Case No. 13-RC-121359

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,

Employer,

- and

COLLEGE ATHLETES PLAYERS
ASSOCIATION (CAPA)

Petitioner

BRIEF OF AMICI CURIAE IN SUPPORT OF NORTHWESTERN UNIVERSITY BY LEECH TISHMAN FUSCALDO & LAMPL, LLC

LEECH TISHMAN
FUSCALDO & LAMPL, LLC

Robert F. Schultz
Patrick W. Carothers
Gregory W. Hauswirth
525 William Penn Place, 28th Floor
Pittsburgh, PA 15219
Attorneys for Amici Curiae

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Leech Tishman Fuscaldo & Lampl, LLC

Leech Tishman Fuscaldo & Lampl, LLC, ("LTFL") is a private, predominantly management-side law firm with its primary office located at 525 William Penn Place, 28th Floor, Pittsburgh, Pennsylvania 15219. As a law firm with a growing labor and employment practice, LTFL is concerned with the expanding nature of the term "employer" and the increased litigation this brings to an already overwhelmed system. LTFL works with both unions and management, and has lawyers who are well versed on both sides, thus LTFL is able to uniquely see that the National Labor Relations Act is not an appropriate solution to the problems faced by student-athletes at Division-I schools.

QUESTION PRESENTED

Which test should the National Labor Relations Board apply to determine whether grant-in-aid scholarship football players are "employees" within the meaning of Section 2(3) of the National Labor Relations Act, and what is the proper result, considering all public policy and other concerns, when applying the appropriate test?

ARGUMENT

I. INTRODUCTION

In 2004, the National Labor Relations Board ("The Board") reaffirmed a long held belief that in the academic realm, the student-institution relationship within is unique from all other potential employment situations. *Brown University*, 342 N.L.R.B. 483 (2004). In March of 2014, after a decade of this decision governing, the Regional Director ignored this precedent and incorrectly applied a common law definition of employee to a group of student-athletes; expanding the NLRA into an area it was never intended to apply. *Northwestern University*, 2014 N.L.R.B. Reg. Dir. Dec. LEXIS 46 (N.L.R.B. Mar. 26, 2014), *review granted by Northwestern University*, 2014 NLRB LEXIS 298 (Apr. 24, 2014). The implications of this decision are huge and will have an overwhelmingly negative impact on the academic landscape of the United States and will overburden the Board and the judicial system in general. While the motives of the Regional Director were likely good, his desire to assist college athletes inappropriately applies the law and is unprecedented. The Board should leave to Congress what is meant for Congress and follow their own precedent; ruling that college athletes are not employees eligible for elections or unionization under the NLRA.

II. THE REGIONAL DIRECTOR APPLIED THE WRONG TEST

When determining whether or not a group fits the definition of "employees" for purposes of the NLRA, the Board considers many criteria, including the number of employees, the gross income of employer, and the geography of workspaces, amongst other things. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2013). Once these technical considerations are weighed, the Board generally turns to the common law definition of employee, "(A) person who performs services for another under a contract of hire, subject to the other's control or right of control, and

in return for payment." *NLRB v. Town & Country*, 516 U.S. 85, 94 (1995). However, for public policy purposes, the Board has carved out exceptions where the common law definition does not apply. *Leland Stanford Junior University*, 214 NLRB 621 (1974). Academia is one such exception. *Brown University*, 342 NLRB at 492. Regional Director Peter Ohr was presented with both the common law and academic tests for employee, and to apply the wrong one, ignoring years of precedent. *Northwestern University*, 2014 N.L.R.B. Reg. Dir. Dec. LEXIS at 15.

A. The common law definition of "employee" does not apply to students in the academic setting

The U.S. Supreme Court has said, "(P)rinciples developed for use in the industrial setting cannot be imposed blindly on the academic world." *NLRB v. Yeshiva U.*, 444 U.S. 672, 681 (1980). The Board echoed this sentiment in 2004 in ruling that the proper test for determining if students are employees is by looking at whether the group is "primarily students and have a primarily educational, not economic, relationship with their university." *Brown University*, 342 NLRB at 487. Through this decision, the Board established a separate test uniquely for the university setting when determining the applicability of the NLRA. Director Ohr dismissed this, saying the athletes' "football-related duties are unrelated to their academic studies unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements." *Northwestern University*, 2014 N.L.R.B. Reg. Dir. Dec. LEXIS at 15.

Director Ohr's overly simplistic reading of *Brown University* completely misinterprets the holding of the Board in that decision. *Brown University* took the common law definition of employee away from evaluating this under academic scenarios. In 2000, the Board held in *New York University* ("*NYU*") that the common law definition of employee applied to students in the academic setting stating, "(W)e will not deprive workers… of their fundamental statutory rights

to organize and bargain with their employer, simply because they also are students." 332 NLRB 1205, 1209 (2000). This sentiment and application of the common law definition for student populations was explicitly overruled in *Brown University* and the twenty-five years of precedent that *NYU* overturned was properly and explicitly re-instated. As the Board said, "*NYU* was wrongly decided and should be overruled." *Brown University*, 342 NLRB at 483. Thus, the common law definition is not applicable to student populations and Director Ohr was in error in applying such.

B. The *Brown University* test applies

Brown University is the authority in regards to assessing student employees in academic settings and has been for nearly a decade. To not apply *Brown University* is to overrule *Brown University*. Not only does Director Ohr not have the authority to overrule a Board decision, it would be a grave error for the Board to do so.

According to the Board, "(T)here is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process." *Id*. Years of precedent have established that student-institution relationships are different from employee-employer relationships and should be assessed differently for purposes of applying the NLRA. *See e.g.*, *Adelphi University*, 195 NLRB 639 (1972). The uniqueness of the college setting is not just in regards to labor, since Congress has acknowledged that colleges are treated differently in regards to issues of free speech and even taxation. *See e.g.*, *Bob Jones University v. U.S.*, 461 U.S. 574 (1983). Even at the initial hearings for the NLRA before Congress in the 1930s, the college-campus was utilized as an example of the type of situation the bill would not cover. *National Labor Relations Act: Hearing on H.R. 74-198 Before H. Comm. on Labor*, 74th Cong. 198 (1935).

Director Ohr dismissed the proper application of *Brown University* by saying, "the players' football-related duties are unrelated to their academic studies unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements." *Northwestern University*, 2014 N.L.R.B. Reg. Dir. Dec. LEXIS at 15. This is a vast oversimplification and ignores the scope of the Board's ruling. Director Ohr seems to think it only applies where the group's student status is superior to their economic status. The Board stressed in *Brown University* the uniqueness of the academic setting and the importance of balancing different factors. This decision applies because the group petitioning are students and their supposed "employment" is inherently connected to this. In the present case, grant-in-aid scholarship football players register for classes, attend classes, receive grades, obtain a degree, and are not permitted to play college sports once they have graduated. If a grant-in-aid scholarship football player stops taking classes, they are no longer eligible to play. There is an inherent connection between the student status and the supposed employment; therefore the *Brown University* test applies.

C. Under the *Brown University* framework, grant-in-aid scholarship football players are not employees

The *Brown University* framework looks at the balance between whether a group of individuals have a primarily academic relationship with an institution, making them students, or if their relationship is primarily economic, making them employees. *Brown University*, 342 NLRB at 483. The test is a straight-forward predominance test that looks at several factors in order to determine if the relationship is mostly academic or economic.

One key element in determining this is the contingency of the athletes "employment" on their student status. The Board stated in *Brown University*, "Because their status as a graduate student assistant is contingent on their continued enrollment as students, we find that they are

primarily students." *Id*. at 488. In the present case, a Northwestern University student-athlete must be a student in order to be eligible to play college sports. If the student-athlete is expelled, suspended or in some other way penalized academically, his or her ability to continue on the team is put into jeopardy. However, if his or her participation on the team is temporarily or permanently halted, the individual does not immediately lose the status of "student." This is further emphasized by the fact that if a student-athlete's grade point average drops below a certain marker, they lose their eligibility to play. However, if a student-athlete has a bad season, this has no real impact on his or her continuation as an enrolled student.

Other factors highlighted in *Brown University* when weighing the predominance test are the scholarship funding source and the academic relevance of the activity. The funding source for football scholarships at Northwestern University, and similar institutions, is not a separate funding source outside of the general institutional funds. Rather, the funding mimics that of other available scholarships. Thus, "the money is not consideration for work. It is financial aid to a student." *Id*. Additionally, the team has direct academic relevance in that sports and physical fitness have a long and deep history with American colleges and play a major part in the holistic development of the student. George D. Kuh, *The Other Curriculum: Out-of-Class Experiences Associated with Student Learning and Personal Development*, 66 J. of Higher Educ. 123 (1995). Many elite institutions, including Columbia University, Massachusetts Institute of Technology, and Reed College, still have physical fitness requirements for graduation that can be satisfied through involvement on an athletic team. Kim Painter, *Colleges' Physical Education Requirements Fade Away*, USA Today, Jan. 9, 2013. While Northwestern University does not have such a requirement, it still sees the academic value to athletic participation, as is evidenced through the 97% graduation rate of its athletes; higher than the general graduation rate of

Northwestern students. Alan K. Cubbage, *Northwestern Asks National Labor Relations Board to Overturn Regional Director's Ruling on Football Players' Unionization*, Northwestern University, (Apr. 9, 2014), http://www.northwestern.edu/newscenter/stories/2014/04.

Director Ohr's decision emphasizes how removed he is from the academic setting. The modern U.S. college focuses heavily on the holistic development of the student. George D. Kuh, *The Other Curriculum: Out-of-Class Experiences Associated with Student Learning and Personal Development*, 66 J. of Higher Educ. 123 (1995). This means there is an acknowledgement that many aspects of the college experience play into the long-term success of a student and one's ability to exist in and contribute to the post-college world. This is why activities such as the school newspaper and student governance are highlighted for students, even those not majoring in journalism or political science. In the same way, involvement on an athletic team is obviously relevant for individuals majoring in things like Sports Management and Physical Therapy, and has relevance to studying other seemingly unrelated topics due to the need for holistic development. As Director Ohr himself admitted, "(T)he players undoubtedly learn great life lessons from participating on the football team and take with them important values such as character, dedication, perseverance, and team work." *Northwestern University*, 2014 N.L.R.B. Reg. Dir. Dec. LEXIS at 19. Director Ohr discounted this importance because of a lack of credit earned. But, there are dozens of things that are not credit-based that play into a student's academic success. Alexander Astin, the founder of the Higher Education Research Institute at the University of California – Los Angeles, developed an involvement based theory of student development that highlighted involvement outside of the classroom as a vital tool for insuring success in the classroom and beyond. Dr. Astin highlights that involvement outside the classroom is often more important to a student's individual success in college and beyond. *See*

Alexander Astin, *Student Involvement: A Developmental Theory for Higher Education*, J. of C. Student Dev. 518 (1984).

Further, Director Ohr contends that Northwestern University expends between $61,000 and $76,000 per year on these "employees." *Northwestern University*, 2014 N.L.R.B. Reg. Dir. Dec. LEXIS at 17. While this is true, the bulk of this money goes directly towards the student's tuition and furthering their education. At no point do student athletes see this money tangibly, however they do benefit greatly by having a valuable degree that further benefits them in the post-collegiate world.

III. THE QUESTIONS PRESENTED WILL HAVE HUGE RAMIFICATIONS ON THE HIGHER EDUCATION SYSTEM IN THE UNITED STATES, AND OTHER SIMILARLY SITUATED ENTITIES

The costs of higher education are at an all-time high without much expectation that this will subside. U.S. Department of Education, National Center for Education Statistics. (2013). *Digest of Education Statistics*, 2012 (NCES 2014-015), Chapter 3 [hereinafter *Education Statistics*]. While institutions like Northwestern University, Brown University, and New York University are potentially equipped to somewhat handle the increased litigation costs and services necessary to address a unionized sports team, most institutions are in very different financial situations. Thus, the Board needs to explore all of the implications of a decision of this magnitude, not just on Northwestern University, but on the entire higher education system in the United States.

A. The higher education bubble and the economics of this decision

The National Center for Education Statistics, a subdivision of the U.S. Department of Education, reports that the average cost of a 4-year institution of higher education in 1990 was $8,238. *Id*. Taking into consideration inflation, that is roughly $13,564 by today's standards.

Education Statistics. Only twenty years later, in 2010, the average cost of a 4-year institution of higher education increased by 61 percent to $21,093. *Education Statistics*. Even when considering inflation, the cost rose roughly 36 percent.

The National Center for Public Policy and Higher Education, a nonpartisan private non-profit organization, cites two primary reasons for the rise in costs at private institutions. These are decreased funding by governmental entities and increased management of the university setting as a result of increased litigation. William Trombley, *College Affordability in Jeopardy*, National Center for Public Policy and Higher Education (Winter 2003) *available at* http://www.highereducation.org/reports/affordability_supplement.

State funding for public and private institutions has dropped drastically in the past three decades, while attendance at colleges and universities has steadily increased. *Education Statistics*. While this clearly impacts public institutions more than private, it has an immediate impact on available research money, as well as in-state incentives that have been granted to colleges for accepting in-state students.

The second and more pertinent issue leading to the increased costs of higher education is the growth in management positions on college campuses. This growth is due to a number of reasons, but the leading factors are cited as increased litigation and the need for campuses to better mitigate liability. *Education Statistics*. An increase in litigation has led to colleges putting a stronger emphasis on student service programs, including residence hall staff, counseling services, rape and sexual assault prevention services, diversity services, and other staff members focused on assisting students in their transition to and experiences at the institution. Additionally, the growth in litigation has led to the creation of in-house counsel for many larger institutions and overall larger legal bills due to the increased litigation and bureaucracy.

Most of the factors that led to this increased management would be duplicated under a unionized system of athletic teams. In order to fully accommodate the needs of a union and to meet its potential demands, more staff, namely lawyers, must be hired by all institutions wishing to compete in Division 1 athletics. At Northwestern University, there are 19 athletic teams, all of which offer some level of scholarships to students. Northwestern Wildcats, *available at* http://www.nusports.com. Educating these students of their rights alone would lead to a need for increased student service offerings. All of this would consist of new programs and new administrators at an additional cost.

Due primarily to institutional age, size, and other factors, not all Division I schools are in the same financial situation. For example, Northwestern University has one of the largest endowments of any U.S. college at $7.9 billion. *About the Endowment*, Northwestern University Investment Office (2014) *available at* http://www.northwestern.edu/investment. By comparison, the average endowment of a Division 1 school is a fraction of this at $73.5 million. *Study of Endowments*, National Association of College and University Business Officers (2013) *available at* http://www.nacubo.org/Research/NACUBO-Commonfund_Study_of_Endowments. Northwestern University is one of the most prestigious college's in the world with over 32,000 applicants, each willing to pay the $45,120.00 a year bill. Pat Vaughan Tremmel, *Northwestern Applications Hit New High*, Jan. 29, 2013 *available at* http://www.northwestern.edu/newscenter/stories/2013/01. Even without its large endowment, Northwestern University is in a much better situation than most other Division I schools to increase tuition without harming the quality or attendance at the school.

Unionization of athletic programs will have a direct impact on the financial situation of all institutions, but most noticeably the smaller schools with smaller endowments. Unionization

will require schools to hire even more management to handle negotiations and meet union demands, as well as deal with even more litigation. This cost differential will directly effect the general student body at these institutions through some combination of an increase in tuition, a decrease of available "in-house" aid, and a decrease in available programs and services.

All of this will inevitably lead to an increase in debt for the general student, and risks the potential of a lowered attendance for many institutions. Average student loan debt has increased along with the increase in the costs of higher education. In 2013, the average loan debt for a graduating student was $29,400; twelve times more than three decades earlier when it was only $2,275 in 1983. *The Project on Student Debt*, Institute for College Access & Success (2012) *retrievable at* http://projectonstudentdebt.org/state_by_state-data.php. Overall debt has steadied in recent years from the massive increase in the nineties and early 2000s, but a decision like this will likely push this much higher.

Some institutions may choose to shut down their competitive Division-I athletic programs because of the rise in costs and issues associated with unionization. This may also lead to a need to shut down even more extracurricular activities that offer some sort of parallel scholarship program, such as debate, musical performance, or theater.

The Board cannot draw distinctions between schools like Northwestern University and smaller, less financially stable Division 1 schools when looking at unionization.[1] While the NLRA itself puts limits on workforce size, all Division I football teams, and teams in other sports, are large enough and have enough scholarship recipient students to potentially qualify for election under this decision. This is just as true at Northwestern University and the University of

[1] Every Division 1 school meets the minimum requirement of income and "employee" for the NLRA, thus without a Congressional change to the law, the Board would not be able to distinguish.

Alabama as it is at institutions like the University of Tulsa, where 5 percent of the student body is on the football team. Tulsa Hurricane, *available at* http://www.tulsahurricane.com.

B. This Decision Is Plainly At Odds With The Legislative Purpose Of The NLRA And Is An Unnecessary And Unfounded Expansion Of The Act

Colleges are not the Western Pennsylvania steel mills of the past that led to the passing of the NLRA, where employers took advantage of poor local workers and paid them less than a minimum wage and then discarded them once they were no longer useful as employees. Students have choice in their college decision. This is especially true for an individual that has the skill to make it on to the Northwestern University football team coupled with the brains to actually make it into Northwestern University.

In assessing the NLRA, the U.S. Supreme Court has stated, "The Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry. In contrast, authority in the typical 'mature' private university is divided between a central administration and one or more collegial bodies." *Yeshiva U.*, 444 U.S. at 680. As was highlighted above, the professor-university relationship was used as an example of a labor situation not in the scope of the law at the inception of the law during the House Hearing. *National Labor Relations Act: Hearing on H.R. 74-198 Before H. Comm. on Labor*, 74th Cong. 198 (1935). While the Supreme Court has acknowledged that this specific example may have changed given the current status of the university structure in the United States and how it has evolved since the 1930's, an expansion into college athletics is clearly outside this original scope.

This does not mean that the Board cannot apply the NLRA to a new setting (as it has in the past), but it does mean that the Board cannot apply the act to places that are outside the scope of the purpose of Act entirely. As the U.S. Supreme Court has stated, "The plain meaning of

legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). While the U.S. Supreme Court said in *Yeshiva University* that academic settings "could" be NLRA covered workplaces, they were strictly talking about the professors and other traditional staff members; students were so far outside the scope that they did not even consider it or address the issue. 444 U.S. at n.31.

An expansion of this nature opens up a floodgate of potential litigation and application of the NLRA in places it was never meant to apply. The situation at Northwestern University mirrors the situation at many private high schools with strong sports programs, as well as student employees in common settings such as collegiate libraries and dining facilities, employees of summer camp programs, and other similar jobs that the drafters of the NLRA likely never desired to have included. Congress has the ability to amend and alter the NLRA to expand it into these realms, the Board does not.[2]

IV. EVEN IF FOUND TO BE EMPLOYEES, PUBLIC POLICY DEMANDS AN EXCEPTION

As with most areas of the law, the Board the right to make exceptions to certain populations of potential "employees" that clearly fall outside the bounds of congressional intent. Further, the NLRA contains several explicit and implicit exceptions to the term "employee," including domestic workers, agricultural workers, and children employed by their parents, amongst others. 29 U.S.C.A. § 152 (3). Thus, there are several populations that fit the common law definition of "employee" but are left out of coverage under the NLRA due to other considerations. In the event that the Board determines these student-athletes are employees, they should be one such exception.

[2] Although it is important to note that it is highly unlikely they ever would.

The Board has previously expressed legitimate concerns about unionization of student populations. In *Brown University*, the Board stated, "Even if graduate student assistants are statutory employees, a proposition with which we disagree, it simply does not effectuate the national labor policy to accord them collective bargaining rights, because they are primarily students." 342 NLRB at 492.

Although Director Ohr argued that the petitioning group of student-athletes is predominantly football players with economic relationships to their institutions, it does not change the fact that in order to be football players, they must first be students. *Northwestern University*, 2014 N.L.R.B. Reg. Dir. Dec. LEXIS at 18. This relationship, as described above, is contingent upon the status of student and the on-going taking of classes and awarding of grades. Thus, the concerns outlined in *Brown University*, and other unionization efforts by students, ring true here.

Establishing unions for college athletes is turning college athletics into professional sports leagues and is turning student-athletes into just athletes. While discussions about reform of the NCAA and college sports in general may be warranted, it is not the Board's place to litigate this sort of change and this sort of statutory expansion. *See American Totalisator*, 243 NLRB 314 (1979), *affd*. 708 F.2d 46 (2d Cir. 1983), *cert. denied* 464 U.S. 914 (1983). "Absent an indication from Congress that the Board's refusal to assert jurisdiction is contrary to congressional mandate, we are not persuaded that we should exercise our discretion to reverse prior holdings on (an) issue." *American Totalisator*, 243 NLRB at 314. Congress has held hearings on college athletics and various pieces of legislation dealing with these issues pending, thus it is being addressed. Sara Ganim, *Should Northwestern Football Players Unionize? Congress to Weigh In*, CNN, May 3, 2014. The Board here is being encouraged to cross the line

into a legislative role and address an issue that is outside of its scope. This is inappropriate and not within the bounds permitted by the NLRA.

Another area of concern is the protection of the college athlete. While this decision is seemingly in favor of the general college athlete, it has the potential to harm far more student-athletes then it assists. The student-athletes on the Northwestern University team may find themselves in a preferable position, but the overall number of available athletic scholarships are likely to decline and those who are lucky enough to get a scholarship will now find themselves with taxable income in the form of housing and tuition, without the means to pay these taxes. Smaller schools may be forced to pull out of Division I play altogether due to the increased costs, thus competing only in the less intensive Division III leagues where scholarships are not permitted.

Currently, a student-athlete who is injured or for some other reason is involuntarily off the team, even permanently, does not lose their scholarship at all NCAA schools for at least the current year.[3] However, if a student could no longer compete on the team, it would no longer be up to the administration to promise a five year scholarship. Instead, this would be a topic for bargaining with no mandate that it continue. In his decision, Director Ohr argued that players who choose to stop playing currently risk losing their scholarship. *Northwestern University*, 2014 N.L.R.B. Reg. Dir. Dec. LEXIS at 18. This is an odd statement for Director Ohr to make, as any "employee" who chooses to stop partaking in their employment by choice seemingly would likewise stop being compensated, whether or not the workplace is unionized. Additionally, any scholarship recipient at almost any location would risk losing their scholarship if they no longer meet the requirements of that scholarship by choice. If a student receiving a full scholarship to a law school for environmental law chooses to instead begin focusing their

[3] At many schools it continues for all five years, including Northwestern University.

internships and class load on bankruptcy, that student should be aware of the risks that come with such a choice. Thus, it is not clear how unionization will somehow protect the individual who comes to a school on a scholarship and then makes the choice to stop doing the thing the scholarship is actually intended to support.[4]

Students receive no monetary compensation for their participation in college athletics. However, under a unionized system, they would be faced with union dues, taxation, and other potential expenses. Worker's Compensation would only apply if injured on the field, thus a player who is injured outside of the context of their play would risk losing their tuition, food, and housing in a way that they do not risk currently. Even if injured in the course of play, Worker's Compensation deals in money, not housing, food, and tuition; so an injured player could be forced to move out and lose access to their education and meals. Teams would no longer need in-house assistance for injuries and could just defer to the Worker's Compensation courts to deal with the issue, which may require an injured player to hire a lawyer and attend a hearing (or two) before being able to actually pay their medical bills.

Under the NLRA, employers are not required to pay their employees during a strike. Regardless, a strike is one of the most powerful, if not the most powerful, tools a unionized workforce has at their disposal to force negotiations and bargain. *See NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). But, student-athletes are only "paid" through in-kind "compensation" in the form of food, lodging, and scholarship funds. This leaves open the question of if a student-athlete union would face having their housing, meals, and schooling suspended if they ever chose to go on strike. Granted, this could all be rectified by Congress, but that just reaffirms the point that this sort of legislative expansion requires a large amount of

[4] This is distinct from the student who does not choose to do so, but must stop playing due to an injury or other occurrence.

detail and changes. Thus, it should be left to Congress and is outside the power of the Board to make such a decision.

One of Director Ohr's strongest contentions is that grant-in-aid scholarship football players have their lives controlled by their athletic teams. *Northwestern University*, 2014 N.L.R.B. Reg. Dir. Dec. LEXIS at 13. The primary issue with this is that, in his dismissal of the student aspect of a student-athlete's identity, he failed to note that much of this "control" is consistent with the type of programs and controls colleges establish for many, if not all, of their students. His rationale for this mirrors the situation of collegiate debate teams, drama clubs, resident hall assistants, and other groups of students on campus who receive some form of assistance in exchange for their participation in that activity

He writes, "Even the players' academic lives are controlled as evidences by the fact that they are required to attend study hall if they fail to maintain a certain grade point average in their classes." *Id*. at 4. This is true of many scholarship recipients, both academic and athletic, as well as some diversity initiative programs that require students to have monitored study halls to ensure their academic success. Most merit-based scholarships even have a grade point average that you must meet in order to not risk losing the scholarship all together. To use this as justification for unionization ignores those similarly situated. Director Ohr further writes, "The players are subject to anti-hazing and anti-gambling policies." *Id*. at 10. These policies are campus-wide at almost all institutions, and in many states are even state laws applying to all students. At Northwestern University, hazing is banned campus-wide by Illinois state law and through a policy published in their Student Handbook that reads in pertinent part, "The University forbids hazing and all other activities that interfere with the personal liberty of an individual." *Northwestern University Student Handbook*, 48 (2013). Gambling is likewise

prohibited for all students, with the campus policy noting that gambling at Northwestern is a violation of Illinois law. *Id*. at 47. Director Ohr's use of campus norms to somehow illustrate that football students are employees seems ignorant to the realities of these situations.

The above considerations all provide evidence for why public policy demands an exception to any potential finding that grant-in-aid scholarship football players, and others similarly situated, are employees under the NLRA. In not doing this, the Board is prioritizing the perceived rights of the few for the needs of the many.

CONCLUSION

For the foregoing reasons, the Board should overturn Regional Director Peter Ohr's order and apply the *Brown University* test. In doing so, the Board should find in favor of Northwestern University by ruling that the grant-in-aid student-athletes are not employees for purposes of the NLRA and thus a labor union vote should not be granted.

Respectfully submitted,

LEECH TISHMAN FUSCALDO & LAMPL, LLC, IN SUPPORT OF NORTHWESTERN UNIVERSITY AS AMICI CURIAE

By: /s/ Robert S. Schultz
Robert F. Schultz, Esquire
Patrick W. Carothers, Esquire
Gregory W. Hauswirth, Esquire