UNITED STATES OF AMERICA
AMICUS BRIEF
FOR THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY
Employer

and Case 13-RC-121359

COLLEGE ATHLETES PLAYERS
ASSOCIATION (CAPA)
Petitioner

BRIEF OF *AMICUS CURIAE* ON INVITATION BY THE NATIONAL LABOR RELATIONS BOARD

IN SUPPORT OF THE REQUESTERS AND OPPOSING THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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BRIEF OF AMICUS CURIAE IN SUPPORT OF THE REQUESTERS AND OPPOSING THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

STATEMENT OF INTEREST OF *AMICUS CURIAE*

My name is Aloysius Hogan. I am an attorney licensed in Washington, DC.

I serve as Senior Fellow at the Competitive Enterprise Institute, a free-market think tank, where I train my attention to labor and employment issues. I also serve as Editor-in-Chief of the website WorkplaceChoice.org that focuses on labor and employment issues.

Previously I was Counsel and Registered Lobbyist for the labor and employment law firm of Jackson Lewis.

Prior thereto, I handled labor and employment policy in a number of capacities as a staffer for over a decade in the U.S. House and Senate.

I have read the Region 13 decision in this case as well as the decision in *Brown University*. I submitted testimony to and attended the hearing "Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes" before the full United States House of Representatives Committee on Education and the Workforce on May 8, 2014.

I have written on this case.

I have read all amicus briefs in this case available as of July 2, 2014.

I have also read and written on the recent U.S. Supreme Court decision in *Harris v. Quinn*.

ARGUMENT

The U.S. Supreme Court decision in *Harris v. Quinn* on June 30, 2014, involved the governmental definition of "employee" for purposes of unionization and the generally applicable First Amendment standards. The court's thinking in these cases should inform the thinking in this case. Indeed, in the Official Report of Proceedings, counsel John Adam for the Respondent emphasizes the importance of Supreme Court precedent.

This case is of such a high stature, of such broad interest, and potentially involving such vast sums of money that finding its way into the federal court system is entirely conceivable.

The *Harris* court established a standard of "full-fledged" employment, determining that "partial" employment would not suffice for overcoming the central First Amendment principle laid down in that case, to wit, "the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."

CONGRESSIONAL INTENT

There is no showing in Region 13's 24-page decision that Congress intended students receiving grant-in-aid to be considered employees. The decision includes absolutely no legislative history of the 1935 Act.

To impute a Congressional intent would be an unwarranted, unsupported inference.

Before the NLRB's Region 13 decision, the 1935 National Labor Relations Act had never been interpreted to mean these athletes' grant-in-aid scholarships constituted employment.

The full Board should not make such an unwarranted inference, but if it were to, the following sample piece of legislation may be necessary to include in a large, typically year-end bill, if not moved as a stand-alone bill on suspension:

2ND SESSION **H. R. _____**

113TH CONGRESS

To clarify the rights of grant-in-aid students under

the National Labor Relations Act.

IN THE HOUSE OF REPRESENTATIVES

APRIL __, 2014

Mrs. _____ (for herself, Mr. _____, Mr. _____, Mr. _____, and Mr. _____) introduced the following bill; which was referred to the Committee on Education and the Workforce

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A BILL

To clarify the rights of grant-in-aid students under the National Labor Relations Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Student Labor Liberty Act of 2014".

SEC. 2. DEFINITION OF EMPLOYEE.

Section 2 of the National Labor Relations Act (29 U.S.C. 152) is amended—

(1) in paragraph (3), by inserting "any grant-in-aid student," after "shall not include."

Rather than leave the decision to an NLRB that would have shown itself to be highly politicized if it were to find Congressional intent where none is evidenced,

Congress may be forced to clarify the statute to state that scholarship athletes are not intended to be considered employees.

JOINT EMPLOYER

Counsel for both parties, Mr. Adam and Mr. Barbour, agree on page 43 and 44 of the transcript that the NCAA is not the joint employer. Neither party believes the NCAA is a necessary or interested party. Such was the stipulation.

QUESTIONS PRESENTED

1. What test should the Board apply to determine whether grant-in-aid scholarship football players are "employees" within the meaning of Section 2(3) of the Act, and what is the proper result here, applying the appropriate test?

   Section 2(3) reads as follows:

> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained **any other regular** and **substantially equivalent** employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

The terms "any other regular" and "substantially equivalent" may be important here. It is likely that Congress would not have viewed a student's grant-in-aid to be "regular" employment.

It is not likely that full-fledged, full-time work as any employee of the university, such as a secretary, payroll clerk, janitor, coach, professor, maintenance specialist, et cetera would be considered "substantially equivalent."

Furthermore, a textual analysis of "any other regular" may be pertinent for the argument of Counsel Barbour that the players are only temporary employees, even given the most favorable reading.

2. Insofar as the Board's decision in *Brown University*, 342 NLRB 483 (2004), may be applicable to this case, should the Board adhere to, modify, or overrule the test of employee status applied in that case, and if so, on what basis?
6. If grant-in-aid scholarship football players are "employees" under the Act, to what extent, if any, should the Board consider, in determining the parties' collective bargaining obligations, the existence of outside constraints that may alter the ability of the parties to engage in collective bargaining as to certain terms and conditions of employment? What, if any, should be the impact of such constraints on the parties' bargaining obligations? In the alternative, should the Board recognize grant-in-aid scholarship football players as "employees" under the Act, but preclude them from being represented in any bargaining unit or engaging in any collective bargaining, as is the case with confidential employees under Board law?

The line of cases including *Adelphi, Leland Stanford, St. Clare's Hospital,* and *Brown University* are appropriately decided. Specifically, the Board's following reasoning remains sound:

> The Supreme Court has recognized that principles developed for use in the industrial setting cannot be "imposed blindly on the academic world." *NLRB v. Yeshiva University*, 444 U.S. 672, 680–681 (1980), citing *Syracuse University*, 204 NLRB 641, 643 (1973). While graduate [read "academic"] programs may differ somewhat in their details, the concerns raised in *NYU,* supra*,* and here forcefully illustrate the problem of attempting to force the student university relationship into the traditional employer employee framework. After carefully analyzing these issues, we have come to the conclusion that the Board's 25-year pre-*NYU* principle of regarding graduate [read "academic"] students as nonemployees was sound and well reasoned. It is clear to us that graduate student assistants, including those at Brown, are primarily students and have a primarily educational, not economic, relationship with their university. Accordingly, we overrule *NYU* and return to the pre-*NYU* Board precedent**.**
>
> **…**
>
> This interpretation of Section 2(3) followed the fundamental rule that "a reviewing court should not confine itself to examining a particular statutory

provision in isolation."23 We follow that principle here. We look to the underlying fundamental premise of the Act, viz. the Act is designed to cover economic relationships. The Board's longstanding rule that it will not assert jurisdiction over relationships that are "primarily educational" is consistent with these principles.

…

The concerns expressed by the Board in *St. Clare's Hospital* 25 years ago are just as relevant today at Brown. Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration.

…

Our colleagues argue that graduate student assistants are employees at common law. Even assuming arguendo that this is so, it does not follow that they are employees within the meaning of the Act. The issue of employee status under the Act turns on whether Congress intended to cover the individual in question. The issue is not to be decided purely on the basis of older common-law concepts.

…

Moreover, 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. In this regard, the Board has the discretion to determine whether it would effectuate national labor policy to extend collective–bargaining rights to such a category of employees. Indeed, the Board has previously exercised that discretion with respect to medical residents and interns. See *St. Clare's Hospital*, supra. Thus, assuming arguendo that the petitioned-for individuals are employees under Section 2(3), the Board is not compelled to include them in a bargaining unit if the Board determines it would not effectuate the purposes and policies of the Act to do so.

…

For the reasons we have outlined in this opinion, there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process.

3. What policy considerations are relevant to the Board's determination of whether grant-in-aid scholarship football players are "employees" within the meaning of Section 2(3) of the Act and what result do they suggest here?

ADMINISTRATIVE PROBLEMS – PRACTICALITY

The Supreme Court frequently concerns itself (such as in both *Harris* and *Knox*) with administrative problems and practicality. In *Harris*, the court states for example,

> Nor does the *Abood* Court seem to have anticipated the administrative problems that would result in attempting to classify union expenditures as either chargeable or nonchargeable, see, *e.g., Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, or the practical problems that would arise from the heavy burden facing objecting nonmembers wishing to challenge the union's actions.

The record of the Congressional hearing makes it plain, for example, that if the employee status foisted upon the universities in the Region 13 decision were to prevail ultimately, Stanford is prepared to cease participating in its current level of competition.

The situation for walk-on players, players with expired eligibility, and players committed to play but still in high school are other practical concerns.

As Mr. Barbour states, "[M]ost of the objectives CAPA desires to achieve are not even controlled by Northwestern University… Additionally, any collective bargaining rights to collegiate football would require a complete overhaul and

revamping of the existing governance structure, both at the NCAA and the Big Ten Conference level."

The imbalance issues that would accrue across NCAA sports between the 17 schools to which a rule would apply and all of the other schools would be "impractical and simply would not work," as Mr. Barbour stated.

The distinct impression resulting from the Congressional hearing was that, whatever grievances some players may espouse, collective bargaining is not the appropriate process for achieving any desired goals.

CONGRESSIONAL HEARING

The House Education and the Workforce Committee hearing examined the consequences of the recent National Labor Relations Board (NLRB) decision classifying certain student athletes as "employees" for the purposes of collective bargaining. When announcing the hearing, Chairman John Kline (R-MN) said, "Classifying student athletes as employees threatens to fundamentally alter college sports, as well as reduce education access and opportunity."

The recent National Labor Relations Board (NLRB) ruling that Northwestern University players receiving scholarships from the employer are "employees" and may form a union, has thrown athletic departments across the country into a frenzy, as they try to sort out what it means for them. But one thing is for certain: The decision opens the door to the federal government inserting more regulations between students and private institutions nationwide.

One of the witnesses at the Congressional hearing was Stanford University Director of Athletics Bernard Muir, and for good reason. In California, which is not a right-to-work state, a university like Stanford stands a lot to lose from the NLRB decision. Stanford's head football coach David Shaw has questioned what could be behind the union movement at Northwestern saying, "I'm curious what's really driving it. I've seen everything, and everything that's been asked for, my understanding is it's been provided."

To answer Coach Shaw, the United Steelworkers union is driving this whole initiative. The Steelworkers, one of the largest industrial unions in North America, are underwriting and financing the effort and have been trying to unionize students for a decade. The goal? Access to some of the millions of dollars associated with college sports. And Stanford, with its long and storied athletic history, is a prime target for the Steelworkers, with nearly 10 local union chapters in the area.

Consider that unionizing means taking away students' First Amendment freedom of expression, especially troubling in the arena of academic freedom. Section 9(a) of the Taft-Hartley Act would give the union exclusive bargaining rights. Students would have to go through the union, rather than deal directly with the school, leaving student athletes with less of a voice. Halting the communication between coaches and players over practice regimes, for example, and inserting the union representatives would not be welcome for many players. Agency fees certainly would not be appropriate, in any case.

Next, consider how unionization would undermine students' freedom of association. With the union as their exclusive bargaining representative, student athletes would be barred from joining any other association—or even another union—to represent them.

Third, a union would siphon cash from students' bank accounts, when it has been established that these students are already recipients of grant-in-aid.

Moreover, once a union is established, it remains in place as the players' monopoly representative long after those who voted for the union have graduated. Those who follow in their wake are stuck with the union, whether they want it or not. The overwhelming majority of workers in both the private sector and in government inherited collective representation in this manner. In a collegiate athletics setting, where players' (temporary) eligibility is gone within four years, this would be an especially serious problem.

There are other potential problems in allowing college athletes to unionize. The controversial 2010 decision, *Specialty Healthcare*, permits variation in the size of bargaining units, allowing for the creation of "micro-unions." That means that offensive players could have a separate union from their teammates on defense. The marquee players at quarterback and running back could have a separate union from their offensive line. These types of divisions could have drastic effects on team unity, morale, and performance.

4. To what extent are the employment discrimination provisions of Title VII, in comparison to the antidiscrimination provisions of Title IX of the Education Amendments Act of 1972, relevant to whether grant-in-aid scholarship football players are "employees" under the Act?

   In the Official Report of the Proceedings, Mr. Barbour makes this very point. The point was fleshed out repeatedly in the U.S. House hearing. In short, the practical damage that would result from throwing wrenches into the processes for the (essentially only) two profitable sports—men's football and men's basketball—would cascade into the sports that lose money. An overall net detriment to the student athletes would result, with disparate sex/gender impacts.

CONCLUSION

In summary, this amicus brief supports the outcome of *Brown* and suggests that receiving grant-in-aid scholarship money does not rise to the level of establishing an employment relationship.

In the end, unions are in it for the money. Big Labor spends more than $600 million per year on politics and lobbying. Unions are *big* business, and they—in this case the Steelworkers—see college athletics as another source of revenue and college students as a means to an end. The best interests of the students dictate that collective bargaining not be imposed.

Counsel Alex Barbour aptly summarizes, "The model of collective bargaining that CAPA is espousing in this case is simply a Rube Goldberg contraption that would not work in the real world."

Dated: July 3, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing BRIEF OF AMICUS CURIAE IN SUPPORT OF THE REQUESTERS AND OPPOSING THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION was served electronically on this 3rd day of July 2014, to the parties and their counsel in this case by electronically filing via the NLRB website (http://mynlrb.nlrb.gov/efile) and/or via email to the respective parties.

/s/ J. Aloysius Hogan, Esq.