

# NCAA Student Athlete Unionization: NLRB Punts on Northwestern University Football Team

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## ABSTRACT

The NCAA has established a system through which universities profit tremendously from the athletic careers of student athletes, yet athletes' scholarships do not cover the full cost of attendance. With no guarantee of scholarship retention, young men and women commit long hours to athletic programs, risking both bodily injury and career aspirations. For years, nothing was done to improve conditions for student athletes. Recently, however, both current and former student athletes have begun campaigning for expanded student athletes' rights. In 2013, the Northwestern University football team sought to unionize to gain collective bargaining rights and secure safer and more favorable conditions for student athletes.

This Comment initially discusses the current student athlete unionization movement, which has been led by Kain Colter and Ramogi Huma since 2013. Next, this Comment examines the path of the movement, which began with discussions and protests and moved to the National Labor Relations Board's Chicago Regional Office. After providing a description of the fallout resulting from a Regional decision in the Northwestern University football team's favor, this Comment analyzes the National Labor Relations Board's refusal to assert jurisdiction in the case, preventing the team from unionizing and gaining collective bargaining rights. This Comment then evaluates the options remaining for student athletes who wish to unionize. Finally, this Comment recommends that Colter and Huma end their current bid to unionize, due to the beneficial reforms that have been made in the NCAA since the movement began.

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#### I. INTRODUCTION

“Right now the NCAA is like a dictatorship. No one represents us in negotiations. The only way things are going to change is if players have a union.”<sup>1</sup> In January 2014, Northwestern University quarterback Kain Colter advocated for reform in the National Collegiate Athletic Association (“NCAA”),<sup>2</sup> the body that governs college athletics.<sup>3</sup> Specifically, Colter called for greater medical protections and improved scholarships for student athletes.<sup>4</sup> He, along with his Northwestern University teammates, had begun the process to form the first college athlete union to ensure that those reforms would be adopted.<sup>5</sup>

Unfortunately for Colter and his teammates, many entities opposed the team’s attempt to unionize, including the Northwestern University football team’s coaching staff,<sup>6</sup> Northwestern University, and, most importantly, the NCAA.<sup>7</sup> The NCAA and Northwestern quickly took the

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1. Tom Farrey, *Kain Colter Starts Union Movement*, ESPN (Jan. 28, 2014), <http://es.pn/1gmKHwd>.

2. *Id.*

3. *See What Is the NCAA?*, NCAA, <http://on.ncaa.com/2kRmmtd> (last visited Feb. 14, 2017).

4. *See* Farrey, *supra* note 1.

5. *Id.*

6. Adam Rittenberg, *Pat Fitzgerald Urges Against Union*, ESPN (Apr. 5, 2014), <http://es.pn/1iczKZk>.

7. *See* Farrey, *supra* note 1.

position that college athletes were not employees and, as a result, did not qualify for collective bargaining rights.<sup>8</sup>

The dispute over the players' status as employees continued until August 2015 when the National Labor Relations Board (NLRB or "Board") declined to assert jurisdiction over the issue.<sup>9</sup> Although it remains to be seen whether the Board's decision has ended the unionization movement, Colter has vowed to continue fighting for student athletes' rights.<sup>10</sup>

This Comment will examine how the unionization movement built momentum and eventually came before the NLRB.<sup>11</sup> First, Part II of this Comment will examine the parties on both sides of the unionization issue and the roles that each played throughout the petitioning process.<sup>12</sup> Part II will next describe the protests that were used to raise awareness for the need to increase student athlete safety.<sup>13</sup> Additionally, Part II will discuss the growth of the student athletes' rights movement as the petition traveled from the NLRB's Chicago Regional Office to the NLRB, where the Board declined to assert jurisdiction.<sup>14</sup>

Part III of this Comment will evaluate the arguments of both the Northwestern football team and the NCAA regarding players' ability to collectively bargain as employees.<sup>15</sup> Specifically, the players' representatives contended that the employment-like relationship that exists between student athletes and universities confirms that student athletes should be considered employees for purposes of collective bargaining rights.<sup>16</sup> Although the NCAA asserted four arguments to counter the players' position, all claims became moot when the Board decided that ruling on the issue would not promote stability within college athletics.<sup>17</sup> Part III will then analyze and justify the Board's decision to decline to assert jurisdiction.<sup>18</sup> In addition, Part III will consider both the options that remain for student athlete unionization and the changes that the NCAA has undergone since the unionization movement began.<sup>19</sup>

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8. *Id.*

9. Nw. Univ., 362 N.L.R.B. No. 167 (Aug. 17, 2015).

10. Tom Farrey, *Northwestern Players Denied Request to Form First Union for Athletes*, ESPN (Aug. 17, 2015), <http://es.pn/1fkZkAH> [hereinafter *Northwestern Players Denied Request*].

11. *See infra* Part II.B.

12. *See infra* Part II.A.

13. *See infra* Part II.B.

14. *See infra* Part II.B.

15. *See infra* Part III.A.

16. *See infra* Part III.A.

17. *See infra* Part III.A.

18. *See infra* Part III.B.

19. *See infra* Part III.C–D.

Finally, Part IV will recommend that Colter and the Northwestern University football team cease their bid to unionize because of the recent progress in the NCAA and the lack of effective options remaining for unionization.<sup>20</sup>

## II. BACKGROUND

### A. *The Parties Involved*

#### 1. National Labor Relations Board

Created in 1935 under President Franklin D. Roosevelt, the NLRB was established to enforce employees' rights,<sup>21</sup> which were set forth in the National Labor Relations Act (NLRA).<sup>22</sup> To combat the growing labor disputes<sup>23</sup> throughout the country, the NLRA<sup>24</sup> forced employers to engage in collective bargaining<sup>25</sup> discussions with unions.<sup>26</sup> Claiming that the Board had a pro-union bias, many employers vigorously opposed

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20. *See infra* Part IV.

21. *The 1935 Passage of the Wagner Act*, NAT'L LABOR RELATIONS BD., <http://bit.ly/29k0trt> (last visited Feb. 11, 2017).

22. National Labor Relations Act § 7, 29 U.S.C. § 157 (2012) (providing that, among other rights, "[e]mployees shall have the right to self-organize; to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing").

23. *See Pre-Wagner Act Labor Relations*, NAT'L LABOR RELATIONS BD., <http://bit.ly/2lOaS3h> (last visited Feb. 11, 2017). During the early 1900s, workers in the United States joined together to advocate for the development of a national labor policy that would improve working conditions. *Id.* Following World War I and continuing through the early 1930s, the struggle between workers and management intensified. *Id.* Workers' strikes were countered by managements' labor injunctions, resulting in a greater need for a national labor policy. *Id.*

24. 29 U.S.C. § 151. The Act provides:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . . . It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . .

*Id.*

25. *See Employer/Union Rights and Obligations*, NAT'L LABOR RELATIONS BD., <http://bit.ly/1NMZFIm> (last visited Feb. 11, 2017) for a basic overview of the obligations of each party when collectively bargaining.

26. *The 1935 Passage of the Wagner Act*, *supra* note 21.

the creation of the NLRB.<sup>27</sup> Since the Board was founded, however, Congress has amended the NLRA on three occasions, each time expanding the Board's responsibilities.<sup>28</sup> Currently, five members compose the Board, each of whom is appointed by the U.S. President to a five-year term.<sup>29</sup>

Congress created two principal functions for the NLRB.<sup>30</sup> First, the Board responds to unlawful acts—called unfair labor practices<sup>31</sup>—that are committed by either employers or unions, either by preventing those practices from being implemented or by remedying those practices that have already occurred prior to the Board's involvement.<sup>32</sup> To address charges of unfair labor practices, a petitioner must bring the case before one of the Board's 50 Regional, Subregional, or Resident Offices.<sup>33</sup> The NLRA grants to employees,<sup>34</sup> among other privileges, the rights to form and join a labor organization and to bargain collectively through representatives of their own choosing.<sup>35</sup> While these rights apply to most employees in the private sector, they do not apply to employees of federal, state, or local governments.<sup>36</sup>

A petitioner can file a charge of unfair labor practices against either an employer or a labor organization.<sup>37</sup> After the petitioner files the charges, the Regional Director<sup>38</sup> will determine whether formal action is

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27. *Enforcement of the Wagner Act*, NAT'L LABOR RELATIONS BD., <http://bit.ly/2INWmcl> (last visited Feb. 11, 2017).

28. NAT'L LABOR RELATIONS BD., ANNIVERSARY PUBLICATION: 80 YEARS OF PROTECTING EMPLOYEE RIGHTS 10, <http://bit.ly/2cp4bli> (last visited Feb. 11, 2017) [hereinafter ANNIVERSARY PUBLICATION].

29. *Who We Are*, NAT'L LABOR RELATIONS BD., <http://bit.ly/2l6xAop> (last visited Nov. 3, 2015).

30. ANNIVERSARY PUBLICATION, *supra* note 28, at 11.

31. National Labor Relations Act § 8, 29 U.S.C. § 158 (2012) (establishing that an unfair labor practice is the violation of any provision set forth in section 8 of the NLRA).

32. *Id.* § 160.

33. ANNIVERSARY PUBLICATION, *supra* note 28, at 11.

34. 29 U.S.C. § 152(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 . . .”).

35. *Id.* § 157.

36. *Id.* § 152(2)–(3) (providing that, under § 152(2), “[t]he term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision”).

37. *See id.* § 158(a)–(b), 160(b).

38. *See generally Regional Offices*, NAT'L LABOR RELATIONS BD., <http://bit.ly/2klkhsW> (last visited Feb. 11, 2017). In addition to its Washington, D.C. headquarters, the NLRB has 26 Regional Offices, which govern geographic areas around the country. *See id.*; *see also* Eileen B. Goldsmith, *The Role of the Regional Directors in the National Labor Relations Board*, AM. BAR ASS'N (2011), <http://bit.ly/2INPKeg> (last visited Feb. 11, 2017) (“The Regional Directors head their respective regional offices for

appropriate.<sup>39</sup> In specific cases,<sup>40</sup> the Regional Director is required to seek, from a district court, a temporary restraining order to prevent the continuation of any possible unfair labor practices.<sup>41</sup> Alternatively, the charges could be dismissed from the process for three reasons.<sup>42</sup> First, the petitioner may withdraw the charge.<sup>43</sup> Second, the Regional Director may refuse to issue a complaint on the charges.<sup>44</sup> Third, the parties may reach either a formal or informal settlement.<sup>45</sup>

Assuming that the Regional Director investigates the claim and determines that the charge may have merit, he or she will issue a complaint and provide notice of a hearing.<sup>46</sup> Again, at this stage, under certain circumstances, a district court may provide a temporary restraining order to prevent the unfair labor practices from continuing.<sup>47</sup> Additionally, after the complaint has been filed, the charges may once again be withdrawn or the parties may settle.<sup>48</sup> However, relatively few charges of unfair labor practices result in filing a complaint.<sup>49</sup> For instance, in 2016, of the 21,326 unfair labor practice charges filed with the NLRB, 6,010—approximately 28 percent—resulted in a settlement between the parties.<sup>50</sup> However, only 1,272 of the charges that did not result in settlement—approximately six percent of the charges filed in 2016—resulted in a Regional Director filing a complaint.<sup>51</sup>

If and when the respondent files an answer, an administrative law judge (ALJ)<sup>52</sup> hears the case and files a decision.<sup>53</sup> The ALJ will

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purposes of substantive enforcement of the National Labor Relations Act and for administrative purposes.”).

39. Statements of Procedure, 29 C.F.R. § 101.4 (2016).

40. These cases include instances of secondary boycotts (29 U.S.C. § 158(b)(4)) and recognitional picketing (29 U.S.C. § 158(b)(7)). 29 C.F.R. § 101.37.

41. 29 U.S.C. § 160(j) (granting the Board the authority to seek injunction through the federal courts).

42. 29 C.F.R. § 101.4.

43. *Id.* § 101.5.

44. *Id.* § 101.6.

45. *Id.* § 101.7.

46. *Id.* § 101.8.

47. *Id.* § 101.37.

48. *Id.* § 101.9.

49. *See Charges and Complaints*, NAT’L LABOR RELATIONS BD., <http://bit.ly/2IJ1ZfF> (last visited Feb. 11, 2017).

50. *See id.*

51. *See id.* These statistics accurately reflect the findings from 2007–2016. *Id.* Over that period, approximately 32 percent of charges resulted in settlement, while approximately 5.6 percent resulted in the filing of a complaint by a Regional Director. *Id.*

52. *See Classifications & Qualifications*, OFFICE OF PERS. MGMT., <http://bit.ly/216B22g> (last visited Feb. 11, 2017) (explaining that “ALJs serve as independent impartial triers of fact in formal proceedings” before federal agencies).

53. 29 C.F.R. § 101.10.

recommend either that the court order a cease and desist from the unfair labor practice, in which case the court will provide relief, or that the court dismiss the complaint.<sup>54</sup> Both parties then have the opportunity to file exceptions with the Board regarding the ALJ's decision, the record, or the proceedings.<sup>55</sup> Alternatively, parties may also file briefs in support of the ALJ's rulings and decision.<sup>56</sup> In addition, parties may appeal to the Board for a review of the Regional Director's decision.<sup>57</sup>

When reviewing the case,<sup>58</sup> the Board can “adopt, modify, or reject the findings and recommendations of the [ALJ].”<sup>59</sup> If one of the parties wishes to appeal the decision of the Board, the U.S. Court of Appeals—and ultimately the U.S. Supreme Court—may review the case and enforce, set aside, or remand all or part of the case.<sup>60</sup>

The Board's second function is determining whether employees want to be represented by a union, and, if so, by which union.<sup>61</sup> The Northwestern football team began the following path to attempt to establish the first student athlete union.<sup>62</sup>

Prior to filing a petition with the NLRB Regional Office, union organizers must attempt to gain the support of employees who may wish to seek union representation.<sup>63</sup> Once organizers are satisfied that a significant portion of employees support unionization, organizers file a petition for certification with the NLRB.<sup>64</sup> Additionally, organizers must be able to demonstrate that a “substantial number of employees wish to be represented for collective bargaining.”<sup>65</sup> Organizers typically

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54. *Id.* § 101.11(a).

55. *Id.* §§ 101.11(b), 102.46.

56. *Id.* § 102.46.

57. *Id.* § 102.67.

58. If neither party files an exception, the Board will automatically adopt the ALJ's decision. *Id.* § 102.48(a). If a party files an exception, normally a panel of three members of the Board will review the ALJ's decision; however, “the full Board usually considers novel or potentially precedent changing cases.” *Decide Cases*, NAT'L LABOR RELATIONS BD., <http://bit.ly/2kKknVh> (last visited Feb. 21, 2017). In 2016, 21,326 unfair labor practice charges were filed by individuals, unions, and employers. *See Charges and Complaints*, *supra* note 49. Regional Directors issued only 1,272 complaints based on the allegations in those filed charges. *Id.* The Board issued a decision in only 296 cases, which equates to approximately 1.4 percent of the unfair labor practice charges filed in 2016. *See Board Decisions Issued*, NAT'L LABOR RELATIONS BD., <http://bit.ly/2mkxusi> (last visited Feb. 21, 2017).

59. 29 C.F.R. § 101.12.

60. *Id.* § 101.14.

61. National Labor Relations Act § 7, 29 U.S.C. § 157 (2012).

62. *See infra* notes 142–76 and accompanying text.

63. *See The NLRB Process*, NAT'L LABOR RELATIONS BD., <http://bit.ly/2kR9DCM> (last visited Mar. 2, 2017).

64. 29 C.F.R. § 102.60.

65. 29 U.S.C. § 159(c)(1)(A)(i).

establish this showing through signed authorization cards from at least 30 percent of employees who wish to seek unionization.<sup>66</sup>

Once the petition is filed with the NLRB, the Regional Director will either dismiss the petition,<sup>67</sup> in which case the decision may be appealed,<sup>68</sup> or the Regional Director will begin an investigation.<sup>69</sup> Assuming that the employer does not consent to the unionization of its employees, the Regional Office conducts a formal hearing,<sup>70</sup> and the Regional Director issues a decision either directing an election,<sup>71</sup> dismissing the case,<sup>72</sup> or reopening the record.<sup>73</sup> If neither party requests the Board's review of the Regional Director's decision or a request for review is denied,<sup>74</sup> the Regional Office will conduct an election during which employees will decide whether they wish to be represented by a union.<sup>75</sup>

## 2. Kain Colter Initiates the Student Athlete Unionization Movement

Like the NLRB,<sup>76</sup> Kain Colter, a former quarterback at Northwestern University and an advocate for student athletes' rights, is concerned with protecting the rights of workers to unionize and bargain collectively.<sup>77</sup> Colter has been the driving force behind the college athlete unionization movement.<sup>78</sup> Prior to the 2013 football season, during the Big Ten Media Days,<sup>79</sup> Colter spoke publicly about players' rights.<sup>80</sup> On his Twitter account, Colter had previously expressed<sup>81</sup> his

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66. NLRB v. Gissel Packing Co., 395 U.S. 575, 607 (1969).

67. 29 C.F.R. § 102.71(a).

68. *Id.* § 102.71(c).

69. *Id.* § 102.67(a).

70. *Id.*

71. *Id.* § 102.67(b).

72. *Id.* § 102.67(a).

73. *Id.*

74. *Id.* § 102.67(g).

75. *Id.* § 102.67(b).

76. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (2012).

77. *See* Farrey, *supra* note 1. In the article, Colter is quoted as saying, "Right now the NCAA is like a dictatorship. No one represents us in negotiations. The only way things are going to change is if players have a union." *Id.*

78. *See id.*

79. *See Big Ten Football Media Days & Kickoff Luncheon Recap*, BIG TEN (July 25, 2013), <http://bit.ly/2IIToJP>. The Big Ten Media Days is a series of press conferences leading up to the beginning of the football season. *See id.* During these press conferences, reporters interview the head coach of each of the conferences' football teams, as well as select members of those teams. *See id.*

80. Peter Berkes, *Star Northwestern QB Voices Support for O'Bannon vs. NCAA*, SB NATION (July 24, 2013), <http://bit.ly/2kR433k>.

support for the plaintiffs, former collegiate athletes, in *O'Bannon v. NCAA*.<sup>82</sup> However, Colter's discussion of the issue during the 2013 Big Ten Media Days was the first time he took advantage of his position in the public eye to spread his views on players' rights.<sup>83</sup>

Following the Media Days, Colter began gathering support from other current student athletes.<sup>84</sup> With the assistance of the National College Players Association (NCPA), he developed the All Players United<sup>85</sup> campaign.<sup>86</sup> In January 2014, Colter co-founded the College Athletes Players Association<sup>87</sup> (CAPA),<sup>88</sup> which later submitted the petition to the NLRB's Regional Office in Chicago on the Northwestern University football team's behalf.<sup>89</sup>

Since becoming involved with the student athlete unionization movement, Colter graduated from Northwestern University.<sup>90</sup> He pursued a career in the National Football League<sup>91</sup> as a member of the Minnesota Vikings practice squad in 2014<sup>92</sup> and was later signed by both

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81. See Roger Sherman, *Northwestern at Big Ten Media Days: What Pat Fitzgerald, Kain Colter, Venric Mark, and Tyler Scott Had to Say*, SB NATION (July 25, 2013), <http://bit.ly/2li4GDB>.

82. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) (holding that, although certain NCAA rules concerning the amateur status of student athletes may violate federal antitrust law, the NCAA must allow its schools to provide student athletes with scholarships that cover the full cost of attendance).

83. See Sherman, *supra* note 81.

84. See Tom Farrey, *Players Mark Gear in Protest*, ESPN (Sept. 21, 2013), <http://es.pn/2koopCv> [hereinafter *Players Mark Gear in Protest*].

85. *Id.* (“[Student athlete advocate and CAPA co-founder Ramogi] Huma said ‘this is a campaign designed by players that gets the issue in front of people in a way they’re comfortable with.’ He said the primary concern of the players is organizing health and safety issues related to concussions.”).

86. *Who We Are*, COLL. ATHLETES PLAYERS ASS’N, <http://bit.ly/2lOrwzH> (last visited Feb. 11, 2017) [hereinafter *Who We Are (CAPA)*].

87. *More Information*, COLL. ATHLETES PLAYERS ASS’N, <http://bit.ly/2lhTQO9> (last visited Feb. 11, 2017) (“The College Athletes Players Association (CAPA) is a labor organization established to assert college athletes’ status as employees with the right to collectively bargain for basic protections.”).

88. See *Who We Are (CAPA)*, *supra* note 86.

89. *What We’re Doing*, COLL. ATHLETES PLAYERS ASS’N, <http://bit.ly/2lNMxLQ> (last visited Feb. 11, 2017).

90. See *Who We Are (CAPA)*, *supra* note 86.

91. The National Football League is the largest and oldest professional football league still in existence in the United States. See *National Football League (NFL)*, ENCYCLOPÆDIA BRITANNICA, <http://bit.ly/2klivrY> (last updated Feb. 6, 2017). The National Football League is composed of 32 teams, including the Minnesota Vikings, Buffalo Bills, and Los Angeles Rams. See *Teams*, NFL, <http://bit.ly/1c3Kgzp> (last visited Feb. 11, 2017).

92. See *Team*, MINN. VIKINGS, <http://bit.ly/2l6A99Q> (last visited Feb. 11, 2017).

the Los Angeles Rams<sup>93</sup> and the Buffalo Bills prior to the start of the 2016 season.<sup>94</sup>

### 3. Ramogi Huma Continues Pushing for NCAA Reform

Ramogi Huma, a former college athlete, has spent nearly two decades campaigning for expanded protection for NCAA athletes.<sup>95</sup> After Colter reached out to Huma in the spring of 2013, Huma has worked alongside the former Northwestern quarterback in the current movement to provide unionization rights to student athletes.<sup>96</sup>

Huma became an advocate for players' rights during his football career at the University of California, Los Angeles.<sup>97</sup> While Huma was a member of the UCLA team, the NCAA suspended his All-American<sup>98</sup> teammate, Donnie Edwards.<sup>99</sup> Edwards had accepted groceries, which were left at his apartment,<sup>100</sup> after running out of his monthly allotment of scholarship funds.<sup>101</sup> Edwards was provided groceries on two separate occasions, totaling \$150 value.<sup>102</sup> The NCAA suspended Edwards for one game for accepting the food.<sup>103</sup>

While still in school, Huma learned that the NCAA prevented universities from compensating student athletes for any medical bills that may be incurred as a result of injuries during summer workouts.<sup>104</sup> Frustrated that student athletes were without a voice, Huma founded the NCPA to serve as a platform for NCAA reform.<sup>105</sup> Huma used his new organization to recruit student athletes from across the nation, which

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93. See Nick Wagoner, *Kain Colter First Free Agent to Sign with Los Angeles Rams*, ESPN (Feb. 10, 2016) <http://es.pn/2miWbW5>.

94. See *Players*, BUFFALO BILLS, <http://bit.ly/2m8PzKK> (last visited February 21, 2017).

95. *Who We Are (CAPA)*, *supra* note 86.

96. Farrey, *supra* note 1.

97. See *About the NCPA President*, NAT'L COLL. PLAYERS ASS'N, <http://bit.ly/2koqsGs> (last visited Feb. 11, 2017).

98. Sportswriters vote to determine which college football players will receive the honor of "All-American," which is awarded to the best player at each position. See *2016 AP All-America Team*, ASSOCIATED PRESS, Dec. 12, 2016, <http://apne.ws/2IIS89B>.

99. See *id.*

100. Steve Springer, *Edwards Suspended for One Game: UCLA: Linebacker Ordered to Pay Restitution for \$150 Worth of Groceries Left at His Apartment, Allegedly by Agent*, L.A. TIMES (Oct. 13, 1995), <http://lat.ms/2kIabs3>. An NCAA investigation revealed that the groceries were most likely left at Edwards's apartment by a sports agent, Robert Troy Caron. *Id.* Edwards, however, claimed that he did not know who left the groceries at his apartment. *Id.*

101. See *About the NCPA President*, *supra* note 97.

102. Springer, *supra* note 100.

103. *Id.*

104. *Who We Are (CAPA)*, *supra* note 86.

105. See *About the NCPA President*, *supra* note 97.

garnered support from over 1,000 new members.<sup>106</sup> Currently, the NCPA represents over 150 universities with over 17,000 members collectively.<sup>107</sup>

#### 4. National College Players Association

The NCPA advocates for physical, academic, and financial protection for student athletes nationwide.<sup>108</sup> Membership is free and open to all Division I<sup>109</sup> college athletes.<sup>110</sup> The NCPA has established 11 specific goals it hopes to accomplish through the representation of student athletes; these goals include minimizing the risk of brain trauma, establishing uniform safety guidelines, obtaining guaranteed scholarships, and improving the options for student athletes who wish to transfer between schools.<sup>111</sup>

In collaboration with the Drexel University Department of Sports Management, the NCPA published “The \$6 Billion Heist: Robbing College Athletes Under the Guise of Amateurism” (the “Report”), which claims that the NCAA “rules will deny FBS football and men’s basketball players at least \$6.2 billion that they would otherwise receive in a fair market between 2011 and 2015.”<sup>112</sup> According to the Report, athletes who play football or men’s basketball at Football Bowl Series (“FBS”)<sup>113</sup> schools have a yearly value of approximately \$137,000 and

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106. *Id.*

107. *About NCPA*, NAT’L COLL. PLAYERS ASS’N, <http://bit.ly/2kIb3NA> (last visited Feb. 11, 2017).

108. *See* Farrey, *supra* note 1.

109. *NCAA Division I*, NCAA, <http://on.ncaa.com/216s818> (last visited Feb. 11, 2017) (defining Division I schools as “generally hav[ing] the biggest student bodies, manag[ing] the largest athletics budgets and offer[ing] the most generous number of scholarships”).

110. *Join the NCPA*, NAT’L COLL. PLAYERS ASS’N, <http://bit.ly/2kRcID3> (last visited Feb. 11, 2017).

111. *Missions & Goals*, NAT’L COLL. PLAYERS ASS’N, <http://bit.ly/2kvyUiv> (last visited Feb. 11, 2017) (stating that the NCPA also hopes to “[r]aise the scholarship amount,” “[p]revent players from being stuck paying sports-related medical expenses,” “[i]ncrease graduation rates,” “[p]rotect educational opportunities for student-athletes in good standing,” “[e]liminate restrictions on legitimate employment and players ability to directly benefit from commercial opportunities,” and “[p]rohibit the punishment of college athletes that have not committed a violation”).

112. Ramogi Huma & Ellen J. Staurowsky, *The \$6 Billion Heist: Robbing College Athletes Under the Guise of Amateurism*, NAT’L COLL. PLAYERS ASS’N & DREXEL UNIV. SPORTS MGMT., 3 (2012), <http://bit.ly/1hUzGF2> [hereinafter *The \$6 Billion Heist*].

113. *NCAA Division I*, *supra* note 109 (“Division I is subdivided based on football sponsorship. Schools that participate in bowl games belong to the Football Bowl Subdivision. Those that participate in the NCAA-run football championship belong to the Football Championship Subdivision. A third group doesn’t sponsor football at all. The subdivisions apply only to football; all other sports are considered simply Division I.”).

\$289,000 respectively.<sup>114</sup> After accounting for the average value of a full athletic scholarship, the Report alleges that the average FBS football player is denied approximately \$456,000 over a four-year span, while the average basketball player at an FBS school is denied approximately \$1,063,000 over the same span.<sup>115</sup> These values do not include any lost profit from potential commercial endorsements because NCAA rules prohibit student athletes from securing endorsement deals.<sup>116</sup>

The Report's writers conclude that, based on the value of athletic scholarships and the amount of revenue created by student athletes, football players at FBS schools receive approximately 17 percent of their fair market value, while basketball players receive approximately eight percent of their fair market value.<sup>117</sup> The Report explains that the National Football League (NFL) and the National Basketball Association (NBA)<sup>118</sup> served as the models for determining the proper revenue sharing in college athletics.<sup>119</sup> The collective bargaining agreements of the NFL and the NBA share revenue with players at rates of 46.5 percent and 50 percent respectively.<sup>120</sup>

Finally, the Report discusses how student athletes are forced to pay the differences between the cost of attending schools and the insufficient financial assistance provided by full athletic scholarships.<sup>121</sup> The Report claims that the restrictions on full athletic scholarships at FBS schools create poverty rates of 82 percent for student athletes living on campus and 90 percent for those living off campus.<sup>122</sup>

Through its advocacy work, the NCPA claims to have been instrumental in bringing about NCAA reform—citing 11 victories that have led to greater protections for student athletes.<sup>123</sup> These victories

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114. *The \$6 Billion Heist*, *supra* note 112, at 3.

115. *Id.*

116. *Id.*

117. *Id.*

118. The National Basketball Association is the largest professional basketball league in the United States. See *National Basketball Association (NBA)*, ENCYCLOPÆDIA BRITANNICA, <http://bit.ly/216CbH6> (last updated June 20, 2016).

119. *The \$6 Billion Heist*, *supra* note 112, at 11.

120. *Id.*

121. *See id.*

122. *Id.* at 12.

123. See *NCPA Victories*, NAT'L COLL. PLAYERS ASS'N, <http://bit.ly/2kosExY> (last visited Feb. 11, 2017) (claiming that reformation victories include “[a]n increase in the NCAA death benefit from \$10,000 to \$25,000”; “[t]he elimination of limits on health care for college athletes”; “[t]he option of athletic programs to give players multi-year scholarships”; “[t]he expansion of the NCAA Catastrophic Injury Insurance Policy so that college athletes who suffer permanent, debilitating injuries can receive adequate home health care”; “[t]he expansion of the types of scholarship money players can receive”; and “[t]he elimination of the \$2000 salary cap on money earned from part-time jobs”).

include eliminating healthcare limits for college athletes and securing the option for athletic programs to offer multi-year scholarships to athletes.<sup>124</sup>

### 5. All Players United

In an attempt to further the efforts of the unionization movement, Colter, Huma, and the NCPA launched the All Players United campaign.<sup>125</sup> On September 21, 2013, members of the Northwestern football team, including Colter, represented the All Players United campaign by wearing wristbands, tape, or towels on which “APU” or “#APU” was inscribed.<sup>126</sup> Players from at least six other schools<sup>127</sup> made similar statements during the weekend’s games.<sup>128</sup> When asked about the gesture, Huma responded: “[Student athletes have] been using their bodies to make money for the people who run NCAA sports. Now, for the first time, they’re using their bodies to push for basic protections at the very least.”<sup>129</sup>

Less than four months later, All Players United introduced a second protest.<sup>130</sup> For three hours prior to the kickoff of the BCS National Championship Game<sup>131</sup> in Pasadena, California, the NCPA flew a banner over the Rose Bowl.<sup>132</sup> The banner included a message for the NCAA: “All Players United for Concussion Reform. Wake Up NCAA!”<sup>133</sup>

Although a product of the NCPA, All Players United sets forth its own goals.<sup>134</sup> Goals include uniting college athletes and fans, forcing the NCAA to take meaningful steps to minimize brain trauma, supporting players involved in *O’Bannon v. NCAA*, and standing behind student athletes who are unfairly affected by the NCAA’s rules.<sup>135</sup>

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124. *Id.*

125. *Players Mark Gear in Protest*, *supra* note 84.

126. *See id.*

127. Farrey, *supra* note 1 (specifying that players from both the University of Georgia and Georgia Tech participated in the protest).

128. *Id.*

129. *Players Mark Gear in Protest*, *supra* note 84.

130. *APU Banner to Fly Over Rose Bowl*, ESPN (Jan. 3, 2014), <http://es.pn/2IIPb8O>.

131. *The BCS Is . . .*, BCS FOOTBALL (Oct. 1, 2013), <http://bit.ly/2IYvJZ> (“The Bowl Championship Series (BCS) is a five-game college football showcase. It is designed to ensure that the top two teams in the country meet in the national championship game . . .”). Prior to the 2014 season, the NCAA terminated the BCS system and implemented the College Football Playoff. *See Chronology*, COLL. FOOTBALL PLAYOFF, <http://bit.ly/1J5rJWR> (last visited Feb. 14, 2017).

132. *APU Banner to Fly over Rose Bowl*, *supra* note 130.

133. *Id.*

134. *See* Chip Patterson, *All Players United Campaign Launched with ‘APU’ on Wrist Tape*, CBS SPORTS (Sept. 21, 2013), <http://cbsprt.co/2kvE667>.

135. *Id.*

## 6. College Athletes Players Association

Huma, Colter, and Luke Bonner, a former basketball player at the University of Massachusetts, co-founded CAPA in January 2014.<sup>136</sup> Consistent with the other organizations led by Huma and Colter, CAPA is pushing the NCAA to reform and expand the rights afforded to student athletes.<sup>137</sup> Through collective bargaining, CAPA hopes to secure guaranteed coverage for sports-related medical expenses for current and former NCAA athletes, increased athletic scholarships, and the opportunity to receive compensation for commercial sponsorships,<sup>138</sup> among other goals.<sup>139</sup>

Partnering with the United Steelworkers, CAPA submitted the petition to the NLRB's Chicago Regional Office on behalf of the Northwestern University football team.<sup>140</sup> If the petition is successful at some point in the future, CAPA will serve as the Northwestern football team's bargaining representative in discussions with the NCAA to eliminate, what CAPA considers, unjust restrictions.<sup>141</sup>

### B. *Timeline of Events*

The seeds for the unionization movement were planted in the spring of 2013 when Colter contacted Huma for advice in obtaining representation for student athletes hoping to reform the NCAA.<sup>142</sup> During the summer of 2013, Colter spoke with athletes nationwide during conference calls set up by the NCPA.<sup>143</sup> These discussions turned to action on September 21, 2013, when Colter, ten teammates, and football players from six other universities wore gear inscribed with

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136. *Who We Are (CAPA)*, *supra* note 86.

137. *See What We're Doing*, *supra* note 89.

138. *Id.*

139. *Id.* CAPA's specific goals include:

Minimizing the risk of sports-related traumatic brain injury . . . . Improving graduation rates. Establish an educational trust fund to help former players complete their degree and reward those who graduate on time . . . . Securing due process rights. Players should not be punished simply because they are accused of a rule violation, and any punishments levied should be consistent across campuses.

*Id.*

140. *Id.*

141. *See More Information*, *supra* note 87.

142. Farrey, *supra* note 1.

143. *Id.*

“APU” or “#APU” during the aforementioned All Players United campaign.<sup>144</sup>

Months later, on January 28, 2014, Huma, through CAPA and on behalf of the Northwestern University football team, filed a petition with the Chicago Regional Office of the NLRB, asking for union representation.<sup>145</sup> In the days leading up to the filing, members of the football team were asked to sign union authorization cards, which determined whether Colter, Huma, and CAPA would continue seeking union representation for the team.<sup>146</sup> For the NLRB to consider a petition, individuals seeking union representation must show support for unionization from at least 30 percent of employees who would be represented by that union.<sup>147</sup> Although actual figures were not released, Huma claimed that an “overwhelming majority” of the 85 scholarship players on the Northwestern roster signed union cards.<sup>148</sup>

Weeks later, beginning on February 18, 2014, and lasting until February 22, 2014, the NLRB’s Chicago Regional Office held hearings to consider the CAPA petition on behalf of the Northwestern football team.<sup>149</sup> During the hearings, Colter testified about the relationship between the time demands<sup>150</sup> that athletes face when competing at the collegiate level and the athletic scholarships, which often do not meet the financial needs of student athletes.<sup>151</sup> Northwestern University rebutted Colter’s claims with the testimony of his head coach and three of Colter’s teammates, one of whom claimed, “I was never in a position where I had to choose between [football and academics] . . . . I thought they went hand-in-hand.”<sup>152</sup>

Although the NLRB officer<sup>153</sup> who presided over the hearings called the team’s case “weak,”<sup>154</sup> Peter Ohr, the NLRB Chicago Regional

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144. *Id.*

145. *Id.*

146. See Henry Bushnell, *Colter, CAPA, and the Northwestern Unionization Movement: A Timeline*, SB NATION (Aug. 17, 2015), <http://bit.ly/2koA9or>.

147. *Conduct Elections*, NAT’L LABOR RELATIONS BD., <http://bit.ly/2INNYKe> (last visited Feb. 11, 2017).

148. Farrey, *supra* note 1.

149. *Kain Colter Testifies at NLRB Meeting*, ESPN.COM NEWS SERVICES, Feb. 18, 2014, <http://es.pn/MzErEe>.

150. *Northwestern, CAPA Make Final Arguments at NLRB Hearing*, SPORTS ILLUSTRATED (Feb. 25, 2014), <http://on.si.com/2lfsMiE> (referencing Colter’s claim that because of the time demands associated with playing football, he was unable to pursue his goal of becoming an orthopedic surgeon).

151. *Kain Colter Testifies at NLRB Meeting*, *supra* note 149.

152. *Northwestern, CAPA Make Final Arguments at NLRB Hearing*, *supra* note 150.

153. GUIDE FOR HEARING OFFICERS IN NLRB REPRESENTATION AND SECTION 10(K) PROCEEDINGS 6-7, OFFICE OF GEN. COUNSEL, NAT’L LABOR RELATIONS BD. (2003), <http://bit.ly/2kR5uyJ>. The guidelines explain:

Director, issued his decision<sup>155</sup> on March 26, 2014, which granted the players the right to bargain collectively and obtain union representation.<sup>156</sup> Regarding the decisive issue—whether football players receiving grant-in-aid scholarships are “employees” under Section 2(3) of the NLRA—Ohr ruled in favor of CAPA and the players.<sup>157</sup>

On April 2, 2014, coming on the heels of their success, Colter and Huma traveled to Washington, D.C. to raise awareness in Congress about the need for NCAA reform.<sup>158</sup> Colter and Huma were joined by the United Steelworkers Union’s policy director,<sup>159</sup> who had collaborated with CAPA to submit the petition to the NLRB on the Northwestern football team’s behalf.<sup>160</sup>

While Colter and Huma tried to gain support for their cause, Northwestern University began to construct its opposition to the March 26 ruling.<sup>161</sup> Northwestern’s head football coach, Pat Fitzgerald,<sup>162</sup> first tried to downplay the NLRB Chicago Regional Office decision,<sup>163</sup> before actively discouraging his players from unionizing.<sup>164</sup> At least three players on the team, who feared the uncertainty of the effect of

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The hearing officer should guide, direct and control the hearing, excluding irrelevant and cumulative material and not allowing the record to be cluttered with evidence submitted ‘for what it’s worth.’ . . . Although difficult to accomplish, the hearing officer should make every attempt to organize the record so that each issue, and the evidence in support of the issue, is presented separately and completely . . . . The hearing officer may cross-examine and call and examine witnesses . . . . The hearing officer must also keep constantly in mind that, to the parties, he/she is the Board’s representative and they expect him/her to be objective and considerate in the conduct of the hearing. Thus, the hearing officer, while meeting his/her primary responsibility to develop a full yet concise record, should also exercise self-restraint, give the parties prior opportunity to develop points and refrain from needlessly taking over.

*Id.*

154. *NLRB: Players’ Case Is ‘Weak,’* ESPN (Feb. 20, 2014), <http://es.pn/MEEChn>.

155. *Nw. Univ.*, 198 L.R.R.M. (BNA) ¶ 1837, 2014–2015 NLRB Dec. (CCH) ¶ 15,781 (Mar. 26, 2014).

156. *Id.*; see also Ben Strauss & Steve Eder, *College Players Granted Right to Form Union*, N.Y. TIMES (Mar. 26, 2014), <http://nyti.ms/2kotZoz>.

157. *Nw. Univ.*, 198 L.R.R.M. at 23.

158. *Labor Cause Stops on Capitol Hill*, ESPN (Apr. 2, 2014), <http://es.pn/2INVgxF>.

159. *Id.*

160. See *What We’re Doing*, *supra* note 89.

161. See generally Rittenberg, *supra* note 6.

162. *Id.* (providing that “Fitzgerald serves on the [American Football Coaches Association’s] board of trustees and has discussions at both the Big Ten and NCAA levels about improving the experience for players. He said no current or former players asked him for help in improving their experience before filing the union petition.”).

163. Matt Fortuna, *Northwestern Coach: Focus on Team*, ESPN (Apr. 1, 2014), <http://es.pn/2lhVNdk>.

164. See Rittenberg, *supra* note 6.

unionization on Northwestern and college athletics as a whole, followed the coach's lead and spoke out against unionizing.<sup>165</sup>

On April 9, 2014, Northwestern filed an appeal with the Board for a review of the Chicago Regional Director's decision.<sup>166</sup> Northwestern argued that a review was appropriate because "(1) the petition present[ed] a unique, novel issue; (2) the Regional Director ha[d] misapplied and departed from officially reported Board precedent, and (3) the Regional Director's findings on substantial factual issues [were] clearly erroneous on the record and the errors prejudicially affect[ed] Northwestern's rights."<sup>167</sup> Weeks later, on April 24, 2014, the NLRB granted Northwestern's review of the Chicago Regional decision.<sup>168</sup>

Pursuant to the Chicago Regional decision, the members of the Northwestern football team receiving grant-in-aid scholarships were eligible to vote to decide whether the team should unionize.<sup>169</sup> On April 25, 2014, 76 members of the football team were eligible and had the opportunity to cast votes to decide if the team should continue seeking union representation.<sup>170</sup> Players voiced opinions on both sides of the issue.<sup>171</sup> However, without the NLRB's affirmance of the Chicago Regional decision, the results of the voting would be moot and remain unreleased.<sup>172</sup>

On August 17, 2015, the NLRB released its decision in which it declined to assert jurisdiction rather than rule on the substantive issue.<sup>173</sup>

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165. *See id.*

166. Request for Review, Nw. Univ. & Coll. Athletics Players Ass'n (CAPA), No. 13-RC-121359 (N.L.R.B. Apr. 9, 2014), <http://bit.ly/2l6kzen>.

167. *Id.* at 2–3.

168. *Nw. Univ. & Coll. Athletics Players Ass'n (CAPA)*, No. 13-RC-121359, 2014 WL 1653118, at \*1 (DCNET Apr. 24, 2014).

169. *Nw. Univ.*, 198 L.R.R.M. (BNA) ¶ 1837, 22, 2014–2015 NLRB Dec. (CCH) ¶ 15,781 (Mar. 26, 2014).

170. Andy Staples, *Northwestern Union Vote Intriguing, but NLRB Ruling More Significant*, SPORTS ILLUSTRATED (Apr. 24, 2014), <http://on.si.com/2lhUI5p>.

171. *See id.*; *see also* Darren Rovell, *N'western Co-Captain Talks Union*, ESPN (Apr. 27, 2014), <http://es.pn/2kImB3a>. Brandon Vitabile, captain of Northwestern's football team, stated:

I understand the assumption people make that all student-athletes are mistreated, but the majority of us realize we're not in that group . . . . So why would we sacrifice all the relationships we have here with the staff and the university that we love—a program and university that, as a team, all of us have been given everything we were promised?

*Id.*

172. *See* Tom Farrey & Lester Munson, *NU Players Cast Historic Vote*, ESPN (Apr. 25, 2014), <http://es.pn/1iilLoU>. At the time of this Comment's publication, the results of the election were still unknown.

173. *Nw. Univ.*, 362 N.L.R.B. No. 167, 1 (Aug. 17, 2015). The Board concluded: [W]e find that it would not effectuate the policies of the Act to assert jurisdiction in this case, even if we assume, without deciding, that the grant-in-

The unanimous Board emphasized, however, that its decision did not close the door on unionization by student athletes.<sup>174</sup> Rather, the Board limited the reach of its decision to only the Northwestern football team.<sup>175</sup> Although disappointed by the Board's decision, both Huma and Colter promised to continue advocating for players' rights and NCAA reform.<sup>176</sup>

### III. ANALYSIS

Although the Board never definitively ruled whether student athletes qualify as "employees" under the Act, the Board's decision to decline to assert jurisdiction was a victory for both Northwestern University and the NCAA.<sup>177</sup> Some, including Colter and others involved in the unionization efforts, were surprised by the Board's decision,<sup>178</sup> but the Board reserves the right to decline jurisdiction<sup>179</sup> rather than decide the substantive question.<sup>180</sup>

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aid scholarship players are employees within the meaning of Section 2(3) . . . .  
We conclude that asserting jurisdiction in this case would not serve to promote stability in labor relations.

*Id.*

174. *Id.* at 6.

175. *Id.*

176. *Northwestern Players Denied Request*, *supra* note 10 ("Colter said, 'This isn't going to stop us from pushing for college athlete rights. That will eventually come. If it's not going to happen this way, we'll get it another way.'").

177. *Id.*

178. *Id.*

179. *NLRB v. Denver Bldg. Trades Counsel*, 341 U.S. 675, 684 (1951) ("Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case."). Although the Board has declined to assert jurisdiction in other cases and for other reasons, the Board previously asserted jurisdiction in cases involving the NCAA and college students. *See Chickasaw Nation*, 362 N.L.R.B. No. 109, 1 (June 4, 2015) ("[W]e find that application of the Act would abrogate treaty rights, specific to the Nation, contained in the 1830 Treaty of Dancing Rabbit Creek. As a result, we decline to assert jurisdiction over the Nation, the Respondent here."); *Big E. Conference*, 282 N.L.R.B. 335, 341 (1986) (asserting jurisdiction in a case involving the Big East Conference and college basketball referees); *Brown Univ.*, 342 NLRB 483, 493 (2004) (asserting jurisdiction in a case involving graduate student assistants).

180. *Nw. Univ.*, 362 N.L.R.B. No. 167, at 3 (quoting *Denver Bldg. Trades Counsel*, 341 U.S. at 684 and citing *NLRB v. Teamsters Local 364*, 274 F.2d 19, 23 (7th Cir. 1960)).

### A. *Substantive Arguments*

In order for Colter and the members of the Northwestern football team to be able to choose whether to be represented for the purpose of collective bargaining, CAPA, who represented the interests of the players at the hearings, had to show that the players were employees under Section 2(3) of the NLRA.<sup>181</sup> CAPA successfully argued this point in front of Ohr, the Chicago Regional Director.<sup>182</sup>

In making his ruling, Ohr heavily relied on the employment-like relationship that exists between a football player and a football program.<sup>183</sup> Ohr thoroughly examined a student athlete's lifecycle, which begins by signing a "tender."<sup>184</sup> Ohr compared the document, or National Letter of Intent,<sup>185</sup> to an employment contract that provides the players with "detailed information concerning the duration and conditions under which the compensation will be provided to them."<sup>186</sup> Additionally, Ohr spent twelve pages in his opinion describing the connection between the tremendous time commitment and sacrifices<sup>187</sup> that football players make when they accept athletic scholarships<sup>188</sup> and

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181. *Id.* at 1.

182. *Nw. Univ.*, 198 L.R.R.M. (BNA) ¶ 1837, 2, 2014–2015 NLRB Dec. (CCH) ¶ 15,781 (Mar. 26, 2014).

183. *Id.* at 14. ("As the record demonstrates, players receiving scholarships to perform football-related services for the Employer under a contract for hire in return for compensation are subject to the Employer's control and are therefore employees within the meaning of the Act.")

184. *Id.* at 4.

185. *See What Is the National Letter of Intent (NLI)?*, NCAA, <http://on.ncaa.com/2lhN7DN> (last visited Feb. 23, 2017) ("By signing an NLI, the college-bound student-athlete agrees to attend the college or university for one academic year. In exchange, that college or university must provide athletics financial aid for one academic year.")

186. *Nw. Univ.*, 198 L.R.R.M. 1837, at 14.

187. Kevin Trahan, *Questions for Kain Colter at CAPA Hearing*, USA TODAY (Feb. 18, 2014), <http://usat.ly/2kvHjIT>. After describing football as "a job" at the hearing before the Chicago Regional Office, Colter testified that, because of conflicts between required courses and football-related activities, he had to give up his dream of attending medical school. *Id.*

188. *Nw. Univ.*, 198 L.R.R.M. 1837, at 5–13. During training camp, coaches schedule football-related activities from 6:30 a.m. until 10:30 p.m., accounting for 50 to 60 hours a week. *Id.* at 4–5. During the regular season, which stretches from September until the end of November, players are expected to devote 40 to 50 hours a week to football preparation, meetings, and game days. *Id.* at 5. Although NCAA rules limit athletes to four hours each day spent on football-related activities, players are expected to attend player-led workouts and film sessions, which do not count against the four-hour allotment. *Id.* at 5. If the team qualifies for the college football postseason, the players are expected to continue to devote 40 to 50 hours per week on football-related activities until the bowl game is played in December or January. *Id.* at 6. Although the time commitment lessens during the offseason, players still attend various programs and workouts, all while enrolled in classes. *Id.* at 7–8.

the tens of millions of dollars in revenue generated by the university through football.<sup>189</sup> Due to the nature of the relationship<sup>190</sup> between the Northwestern football players and the university, Ohr ruled that the scholarship players were employees under Section 2(3) of the NLRA.<sup>191</sup>

Northwestern asserted four counterarguments.<sup>192</sup> First, the university attempted to show that its football players were not “employees” under Section 2(3) of the Act.<sup>193</sup> Second, the university asserted that its football players should be compared to the non-employee graduate students in a previous Board decision,<sup>194</sup> *Brown University*.<sup>195</sup> Alternatively, Northwestern argued that its football players, if found to be employees, were only temporary employees who do not qualify for collective bargaining rights.<sup>196</sup> Finally, Northwestern claimed that the distinction between scholarship athletes and walk-ons<sup>197</sup> was arbitrary, which would prevent the players from gaining collective bargaining rights.<sup>198</sup> Unconvinced by Northwestern, Ohr dispelled each of the university’s counterarguments.<sup>199</sup>

The Board, however, was not persuaded that the scholarship athletes’ status was easily determinable.<sup>200</sup> While recognizing many of the same facts upon which Ohr relied in reaching his decision,<sup>201</sup> the Board showed more concern for maintaining stability in labor relations than in providing the scholarship members of the Northwestern football team with collective bargaining rights.<sup>202</sup>

Although the Board did not specifically analyze three of the university’s counterarguments, it did discuss<sup>203</sup> the university’s second argument involving *Brown*.<sup>204</sup> Without deciding *Brown*’s applicability to

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189. *Id.* at 11–12.

190. *Id.* at 12 (“[A]n employee is a person who performs services for another under a contract of hire, subject to the other’s control or right of control and in return for payment.”) (citing *Brown Univ.*, 342 N.L.R.B. 483, 490 n.27 (2004)).

191. *Id.* at 22.

192. *Id.* at 1.

193. *Id.*

194. *Id.*

195. *Brown Univ.*, 342 N.L.R.B. 483 (2004).

196. *Nw. Univ.*, 198 L.R.R.M. 1837, at 1.

197. *Id.* at 2 n.3 (providing that, excluding scholarship athletes, “[t]he remainder of the football players on the team are ‘walk-ons’ who do not receive grant-in-aid scholarships”).

198. *Id.* at 1.

199. *See id.*

200. *Nw. Univ.*, 362 N.L.R.B. No. 167, 4 n.13 (Aug. 17, 2015).

201. *Id.* at 2.

202. *Id.* at 3.

203. *Id.*

204. *Brown Univ.*, 342 N.L.R.B. 483 (2004). The Board in *Brown* decided that graduate students did not qualify as “employees” under Section 2(3) of the Act. *Id.* at 483.

the Northwestern players,<sup>205</sup> the Board distinguished the two cases to clarify that precedent did not compel the Board to act in this case.<sup>206</sup> Specifically, the Board emphasized that *Brown* involved graduate, rather than undergraduate, students.<sup>207</sup> Additionally, unlike the activity in *Brown*, the activity in question, football, was unrelated to the players' academics.<sup>208</sup> The Board also briefly mentioned two other decisions involving student janitors<sup>209</sup> and cafeteria workers<sup>210</sup> for the same purpose of distinguishing the Northwestern case.<sup>211</sup>

*B. The Board's Justification for its Decision*

The Board's decision not to assert jurisdiction was most heavily influenced by the structure of the college sports landscape.<sup>212</sup> Specifically, the lack of distinction between public and private universities, as far as athletics are concerned, forced the Board to decline to assert jurisdiction.<sup>213</sup>

Under the NLRA, the Board may assert jurisdiction over only private sector employers, but not public or governmental employers.<sup>214</sup> Because Northwestern University would have been subject to the Board's jurisdiction, due to its status as a private employer engaged in commerce,<sup>215</sup> the Board could have decided the employment status of the scholarship players.<sup>216</sup> As the Board pointed out, however, only 17<sup>217</sup> of the approximately 125 schools competing at the FBS level are private universities.<sup>218</sup> As a result, the Board's decision would apply to only

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205. *Nw. Univ.*, 362 N.L.R.B. No. 167, at 4 n.12.

206. *Id.* at 3–4 n.10.

207. *Id.*

208. *Id.*

209. *S.F. Art Inst.*, 226 N.L.R.B. 1251 (1976).

210. *Saga Food Serv. of Cal.*, 212 N.L.R.B. 786 (1974).

211. *Nw. Univ.*, 362 N.L.R.B. No. 167, at 4 n.12.

212. *Id.* at 3.

213. *Id.*

214. 29 U.S.C. § 152(2) (2012) (“The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision . . .”).

215. *Nw. Univ.*, 362 N.L.R.B. No. 167, at 3 n.5.

216. *See id.* at 3–4; *see also id.* at 3 n.5.

217. *Northwestern Players Denied Request*, *supra* note 10. The private universities that compete on the FBS level are Baylor University, Boston College, Brigham Young University, Duke University, The University of Miami, Northwestern University, The University of Notre Dame, Rice University, Southern Methodist University, Stanford University, Syracuse University, Texas Christian University, Tulane University, The University of Tulsa, The University of Southern California, Vanderbilt University, and Wake Forest University. *Id.*

218. *Nw. Univ.*, 362 N.L.R.B. No. 167, at 1 n.2.

those 17 private institutions.<sup>219</sup> Moreover, Northwestern is a member of the Big Ten Conference,<sup>220</sup> which is composed of 13 other universities,<sup>221</sup> all of which are public institutions.<sup>222</sup>

The Board discussed that, even if it were to assume that student athletes qualify as employees under Section 2(3) of the Act, no precedent exists that would justify allowing a single team to unionize.<sup>223</sup> In previous cases, the Board granted collective bargaining rights to professional sports teams, but only as part of league-wide reformation.<sup>224</sup> To allow the members of a single team, or even a small percentage of teams at the FBS level, to unionize would not—in the opinion of the Board—promote stability in labor relations.<sup>225</sup>

Many writers and sports fans who had been following the team's petition agreed with the Board's rationale because of the instability that would follow from subjecting only a few schools to collective bargaining and others not.<sup>226</sup> For instance, private universities, because of the ability to offer collective bargaining rights and additional financial benefits to student athletes, would gain a significant recruiting advantage over public schools that could not offer the same incentives to recruits.<sup>227</sup> Also, players at private universities could have used their new collective bargaining rights to alter existing NCAA policies, giving those teams a competitive advantage over the public school competition.<sup>228</sup> Additionally, the Board highlighted the irony that would result if athletes at private schools were given this additional right, while the NCAA was formed to “set common rules and standards” across college sports.<sup>229</sup>

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219. *Id.* at 5.

220. *About the Conference*, BIG TEN (July 2015), <http://bit.ly/1ZyIrnq>. FBS teams are split into ten conferences that are loosely based on geographic regions throughout the United States. *See All Conferences Standings*, NCAA, <http://on.ncaa.com/2IOACg1> (last updated Feb. 14, 2017).

221. The Big Ten Conference is home to The University of Illinois, Indiana University, The University of Iowa, The University of Maryland, The University of Michigan, Michigan State University, The University of Minnesota, University of Nebraska, Northwestern University, The Ohio State University, The Pennsylvania State University, Purdue University, Rutgers University, and University of Wisconsin. *See id.*

222. *Nw. Univ.*, 362 N.L.R.B. No. 167, at 2.

223. *Id.* at 4.

224. *Id.* at 5.

225. *Id.*

226. *See* Kevin Trahan, *NLRB Rules Northwestern Players Can't Unionize*, USA TODAY (Aug. 17, 2015), <http://usat.ly/1MtWqa1>; Michael McCann, *Breaking Down Implications of NLRB Ruling on Northwestern Players Union*, SPORTS ILLUSTRATED (Aug. 17, 2015), <http://on.si.com/1HTPWel>.

227. *Id.*

228. Alejandro Cancino, *Northwestern Football Union Petition Dismissed by Labor Board*, CHI. TRIB. (Aug. 17, 2015), <http://trib.in/1Wz8DyU>.

229. *Nw. Univ.*, 362 N.L.R.B. No. 167, at 4.

### C. *Options for Continuing the Unionization Movement*

Though Colter was disappointed with the Board's decision not to assert jurisdiction in the case,<sup>230</sup> the Board was clear that its decision would "not preclude a reconsideration of this issue in the future."<sup>231</sup> Immediately after the Board's decision was announced, Colter responded: "This isn't going to stop us from pushing for college athlete rights. That will eventually come. If it's not going to happen this way, we'll get it another way."<sup>232</sup>

Colter and Huma will likely have the ability to decide between several options going forward. For instance, CAPA, on the team's behalf, could sue the Board in federal court to compel it to assert jurisdiction over the case.<sup>233</sup> Because such a suit will likely prove unsuccessful,<sup>234</sup> CAPA may pursue another route.

Because the Board was clear in stating that its decision applied only to Northwestern's football team,<sup>235</sup> CAPA could file a petition on behalf of another FBS team belonging to a private university.<sup>236</sup> However, it is likely that the Northwestern case would be viewed as precedent by future Boards.<sup>237</sup> Another case that is almost identical to that of the Northwestern team would likely result in the same outcome.<sup>238</sup> To avoid the same ruling, CAPA could attempt to organize a collection of private university FBS teams to petition the Board, which would more closely resemble cases that the Board has previously encountered.<sup>239</sup> Although

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230. *Northwestern Players Denied Request*, *supra* note 10.

231. *Nw. Univ.*, 362 N.L.R.B. No. 167, at 6.

232. *Northwestern Players Denied Request*, *supra* note 10.

233. Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), <http://nyti.ms/1hJLgT7> [hereinafter, *N.L.R.B. Rejects Union Bid*].

234. Michael Tarm, *Few Options for Activists After College Labor Union Blocked*, LAWRENCE J.-WORLD (Aug. 18 2015), <http://apne.ws/2l6szfk> ("An appeal to U.S. courts doesn't appear to be an option . . . . Litigation in court is typically triggered by a company's refusal to collectively bargain with a union approved by workers. That trigger won't exist now that the NLRB has ruled out unionization by the Northwestern players.").

235. *Nw. Univ.*, 362 N.L.R.B. No. 167, at 6. The Board stated:

We note that our decision to decline jurisdiction in this case is based on the facts in the record before us, and that subsequent changes in the treatment of scholarship players could outweigh the considerations that motivate our decision today . . . . We emphasize that our decision today does not concern other individuals associated with FBS football, but is limited to Northwestern's scholarship football players.

*Id.*

236. McCann, *supra* note 226.

237. Tarm, *supra* note 234.

238. McCann, *supra* note 226.

239. *Nw. Univ.*, 362 N.L.R.B. No. 167, at 5 (citing Nat'l Football League, 309 N.L.R.B. 78, 78 (1992); Blast Soccer Assocs., 289 N.L.R.B. 84, 85 (1988); Major League

the Board was clear that it could, in the future, allow a sole team to gain those rights,<sup>240</sup> CAPA may increase its odds for success by joining most or all of the private FBS schools in a similar petition.<sup>241</sup>

Alternatively, CAPA could choose to represent student athletes attending public or state-funded universities.<sup>242</sup> Because the Board's jurisdiction reaches only private employers,<sup>243</sup> athletes at public universities would not be subject to any precedential value that the Northwestern decision may carry within the Board and its Regional Offices.<sup>244</sup> Rather than petition a federal entity for reclassification of student athletes as employees, as CAPA did with the NLRB and the Northwestern players, CAPA would need to push for change on the state level.<sup>245</sup> Lobbying to change the labor laws through a state-by-state strategy could be a viable option for CAPA<sup>246</sup> assuming that CAPA could secure adequate funding for such a strategy.

This state-centered strategy would still leave CAPA to navigate through significant obstacles.<sup>247</sup> Aside from the imbalance that would be created in the NCAA if only some states permitted collective bargaining by student athletes, which was a central reason for the Board declining to assert jurisdiction in the Northwestern case,<sup>248</sup> states' labor laws vary greatly in their current forms.<sup>249</sup> For example, if CAPA chose to continue the unionization movement in the Big Ten, the athletic conference in which Northwestern competes, CAPA would encounter labor laws in 11 states: Illinois, Indiana, Iowa, Maryland, Michigan, Minnesota, Nebraska, New Jersey, Ohio, Pennsylvania, and Wisconsin.<sup>250</sup> Although each of those states provide for some form of collective bargaining by public employees,<sup>251</sup> these laws vary slightly.<sup>252</sup>

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Rodeo, Inc., 246 N.L.R.B. 743; N. Am. Soccer League, 245 N.L.R.B. 1301, 1304 (1979); Am. Basketball Ass'n., 215 N.L.R.B. 280 (1974); Nat'l Football League Mgmt. Council, 203 N.L.R.B. 958, 961 (1973)).

240. *Id.* at 5 n.16 ("We do not reach whether and do not decide that team-by-team organizing and bargaining is foreclosed or that we would never assert jurisdiction over an individual team.").

241. *See id.* at 4–5 (discussing the reasons why it would be difficult for the Board to assert jurisdiction over a single team).

242. McCann, *supra* note 226.

243. *See* 29 U.S.C. § 152(2) (2012).

244. McCann, *supra* note 226.

245. *Id.*

246. *See id.*

247. *Id.*

248. Nw. Univ., 362 N.L.R.B. No. 167, 5 (Aug. 17, 2015).

249. McCann, *supra* note 226.

250. *See About the Conference, supra* note 220.

251. 5 ILL. COMP. STAT. 315/2 (2015); IND. CODE § 36-8-22-2, 8 (2016); IOWA CODE § 20.9 (2015); MD. CODE ANN. STATE PERS. & PENS. § 3-301 (West 2015); MICH. COMP. LAWS § 423.8 (2015); MINN. STAT. § 179A.06 (2015); NEB. REV. STAT. § 81-1370

Although none of these labor laws specifically mention that student athletes qualify for “employee” status,<sup>253</sup> some state lawmakers responded to Ohr’s ruling that the members of the Northwestern football team were employees.<sup>254</sup> In Connecticut, for example, lawmakers considered introducing a bill that would allow students at the state’s public universities to have the same collective bargaining rights as students at private universities.<sup>255</sup> In contrast, two states, Michigan and Ohio,<sup>256</sup> introduced bills that would bar student athlete unionization entirely.<sup>257</sup> Although neither Michigan nor Ohio are home to any private FBS universities, these bills were introduced prior to the Board’s declining to assert jurisdiction in Northwestern’s case and may have been an attempt to curtail any influence that a decision in CAPA’s favor may have had on public universities.<sup>258</sup> Even in the states where specific action has not been taken to prevent student athlete unionization, state legislators may be hesitant to contradict the Board on such a high-profile decision.<sup>259</sup>

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(2015); N.J. STAT. ANN. § 34:13A-5.3 (West 2015); OHIO REV. CODE ANN. § 4117.03 (West 2011); 43 PA. STAT. AND CONS. STAT. ANN. § 1101.401 (West 2016); WIS. STAT. § 111.91 (2015).

252. Although many slight differences exist, the laws do have differences that are more significant. For example, Iowa prohibits public employees from “induc[ing], instigat[ing], encourage[ing], authoriz[ing], ratif[ing] or participat[ing] in a strike against any public employer.” IOWA CODE § 20.12. Maryland and Michigan take the same approach. MD. CODE ANN. STATE PERS. & PENS. § 3-303(b); MICH. COMP. LAWS § 423.202. Illinois, however, gives most public employees the right to strike but prohibits police officers, firefighters, and paramedics from striking. 5 ILL. COMP. STAT. 315/17. Ohio follows the approach taken in Illinois. OHIO REV. CODE ANN. § 4117.14. Minnesota allows only non-essential public employees to strike but only under limited circumstances. MINN. STAT. § 179A.18.

253. 5 ILL. COMP. STAT. 315/2; IND. CODE § 36-8-22-2, 8 (2016); IOWA CODE § 20.9; MD. CODE ANN. STATE PERS. & PENS. § 3-301; MICH. COMP. LAWS § 423.8; MINN. STAT. § 179A.06; NEB. REV. STAT. § 81-1370; N.J. STAT. ANN. § 34:13A-5.3; OHIO REV. CODE ANN. § 4117.03; 43 PA. STAT. AND CONS. STAT. ANN. § 1101.401; WIS. STAT. § 111.91.

254. See *infra* notes 237–41.

255. Daniela Altimari, *Student Athletes in Labor Unions? Lawmaker Is Researching the Idea*, HARTFORD COURANT (Apr. 27, 2014), <http://bit.ly/2l6FRIN>.

256. *Football Bowl Subdivision*, NCAA, <http://on.ncaa.com/2kIcUSj> (last visited Feb. 17, 2017). Michigan and Ohio are home to three Big Ten universities collectively: Michigan, Michigan State, and Ohio State. *Id.* However, the two states are home to a total of 13 FBS schools whose players would be subject to the new legislation. *Id.*

257. Austin Ward, *Bill: Athletes Not State Employees*, ESPN (Apr. 8, 2014), <http://es.pn/1k3HbWY> (explaining that the bill would prevent student athletes from being considered employees); *Michigan Legislature Passes Bill Banning College Athlete Unions*, SPORTS ILLUSTRATED (Dec. 16, 2014), <http://on.si.com/2kId9Nd> (explaining that the bill would prevent student athletes at public universities in the state from unionizing).

258. Ward, *supra* note 257; *Michigan Legislature Passes Bill Banning College Athlete Unions*, *supra* note 257.

259. Travis Waldron & Dave Jamieson, *Northwestern Football Players Won’t Get a Union, but Their Fight Doesn’t End Here*, HUFFINGTON POST (Aug. 18, 2015),

*D. Changes in the NCAA Since 2013*

Although Colter, Huma, and CAPA were unsuccessful in the attempt to gain collective bargaining rights for student athletes through the NLRB, the unionization movement has likely contributed to recent NCAA reform.<sup>260</sup> For example, both the NCPA and CAPA campaigned for the expansion of scholarships to cover student athletes' four-year careers.<sup>261</sup> In October 2014, the Big Ten announced that its schools could provide guaranteed four-year athletic scholarships to student athletes.<sup>262</sup> This announcement was a significant victory for student athletes that will prevent schools and coaches from revoking athletic scholarships due to injury or poor performance on the field.<sup>263</sup> Soon, other schools and conferences followed suit, making four-year scholarships much more accessible to student athletes.<sup>264</sup>

Colter, Huma, and CAPA could argue that the adoption of guaranteed four-year scholarships could serve as a blueprint for NCAA-wide unionization. After the Big Ten adopted its scholarship policy, other conferences presumably felt the need to offer similar benefits to remain competitive. Collective bargaining and unionization rights could potentially unfold in the same manner. For example, if the Board granted unionization rights to student athletes at private universities, public universities would feel the pressure to voluntarily adopt similar policies to remain competitive. Unfortunately, data suggests that, although schools now have the option to hand out four-year scholarships, most have chosen to continue using one-year, non-guaranteed scholarships,<sup>265</sup> which may indicate that many student athletes do not consider such benefits to be of great importance when selecting a university. On the other hand, the slow adoption rate may indicate that

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<http://huff.to/2kR8kDY>. Although the Board's decision could apply to student athletes at private universities, "players at public colleges and universities could still seek to organize under state labor laws. But given the federal board's decision and the politically fraught nature of the case, labor experts said state boards would likely be reluctant to grant athletes union rights." *Id.*

260. *Northwestern Players Denied Request*, *supra* note 10.

261. *See Join the NCPA*, *supra* note 110; *see also What We're Doing*, *supra* note 89.

262. Ben Strauss, *Colleges' Shift on Four-Year Scholarships Reflects Players' Growing Power*, N.Y. TIMES (Oct. 28, 2014), <http://nyti.ms/1wJ2fXm>.

263. *Id.*

264. *Pac-12 Universities Adopt Sweeping Reforms for Student-Athletes, Guaranteeing Scholarships, Improving Health Care, and More*, PAC-12 NEWS (Oct. 27, 2014), <http://pac12.me/1oWhyNt>; *South Carolina Breaks SEC Ground*, ESPN (Sept. 25, 2014), <http://es.pn/2kIpLUF>.

265. Jon Solomon, *Schools Can Give Out 4-Year Athletic Scholarships, but Many Don't*, CBS SPORTS (Sept. 16, 2014), <http://cbsprt.co/YS2Jjg>.

coaches and universities see little difference between the non-guaranteed and guaranteed scholarships.<sup>266</sup>

As detailed in *The \$6 Billion Heist*, the report produced in part by the NCPA, student athletes were forced to pay for expenses that were not covered by their athletic scholarships.<sup>267</sup> However, in January of 2015,<sup>268</sup> the NCAA announced that athletic scholarships could provide greater financial coverage for student athletes.<sup>269</sup> In addition to paying for tuition, room and board, books, and other fees, these new athletic scholarships will also cover other costs that student athletes may incur, such as travel or personal expenses.<sup>270</sup> Estimates provide that this expansion will increase financial aid by at least \$50 million for Division I student athletes.<sup>271</sup> In January 2016, the five largest athletic conferences, commonly referred to as the Power Five,<sup>272</sup> officially passed a resolution that will allow schools to give scholarships to student athletes that will fully cover the cost of attendance.<sup>273</sup>

Additional measures have also been taken to better protect the health of student athletes.<sup>274</sup> A central goal of the APU movement was to

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266. *Id.* The article quotes the University of Alabama Head Football Coach, Nick Saban, as saying, “It really is not an issue either way, though . . . . And if [the player is] on a four-year scholarship and does something in violation of the university policy, you can still take it away. It really is insignificant.” *Id.*

267. *The \$6 Billion Heist*, *supra* note 112, at 11.

268. Steve Berkowitz, *NCAA Increases Value of Scholarships in Historic Vote*, USA TODAY (Jan. 17, 2015), <http://usat.ly/1zpFX1W>. In addition to improving scholarships, members of the NCAA also implemented additional reforms:

Allow athletes to borrow against future earnings to purchase so-called loss-of-value insurance – policies that can help athletes if an injury while playing college sports results in an athlete getting less money from a professional contract than they might have otherwise gotten.

Approve a resolution under which they pledge to, within the next two years, approve rules changes that would regulate time demands on athletes “to ensure an appropriate balance between athletics participation and the academic obligations and opportunities presented to students generally.” Other changes to be addressed include those related to athletes’ access to career-related insurance and interaction with agents.

*Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. The Power Five consists of the SEC, ACC, Big 12, Big Ten, and Pac-12. *See* Jon Solomon, *Power Five Passes on Tackling Big NCAA Issues to Help Athletes*, CBS SPORTS (Jan. 15, 2016), <http://cbsprt.co/2mx80fI> [hereinafter *Power Five Passes*].

273. *Id.*

274. *N.L.R.B. Rejects Union Bid*, *supra* note 233.

The N.C.A.A. changed its governance structure to allow its wealthiest conferences to make some of their own rules, and those leagues, in turn, increased the value of a scholarship by a few thousand dollars and now

increase awareness about the prevalence of concussions in sports so that additional measures could be taken to reduce the number and effect of concussions.<sup>275</sup> In January 2016, the Power Five conferences passed legislation that will better protect in-game players who may have suffered a concussion.<sup>276</sup> Team doctors, who will not serve at the pleasure of the coaching staff, will have “unchallengeable autonomous authority” and will decide whether an athlete needs to be removed from an athletic competition due to concussion-like symptoms.<sup>277</sup> Neither the athlete nor the coaching staff will have any authority to contribute to the decision to allow an athlete to return to the competition.<sup>278</sup> While some think the legislation is significant,<sup>279</sup> others are more skeptical.<sup>280</sup>

#### IV. CONCLUSION

At this point, unionization is no longer a realistic option for college athletes.<sup>281</sup> As explained in the Board’s decision, creating a patchwork of different rules across college sports will not benefit the system.<sup>282</sup> Additionally, because of the discrepancies in state labor laws,<sup>283</sup> getting

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guarantee them for four years. A number of conferences and individual colleges have pledged to offer more comprehensive health care.

*Id.*; Matt Bonesteel, *In Unanimous Vote, NLRB Rejects Northwestern Football Team’s Attempt to Unionize*, WASH. POST (Aug. 17, 2015), <http://wapo.st/2lhWKSX> (“[T]he Pac-12 guarantees medical coverage for athletes injured during competition for up to four years after graduation.”); *Northwestern Players Denied Request*, *supra* note 10 (“Since we started this movement, a lot of positive changes have come from this—the introduction of four-year scholarships, increased stipends, maybe better medical coverage, the lifting of food restrictions.”).

275. See Patterson, *supra* note 134.

276. Max Olson, *Power 5 Passes Concussion Legislation, Resolution on Time Demands*, ESPN (Jan. 15, 2016), <http://es.pn/2kIdVdn>.

277. *Id.*

278. *Id.*

279. *Id.* (“I believe it’s the most important piece of legislation in the history of the NCAA,” said Brian Hainline, the NCAA’s chief medical officer.”).

280. Olson, *supra* note 276. The Power Five conferences did not address issues such as the reduction of time demands related to athletics, the ability of an athlete to profit off of his or her own name, the expansion of medical coverage during and after a student athlete’s playing career, and the enforcement mechanism to be used when a school violates its concussion protocol. *Id.*

281. McCann, *supra* note 226.

282. Nw. Univ., 362 N.L.R.B. No. 167, 5 (Aug. 17, 2015).

283. 5 ILL. COMP. STAT. 315/2 (2015); IND. CODE § 36-8-22-2, 8 (2016); IOWA CODE § 20.9 (2015); MD. CODE ANN. STATE PERS. & PENS. § 3-301 (West 2015); MICH. COMP. LAWS § 423.8 (2015); MINN. STAT. § 179A.06 (2015); NEB. REV. STAT. § 81-1370 (2015); N.J. STAT. ANN. § 34:13A-5.3 (West 2015); OHIO REV. CODE ANN. § 4117.03 (West 2011); 43 PA. STAT. AND CONS. STAT. ANN. § 1101.401 (West 2016); WIS. STAT. § 111.91 (2015).

lawmakers throughout the country to agree on collective bargaining rights for student athletes would be nearly impossible.<sup>284</sup>

Additionally, unionization could ruin other college sports because of the drain on financial resources that would result if schools were required to pay student athletes.<sup>285</sup> Many schools rely on the profits derived from the football and men's basketball programs to support the remaining sports teams.<sup>286</sup> Some FBS schools, such as the University of California-Berkeley, suffer such large losses in other sports that the football and men's basketball program revenues are insufficient to adequately fund the other sports.<sup>287</sup> Although some major universities could likely afford the costs of unionization,<sup>288</sup> additional financial burdens could possibly force other schools to offer fewer nonrevenue-generating sports.

Rather than wasting time trying to unionize, Colter and Huma need to prioritize the proven methods that led to recent changes in college athletics and concentrate on the specific improvements that they hoped to achieve through unionization.<sup>289</sup> The All Players United protest,<sup>290</sup> the flyover before the Rose Bowl,<sup>291</sup> and the meeting with Congress on Capitol Hill<sup>292</sup> raised public awareness and put pressure on the NCAA to respond.<sup>293</sup> Instead of returning to the legal arena, Colter and Huma should focus their efforts on keeping player safety in the news. Doing so will help to retain media attention and increase fan support for reform, which are likely to motivate the NCAA to improve the current state of college athletics.

Additionally, this media attention will also encourage the Power Five conferences to continue to drive change in college sports.<sup>294</sup> Although the Power Five have begun to move in the right direction regarding player safety and rights, those conferences need to take advantage of their ability to provide greater protections and benefits to

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284. See *supra* notes 253–59 and accompanying text.

285. See Kristi Dosh, *Does Football Fund Other Sports at College Level?*, FORBES (May 5, 2011), <http://bit.ly/2m66rFr>.

286. See *id.*

287. See *id.* In 2011, the University of California-Berkeley lost \$119,000 from athletics, even though its football team generated nearly \$6,000,000 in profits. *Id.*

288. See *id.* In 2011, athletics at the University of Florida and the Pennsylvania State University generated net profits of over \$28,000,000 and \$43,000,000 respectively. *Id.*

289. See Patterson, *supra* note 134.

290. *Id.*

291. *APU Banner to Fly over Rose Bowl*, *supra* note 130.

292. *Labor Cause Stops on Capitol Hill*, *supra* note 158.

293. See *supra* notes 290–92 and accompanying text.

294. See *supra* notes 268–80 and accompanying text.

student athletes.<sup>295</sup> Because collegiate athletic programs are continuing to generate more and more revenue each year, the conferences are quickly becoming more powerful than the NCAA and have the influence to govern student athletes as they wish.<sup>296</sup>

As the NCAA continues to learn about the dangers of concussions and the lasting impacts that injuries have on athletes, implementing measures that will increase safety and reduce the risk of injuries has become more crucial than ever.<sup>297</sup> In order to save college sports, the NCAA must change. Although the NLRB may not have caused that change, the Power Five conferences, Colter, Huma, and those speaking out for student athletes' rights can.

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295. Jon Solomon, *Power 5 Conferences Get Lower Voting Threshold in NCAA Proposal*, CBS SPORTS (July 18, 2014), <http://cbsprt.co/2li5aKa> (explaining that in 2014, the Power Five conferences gained greater control of NCAA governance so that the conferences could “make their own rules to benefit athletes”).

296. Matt Hinton, *Division Zero: What the NCAA's 'Power Five' Autonomy Decision Means for the Future of College Sports*, GRANTLAND (Aug. 8, 2014), <http://bit.ly/1oMpTjU>.

297. See *At a Crossroads: The State of College Football and Concussions*, SPORTS ILLUSTRATED (Nov. 3, 2015), <http://on.si.com/1OoSLgx>.