UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

NORTHWESTERN UNIVERSITY

Employer

-and- Case No. 13-RC-121359

COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA)

Petitioner

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Risa L. Lieberwitz
General Counsel
American Association of
University Professors
Professor of Labor and Employment Law
School of Industrial & Labor Relations
Cornell University
361 Ives Hall
Ithaca, New York 14853
(607) 255-3289

Rana M. Jaleel, JD, PhD
Law Fellow
Columbia Law School
435 W 116th St
Room 811 / 5
New York, NY 10025
(212) 854-0164

Aaron Nisenson, Esq.*
Nancy Long, Esq.
American Association of
University Professors
1133 19th Street, NW Suite 200
Washington, DC 20036
(202) 737-5900 x 3629

* Counsel of Record

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INTRODUCTION

Former National Labor Relations Board Chair Edward Miller once observed about higher education unionization decisions:

> I personally have felt sometimes as though we were having to make these [higher education] determinations pretty much in the dark, without the aid of information which could have enabled us to make more informed judgments. We must, of course, decide each case presented to us on the basis of information that is developed on that individual record. I hope that we have not decided cases unwisely because of too scanty information, and thus established precedential guidelines that we will later regret.

Miller, *Is the NLRB Still Alive?,* Address before the Texas Bar Association (July 6, 1973), at 10-11, *in* Matthew W. Finkin, "The NLRB in Higher Education," 5 U. TOL. L. REV. 608, 650 (1974). The American Association of University Professors welcomes the opportunity to participate as *amicus curiae* before the Board to address the problem of "too scanty information" about collective bargaining in the academic community.

INTEREST OF THE *AMICUS CURIAE*

The American Association of University Professors ("AAUP" or "the Association") is a national educational organization of over 40,000 members, who are primarily faculty members in all academic disciplines. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. Local AAUP chapters exist on close to 400 campuses across the country. Out of over 40 local unionized AAUP chapters, 22 are at private sector higher education institutions.

The AAUP plays a unique role in the academic community. Among the organization's central functions is the development of policy standards for the protection of academic freedom,

tenure, due process, shared governance, and other elements central to higher education. *See, e.g.*, American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AAUP POLICY DOCUMENTS & REPORTS 3 (10TH ED. 2006) (*1940 Statement*) (endorsed by more than 200 professional organizations and learned societies). AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1972) (citing AAUP's *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments*); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971) (citing the *1940 Statement*). AAUP has served as *amicus* in numerous cases before courts involving faculty members and collective bargaining. *See, e.g., NLRB v. Yeshiva University*, 444 U.S. 672 (1980). The AAUP has also filed *amicus* briefs before the Board, including in a number of graduate assistant cases. *New York University*, 332 NLRB 1205 (2000); *Brown University*, 342 NLRB 483 (2004); *Columbia University*, 2-RC-22358 (Feb. 11, 2002); *University of Pennsylvania*, 4-RC-20353 (November 21, 2002); *New York University*, Case No. 2-RC-23481 (October 25, 2010) and *New York University*, Case No. 29-RC-12054 (October 25, 2010).

AAUP provides policy assistance to the higher education community at large. As former AAUP President Robert A. Gorman stated:

> The AAUP—by virtue of its history and traditions, its values and its procedures—is different from, and more than, a labor organization . . . . We do not require, and have never required, Association membership as a condition of receiving our aid and good offices. Promoting the academic freedom, or protecting the procedural rights, even of a nonmember is viewed as redounding not only to the benefit of our dues-paying members, and of all of the professoriate, but also to the benefit of all institutions of higher education. Institutions are better, and the quality of higher education improved for what we do, even on behalf of "strangers" to the Association.

Robert A. Gorman, "The AAUP and Collective Bargaining: A Look Backward and Ahead," 68 ACADEME: BULLETIN OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 1a, 2a (Sept./Oct. 1982). The National Labor Relation Board invited *amicus* briefs to address six questions related to the ability of Northwestern University college football players receiving grant-in-aid scholarships to organize for purposes of collective bargaining as employees under the National Labor Relations Act. This AAUP brief addresses the second question: "Insofar as the Board's decision in *Brown University*, 342 NLRB 483 (2004), may be applicable to the College Athletes Players Association's petition, should the Board adhere to, modify, or overrule the test of employee status applied in that case, and if so, on what basis."

ARGUMENT

In *Brown University*, the Board 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. 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). Since the *Brown University* ruling, the "dual" educational and economic status of some graduate assistants has been embraced by the Regional Director of Region 2 in the most recent assessment of private sector graduate assistant unionization. *New York University*, Case No. 2-RC-23481 (October 25, 2010); *New York University*, Case No. 29-RC-12054 (October 25, 2010). As a result, in late 2013, in a stunning reversal of its previous refusal to recognize the graduate assistant union, New York University (NYU) voluntarily recognized its graduate assistants' status as employees and their rights to engage in collective bargaining. The Board should take NYU's voluntary recognition of its graduate assistants' union as evidence of a new recognition of the benefits of private sector graduate assistant unionization and should follow its Regional Director's lead in recognizing the dual economic and educational status of graduate assistants.

At its core, the *Brown University* test of employee status is based on an erroneous understanding of the relationship between academic freedom and collective bargaining. *Brown University* rests on the assertion that allowing graduate assistants to bargain collectively violates institutional academic freedom by requiring the university to bargain about issues that directly impact "who may teach," "what may be taught," "how it shall be taught," and "who may be admitted to study," thus eroding both institutional academic freedom and faculty-student relationships. *Sweezy v. State of New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring), cited in *Brown University,* 342 NLRB at n.26. In the unanimous *New York University (NYU)* decision, overturned by a 3-2 ruling in *Brown University*, the Board rejected the speculative claims of colleges and universities that collective bargaining would violate their institutional academic freedom and found no public policy basis for excluding graduate assistants from coverage under the National Labor Relations Act.

Indeed, interim developments provide further support for the notion that collective bargaining is compatible with academic freedom. These include the NYU administration's decision to voluntarily recognize its graduate assistant union and a new research study that is the first to provide a cross-campus comparison of how faculty-student relationships and academic freedom fare at unionized *and* non-unionized campuses.

In late 2012, New York University reversed its earlier position and conceded that graduate assistants are employees with collective bargaining rights that need not interfere with institutional academic freedom or faculty-student relationships. Both the university and the union now agree that collective bargaining would "improve the graduate student experience, and will sustain and enhance NYU's academic competitiveness." (*Joint Statement of NYU and GSOC and SET, UAW,* NYU Press Release (November 26, 2013).

Additionally, a new study finds that "the potential harm to faculty-student relationships and academic freedom should not continue to serve as bases for the denial of collective bargaining rights to graduate student employees." *See* Sean E. Rodgers, Adrienne E. Eaton, & Paula B. Voos, "Effects of Unionization on Graduate Student Employees: Student Relations, Academic Freedom, and Pay," ILR Review, Vol. 66, No. 2, 487-501 (2013). Thus, no evidence exists that the unionization of graduate assistants interferes with the student-faculty mentoring relationship or institutional academic freedom.

The AAUP also contends that there is no basis for the claim that the First Amendment shields institutions from federal law such as the NLRA. Courts have consistently rejected this argument. *See, e.g., Associated Press v. NLRB,* 301 U.S. 103 (1937). Furthermore, national AAUP policies on faculty and graduate assistant collective bargaining indicate that collective bargaining is not only consistent with, but can promote, academic freedom. Local AAUP

collective bargaining faculty contracts include provisions to protect individual academic freedom. Many graduate assistant contracts contain similar provisions. Just as faculty members and graduate assistants have negotiated protections for individual academic freedom in their contracts with administrations, so too can administrations protect their academic freedom through collective bargaining. In fact, nationwide, at least eight graduate union contracts contain contractual provisions to secure academic freedom. *See, infra*, footnote 8. Some include express, legally enforceable guarantees that the university/employer retains the ability to make all academic management decisions.

Moreover, the claim that collective bargaining over mandatory subjects of bargaining violates institutional academic freedom is speculative, unconvincing, and empirically disproven by the over forty-year existence of public sector graduate employee collective bargaining agreements. State courts have been able to determine mandatory subjects of bargaining in higher education cases, as has the Board in higher education faculty cases, without jeopardizing academic freedom. Parties can resolve many of their differences through collective bargaining. *See, e.g.*, *Regents of the University of California v. PERB*, 715 P.2d 590 (Cal. 1986); *Regents of the University of Michigan v. Employment Relations Commission*, 204 N.W.2d 218 (Mich. 1973). Indeed, the recent decision of NYU to bargain voluntarily with its graduate assistants provides the Board with new evidence that parties can resolve their differences effectively through collective bargaining.

I. THE BOARD SHOULD FIND GRADUATE ASSISTANTS TO BE STATUTORY EMPLOYEES WITH COLLECTIVE BARGAINING RIGHTS AS IT DID IN *NYU*.

The *Brown University* majority tacitly acknowledged that "graduate student assistants are statutory employees" but 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 majority feared that universities would be required to bargain about issues that directly impact "who may teach," "what may be taught," "how it shall be taught," and "who may be admitted to study." *Sweezy v. State of New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring), cited in *Brown University,* 342 NLRB at n.26.

Ample support exists for the *NYU* Board's conclusion that unionization of graduate assistants will not violate a higher education institution's First Amendment academic freedom. The *Brown University* majority's "doomsday cry" is at best speculative, and at worst misleading. *See Regents of the University of California*, 715 P.2d at 605 (rejecting as "doomsday cry" university's contention that the unionization of medical school residents would lead to violation of the institution's academic freedom). The *Brown University* majority's assertions fundamentally misunderstand the interplay between academic freedom and the laws that govern employers, including colleges and universities. In *NYU* the Board reasoned:

> While mindful and respectful of the academic prerogatives of our Nation's great colleges and universities, we cannot say as a matter of law or policy that permitting graduate assistants to be considered employees entitled to the benefit

> of the Act will result in improper interference with the academic freedom of the institution they serve.

NYU, slip op. at 4; *see also Boston Medical Center*, 330 NLRB 152, 164 (1999) (rejecting employer's academic freedom argument because it puts "the proverbial cart before the horse"). Indeed, NYU is currently and voluntarily negotiating a collective bargaining agreement with its graduate assistant union. The Board should return to its earlier position that graduate assistants are statutory employees who hold full collective bargaining rights.

A. The First Amendment Does Not Immunize Universities from the National Labor Relations Act.

Institutional First Amendment academic freedom has never been a basis for "immunizing" higher education institutions from the application of federal law, including the NLRA. *University Request for Review* at 12; *see Associated Press v. NLRB*, 301 U.S. 103, 133 (1937). Courts have long recognized academic freedom as a "special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Such academic freedom typically protects professors, and sometimes institutions and students as well. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Regents of the University of California v. Bakke*, 438 U.S 265, 312-13 (1978) (Powell, J., concurring); *see also Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n. 12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, somewhat inconsistently, on autonomous decisionmaking by the academy itself."); *Aguillard v. Edwards*, 765 F.2d 1251, 1257 (5th Cir. 1983) ("Academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment."), *aff'd*, 482 U.S. 578 (1987).

Nevertheless, courts have ruled that the First Amendment rights of institutions do not preclude application of the NLRA. In *Associated Press*, 301 U.S. at 103, the United States

Supreme Court ruled that the application of the NLRA to an editorial employee did not violate the employer's freedom of speech or of the press under the First Amendment. The Associated Press (AP) argued that, "whatever may be the case with respect to employees in its mechanical departments it must have absolute and unrestricted freedom to employ and discharge those who . . . edit the news," because its "function" was to report news "without bias," and so it could not "be free to furnish unbiased and impartial news reports unless it is equally free to determine for itself the partiality or bias of editorial employees." *Id.* at 131.

The Court rejected the AP's assertion that "any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press." *Id.* In so ruling, the majority roundly criticized the publisher for relying on a hypothetical and counterfactual claim of bias to assert a total prohibition against the application of the NLRA to editorial employees: "It seeks to bar all regulation by contending that regulation in a situation not presented would be invalid." *Id.* at 132. The Court observed that coverage under the NLRA in no way "circumscribes the full freedom and liberty [of the AP] to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the [AP] is free at any time to discharge . . . any editorial employee who fails to comply with the policies it may adopt." *Id.* at 133. Accordingly, the Court found the employer's argument "an unsound generalization":

> [t]he business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.

Id. at 132-33. Therefore, the NLRA applied to the AP and journalists had the right to bargain under the Act.

Claims of institutional academic freedom provide higher education institutions no more "special immunity" from the NLRA than claims of freedom of the press gave the AP. *See Associated Press*, 301 U.S. at 132-33.[1] A university administration's recitation of a parade of horribles does not transform speculations about potential violations of institutional academic freedom into a bar against the application of the NLRA to graduate assistants. Just as the publisher in *Associated Press* had the employer prerogative not to hire or retain an editor who "fails faithfully to edit the news to reflect the facts without bias and prejudice," so, too, does the university administration, as an employer, have the right not to hire and retain those graduate assistants who fail to meet the institution's academic needs. *See id.* at 132. The administration's fears and "unsound generalization[s]" about the consequences of collective bargaining by graduate students, like the AP's concerns after passage of the Wagner Act, do not "immunize" the administration from federal labor law. *See Associated Press*, 301 U.S. at 132; *see also NLRB v. Wentworth Institute*, 515 F.2d 550, 556 (1st Cir. 1975) (rejecting institute's argument that finding faculty to be

[1] Since the early 1970s the Board has applied the NLRA to colleges and universities. *Cornell University*, 183 NLRB 329, 334 (1971) ("[W]e are convinced that assertion of jurisdiction is required over those private colleges and universities whose operations have a substantial effect on commerce to insure the orderly, effective, and uniform application of national labor policy."); *C.W. Post Center of Long Island University*, 189 NLRB 904 (1971) (recognizing unit of faculty members). In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the U.S. Supreme Court ruled that some faculty members may be managers and, therefore, excluded from coverage under the NLRA. While recognizing that the "pyramidal hierarchies of private industry . . . in the industrial setting cannot be 'imposed blindly on the academic world,'" the Court (and the Board) in no way embraced the notion that universities are immune from application of the Act. *See id.* at 680-81 (citations omitted). Accordingly, the Board has applied in post-*Yeshiva* cases the protections of the NLRA to faculty members who are deemed employees, not managers. *See, e.g.*, *Manhattan College*, 2-RC-21735 (Nov. 9, 1999); *NLRB v. Cooper Union*, 783 F.2d 29 (2d Cir.), *cert. denied*, 479 U.S. 815 (1986); *Marymount College of Virginia*, 280 NLRB 486 (1986).

employees and allowing them to engage in collective bargaining "will supposedly result in erosion of academic freedom").

Similarly, just as academic freedom does not "embrace" the right of a university to discriminate, it does not "embrace" the right of a university to prohibit students who are paid to teach or perform other work from unionizing. A university, like any other employing institution, has to organize its affairs consistently with the fundamental principles of federal law, such as Title VII of the Civil Rights Act. *See Powell v. Syracuse University*, 580 F.2d 1150, 1154 (2nd Cir), *cert. denied*, 439 U.S. 984 (1978) (Judicial precedent does not "indicate that academic freedom embraces the freedom to discriminate.").[2] In *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990), the university administration had genuine concerns about the disclosure of materials gathered in the tenure process to parties outside the university. The Court rejected the administration's First Amendment claims of injury to institutional academic freedom in applying Title VII to the tenure review process at the private university. In the case of graduate assistant unionization under the NLRA, academic freedom concerns articulated by the administration are significantly more threadbare than those that the Court rejected as too "speculative" and "attenuated" in the Title VII case. *Id.* at 200.

Like the Equal Employment Opportunity Commission (EEOC), which has the authority to investigate whether colleges and universities discriminate against their staff and faculty, the Board

[2] In *Powell*, 580 F.2d at 1150, the Second Circuit emphasized that a university's First Amendment right to academic freedom did not allow it to violate Title VII. In that case, a female professor sued the university for race and gender discrimination in the nonrenewal of her employment contract. The Second Circuit, in affirming the trial court decision, ruled that the then current judicial "anti-interventionist policy" afforded to higher education institutions, which made them "virtually immune to charges of employment bias," had "been pressed beyond all reasonable limits." *Id.* at 1153. The court concluded that judicial precedent did not, and "was never intended to, indicate that academic freedom embraces the freedom to discriminate." *Id*. at 1154.

has the authority to determine whether graduate students are "employees" under Section 2(3) of the Act. 29 U.S.C. § 152(3). The application of the NLRA to the university, however, does not circumscribe the university's academic freedom to hire and retain those graduate assistants who best meet the needs of the university's academic programs. An institution may continue to apply all legitimate academic policies and standards to make personnel decisions. *See University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. at 198-99 (noting that the university was not prevented "from using any criteria it may wish to use, except those . . . that are proscribed under Title VII" in making "legitimate" academic tenure decisions). The AAUP believes that concern about asserted infringements of institutional academic freedom remain altogether unsubstantiated.

B. National AAUP Policies on Faculty and Graduate Assistant Unionization Recognize That Unionization Is Not Only Consistent With, But Enhances, Academic Freedom.

The AAUP has issued policies that embrace collective bargaining by both faculty and graduate assistants as one of several ways to promote academic freedom on campus. These policies demonstrate that the leading association of faculty members in the United States does not view collective bargaining between unions of graduate assistants and university administrations as inconsistent with the academic freedom of institutions or of faculty, or with other fundamental values in higher education.

The Association's S*tatement on Collective Bargaining* provides that, "[a]s a national organization which has historically played a major role in formulating and implementing the principles that govern relationships in academic life, the Association promotes collective bargaining to reinforce the best features of higher education." AAUP POLICY DOCUMENTS & REPORTS 217 (10th ED. 2006) ("AAUP POLICY DOCUMENTS"). It states that "[c]ollective

bargaining is an effective instrument for achieving" and "securing" the objectives of the Association, including "to protect academic freedom." To promote "the best features of higher education," the *Statement on Collective Bargaining* encourages Association chapters that engage in collective bargaining to strive to "obtain explicit guarantees of academic freedom and tenure in accordance with the principles and stated policies of the Association." *Id.*

The AAUP has also adopted policies supporting the right of graduate students who are deemed employees by the Board to bargain collectively. AAUP's *Statement on Graduate Students* provides that "graduate student assistants like other employees should have the right to organize to bargain collectively . . . [and that] [a]dministrations should honor a majority request for union representation." AAUP POLICY DOCUMENTS 280, 281. The *Statement* recognizes that "[g]raduate students not only engage in more advanced studies than their undergraduate counterparts, they often hold teaching or research assistantships. As graduate assistants, they carry out many of the functions of faculty members and receive compensation for these duties." *Id.*

In the joint *1940 Statement of Principles on Academic Freedom and Tenure*, the AAUP and the Association of American Colleges explain that academic freedom gives teachers "full freedom in research and in the publication of the results" as well as 'freedom "in the classroom [to] discuss[] their subject." AAUP POLICY DOCUMENTS at 3.[3] The *1940 Statement* recognizes that

[3] The entire academic freedom provision of the *1940 Statement* reads:

> 1) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
> 2) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
> 3) College and university teachers are citizens, members of a learned

not only faculty, but also graduate students are entitled to the protections of academic freedom: "Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time tenured and probationary faculty teacher, but also to all others, such as part-time faculty and teaching assistants, who exercise teaching responsibilities." AAUP POLICY DOCUMENTS at 6.

C. Local AAUP Faculty Union Experience Demonstrates That Academic Freedom Is Compatible With Collective Bargaining.

Academic administrations predicted the demise of academic freedom in the 1960s and 1970s, when faculty members initially began to organize unions. Administrators at that time predicted that unions of faculty members would interfere with academic freedom. The actual experience of local AAUP chapters in faculty collective bargaining has refuted these predictions. In fact, faculty collective bargaining has yielded contractual protections for a variety of professional values, including individual academic freedom.[4]

Local AAUP chapters have successfully established explicit guarantees of academic freedom in their collective bargaining contracts. Some chapters for which a local AAUP

> profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

Id. at 3-4.

[4] *See* David M. Rabban, "Is Unionization Compatible with Professionalism?," 45 INDUS. & L.R. REV. 97, 110 (Oct. 1991) (reviewing provisions affecting professional standards in collective bargaining agreements in a number of professions, including higher education faculty, and finding "substantial, unambiguous support for professional values in many agreements," which suggests "at a minimum, that unionization and professionalism are not inherently incompatible").

bargaining representative exists for faculty refer to the *1940 Statement* and quote it extensively in their collective bargaining contracts.[5] Other faculty collective bargaining agreements to which an AAUP chapter is a party incorporate the language of the *1940 Statement* to define academic freedom.[6]

Such local AAUP faculty collective bargaining agreements do not simply promote academic freedom, but make such protections legally enforceable. As former AAUP President Robert A. Gorman wrote in evaluating the initial ten-year effort by local AAUP chapters in collective bargaining: "[C]ollective bargaining agreements leave no doubt that essential AAUP principles of academic freedom, tenure, due process, peer review, nondiscrimination, and the like, can be rendered fully enforceable as part of the contract rules prevailing in court cases and arbitration proceedings." Gorman, *supra*, at 3a.

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[5] Numerous collective bargaining agreements include academic freedom provisions. Such contracts recognize the nearly universal mutual understanding that academic freedom is consistent with collective bargaining. For examples of local AAUP chapter contracts, *see* Bard College (New York) (Art. VIII) ("All teachers (whether Faculty or not) will enjoy academic freedom as set forth in the Association of American Colleges-American Association of University Professors' *1940 Statement of Principles on Academic Freedom and Tenure* . . ."); Curry College (Massachusetts) (Art. III) ("The College and the AAUP endorse the specific section on Academic Freedom from the document entitled *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*."); Indian River Community College (Florida) (Art. XIX) ("The Chapter subscribes to the AAUP *1940 Statement of Principles and the Interpretive Comments of 1940 and 1970*."); Kalamazoo Valley Community College (Michigan) (Art. 3.54) ("The following excerpt is taken from the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure*. . . ."); Kent State University (nontenured) (Art. III. § 2) (tenured) (Art. IV, § 2) ("As stated in the American Association of University Professors' *1940 Statement of Principles on Academic Freedom and Tenure.* . . ."); Regis University (Colorado) (Art. 11.1) ("Regis University affirms and is guided by the ideal that all members of the faculty, whether tenured or not, are entitled to academic freedom as set forth in the *1940 Statement of Principles on Academic Freedom and Tenure* of the American Association of University Professors. . . ."); University of Rhode Island (Art. 7.2) ("The Board and the University of Rhode Island unconditionally endorse the *1940 Statement*.").

[6] *See, e.g.*, Central State University (Ohio) (Art. 5.1); University of Cincinnati (Art. 2); Eastern Michigan University (Art. II).

The collective bargaining process is capable of accommodating and adapting to the concerns of any industry or profession, and the academy is no exception.[7] Collective bargaining has accommodated faculty unionization, and it will continue to adapt to graduate assistant unionization. By demonstrating that parties can negotiate a contract that does not infringe upon academic freedom, but indeed generally enhances and protects it, AAUP policy and local chapter practice support the Board's ruling in *NYU*.

D. Private and Public Sector Graduate Assistant Union Experience Demonstrates that Academic Freedom is Compatible with Collective Bargaining.

Both private and public sector graduate assistant unions have established collective bargaining agreements that contain legally enforceable contractual protections for individual and institutional academic freedom while honoring the economic interests of graduate assistants. The first collective bargaining agreement between NYU and its graduate assistant union contained the following "academic freedom" clause: "Decisions 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." *Complete Proposal of NYU, supra.*While the *Brown University* ruling does not extend NLRA protections to private sector graduate assistants, nothing in the decision precludes voluntary recognition of graduate assistant unions by their universities. In late 2013, in a stunning reversal of its previous refusal to recognize its graduate assistant union, NYU voluntarily recognized its graduate assistants' status as employees and their right to

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[7] *See* William M. Weinberg, *Patterns of State-Institutional Relations Under Collective Bargaining, Faculty Bargaining, State Government and Campus Autonomy: The Experience in Eight States*, *in* PENNSYLVANIA STATE UNIVERSITY AND THE EDUCATION COMMISSION OF THE STATES REPORT 103 (Apr. 1976) ("The higher education 'industry' has adapted collective bargaining, as has every other industry, to match its own administrative structure, product and institutional needs, and relationships with unions.").

engage in collective bargaining. Currently in bargaining for a contract, NYU and the graduate assistant union have once again committed to preserve the university's academic management rights. In a joint statement announcing a graduate assistant union election at NYU, "[b]oth parties concur[red] that the 'academic management rights' of the University to make academic decisions separate from the bargaining relationship will be honored by the Union, making clear that academic decisions are not subject to bargaining." *Joint Statement, supra*. Pre-contract assurances and contractual guarantees to preserve institutional academic and individual academic freedom are an increasingly standard feature of graduate assistant collective bargaining agreements.[8] Like faculty collective bargaining agreements, graduate collective bargaining

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[8] *See* University of Massachusetts, Amherst (Article XXI) ("Nothing in this Article should be understood to abridge whatever rights of academic freedom the Trustees may allow to graduate student employees."); The City University Of New York (Preamble) ("Whereas, CUNY and the PSC seek to maintain and encourage, in accordance with law, full freedom of inquiry, teaching, research and publication of results, the parties subscribe to Academic Freedom for faculty members. The principles of Academic Freedom are recognized as applicable to other members of the Instructional Staff, to the extent that their duties include teaching, research and publication of results, the selection of library or other educational materials or the formation of academic policy."); University of South Florida (Article 5)("The University of South Florida affirms the principles of academic freedom and responsibility, which are rooted in a conception of the University as a community of scholars united in the pursuit of truth and wisdom in an atmosphere of tolerance and freedom."); Rutgers, the State University of New Jersey (Article II, Academic Freedom)("The parties hereto recognize the principles of academic freedom as adopted by the University's Board of Governors on January 13, 1967."); Southern Illinois University (Article 7)("Whereas, SIU Carbondale and GA United seek to maintain and encourage, in accordance with law, full freedom of inquiry, teaching, research and publication of results the parties subscribe to Academic Freedom for faculty members."); University of Florida (Article 5, Academic Freedom)("It is the policy of the UBOT and UFF to encourage graduate assistants, in fulfillment of their assigned teaching responsibilities, to give their own interpretation of instructional materials used by them—whether self-chosen or prescribed by the teaching unit—within the bounds of knowledge and methodologies appropriate to the disciplinary field, under the guidance of the employing department or unit."); University of Rhode Island (Article XIII, Academic Freedom) ("Institutions of higher education are conducted for the common good and not to further the interests of either the individual or the institution as a whole. The common

agreements demonstrate that collective bargaining can secure and enhance both institutional and individual academic freedom.

E. Unionization of Graduate Students Does Not Harm Faculty-Student Mentoring Relationships.

The *Brown University* test of employee status should be overruled because empirical studies provide further evidence that unionization will *not* "compromise" the cooperative relationships between faculty mentors and their graduate student mentees.[9] Studies of unionized campuses as well as a new study published in 2013 that compares faculty-student relationships and degrees of academic freedom at unionized and non-unionized campuses make it clear that graduate assistant unions do not inhibit faculty-graduate student mentoring relationships.

A 2002 study by Daniel J. Julius and Patricia J. Gumport of Stanford University found in their analysis of interview data and collective bargaining contracts that "no conclusive evidence [suggests] that collective bargaining in and of itself is compromising the student-faculty relationship in general, or the willingness of faculty to serve in a mentoring capacity" and that,

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good depends upon the free search for truth and its free exposition. Academic Freedom is essential to these purposes and applies to both teaching and research.");

[9] One administrative law judge (ALJ), upon hearing the claims of graduate students within the University of California system, ordered that the state's student employees attending public institutions be allowed to unionize. *Regents of the University of California*, 20 PERC ¶ 27129 (1996). The ALJ explained that

> [t]he mentor relationship . . . is limited primarily to the relationship between a graduate student and a dissertation committee chair, or sometimes a committee member. Any impact upon that relationship . . . is virtually non-existent [because it is] . . . extremely rare for the same individuals to have been in both an employee-supervisor relationship and a student-faculty mentor relationship.

Id. at 386. The ALJ continued: "Even if evidence indicated that a large number of mentor relationships overlapped with employment relationships, extending coverage would not damage those relationships. There is nothing inherent in collective bargaining that precludes a supervisor from being a mentor." *Id.*

moreover, "data suggest that the clarification of roles and employment policies can enhance mentoring relationships." Daniel J. Julius & Patricia J. Gumport, "Graduate Student Unionization: Catalysts and Consequences," THE REVIEW OF HIGHER EDUCATION, Vol. 26, No. 2, page 187-216 (Winter 2003), at 201. Furthermore, the authors "conferred with labor relations practitioners who could not identify any sustained trends that suggested the student-faculty relationship could evolve into an employee-supervisor relationship, where faculty may be reluctant to speak candidly with students–for fear of grievances being filed." *Id.* The authors conclude that "fears concerning the undermining of mentoring relationships (just as those concerning peer review, professionalism, and the like when full time faculty organized) appear to be without foundation or premature to say the least." *Id.* at 209.

Similarly, in "Graduate Student Employee Collective Bargaining and the Educational Relationship Between Faculty and Graduate Students," Gordon J. Hewitt surveyed a random sample of faculty members at five universities where graduate assistant unions had existed for at least four years. 29 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 153 (2000). The study reveals that professors generally do not believe that their relationships with graduate students have suffered because of collective bargaining. The five universities are the State University of New York at Buffalo and the Universities of Florida, Massachusetts, Michigan, and Oregon. *Id.* at 157.[10]

[10] Like Northwestern University, these five institutions are included in the Carnegie classification "Doctoral/Research Universities/Extensive." The category is defined as "[i]nstitutions [that] typically offer a wide range of baccalaureate programs, and . . . are committed to graduate education through the doctorate. They award 50 or more doctoral degrees per year across at least 15 disciplines." HIGHER EDUCATION DIRECTORY (Higher Education Publications, Inc. 2002). In addition, all of these institutions, except the University of Massachusetts, are members of the prestigious Association of American Universities, which is an "association of 62 leading research universities in the United States and Canada." *See* www.aau.edu/aau/members.html .

Close to 90 percent of the Hewitt survey participants asserted that bargaining had not kept them from forming close mentoring relationships with their graduate students. *Id.* at 161. Perhaps even more significantly, over 90 percent indicated that collective bargaining had not inhibited their ability to advise or instruct graduate students. *Id.* And 95 percent of those surveyed believed that collective bargaining had not inhibited the free exchange of ideas between faculty members and students. *Id.* "[T]he results show [that] faculty . . . support the right of graduate students to bargain collectively, and believe collective bargaining is appropriate for graduate students. . . . [B]ased on their experiences, collective bargaining does not inhibit [professors'] ability to advise, instruct, or mentor their graduate students." *Id.* at 164. Hewitt observed that in their open-ended comments, faculty members never characterized the effect of bargaining on their "educational relationships" with students as "negative." *Id.* Nor did they consider bargaining to be an "educational hindrance." *Id.* And so, "[t]he faculty consider their relationships with graduate students a sacred trust and do not allow bureaucratic or political encumbrances to interfere with that trust." *Id.*

There is no reason to believe that relationships between faculty and students at private institutions would be any different. In fact, a 2013 study, which compares student-faculty relationships, academic freedom, and economic well-being across unionized and non-unionized campuses, shows that the main tenets of the prior surveys still hold. *See* Sean E. Rodgers, Adrienne E. Eaton, & Paula B. Voos, "Effects of Unionization on Graduate Student Employees: Student Relations, Academic Freedom, and Pay," ILR REVIEW, Vol. 66, No. 2, 487-501 (2013). Using survey data collected from PhD students in five academic disciplines across eight "R-1" public U.S. universities, the authors compare unionized and non-unionized graduate student employees in terms of faculty-student relations, academic freedom, and pay. The authors found that union represented graduate student employees report higher levels of personal and

professional support and unionized graduate student employees fare better on pay. Additionally, unionized and nonunionized students report similar perceptions of academic freedom. The study also finds that "unionized GSEs had higher mean ratings on their advisors accepting them as competent professionals, serving as a role model to them, being someone they wanted to become like, and being effective in his or her role." *Id.* at 505. Accordingly, the authors conclude that "these findings suggest that potential harm to faculty-student relationships and academic freedom should not continue to serve as bases for the denial of collective bargaining rights to graduate student employees." *Id.* at 487. Significantly, the authors also note that unionization does not impermissibly intrude into the general academic climate as the *Brown University* majority feared. Instead, "the main impact of unionization is on *employees,* rather than the overall climate for *graduate students*." *Id*. at 500. In summary, no evidence shows or even suggests that graduate assistant unionization interferes with the mentor-mentee relationship.

F. Institutional Academic Freedom Concerns Are Best Addressed Through Collective Bargaining, Not In Determining Whether Graduate Assistants are Employees.

The *Brown University* majority recites a litany of evils pertaining to negotiating over mandatory subjects of bargaining that it believed would violate the institution's academic freedom and, therefore, supported overturning *NYU*. Such concerns involve the scope of bargaining, however, rather than the scope of representation, which is the issue before the Board. To consider topics for negotiation when determining whether graduate assistants are employees puts the "cart before the horse." *See Boston Medical Center*, 330 NLRB at 164.[11] The administration's concerns

[11] This argument was clearly rejected by the Board in *Boston Medical Center*, where the employer asserted that negotiating over mandatory subjects of bargaining violated the medical center's institutional academic freedom. The Board opined:

over academic freedom violations are "speculative" and "premature," because the process of contract negotiations can accommodate the special concerns of parties. *See Regents of the University of California*, 715 P.2d at 605; *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. at 200 (institutional academic freedom argument too "speculative"). As the U.S. Supreme Court opined in *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 45 (1937):

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.

Example after example—from state court rulings to recent collective bargaining between graduate assistants and the administration at NYU—provide further support for the Board's decision in *NYU* that collective bargaining enables graduate assistants and university administrations to resolve any conflicts that arise about institutional academic freedom. The Board should overrule the test of employee status advanced by *Brown University*.

> The contour of collective bargaining is dynamic with new issues frequently arising out of new factual contexts: what can be bargained about or concentrated on, and what the parties are free to bargain about, may change. But such problems have not proven to be insurmountable in the administration of the Act. *We need not define here the boundaries between permissive and mandatory subjects of bargaining concerning [house staff], and between what can be bargained over and what cannot. We will address these issues later, if they arise.* . . . An employer is always free to persuade a union that it cannot bargain over matters in the manner suggested by the union. . . . But that is part of the bargaining process: the parties can identify and confront any issues of academic freedom as they would any other issue in collective bargaining. . . . If the parties cannot resolve their differences through bargaining, they are free to seek resolution of the issues by resort to our processes, and we will address them at the appropriate time.

Boston Medical Center., 330 NLRB at 164 (emphasis added).

State courts have found not only that collective bargaining for student-employees is compatible with institutional academic freedom, but also that such academic freedom concerns as may arise are best dealt with through collective bargaining. In *Regents of the University of California*, 715 P.2d at 590, the California Supreme Court ruled that interns and residents were employees under state law. In so ruling, the court rejected the institution's academic freedom argument. The California court observed:

> The University asserts that if collective bargaining rights were given to house staff the University's educational mission would be undermined by requiring bargaining on subjects which are intrinsically tied to the educational aspects of the residency programs. . . . [T]he University's argument is premature. The argument basically concerns the appropriate scope of representation under the Act. . . . Such issues will undoubtedly arise in specific factual contexts in which one side wishes to bargain over a certain subject and the other side does not. These scope-of-representation issues may be resolved by the Board when they arise. . . .

Id. at 605.

Similarly, in *Regents of the University of Michigan*, 204 N.W.2d at 218, the Michigan Supreme Court considered the scope of bargaining between the administration and a group of interns, residents, and post-doctoral fellows at the University of Michigan Hospital under Michigan's labor law and its state constitution, which provides for the Board of Regents' autonomy. The court held that "[b]ecause of the unique nature of the University of Michigan . . . the scope of bargaining by the Association may be limited if the subject matter falls clearly within the educational sphere." *Id.* at 224. The court continued:

> For example, the Association clearly can bargain with the Regents on the salary that their members receive since it is not within the educational sphere. While normally employees can bargain to discontinue a certain aspect of a particular job, the Association does not have the same latitude as other public employees. For example, interns could not negotiate working in the pathology department because they found such work distasteful. If the administrators of medical schools felt that a certain number of hours devoted to pathology was necessary to the education of the intern, our Court would not interfere since this does fall within the autonomy

> of the Regents [under the state constitution.] Numerous other issues may arise which fall between these two extremes and they will have to be decided on a case by case basis.

Id. While the decisions of these state courts were necessarily circumscribed by specific statutes and binding judicial precedent, the cases provide further support for the Board's decision in *NYU* that through collective bargaining, parties can often resolve their differences, and that collective bargaining does not violate institutional academic freedom.

For more than four decades faculty members have engaged in collective bargaining, and during that period the Board, the courts, and state agencies have been able to "draw the line" in determining the scope of mandatory bargaining consistent with the concerns of institutional academic freedom.[12] The concerns raised by the *Brown University* majority can be addressed by the parties through collective bargaining and, if need be, by the Board's giving content to the statutory terms "rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a). If and when the Board is presented with an actual dispute, it will "draw the

[12] S*ee* Bernhard Wolfgang Rohrbacher, "After *Boston Medical Center*: Why Teaching Assistants Should Have the Right to Bargain Collectively," 33 LOY. L.A. L. REV. 1849, 1911 (2000) (noting that different state courts "all have been able to 'draw the line' somewhere" in determining mandatory bargaining issues in education, such as class size, and so, "[b]y the same token, there is no reason to believe that the NLRB will not equally be able to 'draw the line'") (internal citations omitted)). The Board has defined what is within the scope of bargaining for higher education faculty under the NLRA. *See, e.g.*, *Kendall College*, 228 NLRB 1083 (1977) (holding faculty schedules to be a mandatory subject of bargaining), *enf'd*, 570 F.2d 216 (7th Cir. 1978); *Kendall College*, 288 NLRB 1205, 1211 (1988) (finding outside employment to be a mandatory subject of bargaining). So, too, have state courts. *See, e.g.,*V*ermont State Colleges Faculty Federation v. Vermont State Colleges*, 141 Vt. 138 (S. Ct. 1982) (tenure is a mandatory subject of bargaining); *Burlington County College Faculty Ass'n v. Board of Trustees*, 311 A.2d 733 (N.J. 1973) (academic calendar not a mandatory subject of bargaining). *See also* David M. Rabban, "Can American Labor Law Accommodate Collective Bargaining by Professional Employees?," 99 YALE L.J. 689, 706 (Jan. 1990) (reviewing scope-of-bargaining decisions of state courts and boards in cases primarily involving public school teachers).

line" in determining the appropriate scope of bargaining for graduate assistants without violating an institution's academic freedom.

III. THE GRANTING OF ACADEMIC CREDIT FOR THE TEACHING RESPONSIBILITIES CARRIED OUT BY GRADUATE ASSISTANTS SHOULD NOT AUTOMATICALLY PRECLUDE A FINDING THAT THEY ARE EMPLOYEES.

Neither the Act nor Board precedent supports the denial of statutory rights to employees simply because the services they perform are required as part of an educational program or are compensated through fellowships or grant-in-aid. A graduate assistant can be both a student and an employee, since the Board broadly interprets the statutory term "employee." 29 U.S.C. § 152(3); *see WBAI Pacifica*, 328 NLRB 1273, 1274 (1999).

In *NYU* the Board found that graduate assistants were "employees" under the Act and, therefore, could unionize: "[T]he fulfillment of duties of a graduate assistant requires performance of work, controlled by the Employer, and in exchange for consideration." *NYU*, slip op. at 2. The Board found that even if their work is "primarily educational," graduate assistants may be employees if they perform services for the administration in exchange for compensation: "[N]otwithstanding any educational benefit derived from graduate assistants' employment, we reject the premise of the Employer's argument that graduate assistants should be denied collective bargaining rights because their work is primarily educational." *Id.* at 3. The work of faculty is also "primarily educational," and the Board has asserted jurisdiction over them as employees, even though they are paid to learn through teaching, research and service. Under *NLRB v. Yeshiva*, 444 U.S. 672 (1980), some faculty members are excluded from NLRA coverage based on findings of managerial status, not because they learn as part of their employment.

In *Boston Medical Center* the Board rejected the argument that residents and interns were not employees, even though their work was required to complete the educational requirements for

certification in a medical specialty. That the house staff obtain "educational benefits" from their employment, the Board ruled, "is not inconsistent with their employee status": "Their status as students is not mutually exclusive of a finding that they are employees *Boston Medical Center*, 330 NLRB at 160 (emphasis added). The Board noted that "[i]t has never been doubted that apprentices are statutory employees. . . ." *Id.* (citations omitted). As the Board accurately observed, "[m]embers of all professions continue learning throughout their careers" and, therefore, a learning component should not preclude the Board from determining that a student may be an employee. *Id.* at 45-46.

The *Brown University* majority's characterization of teaching as an academic requirement to preclude employee status undermines the Board's consistently broad interpretation of "employee" under Section 2(3) of the NLRA.[13] The Board carefully examines an employer's characterizations of an individual's employee status on a case-by-case basis. *See, e.g., NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706 (2001) (nurses as supervisors); *Yeshiva University*, 444 U.S. at 672 (faculty as managers). The Board should similarly examine the assertion that graduate assistants who otherwise would qualify as employees cease to be employees simply because their work is declared by administrators to be academically required. *See*, *Shephard's Uniform and Linen Supply*, 274 NLRB 1423 (1985) (ruling, in part, that students

[13] *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984) (ruling that "the breadth of Section 2(3) is striking" and, therefore, undocumented aliens "plainly come within the broad statutory definition of 'employee'"); *NLRB v. Town & Country*, 516 U.S. 85, 90 (1995) (concluding that "[t]he phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition for it says, '[t]he term "employee" shall include any employee'"); *see also Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992) (cautioning against disenfranchisement of individuals who might be entitled to NLRA protections).

performing maintenance work for academic credit as part of a high school vocational educational program are employees under the Act).

CONCLUSION

For the reasons above, the Board should overrule the test of employee status applied in *Brown University* and return to its well-reasoned *NYU* decision, which found collective bargaining by graduate assistants compatible with academic freedom.

Sincerely,

/s/

Aaron Nisenson
Senior Counsel
American Association of University Professors
1133 19th St. NW, Suite 200
Washington, D.C. 20036
202-737-5900
202-737-5526 (FAX)
anisenson@aaup.org

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2014 a copy of the foregoing brief *amicus curiae* was served via email on the following:

Employer
(Legal Representatives)
Joseph E. Tilson
Anna Wermuth
Jeremy Glenn
Alex V. Barbour
Meckler Bulger Tilson Marick & Pearson LLP
123 N. Wacker Drive, Suite 1800
Chicago, IL 60606-1770
Email: alex.barbour@mbtlaw.com
Email: joe.tilson@mbtlaw.com

(Notification)
Donald M. Remy
National Collegiate Athletic Association
700 W. Washington Street
Indianapolis, IN 46204
Email: dremy@ncaa.org

Petitioner
(Legal Representatives)
Jeremiah A. Collins
Gary Kohlman
Ramya Ravindran
Bredhoff & Kaiser PLLC
805 15th Street, NW, Suite 1000
Washington, D.C. 20005-2286
Email: jcollins@bredhoff.com
Email: gkohlman@bredhoff.com
Email: rravindran@bredhoff.com

(Legal Representative)
John G. Adam
Legghio & Israel, P.C.
306 S. Washington Avenue, Suite 600
Royal Oak, MI 48067-3837
(Legal Representative)
Stephen A. Yokich
Associate General Counsel
Cornfield and Feldman LLP
25 E Washington Street, Suite 1400

Chicago, IL 60602
Email: syokich@cornfieldandfeldman.com

NLRB Regional Office
Peter Ohr
Regional Director, Region 13
The Rookery Building
209 South LaSalle Street
Suite 900
Chicago, IL 60604-5208
Email: NLRBRegion13@nlrb.gov

/s/
Aaron Nisenson
Senior Counsel, AAUP