

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Region 13

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

**POST-HEARING BRIEF OF PETITIONER COLLEGE ATHLETES  
PLAYERS ASSOCIATION**

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## INTRODUCTION

Northwestern University's scholarship football players (the "Players") seek to be represented by a labor organization—the College Athletes Players Association (CAPA)—so that they may improve their terms and conditions of employment through collective bargaining.

Faced with the serious risk of concussions and long-term injuries, the Players seek to bargain over health and safety issues like other employees protected by the Act. CAPA will not jeopardize the Players' eligibility by bargaining compensation not permitted by National Collegiate Athletic Association rules, but can bargain additional financial support and protections within the existing NCAA rules, and will speak for the Players as the NCAA landscape continues to evolve.

This case involves an industry with which the Board has not yet dealt—Division I football—but presents questions that have arisen in many industries and that are governed by well-established Board law. As we show, the evidentiary record establishes that the Players are employees within the meaning of Section 2(3) of the National Labor Relations Act, that CAPA is a labor organization within the meaning of Section 2(5), and that CAPA seeks to represent an appropriate unit.

The Players perform valuable services for Northwestern University. They have substantial football-related responsibilities year-round, performed under the strict supervision and control of the Northwestern coaches and Athletic Department staff. Their football activities are separate from the Players' academic pursuits as students at the University. In return for their football services, the Players are compensated by the University through scholarships that a Player receives only because he is a football player, and which he will lose if he withdraws from the team.

The Players' services enable Northwestern to have a football program that competes in the highest division of college football in the nationally-known Big Ten Conference.

Northwestern football is big business. Each year, because of the Players' labor, Northwestern's football program generates net profits of between five and ten million dollars.

But this case is not about how much money Northwestern makes from football, or whether Northwestern is a good employer, or whether the compensation provided to the Players is fair. Nor is it about the quality of the education that the Players receive at Northwestern. Indeed, the Players view Northwestern as a good employer. They appreciate that they receive an excellent education and they take pride in the academic success they achieve while performing what amounts to a full-time job for Northwestern's football program. But an employee is an employee, whether his compensation is generous or parsimonious, whether he has excellent or tenuous job security, and whether his employer is enlightened or unreasonable. If the employee provides services for and at the direction of the employer and is compensated for doing so, the employee is an employee, and is entitled to the rights and protections of the Act.

Northwestern argues that *Brown University*, 342 NLRB 463 (2004), bars the Players' efforts to organize. But that contention would not hold water even if we assume that the much-criticized *Brown* decision remains good law. *Brown* was premised on the finding that the graduate assistants' teaching duties were an integral part of their post-graduate degree program, such that bargaining would intrude on the university's freedom to make core academic decisions. This case involves no such intrusion. Football is not part of Northwestern's academic program. The Players receive no academic credit for their services to the football program. Collective bargaining with respect to the football program would not interfere in any way with Northwestern's academic decisionmaking.



All of Northwestern's other "public policy" arguments are without substance. They are merely variations on the theme often sounded by employers who do not wish to be subjected to collective bargaining: that bargaining may be "bad for business." Even if Northwestern's fears were supported by the record—and they are not—they would not provide grounds for denying the Players their rights under the Act. An election should therefore be directed.

## STATEMENT OF FACTS<sup>1</sup>

### I. The Parties

#### A. CAPA

Petitioner College Athletes Players Association ("CAPA") is a labor organization formed in January 2014. CAPA seeks to "represent and advocate for college athletes in collective bargaining with respect to health and safety, financial support, and other terms and conditions of employment." Jt. Exs. 1-2. CAPA is governed by an Executive Board, consisting of the president and at least two other members. Jt. Ex. 1 at § 4.01. CAPA's president is Ramogi Huma. Jt. Exs. 2, 7. One of CAPA's founding members is Kain Colter, who played football at Northwestern for four seasons, was a team co-captain for his last two years, and served on the team's leadership council. Jt. Exs. 2, 7; Tr. 57:3-8, 58:25-59:4 (Colter).

CAPA filed a petition seeking to represent the football players at Northwestern who receive grant-in-aid athletic scholarships. NLRB Ex. 1A-1G. The players signed cards seeking union representation after meetings with CAPA, where Colter explained that CAPA wants to "represent them and collectively bargain on their behalf with our employer, Northwestern

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<sup>1</sup> Hearings were held on February 12, 18, 19, 20, 21 and 25, 2014. References to the transcripts will cite the page and line number, followed by the witness name (except where the witness is indicated in the text), as follows: "Tr. \_\_:\_\_(\_\_)." References to Joint Exhibits 1-33, Petitioner CAPA Exhibits 1-11 and Northwestern Exhibits 1-32 are cited, respectively, as "Jt. Ex. \_\_", "Pet. Ex. \_\_," and "Er. Ex. \_\_."

University, to ensure their basic protections and make sure that they're treated fairly.” Tr. 310:23-311:6 (Colter). CAPA seeks to bargain with Northwestern University over the terms and conditions of the football players' employment with the University, consistent with NCAA and Big Ten conference rules. Jt. Ex. 6; Tr. 291:22-293:9 (Colter). The proposed unit consists of the approximately eighty-five team members who receive athletic scholarships from the University to play football (the “Players”).<sup>2</sup> NLRB Ex. 1A-1G; Tr. 553:6-9 (Baptiste).

### **B. Northwestern University**

Northwestern is a private university in Evanston, Illinois. Tr. 60:9-12 (Colter). Northwestern is a member of the National Collegiate Athletic Association (“NCAA”), a private voluntary association comprised of collegiate institutions across the country. Tr. 557:9-23 (Baptiste). Northwestern has a sophisticated and accomplished football program, which competes in the top college football division—Division IA or the Football Bowl Subdivision (“FBS”)—and is part of the nationally-known Big Ten Conference. Tr. 61:18-19 (Colter); Tr. 343:20-344:4 (Berri). The football team plays twelve regular season games, traveling across the United States, and often plays in post-season bowl games as well. Tr. 1133:1-10 (Fitzgerald). Northwestern derives substantial revenue from its football program, including from the Players' participation in post-season games. Pet. Exs. 5, 6a, 6b; Er. Ex. 11; Tr. 617:13-16 (Baptiste).

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<sup>2</sup> CAPA's membership is currently open to scholarship athletes who participate in the Football Bowl Subdivision and Division I men's basketball. Jt. Ex. 1 at 3.01. As stated in the founding statement, that statement is intended only to set forth CAPA's initial objectives, which will be amended as CAPA evolves. *Id.* at 6.01. CAPA is open to organizing other Division I college athletes, male and female, if they meet the definition of employee under the National Labor Relations Act. Tr. 1206:7-11 (Adam). As CAPA stated in the hearing, it would welcome into the proposed bargaining unit walk-on players who do not receive athletic scholarships, if the Board were to determine that the walk-ons should be included in the unit. Tr. 282:22-284:13 (Colter); 1205:24-1206:16 (Adam).

The football team is supervised by a professional coaching staff. Jt. Ex. 17 at 9-10; 618:6-10 (Baptiste). Patrick Fitzgerald is the head football coach. Tr. 1018:-7-13 (Fitzgerald). He supervises a coaching staff of nine assistant coaches and four graduate assistant coaches. Jt. Ex. 17 at 9. There are also five full-time strength and conditioning coaches for football. Tr. 618:11-14 (Baptiste); Tr. 1022:10-13 (Fitzgerald). In addition, Coach Fitzgerald has a nine-member operations staff, a three-member quality control staff, and a video department, all of whom report to him. Jt. Ex. 17 at 10; Tr. 1021:21-1022:9 (Fitzgerald). Coach Fitzgerald reports to Athletic Director Jim Phillips, who is in charge of the Athletic Department. Jt. Ex. 32. The Athletic Department has an extensive staff that assists with the operation of Northwestern's intercollegiate athletic teams, including the football team. *Id.*

## **II. The Players' Football Duties**

Football is a "year-round gig" at Northwestern. Tr. 63:13-15 (Colter). As evidenced through witness testimony and Northwestern's documents detailing the daily life of a football player, the Players have extensive mandatory football-related duties that they perform throughout the year, under the comprehensive control of the coaches. Jt. Ex. 18; Tr. 70:3-145:3 (Colter).

Coach Fitzgerald, in consultation with his staff, determines the specific day-to-day tasks that are to be performed by the Players. Tr. 1077:7-1078:1, 1136:23-1139:6 (Fitzgerald). The Players' required activities are set forth in daily schedules prepared by Coach Fitzgerald, with input from his coaching staff and approval by Athletic Department officials. Tr. 1102:17-1103:9 (Fitzgerald); Jt. Ex. 18. These schedules are given to the Players throughout the year and "detail [their] daily duty." Tr. 67:21-68:2 (Colter). The schedules set forth the "matters that the players are supposed to attend unless they have a legitimate excuse," and the Players are told by Coach Fitzgerald and in written rules that there are consequences if they fail to adhere to those

schedules. Tr. 1111:2- 1112:4 (Fitzgerald). Coach Fitzgerald delegates to his staff the responsibility of ensuring that the Players are performing the daily tasks he has set, Tr. 1076:15-1078:17 (Fitzgerald), and he determines the corrective action to be taken if the Players fail to do so, which may include reporting the matter to his superiors within the Athletic Department. Tr. 1091:6-1095:1 (Fitzgerald).

Kain Colter played football for Northwestern for the past four seasons. Tr. 57:5-8 (Colter). As he testified in detail, a Northwestern player's football-related activities can be divided into eight periods: (1) training camp; (2) regular season; (3) post-season; (4) winter workouts; (5) Winning Edge; (6) spring football; (7) spring workouts; and (8) summer workouts. Tr. 70:3-145:3. In addition to Colter's testimony, which was uncontroverted, Joint Exhibit 18 contains daily football schedules for the 2012-13 and 2013-14 periods, which "outline . . . [the Players'] duties." Tr. 86:19-87:12 (Colter). Taken together, the testimony and exhibits establish that, year-round, the Players perform extensive activities as determined and controlled by the football coaches to improve their football performance and help the team achieve success.

### ***Training Camp***

The Players are required to report for training camp in early August, during which time "it's football every day." Tr. 70:13-16 (Colter). For instance, for the 2012 football season, new players had to report for camp on Saturday, August 4, 2012, while veterans had to report on Sunday, August 5. Jt. Ex. 18 at NU001219-1220. Training camp lasts a month, leading up to the week of the team's first game. Tr. 70:13-19 (Colter); Jt. Ex. 18 at NU001219-1240, 1399-1424.

When they report for camp, rookies undergo physical exams and equipment fitting. Jt. Ex. 18 at NU001220, 1404.<sup>3</sup> The Players participate in activities each day based on the schedules prepared by the coaching staff, from early in the morning to late in the evening. These activities include: (1) football practices; (2) meetings with position coaches who instruct the Players on fundamentals relating to their positions, including the schemes and plays that the coaches have designed for the team;<sup>4</sup> (3) walk-throughs—indoor practices scripted by the coaches where the Players run through a set number of plays; (4) team meetings with the coaches; and (5) film sessions where the Players watch the prior day’s practice to improve their performance. Jt. Ex. 18 at NU001221-1240, 1405-1424; Tr. 90:25-91:21, 93:17-94:9 (Colter). The Players must attend all scheduled activities. If they fail to do so, they are subject to discipline by Coach Fitzgerald. Tr. 1109:7-1110:13 (Fitzgerald).

For Players who are injured or need treatment to practice, the daily schedules set the time the Players must report to the Athletic Training Room to receive that treatment. Jt. Ex. 18 at NU001221-1240, 1405-1424; Tr. 88:16-21, 89:2-12, 95:4-96:6 (Colter). The schedules also set forth when Players are to report for their meals throughout the day. Jt. Ex. 18 at NU001221-1240, 1405-1424; Tr. 88:22-24, 91:22-92:2 (Colter).

The first week of training camp takes place at Northwestern’s football facility on campus. Jt. Ex. 18 at NU001221-1226, 1405-1409. Training camp then moves to a facility in Kenosha, Wisconsin, *id.* at NU001226-1235, 1410-1419, where the Players stay and perform their required

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<sup>3</sup> The coaching staff may also require any Player to take a fitness test to ensure that he is in proper shape to perform his football duties. Jt. Ex. 18 at NU001221, 1405; Tr. 1107:15-23 (Fitzgerald). If a Player were to fail to report for the fitness test, that would be brought to Coach Fitzgerald’s attention and there would be consequences if he failed to provide a reasonable excuse. Tr. 1107:15-1108:15 (Fitzgerald).

<sup>4</sup> “Position coaches” are assistant coaches on Coach Fitzgerald’s staff who have responsibility over a particular position on the football team, such as quarterback or defensive line. Jt. Ex. 17 at 9.

activities for the duration of camp. *Id.*; Tr. 97:17-98:10 (Colter). A typical day during training camp lasts from 8 am until 10 pm. Tr. 96:25-97:12 (Colter); Jt. Ex. 18 at NU001221-1240, 1405-1424. Colter estimated that Players devote 50 to 60 hours a week to football-related duties during this period. Tr. 70:17-22 (Colter). The purpose of the activities the Players perform during training camp is to prepare them for the opening game. Tr. 1107:1-12 (Fitzgerald).

### ***Regular Season***

The 12-game regular season begins immediately after training camp ends. It lasts from the beginning of September through November or early December. Tr. 70:23-71:4 (Colter). The Players again are provided a detailed schedule of required activities prepared by the coaches. Jt. Ex. 18 at NU001241-1360 (2012 season), 1425-1533 (2013 season). Tr. 100:2-17 (Colter).

The games typically are played on Saturdays. Tr. 1056:23-25 (Fitzgerald). On the Sunday following a game, the Players who played must report to the football facility for an injury check. Jt. Ex. 18 at NU001249, 1260, 1269, 1277, 1286, 1293, 1307, 1313, 1321, 1336, 1348, 1354, 1431, 1437, 1444, 1453, 1477, 1486, 1494, 1503, 1519, 1527; Tr. 101:21-22 (Colter). On Mondays, the Players attend position and team meetings with the coaches to learn the plays and the game plan to prepare for their next opponent. Tr. 101:18-102:6 (Colter); Jt. Ex. 18 at NU001242, 1250, 1261, 1270, 1278, 1286, 1294, 1308, 1314, 1331, 1337, 1349, 1426, 1432, 1438, 1445, 1463-64, 1468, 1487, 1495, 1514, 1520, 1528. The Players then have a required weightlifting workout. *Id.* On Tuesdays through Thursdays, the Players have additional position and team meetings, and practice with full pads for approximately two hours. Jt. Ex. 18 at NU001243-45, 1251-53, 1262-64, 1271-73, 1279-81, 1287-89, 1295-97, 1309-11, 1315-17, 1323-25, 1332-34, 1338-40, 1350-52, 1427-29, 1433-35, 1439-41, 1446-48, 1455-57, 1464-66,

1469-71, 1478-80, 1488-90, 1496-98, 1504-06, 1515-17, 1521-23, 1529-31; Tr. 102:16-104:2 (Colter).

Coach Fitzgerald, with input from his staff, determines when practices are held, how they are conducted, and which drills are run. Tr. 1077:7-23 (Fitzgerald). Coach Fitzgerald also decides whether to have meetings, how many, and when. Tr. 1077:24-1078:1 (Fitzgerald).

Prior to practice, the Players must report to the training room between 6:15 am and 7:50 am to have their ankles taped and get any other needed treatment. Tr. 103:9-19 (Colter). Following practice, the Players attend mandatory “training table,” a required meal the Players eat together at the football facility. Tr. 74:20-75:4 (Colter); 1057:16-21 (Fitzgerald). Athletic Department staff take attendance at the training table. Tr. 75:20-76:12, 134:15-135:1 (Colter). The Players are assigned to specific tables based on the coaches’ determination, in consultation with a nutritionist, that the Player should be in a “weight loss,” “weight gain,” or “weight maintenance” group. Tr. 160:10-161:20 (Colter).

During position meetings and team meetings, the Players also watch film of themselves and their opponents. Tr. 104:5-105:13 (Colter). The football program has a video staff that films every practice and uploads these videos to a database accessible from computers in the football facility. Tr. 141:9-13 (Colter); Tr. 1022:7-9 (Fitzgerald); Jt. Ex. 17 at 10. During the regular season, the Players often return to the football facility in the evenings to watch additional film to prepare for the next game. Tr. 104:5-106:12 (Colter). As Colter testified, he watched additional film to improve his performance and to prepare for the upcoming game by learning his opponents’ tendencies and the type of plays they run. Tr. 106:13-107:4. The Players generally return to the football facility to watch additional film on Monday, Tuesday, Wednesday, and Thursday evenings. Tr. 105:3-10 (Colter).

The Friday and Saturday of a game week are the most time-intensive days during the regular season. The coaches prepare and provide to the Players detailed itineraries setting forth the schedule of activities they must follow. Jt. Ex. 18 at NU001246, 1254, 1259, 1265, 1267, 1274, 1276, 1282, 1284, 1292, 1298, 1302, 1306, 1312, 1318, 1320, 1326, 1329, 1335, 1341, 1343, 1347, 1353, 1430, 1436, 1442-43, 1449-50, 1458, 1460, 1467, 1473, 1481-82, 1491-92, 1499-1500, 1507, 1509, 1518, 1524-25, 1532, 1542; Tr. 1123:2-9, 1135:14-1136:22 (Fitzgerald). The Players also must adhere to a dress code imposed by the coaching staff. Tr. 161:21-162:16 (Colter); Tr. 1082:11-1083:7 (Fitzgerald).

On Fridays before a home game, the Players must report to the football stadium between 3:00-4:00pm for meetings, walk-throughs, and film sessions. Jt. Ex. 18 at NU001267, 1276, 1284, 1292, 1320, 1329, 1443, 1450, 1460, 1473, 1492, 1525, 1532; Tr. 109:3-17 (Colter). Following these activities, the Players are taken to a hotel where they are required to stay Friday night. *Id.* There are additional scheduled meals and activities on Friday night until “Lights out” at 10:30 pm. *Id.*; Tr.109:18-110:4 (Colter).

On Saturdays, the Players attend meetings to prepare for the game, put on their pads and other equipment, and participate in pre-game warm-ups and stretching. Jt. Ex. 18 at NU001267, 1276, 1284, 1292, 1320, 1329, 1443, 1450, 1460, 1473, 1492, 1525, 1532. Then they play the game. *Id.* Coach Fitzgerald, with input from his staff, decides who plays in which aspects of the game, how long they play, whether they will be replaced, and who will replace them. Tr. 1136:23-1139:6 (Fitzgerald). Each Player’s work in practice, meetings, film sessions and other preparation for the game is relevant to the Coach’s decisions on these matters. Tr. 1138:1-1139:6 (Fitzgerald).



After the game, the Players have a team meeting with the coaches, remove their pads and equipment, shower, receive any needed medical treatment, and fulfill media obligations assigned by the University. Tr. 116:12-20, 117:4-12 (Colter); Tr. 1124:8-17 (Fitzgerald). The Athletic Department's communications staff decides which Players are to be made available for interviews and press conferences, and if requested by the Athletic Department, the Player must participate in media activities. Tr. 117:10-16 (Colter); Tr. 1083:8-14 (Fitzgerald); Jt. Ex. 17 at NU00177). The football team handbook states that the Players "have a responsibility to Northwestern, your coaches, teammates and yourself to cooperate with the media." Jt. Ex. 17 at NU000179.

When the team is playing an away game, in addition to the above activities, the Players spend additional time on travel. As Coach Fitzgerald testified, the travel day itinerary sets forth the schedule of activities that the Players must follow from early morning until "lights out" at 10:30pm. Tr. 1123:2-9. For example, for the game against Michigan on November 10, 2012, the rookies had to report at 7:00am to run and lift weights. Jt. Ex. 18 at NU001343; Tr. 112:5-25 (Colter). The remaining Players who had been chosen by the coaches to travel to the game were required to be present at the football facility by 8:20am for a walk-through conducted by the coaches. *Id.*; Tr. 113:1-3 (Colter).

The Players then departed by bus at 10 am for the five-hour drive to Ann Arbor, Michigan. Jt. Ex. 18 at NU001343. While players may use the time spent on the bus or plane traveling to an away game for personal activities, Tr. 1129:7-12 (Fitzgerald), the football team 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." Jt. Ex. 17 at NU000233. As Coach

Fitzgerald explained, while players can sleep or study on the bus, “at the end of the day I would want them to get their mind right to get ready to play.” Tr. 1128:22-1129:12 (Fitzgerald).

Once they arrived at Ann Arbor the Players had more meetings, the team dinner and team snack, and other activities. *Id.*; Tr. 113:17-114:16 (Colter).

On Saturday, the Players received a 7:30am wake-up call and were required to report by 8:05am for a pre-game meal and additional meetings. Jt. Ex. 18 at NU001343. The Players must be dressed in coat and tie when they report. *Id.*; Tr. 114:24-115:7 (Colter). The Players then went to the stadium, where they changed into workout clothes for their pre-game stretches, met with the athletic trainers to get taped up and other treatment in preparation for the game, put on their pads and equipment, and then had more warm-ups out on the field to get ready for the game. Tr. 115:13-116:11 (Colter); Jt. Ex. 18 at NU001343. The Players then played the game against Michigan, which went into overtime and lasted around four hours. Tr. 116:12-17 (Colter). The Players went through the same post-game activities as with a home game, and then took the bus back to Evanston, arriving around 9-10pm. Tr. 116:12-117:25 (Colter).

In total, the Players devoted more than 24 hours on those two days to required football activities. Jt. Ex. 18 at NU001343; Tr. 117:21-118:6 (Colter). Coach Fitzgerald confirmed that the Michigan game schedule is representative of the time the Players devote to football on the Friday and Saturday of an away game. Tr. 1125:17-1126:16; *see also* Jt. Ex. 18 at NU001259, 1302, 1306, 1343, 1347, 1482, 1500, 1509, 1542.

The weekly schedule described above is followed throughout the regular season. Jt. Ex. 18 at NU001241-1360; Tr. 121:8-10 (Colter). For instance, although the students are on vacation during Thanksgiving, Jt. Exs. 12-13, the Players report for required meetings and practice on Thanksgiving morning like any other Thursday. *Compare* Jt. Ex. 18 at NU001352,

1531 *with* Jt. Ex. 18 at NU001245, 1253, 1264, 1273, 1281, 1289, 1297, 1311, 1317, 1325, 1334, 1340, 1352, 1429, 1435, 1441, 1448, 1457, 1466, 1471, 1480, 1490, 1498, 1506, 1517, 1523, 1531. The Players are told that if they want to leave campus after completing their football obligations on Thanksgiving, they must stay within a six-hour radius of Northwestern. Tr. 122:12-123:5 (Colter).

In general, the Players devote significant time to required football activities every day of the week except Sunday. On Mondays, the Players have mandatory activities from 7am until around 12pm. Jt. Ex. 18 at NU001242, 1250, 1261, 1270, 1278, 1286, 1294, 1308, 1314, 1331, 1337, 1349, 1426, 1432, 1438, 1445, 1463, 1468, 1487, 1495, 1514, 1520, 1528. On Tuesdays, Wednesdays, and Thursdays, the Players have approximately 4-5 hours of mandatory activities. Jt. Ex. 18 at NU001243-45, 1251-53, 1262-64, 1271-73, 1279-81, 1287-89, 1295-97, 1309-11, 1315-17, 1323-25, 1332-34, 1338-40, 1350-52, 1427-29, 1433-35, 1439-41, 1446-48, 1455-57, 1464-66, 1469-71, 1478-80, 1488-90, 1496-98, 1504-06, 1515-17, 1521-23, 1529-31. And, as described above, the Players may spend more than 24 hours on scheduled football activities on Friday and Saturday, including travel time. Jt. Ex. 18 at NU001246, 1254, 1259, 1265, 1267, 1274, 1276, 1282, 1284, 1292, 1298, 1302, 1306, 1312, 1318, 1320, 1326, 1329, 1335, 1341, 1343, 1347, 1353, 1430, 1436, 1442-43, 1449-50, 1458, 1460, 1467, 1473, 1481-82, 1491-92, 1499-1500, 1507, 1509, 1518, 1524-25, 1532, 1542; Tr. 117:21-118:6 (Colter). Thus, the Players generally devote more than 40 hours each week to required football activities during the regular season; and in reality, when one includes the additional time that the Players regularly spend watching film in the evenings to be better prepared for the games and to improve the team's chances of success, the total is much more than 40 hours a week. Tr. 71:5-12 (Colter); Tr. 995:5-21, 996:17-997:2 (Blais).

### *Post-Season*

When the football team qualifies for a post-season bowl game—as it has in three of the past four years—the Players continue to have football duties after the regular season ends.<sup>5</sup> Scheduled practices, meetings, workouts, and other team activities continue throughout December as the team prepares for the bowl game. Jt. Ex. 18 at NU001362-1386; Tr. 71:19-72:3 (Colter). Although regular students are off for the holidays, Jt. Exs. 12-13, the Players are limited in any vacation they may take to see their families due to their football responsibilities. For instance, when the football team played in the Gator Bowl following the 2012 regular season, the Players could not leave until after 3pm on December 20 and were required to return on Christmas Day. Jt. Ex. 18 at NU001377; Tr. 127:7-128:9 (Colter). The Players must get their travel plans approved by their position coaches. Tr. 128:10-129:5 (Colter).

The Players generally follow a routine during the post-season like the one for the regular season. Tr. 123:17-25 (Colter). For Players living on campus—as all the Players are required to do for their first two years, Tr. 154:17-155:13 (Colter); Tr. 1081:16-22 (Fitzgerald)<sup>6</sup>—they are moved into a hotel because the dorms close in early December following the end of the academic quarter, so Northwestern must arrange accommodations for the Players due to their continuing football duties. Tr. 123:17-124:23 (Colter). For the one week preceding the bowl game, the coaches provide a detailed itinerary setting forth the Players' daily activities much like the travel itineraries provided during the regular season. Jt. Ex. 18 at NU001379-1386. These itineraries show required activities such as practices, meetings, walk-throughs, and team meals, as well as mandatory and optional social activities, required dress for various events, and curfew. *Id.*

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<sup>5</sup> In the past three seasons that Northwestern played in a bowl game, that game was played on December 31 or January 1, extending the season by another month. Tr. 71:13-22 (Colter).

<sup>6</sup> If a Player moves off-campus after two years, his lease must be approved by Coach Fitzgerald. Tr. 154:17-155:13, 309:25-310:2 (Colter).

Thus, the time spent by the Players on football-related activities in December in preparation for a bowl game is comparable to the time commitment in the regular season. Tr. 71:23-72:7 (Colter).

### ***Winter Workouts***

The winter workout period begins mid-January—about two weeks after the post-season ends in those years that Northwestern plays in a bowl game—and continues until mid-February. Tr. 73:8-25 (Colter). These workouts are conducted by the strength and conditioning coaches, and generally consist of one hour of running and agility drills and one hour of weightlifting. Tr. 74:9-14, 134:1-8 (Colter). The Players are divided into groups and must report at their assigned group workout time. Tr. 133:15-25 (Colter). The strength coaches take attendance, direct the Players as to the type of workouts they are to do, and supervise and critique their performances. Tr. 81:8-82:22 (Colter). Following workouts, the Players attend mandatory training table. Tr. 74:9-16 (Colter). They also report for injury treatment. Tr. 74:16-19 (Colter). The Players have these scheduled workouts 4-5 days a week, Jt. Ex. 18 at NU001390, NU001535-1536, and thus devote about 12-15 hours a week to their football obligations, Tr. 74:2-5 (Colter). The workouts ensure the Players stay in shape and are ready to perform their football duties. Tr. 64:16-65:4 (Colter).

### ***Winning Edge***

After the winter workouts end, there is one-week of “Winning Edge.” During Winning Edge, the Players work out on four days and lift weights on other days in accordance with the schedules prepared by the coaching staff. Jt. Ex. 18 at NU001390, 1536; Tr. 76:23-77:6 (Colter). Coach Fitzgerald and his staff conduct the workouts. Tr. 68:15-21 (Colter). These are the hardest workouts of the year, consisting of a demanding series of conditioning drills. Tr. 68:9-23, 76:16-25 (Colter). Players devote 15 to 20 hours to football obligations during this week.

Tr. 77:14-16 (Colter). Winning Edge is to prepare the Players to “transition” into spring football.  
Tr. 76:16-17 (Colter).

### ***Spring Football***

Spring football starts right after Winning Edge and continues until mid-April. Jt. Ex. 18 at NU001390-1392, 1536-1538. The Players have mandatory football activities six days a week, consisting of practices, meetings with the coaching staff to learn the offensive and defensive schemes, and weightlifting and conditioning. *Id.*; Tr. 77:17-78:14 (Colter). These practices are like those during the regular season. Tr. 140:10-18 (Colter). The Players also watch film with their coaches during their scheduled meetings, and also watch film in the evenings, like they would during the regular season. Tr. 140:19-141:20 (Colter). The Players must report for their daily activities in accordance with the schedules prepared by the coaches. Jt. Ex. 18 at NU001390-1393, 1536-1538. Their days can begin as early as 5:30am, and last 3-6 hours depending on the day’s schedule. *Id.* The Players thus generally devote 20-25 hours a week to their football obligations during this period. Tr. 78:21-24 (Colter).

### ***Spring Workouts***

Spring workouts begin about one week after spring football ends and continue through May. Tr. 78:25-79:17 (Colter). This period is similar to the winter workouts, with mandatory workouts four days a week consisting of running and weightlifting. Tr. 79:3-8 (Colter); Jt. Ex. 18 at NU001392, 1394. Players must report to the workout facility at their assigned times, and must perform their activities under the direction and control of the strength and conditioning coaches. Tr. 81:8-82:22, 142:5-13 (Colter). The Players then must report to training table after the workout. Tr. 142:10-13 (Colter).

### ***Summer Workouts***

The academic spring quarter ends in early June, at which time most regular students leave Northwestern for the summer. Tr. 142:18-19 (Colter). The Players have about one to two weeks of vacation but they must then report back to campus for their summer workouts. Tr. 84:15-85:1, 142:18-22 (Colter); Jt. Ex. 18 at NU001395, 1397-1398. Summer workouts are like the winter and spring workouts. Tr. 142:23-143:1 (Colter). This period begins with a team meeting and “Expectations Testing.” Jt. Ex. 18 at NU001397. The Players work out about four days a week, reporting at their assigned times and performing their workouts under the direction of the strength and conditioning coaches. Jt. Ex. 18 at NU001397-1398; Tr. 142:23-143:1, 144:22-25 (Colter). All Players are expected to participate in summer workouts. Tr. 85:19-86:1 (Colter). If a Player is taking a summer class or has a summer internship that conflicts with the summer workouts, he must report early at 5:30 am to do his assigned workouts. Tr. 143:7-144:3 (Colter).

The Players also participate in “7 on 7” drills in the afternoons or evenings. These are player-run practices, in which the Players perform football-related drills involving a group of offensive and defensive players. Tr. 66:25-67:3, 83:13-17 (Colter). These drills are performed at the Northwestern football facility, Tr. 83:18-84:4 (Colter), and an athletic trainer is present, Tr. 622:6-10 (Baptiste). Team leaders are responsible for running the 7 on 7 drills to help train younger team members and get them prepared for the upcoming season. Tr. 86:6-18 (Colter). Taking into account these 7 on 7 drills as well as the assigned workouts, Colter estimated that Players spent approximately 20-25 hours a week on football-related activities during the summer workout period. Tr. 86:2-5 (Colter). Summer workouts run through July, at which time training camp begins and the yearly cycle starts again. Tr. 85:5-12 (Colter).

### *Discretionary Weeks*

Between January 1 and July 31, the Players are provided nine “discretionary” weeks. Pet. Ex. 7; Tr. 517:5-24 (Baptiste). Some of these weeks—such as spring break and the time between the end of the spring academic quarter and the summer workout period—are used as vacation by the Players. As Colter testified, generally the only times during the year when he might be able to fly home and visit his family were in January in the week between the end of the post-season and beginning of the winter academic quarter, or during spring break in March, or for a few days at Christmas. Tr. 139:4-17.

As to the other “discretionary weeks,” the Players are not required to perform football activities, but most come to the football facility for strength and conditioning workouts. Tr. 79:18-80:23 (Colter). Although the strength and conditioning coaches are not supposed to conduct these workouts, they are permitted to monitor them, and they prepare instructional sheets for the Players describing exercises the Players could do. Pet. Ex. 7; Tr. 133:5-10 (Colter); Tr. 621:16-622:3 (Baptiste). All discretionary workouts are at the football facility. Tr. 80:20-23 (Colter); Tr. 620:15-18 (Baptiste). Colter understood from his leadership council meetings with Coach Fitzgerald that for the team to be successful, it was important to have high attendance at these workouts; and in fact, nearly all Players participated in these discretionary workouts.<sup>7</sup> Tr. 130:1-14, 132:24-133:14 (Colter); Tr. 1154:14-1155:16 (Fitzgerald). Coach Fitzgerald testified that one of his goals in creating the leadership council was to develop a process by which team leaders would exert influence on their teammates “to improve...the

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<sup>7</sup> The leadership council, consisting of a group of football players who are elected by their peers, and Coach Fitzgerald and a representative of the assistant coaches, enables Coach Fitzgerald to hear from those players about any issues with the team. Tr. 130:15-131:16 (Colter). Coach Fitzgerald runs the council, however, and has 51% of the vote on the council. Tr. 304:6-22 (Colter); Tr. 1116:2-23 (Fitzgerald).



running of the program.” Tr. 1116:8-18 (Fitzgerald). Colter confirmed that peer influence was used to get high attendance at discretionary workouts. Tr. 306:19-307:10 (Colter).

Aside from the discretionary weeks, all other time during the off-season consists of mandatory scheduled activities. Tr. 1131:12-1132:4, 1147:24-1148:6, 1148:21-1149:5 (Fitzgerald).

Consistent with the facts just described, Coach Fitzgerald testified that a Player’s football responsibilities are fairly viewed as a “full-time job.” Tr. 1159:14-1160:18.<sup>8</sup>

### **III. The Benefits Northwestern Receives From the Players’ Services**

Through the services performed by the Players, Northwestern is able to field a football team that competes in the highest division of college football, and to derive substantial financial benefits. Tr. 61:18-19 (Colter); Tr. 343:17-344:1, 345:2-20 (Berri) As members of the Big Ten Conference, Northwestern shares in significant revenue generated through football television contracts and bowl game participation. Tr. 344:12-21 (Berri); Tr. 558:2-13 (Baptiste).

Northwestern reported approximately \$235 million in revenue from its football program from 2003-2012, and reported a net profit from its football program that ranged from more than \$5 million to nearly \$10 million each year, with the total excess of revenue over expenses amounting to \$76.3 million over those ten years. Tr. 371:15-16 (Berri); Pet. Ex. 5 at 5-6; Pet. Exs. 6a-6b. Revenue sources include ticket sales, television contracts, and merchandise sales and licensing. Pet. Ex. 5 at 3-5; Tr. 373:4-21 (Berri). Northwestern sells merchandise bearing its football players’ names, jersey number, and images; uses images of the football players in

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<sup>8</sup> Coach Fitzgerald’s “full-time job” reference was first made in a July 2013 newspaper article. Pet. Ex. 10. While the article does not make clear whether Coach Fitzgerald was referring to the player’s football obligations or total obligations, in his testimony Coach Fitzgerald made clear that a player’s *football responsibilities* constitute a full-time job. Tr. 1159:14-1160:18.

marketing materials; and requests Players to sign autographs that are donated, sold, or auctioned for the University's benefit. Pet. Ex. 2; Er. Ex. 31 at 41; Tr. 155:22-157:11, 158:10-159:13 (Colter). As sports economist Professor David Berri concluded, with respect to the FBS division in which Northwestern participates, the "consistent story told through the years that this is a business that is trying to increase revenues, and that's what it is trying to accomplish." Tr. 381:10-13 (Berri).

In addition to the direct financial benefits Northwestern realizes from its football program, the University reaps substantial indirect benefits. Tr. 373:25-374:6, 376:25-378:2 (Berri). For instance, numerous studies have shown a phenomenon known in the industry as the "Flutie Effect," in which athletic success leads to increased student applications to the university. Pet. Ex. 5 at 7-8. For instance, Northwestern saw applications increase by 21% following the football season in which the team won the Big Ten conference title and played in the Rose Bowl. *Id.* at 8. Another study showed that media mentions of Northwestern increased by 185% following that same football season. *Id.* at 8 n.27. The football team's performance can also result in increased alumni donations. *Id.* at 8-9.

NCAA officials acknowledge that college football in the FBS division is a major commercial enterprise. Pet. Ex. 5 at 3, 9; Tr. 378:7-379:8, 380:12-381:4 (Berri). Indeed, the business model for FBS college football programs like Northwestern's is comparable to the business model for professional teams in the National Football League. Tr. 381:16-20 (Berri). Both a college football program like Northwestern's and the NFL are in the business of providing sports entertainment through the labor provided by players, Tr. 345:10-17 (Berri); Pet. Ex. 5 at 6, 10, and in both cases the business derives substantial revenue from that labor through ticket sales, television contracts, merchandise, stadium rights, and other sources. Tr. 383:23-

384:15 (Berri); Pet. Ex. 5 at 6-7. Except for the limitations placed by NCAA rules on the amount of compensation that can be provided to college football players, the economic relationship between the Players and Northwestern closely resembles the economic relationship between a professional football player and his NFL team. Pet. Ex. 5 at 6-7; Tr. 383:23-386:20 (Berri).

To ensure the continued success of this business, Northwestern exerts control not only over the Players' football-related tasks—e.g., workouts, practices, and games as described above—but also over other aspects of the Players' lives that relate to their status as members of the football team. The Players are provided a team handbook that contains rules and policies applicable to football players only. Jt. Ex. 17. The Players also are subject to the rules and policies in the Northwestern University Athletics Handbook. Jt. Ex. 16. Both handbooks set rules applicable to the Players that are separate from any University rules applicable to the general student body.

For example, a Player is required to grant to Northwestern and the Big Ten Conference all rights to use his name, image, and likeness in any manner they see fit to further their institutional interests, and a Player must also relinquish his rights to any compensation from the use of his name, image, and likeness. Jt. Ex. 10 at “Student-Athlete Name and Likeness Release”; Tr. 157:12-158:9 (Colter); 1081:23-1082:5 (Fitzgerald). The Players must also get approval from the Athletic Department before they can work anywhere else. Tr. 192:22-193:11 (Colter); 1083:15-21 (Fitzgerald). And a Player who wishes to transfer to another school to play football must sit out a year before he can compete for the new school. Jt. Ex. 22 at 170.

As has been noted, Players are required to make media appearances as directed by the University. The Players are also subject to a social media policy, separate from the policy

applicable to students, which is enforced by the Athletic Department. Jt. Ex. 17 at NU00158-164; Tr. 151:7-152:8 (Colter). Violations of this policy can result in dismissal from the football program and loss of the Player’s athletic scholarship. Tr. 625:22-626:10 (Baptiste). Players must give access to their Facebook and Twitter accounts to coaches who monitor what the Players say or post online. Tr. 152:9-21, 153:12-154:12 (Colter). The Players are prohibited from using certain swear words, Tr. 152:22-153:9 (Colter); Jt. Ex. 16 at NU000007, and can be suspended if they “embarrass [the] team,” Jt. Ex. 17 at NU00176, Tr. 1085:18-20 (Fitzgerald). The University also prohibits a Player from providing any media interview unless arranged by the Athletic Department communications staff. Jt. Ex. 17 at NU00179; Tr. 1083:8-14 (Fitzgerald).<sup>9</sup>

#### **IV. The Players’ Compensation**

As compensation for their services to Northwestern’s football team, the Players (excluding walk-ons) receive “athletic aid”—commonly referred to as an “athletic scholarship”—which is at least 100% of the “full ride equivalency” of \$61,063. Tr. 782:7-9 (Lindley); Er. Ex. 16. This covers tuition, fees, room, board and books. Jt. Ex. 27. When Players live off campus, the non-tuition portion of the award takes the form of a cash stipend of about \$14,000 per year, Tr. 554:3 (Baptiste), from which charges for training table meals are deducted, Tr. 74:24-75:2 (Colter).

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<sup>9</sup> In addition, the Players are subject to a drug and alcohol policy separate from the general policy applicable to students. While the Student Handbook contains a drug policy that prohibits the “unlawful possession, use, or distribution of illicit drugs and alcohol,” Jt. Ex. 19 at 44, the Players are subject to more restrictions and, like professional football players, must submit to mandatory testing, Tr. 164:9-14 (Colter); Tr. 1082:6-10 (Fitzgerald). Compliance with the drug policy, including mandatory random drug testing, is necessary for football programs that wish to compete in the Big Ten conference and the NCAA. Jt. Ex. 10; Jt. Ex. 22 at 141. Violations of the drug policy are handled by the Athletic Department, and during Coach Fitzgerald’s tenure, a player had his football scholarship revoked for violating the drug policy. Tr. 1045:5-1046:2, 1175:6-1176:3 (Fitzgerald).

The “full ride equivalency” is slightly below the \$63,193 figure that is considered the full cost of attendance (COA) at Northwestern for purposes of need-based aid. Tr. 742:19-743:10 (Lindley). However, if a Player receives a federal Pell Grant, he will receive the full \$61,063 on top of the Pell Grant, which will bring the total above the COA. Tr. 743:18-19, 744:5-9 (Lindley). Thus, the data presented in Employer Exhibit 18 shows that in 2013-14, sixteen Players received a package that exceeded the COA. This “over-awarding” of Pell Grant recipients is not allowed for non-athletes. Tr. 743:14-744:9 (Lindley).

If a Player takes summer classes—as is necessary when a Player needs to take a course that would conflict with his football duties during the academic year, Tr. 179:14-24 (Colter)—the value of the scholarship is increased to more than \$75,000. Tr. 148:12-15 (Colter); 553:10-23 (Baptiste).

Most other scholarship athletes at Northwestern do not receive a “full-ride equivalency.” Employer Exhibit 16 shows that in 2013-14 the University gave athletic aid to 169 individuals. This total included 88 football players, who each received aid at 100%. Er. Ex. 16. In contrast, the exhibit shows that, of the 305 athletic aid recipients who were not football players, only 81 received 100%, and 86 received less than 24%. *Id.*

The “athletic aid” provided to the Players is explicitly provided in return for their services to the football team. The scholarship offer states that it is being made by “the Northwestern Football Staff and [Coach Fitzgerald].” Er. Ex. 5 at NU000967. It recites that the Player “understand[s] this tender may be immediately reduced or cancelled” if he becomes “ineligible for intercollegiate competition” or “voluntarily withdraw[s] from [the] sport at any time for any reason.” *Id.* at NU000971. A scholarship can also be cancelled if the Player “[a]buse[s] team rules as determined by the coach or athletic administration.” *Id.* As Brian Baptiste,

Northwestern's Associate Athletic Director for Compliance, stated, a Player who refused to go to practice or failed to show up for the games would be considered to have voluntarily withdrawn from the team, "and, therefore, there's a reason for the institution to cancel their athletic aid." Tr. 577:12-24.

In short, an individual must be on the football team to continue to receive a football scholarship. Tr. 768:11-19 (Lindley). *See also* Jt. Ex. 21 at NU000423 ("It is the policy of Northwestern University that an individual who is offered and accepts athletically related financial aid will continue to receive such support provided that he or she continues to be a team member.") If a Player "voluntarily withdraws from participation prior to the end of an academic year, all athletically related financial aid may cease at the time of withdrawal." Jt. Ex. 16 at 26-27.

The compensation provided by a Northwestern football scholarship is fundamentally different in purpose and amount from the financial aid provided to regular students. Northwestern's financial aid brochure does not even mention athletic scholarships, except to state, under the heading of "Other Useful Resources," that "[i]f you believe you might qualify for an NCAA Division I athletic scholarship, contact the appropriate Northwestern coach." Er. Ex. 13 at 16. For non-athletes, "Northwestern scholarship funds are awarded in accordance with [the University's] need-based financial aid policy." Er. Ex. 14 at 1. Under that policy, "[t]he University does not award its scholarships based on academic merit; it reserves this assistance for students who would not otherwise be able to attend."<sup>10</sup> Tr. 759:17-23 (Lindley); Pet. Ex. 9 at 3.

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<sup>10</sup> Although Northwestern has "music talent awards and the debate scholarships and a few other things here and there," for non-athletes "the basic premise" of financial aid is need. Tr. 759:17-760:3 (Lindley).

To that end, the Financial Aid office determines an “Expected Family Contribution”(EFC) for each non-athlete seeking aid, and provides a “financial aid package [that] equals the difference between the COA and the EFC.” Er. Ex. 13 at 4. That package “typically includes a combination of need-based scholarships, grants, loans, and part-time work,” *id.*, with most of the COA to be paid from family resources, loans and work rather than through the award of a scholarship. As of 2013-2014, Northwestern’s COA was \$63,193, *id.*, but the average scholarship received by students with parent income above \$90,000 was less than half of that amount, and even for students with parent income below \$30,000, the average scholarship was less than \$40,000, *id.* at 6.

And of course, unlike football scholarships, which are dependent on a Player’s performing services for the football program, no services are required of a student who receives need-based assistance. Tr. 757:15-20 (Lindley).<sup>11</sup>

## ARGUMENT

### I. THE LAW GOVERNING EMPLOYEE STATUS: COMMON LAW OF AGENCY

In *NLRB v. Town & Country, Inc.*, 516 U.S. 85, 90 (1995), the Supreme Court stated that “[t]he ordinary dictionary definition of ‘employee’ [is] any ‘person who works for another in return for financial or other compensation’” (quoting American Heritage Dictionary 604 (3d ed. 1992)). Consistent with that definition, the Court held that it was correct for the Board to determine statutory employee status by consulting “the common law of agency,” *id.* at 94, noting that, “in the past, when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as

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<sup>11</sup> If a scholarship football player leaves the team and thus loses his football scholarship, he can then apply for need-based assistance like other students. Tr. 784:9-14 (Lindley).

understood by common-law agency doctrine,” *id.* (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992)).

The Board recognizes that *Town & Country* and *Darden* “teach us not only that the common law of agency is the standard to measure employee status but also that we have no authority to change it.” *Roadway Package Sys., Inc.*, 326 NLRB 842, 849 (1998). *See also* *WBAI Pacifica Found.*, 328 NLRB 1273, 1274 (1998) (relying on the dictionary definition of “employee” quoted in *Town & Country*); *Seattle Opera Ass’n*, 331 NLRB 1072 (2000) (relying on *Town & Country* in holding that auxiliary opera choristers were employees rather than volunteers); *enf’d*, 292 F.3d 757 (D.C. Cir. 2002)); *The Ariz. Republic*, 349 NLRB 1040, 1042 (2007) (citing *Darden*) (common-law agency determines whether an individual is an employee, because, “where Congress has used the term ‘employee’ without defining it, it intended that the common-law agency doctrine would apply”).

We show in Part II that Northwestern’s scholarship football players are employees under *Town & Country*’s common law test and Board law. We then show in Part III that CAPA is seeking to represent an appropriate unit. Finally, in Part IV we explain why none of the “policy” arguments offered by Northwestern provides a basis for denying the Players the rights that the Act confers on employees.

## **II. NORTHWESTERN’S SCHOLARSHIP FOOTBALL PLAYERS ARE EMPLOYEES**

In *Boston Medical Center Corp.*, 330 NLRB 152 (1999), in holding that hospital housestaff are statutory employees even though they are also students, the Board relied on *Town & Country*’s approval of the proposition that “the term ‘employee’ as used in the Act reflect[s] the common law agency doctrine of the conventional master-servant relationship.” *Id.* at 160. The Board observed that “[a]t common law, a servant was one who performed services for



another and was subject to the other's control or right of control," *id.*, and "[c]onsideration, *i.e.*, payment, is strongly indicative of employee status." *Id.*<sup>12</sup>

In *New York University*, 332 NLRB 1205 (2000), in holding that graduate assistants performing teaching duties were statutory employees even though they were also students, the Board again relied on *Town & Country's* teaching that "[t]he definition of the term 'employee' reflects the common law agency doctrine of the conventional master-servant relationship . . . [which] exists when a servant performs services for another, under the other's control or right of control, and in return for payment." *Id.* at 1205-06.

In *Brown University*, although a divided Board overruled *NYU* insofar as *NYU* had held that graduate assistants who perform teaching duties as part of their academic program have a right to engage in collective bargaining, the majority recognized that *NYU* had "rel[ied] on *NLRB v. Town & Country*" in holding that a master-servant relationship "exists when a servant performs services for another, under the other's control or right of control, and in return for payment." 342 NLRB at 483 and n.3 (quoting *NYU*, 332 NLRB at 1206). The Board did not suggest in *Brown* that *NYU* had misstated the common law test.<sup>13</sup>

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<sup>12</sup> *Boston Medical Center* was reaffirmed in *St. Barnabas Hospital*, 355 NLRB No 39 (2010). See also *Icahn Sch. of Med. at Mount Sinai*, NLRB Reg. Dir. No. 29-RC-112517 (Feb. 25, 2014) (following *Boston Medical Center*).

<sup>13</sup> As to the issue on which *Brown* overruled *NYU*, the Board has recently recognized that there are "compelling reasons for reconsideration of the decision in *Brown*." *New York University*, 356 NLRB No. 7 (2010); *New York University*, 2012 WL 2366171 (NLRB June 22, 2012). However, as will be discussed, the disagreement between *NYU* and *Brown* concerns factors not present in this case. Although we believe that the *NYU* case was rightly decided and that *Brown* should be overruled, even if *Brown* were considered to be good law it would not undercut our showing that the Players are statutory employees who have the right to organize and to bargain.

We therefore turn to the question whether the Players “perform[ ] services for [the University], under the [University’s] control or right of control, and in return for payment.” As we will show, all of those elements are present here.

**A. The Players Perform Services Under the University’s Control.**

1. The facts summarized above establish that Northwestern’s scholarship football players are required to perform services of a kind that an employee performs. Indeed, these services are very similar to what a player employed by an NFL team performs. And as we have seen, these services are performed under the direct and comprehensive control of the coaching staff. In games, practices, workouts and other football activities, the Players are told by the coaches what to do, how to do it and when to do it, and their performance of their duties is closely regulated and monitored. *See supra* at 5-19. Furthermore, to the extent that some of the Players’ activities are less closely controlled by the coaching staff, such activities are directly connected with the closely-supervised activities that are the core of the job, and the Players perform them as part of their job—just as is the case with a professional athlete and with other employees in entertainment industries, such as an actor employed by a theater company who is responsible for learning her lines on her own, or a musician employed by a symphony orchestra who is responsible for practicing at home.

Also indicative of the University’s control over the Players’ football services is the fact that separate from and in addition to rules that apply to *students*, the Players are subject to numerous *other* rules applicable to them as *football players*, enforced by the *football* staff (sometimes with the involvement of other Athletics Department officials). If certain conduct violates both a student rule and a football rule—such as using drugs—the consequences with respect to football, including whether the player will retain his scholarship, are determined by the football disciplinary process. *See* Tr. 1173:9—1176:12 (Fitzgerald). Only decisions “that ha[ve]

nothing to do with football” “go to the other side,” *i.e.*, to the student disciplinary process. Tr. 1127:13-20 (Fitzgerald). In short, the athletic officials who supervise the football business determine the job consequences for Players who violate the rules applicable to their employment, just as in any employer-employee relationship, while leaving disciplinary decisions regarding academic status to the academic authorities.

The Players’ football services and responsibilities are so extensive as to amount to a full-time job. *See supra* at 29.<sup>14</sup> But even if the job were considered to be part-time, that would not nullify the Players’ right to organize. *See, e.g., Univ. of San Francisco*, 265 NLRB 1221 (1982) (approving part-time faculty units); *Teamsters Local 952 (Pepsi Cola Bottling Co. of L.A.)*, 305 NLRB 268 (1991) (noting approval of part-time merchandisers unit).

There is no merit to the University’s suggestion that the Players are “temporary” employees who should have no right to organize. *Boston Medical Center* soundly rejected a similar contention made with regard to hospital house staff, who served “for a set period of time, in some instances for 3 years.” 330 NLRB at 166. The Board “d[id] not find that house staff are ‘temporary’ employees as the Board has defined that term,” explaining:

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<sup>14</sup> Brian Baptiste, Northwestern’s Associate Athletic Director for Compliance, testified about how the football program reports of hours spent on “Countable Athletic Related Activity” (CARA) as defined by the NCAA. Tr. 509:16-17 (Baptiste). CARA does *not* include all of the Players’ football activities. For example, it does not include the time spent traveling to a game; and CARA defines a “competition day” as consuming only three hours, “regardless of the duration of the[ ] activities”—which, when one considers the actual length of a football game and the time spent on gameday in meetings, warmups and other required activities, far exceed what is counted as CARA. Tr. 567:4-568:10 (Baptiste). When asked whether, “in real time, it’s far more than” the hours reported as CARA, Mr. Baptiste answered “Sure.” Tr. 573:7-10 (Baptiste). It appears that Northwestern introduced evidence regarding its CARA reporting not in an attempt to controvert the evidence, including Colter’s testimony, regarding the time required of Northwestern’s scholarship football players, but only to foreclose any implication that the football program has not reported hours as required by the NCAA. That is beside the point. CARA is an artificial construct, and the evidence about Northwestern’s CARA reporting does not speak to the amount of work the Players do “in real time.”

[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.

As the Board noted in *Boston Medical Center*, professional athletes are one example, among many, of employment relationships that are not expected to last for more than a few years. Indeed, the average career of an NFL player is only three years. Tr. 393:23-24 (Berri). Northwestern’s scholarship football players typically have a four-year football career at the University, which is *longer* than the average NFL career. To deny them the rights of statutory employees by labeling them “temporary” would be “to make what was intended to be a limited exception swallow the whole.” *Boston Medical Center*, 330 NLRB at 166.<sup>15</sup>

2. The separation of football player discipline from student discipline noted above is one manifestation of the fact that the Players’ enrollment as students does not alter the character of their football services in any way that is inconsistent with their employee status.

The *Brown* majority viewed the relationship between the graduate students’ teaching duties and the academic program they were pursuing as supporting a policy argument against collective bargaining. As we show in Part IV, that policy argument, even if it were assumed to

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<sup>15</sup> In *San Francisco Art Institute*, 226 NLRB 1251 (1976), a divided Board refused to direct an election for a unit consisting of students who worked as part-time janitors at the art school they were attending, finding that they had only a “very tenuous secondary interest . . . in their part-time employment.” *Id.* at 1252. Although we believe that *San Francisco Art Institute* was wrongly decided, *see infra* at 41, to the extent that the decision turned on the “very tenuous” nature of the janitors’ interest in their employment, it is clear in this case that the Players’ interest in their football duties is anything but “very tenuous.”

have merit in the context of teaching duties, does not apply to football duties. At this juncture, however, we note that there is nothing about the Players' status as students that makes their work as football players inconsistent with a common law master-servant relationship.

The relevant question is *not* whether the Players and the University regard it as important that the Players receive their degrees. Certainly they do. Nor is the question whether the football program makes efforts to enable the Players to remain academically eligible. Certainly it does.<sup>16</sup> But what can be inferred from the extent of the advisory programs, tutoring and other

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<sup>16</sup> Even so—although we do not regard the point as in any way essential—the record indicates that the Players' academic success is not what it would be absent football. In exit interviews, the number one source of dissatisfaction cited by Northwestern's football players is that they could not reach their academic potential because of the demands of the football program. Tr. 170:5-19 (Colter). Although the aggregate grade point average of the Players is a commendable 3.0, Er. Ex. 25, that ranks 18<sup>th</sup> out of Northwestern's 19 teams, *id.* Furthermore, as Colter testified, the prevalent majors for the scholarship football players are Communications or Learning and Organizational Change; few scholarship players major in such subjects as engineering or premedical studies. Tr. 186:9-187:5 (Colter). *See also* Er. Exs. 26-27 (listing the majors taken by all football Players, without excluding walk-ons who do not receive a football scholarship).

The amount of time the Players devote to football greatly exceeds the eight to twelve hours that Northwestern students who have work-study jobs typically devote to their work. Pet. Ex. 9 at 3. Northwestern has stated that “[m]ost students do not find that this [eight to twelve hour] commitment adversely affects academic performance,” *id.*; but the same cannot be said of the much greater commitment that the Players are required to make to the football program. In Colter's case, it proved impossible to pursue his original plan to complete premedical studies due to the demands of his football duties. Tr. 167:1-169:18; 185:10-24, 187:6-23 (Colter). The testimony offered by the three former Players called by the University was not inconsistent with Colter. One former player, whose GPA was much higher than the average among the Players, Tr. 1215: 23-25 (Bartels), was able to complete the premed program due to superior time management skills. Tr. 1232:16-24 (Bartels). The medical school he subsequently attended was “amazed” that he had been able to earn a premed degree while playing football at Northwestern. Tr. 1238:8-18 (Bartels). The second former player, who majored in engineering, likewise attributed his success to time management skills, Tr. 1277:10-14 (Pace), and his subsequent employer likewise was “blown away” by his ability to manage both football and engineering at Northwestern. Tr. 1278:25-1279:4 (Pace). The third former player was unusually gifted academically, graduating with a 3.94 GPA. Tr. 1294:6-9 (Ward). Those individuals deserve credit for their unusual success in apparently reaching their academic potential notwithstanding their participation in the football program—but such success is indeed unusual and in no way contradicts Colter's testimony about the difficulty of accomplishing such feats.

steps the University takes to assist the Players in obtaining their degrees is that, absent such special efforts, many Players would find it impossible to succeed academically, given the enormous demands placed on them by their football duties. And of course, the University has an interest in having its Players make sufficient academic progress to retain their eligibility, just as an employer whose work requires employees to be licensed has an interest in making it possible for employees to obtain and retain necessary licenses.

Consistent with that fact, the evidence at the hearing on the subject of conflicts between course schedules and football obligations shows that, to the extent that the football program allows some flexibility, it is no more than what employers in other industries typically allow in the way of scheduling accommodations. Northwestern's willingness to adjust for Players' course conflicts is in fact quite limited. Colter testified that, other than during the summer, "you're basically just not allowed to schedule things early in the morning that would conflict with football." Tr. 144:4-11. *See also* Tr. 143:7-144:11, 169:4, 170:2, 172:5-17, 222:6, 223:1 (Colter). The testimony of Janna Blais, Northwestern's Deputy Director of Athletics for Student-Athlete Welfare, confirms Colter's testimony: she acknowledged that Northwestern's academic advisers "help [the Players] stay away from" courses that would conflict with practice, Tr. 841:15-20, and that the timing of football practice determines "[the] class options [the Players may] select from," Tr. 842:15-843:2. Coach Fitzgerald made the same point, testifying that he favored morning practices when fewer classes are scheduled, in order to "allow our young men to take more classes," because he "wanted to try to get our class-missed opportunities mitigated." Tr. 1040:23-1041:1. That testimony makes clear that, as a rule, football is first and the Players are not "allow[ed] . . . to take . . . classes" that conflict with football. *Id.* *See also* Tr. 137:8-10 (Players "were not allowed to" schedule a class before 11:00) (Colter)).

Although Ms. Blais testified that there are occasions when a Player is allowed to “take [a] class [that conflicts with practice] and our coaches work around it,” she described this as allowed where a course is “a requirement” for a particular player and the player cannot “reasonably” take that course in the summer. Tr. 841:24, 842:6. It is clear that in reality, it is very rare for a Player to be granted even such a limited dispensation from practice. Indeed, Ms. Blais was aware of only one scholarship football player who had taken any course as early as 10:00 on any practice day. Tr. 1007:1-9.<sup>17</sup> And, on the very rare occasions when a Player is allowed to take a course that presents a conflict with the football schedule, the testimony of former player John Henry Pace illuminates how the football coaches “work around” such a conflict. Pace testified that he needed to take a 9:00 class or he would not “be able to graduate and keep on track.” Tr. 1272:19-21. Fortunately, Pace was a “long snapper.” Because “all the team duties as a long snapper start at the beginning of practice,” Tr. 1272:24-1273:1 (Pace), and only one team member needs to be on hand in order for a long snapper to perform his individual drills, Tr. 1284:17-1285:11 (Pace), Coach Fitzgerald allowed Pace to leave practice to attend his class after he had completed his “team duties,” “on the promise that [he] would come back and do individual drill work later in the day, which [he] always did.” Tr. 1273:2-7 (Pace).

Thus, the way in which the football program deals with conflicts between football schedules and class schedules is indicative of an employer that is open to some minimal flexibility as to scheduling, as long as it does not significantly interfere with work. That may be the approach of a *good* employer—but it is that of an employer nonetheless. And, when a Player wants to be excused temporarily from his football duties not because of a scheduling conflict

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<sup>17</sup> Some scholarship players take courses that begin at 11:00; but that does not present a serious conflict because, as Coach Fitzgerald explained, practice typically starts at 6:50 am “and then we’re typically done at 10:30, from a meeting standpoint.” Tr. 1041:17-18 (Fitzgerald).

with a class but because he has fallen behind academically, the record again indicates that such permission is granted only sparingly, as it might be granted by any employer. Indeed, Coach Fitzgerald's emphasis on one occasion when a scholarship player who had fallen behind academically was allowed to miss one week of practice, Tr. 1061:8-1062:7 (Fitzgerald), strongly suggests that this was the *only* occasion on which a Player has been given time off from his football duties in order to meet academic demands.

**B. The Players' Services are Performed For the University.**

A master-servant relationship requires that the servant perform services "for" the master. *See supra* at 26-27. Considering the many millions of dollars of surplus revenue the University receives as a result of the Players' services and the extent to which the University seeks to tap the value of the Players' football skills through ticket sales, merchandising and other commercial ventures, it cannot be disputed that the Players are performing services "for the [University]."

No contrary conclusion flows from *Brown University*, where Member Schaumber was of the view that "[t]he teaching and research [of graduate assistants] are not performed 'for' the university, as such, but rather as an integral part of the students' educational course of study." 342 NLRB at 490 n.27. No other member of the Board joined in that conclusion,<sup>18</sup> which we believe was incorrect even as to the facts in *Brown*. *See id.* at 495 n.9 (Members Liebman and Walsh, dissenting). But be that as it may, Northwestern's scholarship football players are not performing their football duties "as an integral part of [their] educational course of study." Rather, the two spheres are "completely separate." Tr. 174:11-14 (Colter).

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<sup>18</sup> *See id.* at 495 (Members Liebman and Walsh, dissenting) ("We do not understand the majority to hold that the graduate assistants in this case are *not* common law employees, a position that only Member Schaumber reaches toward.") (emphasis in original).



The football coaches are not members of Northwestern’s faculty, and the Players receive no academic credit for any of their football program activities. Tr. 173:4-10, 178:9-13 (Colter). Players may find enjoyment and satisfaction in their work, but the same can be said of many employees, particularly those who work in the sports and entertainment industries; and work satisfaction is not inconsistent with employee status. *See, e.g., Seattle Opera Ass’n*, 331 NLRB at 1073 (auxiliary opera choristers were statutory employees even though they received very little compensation and “presumably derive pleasure and satisfaction in performing”). Players also may learn leadership skills and “life lessons” from participating in the football program, *see* Tr. 1143:18-24 (Fitzgerald); but here again, the same can be said of many jobs. Indeed, Coach Fitzgerald acknowledged that in the course of his professional employment as an assistant coach, the head coach who was his boss provided life lessons similar to those he imparts to the Players. Tr. 1139:25-1141:3 (Fitzgerald).<sup>19</sup>

In short, the Players provide services for the University, under the University’s control. To the extent that the Players enjoy their job and learn from it, it is still a job—*i.e.*, a master-servant relationship as defined by common law.

### **C. The Players’ Services are Provided in Return For Payment.**

The remaining element of the common law test is that services are provided “in return for payment.” *See supra* at 26-27.

This element requires only “a rudimentary economic relationship . . . between employee and employer.” *WBAI Pacifica*, 328 NLRB at 1274. Thus, in *Seattle Opera*, the Board found auxiliary opera choristers to be employees where the only compensation they received was \$214

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<sup>19</sup> For a few Players, Northwestern’s football program may prepare them for an NFL career. But there are any number of jobs—including apprenticeships, internships, and hospital house staff positions—the principal benefit derived by the employee is not the pay but the experience. *See Boston Medical Center*, 330 NLRB at 160-61 and cases cited therein.

for each production in which they performed—with six to eight performances being required per production—and a few tickets to dress rehearsals. *See* 331 NLRB at 1072 and n.1. It was enough that, unlike the unpaid volunteers in *WBAI*, “auxiliary choristers . . . receive *some* monetary compensation for their work.” *Id.* at 1073 (emphasis added). The D.C. Circuit agreed. 292 F.3d at 763-64.<sup>20</sup>

The Board recognizes that in-kind benefits are compensation just like wages. For example, room and board provided by an employer, as “emoluments of value arising out of the employment relationship,” are included in calculating backpay in ULP cases. *Amshu Assocs., Inc.*, 234 NLRB 791, 796 (1978) (quoting *W.C. Nabors*, 134 NLRB 1078, 1086 (1961)). *See also Pierre Pellaton Enters., Inc.*, 222 NLRB 555, 557 (1976) (including value of employer-provided room and board in backpay award); *Colo. Forge Co.*, 285 NLRB 530, 542 (1987) (including value of employer-provided room and board in interim earnings to be deducted from backpay).

Here, the room and board the Players receive, either in kind or in the form of a cash stipend, constitutes compensation. Indeed, in *Managers of the Boston Port & Seamen’s Aide Soc.*, NLRB Reg. Dir. No. 1-RC-21646 (July 3, 2003), where an individual received room and board but no other remuneration, Regional Director Pye found that “[t]he receipt of room and board . . . [w]as simply another type of compensation and that there [wa]s a sufficient economic relationship between him and the Employer to warrant a finding of employee status.” *Id.* at 5. Director Pye noted that in *WBAI*, where unpaid volunteers were found not to be statutory

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<sup>20</sup> The D.C. Circuit found it to be “of little analytical significance” that the employer did not treat the auxiliary choristers’ stipends as taxable income. *See id.* at 764 n.8. In this case, it is even less relevant how the University and the Players treat “athletic aid” for tax purposes. Issues of first impression are presented by this situation. Due to complexities in the Internal Revenue Code, it is not clear what would be the appropriate tax reporting approach if the Players are held to be employees for NLRA purposes, or if any change would be warranted.

employees, the Board relied on the fact that the volunteers received “no wages *or fringe benefits*.” *Id.* (emphasis added) (quoting *WBAI*, 328 NLRB at 1275). Here, the fringe benefits the Players receive in addition to room and board include tuition payments, another benefit that constitutes compensation. *See New Orleans Pub. Serv., Inc.*, 197 NLRB 725, 727 (1972). Taken in its totality, the “full-ride equivalency” the Players receive, which amounts to more than \$60,000 per year, constitutes “at least a rudimentary economic relationship” between the Players and the University. *WBAI*, 328 NLRB at 1274.

Moreover, this remuneration is received by the Players *only* if they continue to be members of the football team. *See supra* at 23-24. A Player understands that “[i]f I slack off with the football work, if I don’t attend the games, or if I don’t attend summer practice or anything like that, I’m not going to have that scholarship. . . . I’m not going to have my paycheck to pay for my school.” Tr. 187:17-23 (Colter). *See also* Tr. 577:12-17 (Baptiste) (if a Player were to refuse to go to practices, Northwestern “would say that [he] has voluntarily withdrawn from the program, which is [a] reason why you can remove someone’s athletic aid”).

This sharply distinguishes this case from *Brown University*, where the majority, in holding that graduate assistants performing teaching duties were not statutory employees, “emphasize[d] that the money received by [the assistants who taught was] the same as that received by fellows [who did not teach].” 342 NLRB at 488. *See also id.* at 489 (“the amounts received by [the graduate assistants who taught] generally are the same or similar to the amounts received by students who receive funds for a fellowship, which do not require any assistance in teaching and research”).

In marked contrast, the “athletic aid” received by the Players differs greatly in nature, amounts and purpose from the financial assistance received by others who attend the University.

It differs in its fundamental nature because it is not need-based and requires the performance of services. *See supra* at 23-24. It differs in amount because it provides at least a “full-ride equivalency,” sometimes even exceeding the cost of attendance, entirely in the form of a grant, whereas other students must use family resources, loans or work-study to meet the cost of attendance. *See supra* at 24-25. And it differs in purpose because, while need-based financial assistance promotes Northwestern’s academic mission by making a Northwestern education available “for students who otherwise would not be able to afford to attend,” Pet. Ex. 9 at 3, Northwestern’s football scholarships are awarded without regard to whether an individual otherwise “[would or] would not be able to afford to attend,” and thus are aimed at promoting the *football program*, not the University’s academy mission. *See* Tr. 1315:2-6 (Ward) (he “was recruited because of both [his] academic and athletic accomplishments in high school [; but the] scholarship itself was for athletic purposes”).

Northwestern made much of the fact that a Player does not lose his scholarship if he does not play due to injury or a low position on the depth chart. As regards employee status, what is significant is the fact that a Player *does* lose his scholarship if he voluntarily withdraws from the football team or is removed from the team for disciplinary reasons. As Professor Berri explained, in professional sports, players can continue to be paid while they are injured. Tr. 423:8-424:1. Payment regardless of performance likewise can be negotiated as part of a “guaranteed contract.” Tr. 441:6-19 (Berri). In professional sports and Division I football alike, a player with potential is a valuable commodity whom teams will be eager to recruit, but who may not end up on the field as much as anticipated, due to injury or to performance in relation to other players vying for the same position. To the extent that players are at risk of losing their compensation as a result of such vicissitudes, it will be that much harder to recruit them,

especially for a sport as hazardous and unpredictable as football. That being the case, it is neither surprising nor inconsistent with employee status that college players at Northwestern, as at other schools, are given some job security.

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*In sum*, here the Players provide services for Northwestern under Northwestern’s control, and they do so in return for compensation. As such, they have a master-servant relationship with the University.<sup>21</sup>

### **III. CAPA SEEKS TO REPRESENT AN APPROPRIATE UNIT OF SCHOLARSHIP PAID ATHLETES BUT WOULD INCLUDE WALK-ONS IF THE BOARD FINDS THAT TO BE APPROPRIATE**

Even assuming the Players are found to be employees, Northwestern suggests that the proposed unit improperly excludes players who do not receive athletic scholarships, commonly called walk-ons.

CAPA did not include walk-ons because these players are not being compensated for their services, and consequently they may not be viewed as statutory employees. But even if the walk-ons were found to be statutory employees, CAPA’s proposed unit would be appropriate and reasonable. It is not a “fractured unit[ ], *i.e.*, combinations of employees that . . . have no rational basis.” *Specialty Healthcare & Rehabilitation Ctr. of Mobile*, 357 NLRB No. 83 at 13 (2011) (quoting *Seaboard Marine*, 327 NLRB 556, 556 (1999)). Northwestern has not met its burden

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<sup>21</sup> It follows that CAPA is a labor organization as defined in the Act. *See Boston Medical Center*, 330 NLRB at 165 (“Since we are finding herein that interns, residents, and fellows employed by BMC are employees within the meaning of Section 2(3) of the Act, and since the record establishes that the Petitioner is an organization in which employees (house staff) participate and that exists at least in part for the purpose of dealing with employers concerning wages, hours, and terms and conditions of employment, we conclude that the Petitioner is a labor organization”). Northwestern suggested that CAPA can be found to be a labor organization only if the unit CAPA seeks to represent is found to be appropriate. Tr. 34:1-20 (Barbour). That is *not* a prerequisite to labor organization status; but regardless, as we next show, CAPA seeks to represent an appropriate unit.

under *Specialty Healthcare* to show that the walk-ons share an “overwhelming community of interest” with the scholarship players, “such that there ‘is no legitimate basis upon which to exclude [them]’” from the unit. *Id.* at 16 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421, 422 (D.C. Cir. 2008)). On the contrary, it is proper for “[a] unit [to be] drawn in accordance with methods of compensation.” *Odwalla, Inc.*, 357 NLRB No. 132 at 6 (2011).

If the walk-ons are considered to receive compensation at all, it surely is different from the compensation the scholarship players receive, and this means that the community of interest between the two groups is not so “overwhelming” as to make a unit of scholarship players impermissible under the standards of *Specialty Healthcare*. But in any event, CAPA has stated that “if the [NLRB] finds that walk-ons . . . should be included, we welcome them into the unit.” Tr. 1206:12-16 (Adam).

#### **IV. NORTHWESTERN’S “POLICY” ARGUMENTS CANNOT JUSTIFY DENYING EMPLOYEES RIGHTS UNDER THE ACT**

Northwestern advances an array of “policy” arguments against allowing the Players the protections of the Act. None has merit.

##### **A. The Players Do Not Forfeit the Right to Organize Because Northwestern Would Portray Them as “Primarily Students.”**

1. Invoking the majority opinion in *Brown*, Northwestern asserts that the Players should not be allowed to organize because they are “predominantly, first and foremost, students as opposed to employees.” Tr. 8:10-16 (opening statement). That contention cannot withstand analysis.

*Brown* characterized graduate assistants as “primarily students,” 342 NLRB at 487; and in some earlier cases, the Board referred to the “primar[y]” concern of students who were seeking to organize. *See San Francisco Art Institute*, 226 NLRB at 1252. But such statements

cannot be understood as denying the reality that an individual can be *both* an employee and a student. Nor has the Board spelled out a specific test for determining when an individual's "student" role is so "primary" that the individual must be denied the right to collective bargaining.

However, Board decisions indicate that there are two kinds of circumstances in which bargaining rights may be denied on the ground that the individuals seeking to invoke them are "primarily students," neither of which is presented here.

a. The first situation where student employees have been held not to have the right to collective bargaining is where they do not "manifest a sufficient interest in their conditions of employment to warrant representation," *San Francisco Art Institute*, 226 NLRB at 1252, because they have only a "very tenuous secondary interest . . . in their part-time employment," *id.* (also referring to "the insubstantiality of [the students'] employment interest").

We submit that rarely, if ever, will it be appropriate for the Board to determine that student employees who are seeking to organize do not really have an interest in so doing. It is doubtful that *San Francisco Art Institute* was rightly decided in this respect. *See id.* at 1254 (Members Fanning and Jenkins, dissenting and finding, contrary to the majority, that "the student janitors have a sufficient interest in employment to warrant their inclusion in a unit"). But even if *San Francisco Art Institute* were assumed to be rightly decided, there would be no basis for concluding here that the Players have only a "very tenuous secondary interest" in their work football work.

Whatever may have been the nature and extent of the interest of the San Francisco art students in their part-time work as janitors, it cannot be compared with the interest of the Players here. Colter testified that a scholarship football player at Northwestern is "first and foremost an

athlete, an employee of the school who provides an athletic service,” and “[e]verything we do is scheduled around football.” Tr. 166:18-25. *See also* Tr. 170:14-19 (Players are “not allowed to sacrifice football . . . [b]ecause we’re brought to the University to play football”). Even if not all Players feel as strong a commitment to football as Colter, the record shows that their engagement in football duties is the antithesis of a “very tenuous secondary interest.”

b. *Brown* involved a second situation, where students performing services for the university were denied the right to organize because “the individuals are rendering services which are directly related to—and indeed constitute an integral part of—their educational program,” such that “the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature.” 342 NLRB at 489 (quoting *St. Clare’s Hosp.*, 229 NLRB 1000, 1002 (1977)).<sup>22</sup>

The *Brown* majority found that principle applicable because the teaching duties of the graduate assistants who were seeking to organize were “part and parcel of the core elements of the Ph.D. degree.” *Id.* at 488. “[F]or a substantial majority of graduate students, teaching [wa]s so integral to their education that they w[ould] not get the degree until they satisf[ied] that requirement,” *id.*; and in most cases, the graduate assistants’ teaching was supervised by the faculty of the academic department in which the assistants were earning their degrees, *id.* at 489. Furthermore, the teaching duties involved “only a limited number of hours” on the students’ part. *Id.* at 488. On those facts, the majority stated that “the conclusion that these graduate student assistants are primarily students ‘connotes nothing more than the simple fact that when an individual is providing services . . . as part and parcel of his or her educational development the

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<sup>22</sup> *Brown* expressed reservations as to other aspects of the analysis in *St. Clare’s Hospital*. *See* 342 NLRB at 490 n.25.



individual's interest in rendering such services is more academic than economic.” *Id.* at 492 (quoting *St. Clare's Hosp.*, 229 NLRB at 1003).

It was that “simple” fact that led to the conclusion of the *Brown* majority that the nature of the graduate assistants' role as “primarily students” was such that they were not entitled to bargain collectively. Because the assistants' teaching functions constituted *part of their core academic program*, the majority reasoned that bargaining with respect to their teaching would “subject[ ] educational decisions to [the bargaining] process.” *Id.* at 489. And, because the “educational process” is predicated on individualized treatment, whereas collective bargaining is “predicated on the collective or group treatment of represented individuals,” *id.* at 489-90, “teachers and students have a mutual interest in the advancement of the student's education,” *id.* at 490, whereas collective bargaining is designed for economic relationships where “such mutuality of goals ‘rarely exists.’” *Id.* (quoting *St. Clare's Hosp.*, 229 NLRB at 1002).

Having determined that collective bargaining with respect to graduate assistants' teaching duties would involve core academic decisions, the *Brown* majority concluded that “[such] collective bargaining would unduly infringe upon traditional academic freedoms,” *id.*, which “includes the right of a university ‘to determine for itself on academic grounds who may teach, what may be taught, [and] how it shall be taught,’” *id.* at 490 n.26 (quoting *Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). As the majority put it, *id.* at 490:

Imposing collective bargaining would have a deleterious impact on overall educational decisions by the *Brown* faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives

of an educational institution like *Brown*. Although these issues give the appearance of being terms and conditions of employment, all involve educational concerns and decisions, which are based on different, and often individualized considerations.

Whether *Brown* remains good law as a matter of statutory interpretation and policy, and whether the evidence supported the majority's views about the incompatibility of collective bargaining and academic decisionmaking, is highly doubtful, as indicated by the strong dissent, *id.* at 493-500, and by the Board's subsequent recognition that there are "compelling reasons for reconsideration of the decision in *Brown*," *see supra* note 13. In our view, *Brown* was wrongly decided, and the opposite conclusion regarding graduate assistants' employee status that had been reached in *NYU* was correct. Nevertheless, *Brown* is premised on facts and policy considerations that are *entirely absent* here. The *Brown* majority's "conclusion that the[ ] graduate student assistants [we]re primarily students 'connote[d] nothing more than the simple fact that . . . [they were] providing services . . . as part and parcel of [their] educational development.'" *See supra* at 42. That "simple fact" is not present here: playing football is *not* part of the Players' academic program. As we have discussed, *supra* at 25, the Players receive no academic credit for any of their football program activities. Although they may learn leadership and "life lessons" from football, these are not an "integral part of . . . the[ ] academic program," *Brown*, 342 NLRB at 489. The coaches are not faculty members, and the Players' academic records are not affected by whether they acquire leadership skills or master life lessons (on which, of course, they are not graded). Football and academics are "completely separate." Tr. 174:11-14 (Colter).

Indeed, the leadership/"life lessons" that Northwestern touts as educational aspects of the football program bear more similarity to what people learn through *employment*. *See supra* at

35. See also Tr. 174:18-23 (Colter) (“Performing any type of job helps build . . . these human values . . . . They didn’t help me get my psychology degree.”) That is reflected in the testimony of the former student who explained that the football program’s motto of “play hard, play smart, play together” describes how he approaches his work as an engineer. Tr. 1298:17-1299:1 (Ward). “Play hard, play smart, play together” would be an appropriate motto for an NFL team. By no stretch does a Player’s (ungraded) pursuit of such objectives constitute part of his academic program at Northwestern University.<sup>23</sup>

What is more, the *Brown* majority did not focus on the overlap between the students’ teaching and academic roles in the abstract, but on the likelihood that collective bargaining over graduate assistants’ teaching functions “would *intrude upon decisions over who, what, and where to teach or research*—the principal prerogatives of an educational institution like *Brown*.” 342 NLRB at 490 (emphasis added). Those are the kinds of “genuinely academic decision[s],” *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985), into which courts and agencies hesitate to intrude. See also *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2419 (2013) (“some . . . deference” was owed to a university’s “academic judgment,” but not to other decisions by the university); *Kunda v Muhlenberg College*, 621 F.2d 532, 547 (3d Cir. 1980) (“[i]t does not follow that because academic freedom is inextricably related to the educational process it is implicated in every employment decision of an educational institution”).

There is no risk of such intrusion here. The “lessons” Northwestern contends that Players learn from football do not involve the core academic judgments cited in *Brown*. And in any event, the University presented no evidence that intrusion into such judgments, which the *Brown*

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<sup>23</sup> Another former Player testified that “one of the biggest things” he learned from playing football for Northwestern, which he applies in medical school, is “being cool under pressure.” Tr. 1234:11-1235:4 (Bartels). Teaching coolness under pressure is not part of Northwestern’s academic program, and is another trait more commonly learned on a job than as a student.

majority feared could result from collective bargaining over *teaching* duties, will result from collective bargaining over *football* duties. If allowed to bargain collectively, the Players will continue to “play hard, play smart, [and] play together,” and to attend to life lessons imparted by the coaches. Any suggestion that collective bargaining by the Players will deprive Northwestern of its freedom to make core academic decisions has no basis in fact or law.<sup>24</sup>

Thus, neither of the concerns that have been found to justify excluding student employees from the protections of the Act in certain cases—*i.e.*, that the students’ interest in their employment is too “tenuous” (*San Francisco Art Institute*) or that the students’ duties are an integral part of the academic program (*Brown University*)—is implicated here. To suggest that the status of the Players as students should preclude their right to organize and to bargain even though those concerns are absent would give the “primarily students” notion an expansive, limitless and standardless role the Board has never ascribed to it, and one that would have no connection with the statutory language or purposes.

For example, there is no basis in the Act for a notion that students who work, say, 30 hours a week on campus jobs *should* be entitled to bargain if they spend 28 hours a week on classes and studies, but *not* if they spend 32 hours a week on those academic pursuits. (And in any event, the record shows that the Players “spent a lot more time dedicating [them]selves to football, performing football activities,” than “studying and attending classes.” Tr. 177:7-15 (Colter).) Equally unjustified—and impossible to administer—would be a notion that the right to bargain depends on whether students subjectively value their employment more or less than they value their academic work. But if such a subjective test were applied, Colter testified that a

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<sup>24</sup> Furthermore, if, as a purely hypothetical matter, there were some area of academic decisionmaking into which bargaining might intrude, at most the employer might be allowed to refuse to bargain as to that matter. This would not justify denying the Players the right to bargain over the *nonacademic* matters that constitute their actual bargaining agenda.

scholarship football player at Northwestern is “first and foremost an athlete, an employee of the school who provides an athletic service,” for whom football is “our first priority,” “[a]nd then if you can . . . , fit in the academics.” Tr. 166:18-20, 177:17-21. That testimony, together with the “football first” approach that is followed in dealing with conflicts between class schedules and football, *see supra* at 32-34, and the record as a whole, makes it impossible to find that the Players are “primarily students” even in some subjective sense.<sup>25</sup>

It is one thing to say that bargaining rights may be denied where student employees have no significant interest in their jobs (*San Francisco Art Institute*) or where bargaining with respect to the job would conflict with academic decisionmaking (*Brown University*). But where, as here, both the job and the academics are of great importance, and bargaining would present no conflict between them, there is no principled basis for holding that only the “primary” role can be recognized—even if, contrary to the evidence, the Players’ “primary” role could be found to be their “student” role.

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<sup>25</sup> To be sure, Northwestern’s witnesses, including Coach Fitzgerald, opined that Northwestern puts academics ahead of football. But the record as a whole does not sustain that notion; and even Coach Fitzgerald indicated the primacy of football when he testified:

In the short term, as I work with our guys, the goals are:  
To consistently prepare for victory.  
To win our division.  
To win the Big Ten championship.  
And then to win the national championship.  
To prepare to be a champion in life.  
And to earn a Northwestern degree.  
So those are the emphases that we make every year.

Tr. 1023:23-1024:7. Only the last of these goals involves the Players’ role as students rather than as employees performing services in furtherance of Northwestern’s football program.

In any event, employees’ rights under the Act are not dependent on whether their employer chooses to acknowledge that they are employees.

## **B. The University's Opinion that Bargaining Would Be "Bad for Business" Provides No Basis for Denying the Players Their Rights Under the Act.**

Northwestern advances a number of purported policy arguments that amount to nothing more than the complaint that many employers who wish to resist unionization make about collective bargaining—*i.e.*, that bargaining would be bad for business. In this case, those contentions are greatly exaggerated, but in any event they are not proper matters of concern for the Board.

### **1. The Alleged Potential Impact on Northwestern's Non-Revenue Sports**

As one of the "public policy reasons" why the Board should not allow an election, the University asserts that collective bargaining "would adversely impact the non-revenue sports." Tr. 39:17, 40:2-4 (opening statement). That is based on two propositions: first, that Northwestern's non-revenue sports are subsidized by football, and second, that collective bargaining might reduce the football program's profit. Assuming that first point is true (although the record does not spell out how Northwestern applies the surplus revenue that it receives from the football program), it is entirely speculative whether, or to what extent, collective bargaining would reduce Northwestern's football profits. Indeed, CAPA has committed to bargain within the constraints of NCAA rules, which currently place tight restrictions on athlete compensation.

But there is no need to engage in speculation, because Northwestern's supposed "public policy" does not exist. The Board does not concern itself with employer profitability, or with what use an employer may make of its profits, any more than it concerns itself with the adequacy of employee compensation.

### **2. The Alleged Potential Impact on NCAA Football**

a. Northwestern also expressed concern in its opening statement that allowing collective bargaining at NCAA member schools could have negative impacts on the NCAA as an

institution and on NCAA football, perhaps upsetting some “competitive balance,” Tr. 40:5-8, or making it necessary to revamp the NCAA’s governance structure, Tr. 40-12-16, or causing some undefined “impractical[ity]” resulting from the possibility that “only a small segment of the NCAA FBS schools” might be organized, Tr. 40:17-21.

These concerns, too, are speculative. It is presently unknowable (i) what impact collective bargaining may have at Northwestern, (ii) the extent to which, over time, other NCAA member schools may be called to engage in collective bargaining under the NLRA or, in the case of public institutions, under state laws, (iii) how the NCAA and the Big Ten Conference might react to such developments, and (iv) what effect, if any, this might have on “competitive” balance.<sup>26</sup>

In any event, these are not proper concerns for the Board in determining employee status. The NCAA is a private entity. Its member schools, including Northwestern, market a particular product—college athletics. *See NCAA v. Board of Regents*. 468 U.S. 85, 101 (1984). The Board cannot deny employees the right to organize out of fear that bargaining might affect the price or quality or marketability of a product. This is so whether the product is NCAA football or anything else. That is not to denigrate the worthiness of NCAA football; but there is no public policy that deems NCAA football worthier than, say, a symphony orchestra, a community service organization, a widget manufacturer, or for that matter, a professional sports team.

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<sup>26</sup> On the latter point, Professor Berri testified that fixing athletes’ compensation so that it will not vary significantly from school to school *harms* competitive balance, as it results in athletes disproportionately favoring the schools that have had the most success on the field, whereas allowing compensation to vary would enable schools that have been less successful in the win column to attract talented athletes, thus improving competitive balance. Tr. 386:25-393-12, 424:19-425:13, 430:8-24, 443:20-444:19.

Northwestern's professed concerns about the possible impact of collective bargaining in its industry are not legitimate matters for Board consideration.

b. The NCAA sometimes asserts that the Supreme Court's decision in *Board of Regents* indicates that college sports must remain "amateur," and that allowing college athletes to seek any kind of compensation not authorized by the NCAA would be contrary to that principle. But Northwestern can derive no support from *Board of Regents* on any issue relevant to this proceeding.

*Board of Regents* was an antitrust case, which concerned only whether NCAA rules dealing with televising of games were unlawfully anticompetitive. Noting that any league sport requires agreements among the member teams, the Supreme Court stated that actions taken in concert that might otherwise appear to be anticompetitive do not necessarily violate the antitrust laws if they "enable[ ] a product to be marketed which might otherwise be unavailable." 468 U.S. at 102. Because the NCAA and its member schools are marketing "a particular brand of football" which is "differentiate[d] . . . from . . . professional sports" by "[t]he identification of this 'product' with an academic tradition," *id.* at 101-02, the Court stated that NCAA rules designed to preserve that product identification do not necessarily violate the antitrust laws. In *dictum*, the Court indicated that this antitrust principle may apply to the NCAA's requirement that athletes attend classes and not be paid.

That *dictum* is beside the point here, for two reasons.

*First*, this is not an antitrust case. The question here is not whether any particular NCAA rules are or are not anticompetitive for purposes of the antitrust laws.

*Second*, *Board of Regents* does not hold that the current NCAA eligibility rules, singly or in combination, are free of antitrust problems. As Associate Athletic Director Baptiste



acknowledged, “amateurism” for NCAA purposes is merely defined by whatever compensation the NCAA rules permit at any given time. Thus, for example, because NCAA rules do not presently allow institutions to pay athletes \$50,000 a year in cash, if an athlete received such a payment today he would not qualify as an amateur under the NCAA rules; but if the NCAA were to change its rules to allow such payments, the recipients would then be amateurs in the eyes of the NCAA. Tr. 585:1-21 (Baptiste). Given the malleability of the NCAA’s concept of “amateurism,” courts have rejected the notion that every rule the NCAA has adopted in the name of “amateurism” is essential to the integrity of college sports or even to the NCAA’s “brand.” See, e.g., *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012); *In re NCAA Student Athlete Name & Likeness Licensing Litig.* No. C09-1967, 2013 U.S. Dist. LEXIS 153730 at \*23-29 (N.D. Cal. Oct. 25, 2013); *Rock v. NCAA*, No. 12-cv-1019, 2013 U.S. Dist. LEXIS 116133 (S.D. Ind. Aug. 16, 2013).

Hence, the NCAA’s concept of amateurism is not controlling even for purposes of antitrust analysis; and in any event, antitrust analysis is irrelevant here. The Board has no mandate to protect “amateurism” in college football, however that term may be defined. And if the Players are statutory employees, as we have shown they are, they cannot be denied rights under the Act due to any dictate of the NCAA.

### **3. The Alleged Potential Impact on Title IX Compliance**

The Northwestern witness who has responsibility for Title IX compliance testified that she has “serious concerns” regarding the possible impact on compliance if collective bargaining were to result in gains for the football players, “not that we would be taking away from the women, but that we would need to generate even further revenue in order to be able to give the

women the same experience that the men are collectively bargaining for.” Tr. 920:10-12, 927:7-928:1, 941:2-15 (Blais). That professed concern is of no moment for two reasons.

*First*, Title IX does not require a university to expend the same amount of money on men’s and women’s sports. *See* 34 C.F.R. § 106.41(c) (“Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section . . .”). As the data submitted by Northwestern to the Department of Education for Title IX compliance shows, the University *already* spends substantially more on its men’s teams than its women’s teams, and indeed spends more on the football team than all of its women’s sports teams combined. Er. Ex. 11 at NU001962. This imbalance is expected. As explained in the DOE’s Title IX Policy Interpretation—an interpretation to which the courts defer, *see, e.g., Kelley v. Bd. of Trs.*, 35 F.3d 265, 271 (7<sup>th</sup> Cir. 1994)—in evaluating Title IX compliance the DOE recognizes that “[s]ome aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities,” including factors such as the equipment needed and the “rates of injury resulting from participation” in the sport. *See* A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979). The DOE goes on to make clear that, “[f]or the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men.” *Id.* at 71,416.

Thus, that collective bargaining may result in more money going to Northwestern’s football program would not alter the situation that exists today, and would have no impact on Title IX compliance.

*Second*, even if Ms. Blais’ professed concern about Title IX compliance were not imaginary, she admits that Northwestern could “answer . . . the concern” by allocating more

money to women's sports. Tr. 942:22-943:9. So her concern, in the end, is no more than the complaint often made by employers resisting unionization: that providing greater pay or benefits to an organized workforce might result in the employer's having to provide more to others as well. That does not give Northwestern a right to be immune from collective bargaining.

**C. The Extent to Which Collective Bargaining Would Enable CAPA to Achieve its Objectives is Irrelevant.**

To protect the Players eligibility, CAPA has stated that it will not seek to bargain for things that are prohibited by NCAA rules. This led Northwestern to assert in its opening statement, as a "public policy [argument]," that "CAPA's objectives could not be achieved through collective bargaining with Northwestern," because "most of the objectives CAPA desires to achieve are not even controlled by Northwestern University." Tr. 39:15-40:1.

The hearing officer properly sustained an objection to the testimony by Associate Athletic Director Baptiste that the University offered on this subject, because the list of "goals" that Baptiste discussed were *not* the goals of CAPA, but of a different organization. Tr. 543:11-544:8. But the hearing officer declined to strike the testimony from the record, *id.*, so we will briefly respond to this argument.

Although current NCAA rules place restrictions on the compensation that member schools may provide to football players, these rules are changing. They may change out of simple fairness, or in recognition of the players' status as employees, or as a result of antitrust litigation.<sup>27</sup> "[T]here's reform going on all the time at the NCAA." Tr. 293:6-9 (Colter).

But even now, NCAA rules leave room for bargaining. For example, under NCAA rules Northwestern can provide one-year scholarships. Tr. 580:12-581:9 (Baptiste). Collective bargaining could ensure that four-year scholarships continue. A related subject for bargaining

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<sup>27</sup> As to the latter, *see* cases cited at 51.

would be for the University to provide assistance for more than four years. Tr. 293:1-3 (Colter). NCAA rules allow Northwestern to provide the Players with full medical insurance, which it does not presently do. Tr. 292:24-25 (Colter); 596:11-14, 596:24-597:7 (Baptiste). And if a Player suffers an injury playing football at Northwestern, there is presently no guarantee that Northwestern will cover all the expenses; the University simply chooses how long it will provide such coverage, generally for a year after the Player's final season of competition has ended, but sometimes longer. Tr. 804:1-805:5 (Blais). There is no suggestion that the NCAA would not permit broader protection of a member school's injured athletes. In addition, the NCAA allows institutions to provide an assistance fund for athletes who have particular financial needs, which Northwestern uses to assist individual Players with such things as clothing and medical insurance needs. Tr. 544:16-546:7, 560:19-561:3 (Baptiste). All these things and more could be made subjects of bargaining without violating NCAA rules.

To whatever extent bargaining over compensation may be limited, at least initially, by NCAA rules, Colter explained that there nevertheless are a "lot of things that we can negotiate for through Northwestern." Tr. 291:25-292:1. One example is the serious problem of concussions. CAPA could negotiate to limit the amount of contact in Northwestern's practices, which would help to reduce the amount of head trauma to which Players are exposed. Tr. 292:2-7 (Colter). "That's something . . . we can bargain with Northwestern for. We don't have to go through the NCAA." Tr. 292:8-10 (Colter).<sup>28</sup>

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<sup>28</sup> One might think that Northwestern might institute concussion reforms on its own, with no need for collective bargaining, but one would be mistaken. On direct examination, Associate Athletic Director Baptiste, declaring blithely that "football is a violent game," asserted that improving Players' safety is "something that other individuals would have to regulate . . . whether that's the NCAA changing . . . the contact restrictions or maybe the manufacturers of helmets changing . . . their safety standards. But that's not something that Northwestern would be able to control." Tr. 539:20-540:2. Only on cross-examination did Mr. Baptiste acknowledge

Questions regarding the scope of the matters on which CAPA may bargain are irrelevant in any event. Northwestern's suggestion that "public policy" allows employees to organize only where it is clear that collective bargaining will enable them to achieve their "objectives" is, once again, an attempt to involve the Board in matters that are not its proper concern. The Board "ha[s] decided that it is not proper for the Board to decide whether to assert jurisdiction based on the Board's assessment of the quality and/or quantity of factors available for negotiation." *Management Training Corp.*, 317 NLRB 1355, 1358 (1995). Even where an employer has no authority to set compensation, collective bargaining is not foreclosed. *Id.* at 1357-58. "[I]n the final analysis, employee voters will decide for themselves whether they wish to engage in collective bargaining under those circumstances." *Id.* at 1358.

## CONCLUSION

The extensive and undisputed record shows that Northwestern scholarship football players are "employees" within the meaning of Section 2(3) of the NLRA, that CAPA is a labor organization with the meaning of Section 2(5), and that CAPA's petitioned-for unit of scholarship football players is appropriate.<sup>29</sup> CAPA urges the Regional Director to so find, and

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that there are steps Northwestern itself could agree to take to improve safety, such as limiting the amount of contact in practice. Tr. 597:22-25.

<sup>29</sup> "In the last twenty years, more than a half-dozen law review articles have suggested that the [NLRB] should recognize Division I scholarship athletes in revenue-generating sports as 'employees' under federal labor law." Nicholas Fram & T. Ward Frampton, *A Union Of Amateurs: A Legal Blueprint To Reshape Big-Time College Athletics*, 60 Buff. L. Rev. 1003, 1008 (2012). While these articles sometimes present slightly different legal theories or focus on different factors, recognition of the employee status of scholarship athletes is long overdue. See, e.g., Christian Dennie, *Changing The Game: The Litigation That May Be The Catalyst For Change In Intercollegiate Athletics*, 62 Syracuse L. Rev. 15, 46 (2012) ("In applying the employee-employer factors, a strong case can be made in favor of the student-athlete serving as an employee of an institution. Often times, student-athletes spend hours after practice, under the control and eyes of coaches, reviewing film, lifting weights, and glad-handing powerful alumni on caravan tours."); Robert A. McCormick & Amy Christian McCormick, *The*

to direct an election in the petitioned-for unit. If the Regional Director finds the non-scholarship players (walk-ons) are employees and should be included in the unit, we ask that the unit include all Northwestern football players, and that an election be directed in this alternative unit.

Respectfully submitted,

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*Myth of the Student-Athlete: The College Athlete as Employee*, 81 Wash. L. Rev. 71, 86 (2006) (“The NCAA purposely created the term ‘student-athlete’ as propaganda, solely to obscure the reality of the university-athlete employment relationship and to avoid universities’ legal responsibilities as employers [and] [i]n the ensuing fifty years, the NCAA, colleges, and universities have profited immensely from the vigorous defense and preservation of this myth.”); J. Trevor Johnston, *Show Them The Money: The Threat Of NCAA Athlete Unionization In Response To The Commercialization Of College Sports*, 13 Seton Hall J. Sport L. 203, 234 (2003) (stating “there are policy reasons for concluding that student-athletes are covered by the NLRA. The Supreme Court has supported the broad interpretation of ‘employee’ in close cases to further the overriding purposes of the Act” and as “the Board stated in Boston Med. Ctr., unionism and collective bargaining are dynamic institutions that should adjust to all sectors of the changing economy”); Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 Hamline L. Rev. 24, 41,53 (2000) (“The argument that athletes are employees of the university is not a new one”; “The common law criteria used to determine an employment relationship strongly point to finding that athletes are employees of the university”); Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 Howard L.J. 259, 278 (1993) (“[M]uch of the reality of college sports belies that interpretation [that student-athletes are not ‘employees’ under the NLRA], as it is very clear that the athletes are paid for their services....”).

**CERTIFICATE OF SERVICE**

I certify that CAPA's Post-Hearing brief was served via email on March 17, 2014 to:

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