UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK UNIVERSITY,
Employer

and 02-RC-023481

GSOC/UAW, AFL-CIO,
Petitioner

POLYTECHNIC INSTITUTE OF
NEW YORK UNIVERSITY,
Employer

and 29-RC-012054

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE, AND
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, AFL-CIO,
Petitioner

BRIEF ON BEHALF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AND THE NATIONAL EDUCATION ASSOCIATION AS AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations, the American Federation of Teachers, AFL-CIO, the American Association of University Professors, and the National Education Association, as amici curiae, submit this brief in response to the National Labor Relations Board's invitation to address four questions regarding the right of graduate student

assistants to organize for purposes of collective bargaining as employees under the National Labor Relations Act. We take up each of the four questions in turn.

> 1. Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of section 2(3) of the National Labor Relations Act, because they "have a primarily educational, not economic, relationship with their university"? 342 NLRB at 487.

The *Brown University* decision "declare[d] the Federal law to be that graduate student assistants are not employees within the meaning of Section 2(3) of the Act." 342 NLRB at 493. That declaration is contrary to the terms of Section 2(3) and to the common law definition of "employee" that informs the proper interpretation of those statutory terms. The policy reasons cited by the *Brown University* majority do not justify implying a special "graduate student assistant" exception to the statutory definition of "employee." Therefore, the Board should overrule *Brown University* and return to its understanding that, where "the fulfillment of the duties of a graduate assistant requires performance of work, controlled by the Employer, and in exchange for consideration," "the graduate assistants are statutory employees, notwithstanding that they simultaneously are enrolled as students." *New York University*, 332 NLRB 1205, 1207 & 1209 (2000).

Section 2(3) states that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this

subchapter explicitly states otherwise." 29 U.S.C. § 152(3). The Supreme Court has observed that "[t]he ordinary dictionary definition of 'employee' includes any 'person who works for another in return for financial or other compensation'" and that "[t]he phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition." *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 90 (1995), quoting *American Heritage Dictionary* 604 (3d ed. 1992).

The *Restatement (Third) of Employment Law* accords with the ordinary dictionary definition in "identif[ying] the class of individuals who are treated as 'employees' or an 'employer' in order to set the main boundaries for the field of employment law." Introductory Note *a. Scope*, p. 1 (Tentative Draft No. 2, 2009). *See id.* §§ 1.01(1)(a) & (b) & 1.02, pp. 2 & 28-29.[1] Of particular significance here, the *Restatement* recognizes that "[w]here an educational institution compensates student assistants for work that benefits the institution, . . . such compensation encourages the students to work for more than educational benefits and thereby establishes an employment as well as an educational relationship." § 1.02, Comment d, p. 33. The *Restatement*'s illustration of this point could have been taken from the facts of the instant case:

[1] This chapter of the *Restatement* is available at http://www.ali.org/00021333/Employment%20Law%20TD%20No%202%20-%20Revised%20-%20September%202009.pdf. The "Chapter was approved by the ALI Council and the ALI membership (subject to editorial changes)," and, therefore, "[t]his material may be cited." www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=31 n. *.

> "A is a graduate student in biochemistry at university P. In order to complete the degree requirements, A must work in a laboratory under P's auspices, either for pay or as a volunteer. A works in the laboratory of a professor, for which A is paid a yearly stipend and given full tuition remission. The professor has secured grants to support the research that A is assisting. A is an employee of P. P is providing A with significant benefits both in order to further A's education and also to obtain A's services on P's funded research." § 1.02, Comment d, Illustration 7, p. 34.

"[T]he black-letter rules" stated in Chapter 1 of the *Restatement* ("Existence of the Employment Relationship") "are derived from judicial and administrative decisions determining whether there is an employment relationship for purposes of laws that protect or benefit employees or impose obligations on employers or employees." Introductory Note, a. Scope, p. 1. Unfortunately, as the *Restatement* observes, "[t]he National Labor Relations Board has vacillated on the question of whether graduate students who are both paid a stipend and required to perform some teaching or research service to their university should be treated as employees under the NLRA." § 1.02, Reporters' Notes, Comment d, p. 38. In *New York University*, the Board recognized that "graduate assistants' relationship with [their university-employer] is . . . indistinguishable from a traditional master-servant relationship." 332 NLRB at 1206. The Board should return to that

understanding, which is consistent with the generally accepted view that the term "employee" as used in "laws that protect or benefit employees" encompasses "student assistants" who receive "compensat[ion] . . . for work that benefits the[ir educational] institution." *Restatement* § 1.02, Comment d, p. 33.

As the *Restatement* indicates, under the definition of "employee" generally accepted in the area of employment law, "an educational institution [that] compensates student assistants for work that benefits the institution, . . . thereby establishes an employment as well as an educational relationship." § 1.02, Comment d, p. 33. The broad language used by the NLRA to define covered "employees" – "any employee" – is similar to the definitions used in other employment law statutes.[2] The Supreme Court has held that the use of this common formulation in defining the "employees" covered by an employment law statute indicates a Congressional intent to "adopt a common-law test for

[2] *See*, *e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 630(f) ("an individual employed by any employer"); Americans with Disabilities Act, 42 U.S.C. § 12111(4) ("an individual employed by an employer"); Employee Retirement Income Security Act, 29 U.S.C. § 1002(B)(6) ("any individual employed by an employer"); Fair Labor Standards Act, 29 U.S.C. § 203(e)(1) ("any individual employed by an employer"); Family and Medical Leave Act, 29 U.S.C. § 2611(2)(A) ("an employee who has been employed for at least 12 months by the employer"); Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 402(f) ("any individual employed by an employer"); Occupational Safety and Health Act, 29 U.S.C. § 652(6) ("an employee of an employer"); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e(f) ("an individual employed by an employer"); Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4303 ("any person employed by an employer").

determining who qualifies as an 'employee' under [the particular statute]." *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323 (1992). Thus, it is particularly inappropriate for the NLRB to follow an eccentric understanding of the term "employee" as it applies to "student assistants."

In the end, the *Brown University* majority tacitly acknowledged that "graduate student assistants are statutory employees" and based its implied exemption for "student assistants" on the majority's assessment that "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process." 342 NLRB at 493. The majority's concern stemmed from its mistaken understanding that "the broad power to bargain over all Section 8(d) subjects would, in the case of graduate student assistants, carry with it the power to intrude into areas that are at the heart of the educational process." *Id*. at 492.

The *Brown University* majority acknowledged that graduate student assistants at public universities have often engaged in collective bargaining with no detrimental effect on the educational process. But the majority attributed this to the fact that the relevant state labor laws "limit bargaining subjects for public academic employees." 342 NLRB at 492. The majority cites as an example the California statute "excluding, from collective bargaining, admission requirements for students, conditions for awarding degrees, and content and supervision of

courses, curricula, and research programs." *Id*. at 492 n. 31.

The *Brown University* majority ignored the highly pertinent fact that, "the language of section 8(d), while sweeping and apparently all-inclusive, [has] be[en] construed to exclude various kinds of management decisions from the scope of the duty to bargain" in order to preserve "the principle of control by the owner of property over basic decisions concerning his enterprise." *Philadelphia Newspaper Guild v. NLRB*, 636 F.2d 550, 559 (D.C. Cir. 1980). As a result of that construction, "[e]mployers have no obligation to bargain about management decisions that involve, for example, 'choice of advertising and promotion, product type and design, and financing arrangements.' *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981)." *Kiro, Inc.*, 317 NLRB 1325, 1327 (1995). The Board has been particularly protective of management prerogatives where the enterprise involves the exercise of First Amendment rights. *Peerless Publications, Inc.*, 283 NLRB 334, 335 (1987). It is virtually certain, therefore, that Section 8(d) would be construed to "limit bargaining subjects for . . . academic employees" by "excluding, from collective bargaining, admission requirements for students, conditions for awarding degrees, and content and supervision of courses, curricula, and research programs." *Brown University*, 342 NLRB at 492 & n. 31.

The collective bargaining agreement covering NYU graduate student assistants expressly recognized the University's right to control academic matters.

The agreement provided that "[d]ecisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University." Article XXII B. NYU complains that, nevertheless, "the University was faced with multiple grievances and arbitrations that threatened its academic autonomy." NYU Opp. to Request for Review 6. If that is so, the University has only itself to blame for entertaining those grievances, because the agreement provided that "[n]o action taken by the University with respect to a management or academic right shall be subject to the grievance or arbitration procedure . . . unless the exercise thereof violates an express written provision of this agreement." Article XXII D. What's more, the University could have – but did not – seek legal redress against the Union for the alleged abuse of the grievance procedure, either by filing a grievance alleging breach of contract or by filing a bad faith bargaining charge against the Union with the NLRB. *See Firemen & Oilers Local 288 (Diversy Wyandotte)*, 302 NLRB 1008 (1991).

In short, the extensive experience with collective bargaining by graduate student assistants at public universities – which cannot be distinguished on the scope of bargaining grounds cited by the *Brown University* majority – and the experience at NYU clearly demonstrate that the *Brown University* majority wrongly concluded that "there is a significant risk, and indeed a strong likelihood,

that the collective-bargaining process will be detrimental to the educational process." 342 NLRB at 493. The NLRB has been charged with the tasks of "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. The Board has *not* been assigned the task of determining whether collective bargaining should be encouraged according to the agency's views of sound educational policy.

A "broad, literal interpretation of the word 'employee' is consistent with several of the Act's purposes, such as protecting the right of employees to organize for mutual aid without employer interference and encouraging and protecting the collective-bargaining process." *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 91 (1995) (quotation marks and citations omitted). "[T]he Act's definition . . . contains a list of exceptions," *id.* at 90, but none of the exceptions apply to "student assistants." The Board should apply a "broad, literal interpretation of the word 'employee'" that encompasses graduate student assistants, and the Board should abandon the implied exception created by the *Brown University* decision on the basis of a misperception of sound academic policy.

2. If the Board modifies or overrules *Brown University*, supra, should the Board continue to find that graduate student assistants engaged in research

> funded by external grants are not statutory employees, in part, because they do not perform a service for the university? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974)).

This question seems to conflate two different types of grant-funded university research.

The graduate student researchers at issue in the first *New York University* decision "were funded by external grants and were performing research on their dissertation topics as opposed to being required to perform specific research tasks." 332 NLRB at 1220. Those graduate students were simply pursuing their own studies with financial assistance from outside grants. Their research was not a service to the University and thus did not make them employees of the University.

Graduate students pursuing their own research should be contrasted with the student assistant posited by the example in the *Restatement*. The graduate student in that example "works in the laboratory of a professor" who "has secured grants to support the research [the student] is assisting" and who uses a portion of the grant funds "to obtain [the student's] services on [the professor's] funded research." § 1.02, Comment d, Illustration 7, p. 34. That student "is an employee of [the university]." *Ibid*. In this regard, the graduate student working on a grant-funded research project is no different than other university employees, such as the principal investigator, other research faculty, lab techs, and clericals, who are working on the same project. The ultimate source of the funds used to pay wages

is not relevant to, much less determinative of, employee status.

With respect to the question of external funding, the graduate student research assistant in the *Restatement* example is in an identical position to the graduate student researchers at issue in *Research Foundation-SUNY*, 350 NLRB 197 (2007). The *Research Foundation* graduate students assisted on externally funded research projects of their university in return for compensation. The only difference between the *Restatement* example and *Research Foundation* is that the student in the *Restatement* example was directly employed by his or her university whereas those in *Research Foundation* were employed by a foundation that their university had established to manage its research awards. That difference would matter under a reading of *Brown University* as establishing a per se rule that graduate students performing work relating to their course of study can never be considered employees of their university. If *Brown University* is overruled, the question of the employee status of graduate student research assistants working on externally funded projects would be directly controlled by *Research Foundation*.

> 3. If the Board were to conclude that graduate student assistants may be statutory employees, in what circumstances, if any, would a separate bargaining unit of graduate student assistants be appropriate under the Act?

A separate bargaining unit of graduate student assistants is appropriate where they have "a community of interest sufficiently distinct from other . . . employees." *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op.

1 (2011).

"In determining whether the employees in the unit sought possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration." *Boeing Co.*, 337 NLRB 152, 153 (2001). As the Regional Directors' decisions in these cases discuss, graduate student assistants will often have common interests in these regards.

Because the unit must be "appropriate for the purposes of collective bargaining," 29 U.S.C. § 159(b), a history of collective bargaining in the proposed unit will often be highly pertinent. At NYU, there is a history of bargaining in a unit composed of graduate student assistants.

Questions can arise as to whether some graduate student assistants belong in pre-existing bargaining units containing nonstudent university employees. For instance, NYU has argued that the graduate student teaching assistants should be accreted to the pre-existing unit of adjunct faculty. In that instance, the determinative factor is whether the graduate student assistants at issue "share an overwhelming community of interest with the preexisting unit." *Giant Eagle Mkts. Co.*, 308 NLRB 206, 206 (1992). The same standard would apply if the question where whether to add nonstudent employees to the proposed graduate student

assistant unit. *See Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421-22 & n. * (D.C. Cir. 2008).

In short, whether a separate bargaining unit of graduate student assistants is appropriate should be decided based on the factors generally employed to determine the appropriateness of a petitioned-for bargaining unit. As the decisions of the Regional Directors explain, the proposed units of graduate student assistants in these cases are appropriate.

> 4. If the Board were to conclude that graduate student assistants may be statutory employees, what standard should the Board apply to determine (a) whether such assistants constitute temporary employees and (b) what the appropriate bargaining unit placement of the assistants determined to be temporary employees should be?

An employee is "temporary" in the sense relevant to voter eligibility in an NLRB representation election only if "the prospect of termination was sufficiently definite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired." *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992). Graduate student assistants who are hired on a semester-by-semester or school-year-by-school-year basis will typically have a reasonable contemplation of being re-engaged in future semesters or school-years, so long as they remain graduate students. Graduate student assistants with that expectation will thus not be "temporary employees," even though their current term of employment has a fixed ending date.

That is not to say, however, that the duration of the current term of employment can never be relevant to unit placement. *See Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28 (2010). For instance, the graduate student assistants hired by NYU to grade papers for very short terms of employment have been properly excluded from the proposed unit on that basis. But graduate student assistants who have been employed for a full semester or a full school-year would obviously have a community of interest with the other graduate student assistants employed on a semester or school-year basis and should not be excluded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James B. Coppess, hereby certify that on July 23, 2012, I caused to be served a copy of the foregoing brief on behalf of the American Federation of Labor and Congress of Industrial Organizations, the American Federation of Teachers, AFL-CIO, the American Association of University Professors, and the National Education Association as *Amici Curiae*, by electronic mail on the following:

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