that student-athletes receiving athletic scholarships should be treated as employees. If the federal government is to change the legal status of student-athletes, that judgment should be deliberated by the Congress, not announced by the NLRB.

Thank you for your consideration of these comments.

Sincerely,

Molly Corbett Broad
President

Office of the President ♦ Telephone: 202 939 9310 ♦ FAX: 202 659 2212

Mr. MILLER. I ask unanimous consent to submit for the record an article from the Stanford Daily, "Student Athletes Had Access to Easy Courses."

[The information follows:]

The Stanford Daily

Stanford athletes had access to list of 'easy' courses

By: Amy Julia Harris March 9, 2011 0 Comments

Please see Letter from the Editor and statement from California Watch.

California Watch is a project of the independent, nonprofit Center for Investigative Reporting. This story was reported by Stanford University investigative reporting students Ryan Mac, Amy Julia Harris, Elizabeth Titus, Devin Banerjee, Ellen Huet, Joshua Hicks, Cassandra Feliciano, Daniel Bohm, Jamie Hansen, Julia James, Paul Jones, Valentina Nesci, Dean Schaffer, Kareem Yasin, Kathleen Chaykowski and Thomas Corrigan. The class was under the direction of California Watch Editorial Director Mark Katches.

A drama class in "Beginning Improvising" and another in "Social Dances of North America III" were among dozens of classes on a closely guarded quarterly list distributed only to Stanford athletes to help them choose classes.

Stanford officials said the list was designed to accommodate athletes' demanding schedules and disputed that the list was made up of easy courses. Officials discontinued the list last week after student reporters working for California Watch began asking about it.

The list, which has existed at least since 2001, was widely regarded by athletes as an easy class list. More than a quarter of the courses on the list did not fulfill university general education requirements.

"It's definitely not going to be a hard class if it's coming off that list," said Karissa Cook, a sophomore women's volleyball player, who consulted the list to pick classes in her first quarter at Stanford.

The classes on the list were "always chock-full of athletes and very easy As," added Kira Maker, a women's soccer player, who used the list her freshman year.

Titled "courses of interest," the list was distributed by the Athletic Academic Resource Center. Advisers in other departments at the University said they were unaware such a list existed.

Stanford has long mandated equal scholastic footing among all undergraduates, including athletes. Many of its student athletes, in fact, have distinguished themselves in the classroom, notably football stars Andrew Luck, who has a 3.5 GPA, and Owen Marecic, who plans to graduate this year with a degree in human biology. The university's hard-line approach has rankled some coaches over the years who have watched talented recruits go elsewhere because they didn't measure up to Stanford's academic standards.

But some faculty and students say the list may have offered an academic advantage for the athletes who requested it — especially since the general population was unaware it was even available. The Athletic Academic Resource Center didn't advertise the list or post it on its website. But athletes have been known to ask for it.

Athletes said they heard about the list by word of mouth or simply picked up the document at the resource center.

"There's a perception that the classes are easier," said Carly Villareal, captain of the Stanford women's crew team. "Some of the classes are substantially easier."

Austin Lee, director of academic services at the Athletic Academic Resource Center, disagreed.

"An objective evaluation of the courses included on the list reveals several courses that most students would consider to be academically rigorous," Lee said. He did not identify specific classes.

Lee said the center's four advisers compiled the list to help student athletes find introductory classes that fit into constrained time schedules and fulfill general education requirements. Afternoon team practices mean that athletes have to choose classes that start in the morning and early afternoon — typically classes that begin from 9 a.m. to 1:15 p.m. The list mostly contained classes during those hours.

Before officials discontinued the list, Julie Lythcott-Haims, dean of freshmen and undergraduate advising, said with other scheduling resources available to all students, perhaps the list was "unnecessary."

Gerald Gurney, president of the National Association of Academic Advisers for Athletics, was unaware of the situation at Stanford, and was unwilling to speculate on the matter. His association, a collection of college academic advisers throughout the nation, focuses on promoting the integrity of athlete advising.

"The ethical duty of academic advisers working with student athletes is to assist them in achieving their personal academic goals and to help them not take the path of easiest resistance for the purpose of maintaining eligibility," he said.

"The course list in itself isn't a violation, but promoting courses because they're easy isn't, ethically, something that academic advisers should do," he said.

The 40 classes on the winter quarter list included "Intro to Statistics" and "Elementary Economics." The list also included 14 classes that didn't meet general education requirements, including the "Beginning Improvising," and "Social Dances" courses in addition to "Public Speaking," one of the only evening classes on the list.

Nearly 200 courses in 16 academic departments and programs offered during the 9 a.m. to 1:15 p.m. time slots were left off the list, a review of online course catalogs showed.

Sociology professor Cecilia Ridgeway was surprised to learn that her class titled "Interpersonal Relations" was included on the winter quarter list. Ridgeway said she had heard about the document in years past and talked to the athletics department about removing her class from the list. She said department staff told her at the time that the list did not exist.

Like many professors whose courses are on the list, Ridgeway said her class is academically challenging, noting that she had given failing grades to student athletes — to the displeasure of the athletics department.

Other professors were unconcerned that a class they taught made it onto the list. Some, in fact, said they believed student athletes should be treated differently than the typical student.

"(Stanford) accommodates athletes in the manner that they accommodate students with disabilities," said Donald Barr, who teaches a course titled "Social Class, Race, Ethnicity, Health," which was highlighted by resource center advisers.

Some faculty members said they didn't believe the list harmed anyone — and may have helped fill their classrooms.

Art history lecturer Thomas Beischer, a former Stanford rower, said he welcomed the boost in enrollment brought by the inclusion of his class on the list.

While the list has an intended audience of student athletes, Lythcott-Haims said any Stanford student could have obtained a copy of the document, which was available only in hard copy from the offices of the Athletic Academic Resource Center — in the basement of the Arrillaga Center for Sports and Recreation.

But Miriam Marks, a Stanford senior and Daily columnist who was told about the list, said the list is essentially only for the athlete community.

"The biggest drawback is that it is specifically made available to athletes," Marks said. "If it was published to the entire student body, that's a different thing. If I were to walk in and ask for the list, they would ask me why I needed it, since I'm not an athlete."

Some academic advisers outside the resource center found out about the list when they were shown a copy of it by student reporters. They said there was no comparable list for students who are not athletes.

"As far as I know, there's no decided answer to which classes are easier and how to take an easier quarter," said Melissa Stevenson, one of the school's eight academic directors located at student residences.

Lythcott-Haims said the school has made accommodations for student athletes because they "have the most constrained schedules of any Stanford students."

"The list originated before the university's transition to an (sic) searchable on-line bulletin when students had no practical, efficient means to navigate the printed bulletin," Lee wrote in an e-mail response to student reporters.

But for at least the last seven years, the university has provided other ways for students to find classes, including Axess — an online interface that enables students to sort and choose classes by time.

Until spring 2009, Stanford also printed and widely distributed the "time schedule," which listed all the quarter's offerings by time.

Stanford students now also can use the online options of CourseRank and Explore Courses to help sort classes based on time offered and general education requirements.

Lee and Lythcott-Haims said the list was meant to serve as the beginning of an advising conversation.

"We're not handing it out and distributing it all around," said Lythcott-Haims.

But student athletes said they typically just picked up a copy of the list and left. In some cases, no advising conversation ever took place.

"Literally, when you walk into the AARC, right next to the door, it's right there," said Ryan Sudeck, a junior on the men's crew team.

"I never used it before this year," he continued. "I was trying to get my requirements done. But this quarter it was like, 'Oh, I need an easy class to boost my GPA.' "

Susan Simoni Burk, the former assistant athletic director for student services who oversaw the Athletic Academic Resource Center's advising efforts from 1995 to 2009, said any student, athlete or not, could pick up the list. But she also noted that students who were not athletes rarely had reason to visit the offices.

"They were put on a table, and usually they were gone within the first day," she said.

Since as early as 2001, the Athletic Academic Resource Center, a part of Undergraduate Advising, has published its "Courses of Interest" list. The center has said that the classes it selects are chosen to help athletes find courses that fit into their restricted time schedules and fulfill general education requirements. The common perception among Stanford's student athletes, however, is that the list identifies easier classes. Attached below is the winter quarter "Courses of Interest" list.

http://www.stanforddaily.com/2011/03/09/1046687/

Chairman KLINE. Without objection, both will be entered in the record. All right.

Dr. Foxx?

Ms. FOXX. Thank you, Mr. Chairman. And I want to thank all of our witnesses here today. You have provided some fascinating information to us, and I am grateful to you. As someone who has spent a lot of time in education and higher education, I have dealt with student athletes and students who weren't athletes. So I appreciate the information.

Judge Starr, I understand Baylor's priority is education. In fact, all of you have talked about that. Would you describe how Baylor's athletic programs work with the academic programs to ensure student athletes can prioritize their studies while also meeting their commitments to the team?

Judge STARR. One of the keys, Dr. Foxx, is the planning process that goes into developing the major planning, then the schedule. And the student athletes do have priority in terms of registration, so we do not have a crowding out kind of question at all. And so throughout the academic year there is a careful monitoring of that student's progress. And if there are issues that are being identified, then those issues are going to be addressed.

And I think that is why we have seen a steady increase in recent years, even before my watch, but it is a point of personal emphasis on my watch, that we want the student athletes to have that entire reservoir of support. And that is why the GPA, cumulative GPA average, is 3.27. It is a very labor-intensive and very student athlete-specifically focused activity.

Ms. FOXX. I am assuming you have study halls?

Judge STARR. They are—as elsewhere, mandatory for first-years, for freshmen. And then there are abundant study facilities available. They are very conveniently located, as part of our Simpson Highers academic and athletic center.

Ms. FOXX. Well, let me come back to the regional director's opinion. He includes a list of restrictions placed on the athletes. He says that they have to obtain permission from the coaches before applying for outside employment, posting items on the Internet, and speaking to the media. They are also prohibited from using alcohol and drugs and engaging in gambling. Judge, this may sound like a silly question. But please tell me why you place these restrictions on student athletes.

Judge STARR. Well, it is, in fact, to create a team culture. And also to ensure, as best we can, appropriate behavior. Dr. Foxx, when the student athlete arrives he or she is presented with a student athletic handbook. And the earliest pages say here is the kind of behavior that is forbidden because it reflects poorly on the university, it reflects poorly on the team and, frankly, it is destructive of the culture of the team. So yes, there a number of prohibitions, but they are all grounded in human experience. These are things that the student athlete should not be doing.

Ms. FOXX. Some of those things are things no student should be doing, correct?

Judge STARR. That is correct. In fact, one of the things—when you go through the "thou shall not" list it is, in fact, very, very comparable to that of any other student. There are obviously some

athletics-specific activity. But it is, in fact, a community of rules that we are in community together and these are the rules that bind us all.

Ms. FOXX. Right. I would like to ask you this question. And then if Mr. Muir has an opportunity to respond to it also I would appreciate it. We know that the decision made by the NLRB gentleman has implications beyond the NLRA. It has implications for Title IX of the education amendments of 1972, Workers' Compensation laws, tax law, *Fair Labor Standards Act*—could all be implicated. Would you tell us your thoughts on the possible implication of these laws for Baylor, and then, Mr. Muir, for Stanford?

Judge STARR. I think they are very serious issues with respect to Title IX in particular. If the football scholarship student athletes are all employees then, in fact, that is going to create a very serious issue in terms of imbalance with respect to what Title IX requires.

There are going to be a host of other issues, as well. Injuries are important, health is very important. We are very sensitive to that. And therefore, the question will be triggered is—does OSHA have jurisdiction in this context, as well. So I think it is going to raise a hornet's nest of issues.

Mr. MUIR. Yes, I believe if we go down that path that first and foremost, you know, our students are students first. And we want to ensure that. Many of the issues that the Northwestern student athletes raise are issues that we are already covering at Stanford. I think if we go down the path where—eventually that we call our students—student athletes—employees, and they just become a true working employer—working relationship, then I do think some of those things as Title IX and making sure that we provide a broad offering to all of our students becomes at risk, the pressures become greater.

Chairman KLINE. The gentlelady's time has expired.

Mr. Bishop?

Mr. BISHOP. Thank you very much, Mr. Chairman. And to our panel, thank you for your testimony.

Mr. Eilers, particularly I want to thank you for you testimony. Because you have highlighted some of the issues that I want to talk about. You described the effort at Northwestern as a means to an end. I think it is also fair to describe it as a cry for help. I think that we talk about having the student athletes interest at the center of what we do—and I used to run a college so I—it was a Division 2 school. But there is really nobody talking for the students. And I think what is happening at Northwestern is that this is an effort to get somebody to listen.

And so I want to address this to Judge Starr and to Mr. Muir. You both represent highly-regarded, very prestigious institutions that have succeeded both on the athletic field and in the classroom. You both are members of very large conferences. And I want to just go over what the players at Northwestern are asking for. They are asking for efforts to minimize college athletes' brain trauma risks. They are asking to prevent players from being stuck paying sports-related medical expenses. They are asking that graduation rates increase. They are asking that educational opportunities for student athletes in good standing be protected.

They are asking that universities be prohibited from using a permanent injury suffered during athletics as a reason to reduce or eliminate a scholarship. They are asking to establish and enforce uniform safety guidelines in all sports to help prevent serious injuries and avoidable deaths. And they are asking to prohibit the punishment of college athletes that have not committed a crime. Is there any one on that list that I have just mentioned that is unreasonable? Is there any piece of that your institution would say no, I am awful sorry, we can't do that?

Or let me phrase it positively. Would you each be willing to lead an effort in your respective conferences to see to it that your fellow member institutions say absolutely, guys, you are absolutely right? We are going to do it, it is the right thing to do.

Judge STARR. Mr. Bishop, I think that series of questions, they are in fact important. They are legitimate. And we are, in fact, continually working toward addressing them. Take the concussion policy. The NCAA does have a concussion policy, and requires members to—our conference requires it. And we have a concussion policy. We continually monitor that. There are studies underway, from the University of Virginia and the NCAA has personally has directly funded a study. So this is evolving science. So yes, we want to—

Mr. BISHOP. Here is my question.

Judge STARR. Yes.

Mr. BISHOP. I am sorry. I don't mean to be rude, but I only have five minutes. Should we not—if unionization is as bad as so many of you think it is, should we not use this as a catalyst? I mean, and not just talk about conversations and not just talk about yes, we are looking at it and we are studying it. Let's do it. Can't—I mean, you are very powerful institutions in very powerful conferences that people look to for leadership. Can you not just say we are going to lead an effort to make this happen?

Judge STARR. Again, briefly, I believe it is happening. Can we move more quickly? Of course, you could always move more quickly. But it is, in fact, a serious conversation. These myriad issues that you have rightly raised are under serious review. And it is not just a conversation, things are happening. The NCAA, the cost of attendance for the Division 1—

Mr. BISHOP. I want to give Mr. Muir a chance. But my question is, in these conversations who is speaking for the student athlete?

Mr. MUIR. I would say there are a multiple of individuals who are speaking for the student athletes, including the student athletes themselves. We here are—a number of our constituencies, both on and off campus, both saying we need the student athlete's voice. And certainly we are being attentive to that.

Our presidents are at the table. They are constantly thinking about this. They are trying to take leadership roles, as you so mentioned. Athletic directors, I was at an athletic directors meeting yesterday. Again, this is a prominent discussion point because we do want to make sure that the student athlete's experience is the best it possibly can be. And we need to enhance it.

Mr. BISHOP. Right. Let me just say one last thing. I hope that we can somehow collectively get to the point where we hold student athletes to the same—or hold coaches to the same standards we

hold student athletes. A coach can break a contract with impunity. When you left Yale University you had to sit out a year. I don't understand why it is that a coach can break a contract with impunity, and a student athlete is penalized if he wants to move from one institution to another institution that he thinks better serves his needs.

Mr. Eilers, you want to comment on that, or—

Mr. EILERS. No. I think I kind of said it in my testimony, Congressman Bishop. But I do think if you are—if—and I don't understand why we can't get there. People should go to college to get degrees, first and foremost, full stop. Part of their educational experience, at least for me, was participating in a sports-related program, just like someone would do drama, speech, debate, what have you. It has made me who I am today, it has made me a better father, a better husband, a better person, a better businessperson.

And so, you know, it is—I would disagree with Mr. Schwarz's characterization that it is separate and distinct from your educational experience. I think it is integral, like any of those things. And what we need to do is make sure that student athletes have the ability to go to an institution for four years and earn a degree, and leave with a degree. And so if that is the case, I would respectfully disagree that there should be some quid pro quo. That person should make a commitment to that coach to give him four years of service coming out of high school.

If we don't do that, though, then I would submit to what you are suggesting. That we should allow people to then flow around, it they should be equal. I want a two-way street to be equal for both parties.

Chairman KLINE. The gentleman's time has expired.

Dr. Roe?

Mr. ROE. Thanks very much, Mr. Chairman. And just to clarify a couple things that Mr. Schwarz started with. A full disclosure. The head basketball coach and athletic director where I was, where I went to college, Dave Luce, did both jobs for a long time. This is a mid-Division 1 school. And I am absolutely committed to college athletics. I donated the money to build the athletic academic center at the college.

Mr. Schwarz, you pointed out about how much money—and I agree, the NCAA is. But most don't live at that lofty level. I just looked—pulled up on my iPad right here, most colleges lose money in athletics. They don't make money. A few of the big areas do, big schools do. But at Austin P, it is a $9 million budget a year, not a $90 million budget. And they are—most schools at that level are struggling. Now, I realize this is unionization at a private university, not a state university. But student athletes, Mr. Eilers, I agree totally with you.

And, Mr. Bishop, a couple things. You can transfer now and—without loss of a time if you transfer at a different level. If you go from Division 1 to Division 2, or Division 2 up, you can play immediately. Just to clarify that for everyone. Either Mr. Livingston or maybe Judge Starr, you—I think this ruling, what concerns me is, at least when I played sports it was fun. I had a good—I mean, we sound like it is some kind of drudgery here. I—golf is sometimes, but for the most part sports are fun. That is why you play sports.

And as Mr. Eilers clearly said, he added his experience as a student athlete and it made him a better—he mentioned it very eloquently. I think that is what athletics—it did for me. It taught me—I learned a lot on the playing field I would never have learned in the classroom. So it is—I think it is added. Do you think this ruling could potentially cause schools just to drop football, or sports?

Judge STARR. Well, we have to consider all options in terms of the best interests of the university. I know that the president of the University of Delaware has said that—and he was a student athlete himself, that the University of Delaware would not be able to continue. Now, it is a public university. So it really is raising a host of serious questions. I think it could, in fact, at a minimum cause programmatic curtailments. I think it raises the issues that we talk about under Title IX: how do you achieve the Title IX, a very important balance to achieve, as a matter of policy and as a matter of law.

It is simply the wrong way to go to address these very important issues. The number of questions that are raised are so myriad they are just remarkably wide-ranging. And I don't think there is a real answer for most of these questions. The *Fair Labor Standards Act* is yet another. The antitrust laws themselves that were emphasized earlier. So it is bringing us into a sea of complete uncertainty.

Mr. ROE. I agree, and in the—excuse me, go ahead—

Mr. LIVINGSTON. If I might add, the issue that Mr. Schwarz talked about in terms of the protection for entire leagues, where they all belong under one collective bargaining agreement, is absolutely correct for professional sports. That does not exist in college sports. The NLRB only would govern 17 out of the approximately 120 schools that play football. And so you end up with a potential arms race for those that can afford it, and others—as Judge Starr says—may decide to make a decision to get rid of it. Sports are competitive, and so the teams that want to win are going to, you know, pay their way up to win.

Mr. ROE. I think if Northwestern unionizes they are going to play 12 homecoming games is what I think they are going to do. In the event that the student athlete unionizes and parties can't agree on the terms and conditions of employment, is it possible the student athletes will strike?

Judge STARR. That is a traditional tool in collective bargaining. And that itself raises not only just the idea, seems to be unthinkable that the football team goes on strike. Well, then what about the non-scholarship athletes? So, again, that is the incoherence of the collective bargaining agreement. But does that mean they also walk out on class? If they are employees, then what is their relationship to the academic enterprise?

Mr. ROE. I think, Mr. Eilers, I am going to you the final comment. I think you said it. When I was in college, the students were true student athletes. Our quarterback had a 4.0 as a physics/math major. And there are many people that use athletics to do what you have done to enhance their—if you play—you were obviously an incredible athlete because you played professional football. Well, you are if you got in the professional leagues.

But I think your comments were absolutely spot on, and that is the way we should look at it as a student athlete. And you pointed out that some students play in the band, some, and they practice for hours. Some go to ROTC. They work very hard. And drama and other things. And so I will give you the final say on this.

Chairman KLINE. Actually, the gentleman's time has expired.

[Laughter.]

Brilliant timing.

Mr. Courtney?

Mr. COURTNEY. Thank you, Mr. Chairman. I think, you know, listening to the testimony, most people, I think, would agree that what happened at Northwestern was because the NCAA has created a vacuum in terms of students being treated fairly. And if you look at the mission statement of the College Athletes Players Association, one of the mission statement items is to provide better due process in sanction actions. Again, I represent the University of Connecticut. We had a pretty exciting spring.

Shabazz Napier made two incredible, I think, courageous comments during the course of the lead-up to the tournament. Number one, describing in a way that might be embarrassing to some that sometimes he went to bed hungry at night. And that is because of the nickel-and-dime, Mickey Mouse NCAA rules in terms of defining what universities could provide to students. I mean, it was kind of almost comical to see Mr. Emmert rush to announce a new rule on April 15 that now has changed and reformed that, of course, not because of what Mr. Napier said.

But, you know, for a lot of us, you know, it seems, at times, that the only thing that changes the NCAA is external pressure. And frankly, that is what I think this event at Northwestern has kind of produced. We wouldn't be having this hearing to talk about the plight of students but for the actions of those students. But frankly, there are other times when these sanctions—process is far more pernicious than maybe, you know, missing a—a midnight snack. You know, we look at what Mr. Napier said about the fact that this is what happens when you ban us; the due process, and I use that term loosely, that the NCAA engages in, unfortunately, far too many times shoots the bystander in an effort to try and comport with some measure of student athletes.

That school was banned because of a cohort of students who had poor academic performance. And there is—no one is going to dispute that. In 2007, not one player on that team was around at the university when those scores triggered an APR finding that—with a four-year look-back period. And yet they found themselves in a situation where they were banned from post season play because of a rule that makes absolutely no sense.

And by the way, other schools are doing the one-and-done, you know, system. Which—you know, try and explain that to the average person why that is okay, and yet a student like Shabazz Napier is punished. By the—he is going to graduate in a couple weeks. He is getting his full degree. He is getting punished for something that somebody he never even knew who was at stores seven years earlier in terms of their performance. And that is where, again, I just am very skeptical, frankly, of the protections

for students who get swept up in this bizarre, Byzantine system of trying to comport with some definition of student athletes.

And with all due respect to the witnesses here, I don't think the colleges and universities—because they have their own pressures in terms of not rocking the boat with the NCAA to really step up and provide real, honest to God advocacy for students who are getting swept up. Perry Jones III was disqualified at Baylor because his mother took three small loans when he was a high school sophomore, before he even went to Baylor. And yet he was punished later on in his college career because his mother was in a desperate financial situation, took a short-term loan from an AAU coach.

I am sure—you know, no one wants to, you know, vouch for that. But nonetheless, why would he get punished for that except for the NCAA's desperate attempt to try and somehow comport with the definition of student athletes.

So, Mr. Schwarz, I guess—you know, when we talk about treating people with dignity—because that is, to me what is really so offensive about the way—you know, the NCAA violated patient rights in that Miami investigation. I mean, the power that they can exert, again, tramples on people's ability to even just have basic due process rights when these sanction hearings and investigations.

And I was wondering if you could just sort of put your comments in that context.

Mr. SCHWARZ. Sure. Sure, I mean, I think it is a great step that the NCAA has started saying that if a school wants to give an athlete a meal they are allowed to. Previously, the individual choice to feed an athlete was prohibited beyond a certain number of meals. And that is the level of cartel control we see here.

And you are exactly right that the issue is not whether a benevolent organization will deign to provide the people who bring value with some crumbs. It is a voice, it is advocacy.

I don't know how often James Brown is quoted in here, but here he is saying "I don't want nobody to give me nothing. Open up the door, I will get it myself". And that is, effectively, what the movement here is about. It is about saying give us some avenue. Let us come in. It is an NCAA violation to come in and ask for money right now, as an example. You get permanently banned.

Chairman KLINE. The gentleman's time has expired. And I want to commend him, the gentleman from Connecticut, for getting a little bragging without actually mentioning the basketball word.

[Laughter.]

Dr. Desjarlais?

Mr. DESJARLAIS. Thank you, Mr. Chairman. Certainly appreciate all of you being here today, bringing us your expertise.

I wanted to go to Mr. Livingston first, and ask a few questions. Mr. Livingston, the NLRB regional director's decision in Northwestern applies solely to private universities because state universities, as state government entities, are excluded from NLRA coverage. That means the decision only applies to a portion of universities in each conference and division. However, state law applies to public colleges.

What are the differences between state and federal laws regarding collective bargaining and do mandatory subjects of bargaining differ?

Mr. LIVINGSTON. There are a variety of differences and the states actually vary widely. The NLRA, as you know, covers organizing rules, bargaining unit determinations, subjects of bargaining, and the right to engage in economic action. All those differ under various state laws. For example, some prohibit public sector bargaining entirely. Others permit public sector bargaining on very limited terms. Others don't have the right to engage in economic action. Others, for example, would have interest arbitration. So you would have different subjects being negotiated by different groups in different collective bargaining agreements.

It ultimately would end up with individual bargaining and an un-level playing field. Different terms in different contracts. Then when those teams compete, unlike in professional sports you have got something that I simply don't think is workable.

Mr. DESJARLAIS. Okay, yes. And I think that is an important point. That if the scholarship athletes do organize the union, universities will bargain over terms and conditions of employment. And the parties are compelled to bargain over mandatory subjects of bargaining. What terms and conditions of employment are mandatory subjects of bargaining?

Mr. LIVINGSTON. I appreciate the comments that we have heard from everyone today about the need for college athletics to improve. You know, improve the lot of the student athlete. But whether it is the College Athletes Players Association or any other union—and, of course, any other union has the right to go ahead and organize—under the *National Labor Relations Act* they could bargain about a wide variety of things. The statute is wages, hours, and other terms and conditions of employment. That is so broad that it would cover compensation, signing bonuses, retention bonuses, hours of work—so in terms of schedules, potentially even class attendance.

While CAPA's goals may be limited right now, if they are eventually certified as some organization based on member desires maybe they become greater. And, of course, any other union wouldn't be limited to the goals that we have heard today.

Mr. DESJARLAIS. In the event that student athletes unionize, they will pay dues to the union. Where do these payments come from?

Mr. LIVINGSTON. Dues are an internal union matter. So how they decide to do it is up to them. But under section 302 of the *Labor Management Relations Act,* it is clear that an employer—in this case, the university—can't pay it. An employer would have to bargain over check-off, for example, but that comes from wages. And so unless we are talking about wages in some form, the union would have to answer that; CAPA or any other union.

Mr. DESJARLAIS. We touched briefly, earlier, on taxation. These universities and organizations are tax-exempt. If a student becomes an employer are they then subject to taxation? And if so, does that affect Pell grants, ability to get student loans? Where do we go to—how do we go down that road?

Mr. LIVINGSTON. Those really are beyond my area of expertise. But I do believe that others perhaps can answer that question.

Mr. DESJARLAIS. Does somebody else have a comment on that?

Judge STARR. Well, section 61 of the Internal Revenue Code has a very capacious definition of what is income. So if an individual is an employee, then very strong arguments, it is unsettled and, obviously, this is a new question. But it is going to open up serious questions about the entire range of services, including the scholarship itself. There are issues presently with respect to how a scholarship is treated. But if they are employees, then it is compensation and it is presumptively taxable.

Mr. LIVINGSTON. And if they are employees, and you presume that they would have to pay taxes on it, I would presume that the goals any scholarship negotiations, wage negotiations would be to increase that amount to take into account the tax consequences.

Mr. DESJARLAIS. Okay, thank you.

I yield back.

Chairman KLINE. The gentleman yields back.

Ms. Fudge?

Ms. FUDGE. Thank you very much, Mr. Chairman. And thank you all for being here today.

Just want to make a couple of comments about things that I have heard in your earlier testimony. I want to go back to something my colleague, Mr. Courtney, said. I happen to have attended Ohio State University. I knew a lot of the football players when I was in school. This issue was a problem then, it is an issue today. So why has it not been taken care of in more than 30 years? There is no reason for it. And but for the courageous actions of these young men, we wouldn't be talking about it today. So I want to put that on the record.

And then, for you, Mr. Livingston, you talked about the Ohio statehouse, who has determined that our athletes are not employees. Just because they said it doesn't make it so. These are the same people that want to restrict voting rights. So just because they said that doesn't make it so.

As well, we do know that student athletes, that scholarship athletes, are treated differently than those not on scholarship. We know it, and we just need to admit it and not even pretend that there is some difference. The restrictions they have and the time commitment is much different than students who are non-scholarship students.

First question, I would really like to ask Mr. Schwarz. In your written testimony, you mentioned the level of profit the NAAC—I mean, the NCAA is making off its student athletes. Do you know if any of that profit is dedicated in any way to providing health benefits to those students?

Mr. SCHWARZ. Some of it is. I mean, most on-field injuries, the immediate cost of that injury is covered. It is not required, but it is covered. Long-term injuries that linger typically are less likely to be covered. So it is not always the case.

Could I just add one quick thing, real fast?

Ms. FUDGE. Very quickly.

Mr. SCHWARZ. You mention that since you were in college there has been a problem about the cost of attendance stipends. The rea-

son that there aren't cost of attendance stipends is because the NCAA voted them away in 1973. They have been claiming that they have been talking about bringing them back now since 1973. In 1986, something was tried, they didn't pass it. In 2006, something was tried, they didn't pass it. Now they are telling you, oh, it is coming real soon. There has been a long history of its coming real soon.

Ms. FUDGE. Well, thank you. You know, I mean, the NCAA also doesn't want these young people to be able to make a living, the little bit that they can, as well. I mean, I was around when the whole scandal at Ohio State happened about some kids selling their own shirts. The university sells their shirts every day, but the shirts that they take off their back they can't sell. I won't go to that one.

But I would like to ask Mr. Starr and Mr. Muir, what do your football and basketball coaches make annually?

Judge STARR. I don't have the number off the top of my head. It is substantial, it is a free market. And so we want to keep our coaches. We have had stability, so I—

Ms. FUDGE. But you—

Judge Starr.—I can get those for you.

Ms. FUDGE. Would you please?

Mr. Muir?

Mr. MUIR. I am not at liberty to share the numbers.

Ms. FUDGE. Is it a secret?

Mr. MUIR. No, it is just something that we don't share at Stanford.

Ms. FUDGE. Okay.

Mr. MUIR. But at the same token—

Ms. FUDGE. Okay, thank you. That is just the only thing I wanted to ask you.

Yes, sir?

Mr. SCHWARZ. I know the answer for Baylor. Coach Art Briles makes—made, in 2011, $2.4 million; Scott Drew made $2.1 million. And the women's basketball coach made $1.3 million. At Stanford, the number isn't published. But in the one year that Jim Harbaugh's salary rose above the Stanford surgeons, who are the top five employees, he made a little over $1 million.

Ms. FUDGE. Thank you very much.

Mr. Starr, you mentioned earlier that obviously the goal of attending a college or university is to obtain a degree. I am assuming we agree on that point.

Judge STARR. Yes, we do.

Ms. FUDGE. Okay, but do you also realize that for Division 1 football athletes, the admins basketball players, their graduation rates across the board hover around 50 percent?

Judge STARR. At Baylor it is higher. At Baylor it is 62 percent for our men's basketball team. But I could not agree more, Ms. Fudge. We need to create—especially in men's basketball, but to a considerable degree in football, as well—this culture of student athlete. And it begins with the coaches, it begins with the head coach. But the entire infrastructure has to be oriented toward that. At the same time, these are young men and young women who are making their own choices. They decide what is important for them. All

we can do is create a culture of encouragement and of genuine support.

Ms. FUDGE. Thank you very much. I see my time is going.

I will yield back, Mr. Chairman. Thank you, thank you all.

Chairman KLINE. I thank the gentlelady.

Dr. Bucshon, you are recognized.

Mr. BUCSHON. Thank you very much. I will be brief. Anyone can answer this question. Do athletic scholarships give potential academic opportunities to students who otherwise would not have them available to them because of—shearly based on their ability to play a sport?

Mr. Muir?

Mr. MUIR. Yes, I would say that the opportunity to attend an institution like Stanford, to be afforded the opportunity to both compete at the highest level as well as get a quality education, we had less than five percent be admitted this past year; 40,000 applications. And so when our coaches present young people with an opportunity to come and compete at Stanford it is a wonderful experience. And I think our kids, as soon as they get in the door, understand and cherish that opportunity. And as I said, with the high graduation rate they understand that they are part of the fabric of the place.

Mr. BUCSHON. Thank you.

Judge STARR. There is a very significant opportunity for first-generation college attendees. So it is a door opener, it has been historically. I believe the NCAA has said that approximately 15 percent of student athletes who receive scholarships are first-generation; no one has attended college in their family. So it is a great part of the American story.

Mr. BUCSHON. Thank you. I will just have a brief comment, then. I think we all here today—people testifying and members on both sides—know that there are substantial issues we are discussing today. And I am hopeful this discussion will continue and make things better for, and improvements to, our college athletic system. So that young people across the country can continue to compete. But also, as many of you have outlined, more importantly have access to an educational experience that helps them in their future careers and down the line.

So with that, I yield back.

Chairman KLINE. The gentleman yields back.

Ms. Bonamici?

Ms. BONAMICI. Thank you very much, Mr. Chairman. This is a very interesting hearing, and I appreciate your expertise, all of the witnesses who are here today.

Mr. Eilers, did I say your name correctly?

Mr. EILERS. You did.

Ms. BONAMICI. Thanks. Mr. Eilers, you talked about how the debate should be about what is the best way to address the goal. And I really appreciate that. I know that some of my colleagues have mentioned the importance of addressing the goals that the college athletes have set out.

I was reading an editorial that came out after the regional director's opinion that said that the college sports establishment has brought this trouble on itself by not moving to address players' le-

gitimate grievances. Obviously, the regional director found some differences between what Northwestern is doing and what you have described in your experience and, of course, Mr. Muir and Judge Starr.

I wanted to ask just a quick question. I know, Mr. Eilers, you said you went—you have an MBA from Kellogg school, a great program. But you are not here representing Northwestern.

Mr. Livingston, do you happen to represent Northwestern?

Mr. LIVINGSTON. I do not.

Ms. BONAMICI. I was just curious about that because—

Mr. LIVINGSTON. I am here on my own behalf.

Ms. BONAMICI. I was just curious about that because, you know, we have heard different experiences here and different facts about your colleges, like Mr. Muir, what Stanford is doing. But what we are talking about is a decision that is specific to Northwestern. And I—one of the things that the regional director found was that the scholarship players are identified and recruited in the first instance because of their football prowess and not because of their academic achievement in high school. Is that similar, Mr. Muir, you are shaking your head no. Is that different from your experience at Stanford?

Mr. MUIR. That is definitely different. When I think about what our coaches are doing in identifying young people to potentially come to Stanford, as I said earlier the first process that they have to hurdle, they have to go through, is making sure that they can pass admissions and make sure that they can enter school just like the general student. So we are weeding out individuals. Because if they don't have the academic record, doesn't matter what their athletic accomplishments are. If they are not able to—in order to meet the needs of ensuring that they get an education that is not going to happen.

Ms. BONAMICI. And I was trying to figure out from reading part of the regional director's opinion, what happens if a class that—a player, a scholarship player, wants to take, because of his major—or I should say his or her major because maybe this could be expanded to women's sports, as well—what happens if that class conflicts with practice? What does the college do?

Mr. MUIR. So when I attend a practice, when I see our student athletes practicing, getting ready for a competition, there is many a time where I will see our football student athletes specifically walk off the field because they are attending a lab, they are attending a class and that comes first. And—

Ms. BONAMICI. And they are not penalized for that, or—

Mr. MUIR. They are not. Those—

Ms. BONAMICI. They are permitted to do that?

Mr. MUIR. No, those are the same kids who are—who will play on Saturdays, as well, too. So—

Ms. BONAMICI. Was that your experience, too, Mr. Eilers?

Mr. EILERS. Yes, it was. And there—you know, there are sacrifices it made. So I took organic chemistry one summer, right, between my sophomore and my junior year because of that fact and trying to take the labs. I would only submit one additional item, which is I think what Stanford has done is incredible in football, and what they do on the academic front, accomplishing both. There

was a brief moment in time, before we ran into an unfortunate game against Alabama in the national championship, I was most proud of Notre Dame having the highest graduation rate for the football players, as well as briefly being ranked number one in the country. So you can do both.

Ms. BONAMICI. Well, that is interesting. Because the regional director, I believe, found that Northwestern has a 97 percent graduation rate for its players, which seems to be pretty high.

I wanted to ask also about what happens during the recruitment process? Because I mentioned what the finding was about Northwestern that they were recruited because of their football prowess. But what happens during that recruitment process? How are the prospective athletes actually made aware of all of the opportunities that are available to them?

How do they decide what they are considering during that consideration process? Who informs them about, you know, whether they will lose their scholarship if they don't stay on the team? Mr. Muir, and maybe, Judge Starr, you could respond to that, as well.

Judge STARR. First of all, in terms of the recruitment process I have personally seen what that process looks like. And it includes a very thorough introduction to here is the academic support. They will meet people from the academic support staff. They will see—and we try, of course, to determine is there a diagnostic testing issue. That is done by the university. But those tried in terms of any learning disability. So there is a very holistic introduction to the university as a whole, including the academic side. And usually, the parents or parent, or loved one is there with the prospective student athlete.

Ms. BONAMICI. Thank you. And my time has expired. I yield back.

Thank you, Mr. Chairman.

Chairman KLINE. I thank the gentlelady.

Mr. Rokita?

Mr. ROKITA. I thank the chairman. I thank the gentlemen for your testimony today.

You know, I think from what I heard Judge Starr kind of, as he would being a former judge, kind of really clarified the issue. And that is, are we going to use the NLRA as a vehicle for the improvements that you have all talked about today. I suspect—no, I can't imagine—the authors of the law or the intent of Congress was to cover this situation. But let's poke around with it. Let's explore a little bit.

Mr. Livingston, if the students were to strike or if the athletics department or university were to lock the players out, like you would have at a steel mill let's say, during the collective bargaining process, would the students be able to attend class?

Mr. LIVINGSTON. That is an unanswered question. The only experience we really have is, in professional sports where it is the entire league that typically goes on strike or is locked out—

Mr. ROKITA. That is in professional sports.

Mr. LIVINGSTON. But in college, because we don't have it, we don't know what would happen. And so, for example—

Mr. ROKITA. Because in college you have classes, right, and teachers and whatnot?

Mr. LIVINGSTON. Yes. Would they be entitled to stay in their dorms? Would they have to vacate those? Would they have to leave class, or start paying for it.

Mr. ROKITA. Thank you.

Mr. LIVINGSTON. Those are unanswered questions.

Mr. ROKITA. Right. Yes, certainly not answered by the law or the regulations, or anything else.

Mr. Muir, Northwestern is in the Big-10 conference, as you know, along with two schools in Indiana, one being Purdue, in my district. Let's say that Northwestern students, student athletes, were to unionize and proceed to either strike or be locked out. How would that affect the rest of the conference? Using your knowledge and experience.

Mr. MUIR. You know, not being at Northwestern I don't know if it is appropriate for me to jump on that. But I—

Mr. ROKITA. No. I just say using your experience and knowledge, what do you think would happen? How do you feel?

Mr. MUIR. I think it would be difficult to continue to schedule and continue to have competition.

Mr. ROKITA. If Stanford were in a similar situation, what would be the effects?

Mr. MUIR. I think if that was the case, we were going down the path, Stanford might not opt to continue to compete at the level that we are currently competing at.

Mr. ROKITA. Right, kind of to Dr. Roe's point, or comment that he made earlier.

My district also has St. Joseph's College, which I am proud to be a board member of. It is a Division 2 school, which if I understand right you can share scholarships at that level between students, and there are limited funds. Again, experience—looking into your crystal ball—what would be the effect of Division 2 students with regard to this?

Mr. MUIR. If this—again, I am not a legal expert. But if this were—the students at Division 2 wanted to unionize as well, too, I think that would dramatically affect whether institutions can continue to offer—have these offerings.

Mr. ROKITA. Yes.

Mr. MUIR. Which is part of the fabric of higher education, I think, intercollegiate athletics. And so that would be a shame if that all of a sudden changed.

Mr. ROKITA. Yes, I—these questions, and your answers, continue to bring clarity to me that I don't think this law was even intended for this kind of situation.

Mr. Livingston?

Mr. LIVINGSTON. May I add something? That we are talking about scholarships as though there is a finite limit. Under the *National Labor Relations Act,* the union would be able to bargain about the number and, of course, the value. So half-scholarships versus full scholarships, it is all a subject of bargaining under the NLRA.

Mr. ROKITA. Understood. Thank you.

Judge Starr, coming to you. You know, we often talk about, on this committee and in businesses across the nation and in union halls, about the cost of unionization, the cost of bargaining, the cost

of dues, et cetera. Whether or not a union member should have to pay dues voluntarily or not have a choice in that. What do you think, in your experience, would be the cost of unionization for the employer and the employees? Can you estimate employer and employee cost if student athletes unionized at Baylor, for example?

Judge STARR. I have not—we have not punched through the numbers enough to even come up with a reasonable estimate. What we do know is that the whole idea of collective bargaining is, in fact, to increase the whole reservoir of duly agreed upon commitments by the employer. So I think part of the question is, what can we do outside the collective bargaining—which has never been contemplated before—that, in fact, improves student welfare. That is the ultimate policy question, it seems to me, that you have rightly focused on. And the unionization process is just raising a whole host of questions that we can't answer today.

But what we do know, the costs will, in fact, go up. Including issues, then, with respect to how is that student going to be treated as an employee in terms of taxation, Medicare and the like.

Mr. ROKITA. Thank you. And that is a segue into my last question. And it is for you, Judge STARR. Considering that the world is a jury, watching today people might get the impression that the acknowledgment that improvements need to be made is an acknowledgment that someone was caught or that this just started as a reaction to this recent decision. Can you give us evidence otherwise, via your testimony?

Judge STARR. Yes.

Chairman KLINE. I am sorry. I am sorry, Judge. The gentleman's time has expired.

Mr. ROKITA. Can the gentleman respond?

Chairman KLINE. The gentleman's time has expired.

Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Schwarz, in many cases the scholarship requires you to play, in most cases?

Mr. SCHWARZ. My understanding is, until 2011 the NCAA mandated that the scholarship could only be for one year, whether schools wanted to give one or not. If you stopped playing during the course of that year you were allowed to continue for that year, after which the scholarship would not be renewed. The current deal—

Mr. SCOTT. Yes, some colleges, you get a scholarship and you can continue with the scholarship whether you play or not. Isn't that right? If you have a needs-based scholarship?

Mr. SCHWARZ. If you choose not to play football, the schools have the option per the agreement to terminate the aid, even on a four-year deal, at the end of that year.

Mr. SCOTT. Okay. Now, you have indicated the number of hours that had to be committed. Is an athlete required to comply with that schedule?

Mr. SCHWARZ. You know, in the NLRB hearing the facts that came out that weren't controverted—and, in effect, I heard Mark Emmert say similar things—it is a 40-, 50-, 60-hour a week job during the season, and about half that off-season.

Mr. SCOTT. Okay. Now, can a student ever be—before the ruling, could a student ever be an employee of the college, like if they worked at the library or something like that?

Mr. SCHWARZ. I mean, students are employees at universities all the time. At the Stanford Daily, the editor in chief, I think, makes about $45,000. Football players—

Mr. SCOTT. Now, in that case, is the student's—is the status of a student, does that affect his status as an employee?

Mr. SCHWARZ. No. Students, employees are mutually exclusive concepts—

Mr. SCOTT. And the part-time job could be an essential part of the financial aid package. You get a certain amount of scholarship, you get a certain loan and we will make sure you get a part-time job at the library. That could be an essential part of—

Mr. SCHWARZ. That is right. My roommate in college did just that.

Mr. SCOTT. And it is unlikely that if you quit your job at the library you would lose the rest of your scholarship. That would be a little unheard of, wouldn't it?

Mr. SCHWARZ. I think that is right. You know, there are lots of ways that students outside of sports can be compensated. At Stanford, there was a class that required students to sell an app on Facebook. And to commercialize it was part of the requirements of the class, and they got credit for doing that rather than being—you know, losing—

Mr. SCOTT. Okay. Now, is it possible that some student athletes would qualify as employees under this ruling, and others not qualify?

Mr. SCHWARZ. My understanding is, the ruling applies only to FBS football athletes who receive a scholarship.

Mr. SCOTT. Now, what would the difference be for those who would—I mean, if you have a scholarship and just put a couple hours a week in swimming or wrestling or some other sport that doesn't have the time commitment, is it possible that you would be a student athlete and not an employee?

Mr. SCHWARZ. Well, I object to the term "student athlete" because it is a term of our design—designed to basically dodge legal agreements. But if you say "college athlete," I think college athletes are college athletes if they go to college and they play sports.

Mr. SCOTT. Well. And it is possible that some would qualify as employees and some would not.

Mr. SCHWARZ. I think that is right.

Mr. SCOTT. And if a college wanted to avoid the union problem, they could treat them like college students and not like employees. Is that right?

Mr. SCHWARZ. I am not sure if I am fully understanding, but—

Mr. SCOTT. Well, if you are—if you have got a scholarship for the chess club or something, or band, and are not required to put in these kind of hours, you would be a—I think—a college athlete.

Mr. SCHWARZ. That is right. And actually, the reverse is true. Right now, the chess team has more rights than college athletes because the chess team could say I want a college scholarship that covers more than just the athletic scholarship. They have the right in the market to bargain, but football athletes don't.

Mr. SCOTT. But it is possible, under this ruling, that some would qualify as employees and others would not.

Mr. SCHWARZ. I think that is correct.

Mr. SCOTT. Mr. Eilers, you indicated issues of the right to scholarship, medical treatment, the right to minimize brain trauma and other situations like that. A union could actually—could engage these issues. If it is not the union, who would be in a position, in a bargaining position, to engage these issues and have the resources actually to do the research and make a presentation on behalf of the athletes?

Mr. EILERS. Yes. Mr. Scott, as I said in my testimony, I don't have a solution. To me, it should be the NCAA and the member institutions. And it is clear—and I think, some, just to clarify what I think are some misconceptions—schools operate differently. At Notre Dame, there is a specific instance of a scholarship athlete, played football, decided after his sophomore year not to play football anymore. We honored his scholarship, he graduated with a degree, in four years, from the University of Notre Dame.

There may be other schools that operate differently. And our walk-ons were treated just like the scholarship athletes. Maybe at the University of Ohio—at Ohio State they weren't. So there needs to be an elevation across all, I think, collegiate sports to make sure that we are delivering for the student.

Chairman KLINE. The gentleman's time has expired.

Mrs. Brooks?

Mrs. BROOKS. Thank you. And thank you all for your testimony today. It is so very important. I am the daughter of a high school football coach, and the mother of a D1 soccer graduate from Javier University who suffered a serious concussion in high school in the last game of her high school career. And after wonderful medical treatment and proper healing, she went on to play four years of D1 soccer.

Now, many parents, and people who are helping these athletes get scholarships—which they all work so very hard in their lives to achieve those scholarships—parents advocate for these young people, the students advocate. The student athlete advisory committee of the NCAA advocates. I would assume the president of the universities and the representatives of each of the conferences that represent the NCAA on their board are advocates for these athletes.

And I would submit that there are many avenues to rectify the problems. And there are continued problems for college athletes. But these athletes make these choices as to which schools to attend.

One thing we haven't talked about enough is the role of the coaches in all of this process. And the coaches, who are employees of the university who report to the athletic directors who report to the college presidents who report to the board of trustees, what mechanisms are there in your universities for the students to voice their concerns with the coaches and the coaches to voice their concerns to the administration?

I will start with you, Judge Starr.

Judge STARR. Yes, we do have at Baylor, and it is frequently the case at most institutions, that there is a student athletic council. So these are student athletes themselves who come together. They are elected by their fellow student athletes. And so they have direct access, not simply to their coaches but to the athletic director. They

can also communicate with someone who we haven't talked about this morning. That is the faculty athletic representative, who is to, in fact, bring an academic perspective to bear in terms of the entire athletic program, including reviewing specific cases.

So there are—you are absolutely right. There are numerous avenues for voices to be heard. The NCAA—the final thing I would say is, the NCAA itself, however, believes that in its governance historically it has not done well in terms of assuring the student athlete voice. And so there are reforms underway that I think will be adopted that will, in fact, better ensure that student athletes are there in the inner councils of the NCAA.

Mrs. BROOKS. Thank you.

Mr. Muir?

Mr. MUIR. Yes, we have a number of opportunities to hear from our student athletes and from our coaches. The student athlete council at Stanford, the cardinal council I just met with at my home two weeks ago. And it is a chance for me to check in and hear various user concerns and how are we doing. And it is really important.

Also, we survey all of our student athletes after every season and we provide feedback. They can do it anonymously, and we get information on just how their experience is going. Also, the coaches have an open door policy. We look for that when we select our coaches, and the proper leadership.

We think we have one of the largest leadership development programs on our campus. And so that is another opportunity for student athletes to engage. We have administrators, we have counselors, we have tutors, all on a united front to make sure that their experience is the best it possibly can be, and an avenue for our student athletes to engage.

Mrs. BROOKS. Is it fair to say that your coaches, in part, are judged, and their successes judged in part, on the graduation rates of their athletes?

Mr. MUIR. Yes, we look at number of things. And we are obviously looking at the graduation rates and what they are doing in the classroom. And what they are doing to make sure that they are solid citizens and a part of the university fabric, which is what we have talked about earlier.

Mrs. BROOKS. And I know there is always a tension when student athletes have to leave and may miss classes or test or labs and so forth. But as Judge Starr indicated, there are faculty representatives. And there has to be that relationship with the faculty and the athletic department does there not, in order to ensure that those students take the tests, that they get the proper reinforcement. And, in addition, the study halls. I know my daughter, there were numerous study tables that were required of all student athletes in order to achieve certain GPAs. And those were absolute requirements that they must achieve a certain GPA to get out of those study halls.

Are you familiar with that, Mr. Eilers, at Notre Dame?

Mr. EILERS. I am. It wasn't proactive like it is today when I was there. If you started and you didn't perform well, you got sent to study hall. Today, they default to everybody starts in study hall. And the only thing else that I would comment, Mrs. Brooks, is that

I am aware of institutions that aren't at this table but take academics and athletics seriously. And their coaches do have provisions in their contract that if they don't graduate their student athletes there are negative implications to their salary and to their career.

Mrs. BROOKS. Thank you.

My time has expired.

Chairman KLINE. I thank the gentlelady.

Mr. Tierney?

Mr. TIERNEY. Thank you very much, Mr. Chairman. Thank the witnesses today.

Mr. Eilers, I am impressed that, with the concern and the way that you sort of agree with the concerns, the goals, of CAPA, but you have a concern about unionization. But I want to point out here, these concerns have existed for decades. So I wish that you had an idea that you could put forward what you would do if you did unionize. Because it seems totally frustrating.

Mr. Schwarz, let me ask you. I mean, these are not new problems, are they?

Mr. SCHWARZ. No, not at all. As I said, the issue of cost of attendance stipends has been around since 1973 when, by collective vote, the NCAA took them away.

Mr. TIERNEY. And so I agree with my colleagues, that there are lots of advocates out there, different people. But apparently it hasn't been very effective, right? I mean, how is that going for you? They have been advocating all this time, and the problem still exists.

Mr. SCHWARZ. Well, it is a one-sided discussion.

Mr. TIERNEY. On that. So there was also a comment made that the student—the college athlete has choices. What would you say to that?

Mr. SCHWARZ. You know, I am advocating for a much more free market opportunity. I think choice would be great. Congresswoman Brooks mentioned that schools—students have choice. But what they don't have a choice about is the full package that they receive. Because the schools fix the price of what they offer. Everyone offers the same thing, so it limits choice.

Mr. TIERNEY. So, the NCAA, you know, seems to have about $3.2 billion in revenues. They can make all kinds of decisions to make sure that number goes up, but they can't address even five really basic issues except to say that it is coming soon—

Mr. SCHWARZ. Yes, if I could just—could I add just one thing? The idea that this is a money-losing industry, you know, is incredible. If you look at a money-losing industry, you wouldn't see rising pay for employees, you wouldn't see firms flocking to enter the industry. Nineteen new schools have entered FBS since 1996. None have left. You wouldn't see bonuses that are like 10-to-one for sports results instead of academic results. The money is in the system. It is just that it is being denied to the primary generators.

Mr. TIERNEY. Well, you made another point when we talked about ability. You said that money is being funneled to football coaches instead of to the male athlete, and cited some coaches get paid $7 million on that. And when the money is going to coaches in lieu of increased financial aid to the male athletes, it sort of ef-

fectively puts a cap on that, and then deprives female athletes of Title IX matching funds.

Mr. SCHWARZ. See, that—thanks right. Title IX doesn't apply to coaching pay. That is why male coaches can make so much more than female coaches. It applies to financial aid provided to students. And so if that aid is capped, which it is now—and even the NCAA says they wish it were higher—a lifting of that cap on male athletes would result in effectively matching funds to female athletes. So the cap on men also results in a cap on women.

Mr. TIERNEY. Mr. Starr, I want to just go to some part of your testimony. I am going to quote it, if you allow me. "Under current principles of Title IX, the amount of financial aid awards for student athletes must be in the same proportion as the intercollegiate sports participation rate of male and females."

Judge STARR. Yes.

Mr. TIERNEY. But when I look at the data from the Department of Education Web site, it shows that Baylor spends 56 cents on male scholarships out of every dollar, but only 44 cents on women's scholarships. But the participation rate suggests that under Title IX they should be giving something like 42 cents to men and 58 cents to women. The Department of Education tells us that there is a disparity of just one percentage point. You got some serious explaining to do.

I want to give you the opportunity to sort of explain to us the disparity between the scholarship dollars that go to men versus women at Baylor, and the participation rates of men and women.

Judge STARR. Well, that is a very dynamic and fluid process. So it may change from year to year. But if there is, in fact, a disparity—and I accept what you have said, it has to be addressed. So we have to come forward with explanations as to why there may be a temporary disparity. We recently created two new women's sports, with scholarships, in order to address the disparity. So we have, for example, created equestrian, with a number of scholarships for women. We have created acrobatics and tumbling.

Mr. TIERNEY. Are you saying you believe this is a temporary issue? You are saying this isn't a year-to-year thing? Are you saying that with some knowledge of the fact, or are you just guessing that is the case?

Judge STARR. Well, I don't know the specifics of those—that specific disparity. So that is information to me. What I do know is that the academic department—the athletic department does have to focus on this with our Title IX compliance officer. We have a Title IX compliance officer who reviews all these kinds of issues to determine whether they are—

Mr. TIERNEY. I am just disturbed that, you know, the NCAA's answer to all of these issues, which most people agree ought to be addressed, is wait for the next decade or two and we might get around to it. And even on the Title IX questions, is yeah, we are working on it. I think we all ought to be concerned on that.

And Mr. Eilers, sure, what—

Mr. EILERS. Could I just share a comment? I agree with your—and I have the same frustration. That is that is why I am here today.

Mr. TIERNEY. Yes, I—

Mr. EILERS. I would like to see this implemented. And the one thing that I didn't want to throw on the table, when we were—when I was a student athlete at Notre Dame, we are trying to prepare to play. We used to open up against Michigan, trying to prepare for class. I just couldn't conceive, when this came up, of trying to think about threatening to strike or getting to the Friday night or Saturday morning of the football game and not leaving the locker room because demands weren't being met. I don't think the student athlete needs that incremental burden, but we have got to get there on these issues—

Mr. TIERNEY. So apparently, they needed to take some drastic action just to get the conversation started here with some sincerity. So—

Chairman KLINE. The gentleman's time—

Mr. TIERNEY. It is a good idea, I think we ought to at least acknowledge that.

Chairman KLINE. The gentleman's time has expired.

Mr. Walberg?

Mr. WALBERG. Thank you, Mr. Chairman. And thanks to the panel for being here.

I didn't participate in a revenue sport. I was in an Olympic sport, but wrestling in high school and college, university, for the time that I did that was probably the best training for life that I ever had. And I did it out of the joy of the sport. I made it by choice. Suffered four shoulder surgeries as a result of that in later years of my life, but I look back, and I would do it all over again.

I appreciate also the aspect that there has to be care taken for our athletes. And I respect what you have said about your concerns, already, on that. Mr. Muir, in your testimony you state Stanford has taken steps to cover medical costs for injuries, promote player safety, and researched prevention and effects of concussions. Could you elaborate a little bit more on those steps? And are these consistent with NCAA rules?

Mr. MUIR. They are consistent with NCAA rules. We have a—our Stanford medical team is right now doing a concussion study on our football student athletes, our lacrosse student athletes, our soccer student athletes. What they have told me is this research is going to be lengthy in time. We can't today say, well, here is how we prevent that from happening. But certainly they are observing that. And they have a medical mouthpiece that they put in each of the student athletes that track where blows come from. And certainly that is going to be an ongoing study for us, and they are leading in that regard.

Across the board in terms of the overall student welfare of our student athletes, that is something that we hold close and dear to us. And it is important that we try to enhance those things as we move forward with our student athletes competing at this level.

Mr. WALBERG. Do the student athletes understand this? Are they made aware of opportunities, considerations, programs?

Mr. MUIR. They are testing. They are the ones who are wearing those mouthpieces, they are the ones who are getting educated on the risks that are involved and, certainly, what the research that we are trying to do. And there is obviously great discussion about what does the future hold. And so that is something that they en-

gage in, and I think it has been worthwhile to have this leadership role.

Mr. WALBERG. Well, along that line, you state that Stanford has taken steps to protect scholarship support for students who are medically disqualified from playing. What are those steps?

Mr. MUIR. So, for example, we have three incoming football student athletes who have been awarded scholarships. They were not able to finish their senior year in competition. We still honored those scholarships. We are looking forward to them contributing once they are healthy. And we have had other student athletes who have gotten injured during the course of play while at Stanford that we still honor their scholarships at the end of the day. First and foremost, we are here to make sure that they get their degree. And we will do everything in our power to make sure that happens, regardless of whether they continue to play or not.

Mr. WALBERG. What about Baylor, Mr. Starr?

Judge STARR. It is the same policy in place. We do, in fact, care for our student athletes and for our football players. If they are, in fact, injured the scholarship continues. And we also believe we have the moral obligation to them with respect to an injury sustained in football, even post graduation.

Mr. WALBERG. Okay.

Notre Dame, as far as you know, Mr. Eilers?

Mr. EILERS. Pardon me. As far as I know, Notre Dame is consistent with the other testimony.

Mr. WALBERG. Okay. Mr. Muir and Mr. Eilers, I would like you to comment, as well. This year, it appears the NCAA will revisit the stipend issue. We have talked a bit about that. What is the major concern with the stipend issue, from your perspective as an athletic director at a major private university?

Mr. MUIR. So the major issue, I think, is that each institution is trying to pay up to the cost of attendance. That is the issue that is out there. For each institution, that cost of attendance for personal costs are different. And trying to figure out their exact number, where we can at least try to be equitable. The other thing that Mr. Schwarz had mentioned, as well, is the resources that would be necessary to provide that. Not all schools are able to meet that cost of attendance, and it is a concern for them. Or they will have to make other decisions and so that is a difficult one.

And that is why we spent so many years trying to figure that out. I do feel, because of the discussion and the dialogue, that we are closer. We realize we need to enhance that overall experience for the student athletes, but it is difficult from school to school since there are so few that are truly making revenue that they are able to far exceed their expenses with revenue. It makes it hard, makes it difficult. So I do think we are making progress, but it is going to take a little more time.

Mr. WALBERG. Mr. Eilers?

Mr. EILERS. Yes. And anecdotally, I would just tell you I was—my parents, I was fortunate, were able to give me out of pocket expense money to—when I was on scholarship at Notre Dame. My little brother was there, two years younger than me. Chris Zorich became a college All-American and I played with my last year at the Chicago Bears. He didn't have—he came from a single-parent fam-

ily, went to Chicago VoTech High School. Had no out of pocket money. His mom couldn't afford it, you know.

So it came down to people—his teammates, you know, his mentors to make sure that he could go out to dinner with us, you know, do laundry, et cetera off campus if need be. And I just think that is wrong.

Mr. WALBERG. Yes, yes. Had my first wrestling win at Chicago VoTech.

Chairman KLINE. The gentleman's time is expired.

Mr. Byrne?

Mr. BYRNE. Thank you, gentlemen. I am the former chancellor of post secondary education for the state of Alabama. I am sorry, Mr. Eilers. Don't hold that against me.

[Laughter.]

I am also—

Mr. EILERS. Congratulations.

Mr. BYRNE.—a former labor lawyer who represented numerous clients in front of the National Labor Relations Board, dealt with the *National Labor Relations Act* on a number of occasions. So this issue fascinates me because I have dealt with it both ways. Our two-year colleges, which is what the post secondary education department in Alabama deals with, does have athletic programs. In fact, we had a golfer at Faulkner State Community College that is in my district, named Bubba Watson. Bubba went on to the University of Georgia, but he started at an Alabama two-year college. And we are very proud of him.

But we are also proud of all of those student athletes. And the vast majority of them will never do what Bubba does, but we hope that they come to us and get a good education. Now, Mr. Muir, Judge Starr, you know when we are dealing with students in that environment they bring their life issues with them. They may be students, they may be athletes, but they are also young people and they have life issues. And we have coaches and counselors that deal with them on stuff that happens on the field and stuff that happens off the field. You can't take them apart. They just come together like that.

And I guess what bothers me about this whole issue—and I want to share the concerns I have heard about the NCAA, by the way. I see that as a separate issue, frankly, and I think we are trying to use the wrong tool to get at some of those NCAA issues. What concerns me is, is that if students organize, and we have to deal with a union representative instead of the student, what does that do to the obligation, the responsibility—I know you all feel it from your institutions—to deal with these student athletes with their life issues and the stuff that is not directly involved with whatever they are doing on the field. What does that do to that?

Judge STARR. I think it would be very disruptive. You are absolutely right, Congressman, that the relationship is a very individual relationship. And it is not just the coach and the coaching staff. It is that entire battery of support services, it is that tutor. But it is also the faculty member, it is also the representative to the student athletic council. At Baylor we have a very vibrant chaplaincy program. So there is the spiritual dimension, as well. So trying to channel everything into, at the age of 18 to 22, a set of

labor law issues of wages and terms and conditions and so forth, seems to be very artificial and arbitrary and not serving the ultimate interests of the individual student athlete.

Mr. BYRNE. Mr. Muir, do you have a vantage point on that?

Mr. MUIR. Yes, I do. I just think about the relationships that we build with young people. And it starts, obviously, prior to coming to college. We start early now. It is becoming sophomore year, junior year of high school; obviously, when they get to be seniors. And that carries through. Not only the four years or five years that they are on campus, but we want them to have a relationship with us, actually, once they graduate and have the degree. That relationship is so important to us.

And yes, we do have students who have other issues that are—that need to be dealt with, and how do they cope and manage. But that is—they feel open and for the most of—the majority of them, that they are able to come to someone here in the university setting—whether it be a faculty member or a coach, an administrator. And that is the beauty of the college environment. And I think that is really important for us to keep in mind as we move forward.

And certainly there are, as we noted, there are many issues that need to be addressed. And I think we are going to work our way to getting those done. It is always evolving.

Mr. BYRNE. Well, I would ask this question to legal counsel here. I mean, you heard the vantage point of people who are dealing with these student athletes on things that go far beyond what happens in their actual athletic work, if you want to call it work, in this environment. Is the NLRA the right tool to deal the issues that people seem to have with the NCAA? Sir, let me just say this. NCAA doesn't have anything to do with two-year colleges. So some of—we start creating a bigger definition of employee, it is going to affect a whole lot of people, not just people who are governed by the NCAA.

So is the NLRA the right tool to do this?

Mr. LIVINGSTON. Well, Mr. Byrne, that is a great question, and one of the reasons why I don't think it applies. Under the NLRA, all employees have certain rights. And the policies that Judge Starr and others have talked about, based on recent NLRB decisions they would clearly violate them. A coach is—requires his players to be a Facebook friend. The schools monitor Facebook postings. They prohibit media interviews.

Recent board cases have made it clear that violates the rights of any employee, whether they are in a union or not. And so at all 17 schools the framework that we are talking about likely already violates the NLRA. It is just not the appropriate tool.

Chairman KLINE. The gentleman's time has expired.

On my agenda here it says we are to close the remarks, so I am going to yield to the senior Democratic member, Mr. Miller, for his closing remarks.

Mr. MILLER. Thank you very much, Mr. Chairman. I think this is a very important hearing. You know, America is in the throes of celebrating, on a daily basis, socially and economically, every way possible, entrepreneurs and those who take risks. The list of grievances that these players presented is a list of grievances that players could have presented five years ago and 10 years ago,

across the college community. But they haven't been addressed. These players are put in the position of being on the edge all of the time; scholarship, no scholarship, play, don't play, classes, no classes all of the time.

That is a very interesting place to keep your employees that you care so much about. I think these players might play better if they had some more certainty in their life. But the NCAA doesn't let you do that as a university. We have some remarkable examples of universities here and programs. You know you are not typical across the board of high-stakes football in this country. And we know the athletes are not typical. And the fact is, you are graduating people, but we also have clusters of athletes that go to certain classes for certain reasons that may not have—may not apply toward their graduation so they are short but they stay eligible by taking the classes.

I am not holding you responsible, but that we know this landscape. That is why the Knight Commission was set up, to look at the landscape. No easy critics out of the industry. But the fact of the matter is that this landscape has changed dramatically. I have been in Congress long enough to know that when I have seen really tough issues on academic sides, where they thought that Congress might get involved in accreditation or what have you, very often you don't meet the college president. You meet the college coach.

And we know that the education journals, sports journal shows—are constantly debating this question who is the most powerful person on campus, the president or the coach? We know all hell can be paid for the mishandling of the hiring or the firing of a coach. These concerns that these young men were willing to take a risk on exist on every campus whether or not you have the security of a scholarship, for how long; whether or not you are going to have health insurance; whether or not you are going to—what is going to happen with your injuries if you lose your scholarship.

Stipends, transfers—we have been over this. We have been over this and over this and over this. I think I held the first concussion hearings. No—this is not proper for public discussion. This is a sport, this is volunteers. People play. Until they started to see the extent of the damage done. I worked with many NFL coaches and many NFL players. We couldn't get to first base. I had coaches come and tell me the documents are here, we know what has taken place here. Well, finally the Players Association went to court, and we know the rest is history.

And that is just the beginning. But the fact of the matter is, the determination was made that it was better to run the organization in the manner in which the owners wanted to run it than to deal with these issues. And I grant you, it could change the game. It has already changed the viewership. It has changed the way TV portrays it. They don't rerun those big hits because the audience has a different reaction today when they see that hit. They know that is a damaging hit. They know there are consequences to that.

But before, that was highlights. But highlights now are a liability. So we can have all the parade of horribles here about what could happen if there is unionization. Why don't we think about what could happen if you took care of the problems of these student athletes. And if the universities got back in control of this program

and not the NCAA, not the conference. I understand there has got to be rules and regulations. But, you know, we see arbitrary decisions made all the time by the NCAA. Mr. Courtney raised the issue.

I remember talking to sports journalists about the issue: why are students who had nothing to do with the infraction losing their rights to playoff games? You know what that means if you think you are going to the NBA or you are going to the NFL and you can't get in the playoffs, where everybody is focused on your performance? That is a huge punishment. To what? That they are upholding some morality of their vision of football, and they are going to show that they are really tough on this school? No, they were tough on a bunch of students who weren't there when the infraction took place.

So I think there is a lot to think about on the campuses. We spend a lot of time in this committee about higher ed and the approaches we take. And I think that you, you are here because you are leaders in this field. You are not immune from this. This is the Stanford Daily that I asked to be put in. The list of easy classes that nobody knew exist. Everybody said didn't happen. And yet professors said, well, it upped my attendance. I am glad it was on there. And they said no, they come here to—they major in eligibility.

I guess the Senate is going to hear from Ms. Willingham on North Carolina. I think—I don't know if she is here or not. I think she was going to—there you are. I think the Senate—Senator Rockefeller and others are going to hear from this. And you all know we have been through these scandals before. So you can rail against the unionization. Like the NFL, like the NBA you better address the problem. This is college sports. Not NCAA, it is college sports.

And I appreciate—I stood on the sidelines. I was so proud there—happened to be with a big donor—of USC–Notre Dame in Los Angeles, and then in South Bend. Most exciting moment of my life. I never knew it could be that noisy. And I played a lot of football, but I didn't play at that level. So we know the influences here. We know the influences here. They are student athletes. I don't think you would treat the other students like this on campus.

You know, I think somebody better get and take control of this situation again. And in most of the journals I read the president is losing in this war against the coaches for the say and the standards on campus. Mr. Schwarz is right. This is like that cab in Compton, California. It is always coming, but it never arrives. The NCAA just can't make these decisions, and yet—so we get these arbitrary actions against institutions and against the students and, in some cases, against the coach now and then.

There is a lot to think about here. I have been here 40 years. I have watched a lot of people deny the problems and blame—and go after the symptom which, in this case, is the decision to join the union. A rational decision by these young people. There was no other outlet for them. No other outlet as there wasn't for the people who proceeded them. So I wouldn't be so concerned about whether or not they are going to vote they are not going to go out on the

field on Saturday. That is not the makeup of these young men, you know.

But I remember talking to Bobby Knight when we decided—when the networks decided they needed a mid-week game. And now we have it, you know, for different—depends on what conference you are in, what day we—how many days of school you miss. You can keep defending it. I would work on changing it.

Thank you very much, Mr. Chairman, for this hearing.

Chairman KLINE. I thank the gentleman.

I am going to thank the witnesses. A lot of expertise, real knowledge. I appreciate everything that you had to offer. Quite a diversity in experiences and positions here. Somebody who was a top-level college athlete, and then went on to play in the NFL. Has very strong feelings and opinions about these issues, and has pointed out very eloquently, Mr. Eilers, that we have got problems out there, as Mr. Miller, again very passionately, pointed out that need to be addressed.

What brought this hearing together was the actions of a regional director of the National Labor Relations Board, who suggested that these athletes are employees and therefore could, if they chose, vote to join a union. And so we explored some of the possible downsides of that issue, and we heard from witnesses here that talked about how would this deal with class attendance and practice times, attending games, how many games. What about walk-on players, what about universities who are public and don't fall under the *National Labor Relations Act.* And a host, frankly, of potential problems.

And we wanted to get out that, and I very much appreciate the testimony of the witnesses today as we start to explore that. I don't think there is a person on this committee that doesn't agree that we need to address some of those very issues that we talked about and, again, that Mr. Eilers' talked about so eloquently. The question is, is unionization of some sports, some players, and some schools the appropriate tool to get to that end. I think I have been very clear to say that I don't think that it is.

And we need to then focus on, I think, all of us—perhaps in Congress and certainly those of you in the field, as it were, as athletic directors and college presidents and those concerned—to do the sorts of things that Mr. Miller was talking about; that we address these issues. I just don't believe that the sporadic unionization, and no, I am not arguing for a bigger bargaining unit there, Mr. Miller. I just think that the law is the wrong law, it is the wrong tool to use here.

Okay. There being no further business, the committee is adjourned.

[Additional Submissions by Mr. Miller follow:]

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

NORTHWESTERN UNIVERSITY

Employer

and **Case 13-RC-121359**

COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA)

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended ("the Act"), a hearing was held before a hearing officer of the National Labor Relations Board ("the Board"). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated to the undersigned its authority in this proceeding.[1]

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[1]Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings, made at the hearing, are free from prejudicial error and are affirmed.

2. Northwestern University ("the Employer") is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. College Athletes Players Association ("the Petitioner") is a labor organization within the meaning of the Act. At the hearing, the Employer stipulated that the Petitioner was a labor organization if two conditions were met: (1) its football players who receive grant-in-aid scholarships are found to be "employees" within the meaning of the Act; and (2) the petitioned-for-unit was found to be an appropriate unit within the meaning of the Act. I find that both of these conditions have been met. See also *Boston Medical Center*, 330 NLRB 152, 165 (1999) (where Board found that the petitioner was a labor organization since employer's interns, residents, and fellows were employees within the meaning of Section 2(3) of the Act). Further, notwithstanding the Employer's conditional stipulation, I find that the Petitioner is a labor organization within the meaning of the Act for the reasons set forth in Section IV (F) of this decision.

4. The Petitioner claims to represent certain employees of the Employer in the unit described in the petition it filed herein, but the Employer declines to recognize the Petitioner as the collective-bargaining representative of those employees

5. There is no collective-bargaining agreement covering any of the employees in the unit sought in this petition and the parties do not contend that there is any contract bar to this proceeding.
6. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

I. ISSUES

The Petitioner contends that football players ("players") receiving grant-in-aid scholarships ("scholarship") from the Employer are "employees" within the meaning of the Act, and therefore are entitled to choose whether or not to be represented for the purposes of collective-bargaining. The Employer, on the other hand, asserts that its football players receiving grant-in-aid scholarships are not "employees" under the Act. It further asserts that these players are more akin to graduate students in *Brown University*, 342 NLRB 483 (2004), whom the Board found not to be "employees" under the Act.

In the alternative, the Employer contends that its players are temporary employees who are not eligible for collective bargaining.

Finally, the Employer contends that the petitioned-for-unit is arbitrary and not appropriate for bargaining.

II. DECISION

For the reasons discussed in detail below, I find that players receiving scholarships from the Employer are "employees" under Section 2(3) of the Act. Accordingly, **IT IS HEREBY ORDERED** that an election be conducted under the direction of the Regional Director for Region 13 in the following appropriate bargaining unit:

> Eligible to vote are all football players receiving football grant-in-aid scholarship and not having exhausted their playing eligibility employed by the Employer located at 1501 Central Street, Evanston, Illinois, but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

III. STATEMENT OF FACTS

A. Background

The Employer is a private, non-profit, non-sectarian, coeducational teaching university chartered by the State of Illinois, with three campuses, including one located in Evanston, Illinois. It currently has an undergraduate enrollment of about 8,400 students. The academic calendar year for these students is broken down into four quarters: Fall, Winter, Spring, and an optional Summer Session. The schedule for the current academic calendar year shows that classes began on September 24, 2013 and conclude on June 13, 2014.

The Employer maintains an intercollegiate athletic program and is a member of the National Collegiate Athletic Association (NCAA). The NCAA is responsible for formulating and enforcing rules governing intercollegiate sports for participating colleges. The Employer is also a member of the Big Ten Conference and its students compete against the other 11 member schools (as well as non-conference opponents) in various sports. There are currently 19 varsity sports, which the Employer's students can participate in at the Division I level, including 8

varsity sports for men and 11 varsity sports for women. In total, there are about 500 students who compete in one of these sports each year for the Employer.

B. The Employer's Football Staff and Grant-in-Aid Scholarship Players

As part of its athletic program, the Employer has a varsity football team that competes in games against other universities. The team is considered a Football Bowl Subdivision (FBS) Division I program.[2] Since 2006, the head football coach has been Patrick Fitzgerald, Jr., and he has been successful in taking his team to five bowl games. On his football staff, there is a Director of Football Operations, Director of Player Personnel, Director of Player Development, nine full-time assistant coaches, and four graduate assistant coaches who assist him with his various duties. There are also five full-time strength coaches, two full-time video staff employees, two administrative assistants, and various interns who report to him. In turn, Head Coach Fitzgerald reports to Athletic Director James J. Phillips and President Dr. Morton Shapiro.

The Employer's football team is comprised of about 112 players of which there are 85 players who receive football grant-in-aid scholarships that pay for their tuition, fees, room, board, and books.[3] The players on a scholarship typically receive grant-in-aid totaling $61,000 each academic year.[4] The grant-in-aid for the players' tuition, fees and books is not provided directly to them in the form of a stipend as is sometimes done with room and board. Because the Employer's football team has a rule requiring its players to live on campus during their first two years, these players live in a dorm room and are provided a meal card, which allows them to buy food at the school cafeteria. In contrast, the players who are upperclassmen can elect to live off campus, and scholarship players are provided a monthly stipend totaling between $1,200 and $1,600 to cover their living expenses. Under current NCAA regulations, the Employer is prohibited from offering its players additional compensation for playing football at its institution with one exception. The Employer is permitted to provide its players with additional funds out of a "Student Assistance Fund" to cover certain expenses such as health insurance, dress clothes required to be worn by the team while traveling to games, the cost of traveling home for a family member's funeral, and fees for graduate school admittance tests and tutoring.[5] The players do not have FICA taxes withheld from the scholarship monies they receive. Nor do they receive a W-2 tax form from the Employer.

For a number of years, the NCAA rules provided that players could only receive one-year scholarships that were renewable each year at the discretion of the head coach. But effective the 2012-2013 academic year, the NCAA changed its rule to permit universities to offer four-year scholarships to players. The Employer immediately thereafter began to award its recruits four-

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[2] There are currently 120 to 125 universities with collegiate football teams that compete at the FBS Division I level. Seventeen of these universities, including the Employer, are private institutions.

[3] The remainder of the football players on the team are "walk-ons" who do not receive grant-in-aid scholarships, but may receive need-based financial aid to attend the university which is not contingent on them remaining on the football team. This financial aid can be renewed every year if the player qualifies for it. The walk-ons may also eventually earn a grant-in-aid scholarship and this has in fact happened to 21 players within the past seven years.

[4] This figure increases to about $76,000 if a grant-in-aid scholarship player enrolls in classes during the Summer session.

[5] For academic calendar year 2012-2013, the Employer disbursed about $54,000 from this fund to 30 or 35 of its football players.

year scholarships with an option for a fifth year (typically, in the case of a player who "redshirts" their freshmen year).[6] When Head Coach Fitzgerald makes a scholarship offer to a recruit, he provides the individual both a National Letter of Intent and a four-year scholarship offer that is referred to as a "tender". Both documents must be signed by the recruit and the "tender" describes the terms and conditions of the offer.[7] More specifically, it explains to the recruit that, under NCAA's rules, the scholarship can be reduced or canceled during the term of the award if the player: (1) renders himself ineligible from intercollegiate competition; (2) engages in serious misconduct warranting substantial disciplinary action; (3) engages in conduct resulting in criminal charges; (4) abuses team rules as determined by the coach or athletic administration; (5) voluntarily withdraws from the sport at any time for any reason; (6) accepts compensation for participating in an athletic contest in his sport; or (7) agrees to be represented by an agent. The "tender" further explains to the recruit that the scholarship cannot be reduced during the period of the award on the basis of his athletic ability or an injury.[8] By July 1 of each year, the Employer has to inform its players, in writing, if their scholarships will not be renewed. However, the "tender" provides the players the right to appeal this decision.

In cases where Coach Fitzgerald believes that a player may have engaged in conduct that could result in the cancelation of his scholarship, he will speak to individuals within the athletic department. Athletic Director Phillips, after considering any recommendation offered by Fitzgerald, will then determine whether the conduct warrants cancellation of the scholarship. If the player appeals this decision, the player will meet with the Employer's Director of Financial Aid, the Faculty Representative, and a Representative from the Vice President of Student Affairs. It is undisputed that within the past five years, only one player has had his scholarship canceled for engaging in misconduct (shooting a BB gun in a dormitory) and another player had his scholarship canceled for violating the alcohol and drug policy a second time. In both cases, the athletic director asked for, and followed, Fitzgerald's recommendation to cancel the scholarships.

C. The Employer's Football Players are Subject to Special Rules

As has already been alluded to, the Employer's players (both scholarship players and walk-ons) are subject to certain team and athletic department rules set forth, inter alia, in the Team Handbook that is applicable solely to the Employer's players and Northwestern's Athletic Department Handbook. Northwestern's regular student population is not subject to these rules and policies. Specifically, freshmen and sophomore year players receiving scholarships are required to live in on-campus dormitories. Only upperclassmen players are permitted to live off campus and even then they are required to submit their lease to Fitzgerald for his approval before they can enter into it. If players want to obtain outside employment, they must likewise first obtain permission from the athletic department. This is so that the Employer can monitor whether the player is receiving any sort of additional compensation or benefit because of their

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[6] These four year scholarships remain in effect through the end of the players' senior year even if they no longer have any remaining football eligibility.

[7] Once the recruit signs the "tender," its contractual terms are binding on the Employer. However, the recruit is permitted to terminate the "tender" after signing it.

[8] The Employer's own policy is to not cancel a player's scholarship due to injury or position on the team's depth chart as explained in Head Coach Fitzgerald's scholarship offer letter to recruits. If a player has a career ending injury, they are deemed a "medical non-counter" which means that their football scholarship does not count against the NCAA's 85 scholarship limit for Division I football.

athletic ability or reputation.[9] Similarly, players are required to disclose to their coaches detailed information pertaining to the vehicle that they drive. The players must also abide by a social media policy, which restricts what they can post on the internet, including Twitter, Facebook, and Instagram. In fact, the players are prohibited from denying a coach's "friend" request and the former's postings are monitored. The Employer prohibits players from giving media interviews unless they are directed to participate in interviews that are arranged by the Athletic Department. Players are prohibited from swearing in public, and if a player "embarrasses" the team, he can be suspended for one game. A second offense of this nature can result in a suspension up to one year. Players who transfer to another school to play football must sit out a year before they can compete for the new school. Players are prohibited from profiting off their image or reputation, including the selling of merchandise and autographs. Players are also required to sign a release permitting the Employer and the Big Ten Conference to utilize their name, likeness and image for any purpose.[10] The players are subject to strict drug and alcohol policies and must sign a release making themselves subject to drug testing by the Employer, Big Ten Conference, and NCAA. The players are subject to anti-hazing and anti-gambling policies as well.

During the regular season, the players are required to wear a suit to home games and team issued travel sweats when traveling to an away football game. They are also required to remain within a six-hour radius of campus prior to football games. If players are late to practice, they have to attend one hour of study hall on consecutive days for each minute they were tardy. Players may also be required to run laps for violating less egregious team rules. Even the players' academic lives are controlled as evidenced by the fact that they are required to attend study hall if they fail to maintain a certain grade point average (GPA) in their classes. And irrespective of their GPA, all freshmen players must attend six hours of study hall each week.

D. Football Players' Time Commitment to Their Sport

The first week in August, the scholarship and walk-on players begin their football season with a month-long training camp, which is considered the most demanding part of the season. In training camp (and the remainder of the calendar year), the coaching staff prepares and provides the players with daily itineraries that detail which football-related activities they are required to attend and participate in. The itineraries likewise delineate when the players are to eat their meals and receive any necessary medical treatment. For example, the daily itinerary for the first day of training camp in 2012 shows that the athletic training room was open from 6:30 a.m. to 8:00 a.m. so the players could receive medical treatment and rehabilitate any lingering injuries. Because of the physical nature of football, many players were in the training room during these hours. At the same time, the players had breakfast made available to them at the N Club. From 8:00 a.m. to 8:30 a.m., any players who missed a summer workout (discussed below) or who were otherwise deemed unfit by the coaches were required to complete a fitness test. The players were then separated by position and required to attend position meetings from 8:30 am.

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[9] If the Employer is found to be in violation of NCAA regulations, it can be penalized by the imposition of practice limitations, scholarship reductions, public reprimands, fines, coach suspensions, personnel limitations, and postseason prohibitions.

[10] It is undisputed that the Employer sells merchandise to the public, such as football jerseys with a player's name and number, that may or may not be autographed by the player.

to 11:00 a.m. so that they could begin to install their plays and work on basic football fundamentals. The players were also required to watch film of their prior practices at this time. Following these meetings, the players had a walk-thru from 11:00 a.m. to 12:00 p.m. at which time they scripted and ran football plays. The players then had a one-hour lunch during which time they could go to the athletic training room, if they needed medical treatment. From 1:00 p.m. to 4:00 p.m., the players had additional meetings that they were required to attend. Afterwards, at 4:00 p.m., they practiced until team dinner, which was held from 6:30 p.m. to 8:00 p.m. at the N Club. The team then had additional position and team meetings for a couple of more hours. At 10:30 p.m., the players were expected to be in bed ("lights out") since they had a full day of football activities and meetings throughout each day of training camp. After about a week of training camp on campus, the Employer's football team made their annual trek to Kenosha, Wisconsin for the remainder of their training camp where the players continued to devote 50 to 60 hours per week on football related activities.

After training camp, the Employer's football team starts its regular season which consists of 12 games played against other colleges, usually played on Saturdays, between the beginning of September and the end of November. During this time, the players devote 40 to 50 hours per week to football-related activities, including travel to and from their scheduled games.[11] During each Monday of the practice week, injured players must report to the athletic training room to receive medical treatment starting at about 6:15 a.m. Afterwards, the football coaches require the players to attend mandatory meetings so that they can begin to install the game plan for their upcoming opponent. However, the only physical activity the coaches expect the players to engage in during this day is weightlifting since they are still recovering from their previous game. The next several days of the week (Tuesday through Thursday), injured players must report to the athletic training room before practice to continue to receive medical treatment. The coaches require all the players to attend mandatory practices and participate in various football-related activities in pads and helmets from about 7:50 a.m. until 11:50 a.m.[12] In addition, the players must attend various team and position meetings during this time period. Upon completion of these practices and meetings, the scholarship players attend a mandatory "training table" at the N Club where they receive food to assist them in their recovery. Attendance is taken at these meals and food is only provided to scholarship players and those walk-ons who choose to pay for it out of their own pocket.[13]

Because NCAA rules limit the players' CARA hours to four per day, the coaches are not permitted to compel the players to practice again later in the day. The players, however,

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[11] NCAA rules limit "countable athletically related activities" (CARA) to 20 hours per week from the first regular season game until the final regular season game (or until the end of the Employer's Fall quarter in the event it qualifies for a Bowl game). The CARA total also cannot exceed four hours per day and the players are required to have one day off every week. However, the fact that the players devote well over 20 actual hours per week on football-related activities does not violate the NCAA's CARA limitations since numerous activities such as travel, mandatory training meetings, voluntary weight conditioning or strength training, medical check-ins, training tape review and required attendance at "training table" are not counted by the NCAA. In the same vein, NCAA limits players to 20 CARA hours during Spring football practice and 8 CARA hours during the remainder of the off-season.

[12] After the classes begin in late September, the football practices are moved up one hour.

[13] To avoid providing an additional benefit to the scholarship players, the Employer will reduce the monthly stipend of any upperclassmen living off campus by about $13 for each "training table."

regularly hold 7-on-7 drills (which involve throwing the football without the participation of the team's offensive and defensive linemen) outside the presence of their coaches. To avoid violating the NCAA's CARA limitations, these drills are scheduled by the quarterback and held in the football team's indoor facility in the evening. A student athletic trainer is also present for these drills to provide medical assistance, if necessary. In the same way, around 8:00 p.m., the players will go to their coaches' offices to watch film on their own for up to a couple of hours.[14]

During the regular competition season, the players' schedule is different on Friday than other days of the week because it is typically a travel day. For home games, the team will initially meet at 3:00 p.m. and have a series of meetings, walk-thrus and film sessions until about 6:00 p.m. The team will then take a bus to a local hotel where the players will be required to have a team dinner and stay overnight. In the evening, the players have the option of attending chapel and then watching a movie. At the conclusion of the movie, the players have a team breakdown meeting at 9:00 p.m. before going to bed.

About half of the games require the players to travel to another university, either by bus or airplane. In the case of an away game against the University of Michigan football team on November 9, 2012,[15] the majority of players were required to report to the N Club by 8:20 a.m. for breakfast. At 8:45 a.m., the offensive and defensive coaches directed a walk-thru for their respective squads. The team then boarded their buses at 10:00 a.m. and traveled about five hours to Ann Arbor, Michigan.[16] At 4:30 p.m. (EST), after arriving at Michigan's campus, the players did a stadium walk-thru and then had position meetings from 5:00 p.m. to 6:00 p.m. The coaches thereafter had the team follow a similar schedule as the home games with a team dinner, optional chapel, and a team movie. The players were once again expected to be in bed by 10:30 p.m.

On Saturday, the day of the Michigan game, the players received a wake-up call at 7:30 a.m. and were required to meet for breakfast in a coat and tie by no later than 8:05 a.m. The team then had 20 minutes of meetings before boarding a bus and departing for the stadium at 8:45 a.m. Upon arriving at the stadium, the players changed into their workout clothes and stretched for a period of time. They afterwards headed to the training room to get taped up, receive any medical treatment, and put on their football gear. About 65 minutes before kickoff, the players took the field and did additional stretches and otherwise warmed-up for the game. At noon, the game kicked off and Head Coach Fitzgerald, in consultation with his assistant coaches, was responsible for determining the starting lineup and which substitutions would be made during the course of the game. While most games normally last about three hours, this one lasted about four hours since it went into overtime. Following the game, the coaches met with the players, and some of those individuals were made available to the media for post-game interviews by the Employer's athletic department staff. Other players had to receive medical

[14] The players watch film of their past games and critique their performance and similarly watch film of an upcoming opponent's prior games to try to gain a competitive advantage.

[15] It is undisputed that the travel itinerary for the Michigan game accurately reflects the players' required time commitment on Friday and Saturday when playing an away game.

[16] The football team's handbook states that "when we travel, we are traveling for one reason: to WIN a football game. We will focus all of our energy on winning the game." However, the players are permitted to spend two or three hours studying for their classes while traveling to a game as long as they, in the words of Head Coach Fitzgerald "get their mind right to get ready to play."

treatment and eventually everyone on the roster changed back into their travel clothes before getting on the bus for the five hour drive back to the Evanston campus. At around 9:00 or 10:00 p.m., the players arrived at the campus.[17]

Although no mandatory practices are scheduled on Sunday following that week's football game, the players are required to report to the team's athletic trainers for a mandatory injury check. Those players who sustained injuries in the game will receive medical treatment at the football facility.

In the years that the team qualifies for a Bowl game, the season will be extended another month such that the players are practicing during the month of December in preparation for their Bowl game – which is usually played in early January. The coaches expect the players to devote the same amount of hours on their football duties during the postseason (40 to 50 hours per week), with one key difference being that the players are no longer taking classes since the academic quarter ends in mid-December.[18] While the players are allowed to leave campus for several days before Christmas, they must report back by Christmas morning. To ensure that the players abide by this schedule, they are required to give their flight itinerary to their position coaches before leaving campus.[19]

Following the Bowl game, there is a two-week discretionary period where the players have the option to go into the weight room to workout.[20] While the weight room is next to the football coaches' offices, NCAA rules prohibit coaches from conducting the players' workouts during this discretionary period. While the Employer's strength and conditioning coaches are allowed to monitor these workouts, various team leaders, including those players on the team leadership council,[21] attempt to ensure that attendance is high at these optional workouts during this and the eight other discretionary weeks throughout the year.

In mid-January, the players begin a one-month period of winter workouts during, which they spend about one hour running and doing agility drills and another hour lifting weights four or five days per week. These mandatory workouts are conducted by the football team's strength and conditioning coaches as they critique each individual player's attitude and performance. During this time the players also receive medical treatment for any ailments or injuries. This treatment could take the form of something as simple as getting into a cold tub or having their ankles taped. As is done in the regular season, the scholarship players are required to attend

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[17] Although the players devoted more than 24 hours on Friday and Saturday to travel and football related activities, this only constituted 4.8 CARA hours under the NCAA's guidelines. In fact, the entire game day constituted only three CARA hours under these guidelines.

[18] The players who are living on campus must also move into a hotel since the dorms are closed after final exams are completed.

[19] The players are also required to give their flight itineraries to their position coaches at other times of the year when they desire to fly home.

[20] Between January 1 and the beginning of preseason practice, the NCAA rules mandate that players be provided a total of nine discretionary weeks.

[21] Each season, the football team has a "leadership council" which consists of freshmen, sophomore, junior, and senior players who were voted on by their teammates. These players meet with Coach Fitzgerald and discuss any issues that arise on the team. However, Fitzgerald retains the final decision on all matters raised.

mandatory "training table" after their workouts. In total, the players devote about 12 to 15 hours per week on these workouts.

In mid-February, the players have a one-week period referred to as "Winning Edge" which serves as a transition to Spring football. During this week, the football coaches separate the players into smaller groups and require them to compete with one another in various types of demanding competitions to test their levels of conditioning. The coaches also have the players lift weights in between these scheduled competitions. Overall, the players can expect to spend 15 to 20 hours on this week's mandatory activities.

From the conclusion of the "Winning Edge" until about mid-April, the players participate in Spring football which requires them to devote about 20 to 25 hours per week. In this period, the players wear their pads and helmets and resume practicing football skills. The football coaches also require the players to attend scheduled meetings so they can reinstall their offense and defense for the upcoming season. The players are similarly required to watch film of each day's practice to assist in their development while in these meetings. In addition, the coaches will designate times when the players must lift weights and improve their conditioning. This important two-month period serves as an opportunity for the players to impress their coaches and move up on the depth charts in the various positions they are competing for. At the conclusion of Spring football, the team holds its annual Spring game which is basically a scrimmage between the current eligible players.

Following the conclusion of Spring football, the players have a discretionary week in which there is no expectation that they remain on campus and train. The players then return to campus and begin Spring workouts, which are conducted by the strength and conditioning coaches. These mandatory workouts are similar to those performed in the winter and involve one hour of running and another hour of weightlifting. Besides one discretionary week in the first week in May, the workouts continue until about the beginning of June when the academic year ends.

At the end of the academic year, the players will return to their respective homes for a couple of weeks (which are discretionary weeks) before being required to report back to campus for Summer workouts, which are once again conducted by the strength and conditioning coaches. The team leaders will also use this time to teach the team's offense and defense to incoming freshmen. In fact, the players participate in 7-on-7 drills from 7:00 p.m. to 10:00 p.m., two times per week and watch film as part of their preparation for the upcoming season. In total, both the upperclassmen and incoming freshmen devote 20 to 25 hours per week on summer workouts before the start of training camp.

E. The Recruitment and Academic Life of the Employer's Grant-in-Aid Scholarship Players

The record makes clear that the Employer's scholarship players are identified and recruited in the first instance because of their football prowess and not because of their academic achievement in high school. Only after the Employer's football program becomes interested in a high school player based on the potential benefit he might add to the Employer's football

program does the potential candidate get vetted through the Employer's recruiting and admissions process.

Regarding the Employer's recruitment process, after a potential player comes to the attention of the Employer's football program, Coach Fitzgerald becomes involved. One of Fitzgerald's busiest recruiting periods is in September when he is permitted to evaluate recruits at their respective high schools and attend their football games to observe their football ability first hand. In December and January, he is also permitted to have one in-home visit with each recruit. These home visits provide him the opportunity to explain to the recruit and their parents what it means to be a student-athlete at the Employer. More specifically, Fitzgerald will explain how they will have the opportunity to take certain classes, receive academic and social support, and have certain responsibilities as players. Fitzgerald's assistant coaches are likewise involved in recruiting and can visit recruits at their high schools in April and May. The coaches are also permitted to have six in-home visits with each recruit in December and January. As part of this initial process, after the football staff identifies candidates they are interested in, information regarding a potential recruit's high school transcript, standardized test scores, letters of recommendation and senior class schedule are presented to the Employer's Admission Office to evaluate potential recruits for pre-admission to the University.

During the recruiting process, the Employer's football coaches are not permitted to have direct contact with the Admissions Office so that Christopher Watson, the Dean of Undergraduate Admissions, does not feel pressured to pre-approve a recruit for admission. Head Coach Fitzgerald must instead speak to Janna Blais, who is the Deputy Director of Athletics for Student-Athlete Welfare. She reviews the recruit's high school transcript, standardized test scores, letters of recommendation, and senior year class schedule before making an initial determination as to whether he can be academically successful. If Blais believes the recruit meets this standard, she will speak to and obtain a final decision from Watson concerning that recruit.[22] If the recruit is pre-approved for admission, he completes the formal admissions application with the understanding that he will be admitted as long as his academic record is maintained. However, some recruits are not deemed admissible such that the coaches will have to cease recruiting that individual.

After being pre-approved for admission, recruits selected to receive an offer of scholarship are informed of their pre-admission via letter by Coach Fitzgerald notifying the potential players:

> "CONGRATULATIONS, the Northwestern Football Staff and I would like to offer you a full scholarship… You possess the talent and embody the characteristics and values necessary to succeed at Northwestern University as a student-athlete on our football team."

Subsequently, the Employer extends formal tender offers to recruits which must formally accept and execute. The offers specifically set forth the terms and conditions of the Athletic Tender

[22] According to Blais, there are no written guidelines in terms of a minimum GPA or standardized test score that a football recruit must have to gain admission to the University. She testified that the lowest GPA for a football recruit that she recalled discussing with the admissions office was 2.78 (on scale of 4.0).

Agreement governing the grant of the scholarship. Moreover, the offers provide players with detailed information concerning the duration and conditions under which their scholarship will be continued and includes the explicit admonition that the "tender may be immediately reduced or cancelled during the term of this award per NCAA Bylaw 15.3.4.2" if the player renders himself ineligible for intercollegiate competition; and/or voluntarily withdraws from a sport at any time for any reason.

Further, to be eligible to play on the football team, the players must be: (1) enrolled as full-time students; (2) making adequate progress towards obtaining their degree; and (3) maintain a minimum GPA. For players entering their second year of school, they must pass 36 quarter hours and have a 1.8 GPA. For players entering their third year of school, they must have 40% of their degree applicable units completed and a 1.9 GPA. For players entering their fourth year of school, they must have 60% of their degree applicable units completed and a 2.0 GPA. For players entering their fifth year of school, they must have 80% of their degree applicable units completed and a 2.0 GPA. For this reason, players normally take three to four courses during the Fall, Winter, and Spring Quarters.[23] The players spend about 20 hours per week attending classes each week. The players also have to spend time completing their homework and preparing for exams. Significantly, the players do not receive any academic credit for their playing football and none of their coaches are members of the academic faculty.

According to senior quarterback Kain Colter, following a successful high school football career, the Employer admitted him due to his football skills as his academic record was "decent." He also testified that he based his decision to attend Northwestern on football considerations (i.e. they were going to let him play quarterback). But he still had aspirations of going to medical school and attempted to take a required chemistry class in his sophomore year. At that time, Colter testified that his coaches and advisors discouraged him from taking the class because it conflicted with morning football practices. Colter consequently had to take this class in the Summer session, which caused him to fall behind his classmates who were pursuing the same pre-med major. Ultimately he decided to switch his major to psychology which he believed to be less demanding.

Colter further testified that those players receiving scholarships were not permitted to miss football practice during the regular season if they had a class conflict. On the other hand, walk-ons were permitted to leave practice a little early in order to make it to class.[24] This continued in the Spring with scholarship players being told by their coaches and academic/athletic advisors that they could not take any classes that started before 11:00 a.m. as they would conflict with practice. Even during the Summer session, players were generally only permitted to enroll in classes that were 6 weeks long since the classes that were 8 weeks long would conflict with the start of training camp.

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[23] At most, the players only take one or two classes during the Summer session.

[24] During his redshirt sophomore year, walk-on Pace was permitted by Fitzgerald to leave practice early once he had completed his long snapper duties in order to attend a 9:00 a.m. class. This was contingent on Pace returning later in the day to perform his individual drill work. The following year, Pace was also permitted to leave practice early as he had an 11:00 a.m. class. However, scholarship player Ward never took any classes that conflicted with practice during the regular season.

In contrast, Blais and Fitzgerald testified that, if a player had to take a class required for their degree that conflicted with practice, Cody Cejeda (Director of Football Operations) would pull them out of practice about 30 minutes early and provide them a ride to class along with a to-go meal.[25] Fitzgerald also testified that he never told any player that they could not leave practice early because of a class conflict. In addition, if a large number of players had the same class conflict, Fitzgerald testified that he would sometimes move the practice time up to accommodate the class. He cited one Friday during a bye week when he moved up practice for this very reason. Scholarship player Ward corroborated this testimony by citing an example where he and other players had an early class during Spring practice in 2011 so practice was moved up to avoid the conflict.

The Employer's Student-Athlete Handbook states that players' academics must take precedence over athletics. For this reason, the Employer attempts to assist the players with their academics by having: (1) study tables; (2) tutor programs; (3) class attendance policies; (4) travel policies which restrict players from being off campus 48 hours prior to finals; and (5) a policy prohibiting players from missing more than five classes in a quarter due to games. In situations where a player has a game that conflicts with a test or quiz, the player will talk to the professor about the possibility of taking it at some other time. If the professor refuses, the Associate Athletic Director for Academics and Student Development will then speak to the professor and inquire if the test or quiz can be taken at the institution where the game is being held. Generally, the professors are willing to make some type of accommodation for the player. On one occasion, however, during the 2013 regular season, a professor refused to that, which resulted in the Employer holding back one bus so that seven players could take a quiz and then travel to the football game against the University of Iowa.[26] On another occasion last year, Fitzgerald also attempted to accommodate a scholarship player's academic work by permitting him to miss a week of practice and the game against the University of Nebraska. However, no other examples were provided of scholarship players being permitted to miss entire practices and/or games to attend to their studies.

In addition, the Employer's athletic department has student development programs which are referred to as NU P.R.I.D.E. These programs are meant to help the students "find personal success through service to the campus and their community while enhancing their leadership skills, celebrating diversity, and promoting student-athlete welfare through meaningful programming." More specifically, they consist of: (1) Student-Athlete Advisory Committee; (2) P.U.R.P.L.E. Peer Mentor program; (3) Freshmen Year Experiences (F.Y.E.) program; (4) Engage; (5) NU P.R.I.D.E. Program Speaker Series; and (6) P.R.I.D.E. challenge. There is likewise a mandatory four-year NU For Life Program which is designed to assist student-athletes with their professional development so they are able to excel in their chosen field upon completion of their degree.[27] But the players do not receive academic credit for participating in these programs.

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[25] In the Fall Quarter of 2012, there were about eight players who had classes that conflicted with practice. But only one of them was on a football scholarship at the time.

[26] The record does not reveal whether any of these players were receiving a football scholarship at the time.

[27] Following their sophomore year, the football players are also assigned a mentor who is an alumni of the team.

It should be noted that the players have a cumulative grade point average of 3.024 and a 97% graduation rate. The players likewise have an Academic Progress Rate (APR) of 996 out of 1000.[28] The players' graduation rate and their APR both rank first in the country among football teams. In addition, the players have about 20 different declared majors, with some of them going on to medical school, law school, and careers in the engineering field after receiving their undergraduate degree.

F. The Revenues and Expenses Generated by the Employer's Football Program

The Employer's football team generates revenue in various ways including: (1) ticket sales; (2) television broadcast contracts with various networks; and (3) the sale of football team merchandise. The Employer reported to the Department of Education that its football team generated total revenues of $235 million and incurred total expenses of $159 million between 2003 and 2012.[29] For the 2012-2013 academic year, the Employer reported that its football program generated $30.1 million in revenue and $21.7 million in expenses. However, the latter figure does not include costs to maintain the stadium which total between $250,000 and $500,000 per calendar year. In addition, the profit realized from the football team's annual revenue is utilized to subsidize the Employer's non-revenue generating sports (i.e. all the other varsity sports with the exception of men's basketball). This, in turn, assists the Employer in ensuring that it offers a proportionate number of men's and women's varsity sports in compliance with Title IX of the Education Amendments of 1972.

IV. DISCUSSION AND ANALYSIS

A. The Burden Of Proof

A party seeking to exclude an otherwise eligible employee from the coverage of the Act bears the burden of establishing a justification for the exclusion.[30] Accordingly, it was the Employer's burden to justify denying its scholarship football players employee status. I find that the Employer failed to carry its burden.

B. The Applicable Legal Standard

Section 2(3) of the Act provides in relevant part that the "term 'employee' shall include any employee . . . " The U.S. Supreme Court has held that in applying this broad definition of "employee" it is necessary to consider the common law definition of "employee." *NLRB v. Town & Country Electric*, 516 U.S. 85, 94 (1995). Under the common law definition, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment. *Brown University*, 342 NLRB 483, 490, fn. 27 (2004) (citing *NLRB v. Town & Country Electric*, 516 U.S. at 94). See also

[28] APR refers to a university's retention of its student-athletes and the eligibility of its student-athletes on each team.
[29] These revenue and expense figures are adjusted for inflation.
[30] See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001) (party seeking to exclude alleged supervisors bears burden of proof); *Montefiore Hospital and Medical Center*, 261 NLRB 569, 572 fn. 17 (1982) (party seeking to exclude alleged managers must "come forward with the evidence necessary to establish such exclusion"); *BKN, Inc.*, 333 NLRB 143, 144 (2001) (independent contractors); *AgriGeneral, L.P.*, 325 NLRB 972 (1998) (agricultural employees).

RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958). As a result, the Board has subsequently applied the common law test to determine that individuals are indeed statutory employees. See e.g., *Seattle Opera v. NLRB*, 292 F.3d 757, 761-62 (D.C. Cir. 2002), enfg. 331 NLRB 1072 (2000) (holding that opera's auxiliary choristers are statutory employees).

As the record demonstrates, players receiving scholarships to perform football-related services for the Employer under a contract for hire in return for compensation are subject to the Employer's control and are therefore employees within the meaning of the Act.

1. Grant-in-Aid Scholarship Football Players Perform Services for the Benefit of the Employer for Which They Receive Compensation

Clearly, the Employer's players perform valuable services for their Employer. Monetarily, the Employer's football program generated revenues of approximately $235 million during the nine year period 2003 – 2012 through its participation in the NCAA Division I and Big Ten Conference that were generated through ticket sales, television contracts, merchandise sales and licensing agreements. The Employer was able to utilize this economic benefit provided by the services of its football team in any manner it chose. Less quantifiable but also of great benefit to the Employer is the immeasurable positive impact to Northwestern's reputation a winning football team may have on alumni giving and increase in number of applicants for enrollment at the University.

Understandably, the goal of the football program is to field the most competitive team possible. To further this end, players on scholarship are initially sought out, recruited and ultimately granted scholarships because of their athletic prowess on the football field. Thus, it is clear that the scholarships the players receive is compensation for the athletic services they perform for the Employer throughout the calendar year, but especially during the regular season and postseason. That the scholarships are a transfer of economic value is evident from the fact that the Employer pays for the players' tuition, fees, room, board, and books for up to five years. Indeed, the monetary value of these scholarships totals as much as $76,000 per calendar year and results in each player receiving total compensation in excess of one quarter of a million dollars throughout the four or five years they perform football duties for the Employer. While it is true that the players do not receive a paycheck in the traditional sense, they nevertheless receive a substantial economic benefit for playing football. And those players who elect to live off campus receive part of their scholarship in the form of a monthly stipend well over $1,000 that can be used to pay their living expenses. The fact that the Employer does not treat these scholarships or stipends as taxable income is not dispositive of whether it is compensation. See *Seattle Opera v. NLRB*, 292 F.3d at 764, fn. 8.

Equally important, the type of compensation that is provided to the players is set forth in a "tender" that they are required to sign before the beginning of each period of the scholarship. This "tender" serves as an employment contract and also gives the players detailed information concerning the duration and conditions under which the compensation will be provided to them. Because NCAA rules do not permit the players to receive any additional compensation or otherwise profit from their athletic ability and/or reputation, the scholarship players are truly dependent on their scholarships to pay for basic necessities, including food and shelter. Another

consequence of this rule is that all of the players generally receive the same compensation for their services. In other words, the team's best scholarship player is paid as much as any other member of the Employer's football team receiving a scholarship. However, this undeniable fact does not mean that the compensation provided to either player is not a significant transfer of economic value to them. This is especially true given the nature of football and the foreseeable injuries that will occur during the season which can result in backup players assuming starting roles.

In addition, it is clear that the scholarships that players receive are in exchange for the athletic services being performed. Unlike other universities, the Employer, a couple of years ago, decided to move from one-year renewable scholarships to four-year scholarships. This certainly might make the players feel less pressure to perform on the field so as to avoid having their scholarship possibly not renewed for another year.[31] But the fact remains that the Head Coach of the football team, in consultation with the athletic department, can immediately reduce or cancel the players' scholarship for a variety of reasons. Indeed, the scholarship is clearly tied to the player's performance of athletic services as evidenced by the fact that scholarships can be immediately canceled if the player voluntarily withdraws from the team or abuses team rules. Although only two players have had the misfortune of losing their scholarships during the past five years, the threat nevertheless hangs over the entire team and provides a powerful incentive for them to attend practices and games, as well as abide by all the rules they are subject to.

2. Grant-in-Aid Scholarship Football Players are Subject to the Employer's Control in the Performance of Their Duties as Football Players

In the instant case, the record establishes that the players who receive scholarships are under strict and exacting control by their Employer throughout the entire year. Commencing with training camp which begins approximately six weeks before the start of the academic year, the coaches exercise a great deal of control over the players. This is evidenced by the fact that the coaches prepare and provide daily itineraries to the players which set forth, hour by hour, what football related activities the players are to engage in from as early as 5:45 a.m. until 10:30 p.m., when they are expected to be in bed.[32] Not surprisingly, the players spend 50 to 60 hours per week engaging in football-related activities during training camp. In addition, the location, duration, and manner in which the players carry out their football duties are all within the control of the football coaches.

When the regular football season begins, the players do not commence classes for another few weeks so they are still able to devote 40 to 50 hours per week on football related activities. Apart from their practices, meetings, film sessions, and workouts, the players must now also compete in football games against other colleges on Saturdays. These games are clearly a large time commitment for the players regardless of whether it is a home or an away game. In fact, if the team is playing an away game, it is not unusual for the players to have to spend 25 hours over

[31] While Head Coach Fitzgerald's scholarship offer letter to recruits states that players will not lose their scholarship due to injury or position on the team's depth chart, even star quarterback Kain Colter testified that he feared that he might lose his scholarship if he slacked off in his football duties.
[32] Even the players' meals must be eaten at certain times.

a two day period traveling to and from the game, attending practices and meetings, and competing in the game. The team's handbook also makes it clear that the players are "traveling for one reason: to WIN a football game." And of course, the coaches have control over where the team will spend the night before the game (which is done for both home and away games), the travel itinerary which spells out in detail what will occur throughout the trip, the players' dress attire while in travel status, and which players will play in the game and to what extent. While the NCAA limits CARA hours to 20 per week once the academic year begins, the evidence establishes that the players continue to devote 40 to 50 hours per week to their football duties all the way through to the end of the season, which could last until early January.[33]

The football coaches are able to maintain control over the players by monitoring their adherence to NCAA and team rules and disciplining them for any violations that occur. If a player arrives late to practice, they must attend one hour of study hall on consecutive days for each minute they were tardy. The players must also run laps for violating minor team rules. And in instances where a player repeatedly misses practices and/or games, he may be deemed to have voluntarily withdrawn from the team and will lose his scholarship. In the same way, a player who violates a more egregious rule stands to lose his scholarship or be suspended from participating in games.

In addition, the coaches have control over nearly every aspect of the players' private lives by virtue of the fact that there are many rules that they must follow under threat of discipline and/or the loss of a scholarship. The players have restrictions placed on them and/or have to obtain permission from the coaches before they can: (1) make their living arrangements; (2) apply for outside employment;[34] (3) drive personal vehicles; (4) travel off campus; (5) post items on the Internet; (6) speak to the media; (7) use alcohol and drugs; and (8) engage in gambling. The fact that some of these rules are put in place to protect the players and the Employer from running afoul of NCAA rules does not detract from the amount of control the coaches exert over the players' daily lives.

While the football coaches, and the Employer as a whole, appear to value the players' academic education, it is clear that the players are controlled to such a degree that it does impact their academic pursuits to a certain extent. This appears to be especially true for the scholarships players as they are sometimes unable to take courses in a certain academic quarters due to conflicts with scheduled practices. The players must also sometimes miss classes due to conflicts with travel to football games, notwithstanding the Employer's laudable efforts to minimize this from occurring. To try to ensure that its players succeed academically, the Employer requires freshmen players (and sometimes upperclassmen) to attend study hall six hours per week and all the players have tutoring and advisory programs that are not available to regular students. Players are likewise required to participate in a four-year NU For Life Program which is meant to further their professional development once they graduate. However, these noble efforts by the Employer, in some ways only further highlight how pervasively the players' lives are controlled when they accept a football scholarship. The special assistance that the

[33] The football coaches' control over the players even extends to the off-season since the latter are expected to devote 12 to 25 hours per week on football related activities.

[34] The players are also prohibited from profiting off their image or reputation, including the selling of merchandise and autographs.

Employer must provide to the players so that they can succeed academically (or at least, maintain the required minimum grade point average and make adequate progress towards obtaining their degrees) likewise shows the extraordinary time demands placed on the players by their athletic duties.

3. The Employer's Grant-in-Aid Scholarship Players are Employees Under the Common Law Definition

In sum, based on the entire record in this case, I find that the Employer's football players who receive scholarships fall squarely within the Act's broad definition of "employee" when one considers the common law definition of "employee." However, I find that the walk-ons do not meet the definition of "employee" for the fundamental reason that they do not receive compensation for the athletic services that they perform. Unlike the scholarship players, the walk-ons do not sign a "tender" or otherwise enter into any type of employment contract with the Employer. The walk-ons also appear to be permitted a greater amount of flexibility by the football coaches when it comes to missing portions of practices and workouts during the football season if they conflict with their class schedule. In this regard, it is noted that both scholarship players who testified, Colter and Ward, testified that they did not enroll in classes that conflicted with their football commitments. This distinction is not surprising given that the players are compelled by the terms of their "tender" to remain on the team and participate in all its activities in order to maintain their scholarship.

The walk-ons, on the other hand, have nothing tying them to the football team except their "love of the game" and the strong camaraderie that exists among the players. That some of the walk-ons may also have aspirations of earning a football scholarship does not change the fact that they do not receive any compensation at that point in their collegiate football careers. Thus, the mere fact that they practice (and sometimes play) alongside the scholarship players is insufficient to meet the definition of "employee." However, if a walk-on were to be awarded a scholarship at some later point, they would then be an "employee" within the meaning of the Act and would be included in the unit. Finally, to ensure that only those players who actually meet the definition of "employee" are included in the unit, I conclude that only players who are currently receiving scholarships <u>and</u> who have not exhausted their four years (or five years, in the case of a "redshirt" player) of NCAA playing eligibility will be eligible to vote.[35] This will serve to exclude from the unit those players whose playing eligibility was exhausted at the conclusion of the 2013 regular football season. In the same way, incoming freshmen

[35] The mere fact that a football player enjoys nine discretionary weeks during the course of the calendar year will not provide a basis for excluding them from the unit since these are properly viewed as vacation weeks (during which the player may nevertheless feel compelled to perform football related activities to improve his skills). Importantly, while some activities during both on and off season such as additional conditioning, weight training and review of game tapes may not be directly mandated to maintain their scholarships and place on the team, such voluntary activity undertaken by football players in order to field a winning team, obtain a starting position or otherwise excel in this their chosen field is akin to the non-paid activities of an actor rehearsing lines or musicians practicing their instrument on their own time to enhance their performance in a commercial production. When these activities are included, it is clear scholarship players devote the bulk of their time and energy towards the football services they provide their Employer.

players will be excluded from the unit until they began to perform athletic services for the Employer in exchange for the compensation set forth in their "tender."

C. *Brown University* is not Applicable

In its brief, the Employer contends that the Employer's football players who receive scholarships are not employees because they do not meet the statutory definition of "employee" articulated in *Brown University*, 342 NLRB 483 (2004). The Union, however, argues that the *Brown University* decision does not control whether the grant-in-aid players are employees. In *Brown University*, the Board found that graduate assistants were not "employees" after considering four factors: (1) the status of graduate assistants as students; (2) the role of the graduate student assistantships in graduate education; (3) the graduate student assistants' relationship with the faculty; and (4) the financial support they receive to attend Brown University. In applying those factors, the Board concluded that the overall relationship between the graduate assistants and their university was primarily an educational one, rather than economic one. Although I find that this statutory test is inapplicable in the instant case because the players' football-related duties are unrelated to their academic studies unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements, for the reasons discussed below the outcome would not change even after applying the four factors to the facts of this case.

1. The Employer's Grant-in-Aid Scholarship Football Players are not "Primarily Students"

The first factor that the Board considered in *Brown University* was the fact that all the graduate assistants were enrolled as students and that their purported employment status was contingent on their enrollment. *Id.* at 488. But this alone was not dispositive because the Board went on to consider the amount of time the graduate assistants spent on their educational studies as opposed to their work duties. In finding that they were "primarily students," the Board held that "students serving as graduate student assistants spend only a limited number of hours performing their duties, and it is beyond dispute that their principal time commitment at Brown is focused on obtaining a degree and, thus, being a student." *Id.*

In contrast, in the instant case it cannot be said the Employer's scholarship players are "primarily students." The players spend 50 to 60 hours per week on their football duties during a one-month training camp prior to the start of the academic year and an additional 40 to 50 hours per week on those duties during the three or four month football season. Not only is this more hours than many undisputed full-time employees work at their jobs, it is also many more hours than the players spend on their studies. In fact, the players do not attend academic classes while in training camp or the first few weeks of the regular season. After the academic year begins, the players still continue to devote 40 to 50 hours per week on football-related activities while only spending about 20 hours per week attending classes. Obviously, the players are also required to spend time studying and completing their homework as they have to spend time practicing their football skills even without the direct orders of their coaches. But it cannot be said that they are "primarily students" who "spend only a limited number of hours performing their athletic duties."

2. Grant-in-Aid Scholarship Football Players' Athletic Duties do not Constitute a Core Element of Their Educational Degree Requirements

The second factor that the Board considered in *Brown University* was the extent to which the graduate assistants' teaching and research duties constituted a core element of their graduate degree requirements. *Id.* at 488-89. The Board found that the graduate assistants received both academic credit for performing their duties, and for the substantial majority, these duties were a requirement for them to be able to obtain their graduate degree. *Id.* Due to the fact that the graduate assistants' duties were directly related to their educational requirements, it was determined that their relationship with the university was an academic one as opposed to an economic one. *Id.*

In this case, it is undisputed that the Employer's scholarship players do not receive any academic credit for playing football. They are also not required to play football in order to obtain their undergraduate degree, regardless of which major they pursue. The fact that the players undoubtedly learn great life lessons from participating on the football team and take with them important values such as character, dedication, perseverance, and team work, is insufficient to show that their relationship with the Employer is primarily an academic one. Indeed, as already discussed above, this relationship is an economic one that involves the transfer of great sums of money to the players in the form of scholarships. The Employer expends between $61,000 and $76,000 per scholarship per year or in other words over five million dollars per year for the 85 scholarships.

3. The Employer's Academic Faculty does not Supervise Grant-in-Aid Scholarship Players' Athletic Duties

The third factor that the Board considered in *Brown University* was the graduate assistants' relationship with the faculty. *Id.* at 489. In particular, the Board found that the faculty oversaw the work of graduate assistants and it was a part of the latter's education since the work was typically performed under the direction and control of faculty members from those students' particular educational departments. *Id.* In fact, these same faculty members were responsible for teaching the students and assisting them in the preparation of their dissertations. *Id.*

Here, the Employer's scholarship players are in a different position than the graduate assistants since the academic faculty members do not oversee the athletic duties that the players' perform. Instead, football coaches, who are not members of the academic faculty, are responsible for supervising the players' athletic duties. This critical distinction certainly lessens any concern that imposing collective bargaining would have a "deleterious impact on overall educational decisions" by the Employer's academic faculty. While it is true that the Employer's administration does play a role in determining whether to cancel a scholarship, Fitzgerald's recommendation has been followed in the two instances where this has happened. Accordingly, the players' lack of a relationship with the faculty when performing their athletic duties militates against a finding that they are merely students.

4. Grant-in-Aid Scholarship Players' Compensation is not Financial Aid

The fourth factor that the Board considered in *Brown University* was the fact that the graduate assistants' compensation was not pay for services performed, but rather financial aid to attend the university. *Id.* at 488-89. In discussing this factor, the Board noted two relevant facts: (1) that the graduate assistants received the same compensation as the graduate fellows for whom no teaching or research was required; and (2) that the graduate assistants' compensation was not tied to the quality of their work. *Id.*

Unlike the graduate assistants, the facts here show that the Employer never offer a scholarship to a prospective student unless they intend to provide an athletic service to the Employer. In fact, the players can have their scholarships immediately canceled if they voluntarily withdraw from the football team. Even players who are not starters and consequently do not play in any games, must still attend all of the practices, workouts, and meetings as a condition of retaining their scholarship. In contrast to scholarships, need-based financial aid that walk-ons (and other regular students) receive is not provided in exchange for any type of service to the Employer. For this reason, the walk-ons are free to quit the team at any time without losing their financial aid. This simply is not true for players receiving football scholarships who stand to lose their scholarship if they "voluntarily withdraw" from the team.

D. The Employer's Grant-in-Aid Scholarships Players are not Temporary Employees Within the Meaning of the Act

Under Board law, the general test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. *Marian Medical Center*, 339 NLRB 127 (2003). If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. *Personal Products Corp.*, 114 NLRB 959 (1955); *Lloyd A. Fry Roofing Co.*, 121 NLRB 1433 (1958); *United States Aluminum Corp.*, 305 NLRB 719 (1991); and *NLRB v. New England Lithographic Co.*, 589 F.2d 29 (1st Cir. 1978). On the other hand, where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment and are notified of this fact, and there have been no recalls, such employees are excluded as temporaries. *Indiana Bottled Gas Co.*, 128 NLRB 1441 fn. 4 (1960); *Owens-Corning Fiberglas Corp.*, 140 NLRB 1323 (1963); *Sealite, Inc.*, 125 NLRB 619 (1959); and *E. F. Drew & Co.*, 133 NLRB 155 (1961).

In *Boston Medical Center*, 330 NLRB 152 (1999), the Board considered the employer's contention that its house officers were temporary employees by virtue of the fact that they worked there for a set period of time – albeit, anywhere from three to seven years depending on their particular residency program. The Board there clarified that it will not find individuals to be temporary employees simply because their employment will terminate on a date certain. In reaching this conclusion, it was noted that:

> [T]he Board has never applied the term "temporary" to employees whose employment, albeit of finite duration, might last from 3 to 7 or more years, and

> we will not do so here. In many employment relationships, an employee may have a set tenure and, in that sense, may not have an indefinite departure date. Athletes who have 1, 2, or greater years' length employment contracts are, theoretically at least, employed for a limited time, unless their contracts are renewed; work at a legal aid office may be for a set 2-year period; a teaching assignment similarly may be on a contract basis. To extend the definition of "temporary employee" to such situations, however, would be to make what was intended to be a limited exception swallow the whole.

Id. at 166.

In the instant case, the Employer's scholarship players have employment that is of a finite duration much like the house officers in *Boston Medical Center*. The players, due to NCAA eligibility rules, may generally only remain on the football team for four years, or at most five years in the case of a "redshirt" player. However, given the substantial length of the players' employment it is clear that they cannot be found to be temporary employees under Board law. Finally, to the extent that the Employer cites *San Francisco Art Institute*, 226 NLRB 1251 (1976), in support of its position that its players are temporary employees, I find that case to be distinguishable. There the Board refused to direct an election for a unit of student janitors, who generally worked 20 hours per week at their art school and were subject to a high turnover rate due to their brief employment tenure, because they were found to be concerned primarily with their studies rather than with their part-time employment. The Employer's scholarship players stand in stark contrast to those student janitors due to the fact that they: (1) work in excess of well over 40 hours per week during training camp and the football season; (2) work virtually year round and have a much longer employment tenure; and (3) do not have a "very tenuous secondary interest" in their employment. This is clearly established by the undeniable fact that the scholarship players' interest and skill in playing football are far greater than a "very tenuous secondary interest" but in fact a primary interest. Moreover, but for their football prowess the players would not have been offered a scholarship by the Employer. Significantly, *San Francisco Art Institute, id.*, has not been relied upon by the Board since it issued in 1976.

E. The Petitioned-for-Unit is an Appropriate Unit

The Employer contends that the petitioned-for-unit is not an appropriate unit for two reasons: (1) the unit consists of scholarship players who are not employees; and (2) the unit is an arbitrary, fractured grouping that that excludes walk-ons who share an overwhelming community of interest with the sought after unit. Having already concluded that the Employer's scholarships players are "employees" under the Act, I will now address its second assertion.

The Board in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 1 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB,* 727 F.3d 552 (6th Cir 2013), held that a petitioned-for-unit is not an appropriate unit if it excludes employees who have an "overwhelming community of interest" with

those employees that the union seeks to represent. Consistent with this decision, the Board shortly thereafter found in *Odwalla, Inc.*, 357 NLRB No. 132 slip op. at 5 (2011), that a petitioned-for-unit was not an appropriate unit because it excluded employees who shared an "overwhelming community of interest" with other employees. Thus, it is clear that, "a petitioner cannot fracture a unit, seeking representation in 'an arbitrary segment' of what would be an appropriate unit." *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 13, citing *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999).

In its brief, the Employer asserts that the petitioned-for-unit in the instant case is a fractured one because it excludes the walk-ons, who share an "overwhelming community of interest" with the Employer's scholarship players. It points out that the walk-ons are subject to the same rules, attend the same football practices and workouts, and play in the same football games if their skills warrant it. Indeed, the Employer contends that the "only" difference between the two groups is that the scholarship players receive compensation for their athletic services. The receipt of this compensation in and of itself is a substantial difference in whatever community of interests exists between the two groups. Fundamentally, walk-on players do not share the significant threat of possibly losing up to the equivalent of a quarter million dollars in scholarship if they stop playing football for the Employer as do the scholarship players. Moreover, to constitute a fractured unit, the putative group must consist of employees as defined by the Act, and the Employer concedes that the lack of scholarship precludes a finding that the walk-ons are employees under the Act. In the absence of a finding that the walk-on players are employees a fractured unit cannot exist, and the petitioned for unit is an appropriate unit.[36]

F. The Petitioner is a Labor Organization Within the Meaning of the Act

The Employer argues that the Petitioner is not a labor organization within the meaning of the Act unless the following two conditions are met: (1) its players who receive scholarships are found to be "employees" within the meaning of the Act; and (2) the petitioned-for-unit is found to be an appropriate unit within the meaning of the Act.

Section 2(5) of the Act provides the following definition of "labor organization":

> Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The statutory definition of a "labor organization" has long been interpreted broadly. See, *Electromation, Inc.*, 309 NLRB 990, 993-94 (1992), enf'd. 35 F.3d 1148 (7th Cir. 1994). To fall within the definition of a "labor organization," the Board has held that employees must

[36] This would be akin to finding that a unit of employees was an appropriate unit notwithstanding the fact that unpaid interns who may otherwise be subject to similar terms and conditions of employment but received no compensation and as such were not employees within the meaning of the Act were properly not included in the unit because they were not employees. See, *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999).

participate in the organization and it must exist for the purpose, in whole or in part, of dealing with employers on their behalf regarding their wages, hours of employment and other terms and conditions of employment. *Alto Plastic Mfg. Corp.*, 136 NLRB 850, 851-852 (1962).

At the hearing, the Petitioner introduced evidence that it was established to represent and advocate for certain collegiate athletes, including the Employer's players who receive scholarships, in collective bargaining with respect to health and safety, financial support, and other terms and conditions of employment. A substantial portion of the Employer's scholarship players have also signed authorization cards seeking to have the Petitioner represent them for the purposes of collective bargaining, and some of them, have taken a more active role with the Petitioner, including Colter. In addition, the players will presumably have the opportunity to participate in contract negotiations if the Petitioner is ultimately certified. Based on the evidence presented at the hearing and the Employer's conditional stipulation which was met, I find that the Petitioner is a labor organization within the meaning of the Act.

V. CONCLUSION

Based on the foregoing and the entire record herein, I have found that all grant-in-aid scholarship players for the Employer's football team who have not exhausted their playing eligibility are "employees" under Section 2(3) of the Act. Thus, I direct an immediate election in this case.

VI. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are all football players receiving football grant-in-aid scholarship and not having exhausted their playing eligibility employed by the Employer located at 1501 Central Street, Evanston, Illinois, but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strikes that have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by College Athletes Players Association (CAPA).

VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Employer*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, 209 South, LaSalle Street, Suite 900, Chicago, Illinois 60604 on or before **April 2, 2014.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **April 9, 2014.**

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website, select the E-Gov tab and click on E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

DATED at Chicago, Illinois this 26th day of March 2014.

/s/ Peter Sung Ohr
Peter Sung Ohr, Regional Director
National Labor Relations Board, Region 13
209 South LaSalle Street, 9th Floor
Chicago, Illinois 60604

College Athletes Players Association Goals

1. Guaranteed coverage for sports-related medical expenses for current and former players

2. Policies that minimize the risk of sports-related traumatic brain injury

3. Support for improving graduation rates

4. Increased athletic scholarships and rule changes that allow players to be compensated for commercial sponsorships

5. Due process rights for players accused of a rule violation

NORTHWESTERN FOOTBALL SAMPLE SCHEDULE

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
6		*Training Room*	*Training Room*	*Training Room*	*Training Room*		
7		Position Meeting	Team Meeting				
8			Position Meeting	Position Meeting	Position Meeting		
9		Team Meeting				Walk Thru	
10		Varsity Lift	Practice	Practice	Practice	Friday Script	
11		Leadership Meeting			Training Table		
12	Injury Check	Training Table	Training Table	Training Table			
1						TRAVEL	
2							GAME DAY
3							
4							
5				Captains Meeting		Offense Meeting	
6	TRAVEL					Team Dinner	
7							
8		Captains Film	Captains Film	Captains Film	Captains Film	Leadership Meeting	
9						Team Snack	

Developed by the Committee on Education and the Workforce Democrats

[Additional Submissions by Mr. Muir follow:]

Courses of Interest Winter 10-11

Class time is 50 minutes (i.e. 9:00-9:50) unless noted otherwise.
key: Dept, Cat. # - Course Title, Days/time class meets (# of units) (GER area fulfillment*)

9am

ARTHIST 102- Empire and Aftermath: Greek Art from Parthenon to Praxiteles, MWF 9:30-10:45 (4)(HUM)
ATHLETIC 187 – Analysis of Human Movement, TTh 9-10:50 (2-4) Kissick Aud
COMM 1B- Media, Culture & Society, TTh 9-10:15 (5)(SS)
MATH 19 – Calculus, MWF (3)(MATH)
MUSIC 41 – Music History 1600-1830, TTh 9-10:30+sec (4)(HUM)
MS&E 271 – Global Entrepreneurial Marketing, TTh 9-10:30 (3-4)
STATS 60 – Intro to Statistics, MTWThF+sec (5)(MATH)

10am

ANTHRO 1 – Intro to Cultural and Social Anthropology, TTh 10-10:50+sec (5)(SS/GC)
DRAMA 103 – Beginning Improvising, MWF 10-11:50 (3) must attend 1st class
EESS 2 – Earth System History, TTh+sec (3)(NS)
ENGLISH 160- Poetry & Poetics, MTWTH (5)(HUM)
HIST 106B- Global Human Geography, MWF+sec (5)
POLISCI 114S – Intl. Security in Changing World, MTWTh+sec (5)(SS)
PSYCH 125/CTL 130 – Beyond Stereotype Threat, F 10-11:50 (3)

11am

ARTHIST 3- Intro to History of Architecture, TTh 11-12:30 (5)(HUM) must attend 1st class
CLASSHIS 101- The Greeks, MWF (4-5)(HUM)
COMM 131- Media, Ethics & Responsibilities, TTh 11-12:15 (4-5)(SS)
CSRE 196C- Intro to Comparative Studies in Race & Ethnicity, MW 11-12:30 (5)(SS/AC)
DANCE 156- Social Dances of North America III, TTh 11-12:05 (1)
ECON 1A – Elementary Economics, MTWTh+sec (5)(SS)
HISTORY 50B/150B - 19th Century America, MW 11-12:15 (3/5)(SS/AC)
HUMBIO 122S- Social Class, Race, Ethnicity & Health, TTh (4)(SS/AC)
POLISCI 2 – Intro to American Natl. Govt., MW 11-12:15+sec (5)(SS)
PSYCH 1 – Intro to Psychology, MWF 11-12:15+sec (5)(SS)
SOC 120 – Interpersonal Relations, TTh 11-12:15+sec (5)(SS)
SOC 149 – The Urban Underclass, TTh+sec (5)(SS/AC)

Noon

AFRICAST 300 – Contemporary Issues in Africa, MW 12:15-1:05 (1)
CS 547 – Human Computer Interaction Seminar, F 12:50-2:-05 (1)
MED 207 – History of Medicine, Th 12-1 (1)
MED 242 – Physicians & Human Rights, M 12:15-1:05 (1)
SOC 142 – Sociology of Gender, MW 12:50-2:05+sec (5)(GS)

1:15

ANTHRO 15 - Sex & Gender, TTh 1:15-3:05 (3)(SS/GS)
CEE 64 - Air Pollution, MWF (3)(NS)
DRAMA 20 -Acting for Non-majors, MW 1:15-3:05 (1-3)
PSYC 135 - Sleep & Dreams, MWF (3)
URBANST 110 - Intro to Urban Studies, MWF (4)(SS/AC)

Evening

ENGINEER 103 - Public Speaking T or W 7:30-10 (3)
MS&E 41 - Financial Literacy, M 7-8 (1)

Miscellaneous

AFRICAAM 105-Intro to African & AA Studies TBD (5)(HUM/AC)
MS&E 472 - Entrepreneurial Thought Leaders Sem, W 4:15-5:30 (1)

Don't forget language conversation classes & frosh/soph seminars
Special language classes (in frosh dorms)

GER fulfillment - Table
NS - Natural Science
E/AP - Engineering & Applied Science
MATH - Mathematics
HUM - Humanities
SS - Social Sciences
AC - American Cultures
GC - Global Community
GS - Gender Studies
ER - Ethical Reasoning

May 14, 2014

The Honorable John Kline
Chairman
Education and the Workforce Committee
US House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

The Honorable George Miller
Ranking Minority Member
Education and the Workforce Committee
US House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

Chairman Kline and Ranking Member Miller:

During your May 8, 2014, hearing examining the impact of the Northwestern University case currently before the National Labor Relations Board, Congressman Miller submitted a March 2011 article from Stanford University's student newspaper, the Stanford Daily, into the hearing record. Since Congressman Miller did not afford me the opportunity to respond to the assertions made in this article at that time, I am submitting this letter to clarify the record.

The Stanford Daily article in question mischaracterized a list of classes that had been provided to student-athletes to help them plan their course schedules around conflicts that may occur because of their individual practice and travel schedules. The "class list" document contained a selection of courses, organized by time slot, and intended to assist the students in meeting their General Education Requirement. Stanford has no classes designated solely for student-athletes. All classes on the list were open to the entire student body and the list itself was available to all students. Furthermore, Stanford offers no classes with lower academic standards. All classes offered for credit at our university have to meet the same academic standards.

The list is no longer used because improved scheduling materials are now available on our Explore Courses website. However, to dispel the assertions in the Stanford Daily article, I have attached the "class list" itself. While this small list provided a variety of offerings, it included statistics, calculus, economics and General Education courses and 1-unit seminars in subjects that assisted students beginning to explore their academic career at Stanford.

Department of Athletics • Stanford University • Stanford, CA 94305-6130 • 650.723.4591 • Fax 650.725.8642 • www.gostanford.com

As I communicated in both my oral and written testimony, while the Stanford community remains proud of the success our student-athletes have achieved on the field, we never lose focus of the fact that our educational mission comes first. That focus is evidenced by the thousands of student-athletes that graduate with a Stanford degree and go on to incredibly successful careers off the field. It is especially unfortunate that this inaccurate student article entered into a discussion that should have remained focused on our student-athletes who do not seek special treatment and who challenge themselves every day in the classroom.

I thank you for the opportunity to clarify the hearing record. Please do not hesitate to contact me if I can provide any further information.

Sincerely,

Bernard

Bernard Muir
Director of Athletics
Stanford University

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[Additional Submissions by Mr. Starr follow:]

Judge Ken Starr
Baylor University

During the House Education and Workforce Committee hearing, "Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes," Congressman John Tierney posed a question related to Baylor University's compliance with Title IX with respect to financial aid. A thorough review has taken place since the hearing and Baylor is confident in its position of compliance with Title IX of the Education Amendment of 1972.

Baylor has annually hired a third-party consultant to analyze the University's Title IX compliance and to make recommendations (where necessary). Each year, Baylor has been expeditiously responsive to the findings and recommendations. During its most recent review in May 2013, the consultant reviewed sport participation lists (NCAA Squad Lists) and verified our data for purposes of determining gender proportionality and financial assistance.

According to the consultant review, in the 2012-2013 academic year, Baylor was compliant with Title IX regulations. The intercollegiate participation opportunities for Baylor's male and female student-athletes (42.9% and 57.1% respectively) is substantially proportionate to the undergraduate enrollment of men and women students (41.4% and 58.6% respectively), representing an acceptable difference.

Baylor provides the maximum number of athletic grants-in-aid allowable by the NCAA (under NCAA Bylaw 15.5) for all men's and women's athletic programs. Baylor would not be permitted to award more athletic grant monies to men's or women's teams without being non-compliant with legislated NCAA financial aid maximum limitations. In addition, the head coaches of all men's and women's teams are empowered by the University to award all grants-in-aid available to their respective student-athletes.

The report from which Congressman Tierney cited this information is a tool used by the Department of Education: the Equity in Athletics Data Analysis. According to the Department of Education, this analysis is not a Title IX compliance measurement tool. It differs significantly from a Title IX audit; whereas summer aid, medical exemption and scholarships for students whose eligibility has been exhausted are counted in EADA, but not under a Title IX standard.

Most importantly, Title IX standards do not require specific adherence to the actual dollars spent to be in "substantial proportionality" to the male/female undergraduate population ratio. Baylor is providing every scholarship allowable under NCAA competition rules applicable to Division I member institutions in each varsity sport. As such, the difference is not due to any institutional discrimination or bias, but rather adherence to the competition rules, which OCR has accepted as a legitimate, non-discriminatory explanation for any variance.

Baylor University remains fully committed to compliance with Title IX and providing high quality experiences to student-athletes on its men's and women's teams.

[Questions submitted for the record and their responses follow:]

MAJORITY MEMBERS:

JOHN KLINE, MINNESOTA, *Chairman*

THOMAS E. PETRI, WISCONSIN
HOWARD P. "BUCK" McKEON, CALIFORNIA
JOE WILSON, SOUTH CAROLINA
VIRGINIA FOXX, NORTH CAROLINA
TOM PRICE, GEORGIA
KENNY MARCHANT, TEXAS
DUNCAN HUNTER, CALIFORNIA
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GLENN THOMPSON, PENNSYLVANIA
TIM WALBERG, MICHIGAN
MATT SALMON, ARIZONA
BRETT GUTHRIE, KENTUCKY
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TODD ROKITA, INDIANA
LARRY BUCSHON, INDIANA
TOM MARINO, PENNSYLVANIA
JOSEPH J. HECK, NEVADA
MIKE KELLY, PENNSYLVANIA
SUSAN W. BROOKS, INDIANA
RICHARD HUDSON, NORTH CAROLINA
LUKE MESSER, INDIANA
BRADLEY BYRNE, ALABAMA

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6100

MINORITY MEMBERS:

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Senior Democratic Member

ROBERT C. "BOBBY" SCOTT, VIRGINIA
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CAROLYN McCARTHY, NEW YORK
JOHN F. TIERNEY, MASSACHUSETTS
RUSH HOLT, NEW JERSEY
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FREDERICA S. WILSON, FLORIDA
SUZANNE BONAMICI, OREGON
MARK POCAN, WISCONSIN
MARK TAKANO, CALIFORNIA

August 4, 2014

Mr. Andy Schwarz
Partner
OSKR, LLC
2200 Powell Street, Suite 430
Emeryville, CA 94608

Dear Mr. Schwarz:

Thank you for testifying at the May 8, 2014, Committee on Education and the Workforce hearing entitled, "Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes." I appreciate your participation.

Enclosed are additional questions submitted by committee members following the hearing. Please provide written responses no later than August 18, 2014, for inclusion in the official hearing record. Responses should be sent to Zachary McHenry of the committee staff, who can be contacted at (202) 225-7101.

Thank you again for your contribution to the work of the committee.

Sincerely,

John Kline

John Kline
Chairman

From Congressman Kenny Marchant to Mr. Schwarz-

1. If student-athletes are employees, does that mean that all of their aid is taxable? Will it be subject to taxation in every state they play in other than Texas? Are we required to withhold taxes? If so, their aid won't cover either tuition, fees, room, board and books, or cost of attendance.

2. If they are employees, can they be "fired" (their scholarship taken away) for poor performance on the field (like any other employee)? Current NCAA rules do not allow for aid to be withdrawn for poor on-field performance.

3. Are all student-athletes equal employees? Are all within a certain institution required to have the same "salary"? What about Title IX issues?

4. If their "job" is being an athlete, does that render their performance as a student irrelevant? Can we still require good academic standing as a prerequisite for continued "employment"?

[Mr. Schwarz's response to questions submitted for the record follows:]

I write in response to questions forwarded to me from Congressman Kenny Marchant. I would like to begin by thanking Chairman Kline, Ranking Member Miller, Congressman Marchant, and the full Committee, for the opportunity to provide further input into the Committee's deliberations on these very important subjects. It is completely appropriate, and encouraging, that a House Committee dedicated to education and to the workforce bring its full attention to a class of Americans who are both college students and members of the American workforce. These are important issues and the country stands at a crossroads, where we may finally see the production of one of our greatest American products, college sports, brought into the orbit of one of our other great American institutions, the free enterprise system.

I hope that my answers are helpful, both in addressing the specific questions asked, but also in helping to explain that the current collegiate system is based on a foundational disbelief in the forces that have so successfully shaped our capitalist economy. The NCAA's rejection of the market system works to the detriment of the American workforce, American taxpayers, and to the American people as a whole. The recent ruling in *O'Bannon v. NCAA* that current NCAA limits on athlete compensation "unreasonably restrain trade in violation of §1 of the Sherman Act" serves as a clear signal that the largest problem facing colleges sports today is that it is organized around an anti-competitive (and now, per the Court decision, illegal) premise that makes price-fixing the unnecessary foundation of college athletics.

The NCAA and its member institutions have been extremely successful at diverting attention away from the fact that their sports business operations operate at odds with this nation's great economic and founding principles. Some of the questions Congressman Marchant has asked below are likely, and understandably, prompted by the NCAA's influence on all our thinking.

In contrast with a system based on an unreasonable restraint of trade, I have faith in the ability of Division 1 athletic programs to thrive in a less restrictive, more competitive market. The schools that make up NCAA Division 1 have already demonstrated they are excellent at navigating the competitive business of higher education. They all know how to withhold taxes from their employees paychecks, to negotiate salaries (and many do so via unions in addition to individual negotiations), and generally to function as non-profit but competitive firms in a very important sector of our economy. With a few exceptions, most schools' athletic budgets account for 5% or less of the total institutional budget. I have no doubt that the same schools capable of winning Nobel prizes and securing valuable and innovative patents can also figure out how to balance an athletic budget while complying with Title IX and – going forward – the U.S. antitrust laws.

In addition to my own comments, I have pointed the Committee to some useful resources below. I hope my answers prove useful to the Committee, and as you recognize the NCAA's conduct is contrary to the American value of honest competition, I hope that the Committee urges the NCAA to conduct itself more like the rest of the American economy, not less.

Question:
If student-athletes are employees, does that mean that all of their aid is taxable?
Will it be subject to taxation in every state they play in other than Texas?
Are we required to withhold taxes?
If so, their aid won't cover either tuition, fees, room, board and books, or cost of attendance.

Summary Answer:
No.
No.
No.
False Statement.

Full Answer:

Federal Tax law is the province of Congress, and tax law implementation is the charge of the IRS. The equivalent state entities have their own defined responsibilities. Clearly those are the best sources to find a definitive answer to your very important question. My understanding is that when an issue in need of clarification arises, the IRS has a process known as a "revenue ruling" where they decide their interpretation of the tax law with respect to certain benefits. For example, in 1977, the IRS issued a Revenue Ruling to clarify that athletic scholarships are not considered taxable income.[1]

However, with the recognition that I am an economist and not a lawyer, my understanding is that currently, the IRS does exempt the tuition portion of an athletic scholarship from taxation, but that the remainder, while currently liable for taxation, has often gone unenforced. In addition, I understand that the tax code also exempts from taxation tuition remissions paid to university employees,[2] and so to the extent that provision would now apply to student-employee-athletes, it would seem to prevent the potential consequences that you lay out in your question.

Because tax law is outside of my primary area of expertise I consulted the opinion of professors of tax law and based on my question, I was referred to an excellent, detailed analysis entitled "Why the Northwestern Football Players Union Decision Isn't Going to Affect the Tax Treatment of Athletic Scholarships Any Time Soon"[3] by Professor John Colombo. Professor Colombo is the Albert E. Jenner Jr. Professor of Law at the University of Illinois and is currently serving as the interim Dean of the Illinois College of Law. Among his other credentials, he has testified before Congress and he has written an extremely influential article entitled "The NCAA,

[1] Rev. Rul. 77-263, 1977-2 C.B. 47, at *2 (1977).
[2] 26 U.S.C. § 117(d)(2)
[3] http://lawprofessors.typepad.com/nonprofit/2014/04/why-the-northwestern-football-players-union-decision-isnt-going-to-affect-the-tax-treatment-of-athle.html

Tax-Exemption and College Athletics" that was presented to the Knight Commission on Intercollegiate Athletics.[4] Professor Colombo wrote the following in April 2014, which I quote in some detail below (the bolded emphasis is my own):

- " ... I still get a number of phone calls every week from reporters asking whether this decision will affect the tax treatment of athletic scholarships. **My answer is "no."**"
- "... Section 117 of the Code provides an exclusion from gross income for "qualified scholarships" which essentially means scholarships that cover the cost of tuition, books and supplies. Room and board is NOT included in this provision; hence scholarships for room and board already are included in gross income. So room and board scholarships are already taxable...."
- "First, in 1977, the IRS ruled that athletic scholarships qualified for the exclusion under 117 because the scholarship did not, in fact, represent compensation for services. Rev. Rul. 77-263, 1977-2 C.B. 47. **The IRS decision was based upon the underlying structure and terms of the scholarship arrangement, NOT the status of the players as "students" vs. "employees."**
- "The NLRB decision changes nothing about the underlying nature of the scholarship (the terms of athletic scholarships are set by NCAA rules); accordingly, **there is no legal connection between the NLRB view of athletes as "employees" and the exclusion for athletic scholarships**. If the terms of the scholarship haven't changed materially, and the terms were the basis of the IRS's 1977 ruling, there is no reason for the IRS to revisit that ruling."
- **"Second, the fact that one is an employee does not make one ineligible for a scholarship. Indeed, section 117(d), which deals with "qualified tuition reductions" (a fancy name for a scholarship) explicitly contemplates that employees may be offered "tuition reductions" that are excluded from gross income.** In fact, colleges and universities routinely provide scholarships to employees: nearly all graduate research assistants and teaching assistants, many of whom are unionized, receive tuition waivers as part of their "package" with the university. This package normally includes a (very small!) stipend. The universities take the position that the stipend is compensation for services, and that the tuition waiver is an excludable "tuition reduction" under Section 117(d), a position that the IRS seems to be quite comfortable with. In effect, the NLRB ruling that football players are "employees" places them in essentially the same position as grad RA's and TA's. ..."
- **"Finally, there is no necessary connection between the tax law interpretation of a particular legal relationship and the interpretation of that relationship by other bodies of law.** Tax law is a specialized body of law unto itself. ... . **The fact that labor law might characterize a particular item as "compensation for services" does not control the tax definition of that item."**
- "... In the past, every time the IRS has taken tentative steps to tax certain items relating to college athletics, Congress has slapped the agency hard across the cheek. Witness the sequence of events dealing with the IRS's private letter rulings that corporate bowl sponsorships were taxable advertising; Congress moved with almost lightning speed to enact a new corporate-sponsorship exclusion to the UBIT, Section 513(i). Similarly, when the IRS took steps to tax payments for seating premiums by ruling that these items were not donations, Congress responded with

[4] http://www.law.illinois.edu/faculty/profile/johncolombo

Section 170(l) to provide that 80% of these payments were, in fact, deductible - allowing athletic boosters to deduct 80% of their payments for what are essentially "personal seat licenses" at athletic events."

- "So, is it possible that the NLRB action will influence the IRS to change its ruling on athletic scholarships? Sure, it's possible - just as it is possible that the United States will mount a manned mission to Mars next year. Just don't bet the house on it."

As for the rest of your question, if by "we" you mean "we, the American people, complying with regulations enforced by our government such as via the IRS," I think the answer is no. Just as the IRS does not appear to believe that the currently taxable portions of scholarships (e.g., the room and board component) triggers the need for withholding, I would not imagine that a non-cash award in the form of tuition remission would do so.

However, if Congress has an interest in learning the IRS's definitive position on these issues, my understanding is that it could request the IRS make a specific administrative ruling such as the 1977 Revenue Ruling I discussed above, which was issued to clarify that athletic scholarships are not considered taxable income. Conversely, as Congress is authorized to pass legislation specifically related to taxation, Congress could be proactive and take action to ensure that these scholarships not be subject to additional taxation and/or withholding provisions simply due to the employee status of athletes under the NLRA. My surmise is that a (rare) bipartisan agreement could be reached to pass a law ensuring tuition grants to college athletes remain untaxed if there is any doubt that that is already the case.

The last portion of your question touches on economics rather than law, and here I feel I can venture an opinion with some level of direct expertise. A private employer always has the option to provide compensation that includes a tax gross-up designed to leave the employee whole, even if a specific form of taxation becomes taxable. My understanding is that gross-up is itself taxable,[5] but with a little bit of arithmetic it is possible to set the gross-up so that that the net payment to the employee is the same as the original gross payment, less applicable taxes. The formula is basically Grossed-up Pay = Desired Net Pay / (100% - Effective Tax Rate)

As a simple example, if the employee received a $5,000 stipend that became taxed after a change in the law and was in the 10% tax bracket, a payment of $5,000/(100%-10%) or $5,555.56 would result in payment of $555.56 in taxes and leave the recipient with the original $5,000.

My understanding of NCAA rules is that payments unrelated to athletic aid are allowed up to a higher limit than those that can be made for athletic talent, and moreover, under the injunction issued by the Court in O'Bannon, even athletic aid can no longer be capped below that higher cost-of-attendance level. Given these options, I would imagine that complying with the tax code could easily be categorized as consistent with what will remain of NCAA compensation caps. To the extent that is incorrect, nothing about the NLRB decision would prevent the NCAA from

[5] i received such a gross-up when I received a signing bonus from Hewlett-Packard in 1994, and I paid income taxes on the bonus and the gross up.

changing that to ensure that its cap allows the gross payment needed to ensure the net receipt of after-tax funds sufficient to cover the cost of attendance. And moreover, to the extent it did not, this would serve only to highlight that NCAA rules are generally more about collusion to lower University costs than any pro-student or pro-competitive benefit.

In addition, schools have access to a Student Assistance Fund, which in the recent past they have used to assist athletes to purchase income insurance.[6] This would seem a readily available pool of money to use for any tax gross-up consequences.

On top of that, the NCAA has a provision, through bylaw 12.02.8, whereby it can declare the receipt of any specific type of fund not to be "pay" by their definitions and thus have no impact on amateur status as the NCAA defines it.[7]

Of course, all of the above discussion of how NCAA rules currently, or could be made to, accommodate any change in the tax status of student-employee-athletes presupposes some baseline appropriateness in complying with NCAA collusive rules on compensation. The current rules have been found to violate the antitrust laws and starting in 2015, the NCAA has been enjoined from enforcing them as currently written. Congress should applaud that move towards a market-based system rather than heed calls for an ill-conceived NCAA antitrust exemption.

Prior to the recent O'Bannon ruling, the primary impediment to covering the full costs of FBS athletes' attendance in college, whether to not they are subject to taxation, was the nation-wide, price-fixing cartel that has operated in the open and which limits compensation to these athletes. When the Court's injunction goes into effect, that specific cap will be raised and quickly it will become apparent that the cap was responsible for lower payments to the athletes in question. That new, higher level of compensation, whether taxed or not, will exceed their current payments and athletes will be better off. They would be better off still if there were no limits at all, and the market were able to reach a natural equilibrium free of all price fixing.

I very much share your stated commitment to "greater economic certainty, more jobs, and bigger paychecks for hardworking Americans."[8] I would urge you to oppose efforts by institutions, especially those who themselves pay no taxes and receive a large amount of tax-payer funded payments, to collude to suppress the market forces that would result in better pay for those who have developed valuable talents into marketable skills. Collusion is the antithesis of the American values of hard-work, self-reliance, and reward for excellence.

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[6] Two recent examples include an athlete in your state: Cedric Ogbuehi of Texas A&M (http://profootballtalk.nbcsports.com/2014/07/17/cedric-ogbuehi-passed-on-the-draft-texas-am-bought-his-insurance/), as well as Heisman Trophy winner, Jameis Winston of Florida State (http://espn.go.com/college-football/story/_/id/11310051/jameis-winston-insurance-policy-paid-part-florida-state).

[7] "12.02.8 Pay. Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics."

[8] http://marchant.house.gov/issuesandlegislation/issue/?IssueID=114400

Your inquiry seems to assume that this collusion is appropriate and here to stay. I disagree with the first half and I am hopeful that with the recent Court injunction, the second has become an incorrect prediction of the future. I would ask you, and all members of Congress, especially those who consider themselves as exponents of the benefits of market-based capitalism, to work to end any and all collusion that prevents athletes from recognizing their full earning potential.

Congress, especially those members of Congress committed to the benefits of free enterprise and market-based capitalism, should be extremely suspicious of any claim that the best answer for America is less, rather than more, economic competition within an industry. The Supreme Court has made clear, on numerous occasions, that the antitrust laws are the bedrock principle of our free enterprise society:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete – to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy. *Cf. United States v. Philadelphia National Bank,* 374 U. S. 321, 374 U. S. 371 (1963).[9]

The Court elsewhere explained:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[10]

Other courts have specifically applied this logic to efforts by the NCAA to collude to stifle the market level of compensation paid to coaches:

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[9] http://supreme.justia.com/cases/federal/us/405/596/case.html

[10] Northern Pacific. Ry. Co. v. United States, 356 U.S. 1, 4-5 (1958) (citations omitted). http://www.law.cornell.edu/supremecourt/text/356/1

> ... As the Supreme Court reiterated in Superior Court Trial Lawyers, 493 U.S. at 423, "the Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . This judgment recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[11]

These sentiments were also echoed by President Ronald Reagan, who explained:

> "We who live in free market societies believe that growth, prosperity and ultimately human fulfillment, are created from the bottom up, not the government down. Only when the human spirit is allowed to invent and create, only when individuals are given a personal stake in deciding economic policies and benefiting from their success – only then can societies remain economically alive, dynamic, progressive, and free."[12]

Collusion among firms to fix prices, wages, maximum scholarships limits, or any replacement of a market outcome with the pronouncement of a committee of supposedly superior wisdom, saps the essential commercial engine of the United States. Given that this Committee is concerned with the best interests of the American Workforce, it should welcome an opportunity for young men with talent to earn a living – paying Federal taxes is happy side effect of earning one's keep, especially in contrast with earning no income. Under the current system, many athletes are kept sufficiently disempowered and low in income that the qualify for Federal assistance such as Pell Grants and sometimes even food stamps. As I explained in my testimony to this committee:

> Approximately 40 to 45% of all FBS football athletes come from families with low enough means that they receive Pell Grants. As one example, in 2006, 65% of UCLA's Football Athletes received these government grants. In other cases, athletes qualify for food stamps. If collusion among major colleges were ended, economic competition would turn those Pell Grant recipients into skilled earners. As pay rose, these hard-working young men would pay taxes on the portion of their earnings above and beyond the athletic scholarship instead of being recipients of taxpayer-funded welfare.[13]

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[11] http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/10th/963034.html
[12] http://www.presidency.ucsb.edu/ws/?pid=44311
[13] See my written testimony before this committee, available at http://edworkforce.house.gov/uploadedfiles/schwarz_written_testimony_final_.pdf

As I recently wrote in an article discussing the benefits of market competition:

> "In America, we're supposed to value hard work and money well-earned. Corruption is what you get from violating the law, not from earning what you're worth in the marketplace."[14]

Elsewhere, I've described the likely result of the nation embracing a free-market solution for the ills of college football:

> In our dynamic economy, markets adapt flexibly to new circumstances. In 1988, the Berlin Wall seemed a permanent feature of global geopolitics. A year later, it was gone, and the free market spread east, but slowly at first. Once the market took root, some looked back fondly to when economic competition wasn't quite as fierce. But almost 25 years later, most would agree that the change was for the better.
>
> For college football and basketball, when the price-fixing wall finally falls, tomorrow will be much like today. Over time, America will absorb its collegiate version of East Germany, bringing college sports into a market-based economy, keeping the best of those games but jettisoning the anticompetitive conduct. But for now the wall is still in place, and it's time we chip away at the myths that have kept it standing.[15]

Congress and this Committee should help tear down that wall by embracing the belief that markets know best. I would urge the Committee to focus its concern on the real problem – nationwide collusion – rather than creating a tempest in a teapot about the low-likelihood scenario that tax policy will change based on the efforts by athletes to push back against the harmful, collusive practices of the NCAA and its member schools to stifle economic freedom.

Question:

[14] http://regressing.deadspin.com/how-not-to-reform-the-ncaa-1614553705

[15] http://www.slate.com/articles/sports/sports_nut/2014/01/paying_college_athletes_a_point_by_point_evisceration_of_the_ridiculous.single.html

If they are employees, can they be "fired" (their scholarship taken away) for poor performance on the field (like any other employee)?
Current NCAA rules do not allow for aid to be withdrawn for poor on-field performance.

Summary Answer:
No more (and perhaps less) than currently.
False statement.

Full Answer:

You second sentence is false. At most FBS schools, the current contract (whether you consider it an employment contract or not) states that a player's athletic aid cannot be cut during the school year that it covers, but that it is renewable at the discretion of the school. In fact, even the initial offer can be withdrawn (at the school's unilateral discretion) prior to enrollment, so that an athlete can commit to a school and sign a letter of intent, but upon arrival will be informed there is no scholarship for him. Thus, the vast majority of current FBS football players can be, as you put it: "fired" at the discretion of a coach or the school. I would argue this is actually a harsher set of firing conditions that those faced by "any other employee."

In 2011, in a rare nod to a slightly more competitive environment, the NCAA ended a 37-year period of collusion on the length of allowable athlete contracts. From 1973 to 2010, no school was allowed (under threat of being boycotted by all of NCAA members) to provide an athletic scholarship that lasted more than one year. This restriction was driven by a concern by coaches that players might not try hard enough at football if they knew they would continue to receive an education without devoting themselves fully to football; the ban on multi-year scholarships had no academic justification. Over the decades, many players were "fired" for their poor performance on the field. With this change in the rules, we are seeing the initial workings of the competitive process. At first, a few schools changed their policies (notably, Illinois and Fresno State were early adopters of the four-year model[16]) and began to compete in the marketplace with guaranteed 4-year deals. Slowly momentum has built and recently Pac-12 and Big Ten schools have begun to do the same.

As one example of how competition can serve as the engine for improved academic integrity, originally Indiana University resisted providing multi-year scholarships; their head coach (Kevin Wilson) stated "he didn't want to give his athletes the 'carte blanche' he believes would come with a four-year scholarship."[17] However, within a year, as other schools began adopting more educationally-focused four-year offers, Indiana made a bold, competitive move, announcing what they described as a "bill of rights" where every scholarship is guaranteed for life, namely

[16] http://www.post-gazette.com/sports/Pitt/2013/05/19/Colleges-universities-slow-to-offer-multiyear-athletic-scholarships/stories/201305190222
[17] http://www.post-gazette.com/sports/Pitt/2013/05/19/Colleges-universities-slow-to-offer-multiyear-athletic-scholarships/stories/201305190222

the athlete will continue to have his education paid for, for as long as required for him to graduate.[18] It took the NCAA 37 years to allow this competition to occur. It took only one year for market competition to turn Indiana from a professed doubter of the benefits of multi-year scholarships to a competitive trailblazer. Within a month, Maryland (despite other claims of financial distress) announced it would match Indiana's lifetime scholarship offer in order to become "the best intercollegiate athletic program while producing graduates who are prepared to serve as leaders in the local, state and global communities."[19]

This is how competition tends to work, especially when the supply of talent (of sufficiently high quality to play FBS football) is scarce compared to the hundred-plus of schools in search of dozens of new players each year.

However, as of 2014, the one-year renewable contract remains more common among FBS football schools than multi-year scholarships (though fortunately this is changing rapidly). Because one-year contracts remain common, many teams are well known for bringing in 25 (or more[20]) scholarship athletes a year and yet managing to stay under the 85 scholarship total limit imposed by the NCAA. Given the 4 or 5 years of scholarship duration, this means between 100 and 125 athletes come into the system as scholarship athletes and yet only 85 per year receive scholarships. Without a high level of attrition, this process cannot be sustained, as a simple matter of arithmetic. This high level of attrition is only possible because schools "fire" many athletes each year.

As I am sure the Congressman is aware, when private businesses contract with employees, it is possible to enshrine all sorts of employment terms into those contracts. In a market where players were employees with all of the economic rights of any other American seeking to earn a living in a free market, those contracts could take on a variety of forms. If schools and athletes see preventing firings as a valid goal, they can enshrine that in a contract, whether individually or collectively bargained. Economically, often employees are willing to agree to lower total compensation in exchange for greater job security.

We are fortunate to have many other sports employment contracts to look at for analogies of how the process might work. A college athlete contract might resemble either the contracts of NFL players (arrived at through collective bargaining) or of FBS coaches (individually negotiated). To use FBS coaches as an example, they are employees and they often are fired for poor performance, but because there is high demand for them when are hired, they are able to negotiate terms of severance, such that they receive one or more years of additional

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[18] http://espn.go.com/college-sports/story/_/id/11146296/indiana-hoosiers-unveil-student-athlete-bill-rights

[19] http://bleacherreport.com/articles/2168030-maryland-announces-lifetime-degree-guarantee-for-student-athletes-in-all-sports

[20] This process is known as "oversigning" and has resulted in many recruits not getting their promised scholarships despite being called "'reprehensible,' 'disgusting,' and 'nefarious.' " by the President of the University of Florida: http://online.wsj.com/news/articles/SB10001424052748704444604576172954187357370?mg=reno64-wsj

compensation even though they no longer are employees. In return, schools often receive a guarantee that should the coach leave voluntarily prior to the end of his contract, he will pay them a "buy out," which often is then covered by the coach's next employer.

I would envision that the competitive process for FBS athlete talent would be similar – terms of severance would be negotiated such that (as one possible example) a player who did not live up to his potential would be offered a choice of (a) a termination payment, (b) the right to continue his academics at his school under similar scholarship terms but without being a member of the football team (or using up a roster slot) or (c) the right to transfer to the school of the athlete's choosing to play football without his original team exercising any veto power over his new school or the terms of that school's contract.

While this is just one example of a possible market-based outcome, it points out that giving athletes the power to negotiate the terms of their termination in conjunction with giving them the right of access to a competitive market is almost certainly going to improve their lot over that of the "fired" athletes today.

Similarly, while NFL players are often cut, they continued to be paid any guaranteed amounts in their contracts. And they are paid for the duration of their contract if they are unable to play due to injury. I think almost any player would prefer to be fired under the terms of a typical rookie contract in the NFL, with an upfront signing bonus and some level of guaranteed money, than to be "fired" by Alabama after a season or two at the coach's discretion.

Question:
3. Are all student-athletes equal employees?
Are all within a certain institution required to have the same "salary"?
What about Title IX issues?

Summary Answer:
It depends on what you mean by "equal," but generally No.
No.
Title IX isn't a mandate to pay individuals identically.

Full Answer:

I know of no business in America that would say all of their employees were "equal" in terms of their job performance, their market value, their personal experience, their strengths and weaknesses, etc. I suspect this belief may have provided some of the motivation for Congressman Marchant, Chairman, Kline's and several other committee members votes against

the Lilly Ledbetter Fair Pay Act of 2009.[21] Nevertheless, as American citizens, we are all equal in the eyes of the law, which is one reason why it pains me to see a small class of highly talented Americans denied the right of access to the same open, competitive market forces that benefit the rest of us, by an organization whose bedrock principle is a legally recognized form of price fixing.

In an article I recently published entitled "What's Karl Marx Doing In These Arguments Against College Athlete Pay?"[22] I explained how the concept that everyone working an identical amount of time is owed an identical amount of pay has its roots in the "Labor Theory of Value," which today is most closely associated with Marxism. Generally speaking, market-based capitalism argues that compensation should be tied more to supply and demand conditions (with scarcer talent that has more revenue generation potential tending to receive higher compensation than less scarce talent with lower revenue generation potential).[23]

I was not exaggerating when I suggested that Big 12 Commissioner Bob Bolwsby's views on the economics of college sports were founded on this form of Marxist labor theory, as he himself confirmed on a panel in New York on August 6, 2014:

> "... If you apply any form of the labor theory of value, that is to say the work that goes into something is determinant of the cost, football and basketball players don't work any harder than any other athletes. They don't work harder than swimmers. They don't work harder than field hockey players. They don't work harder than wrestlers. They just happen to have the blessing of an adoring public.[24]

Currently, universities do not follow a one-paycheck-fits-all method of compensation, either with respect to athletic coaches or to athletes. As an example from Congressman Marchant's neighboring state of Louisiana, Les Miles, the head football coach of LSU, earned over $4 million per year in 2011-12, while the head men's swimming coach at LSU, earned only $119,200 that same year. Nor should it surprise us that the average scholarship athlete on LSU's football team received a reported $34,000 in athletic aid, while the average men's swimmer on scholarship received only $17,443.

Congressman Marchant's home state's flagship school, the University of Texas, shows a similar disparity; as I wrote in my recent article:

> "[In] Austin, ... the men's swimming coach—of a very successful program that won a national championship in 2010—made something around 5 percent of what the football coach made. Put it this way–if Mack Brown

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[21] http://projects.washingtonpost.com/congress/111/house/1/votes/9/

[22] http://regressing.deadspin.com/whats-karl-marx-doing-in-these-arguments-against-colleg-1608863934

[23] Of course, as you mention, Title IX is a federal law which moderates the pure working of the market, but as I discuss below, Title IX is not an absolute impediment to adoption of a market-based system.

[24] http://www.si.com/college-football/2014/08/06/big-12-forum-college-sports-issues

> belongs to a church that encourages tithing, and he tithed that year, his contribution could have purchased two men's swimming coaches."[25]

So no, to my knowledge, no college or university in the country is required to pay (or does pay) identical salaries to all professors or to all coaches, nor do they pay equal scholarship amounts to all athletes.[26] I would not expect that to change if athletes had the right to bargain collectively or if athletes had access to a non-collusive marketplace for individual negotiations. However, because each college would have the right to bargain for what it thought was best, if a school decided that it wanted to impose a common "salary" structure on its athletic department, I know of no legal impediment to that being their offer in a collective bargaining process, and indeed the recent Court decision in *O'Bannon* recognized equal pay as a possible outcome under the pending injunction. If the players' union agreed with this premise, it could be enshrined into a CBA, but it would not be a legal requirement imposed from without; it would be the result of arm's length negotiations.

Please recognize that if this did occur, it would be a dramatic change from every FBS school's current practice; not a single FBS school pays all coaches identically nor does any school give all scholarship athletes identical levels of aid. Some have suggested that equal pay might be more consistent with a form of amateurism (such that pay is not based on performance, a taboo in NCAA circles), so if that egalitarian urge ran strong at a given school or in a given conference, a common pay structure among all athletes would be a possible outcome (though currently prohibited by NCAA rules[27], which effectively require athletes in some sports to receive less than athletes in other sports), though not one I would think would emerge for purely economic reasons.

As for Title IX, I have written somewhat extensively on this, especially on my own economics web site, *sportsgeekonomics.com*. Below I provide links to some of those posts as well as a summary of my conclusions. In the *amicus* brief submitted to the NLRB that I helped write, my co-authors and I summarized our economic understanding of how Title IX would work in a less-collusive environment in which some level of individual or collective bargaining were possible for FBS football athletes. We wrote:

> "Title IX (as applied to college sports) is primarily about equality of opportunity[28] for athletic participation, but also contains provisions on financial aid and other equitable treatment.

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[25] http://regressing.deadspin.com/whats-karl-marx-doing-in-these-arguments-against-colleg-1608863934

[26] One important thing to note is that almost every FBS football scholarship at a given school is identical. This is not because of a requirement, but rather because the price is fixed below true market value. As a result, virtually every athlete receives the maximum market cap because it is the closest the collusive market can get to his higher open-market value of each athlete.

[27] See for example Bylaws 15.5.3.1.1 and 15.5.3.1.2 which limit the total aid to some sports to levels below 1 full scholarship per scholarship recipient. http://www.ncaapublications.com/p-4355-2014-2015-ncaa-division-i-manual-august-version.aspx

[28] http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html

Title IX offers three ways to comply with respect to participation, [29]

- Substantial proportionality with the male/female ratio on campus;
- Continued progress in offering opportunities to women;
- Meeting the demand for opportunities of all interested women on campus.

With respect to Financial Aid:

- Title IX does not require that individual men's and women's scholarships be equal.[30]
- Title IX does not require equal overall funding to men and women's sports.[31]
- Title IX does require scholarships/financial aid be substantially proportional to participation. [32]
- Title IX has been ruled not to require equality of pay if based on "a business decision to allocate… resources to the team that generates the most revenue." [33]

Finally, Title IX also covers a wide variety of additional topics, generally stating male and female teams must be treated equitably on what's called the "laundry list" of issues, such as equity in the provision of locker rooms and training space, supplies, coaching, etc.[34]

Most relevantly, "Title IX does not require that individual men's and women's scholarships be equal."[35] So the very clear language from the Department of Education flatly contradicts the premise that Title IX would somehow mandate equality of payment across each athlete.

However, the financial proportionality rules of Title IX like may require that some portion of additional financial benefits negotiated by male athletes result in "substantially proportional"

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[29] http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two
[30] http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html
[31] http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html
[32] http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html
[33] Stanley v. University of Southern California, No. 93-56185,http://www.leagle.com/decision/1994132613F3d1313_11121: "Coach Stanley contends that the failure to allocate funds in the promotion of women's basketball team demonstrated gender discrimination. She appears to argue that USC's failure to pay her a salary equal to that of Coach Raveling was the result of USC's "failure to market and promote the women's basketball team." The only evidence Coach Stanley presented in support of this argument is that USC failed to provide the women's team with a poster containing the schedule of games, but had done so for the men's team. This single bit of evidence does not demonstrate that Coach Stanley was denied equal pay for equal work. Instead, it demonstrates, at best, a business decision to allocate USC resources to the team that generates the most revenue."
[34] http://www2.ed.gov/about/offices/list/ocr/docs/interath.html
[35] http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html

increases in financial benefits to female athletes. The *amicus* brief of some of the private universities presented this as if the potential for higher aid to female athletes was a problem:

> "If scholarship football student-athletes are determined to be employees for purposes of the Act, and through collective bargaining receive greater benefits for themselves, the proportionality mandate of Title IX will **require that colleges either increase the benefits to female student-athletes proportionately**, or decrease the benefits provided to male student-athletes in other sports. Depending on the extent of the additional benefits obtained by the unionized football student-athlete "employees," universities may be required to do both: decrease the number of scholarships in other male sports and increase the benefits provided to female student-athletes."[36]

However, to my eyes, this is actually a feature of the law. To the extent that male athletes are able to use their economic value to bargain (again, whether collectively under the NLRA or individually in the absence of collusion among schools) and they receive improved compensation that is subject to gender proportionality under Title IX, then schools will bargain knowing that the aggregate increase in compensation to male athletes will require a "substantially proportional" increase in compensation to female athletes as well. The result will be that the bargained-for male compensation will be somewhat less than it would absent Title IX, and the difference would go towards additional funding for female athletes. To my mind, this seems entirely consistent with the goals of Title IX and likely to result in increased funding for female athletes.

For more detail on the economics of Title IX, I would point the Committee to some of my writings. One is a Deadspin article: "Don't Let Anyone Tell You The O'Bannon Ruling Conflicts With Title IX" available at http://deadspin.com/don-t-let-anyone-tell-you-the-o-bannon-ruling-conflicts-1620712195

The rest can be found here: http://sportsgeekonomics.tumblr.com/title9, but I recommend the following in particular to dispel some of the more egregiously false myths associated with Title IX:

For an empirical demonstration (based on 2011-12 data) that Title IX didn't prevent the schools in the then-six major conferences from spending between $2 and $5 on men's sports for every $1 in women's sports spending, see http://sportsgeekonomics.tumblr.com/post/14676890068/title-ix-doesnt-work-like-you-think-it-does-2010-11 .

As one simple example from 2009-10, "Alabama spent $43mm on men's sports and $13mm on women's. Of course, Auburn matched them in inequality: $42mm spent on men's sports,

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[36] See http://mynlrb.nlrb.gov/link/document.aspx/09031d45817cd706 which is an Amicus Brief submitted by Baylor, Rice, SMU, Stanford, Tulane, USC, Vanderbilt, and Wake Forest). (emphasis added)

$13mm on women's." See http://sportsgeekonomics.tumblr.com/post/8410434598/title-ix-doesnt-work-like-you-think

And for the basic idea implicit in your question, that Title IX requires all athletes to receive identical compensation, please see http://sportsgeekonomics.tumblr.com/post/7809806793/title-ix-what-it-does-and-doesnt-require, where I show that in 2009-10, the average women's scholarship at Georgia was 52% the size of the maximum football scholarship (and Georgia is actually among the best schools in terms of Title IX compliance).

Question
If their "job" is being an athlete, does that render their performance as a student irrelevant? Can we still require good academic standing as a prerequisite for continued "employment"?

Summary Answer: No. Yes.

Full Answer:

Underlying your question is a more fundamental economic question, which is whether college football needs its participants to be college students to generate comparable levels of consumer demand as they do today. In other words, it is an economic question as to what drives consumer demand for college football. Based on my study of the issue, I think it is driven by two primary (and perhaps obvious) factors – college and football. Americans love football and we particularly love seeing football played as a competition between college students. So with that as a basic understanding, it would seem that the rational outcome among colleges wishing to produce successful football programs would be to continue making full-time enrollment in a college be a prerequisite for participation. Failing to do so would threaten one key component of what makes the product desirable to consumers.

So I don't see any impetus from schools to suddenly drop the requirement that its college athletes attend college. I also do not see any likely impetus from a union to prevent its membership from receiving a college education as part of the compensation they receive in exchange for playing football at FBS universities. Thus, this seems to be a concern in search of a problem.

Many industries have conditions that must be made prior to employment. For example, my understanding is that Members of Congress are employees of the Federal Government, but that nevertheless, a requirement of that employment is that they be residents of the Congressional District (for the House) or State (for the Senate) they represent. Other jobs may require some minimum level of education – my understanding is some school districts require their teachers to have a master's degree to teach, even in the case of unionized teachers. These are examples of requirements imposed on an employee as a condition of employment. With the continued caveat

that I am not a lawyer, I know of no legal impediment to an employer insisting, as a condition of employment, that its employees meet certain educational standards.

Many schools currently employ students in work-study jobs and my understanding is that being a student in good-standing at the university in question is a requirement for holding those jobs.

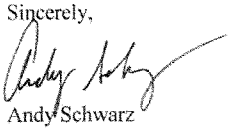
Economically, because I believe it is demand-enhancing to bundle together the college and football aspects of college football, I think it would be unlikely for the employers (schools) in a collective bargaining situation to agree to any agreement that allowed less than full-time student participation with sufficient grades to pass some minimum threshold, as exists today. To my understanding, the current union effort seeks to increase, rather than decrease, the educational component of being a college athlete. So it seems a fairly remote concern, and one that schools could prevent through the bargaining process simply by refusing to agree to anything that would jeopardize the "college" element of college football.

One real benefit of a more free-market approach to the sport would be that, if freed from NCAA restrictions on the types of financial packages they could offer, schools could provide strong incentives for high academic achievement, including graduation bonuses, and that athletes would have much more to lose if their poor academic performance (or off-field conduct) caused them to be dismissed for cause and to lose access to their contractual benefits.

In my experience, when people are paid well for specific targets, like high grades, graduation, etc., it tends to act as an incentive and to result in more favorable outcomes. The stronger the benefits of doing well in school, the more likely a student will take pains to do well in school. I would love to see schools in a position where they can put their money where their professed focus is, and to use compensation and incentives as a tool for increasing graduation rates among FBS athletes, rather than simply relying on punishments for the schools with the most egregious non-graduation rates. As I stated before, neither money nor the pursuit of money is corrupt. Corruption comes from violating laws and from efforts to extract ill-gotten gains from a system filled with profit. In contrast, well-chosen financial incentives can provide excellent tools for schools to improve the nexus between education and athletics, far better than efforts to "integrate" athletes into the campus through denial of market forces (and athlete rights).

I thank the Committee for this chance to address your questions, and I look forward to any additional assistance I can provide.

Sincerely,



Andy Schwarz
Partner, OSKR LLC

[Whereupon, at 12:16 p.m., the committee was adjourned.]

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